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

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

This document contains annotations to certain Ninth 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 Ninth 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. Evans-Martinez, 530 F.3d 1164 (9th Cir. 2008). The Ninth Circuit held that Rule 32(h) requires that a district court provide notice of its intent to depart from the range suggested by the Guidelines post-*Booker*, as it did pre-*Booker*. The court noted that *Irizarry* did not control the result, but said: "In light of *Irizarry*, it is arguable that the due process concerns that led to the promulgation of Rule 32(h) are now equally inapplicable to sentencing departures. We decline to reach that conclusion. We understand the Supreme Court's distinction between a variance and a departure to be a meaningful one. Further, the *Irizarry* Court implies that Rule 32(h) continues to apply with respect to departures. The Supreme Court gives no indication that it disapproves of the continued application of Rule 32(h) to departures in the post- *Booker* era.

United States v. Mix, 457 F.3d 906 (9th Cir. 2006). The Ninth Circuit stated that (1) sentencing courts must still consult the guidelines and consider them when sentencing, (2) sentencing courts must calculate the guidelines range accurately, (3) misinterpreting the guidelines means that the sentencing court did not properly consult the guidelines, and (4) sentencing courts must apply the § 3553(a) factors in imposing a sentence.

United States v. Kilby, 443 F.3d 1135 (9th Cir. 2006). The Ninth Circuit held that the first step for reviewing a sentence is to determine if the district court made a material error in its guidelines calculation that serves as the starting point for its sentencing decision. If there was material error in the guidelines calculation, the court will remand for resentencing, without reaching the question of whether the sentence as a whole is reasonable. If the district court committed no error in applying the guidelines, the court will then consider challenges to the reasonableness of the overall sentence in light of the factors specified in 18 U.S.C. § 3553(a). *See also United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006) ("Although *Booker* rendered the [s]entencing [g]uidelines advisory, district courts must 'consult [the guidelines] and

take them into account when sentencing.' In determining an appropriate sentence, district courts must consider the applicable guideline range, as well as the goals and factors enumerated in 18 U.S.C. § 3553(a).") (citations omitted).

B. Burden of Proof

United States v. Collins, 684 F.3d 873 (9th Cir. 2012). The Ninth Circuit declined to apply the clear and convincing burden of proof to the imposition of a condition of supervised relief. However, it held that the imposition of a "severe" residency restriction during a lifetime term of supervised release on an offender convicted of possessing child pornography was procedurally unreasonable. This was because the district court's explanation for the restriction — that California state law contained such a provision — failed to refer to any specific facts about the defendant's case that justified the condition, and thus was insufficient.

United States v. Berger, 587 F.3d 1038 (9th Cir. 2009). The Ninth Circuit acknowledged that it "ha[s] not been a model of clarity in deciding what analytical framework to employ when determining whether a disproportionate effect on sentencing may require the application of a heightened standard of proof." The court, however, declined to address the defendant's argument that this line of cases improperly applied a different standard of review to facts relating to charged vs. uncharged or acquitted conduct. Instead it held that prior cases clearly and uniformly held that, in fraud cases with loss enhancements based on the extent of the conspiracy, facts establishing the extent of the conspiracy need only be proven by a preponderance of the evidence.

United States v. Staten, 466 F.3d 708 (9th Cir. 2006). The clear and convincing standard still obtains for an enhancement with an extremely disproportionate effect, even though the enhancement now results in the calculation of an advisory rather than a mandatory guidelines sentence. *Booker* has no impact on the due process concerns which require that enhancements resulting in disproportionate, albeit advisory, guidelines sentences find support in facts established by clear and convincing evidence.

United States v. Williamson, 439 F.3d 1125 (9th Cir. 2006). Judicial factfinding is permissible after *Booker*, which concluded that the sentencing judge could find additional facts, "so long as the judge treated the [g]uidelines as advisory." A sentencing judge may consider "uncharged and unadjudicated" conduct for sentencing purposes if it is deemed "relevant conduct."

United States v. Kimbrew, 406 F.3d 1149 (9th Cir. 2005). After *Booker*, the Ninth Circuit continues to review the district court's interpretation of the guidelines *de novo*, the court's application of the guidelines to the facts of a case for an abuse of discretion, and the court's factual findings for clear error. *See also United States v. Staten*, 466 F.3d 708 (9th Cir. 2006) (The court declined to resolve the standard of review for application of the guidelines after Booker); *United States v. Speelman*, 431 F.3d 1226 (9th Cir. 2005) (reviewing the application of the guidelines *de novo*); *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005) (reviewing *de novo* the district court's interpretation of the United States Sentencing Guidelines and its

designation of career offender status thereunder).

C. Confrontation Rights

United States v. Littlesun, 444 F.3d 1196 (9th Cir. 2006). "[T]he law on hearsay at sentencing is still what it was before *Crawford*: hearsay is admissible at sentencing, so long as it is 'accompanied by some minimal indicia of reliability.'"

D. Acquitted Conduct

United States v. Mercado, 474 F.3d 654 (9th Cir. 2007). A split panel of the Ninth Circuit held that the use of acquitted conduct does not violate the constitution.

E. Prior Convictions

United States v. Velasquez-Reyes, 427 F.3d 1227 (9th Cir. 2005). The Ninth Circuit held that the rule of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) survived *Apprendi* and *Booker*, and that prior convictions therefore did not need to be proven beyond a reasonable doubt.

F. Ex Post Facto

United States v. Dupas, 417 F.3d 1064 (9th Cir. 2005). The Ninth Circuit held that retroactive application of the remedial opinion in *Booker* to offenses committed before *Booker* did not violate the ex post facto clause.

II. Departures

United States v. Ellis, 641 F.3d 411 (9th Cir. 2011). The Ninth Circuit held that, where a district court frames its sentence as including a criminal history departure pursuant to §4A1.3, on appeal the issue will only be reviewed for substantive reasonableness.

United States v. Blixt, 548 F.3d 882 (9th Cir. 2008). The Ninth Circuit reaffirmed its pre-*Rita* and *Gall* precedent concluding that it would not apply differing standards of review to departures and variances under the guidelines.

United States v. Evans-Martinez, 530 F.3d 1164 (9th Cir. 2008). Discussing the Supreme Court's ruling in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), the Ninth Circuit acknowledged:

> [T]he Supreme Court emphasizes the distinction between a variance and a departure. Because Rule 32(h) requires notice when the district court is contemplating a "departure," "the rule does not apply to § 3553 variances by its terms." *Id*. at 2202. Rather, " '[d]eparture' is a term of art under the Guidelines and refers only to

> non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id*. *Irizarry* does not control the result in this case because the district court here did not sentence at variance from the recommended Guidelines range based on Section 3553(a) factors, but departed as the term was used when Rule 32(h) was promulgated. By its own terms, the *Irizarry* holding does not extend to sentencing departures under the Guidelines.

United States v. Mohamed, 459 F.3d 979 (9th Cir. 2006). The Ninth Circuit held that, in light of *Booker*, it would "treat such so-called departures as an exercise of post-Booker discretion to sentence a defendant outside of the applicable guidelines range" and subject it to a "unitary review for reasonableness, no matter how the district court styles its sentencing decision."

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast Track

United States v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006). The Ninth Circuit held that since Congress authorized fast-track programs, the disparity between sentences in non-fast-track districts and the sentences imposed on similarly-situated defendants in fast-track districts is not "unwarranted" within the meaning of § 3553(a)(6). It is justified by the benefits gained by the government when defendants plead guilty early in criminal proceedings.

2. Co-defendants

United States v. Plouffe, 436 F.3d 1062 (9th Cir. 2006). In determining reasonableness, the court is guided by the § 3553(a) factors, including the guidelines range. The court then determined that a sentence twice as long as that of a co-defendant was not unreasonable where the district court's approach was reasoned and addressed the § 3553(a) factors, and the defendant's criminal record provided a reasonable basis for imposing the sentence.

3. Plea Agreements

United States v. Reina-Rodriguez, 468 F.3d 1147 (9th Cir. 2006), *overruled on other grounds by United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). The Ninth Circuit held that the district court's observation that the defendant, who pleaded guilty but not pursuant to a plea agreement, would have received a lower sentence had he entered into a plea agreement, did not constitute an improper consideration in sentencing. The Ninth Circuit concluded that this disparity was not unwarranted for purposes of section 3553.

B. Improper factors

United States v. Tapia-Romero, 523 F.3d 1125 (9th Cir. 2008). The Ninth Circuit affirmed the district court's conclusion that the cost to society of imprisoning the defendant is not a proper factor for consideration under § 3553(a).

C. Drug Addiction

United States v. Garcia, 497 F.3d 964 (9th Cir. 2007). The Ninth Circuit vacated and remanded for resentencing a within-guideline sentence imposed where the district court erroneously held "that it did not have the discretion to consider [the defendant's] alleged diminished mental capacity due to drug addiction, because voluntary drug addiction is precluded as a basis for downward departure under the Guidelines." The Ninth Circuit held that there may be some circumstances in which such a consideration is proper under 18 U.S.C. § 3553(a)(1).

IV. Forfeiture

United States v. Mertens, 166 Fed. App'x 955 (9th Cir. 2006). The Ninth Circuit held that *Booker* did not impact forfeiture decisions because the Supreme Court held in *Libretti v. United States*, 516 U.S. 29 (1995) that the Sixth Amendment does not apply to forfeitures.

V. Restitution

United States v. Bussell, 414 F.3d 1048 (9th Cir. 2005). The district court's restitution orders were unaffected by the changes worked by *Booker*.

VI. Reasonableness Review

A. General Principles

United States v. Rudd, 662 F.3d 1257 (9th Cir. 2011). The Ninth Circuit held that the district court imposed a procedurally unreasonable sentence by failing to explain its imposition of a particular residency restriction as a condition of the defendant's supervised release.

United States v. Carty, 520 F.3d 984 (9th Cir. 2008). "A court of appeals may not presume that a non-Guidelines sentence is unreasonable. Although a court may presume on appeal that a sentence within the Guidelines range is reasonable, we decline to adopt such a presumption in this circuit." The Ninth Circuit explained its reasons for deciding not to adopt the presumption, acknowledging that "[t]he difference [between those circuits that have adopted it and those that have not] appears more linguistic than practical. . ." but stating that because "[w]e recognize that a Guidelines sentence 'will usually be reasonable,' . . . we see no particular need for an appellate presumption that says so. A 'presumption' carries baggage as an evidentiary concept that we prefer not to import."

United States v. Rivera, 527 F.3d 891 (9th Cir. 2008) . The court acknowledged an intra-

circuit split "regarding whether we review application of the Guidelines to the facts for an abuse of discretion or de novo" but declined to resolve it because it would not affect the outcome of the case. *See United States v. Garcia*, 497 F.3d 964 (9th Cir. 2007) , *but see United States v. Crandall*, 525 F.3d 907 (9th Cir. 2008) and *United States v. Staten*, 466 F.3d 708 (9th Cir. 2006).

United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006). A reasonableness review includes two steps: (1) first determining whether the sentencing court correctly calculated the guideline range, and (2) then determining reasonableness; but, the court will review for reasonableness only if the district court correctly calculated the guidelines range—otherwise, the court will remand for resentencing.

United States v. Plouffe, 445 F.3d 1126 (9th Cir. 2006). Because "*Booker* requires that appellate courts review the reasonableness of all sentences," jurisdiction exists under 18 U.S.C. § 3742(a)(1) to review within-range sentences.

B. Standard of Review

United States v. Cope, 527 F.3d 944 (9th Cir. 2008). The Ninth Circuit held that, because the length of a term of supervised release was a part of the defendant's sentence and not a condition of supervised release, it would review the length of a term of supervised release for reasonableness rather than abuse of discretion.

United States v. Staten, 466 F.3d 708 (9th Cir. 2006). The clear and convincing standard still obtains for an enhancement with an extremely disproportionate effect, even though the enhancement now results in the calculation of an advisory rather than a mandatory guidelines sentence. *Booker* has no impact on the due process concerns which require that enhancements resulting in disproportionate, albeit advisory, guidelines sentences find support in facts established by clear and convincing evidence.

United States v. Williamson, 439 F.3d 1125 (9th Cir. 2006). Judicial factfinding is permissible after *Booker*, which concluded that the sentencing judge could find additional facts, "so long as the judge treated the [g]uidelines as advisory." A sentencing judge may consider "uncharged and unadjudicated" conduct for sentencing purposes if it is deemed "relevant conduct."

United States v. Kimbrew, 406 F.3d 1149 (9th Cir. 2005). After *Booker*, the Ninth Circuit continues to review the district court's interpretation of the guidelines *de novo*, the court's application of the guidelines to the facts of a case for an abuse of discretion, and the court's factual findings for clear error. *See also United States v. Staten*, 466 F.3d 708 (9th Cir. 2006) (The court declined to resolve the standard of review for application of the guidelines after Booker); *United States v. Speelman*, 431 F.3d 1226 (9th Cir. 2005) (reviewing the application of the guidelines *de novo*); *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005) (reviewing *de novo* the district court's interpretation of the United States Sentencing Guidelines and its designation of career offender status thereunder).

C. Procedural Reasonableness

United States v. Henderson, 649 F.3d 955 (9th Cir. 2011). The Ninth Circuit held that the district court committed procedural error when it failed to recognize that it had discretion to disagree, on policy grounds, with §2G2.2, pursuant to *Kimbrough*. The Ninth Circuit emphasized that the district court was not *required* to disagree, but that it was required to recognize its ability to do so.

United States v. Bragg, 582 F.3d 965 (9th Cir. 2009). The Ninth Circuit reversed as procedurally unreasonable a below-guideline sentence in a tax case. The district court imposed a sentence of three years' probation; however, the Ninth Circuit found that this variance was not supported by the record. It identified four factors that required further explanation: the district court's reliance on its view of the defendant's importance to his family's businesses; the district court's reliance on the seven-year time lag between commission of the offense and its prosecution; the district court's statement that it did not believe general deterrence worked in tax cases; and the district court's incomplete assessment of the defendant's efforts to repay his tax debt in light of its failure to consider interest and penalties due on the unpaid taxes. The Ninth Circuit concluded that the district court committed procedural error by inadequately justifying the variance sentence it imposed, and remanded the case.

United States v. Carter, 560 F.3d 1107 (9th Cir. 2009). The court stated that "[w]hen a district court imposes a within-Guidelines sentence, the explanation of its decision-making process may be brief . . . ." The court found it important that "the district court judge was familiar with [the defendant's] crimes, personal situation, and both the government's and [the defendant's] arguments regarding sentencing." The court held that, in context, the district court's statements at the sentencing hearing "make clear that the district court heard and considered [the defendant's] arguments, considered the § 3553(a) factors, and reached the conclusion that the Guidelines range was suitable to [the defendant's] case."

United States v. Ringgold, 571 F.3d 948 (9th Cir. 2009). The court held that under the circumstances, "the district court did not abuse its discretion or commit procedural error in declining to consider" the disparity between a guideline sentence "and the maximum sentence a defendant would receive if convicted of the same conduct in state court." The court made clear that § 3553(a) "requires district courts to consider sentencing disparities between similarly situated *federal* defendants. . . . It does not require district courts to consider sentence disparities between defendants found guilty of similar conduct in state and federal courts." The court further stated that it had not yet decided "whether consideration of a defendant's potential state sentence may be relevant to a judge's analysis of sentencing factors other than § 3553(a)(6)[,]" and it declined to do so in this case.

United States v. Carty, 520 F.3d 984 (9th Cir. 2008). In its *en banc* decision, the Ninth Circuit set forth several rules, quoting the Supreme Court's opinions in *Booker*, *Rita*, *Gall* and *Kimbrough*, for imposing a procedurally reasonable sentence:

> If a district judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." This does not mean that the district court's discretion is constrained by distance alone. Rather, the extent of the difference is simply a relevant consideration. At the same time, as the Court put it, "[w]e find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." This conclusion finds natural support in the structure of § 3553(a), for the greater the variance, the more persuasive the justification will likely be because other values reflected in § 3553(a) — such as, for example, unwarranted disparity — may figure more heavily in the balance.
>
> [. . .]
>
> The district court need not tick off each of the § 3553(a) factors to show that it has considered them. We assume that district judges know the law and understand their obligation to consider all of the § 3553(a) factors, not just the Guidelines. Nor need the district court articulate in a vacuum how each § 3553(a) factor influences its determination of an appropriate sentence. However, when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position.
>
> [. . .]
>
> It would be procedural error for a district court to fail to calculate — or to calculate incorrectly — the Guidelines range; to treat the Guidelines as mandatory instead of advisory; to fail to consider the § 3553(a) factors; to choose a sentence based on clearly erroneous facts; or to fail adequately to explain the sentence selected, including any deviation from the Guidelines range.

United States v. Crawford, 520 F.3d 1072 (9th Cir. 2008). Although the district court mentioned that other courts of appeals had adopted a presumption of reasonableness, that "statement must be viewed in the context of the entire sentencing hearing" in which the district court engaged in a "thorough process . . . done within the framework established by *Booker* and reinforced by *Rita*, *Gall*, and *Kimbrough*." In this context, the Ninth Circuit concluded that the district court did not improperly presume that a sentence within the guideline range was reasonable.

D. Substantive Reasonableness

United States v. Ressam, 679 F.3d 1069 (9th Cir. 2012). A split panel of the en banc Ninth Circuit held that a sentence of 22 years, representing a downward variance from a guideline range of 65 years to life, was substantively unreasonable in the case of a defendant who engaged in a plot to detonate explosives at Los Angeles International Airport. The Ninth Circuit held that the district court had relied on several erroneous factual findings, especially regarding the nature of the defendant's cooperation and his personal history and characteristics, had failed to give sufficient weight to several of the 3553(a) factors, and relied on improper comparisons in its assessment of the need to avoid unwarranted sentencing disparities.

United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009). The Ninth Circuit held that the defendant's sentence was substantively unreasonable. The defendant argued that his sentence was unreasonable "because it is the product of a 16-level enhancement under U.S.S.G.
§ 2L1.2(b)(1)(A), which is predicated on a conviction that is too old to score under the Guidelines' criminal history provisions." The court stated that "[i]t is not *per se* unreasonable to apply the enhancement when the conviction is too stale to be counted for purposes of the criminal history[,] . . . [but] under the circumstances of this case, it was unreasonable to adhere to the Guidelines sentence . . . because of the staleness of [the defendant's] prior conviction and his subsequent history showing no convictions for harming others or committing other crimes listed in Section 2L1.2." According to the court:

> Although it may be reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country, it does not follow that it is inevitably reasonable to assume that a decades-old prior conviction is deserving of the same severe additional punishment as a recent one.

Also noteworthy may be the dissent from the denial of rehearing *en banc* in this case, issued at 586 F.3d 1176 (9th Cir. 2009) and joined by seven circuit judges. The dissent argues that the panel opinion applied an improper standard of review, failed to grant proper deference to certain sentencing factors, and usurped the role of the district court.

United States v. Paul, 583 F.3d 1136 (9th Cir. 2009). In a previous, unpublished opinion, 239 Fed. App'x. 353 (9th Cir. 2007), the Ninth Circuit reversed the defendant's top-of-the-range sentence of 16 months' imprisonment for theft from a local government receiving federal funding, a violation of 18 U.S.C. § 666(a)(1)(A). In that opinion, the court held that the within-range sentence was substantively unreasonable because, the court held, the case was outside the heartland. Specifically, the court identified four factors that took the case outside the heartland and directed the district court to address them: the defendant's lack of criminal record, the defendant's prompt return of all of the stolen funds, the defendant's remorse, and the defendant's (mistaken) belief that she was entitled to the funds as compensation for work performed. On remand, 561 F.3d 970 (9th Cir. 2009), the district court imposed a 15-month sentence. The defendant appealed the new sentence, arguing that in so doing the district court failed to comply with the mandate. The Ninth Circuit agreed, and again reversed the sentence on grounds that the district court "relied excessively upon [the] defendant's abuse of trust while not giving sufficient consideration to other factors." The remand explicitly directed the district court to consider the identified mitigating factors *and* the Ninth Circuit's "conclusion" that the case is outside the heartland. [The quote comes from the opinion on remand, so I added the citation for clarification because the citation that was listed is to the opinion denying the rehearing en banc.]

United States v. Autery, 555 F.3d 864 (9th Cir. 2009). The Ninth Circuit held that "abuse of discretion is the proper standard of review where a party challenges a sentence's substantive reasonableness on appeal but did not object to the sentence's reasonableness before the district court." In so holding, the Ninth Circuit rejected the argument that the clear error standard of review should apply instead.

United States v. Ruff, 535 F.3d 999 (9th Cir. 2008). A split panel of the Ninth Circuit upheld a variance sentence of one day of imprisonment plus three years' supervised release with a condition of twelve months and one day served at a corrections center that would permit the defendant to participate in work release, receive counseling, and make visits to his young son. The guideline range for the defendant's health care fraud offenses was 30-37 months, but the district court varied downward as a result of the defendant's strong employment history, cooperation and remorse, familial support, mental health problems, and addiction to gambling. The Ninth Circuit emphasized that "[t]he clear message in *Gall* . . . is that we must defer to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence" and that "even [noncustodial sentences] are quite oppressive given that probationers are subject to several standard conditions that substantially restrict their liberty."

United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008). The Ninth Circuit rejected several arguments that the within-range sentence imposed was substantively unreasonable. First, it rejected the defendant's argument that the sentence was substantively unreasonable because the district court counted in his criminal history a conviction that could have been expunged under state law. The Ninth Circuit noted prior circuit precedent holding that a sentence set aside under the state statute is not considered "expunged" for purposes of § 4A1.2(j), so the sentence would still have counted for criminal history purposes. Second, the court rejected the defendant's argument regarding improper double-counting of various enhancements, noting that each "served a unique purpose under the Guidelines, and accounted for a different aspect of the harms caused by Stoterau's criminal act." Finally, the court rejected the defendant's argument that "the abuse he suffered as a child, his mental health issues, and his life-long struggle with methamphetamine addiction" should have led to a sentence below the guideline range, concluding that such circumstances were not "so special as to render [the] sentence unreasonable" and that the sentence did not reflect an abuse of discretion.

United States v. Tankersley, 537 F.3d 1100 (9th Cir. 2008). The Ninth Circuit affirmed an upward departure on substantive reasonableness grounds where the district court, relying on §5K2.0, departed to give effect to the terrorism enhancement at §3A1.4 even though it found, by the terms of the guidelines, that the enhancement did not apply. The Ninth Circuit held that *Kimbrough* sanctioned such departures, and that the district court adequately justified its decision to depart in this particular case. It emphasized that the standard formerly used to judge departures "is relevant today only insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable."

United States v. Whitehead, 532 F.3d 991 (9th Cir. 2008) (per curiam). A split panel of the Ninth Circuit affirmed a variance sentence of five years' probation, 1000 hours' community service and restitution in a case involving the sale of counterfeit access cards in violation of the Digital Millennium Copyright Act. The guideline range was 41-51 months. The court emphasized that the district court "heard from Whitehead and his father, who told the court how Whitehead repented his crime; how he had, since his conviction, devoted himself to his house-painting business and to building an honorable life; how his eight-year-old daughter depended on him; and how he doted on her" and that the court "took into account its finding that Whitehead's crime '[di]d not pose the same danger to the community as many other crimes.'"

The Ninth Circuit noted that "[t]he district court was intimately familiar with the nature of the crime and defendant's role in it, as we are not" and that "[t]he district court could appraise Whitehead's and his father's sincerity first-hand, as we cannot." As a result, the Ninth Circuit concluded that the sentence was not an abuse of discretion.

E. Harmless Error/Plain Error

United States v. Dallman, 533 F.3d 755 (9th Cir. 2008). "In light of our precedent in *Carty*, the district court plainly erred by presuming that a sentence within the Guidelines range is reasonable. Dallman did not, however, show a reasonable probability that he would have received a different sentence if the district court had not concluded that a sentence within the Guidelines range is presumptively reasonable. Because Dallman did not satisfy the third prong of the plain error test, we conclude that the district court's apparent presumption that a sentence within the Guidelines range was reasonable does not warrant relief under the circumstances of this case."

United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006). The Ninth Circuit affirmed that harmless error review survived *Booker*.

F. Waiver of Right to Appeal

United States v. Cardenas, 405 F.3d 1046 (9th Cir. 2005). The Ninth Circuit held that *Booker* did not make the defendant's plea involuntary and unknowing, and therefore did not impact his appeal waiver.

VII. Revocation

United States v. Huerta-Pimental, 445 F.3d 1220 (9th Cir. 2006). *Booker* has no effect on the revocation of supervised release. "Because the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*."

United States v. Miqbel, 444 F.3d 1173 (9th Cir. 2006). In the case of a sentence imposed upon revocation of supervised release, it is the § 3583(e) factors that provide guidance to the sentencing court. The improper reliance on a factor Congress decided to omit from those to be considered at revocation sentencing, as a primary basis for a revocation sentence, would contravene the statute in a manner similar to that of a failure to consider the factors specifically included in § 3583(e). Just as a sentence would be unreasonable if the district court failed to consider the factors listed in § 3553(a), a sentence would be unreasonable if the court based it primarily on an omitted factor, such as a factor provided for in § 3553(a)(2)(A).

VIII. Retroactivity

Schardt v. Payne, 414 F.3d 1025 (9th Cir. 2005). *Booker* did not announce a watershed rule of criminal procedure and thus will not be given retroactive effect to cases on collateral review.

United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005). "*Booker* is not retroactive, and does not apply to cases on collateral review where the conviction was final as of the date of *Booker's* publication."

IX. Crack Cases

United States v. Morales, 590 F.3d 1049 (9th Cir. 2010). The Ninth Circuit held that a defendant currently imprisoned as a result of a supervised release violation was not entitled to a sentence reduction as a result of the retroactive crack cocaine guideline amendment, even though his original sentence would have been reduced under the amendment. The court held that such a reduction would be inconsistent with application note 4 to §1B1.10 and would therefore be impermissible under 18 U.S.C. § 3582(c)(2)'s requirement that any reduction be consistent with the guidelines.

United States v. Wesson, 583 F.3d 728 (9th Cir. 2009). The Ninth Circuit held that the sentence of a crack cocaine trafficker ultimately sentenced pursuant to §4B1.1 as a career offender is not "based on" the drug guideline, §2D1.1, for purposes of a sentence reduction under 18 U.S.C. § 3582(c)(2). This was true regardless of the fact that the district court "considered" the drug type and quantity pursuant to the 18 U.S.C. § 3553(a) factors in ultimately imposing the sentence.

United States v. Jackson, 577 F.3d 1032 (9th Cir. 2009). The court joined the Second, Third, Fourth, Sixth, Eighth, and Eleventh Circuits in holding that a defendant who is sentenced below the mandatory minimum term pursuant to a substantial assistance motion "is ineligible for a sentence reduction under § 3582(c)(2)."

United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), *abrogated by Dillon v. United States*, 130 S. Ct. 2683 (2010). The Ninth Circuit held that *Booker* applies to 18 U.S.C. § 3582(c)(2) resentencing proceedings, permitting the court to impose a sentence lower than the sentence provided by the amended guideline range.

X. Miscellaneous

United States v. Maier, 639 F.3d 927 (9th Cir. 2011), *amended and superseded on other grounds by* 646 F.3d 1148 (9th Cir.). In a case where a defendant is convicted of both possession and receipt/distribution of child pornography, the district court exercises discretion to dismiss one or the other count to avoid double jeopardy. This decision is fundamentally a sentencing decision; as a result of *Booker* and its progeny, the district court must consider the § 3553(a) factors in exercising that discretion.

United States v. Wipf, 620 F.3d 1168 (9th Cir. 2010). *Booker* does not permit a district court to sentence below a statutory mandatory minimum.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Jackson, 167 F.3d 1280 (9th Cir. 1999). The jury returned a general verdict finding the defendant guilty of conspiracy, acquiring prescription drugs by fraud, and furnishing false prescription information, but acquitted the defendant of distribution of prescription drugs and possession with intent to distribute. The government appealed the district court's failure to apply §1B1.2(d) which requires a conviction on a single count of conspiracy to commit more than one offense to be treated as if the defendant had been convicted of a separate count of conspiracy for each offense the defendant conspired to commit. The appellate court agreed, holding that the facts before the district court, regardless of whether one relied on the evidence supporting the substantive distribution charges of which she had been acquitted or on the evidence of uncharged conduct, supported a finding that the defendant was guilty of conspiring to distribute prescription drugs. Thus, the district court's failure to apply §1B1.2(d) and sentence accordingly was error.

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

United States v. Ortiz, 362 F.3d 1274 (9th Cir. 2004). The Ninth Circuit clarified the proper standard for determining relevant conduct for jointly undertaken criminal activity under §1B1.3(a)(1)(B) as amended in 1992. The court held that district courts must make two findings in order to attribute the conduct of others to a defendant under §1B1.3(a)(1)(B): that the conduct was in furtherance of jointly undertaken criminal activity, and that it was reasonably foreseeable in connection with that activity. The Ninth Circuit concluded that the relevant conduct guideline for jointly undertaken criminal activity is to operate conjunctively.

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The defendant challenged a two-level enhancement, per §2B3.1(b)(4)(B), for physically restraining someone to facilitate the robbery of a K-Mart. The defendant claimed that he did not actually physically restrain the subject attendant. Section 1B1.3(a)(1)(B) instructs that the reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity should be considered when imposing enhancements. Because the criminal plan involved taking over the K-Mart cash room and because it was likely that an employee would be working in or near the cash room, it was not clearly erroneous for the district court to conclude that the restraint was foreseeable. *See also United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001) (district court properly increased defendant's sentence for physical restraint of a victim based on relevant conduct); *United States v. Shaw*, 91 F.3d 86 (9th Cir. 1996) (district court properly held a defendant not present during

the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery).

United States v. Ochoa, 311 F.3d 1133 (9th Cir. 2002). The defendant pled guilty to distributing three kilograms of cocaine in violation of section 841(a)(1), which carries a maximum penalty of 40 years in prison. The defendant also stipulated to the fact that he participated in the distribution of an additional 36 kilograms of cocaine. Applying §1B1.3, the district court considered the additional 36 kilograms when computing the base offense level and the sentence was affirmed. On appeal, the defendant argued that *Apprendi* renders §1B1.3 unconstitutional because it allows courts to impose a sentence based on drug quantity neither charged in the accusatory pleading, nor proven beyond a reasonable doubt. The Ninth Circuit held that it was unnecessary to submit the amount of drugs to a jury because the sentence did not exceed the 40-year statutory maximum for his offense of conviction.

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000). The district court erred by summarily adopting the amount of drugs attributed to the defendant by the PSR without first determining the amount that the defendant could reasonably foresee would be involved in the jointly undertaken criminal activity.

United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000). Because "[n]ew losses inflicted independently by third-party criminals after the completion and discovery of a defendant's crime do not 'result from' that crime for purposes of the Sentencing guidelines," the court held that "[f]or purposes of computing a fraud defendant's adjusted offense level under §2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not 'result[] from' the defendant's crime and may not be considered."

United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000), *superseded by statute on other grounds*, 18 U.S.C. § 1341, *as recognized in United States v. Ali*, 620 F.3d 1062 (9th Cir. 2010). The difference in sentencing exposure between a sentencing range of 12-18 months and a 41-51 month range was sufficiently disproportionate to require the government to prove by clear and convincing evidence that the defendants knowingly and intentionally engaged in all the uncharged conduct.

United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000). The district court did not err when it sentenced each defendant based on the quantity of drugs attributable to him instead of the entire quantity involved in the offense.

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999). Where consideration of certain violent conduct of which the defendant was acquitted would have increased the defendant's exposure from 30 to 48 months, the district court should have applied a clear and convincing standard.

§1B1.9 Class B or Class C Misdemeanors and Infractions

United States v. Mack, 200 F.3d 653 (9th Cir. 2000). The jury convicted the defendants of unlawfully maintaining a structure and impeding a United States Forest Service road, after the defendants refused to remove the chains with which they had attached themselves to construction equipment in protest of the road building and logging in the community. The district court sentenced defendants to harsher sentences than those imposed on their codefendant, who had pled guilty. The defendants challenged their sentences, arguing that the relative severity of their sentences indicated that the district court had penalized them for proceeding to trial. The circuit court affirmed the sentences, holding that the district court's explanation that the defendants expressly refused to abide by any restitution order sufficiently justified the imposition of heavier sentences.

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

United States v. Austin, 676 F.3d 924 (9th Cir. 2012). The Ninth Circuit held that, pursuant to Justice Sotomayor's concurrence in *Freeman v. United States*, a defendant whose Rule 11(c)(1)(C) plea agreement recommends a sentence of seventeen years, without any reference to criminal history, is not eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

United States v. Fox, 631 F.3d 1128 (9th Cir.), *cert. denied*, 132 S. Ct. 218 (2011). The Ninth Circuit held that the Sentencing Reform Act contemplated the use of policy statements to provide binding guidance on the guidelines, including sentencing modification provisions.

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

United States v. Lopez-Solis, 447 F.3d 1201 (9th Cir. 2006). Retroactive application of §2L1.2, amended to include statutory rape in the definition of a "crime of violence," violated the *ex post facto* clause. The amended guideline was not in effect at the time the defendant committed the offense of conviction, and under the version of the guideline in effect at the time of the offense, the crime of statutory rape did not categorically meet the definition of a crime of violence.

United States v. Chea, 231 F.3d 531 (9th Cir. 2000). Subsequent version of the sentencing guidelines applicable to the defendant subject to undischarged terms of imprisonment altered the sentencing process to the defendant's disadvantage and could not be applied to a defendant who committed the offense while the old guideline was in effect.

United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The defendant challenged the district court's imposition of a sentence to run consecutive to the sentence the defendant was already serving for violating his supervised release. The circuit court ruled that Application Note 4 "merely makes explicit what was otherwise implicit in the operation of §5G1.3(b) and

5G1.3(c)" which is that the sentence for any offense committed while on supervised release is to be served consecutive to the sentence for the supervised release violation in order to "achieve reasonable incremental punishment." The circuit court held that Application Note 4 confirms a sound prior interpretation of section 5G1.3, and the district court did not violate the *ex post facto* clause when it relied on Application Note 4 to interpret §5G1.3.

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995). Absent an *ex post facto* problem, the court must apply the version of the sentencing guidelines in effect on the date of resentencing.

United States v. Sanders, 67 F.3d 855 (9th Cir. 1995). The Ninth Circuit reversed the district court's imposition of consecutive terms of supervised release. Although at the time of the defendant's sentencing, Ninth Circuit precedent allowed consecutive terms of supervised release, a 1994 amendment to the sentencing guidelines "ma[de] clear that supervised release terms are not to run consecutively, even in cases where punishments for the underlying crimes must be imposed consecutively." The Ninth Circuit held that the amendment retroactively applied to the defendant's sentence, and remanded the case for resentencing.

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994). A violation of 8 U.S.C. § 1326 is a continuing offense. Thus, the use of the guideline manual in effect on the date of the sentence does not violate the *ex post facto* clause if any portion of the offense occurred after the guidelines' effective date.

United States v. Merino, 44 F.3d 749 (9th Cir. 1994). Unauthorized flight to avoid prosecution in violation of 18 U.S.C. § 1073 is a continuing offense and thus subject to the guidelines in effect at sentencing if any portion of the offense occurred after the guidelines' effective date.

§1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995). The Ninth Circuit held that the sentencing guidelines do not apply to a defendant sentenced under the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 and an adjudicated juvenile delinquent may not be sentenced to a term of supervised release.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court applied the dangerous weapon enhancement to the defendant's sentence for aggravated assault resulting in serious bodily injury and involuntary manslaughter where the defendant had caused an automobile accident while he was intoxicated. The circuit court reversed, reasoning that an upward adjustment under §2A2.2(b)(2)(B) is authorized only when a defendant used an instrument capable of causing serious bodily injury with the intent to injure his victim. Because the circuit court concluded the defendant's conduct was reckless, but not intentional, he did not "use" a dangerous weapon within the meaning of the guidelines. Note: Amendment 614 expressly identifies a car as (potentially) a dangerous weapon.

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

United States v. Swank, 676 F.3d 919 (9th Cir. 2012). The fact that the defendant was married to a woman who had custody of the victim did not necessarily mean he was subject to the "custody, care, or supervisory control" enhancement; however, where he lived in the same home as the woman, had a child with her, and shared caretaking responsibilities for the two other young children living in the home, including preparing food for all of the children, he did exercise "custody, care, or supervisory control" within the meaning of the guideline.

United States v. Michaud, 268 F.3d 728 (9th Cir. 2001). Because the cross-reference resulted in a higher offense level, pursuant to §2A4.1(b)(7)(A), the district court cross-referenced §2A3.1, based upon aggravated sexual abuse by force or threat, to determine the base offense level. The defendant contended that because §2A4.1(b)(5) contains a separate provision for kidnapping involving sexual exploitation of the victim, a cross reference to §2A3.1 rendered §2A4.1(b)(5) superfluous. Because §2A4.1(b)(7)(A) unambiguously states that the offense level from the other offense committed during a kidnapping is to apply if it results in a greater offense level, the district court did not err in its application of the guidelines.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Sierra-Velasquez, 310 F.3d 1217 (9th Cir. 2002). The defendants agreed to take a group of aliens from Mexico into the United States for a fee; the defendants then brutally detained the aliens against their will while demanding that the fee be paid. The district court refused to apply the ransom enhancement, finding that there could be no ransom within the meaning of the guideline unless the price was demanded that was higher than the agree-upon fee. The Ninth Circuit disagreed with the district court's reasoning. The court joined sister circuits which have held a ransom enhancement under §2A4.1(b)(1) applies anytime a defendant demands money from a third party for the release of a victim, regardless of whether that money

was already owed to the defendant.

See United States v. Michaud, 268 F.3d 728 (9th Cir. 2001), §2A3.1.

§2A5.2 Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle

United States v. Gonzalez, 492 F.3d 1031 (9th Cir. 2007). Application of the nine-level enhancement under §2A5.2(a)(2) for "recklessly endangering the safety of . . . an airport or an aircraft" does not require "evidence of actual harm to the aircraft." A passenger's "irresponsible statements, threats and conduct" qualify as reckless endangerment to "the safety of . . . an aircraft" within the meaning of §2A5.2(a)(2).

§2A6.1 Threatening or Harassing Communications

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The defendant argued that the district court improperly applied a two-level enhancement pursuant to §2A6.1(b)(2) for threatening the victims of his crime because there was no evidence that the defendant intended to carry out the threats. Evidence of such intent is not necessary to apply the enhancement, and where there is such evidence, a six-level enhancement is prescribed under §2A6.1(b)(1). *See also United States v. Hines*, 26 F.3d 1469 (9th Cir. 1994) (district court did not err in enhancing the defendant's sentence for engaging in conduct evidencing an intent to carry out a threat pursuant to §2A6.1(b)(1)).

Part B Offenses Involving Property

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

Loss (§2B1.1(b)(1))

United States v. Truong, 587 F.3d 1049 (9th Cir. 2009). The Ninth Circuit held that a retail gift card is an "access device" for purposes of §2B1.1 cmt. n. 3(F)(I), which provides a special rule for determining loss in fraud cases involving such devices.

United States v. Van Alstyne, 584 F.3d 803 (9th Cir. 2009). The Ninth Circuit held that Amendment 690, in which the Commission adopted the Eleventh Circuit's rule in *United States v. Orton*, 73 F.3d 331 (11th Cir. 1996) limiting credits against loss in fraudulent investment schemes to repayments of part, but not all, of a victim's investment, is a clarifying amendment and therefore applies retroactively.

United States v. Santos, 527 F.3d 1003 (9th Cir. 2008). "Absent evidence to the contrary,

the district court may reasonably infer that the participants in a counterfeiting scheme intend to take as much as they know they can. Thus, where the scheme involves using stolen checks as templates for counterfeiting, the face value of the stolen checks is 'probative' of the defendants' intended loss, as it is the amount that the participants know is in the accounts from which they are drawing. The district court may not 'mechanically assume[ ]' that the face value of the stolen checks is the intended loss, however. Rather, it must consider the evidence, if any, presented by the defendant tending to show that he did not intend to produce counterfeit checks up to the full face value of the stolen checks."

United States v. Crandall, 525 F.3d 907 (9th Cir. 2008). The Ninth Circuit held that the district court erred in applying the special rule for loss calculation where governmental regulatory approval was required (currently in Application Note 3 (F)(v)(III)) to a scheme involving fraudulent conversions of apartments to condominiums because the plain language of the application note limits its application to "goods" or personal property, not real property. Additionally, the court concluded that doing so in this case did not constitute a "realistic, economic approach" because it did not account for the fact that the apartments in question did have some value to the buyers in spite of the fraud, and that on remand the district court should select a method of assessing loss that accounted for this fact.

United States v. Zolp, 479 F.3d 715 (9th Cir. 2007). In determining intended loss in a stock fraud scheme, a sentencing court's determination that the stock is "worthless" for the purposes of calculating loss must be based on evidence. In a case where the stock involved in a "pump and dump" scheme involved stock for an otherwise legitimate company, the sentencing court's determination that the stock was "worthless" was erroneous when the stock continues to have residual value, even if the value is close to zero because "close to zero is not zero."

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004). An amendment to the sentencing guidelines excluding all interest from loss amount calculation in sentencing a defendant convicted for financial crimes, was a clarifying amendment, warranting its retroactive application. Although the amendment did not appear in the guidelines' list of retroactive amendments, and the Commission did not characterize the amendment as either clarifying or substantive, the amendment was a result of the Commission's efforts to resolve a conflict between the circuits in interpreting the prior loss calculation guideline.

United States v. McCormac, 309 F.3d 623 (9th Cir. 2002). The defendant argued that the district court erred in its loss calculation because it should have reduced the gross amount of the debt by the amount that HCFCU recovered by repossessing and selling her car pursuant to Note 2(E)(ii) to §2B1.1. The Ninth Circuit affirmed, noting that the application notes and the commentary to the amendments did not say whether the credit against loss applied to both actual loss and intended loss. The court held that since Application Note 2(E)(ii) did not automatically require intended loss to be reduced by proceeds from disposition of collateral, its analysis was based on a calculation of the defendant's intended "pecuniary harm." Consequently, the court affirmed the district court's calculation of loss based on defendant's intention not to repay the loan and to prevent HCFCU from collecting the pledged collateral.

United States v. Hardy, 289 F.3d 608 (9th Cir. 2002). Where the true owner of DVDs intended to sell the goods in the wholesale market, and the defendant engaged the same market, the wholesale market value governed the loss determination.

Number of Victims (§2B1.1(b)(2))

United States v. Showalter, 569 F.3d 1150 (9th Cir. 2009). The district court erred by estimating the number of victims in the case. The court found that after the defendant objected to the facts in the PSR, the government was required "to produce at least *some* evidence to support its contention that there were fifty or more victims." According to the court, "[t]he difficulties inherent in calculating monetary loss . . . do not exist when determining the number of victims." Thus, "[t]he guidelines do not . . . allow a district court to 'estimate' the number of victims to enhance a sentence under §2B1.1(b)(2)."

United States v. Armstead, 552 F.3d 769 (9th Cir. 2008). The Ninth Circuit held that the district court erred in a bank fraud case by counting as victims, for purposes of the victim enhancement at §2B1.1(b)(2), account holders at the bank whose pecuniary harms had not been included in the loss amount calculated under §2B1.1(b)(1).

Business of receiving stolen property (§2B1.1(b)(5))

United States v. Kimbrew, 406 F.3d 1149 (9th Cir. 2005). The plain language of the two-level enhancement under §2B1.1(b)(4) for receiving and selling stolen property bars its application to a thief who sells goods that he himself has obtained.

Misrepresentation (§2B1.1(b)(8))

United States v. Lambert, 498 F.3d 963 (9th Cir. 2007). The two level enhancement under §2B1.1(b)(8)(A), for an offense that involves a misrepresentation that the defendant is acting on behalf of an educational organization, applies even if the defendant does not "exploit their victims' charitable impulses." In circumstances where the defendant does not make representations that he or she is acting on behalf of an educational agency, but his or her co-conspirator makes such statements, such conduct is a reasonably foreseeable outcome of the conspiracy and it is proper to apply the two level enhancement at §2B1.1(b)(8)(A) to the defendant.

Means of identification (§2B1.1(b)(10)(c))

United States v. Melendrez, 389 F.3d 829 (9th Cir. 2004). Sentence enhancement for the defendant's use of means of identification (ID) to produce or obtain another means of identification applied where the defendant used stolen Social Security numbers to manufacture bogus identification documents in his own name or a fictitious name. The requirement for enhancement that both source ID numbers and produced ID numbers be of actual, not fictitious, persons other than the defendant himself did not require use, in produced document, of the actual

names of persons to whom Social Security numbers were assigned.

§2B3.1 Robbery

United States v. Albritton, 622 F.3d 1104 (9th Cir. 2010). A bank robber "otherwise used" a BB pistol, for purposes of the 4-level enhancement at §2B3.1(b)(2), when he pointed the pistol at the bank teller and ordered her onto the floor.

United States v. Pike, 473 F.3d 1053 (9th Cir. 2007). To receive the five-level enhancement under §2B3.1(b)(2)(C), the defendant must have possessed a firearm while committing the robbery or during escape. In this case the defendant did not exhibit the firearm at the bank robbery, fled on a bicycle, and was subsequently found in his automobile (via tracking device) thirty minutes later with the unloaded gun. The court reasoned that the enhancement will only apply to possession of a weapon during the offense or during escape. Escape "encompasses only hot pursuit," and since the defendant was not followed by anyone, absent facts to the contrary regarding his possession of the weapon earlier the enhancement will not apply.

United States v. Jennings, 439 F.3d 604 (9th Cir. 2006). Addressing an issue of first impression, the Ninth Circuit held that for purposes of the defendant's sentencing for bank robbery, his statement to bank teller, "I have a gun" could have been sufficient to instill a fear of death in a reasonable victim. Thus, this statement warranted application of the enhancement for a threat of death, absent any circumstances that would deprive the words of their ordinary and expected meaning.

United States v. Morgan, 238 F.3d 1180 (9th Cir. 2001). The defendant was convicted of a carjacking and kidnaping in which he tied the victim up, beat him severely, threw him in a ditch, and left him there in freezing weather. The district court imposed a four-level increase for serious bodily injury, rather than a six-level increase for permanent or life- threatening bodily injury because the circumstances under which the victim found himself were life-threatening but the actual injuries sustained as a result were not. The appellate court held that such a narrow interpretation of the types of injuries that could be considered life-threatening was contradicted by the plain language in §1B1.1(h), comment. (n.1(h)), which defines "permanent or life-threatening bodily injury" to include "maltreatment to a life-threatening degree." Because the district court believed it lacked authority to apply a six-level enhancement, the Ninth Circuit remanded for a determination of whether the treatment of the victim was life threatening.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). A jury convicted the defendant under 18 U.S.C. § 2113(a) and (d), as well as section 924(c), for conspiracy and a series of bank robberies and firearms violations. During one of the bank robberies, a codefendant "grabbed a teller by her hair and pulled her up from the floor." Affirming the enhancement for forcible restraint of a victim, the court held that, under §1B1.3(b), which "holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity," the defendant could reasonably have foreseen his codefendant's physical restraint of the victim, and thus he was accountable. The court did,

however, reverse the enhancement with respect to a different robbery count on grounds that the conduct of pointing a gun at a bank teller and yelling at her to get down on the floor did not satisfy the "sustained focus" standard required for imposition of the enhancement. *See also United States v. Shaw*, 91 F.3d 86 (9th Cir. 1996) (holding a defendant not present during the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery).

United States v. Napier, 21 F.3d 354 (9th Cir. 1994). The district court correctly interpreted "loss" under §2B3.1(b)(6). The defendant, convicted of bank robbery, 18 U.S.C. § 2113(a),(d), argued that no loss occurred because government agents recovered the money shortly after the offense was committed. The Ninth Circuit disagreed. The commentary to §2B3.1 refers to the commentary to §2B1.1 for determining the valuation of loss. Since "'loss' means the value of property taken, damaged or destroyed," §2B1.1, comment. (n.2), the court properly calculated the amount of loss based on the amount of money stolen from the bank.

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

United States v. King, 257 F.3d 1013 (9th Cir. 2001). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards, for which he used a counterfeit postage meter stamp, informing people that they had won $10,000, requiring that such individuals pay $15 in processing fees, then failing to award any money. The district court sentenced defendant under §2B5.1. The defendant argued that the district court should have applied the fraud guideline, §2F1.1, to his conviction for using a counterfeit postage meter stamp because §2B5.1 applies to postage stamps "that are not made out to a specific payee." The court rejected the defendant's argument, holding that the difference in form of counterfeit equipment is insignificant when, as with physical stamps and a counterfeit meter, both devices are used for the same illegal purpose, free mail delivery through the postal service.

Part D Offenses Involving Drugs

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

United States v. Hunt, 656 F.3d 906 (9th Cir. 2011). The Ninth Circuit held that the defendant's sentence violated *Apprendi* because he had not specifically admitted, nor did the record provide overwhelming evidence that the drug the defendant intended to possess was cocaine.

United States v. Culps, 300 F.3d 1069 (9th Cir. 2002). The defendant was convicted at a jury trial of three counts of distributing and possessing marijuana and one count of maintaining a drug house. The district court sentenced him to 88 months in prison based on the court's approximation of how much marijuana had been sold at his house over a three year period. Recognizing that a district court may adopt a multiplier method if each factor is (1) proved by

the government by a preponderance of (2) reliable evidence, and (3) that the court must err on the side of caution, the Ninth Circuit held that the district court erred in adopting the presentence report's estimate with regard to average transaction size and estimated number of days that drugs were sold because the evidence was neither sufficient or reliable, and no evidence supported the supposition that the drug dealing had occurred continuously for three years.

United States v. Gamez, 301 F.3d 1138 (9th Cir. 2002). The facts that defendant did not personally commit murder and was acquitted on that charge do not foreclose the application of §2D1.1(d)(1)'s murder cross-reference. Application of the murder cross-reference was proper as long as the sentencing court found that the murder was both reasonably foreseeable and in furtherance of the drug-related conspiracy.

United States v. Highsmith, 268 F.3d 1141 (9th Cir. 2001). The defendant appealed the district court's finding that he was in constructive possession of a firearm during the commission of drug offenses thus warranting a two-level enhancement pursuant to §2D1.1(b)(1). The firearm was found in someone else's bedroom, along with drugs. The evidence established that the defendant had access to the bedroom and that he dealt drugs from the bedroom but there was no evidence that the defendant knew of the gun. Accordingly, there was insufficient evidence to support a finding of constructive possession and to apply the enhancement.

United States v. Aquino, 242 F.3d 859 (9th Cir. 2001). The defendant pled guilty to conspiracy and possession with intent to distribute methamphetamine, as well as carrying a firearm during a drug trafficking offense, under 21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. § 924(c). Despite guideline language expressly prohibiting the application of any offense characteristic for possession of a firearm when the court must impose a five-year statutory minimum for conviction under section 924(c), the district court imposed a two-level enhancement under §2D1.1(b)(1) for supplying codefendants with firearms. The court vacated the sentence and remanded for resentencing.

United States v. McLain, 133 F.3d 1191 (9th Cir. 1998). The district court properly resentenced the defendant after his section 924(c) conviction was vacated following the Supreme Court's opinion in *Bailey*. As a matter of first impression, the Ninth Circuit held that resentencing under the circumstances did not constitute double jeopardy despite the fact that the defendant had already completed that portion of the sentence connected to the underlying drug offense. The Ninth Circuit noted that following a successful section 2255 petition to vacate a section 924(c) conviction and sentence, a district court has the authority to resentence a defendant in order to correct the defendant's sentence related to the underlying offense, to reflect the possession of a weapon. Additionally, double jeopardy prohibits an increase in a defendant's sentence only where there is a legitimate expectation of finality attached to the sentence.

United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997). The defendant pled guilty to two counts of cocaine distribution. On appeal, the defendant argued that the district court erred in making no specific factual findings regarding the defendant's claim that he was entrapped into trading cocaine for firearms. The Ninth Circuit agreed, vacating the sentence and remanding for

further proceedings. The appellate court noted that the gun enhancement is not applicable when the defendant is able to prove sentencing entrapment by a preponderance of the evidence.

United States v. Scrivner, 114 F.3d 964 (9th Cir. 1997). As a matter of first impression, the Ninth Circuit held that the defendants, who were convicted of various methamphetamine offenses, failed to object during trial or sentencing about the type of drugs involved in their case, and therefore, it was not plain error for the trial court to sentence based on the more common form of D-methamphetamine. Only when a defendant seeks to challenge the factual accuracy of a matter contained in the presentence report must the district court at the time of sentencing make findings or determinations as required by Rule 32.

United States v. Roth, 32 F.3d 437 (9th Cir. 1994). In addressing an issue of first impression in the Ninth Circuit, the appellate court held that the district court did not err in holding that it was precluded from departing downward to a sentence of probation where the defendant was entitled to a downward departure for substantial assistance under 18 U.S.C. § 3553(e), but was subject to a mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). The circuit court held that while section 3553(e) allowed the district court to disregard the minimum sentence otherwise imposed by statute, it did not authorize the court to disregard the statutory ban on probation contained in 21 U.S.C. § 841(b)(1)(A). Rather, the circuit court concluded, the probation ban in section 841(b)(1)(A) was designed to limit the discretion granted sentencing courts to depart below a mandatory minimum under 18 U.S.C. § 3553(e) by eliminating probation without imprisonment as a sentencing option.

§2D1.8 Renting or Managing a Drug Establishment; Attempt or Conspiracy

United States v. Leasure, 319 F.3d 1092 (9th Cir. 2003). The issue on appeal was whether §2D1.8 simply establishes a base offense level, which the government must prove, or if it provides for both a base offense level and a mitigating departure, which a defendant must prove. The Ninth Circuit held that under §2D1.8 the government must prove the facts relevant to obtain the base offense level it seeks. In this case, even though the district court erred by requiring the defendant to prove nonparticipation, the error was nonetheless harmless. The evidence of defendant's participation in the manufacturing of drugs was overwhelming; had the district court placed the burden of proof on the government, the burden would have been met.

§2D1.11 Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical

United States v. Alfaro, 336 F.3d 876 (9th Cir. 2003). The district court applied a 14-level upward departure because the defendant's importation of iodine was large scale. On appeal, the Ninth Circuit affirmed the departure but determined that the extent of the departure was unreasonable. The court reasoned that the district court's methodology in calculating the upward departure amounted to the defendant being sentenced under §2D1.11, a guideline provision not applicable to his case. Further, the departure also violated the *ex post facto* clause. Accordingly, the Ninth Circuit vacated the sentence and remanded for resentencing.

Part F [Deleted]

§2F1.1 Fraud and Deceit[1]

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004). The district court erred in including interest and finance charges in its calculation for actual loss for sentencing purposes. The defendant was sentenced under §2F1.1, which did not specify whether interest and finance charges were a part of the loss calculation. A circuit split developed and the Commission resolved the problem as part of Amendment 617. The Ninth Circuit determined that since the portion of the Amendment applicable in this case was resolving a circuit split on the issue rather than reflecting a change in substantive law, the revision was a clarification. Clarifications are applied retroactively, and the defendant's sentence was vacated and remanded so that interest and finance charges would not be considered in the loss calculation.

United States v. Riley, 335 F.3d 919 (9th Cir. 2003). The two-level enhancement under §2F1.1(b)(5)(c)(ii) for possession of five or more means of identification requires a finding that the defendant possessed false identifications of at least five actual people.

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

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

United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002). The court reviewed whether the cross-reference to §2G2.1, contained in §2G1.1(c)(1), applies when the defendant's primary purpose in causing the juvenile to engage in sexually explicit conduct was sexual gratification, but the secondary purpose was to produce a visual depiction, which triggers the cross-reference. The court determined that the text, context, purpose, and legislative history of the cross-reference, along with case law, direct the broad application of the cross-reference.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002), *rev'd on other grounds by United States v. Gonzales*, 506 F.3d 940 (9th Cir. 2007). Pursuant to §2G1.1(b)(1), the district court applied a four-level enhancement because the Mann Act violations involved physical force. The defendant argued that two of the Mann Act offenses at issue did not specifically involve physical force in the actual interstate travel and thus because the force was not specific to the interstate travel, the enhancement could not apply. The court rejected this argument, ruling that the physical force does not have to relate to the elements of the Mann Act violations, but instead those offenses must merely involve physical force in some fashion. Here, the physical force enhancement was justified because violence occurred to further the overall prostitution scheme.

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[1]Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* App. C, amendment 617.

§2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010). In order to receive the enhancement at §2G1.3(b)(1)(B) where the minor victim was "otherwise in the custody, care, or supervisory control" of the defendant, the supervisory relationship must exist outside of the offense conduct itself.

United States v. Christensen, 598 F.3d 1201 (9th Cir. 2010). The Ninth Circuit held that courts should apply retroactively the Commission's amendment resolving a circuit conflict regarding the application of the enhancement for influencing a minor when the only minor in the case is an undercover law enforcement officer.

§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

See United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002), §2G1.1.

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

United States v. Strickland, 601 F.3d 963 (9th Cir. 2010). An en banc panel of the Ninth Circuit considered whether the defendant's prior offense of child abuse under Maryland law constituted an offense "relating to sexual abuse" for purposes of the statutory enhancement. The Ninth Circuit held that the modified categorical approach applied because the Maryland statute at issue included both qualifying and non-qualifying offenses, and the docket sheet reflected that the defendant had pleaded guilty to a qualifying offense. The Ninth Circuit also held that the district court did not err in relying on the Maryland docket sheet's description of the conviction even though the docket sheet was not "certified" because the defendant failed to explain why its uncertified status made it unreliable.

United States v. Garner, 490 F.3d 739 (9th Cir. 2007). The court affirmed the application of §2G2.2(b)(5), pattern of activity, predicated on the defendant's 35 year old conviction for sexually abusing his children because "[t]he plain language of the Commentary to § 2G2.2 eliminates the need for any temporal or factual nexus between the offense of conviction and any prior act of sexual abuse or exploitation; the provision obviously intends to cast a wide net to draw in any conceivable history of sexual abuse or exploitation of children."

United States v. Williamson, 439 F.3d 1125 (9th Cir. 2006). A court may rely upon relevant conduct that did not underlie the commission of the offense of conviction to determine whether a defendant engaged in a pattern of sexual conduct. On this basis, the district court properly relied on the defendant's sexual abuse of his granddaughter to enhance his offense level for the offense of transmitting child pornography.

United States v. Speelman, 431 F.3d 1226 (9th Cir. 2005). A district court may base a §2G2.2(c)(1) cross-reference on dismissed conduct, including conduct which the federal government would lack jurisdiction to prosecute.

United States v. Rearden, 349 F.3d 608 (9th Cir. 2003). The court of appeals affirmed the four-level enhancement under §2G2.2(b)(3) for transmitting "material that portrays sadistic or masochistic conduct or other depictions of violence" where the evidence established that at least two of the images transmitted depicted the anal penetration of young prepubescent children by adult males. The appellate court concluded that the district court was well within its discretion to conclude that what was shown in the pictures was necessarily painful and thus sadistic.

Part H Offenses Involving Individual Rights

§2H4.1 Peonage, Involuntary Servitude, and Slave Trade

United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002). The defendant was convicted of involuntary servitude, mail fraud, and harboring aliens. The district court adjusted the defendant's base offense level upward two levels under §3A1.1(b) – the "vulnerable victim" enhancement. On appeal, the Ninth Circuit affirmed the vulnerable victim enhancement. The court reasoned that the specific offense characteristics under §2H4.1(b) did not provide an adjustment for victim characteristics such as the victim's immigrant status and the linguistic, educational, and cultural barriers that contributed to her remaining in involuntary servitude.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Arias, 253 F.3d 453 (9th Cir. 2001). The defendant was convicted of witness intimidation but was acquitted of the underlying drug offenses for whose obstruction the intimidation served. The district court erroneously refused to apply a higher enhancement for obstruction of justice under the cross-reference to §2X3.1, believing that it was not permissible because the defendant was acquitted of the underlying offenses. Deciding an issue of first impression, the court held that §2J1.2(c)(1)'s requirement to apply §2X3.1 (Accessory After the Fact) should be followed regardless of whether or not the underlying offense was proved by a preponderance of the evidence or any other standard of proof. The court reasoned that not doing so would defeat the very purpose of the cross reference–to ensure that the sentence reflects the seriousness of the obstruction where it, in turn, depends on the seriousness of the underlying offense. "[O]therwise 'perjurers would be able to benefit from perjury that successfully

persuaded' a jury not to convict."

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

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001). The defendant was convicted of telemarketing fraud. While he was on pretrial release, he continued to engage in telemarketing fraud in violation of the pretrial release order. Subsequently, the district court enhanced his sentence pursuant to 18 U.S.C. § 3147 and §2J1.7. On appeal, the defendant argued that such an enhancement was a violation of due process because he was not specifically warned in the pretrial order that such an enhancement could be applied. Noting a circuit split on the issue, the Ninth Circuit sided with the majority of the circuits in holding that the lack of such a warning does not preclude the sentencing enhancement because the enhancement statute itself does not require such a warning. The guidelines do not require such a warning because the notice requirement in the Commentary of §2J1.7 is a "pre-*sentence* requirement rather than a pre-release requirement."

United States v. Tavakkoly, 238 F.3d 1062 (9th Cir. 2001). The district court did not err by considering the commission of the offenses while on pretrial release both to enhance the defendant's sentence for the instant crime and to impose a separate consecutive sentence for violating the terms of pretrial release.

Part K Offenses Involving Public Safety

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

United States v. Maness, 566 F.3d 894 (9th Cir. 2009). The court agreed with the First, Seventh, Eighth, and Eleventh Circuits, and held that the guidelines "borrow the statutory definition of a semiautomatic assault weapon, but do not explicitly incorporate the statute's effective date, and the Sentencing Commission's determinations do not turn on whether possession of a weapon constitutes a separate criminal act under the statute." The court found that the district court did not err in applying a higher offense level because the offense involved a semiautomatic assault weapon, despite the fact that the weapon was listed in the statute as one exempted from the ban because it was manufactured prior to September 13, 1994.

United States v. Gonzales, 506 F.3d 940 (9th Cir. 2007). To receive the four level increase under §2K2.1(b)(5) for possession of a firearm "in connection with another felony offense" (note that the enhancement is found at §2K2.1(b)(6) after November 1, 2005) it is sufficient for the government to show physical possession "in a manner that permits an inference that it facilitated or potentially facilitated - *i.e.*, had some potential emboldening role in - a defendant's felonious conduct." *See also United States v. Valenzuela*, 495 F.3d 1127 (9th Cir.

[2]Effective November 1, 2006, §2J1.7 was moved to a new Chapter Three Adjustment at §3C1.3.

2007). In *Gonzales* the police officers found a firearm inside a gym bag with methamphetamine in the defendant's car. The defendant admitted that both were his and admitted that he sold drugs. These facts are sufficient to impose the four-level increase under §2K2.1(b)(5).

United States v. Jimison, 493 F.3d 1148 (9th Cir. 2007). The defendant must have formed "knowledge, intent, or reason to believe that he would, at some time in the future, commit another felony offense" before the four level enhancement for possession of a firearm "in connection with another felony offense" at §2K2.1(b)(5) can be applied. The government must show more than mere possession of a firearm to get the enhancement and the defendant's intent must be proved up for a planned offense. In this case, where the defendant threatened "going Rambo" but subsequently gave up the firearms in question prior to capture, such proof of intent was not present and the sentencing court erred in applying the enhancement.

United States v. Clark, 452 F.3d 1082 (9th Cir. 2006). A two-level enhancement for carrying a gun with an obliterated serial number was subject only to a preponderance of the evidence burden of proof because it did not have a disproportionate effect on the defendant's sentence.

United States v. Ellsworth, 456 F.3d 1146 (9th Cir. 2006). The two-level enhancement under §2K2.1(b)(4) for possession of a stolen firearm applies regardless of whether "the defendant knew or had reason to believe" the firearm was stolen. The court rejected the defendant's argument that applying this enhancement if only a "reason to believe" was proven is a violation of the Fifth Amendment. The court reasoned that a Guideline enhancement is not an independent basis for criminal liability and does not impact the defendant's Fifth Amendment rights.

United States v. Nichols, 464 F.3d 1117 (9th Cir. 2006). A four-level increase under §2K2.1(b)(5), for the use or possession of "any firearm" in connection with another felony offense, is appropriate even if the firearm used for the enhancement is not the same firearm upon which the felon-in-possession conviction is based.

United States v. Carter, 421 F.3d 909 (9th Cir. 2005). A serial number is "altered or obliterated" when it is changed in a way that makes information less accessible. Under that standard, a serial number which is not discernable to the unaided eye, but which remains detectable via microscopy, is altered or obliterated.

United States v. Wenner, 351 F.3d 969 (9th Cir. 2003). The defendant pled guilty to being a felon in possession of a firearm. The defendant argued that his state convictions for residential burglary and attempted residential burglary were not crimes of violence under §4B1.2(a)(2). The court of appeals agreed that the Washington residential burglary statute did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2), holding that the scope of the Washington statute exceeded the federal definition. Because the residential burglary was not a crime of violence under §4B1.2(a)(2), the defendant's state conviction for attempted residential burglary also was not a crime of violence. Because neither Washington residential burglary nor attempted residential burglary is a crime of violence, the district court erred in enhancing

Wenner's sentence under § 2K2.1(a)(1).

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Pineda-Doval, 614 F.3d 1019 (9th Cir. 2010). In a case involving alien smuggling, the district court erred in not applying the clear and convincing standard of proof to determine whether the defendant acted with malice aforethought because this determination caused his guideline range to be calculated under §2A1.2 instead of §2L1.1. The difference in these two guidelines more than doubled the defendant's guideline range, increased his offense level by more than 4 levels, and caused him to be sentenced as though he had committed a separate offense - second-degree murder - rather than the offense of conviction, alien smuggling.

United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). The district court erred in applying §3C1.2 in addition to §2L1.1(b)(5) in sentencing the defendant. The defendant sped away from the border checkpoint until she was apprehended; she was attempting to flee from the agents. Because the district court's application of §2L1.1(b)(5) enhancement was due to the defendant's reckless flight from law enforcement officers, under Application Note 6 to §2L1.1, the district court should not have enhanced the defendant's offense level for reckless endangerment during flight under §3C1.2.

United States v. Angwin, 271 F.3d 786 (9th Cir. 2001), *overruled on other grounds by United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (*en banc*). The district court properly applied the §2L1.1(b)(5) upward adjustment due to the substantial risk of death or serious bodily injury to another person created by the defendant because the defendant drove a motor home with 16 (14 aliens) people, although it was rated to hold 6.

United States v. Herrera-Rojas, 243 F.3d 1139 (9th Cir. 2001). Upon finding the necessary intent to create substantial risk under §2L1.1(b)(5), additional intent is not necessary to also increase a sentence under §2L1.1(b)(6) for bodily injury or death that results.

United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001), *overruled on other grounds by United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (*en banc*). An increase in the base offense level under the sentencing guidelines for creating substantial risk of death or bodily injury was appropriate where the defendant drove a dilapidated van with 20 people inside, without seats or seatbelts.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). An increase in the base offense level under the sentencing guidelines for creating the substantial risk of death or bodily injury was appropriate. The defendants were aware of the potential dangerous conditions of the journey but nevertheless proceeded with the trip through rugged terrain despite the immigrants' obvious lack of adequate food, water, clothing, and protection from the elements. Moreover, even though the snowstorm which occurred was unanticipated, the defendants knew the conditions and dangers of proceeding so ill-equipped.

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

United States v. Gomez-Hernandez, 680 F.3d 1171 (9th Cir. 2012). The Ninth Circuit held that, for purposes of the 16-level enhancement, a conviction under Arizona law for attempted aggravated assault can be a crime of violence, even though Arizona's (completed) aggravated assault statute covers non-intentional crimes, because it is clear under Arizona law that a conviction for attempted aggravated assault requires a finding of intent. *But see United States v. Castillo-Marin*, 684 F.3d 914, n.9 (9th Cir. 2012), distinguishing New York's attempted assault statute because a conviction of attempted non-intentional aggravated assault is possible under that state's law.

United States v. Rivera-Gomez, 634 F.3d 507 (9th Cir. 2011). The Ninth Circuit held that, in an illegal re-entry case, an alien's prior offense of resisting arrest can be considered relevant conduct to the instant offense pursuant to §1B1.3(a)(1)(A) if the evidence demonstrates that the resisting was committed in order to avoid detection or responsibility for the re-entry offense. If the offense is relevant conduct, it cannot also be counted as criminal history.

United States v. Valencia-Barragan, 600 F.3d 1132 (9th Cir. 2010), *superseded by United States v. Valencia-Barragan*, 608 F.3d 1103 (9th Cir. 2010). The Ninth Circuit considered whether the defendant's prior offense of rape of a child who is 12 or 13 years of age under Washington law qualifies as a "crime of violence" for purposes of the 16-level enhancement in illegal reentry cases. The court concluded that the offense was similar to sexual abuse of a minor, and therefore qualified for the enhancement, because it required contact with a child younger than 14 years of age, which is per se abusive.

United States v. Laurico-Yeno, 590 F.3d 818 (9th Cir. 2010). The Ninth Circuit affirmed its prior unpublished opinions holding that the California offense of inflicting corporal injury on a spouse or cohabitant partner (California Penal Code § 273.5) is a crime of violence for purposes of the enhancement at §2L1.2. In particular, the court noted that the statute requires "willful" behavior, which is the equivalent of intentional behavior, and that the statute requires that the defendant inflict upon the other person a "traumatic condition," which it further requires to result from a "direct application of force." The Ninth Circuit rejected the defendant's argument that simple battery could qualify, noting that this would contradict the explicit statutory language and no California court had so held.

United States v. Grajeda, 581 F.3d 1186 (9th Cir. 2009). The Ninth Circuit held that the California offense of assault with a deadly weapon or other non-firearm instrument or by any means of force likely to produce great bodily injury is a crime of violence for purposes of §2L1.2. It rejected the defendant's argument that because California courts define assault as *any* unwanted touching, no matter how light, it could not be a crime of violence. The Ninth Circuit held that the deadly weapon or means of force elements of the offense were sufficient to bring it within the crime of violence definition.

United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011) (en banc). The Ninth Circuit held that the California crime of first degree residential burglary in violation of

Cal. Penal Code § 459 was not a crime of violence under the guidelines because it did not require "unlawful or unprivileged entry" as an element of the offense.

United States v. Saavedra-Velazquez, 578 F.3d 1103 (9th Cir. 2009). The court held that the defendant's California attempted burglary conviction is a crime of violence for guidelines purposes, despite the fact that the California definition of "attempt" only requires "slight acts in furtherance" of the crime. The court found that if it concluded "that on the basis of the term 'slight acts' California's definition is broader than the common law definition, [it] would be unable to reconcile [its] conclusion with the opposite holding" in a case construing Nevada's use of the terms "some act" or "slight act."

United States v. Rivera-Ramos, 578 F.3d 1111 (9th Cir. 2009). The court determined that the defendant's prior conviction for New York attempted robbery is a crime of violence pursuant to the guidelines. According to the court, "New York's definition [of 'attempt'], which requires conduct that comes within 'a *dangerous proximity* to the criminal end to be attained,' is no broader than the definition at common law, which requires a '*substantial step* towards committing the crimes.'"

United States v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009). The court held that the defendant's Arizona conviction for aggravated assault was not an aggravated felony pursuant to §2L1.2. The court agreed with the district court when it found that the Arizona statute was broader than "generic aggravated assault because it encompasse[s] 'garden-variety' reckless conduct[,]" not "extreme indifference" recklessness. The court pointed out that it does not use a "common sense" approach, but instead it must "apply the categorical approach 'even when the object offense is enumerated as a *per se* crime of violence under the Guidelines.'" Concluding that "the Model Penal Code and most states define aggravated assault more narrowly than does the Arizona statute," the court agreed with the defendant that his conviction was not a crime of violence.

United States v. Mendoza-Zaragoza, 567 F.3d 431 (9th Cir. 2009). The court clarified that:

> an indictment charging the illegal reentry of a previously removed alien may support an increased maximum sentence under 8 U.S.C. § 1326(b)(2)—a sentence enhancement applicable to aliens removed after an aggravated felony conviction—even if it alleges the date of the prior removal without specifying the relative date of the prior conviction. The date of an alien's removal is the only fact "[o]ther than the fact of a prior conviction . . . that increases the penalty for [the] crime beyond the prescribed statutory maximum" of two years.

United States v. Gomez-Leon, 545 F.3d 777 (9th Cir. 2008). The Ninth Circuit held that the district court erred in applying the 16-level enhancement at §2L1.2(b)(1)(A) because the record did not demonstrate that the sentence of 365 days' imprisonment imposed on revocation of probation on the prior offense did not *include* the 127 days' custody originally imposed as a condition of the probation. Without such a showing, the sentence imposed could not be

considered at least thirteen months, and the enhancement would not apply.

United States v. Rodriguez-Guzman, 506 F.3d 738 (9th Cir. 2007). The court rejected the defendant's argument that statutory rape as defined at § 261.5(c), California Penal Code, is not a crime of violence because the offense is included in the list of "crimes of violence" under §2L1.2. However, the generic definition of statutory rape places the age of consent at 16, while the California statute sets the age of consent at 18. As a result of the different definitions, a divided panel of the Ninth Circuit concluded that the statute is broader than the common definition of statutory rape and, thus, not categorically a crime of violence.

United States v. Olmos-Esparza, 484 F.3d 1111 (9th Cir. 2007). The defendant argued that the time limit at §4A1.2 for counting prior convictions should be incorporated into §2L1.2. The court held that "it is apparent that §2L1.2 on its face contains no temporal limitation on the prior conviction used to enhance sentences for illegal reentry. When viewed in context, it is also clear the Commission did not implicitly mean to create such a limitation on prior convictions in §2L1.2, but was instead expressly eliminating any time limitations" when it "borrowed" the definition for "aggravated felony" from §4A1.2.

United States v. Bolanos-Hernandez, 492 F.3d 1140 (9th Cir. 2007). The court held that a conviction for assault with intent to commit rape in violation of Cal. Penal Code §§ 260 and 261(a)(2) was a "forcible sex offense" and therefore a crime of violence under §2L1.2 because it was "a form of attempted rape" and "require[d] a showing that the defendant has used or attempted at least some level of force on the victim."

United States v. Hernandez-Hernandez, 431 F.3d 1212 (9th Cir. 2005). Under the modified categorical approach, the district court could rely on facts set forth in a stipulated state-court "995" motion to set aside false imprisonment charges to determine whether the offense was a crime of violence justifying the 16-level sentence enhancement. Criminal defendants are bound by the admissions of fact made by their counsel in their presence and with their authority, and the motion admitted to a particular set of facts that clearly involved violence and the use of force.

United States v. Garcia-Gomez, 380 F.3d 1167 (9th Cir. 2004). The defendant argued that his prior 31-month sentence was suspended after 8 months, so it was error under §§2L1.2 and 4A1.2 to take into account those portions of a sentence that were suspended when calculating his offense level and criminal history category. The Court of Appeals held that a decision to release a defendant early must be made by a judge in order for it to qualify as a suspended sentence. Because the defendant was released through an administrative agency determination, his lesser sentence did not qualify as a "suspended" sentence.

United States v. Lopez-Patino, 391 F.3d 1034 (9th Cir. 2004). In sentencing the defendant for unlawful reentry following deportation, the imposition of 16-level enhancement based on prior "crime of violence" for Arizona conviction of child abuse was proper under modified categorical approach, where the transcript, indictment, and judgment adequately established that the crime involved the spanking of a child that resulted in bruising.

United States v. Gonzalez-Tamariz, 310 F.3d 1168 (9th Cir. 2003). The Ninth Circuit joined the Second, Third, Fifth, Tenth, and Eleventh Circuits in holding that an offense classified as a misdemeanor under state law may nevertheless be considered an aggravated felony for sentencing purposes if it meets the requirements of 8 U.S.C. § 1101(a)(43). Thus, the defendant who was convicted of battery, labeled a gross misdemeanor with a one-year maximum sentence, was properly considered an aggravated felony because it is a crime of violence and the (suspended) term of imprisonment was one year.

United States v. Hernandez-Valdovinos, 352 F.3d 1243 (9th Cir. 2003). A suspended sentence that imposed incarceration as a condition of probation constituted a "sentence imposed" for purposes of §2L1.2.

United States v. Medina-Maella, 351 F.3d 944 (9th Cir. 2003). A prior felony conviction for lewd or lascivious acts upon a child under the age of 14 years was a "crime of violence" for purposes of §2L1.2; *see also United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009) (holding the same in light of *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008)).

United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir. 2003). The court addressed, as an issue of first impression, whether a "crime of violence" must be limited to "aggravated felonies" under §2L1.2 as it was amended in 2001. The court held that a "crime of violence" needs only to be a "felony" as defined in the application notes of §2L1.2, and not an "aggravated felony" as statutorily defined in 8 U.S.C. § 1101(a)(43), to qualify for a 16-level enhancement. The court noted that the plain language of the guideline so demonstrates. The court stated that although the phrase "crime of violence" appears in both the statute and the new guideline, the new guideline takes care to include its own definition. Significantly, the guideline definition is different from the statutory definition of that phrase.

United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir. 2003). The defendant was convicted of illegal reentry into the United States and was subject to a 16-level enhancement sentence for a prior state drug conviction. The issue on appeal was whether the three-year prison sentence imposed by the state court after defendant's probation was revoked was included in the calculation of the length of the "sentence imposed" under §2L1.2(b)(1)(A)(I). Analogizing to §4A1.2, the Ninth Circuit held that the prison sentence imposed after revocation of probation should be included in calculating the length of the sentence imposed for the prior offense.

United States v. Maria-Gonzalez, 268 F.3d 664 (9th Cir. 2001). The defendant appealed the district court's aggravated felony enhancement under §2L1.2(b)(1)(A), arguing that because his 1992 conviction was not an aggravated felony at the time of his 1993 deportation, that conviction could not qualify as an aggravated felony. The Supreme Court has ruled that classification of an offense as an aggravated felony applies retroactively. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Moreover, the offense of illegal reentry occurred after the 1992 conviction was classified as an aggravated felony, and the language of the statute, the legislative history, and the guidelines all establish that it is the classification of a prior conviction as an aggravated felony at the time of the reentry violation that justifies the aggravated felony status.

United States v. Echavarria-Escobar, 270 F.3d 1265 (9th Cir. 2001), *overruled on other grounds by United States v. Gonzales*, 506 F.3d 940 (9th Cir. 2007). The defendant appealed the district court's aggravated felony enhancement under §2L1.2(b)(1)(A), contending that because his prior theft offense sentence was suspended, it did not constitute an aggravated felony. Reviewing for plain error, the court disagreed. Relying on the language of 8 U.S.C. § 1101(a), which defines aggravated felonies, the court joined all other circuits in ruling that whether a sentence is suspended is immaterial to the aggravated felony question.

United States v. Galindo-Gallegos, 244 F.3d 728, *as amended by* 255 F.3d 1154 (9th Cir. 2001). A conviction for transporting aliens within the United States constituted an aggravated felony under §2L1.1.

Part M Offenses Involving National Defense and Weapons of Mass Destruction

§2M5.2 Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

United States v. Carper, 659 F.3d 923 (9th Cir. 2011). The Ninth Circuit affirmed the district court's application of §2M5.2(a)(1) rather than (a)(2) where the defendant was convicted of selling night-vision equipment, concluding that because that equipment was not a firearm, it could not fall into the category specified for the lower base offense level.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Blandin, 435 F.3d 1191 (9th Cir. 2005). The defendant was not entitled to the seven-level adjustment for voluntary surrender after an escape from a non-secure facility, because he surrendered only when faced with the prospect of being arrested.

United States v. Novak, 284 F.3d 986 (9th Cir. 2002). For purposes of the downward adjustment under §2P1.1(b)(2), an escape begins when the prisoner departs from lawful custody with the intent to evade detection, even if no one is aware of the escape at that time.

United States v. Patterson, 230 F.3d 1168 (9th Cir. 2000). The defendant pled guilty to escaping from custody, in violation of 18 U.S.C. § 751(a), after failing to return to a community corrections facility while on work release. At the time of his escape, the defendant was completing a 12-month custody sentence for having violated the conditions of a supervised release term imposed subsequent to a prior conviction for unlawful use of a communication facility. Finding that at the time of the escape, the defendant was in custody "by virtue of" the conviction for unlawful use of a communication facility, the district court sentenced the defendant under §2P1.1(a)(1), which mandates an offense level of 13. The defendant challenged his sentence, arguing that the district court should have applied the base offense level in §2P1.1(a)(2). The appellate court held that "when supervised release is imposed as part of a sentence and then revoked in subsequent proceedings, the resulting confinement is 'by virtue of'

the original conviction, and therefore, §2P1.1(a)(1) applies." The court reasoned that but for the original offense, there would have been no supervised release to violate and be revoked, resulting in a return to custody.

Part Q Offenses Involving the Environment

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

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (*en banc*). On appeal, the defendant objected to the district court's six-level upward adjustment pursuant to §2Q1.2(b)(1)(A). The district court did not err. The record showed that during long periods of time, the facility and the powerhouse were contained for purposes of asbestos abatement. Consequently, it was a reasonable inference to assume that contamination had occurred.

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001). The defendant contended that the district court improperly enhanced his sentence because there were insufficient facts to support findings that hazardous substances were discharged into the environment, resulting in a substantial likelihood of death or serious bodily injury, per §2Q1.2(b)(1)(B). That guideline, interpreted in conjunction with Application Note 5, requires a release or emission of a hazardous or toxic substance or pesticide "into the environment," *United States v. Ferrin*, 994 F.2d 658, 662 (9th Cir. 1993), and a showing that the environment was actually contaminated by the substance, *United States v. Van Loben Sels*, 198 F.3d 1161, 1164 (9th Cir. 1999). Here, the district court found that asbestos dust was emitted into the air, which justified imposition of the enhancement. Similarly, the district court properly enhanced the sentence nine levels under §2Q1.2(b)(2) because the offense resulted in a substantial likelihood of death or serious bodily injury. The enhancement was based upon the defendant's noncompliance with work practice standards resulting in workers being exposed to life-threatening asbestos fibers.

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Phillips, 367 F.3d 846 (9th Cir. 2004). The defendant was convicted of multiple violations of the Clean Water Act and conspiracy to violate the Clean Water Act. The Ninth Circuit held that the plain language of §2Q1.3(b)(3) supported a conclusion that the sentencing court must include reliable CERCLA expenses in its calculation of whether a defendant's actions required a substantial expenditure for cleanup.

Part T Offenses Involving Taxation

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

United States v. Yip, 592 F.3d 1035 (9th Cir. 2010). The Ninth Circuit held that the district court properly included unpaid state taxes in the loss calculation under §2T1.1 and that the defendant was not entitled to reduce the amount of tax loss by the amount of any previously unclaimed deduction he would have taken on federal income tax as a result of having paid the state tax.

United States v. Bishop, 291 F.3d 1100 (9th Cir. 2003). The defendant challenged the district court's tax loss calculation. The court considered two of the defendant's arguments, deeming a third contention waived because it was not raised below. First, defendant claimed that the district court should have used "married filing jointly" status, instead of "married filing separately," the use of which resulted in a higher tax loss. The court decided that because the tax loss would have been the same under either status, there was no error: it reached this conclusion because tax loss includes the reasonably foreseeable conduct of all co-actors and thus under either status, the defendant's spouse's income would have to be included. Second, the defendant claimed that the district court erred because it did not itemize the deductions to which he was entitled. According to the defendant, the district court should not have used the standard deduction, but rather, should have itemized, because itemizing permits a "more accurate determination" of tax loss than the default 20 percent of the gross income set forth in §2T1.1(c)(2). Because the defendant failed to produce evidence in support of itemized deductions, the court ruled that using the standard deduction was a reasonable estimate given the available facts, citing §2T1.1, comment. (n.1).

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The district court imposed both a two-level enhancement under §3B1.3 for abuse of a position of trust and under §2T1.1(b)(1) for "fail[ing] to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity." The district court based the enhancement on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. The court reasoned that because the §2T1.1(b)(1) enhancement applies regardless of the manner in which the illegal income was derived (*i.e.*, whether it involved an abuse of a position of trust), both enhancements are appropriate where the conduct has been committed by abusing a position of trust, because the abuse of position of trust was not taken into account by the §2T1.1(b)(1) enhancement.

Part X Other Offenses

§2X3.1 Accessory After the Fact

United States v. Arias, 253 F.3d 453 (9th Cir. 2001). When a defendant is convicted of tampering with a witness, the offense level for obstruction is driven by the offense level of the crime whose prosecution was obstructed. The sentencing guidelines accomplish this by a cross reference from §2J1.2, the obstruction guideline, to §2X3.1. Section 2X1.3 must be applied when the resulting offense level is higher.

§2X5.1 Other Offenses

United States v. McEnry, 659 F.3d 893 (9th Cir. 2011). When choosing the most analogous guideline for an offense not listed in the statutory index, the court may not consider the defendant's relevant conduct; rather, the court is limited to conduct charged in the indictment.

United States v. Van Krieken, 39 F.3d 227 (9th Cir. 1994), *superseded by statute as stated in United States v. McEnry*, 659 F.3d 893 (9th Cir. 2011). The defendant asserted that the district court applied the incorrect guideline in sentencing him upon his conviction for corrupt interference with the administration of tax laws, in violation of 26 U.S.C. § 7212(a). The district court sentenced the defendant using §2J1.2(a), Obstruction of Justice, as opposed to §2T1.5, Fraudulent Returns, Statements, or Other Documents. Under §1B1.2, the commentary provides that the court will "determine which guideline section applies based upon the nature of the offense charged in the count of which the defendant was convicted," when the "particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines." In this case, the district court correctly followed the method set forth in §2X1.5, which instructs the court to determine the most analogous guideline. The district court properly analogized the defendant's conduct in filing false tax returns and seeking a tax levy on innocent tax payers, among other conduct, to obstruction of justice.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Solorza, 470 Fed. App'x 669 (9th Cir. 2012). The Ninth Circuit held that, in a case in which the defendant impersonated a federal officer in order to extort a bribe from a family not legally in the country, the vulnerable victim enhancement applied where it was based on the fact that the family's legal status was known to immigration authorities, making them especially vulnerable to the extortion attempt.

United States v. Rising Sun, 522 F.3d 989 (9th Cir. 2008). The Ninth Circuit reversed the

district court's application of the vulnerable victim enhancement because the only stated basis for imposing the enhancement was the remote location in which the victims were attacked. The court noted that it had previously "interpreted the 'otherwise particularly susceptible' language [in the commentary to §3A1.1] as requiring the sentencing court to consider both the victim's characteristics and the 'circumstances surrounding the criminal act.'" However, the court held that "there must be something about the victim that renders him or her more susceptible than other members of the public to the criminal conduct at issue" and that "[a] remote crime location alone is not enough to sustain the enhancement." If it were enough, the court said, the effect would be to "broaden[] the enhancement to the point where it might be applied to almost any case where a crime was committed in an unprotected or sparsely populated area."

United States v. Wright, 373 F.3d 935 (9th Cir. 2004). The district court applied both a two-level vulnerable victim enhancement because the victim was an 11-month old infant, and a four-level adjustment under §2G2.1(b)(1)(A) where the victim was less than 12 years of age. The district court applied the vulnerable victim enhancement based on the victim's extremely young age and small physical size. The appellate court held that §2G2.1 does not take into consideration the especially vulnerable stages of childhood development, so it was not impermissible double-counting of age to apply §2G2.1(b)(1)(A) and the vulnerable victim enhancement.

United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002). The district court's application of the vulnerable victim enhancement to the defendant who was convicted of holding another to involuntary servitude was not error, since the specific offense characteristics for the conviction did not provide an adjustment for victim characteristics such as immigrant status and the linguistic, educational, and cultural barriers that contributed to the victim remaining in involuntary servitude to the defendant.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002), *overruled on other grounds by United States v. Gonzales*, 506 F.3d 940 (2007). The vulnerable victim enhancement does not apply if the factor that makes the victim vulnerable is not "unusual" for victims of the offense.

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001). The sentencing guidelines provision allowing for an offense level increase when offense involved "a large number of vulnerable victims" was triggered by finding that the defendant's telemarketing fraud involved 300 vulnerable victims.

United States v. Mendoza, 262 F.3d 957 (9th Cir. 2001). Pursuant to §3A1.1(b)(1), the district court imposed a two-level enhancement, because the defendant targeted illegal aliens in committing the offense of selling false employment documents. The defendant contested "class-based" vulnerability. The court explained that what made the victims vulnerable was not that they were Hispanic but that they were in the United States illegally (and thus would not investigate or report the defendant), they were unfamiliar with immigration law, they were not well educated, they could not speak or read English, and the defendant held himself out as sophisticated and knowledgeable in INS procedures. The defendant was convicted of three offenses: 1) conspiracy to commit an offense against the United States, 2) sale of immigration

documents, and 3) pretending to be a federal employee and obtaining money by so pretending. Because of the breadth of these convictions, the court ruled that not all of the victims are vulnerable in the same way for the same reasons. Therefore, the characteristics that made the victims vulnerable were not typically associated with the victims of the offenses and thus the district court did not clearly err in applying the enhancement.

United States v. Wetchie, 207 F.3d 632 (9th Cir. 2000). The district court did not err when it enhanced defendant's sentence under the vulnerable victim guideline because the victim was asleep at the time of the offense.

§3A1.2 Official Victim

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The (disbarred attorney) defendant appealed a three-level "official victim" enhancement under §3A1.2(a) because he threatened two members of the Montana Supreme Court Commission on Practice, which oversaw the defendant's disbarment. The defendant maintained that those two individuals were state employees and that the enhancement only applies to victims who are federal officials. The court first noted that §3A1.2(a) does not limit the term "government officer or employee" to federal officials and employees.

§3A1.4 Terrorism

United States v. Tankersley, 537 F.3d 1100 (9th Cir. 2008). The district court concluded that the enhancement did not apply to the defendant because the proven conduct supporting the enhancement was directed only at private corporations, not government, and the plain language of the enhancement limited its application to acts targeting or responding to government conduct. However, the district court departed upward under §5K2.0 on grounds that the defendant's conduct should be subject to the same enhancement. Although the defendant appealed this upward departure, the Ninth Circuit did *not* rule specifically on this issue; rather, it simply upheld the sentence imposed as reasonable.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002). The defendant challenged a four-level leadership role enhancement under §3B1.1(a). The court first ruled there was no error in the district court's findings that there were five or more members involved in the criminal activity or that the activity was extensive. The court ruled, however, that the government did not satisfy its burden of establishing that the defendant played a leadership role. The district court's reasons for finding to the contrary–the defendant's nephew's deference and the defendant's strong personality–were insufficient to support a role enhancement.

United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001). The defendant contended that application of enhancements under §§3B1.1(c) and 3B1.4 constituted impermissible double counting. These enhancement each account for a different type of harm and thus there was no impermissible double counting: involving others in criminal wrongdoing is harmful without reference to age (§3B1.1(c) enhancement); use of a minor is harmful whether or not the defendant's role in the offense is that of a leader or organizer (§3B1.4 enhancement). Finally, §3B1.4 is not a lesser included offense of §3B1.1: the harm caused by the use of the minor is not fully accounted for by application of §3B1.1(c).

United States v. King, 257 F.3d 1013 (9th Cir. 2001). The defendant appealed the four-level enhancement under §3B1.1(a), for being an organizer or leader of an activity involving at least five participants, arguing that because his workers were unaware of the scheme, they could not be considered participants. Citing Application Note 1 to §3B1.1, which excludes persons not criminally responsible for the offense from being participants, the court vacated the enhancement. It remanded so that the district court could determine the level of involvement of the defendant's ex-wife, whose participation might warrant the enhancement on grounds that the defendant would have been an organizer of a criminal activity that "was otherwise extensive." The court held that an enhancement on such grounds required the participation of at least one other criminally culpable individual.

§3B1.2 Mitigating Role

United States v. Wilson, 392 F.3d 1055 (9th Cir. 2004). The defendant convicted of drug-related conspiracy offenses was not entitled to a "minor role" downward adjustment in his sentence where the defendant was involved in every aspect and at every level of the conspiracy.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001). The defendant who participated in disposing of the murder victim's body, had access to and withdrew money from the victim's account, spent some of the money on himself, and participated in the cover-up was not entitled to a "minor role" downward adjustment in his sentence.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court did not err when it refused to grant defendant a minor participant reduction. The defendant's participation was necessary to the success of the trip and he had confessed both that he was a paid guide in training and that he had made such trips previously.

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

United States v. Contreras, 581 F.3d 1163 (9th Cir. 2009), *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (*en banc*). The Ninth Circuit reversed the district court's application of the enhancement in the case of a prison cook convicted of smuggling drugs into the prison where she worked. The court held that she did not exercise "professional or managerial discretion," and the fact that her position facilitated the offense is insufficient to bring the case within the meaning of application note 1 to the guideline.

United States v. Liang, 362 F.3d 1200 (9th Cir. 2004). The defendant's "extraordinary eyesight" that allowed him to peek at the cards in the shoe during a racketeering scheme to defraud casinos was not a "special skill." A skill is only "special" for purposes of §3B1.3 if it is also a skill usually requiring substantial education, training or licensing.

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002), *overruled in part by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The defendant challenged a §3B1.3 abuse of position of trust enhancement, which was based on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. In that position, the defendant had "wide discretion in deciding whom to admit into the United States" and "had discretion in deciding what vehicles to check for contraband." The court concluded that, "[c]learly, such a position is one of public trust characterized by professional discretion."

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002), *overruled in part by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The defendant's security guard position was not a position of public or private trust.

United States v. Lee, 296 F.3d 792 (9th Cir. 2002). The special skills enhancement does not apply to a defendant who used computer skills to facilitate sales over the Internet using a fraudulent website, but whose computer skills were not in the class of professionals ("pilots, lawyers, doctors, accountants, chemists, and demolition experts").

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994). The defendant's special knowledge of ATM machines and their service procedures did not involve the kind of education, training or licensing required to constitute a special skill under §3B1.3, comment. (n.2).

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

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The Ninth Circuit held that the fact that defendant had her son with her when she crossed the U.S.-Mexico border with marijuana did not, by itself, warrant an enhancement for using a minor. Because it was routine for the son to accompany his mother on trips to Mexico, he was with his mother for the whole trip, and she did not make a special trip to get him just to have him present for the crossing, his mere presence in the car at the time of the offense was insufficient to support the enhancement.

United States v. Castro-Hernandez, 258 F.3d 1057 (9th Cir. 2001). The defendant appealed the district court's two-level upward adjustment, under §3B1.4, for use of a minor to assist in avoiding detection. When the defendant tried to drive marijuana over the border, he brought his son with him. The child was normally cared for by the defendant's mother-in-law during the workday. The appellate court affirmed, holding that the "minor's own participation in a federal crime is not a prerequisite to the application of §3B1.4. It is sufficient that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense."

United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001). Application of the sentencing guideline providing for an enhancement for the use of a minor was not precluded by any lack of awareness on part of the defendant of the minor status of the person involved in the offense.

Part C Obstruction

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

United States v. Gilchrist, 658 F.3d 1197 (9th Cir. 2011). The Ninth Circuit held that the provision could apply where the defendant "engaged in intentional or deliberate acts designed to obstruct any potential investigation, at the time an investigation was in fact pending; it does not mean the defendant had to know for certain that the investigation was pending."

United States v. Yip, 592 F.3d 1035 (9th Cir. 2010). The Ninth Circuit held that an IRS audit is an "investigation" for purposes of determining whether a defendant's obstructive conduct qualifies for the enhancement.

United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009). The Ninth Circuit held that lawsuits filed with no legitimate purpose may be unlawful harassment and therefore may support the application of the obstruction of justice enhancement.

United States v. Reyes, 577 F.3d 1069 (9th Cir. 2009). The court held that the obstruction enhancement cannot be "imposed for a defense attorney's arguments."

United States v. DeGeorge, 380 F.3d 1203 (9th Cir. 2004).[3] The defendant attempted to defraud an insurance company and committed perjury during the civil trial. He was then charged with mail fraud and wire fraud. During the criminal sentencing phase, the prosecutor requested a two-level enhancement for obstruction of justice under §3C1.1, arguing that failure to apply the enhancement would allow the defendant to unfairly benefit by eliminating any sentencing enhancements for his civil perjury. The appellate court reversed application of a two-level enhancement for obstruction of justice, holding that §3C1.1 requires that the perjury occur "during the course of the [criminal] investigation," and ruled that the perjury was not an "obstruction offense" for the purposes of the enhancement.

United States v. Hinostroza, 297 F.3d 924 (9th Cir. 2002). Adjustment for obstruction of justice based on defendant's testimony was appropriate where the district court found that the testimony was false and material to the sentencing determination.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001). The obstruction

[3]Application note 4 to §3C1.1, enacted in 2006, effectively overrules this case by providing that pre-investigative conduct can form the basis of an adjustment under §3C1.1, and providing as an example of covered conduct perjury that occurs during a civil proceeding if such perjury pertains to the conduct that forms the basis of the offense of conviction.

enhancement was properly applied because the state officials to whom the defendant directed his obstructive conduct were investigating the same robbery offense to which he later pled guilty in federal court.

United States v. Hernandez-Ramirez, 254 F.3d 841 (9th Cir. 2001). Submitting a false financial affidavit to a magistrate judge for purposes of obtaining appointed counsel is sufficient to warrant a §3C1.1(B) two-level adjustment for obstruction of justice.

United States v. Verdin, 243 F.3d 1174 (9th Cir. 2001). The district court properly enhanced the defendant's sentence for obstruction of justice based on his use of a false identity before the court.

§3C1.2 Reckless Endangerment During Flight

United States v. Franklin, 321 F.3d 1231 (9th Cir. 2003). As a matter of law, a defendant must do more than knowingly participate in an armed robbery in which getaway vehicles are part of the plan to warrant a reckless endangerment enhancement. Rather, the government must prove that the defendant was responsible for or brought about the driver's conduct for the enhancement to apply.

United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). Imposition of two-level increase in the defendant's sentencing level for recklessly creating a substantial risk of serious bodily injury to another in the course of fleeing from law enforcement officers was not warranted for the defendant convicted of transporting illegal aliens, where the district court also increased the defendant's sentencing level, under the guideline authorizing an increase for recklessly creating a substantial risk of serious bodily injury to another while transporting illegal aliens, and such an increase was based solely on the defendant's conduct in fleeing from law enforcement officers.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Espinoza-Baza, 647 F.3d 1182 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1605, 182 L. Ed. 2d 212 (2012). Multiple instances of illegal re-entry in violation of 8 U.S.C. § 1326 may not be grouped under any of the subsections of §3D1.2.

United States v. Smith, 424 F.3d 992 (9th Cir. 2005). The district court did not err by grouping the tax counts separately from the money laundering and mail and wire fraud counts. The Guidelines provide that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Reasoning that the term "same harm" means the counts involve the "same victim," the Ninth Circuit concluded that the counts in question encompassed different harms and different victims because the victim as to the tax fraud counts is the United States government, whereas the victims as to the mail fraud and wire fraud counts are the clients who had their money stolen by the defendants.

United States v. Melchor-Zaragoza, 351 F.3d 925 (9th Cir. 2003). The indictment alleged that defendants conspired to kidnap 23 illegal aliens from a group of smugglers. The sentencing court divided the conspiracy conviction into separate count groups based on the number of victims under §1B1.2(d) and §3D1.2 and increased the combined offense level by five levels. The issue on appeal was whether a conspiracy to take several hostages should be treated as separate "offenses" committed against separate victims for purposes of §§3D1.2 and 1B1.2. The Ninth Circuit held that where a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into that same number of distinct crimes for sentencing purposes. In the instant case, the 23 victims who were held hostage suffered separate harms. Consequently, the district court did not err in treating the taking of each hostage as a separate offenses under §§3D1.2 and 1B1.2(d) and dividing the conspiracy conviction into 23 separate count groups.

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). Grouping was warranted with respect to two of the defendant's five counts of conviction for interstate communication of threats to injure others that involved the same victim, but was not warranted with respect to the remaining three counts involving threats to different victims.

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). The defendant was convicted of felony murder and aggravated sexual abuse. The district court did not group the two offenses and the defendant received two concurrent life sentences. These two offenses constituted a single act, at essentially the same time, same place, against the same victim and with a single criminal purpose. Accordingly, the sentencing judge erred by not grouping these two offenses together pursuant to §3D1.2(a). The circuit court reversed and remanded the case.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Garrido, 596 F.3d 613 (9th Cir. 2010). The Ninth Circuit held that a defendant may receive a reduction when he has accepted responsibility for all counts that are grouped together under §§3D1.1-1.5 even if he has not accepted responsibility for other counts that are excluded from grouping under §3D1.1(b), such as a consecutive sentence under 18 U.S.C. § 924(c).

United States v. Johnson, 581 F.3d 994 (9th Cir. 2009). The Ninth Circuit held that the government could decline to move for the third level reduction for acceptance of responsibility on the basis of the defendant's decision to enter a conditional plea and to appeal an adverse ruling on a suppression issue. The court held that the government's proper reliance on conserving government resources in the prosecution of the defendant's offense did extend to the use of government resources to defend such appeals.

United States v. Mara, 523 F.3d 1036 (9th Cir 2008). The Ninth Circuit held that a district court could properly deny an acceptance of responsibility reduction where the defendant

engaged in criminal conduct after entering his guilty plea, regardless of whether the criminal conduct was related in any way to the offense of conviction.

United States v. Espinoza-Cano, 456 F.3d 1126 (9th Cir. 2006). The Ninth Circuit joined the Sixth, Eighth, and Tenth Circuits, holding that "a prosecutor is afforded the same discretion to file an acceptance of responsibility motion for a third level reduction under section 3E1.1(b) as that afforded for the filing of a substantial assistance motion under section 5K1.1. That standard is, 'the government cannot refuse to file . . . a motion on the basis of an unconstitutional motive (e.g., racial discrimination), or arbitrarily (i.e., for reasons not rationally related to any legitimate governmental interest).'"

United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005). The defendant's exercise of his right to require government to carry its burden of proving his guilt at trial did not preclude a three-level reduction in his sentencing range for acceptance of responsibility, where defendant admitted all elements of the charge. A judge cannot rely upon the fact that a defendant refuses to plead guilty and insists on his right to trial as the basis for denying the additional one-level reduction acceptance of responsibility adjustment.

United States v. Rojas-Flores, 384 F.3d 775 (9th Cir. 2004). The district court erred when it denied granting a two-level reduction for acceptance of responsibility where the defendant disputed only the legal grounds for his conviction. The defendant was a prisoner found in possession of contraband and was sentenced to an additional 51-month sentence under 18 U.S.C. § 1791. The defendant went to trial where he admitted to the conduct, but argued the application of section 1791 to his conduct, a purely legal defense. The court ruled that arguing the legal basis of the offense of conviction does not amount to a denial of the conduct.

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002). The Ninth Circuit reiterated that a defendant may manifest his acceptance of responsibility in many ways other than a guilty plea–even where defendant contested factual guilt at trial. The court noted that a defendant who went to trial could satisfy every condition listed in Application Note 1. In denying the defendant a two-level reduction for his acceptance of responsibility, the district court noted that the defendant had not merely raised a constitutional defense, but also contested factual guilt at trial. Because the Ninth Circuit could not tell from the record if the district court had *sub silentio* balanced all the relevant factors, or if the district court believed that the defendant was ineligible because he had contested his guilt at trial, the Ninth Circuit remanded for re-consideration.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Langer, 618 F.3d 1044 (9th Cir. 2010). A fingerprint-matched rap sheet is sufficiently reliable for a district court to use when calculating a defendant's criminal history where no evidence contradicted the information on the rap sheet, more reliable evidence had been destroyed, and the defendant conceded the fact of his conviction.

United States v. Buzo-Zepeda, 609 F.3d 1024 (9th Cir. 2010). The Ninth Circuit addressed the issue of how California's "*Johnson* waiver" procedure impacts the federal court's calculation of the length of a sentence imposed for purposes of determining how many criminal history points are to be awarded under §4A1.1(a),(b) or (c). The procedure involves the defendant's waiving his right to application of credit for time served in pre-trial detention against his imposed sentence, thereby permitting the judge to impose a longer sentence than would otherwise be statutorily allowed. The Ninth Circuit held that the use of this procedure had no impact on the criminal history score attributable to the offense, noting that the guidelines require courts to calculate the length of the sentence based on the total time imposed.

United States v. Mendoza-Morales, 347 F.3d 772 (9th Cir. 2003). In deciding whether a prior state conviction should be counted for purposes of a federal criminal history calculation, a district court must examine federal law. In this case, the applicable federal law was clear: any "sentence of incarceration" imposed after an adjudication of guilt counted as a "sentence of imprisonment," §4A1.2(b)(1), and incarceration as a condition of probation was treated in the same way as ordinary incarceration.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The defendant was convicted of illegally reentering the United States following his deportation. At sentencing, the district court found that defendant was under a criminal justice sentence at the time of this offense, and applied two additional criminal history points pursuant to §4A1.1(d). On appeal, the defendant claimed that his probationary period did not fall within the defined meaning of a "criminal justice sentence" under §4A1.1(d) because he was immediately deported and never placed on any form of supervision. The Ninth Circuit held that the guideline made clear that active supervision was not required for this item to apply, deportation did not terminate probation, and the criminal history points were properly counted.

United States v. Reyes-Pacheco, 248 F.3d 942 (9th Cir. 2001). The defendant pled guilty to 8 U.S.C.A. § 1326, which criminalizes attempting to enter, entering, or being found in the United States after deportation for a prior offense. The defendant re-entered the country in 1996, while he was on parole. Police arrested him in 2000 for being found in the country. The district court raised defendant's criminal history level under §4A1.1(d) and (e) for being on parole and for having committed the offense within two years of release from prison. In February 2000,

when the defendant was arrested, however, he was no longer on parole and more than two years had passed since he had been released from prison. As such, the defendant argued that he had been sentenced for the wrong crime because he was guilty of being "found in" the country in February 2000, not of "entering" the country in April 1996. Affirming the sentence, the court held that because being "found in" the country after deportation is a continuing offense, starting from the time one enters the country until the time the person is arrested, the district court appropriately applied §4A1.1(d) and (e), based on the 1996 date when he entered the country while still on parole and within two years of release from prison.

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

United States v. Landa, 642 F.3d 833 (9th Cir. 2011). The Ninth Circuit held that, for a prior offense to be a "juvenile status offense" for purposes of criminal history, "an offense must be (1) committed by a person younger than eighteen years of age, (2) involve conduct that would be lawful if engaged in by an adult, and (3) be non-serious in nature." The defendant's prior offense for driving with an elevated blood alcohol level was not such an offense, even though the prohibited blood alcohol level was lower due to the defendant's age, because it was serious.

United States v. Grob, 625 F.3d 1209 (9th Cir. 2010). When comparing two offenses to determine whether they are similar to each other under the "common sense" approach adopted in Application Note 12 to §4A1.2, the actual punishment imposed should play a larger role than the available range of punishment when weighing the fourth factor, the "level of culpability involved" in the offense.

United States v. Leal-Felix, 665 F.3d 1037 (9th Cir. 2011) (*en banc*). The court held that traffic citations could not be considered "arrests" for the purpose of calculating defendant's criminal history score. The court interpreted the term "arrest" to "require that the individual be formally arrested."

United States v. Calderon Espinosa, 569 F.3d 1005 (9th Cir. 2009). The district court erred when it assessed an additional criminal history point for the defendant's California conviction for "loitering for drug activities." The court held that "the plain language of the Guidelines is clear: 'Loitering,' 'by whatever name [it is] known' is 'never counted' in a defendant's criminal history score."

United States v. Cruz-Gramajo, 570 F.3d 1162 (9th Cir. 2009). The court held that §4A1.2 "does not preclude the district court from assigning criminal history points for sentences received after an illegal entry, but before an alien is found by immigration authorities."

United States v. Marler, 527 F.3d 874 (9th Cir. 2008). The Ninth Circuit held that Amendment 709, which altered the analysis of whether cases are "related" for guideline purposes, was a substantive amendment, not a clarifying amendment, and as such should not be applied where doing so would run afoul of the *ex post facto* clause.

United States v. Garcia-Gomez, 380 F.3d 1167 (9th Cir. 2004). The defendant's early

release did not operate to "suspend" the remainder of his sentence for purposes of criminal history calculation. The defining characteristic of a suspended sentence, which would not be calculated as part of the defendant's criminal history, is that it is suspended by a judicial officer, rather than an executive agency.

United States v. Pearson, 312 F.3d 1287 (9th Cir. 2002). Where a defendant's prior sentence would have extended into the relevant time period to be counted as criminal history had the defendant not escaped from prison, the sentence should be counted.

United States v. Hayden, 255 F.3d 768 (9th Cir. 2001). In 1993, the defendant was convicted of conspiracy to distribute cocaine and heroin and was sentenced pursuant to a plea agreement which stipulated to, among other things, a criminal history category of III. In 1998, the defendant petitioned to have two prior felony convictions from 1987 and 1990 set aside. After these petitions were granted, defendant filed a habeas petition requesting a recalculation of his 1993 sentence because the criminal history calculation counted convictions that were set aside. Under §4A1.2(j), sentences for expunged convictions should not be counted in the criminal history calculation. Application Note 10 to §4A1.2 differentiates between convictions that are "set aside" and those that are "expunged," concluding that sentences resulting from convictions which were *set aside can* be counted, while *expunged* convictions cannot be counted. After reviewing California law, the court concluded that it provided for a "set aside" procedure, but does not expunge the conviction.

§4A1.3 <u>Adequacy of Criminal History Category</u> (Policy Statement)

United States v. Ellis, 641 F.3d 411 (9th Cir. 2011). The Ninth Circuit held that, where a district court frames its sentence as including a criminal history departure pursuant to §4A1.3, on appeal the issue will only be reviewed for substantive reasonableness.

United States v. Atondo-Santos, 385 F.3d 1199 (9th Cir. 2004). A downward departure under the sentencing guidelines based on first-time offender status is not warranted, since the guidelines already take that factor into account.

United States v. Bad Marriage, 392 F.3d 1103 (9th Cir. 2004). An upward departure under sentencing guideline for departures for inadequacy of criminal history category, based on the seriousness of a defendant's past conduct, was improper. Prior convictions for assault, burglary and violation of a no-contact order resulted in sentences of 37 days or less, which did not make his criminal history so unusual as to distinguish him from other defendants in his category, and though the defendant did have an extensive criminal record, the defendant neither attempted to make a living off of crime or escalated his crimes, but rather was an individual ravaged by substance abuse.

United States v. Martin, 278 F.3d 988 (9th Cir. 2002). The district court did not abuse its discretion in horizontally departing upward because the defendant's criminal history category did not adequately reflect his criminal history. The district court also departed upward two offense levels based on the defendant's likelihood of future recidivism. That departure was

improper because "the likelihood of future recidivism is encouraged as a factor to be considered in assessing whether a criminal history score is inaccurate, not in departing from an offense level."

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Mitchell, 624 F.3d 1023 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1542 (2011). A district court may disagree with the career offender guideline itself as a policy matter, and may reduce a career offender's sentence based on the crack/powder cocaine disparity where the defendant's offense of conviction was crack cocaine distribution.

United States v. Taylor, 529 F.3d 1232 (9th Cir. 2008). "When the text of an attempt statute deviates from the federal definition of attempt . . . we must look to state caselaw to determine whether the state's definition is coextensive with the federal definition, and therefore qualifies as an attempt for purposes of the [sentencing guidelines]." Based on the court's review of Arizona caselaw defining "attempt," the Ninth Circuit concluded that Arizona's definition of attempt was coextensive with the federal common law definition, and therefore upheld the district court's determination that the defendant's prior conviction for attempted armed robbery was a crime of violence for career offender purposes.

United States v. Piccolo, 441 F.3d 1084 (9th Cir. 2006). Conviction for walkaway escape from a halfway house is not a "crime of violence" under § 4B1.1.

United States v. Serna, 435 F.3d 1046 (9th Cir. 2006). Possession of an assault weapon under California law is not a crime of violence. As long as an item has substantial legitimate uses, its mere possession cannot, without more, constitute a crime of violence. Assault weapons have legitimate uses.

United States v. Teeples, 432 F.3d 1110 (9th Cir. 2005). Committing lewd and lascivious acts with a child under age 14 always raises a risk of violence against the victim and therefore constitutes a crime of violence.

United States v. Delaney, 427 F.3d 1224 (9th Cir. 2005). Possession of a short-barreled shotgun is a crime of violence.

United States v. Granbois, 376 F.3d 993 (9th Cir. 2004). Abusive sexual contact with a child between the ages of 12 and 15 and any other offense constituting sexual abuse of a minor is considered a "forcible sex offense" and "crime of violence" under §4B1.1.

United States v. Quintana-Quintana, 383 F.3d 1052 (9th Cir. 2004). The defendant argued that *Blakely v. Washington*, 124 S. Ct. 2531 (2004), requires that his sentence be vacated because his prior conviction was not proved to a jury beyond a reasonable doubt and resulted in an unconstitutional 16-point enhancement under §2L1.2. The court held that the defendant's

argument was foreclosed by the express terms of *Blakely* which preserved the exception that facts of prior convictions do not require submission to a jury and proof beyond a reasonable doubt.

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

United States v. Coronado, 603 F.3d 706 (9th Cir. 2010). The Ninth Circuit considered whether the California offense of discharge of a firearm in a grossly negligent manner could be a crime of violence under §4B1.2. The court concluded that, under the standard set out by the Supreme Court in *Begay*, it could not because it did not require "purposeful, violent and aggressive" conduct. In particular, the court held that the statute's mens rea of gross negligence was incompatible with the requirements of *Begay*.

United States v. Alderman, 601 F.3d 949 (9th Cir. 2010). The Ninth Circuit considered whether the defendant's prior offense of theft from the person of another could be a crime of violence under §4B1.2. The court concluded that the offense was similar enough in type to the listed offenses to qualify under the catch-all provision because the act of stealing from a person is "bold and aggressive."

United States v. Almazan-Becerra, 537 F.3d 1094 (9th Cir. 2008). The Ninth Circuit held that, in applying the modified categorical approach for purposes of §4B1.2, the district court could rely on the police report of the prior offense because the defendant had agreed to incorporate the police report into the record during the course of the plea colloquy.

United States v. Snellenberger, 548 F.3d 699 (9th Cir. 2008). The Ninth Circuit held that, in applying the modified categorical approach for purposes of §4B1.2, "district courts may rely on clerk minute orders that conform to the essential procedures described" in the California statute at issue in the case. The Ninth Circuit described the procedure as follows: "[The order is] prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately."

United States v. Asberry, 394 F.3d 712 (9th Cir. 2005). Prior felony conviction of the defendant on charge of rape in the third degree under Oregon law, for having sexual contact with a girl less than 16 years of age and several years his junior, was "crime of violence" for purpose of the career offender guideline, since the commentary to the guideline mentioned that statutory rape met the definition of "crime of violence," and the nature of the conduct described in the statute of conviction generally posed a serious potential risk of physical injury to victim.

United States v. Wenner, 351 F.3d 969 (9th Cir. 2003). The defendant pled guilty to being a felon in possession of a firearm. The defendant argued that his state convictions for residential burglary and attempted residential burglary were not crimes of violence under §4B1.2(a)(2). The court of appeals agreed that the Washington residential burglary statute did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2), holding that the scope of the Washington statute exceeded the federal definition. Because the residential burglary was not a crime of violence under §4B1.2(a)(2), the defendant's state conviction for attempted residential

burglary also was not a crime of violence.

§4B1.4 Armed Career Criminal

United States v. Ladwig, 432 F.3d 1001 (9th Cir. 2005). A felony conviction for making a harassing phone call is a violent felony under 18 U.S.C. § 924(e).

United States v. Smith, 390 F.3d 661 (9th Cir. 2004). Burglary is a violent felony under the Armed Career Criminal Act (ACCA) where there is unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

United States v. Matthews, 278 F.3d 880 (9th Cir. 2002) (*en banc*). The district court erred in sentencing the defendant as an armed career criminal because the district court failed to analyze the statutes under which the defendant was previously convicted to determine whether they satisfied the elements of burglary under the *Taylor* categorical approach.

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001). Under *Apprendi*, the Armed Career Criminal Act remains constitutional, because prior convictions that increase a statutory penalty do not have to be charged in the indictment or proven beyond a reasonable doubt. This "prior conviction" exception to *Apprendi* does not, however, include juvenile adjudications if those proceedings did not afford a jury trial and proof beyond a reasonable doubt.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Franco-Lopez, 312 F.3d 984 (9th Cir. 2002). The defendant entered into a plea agreement in which the government promised to recommend application of the safety valve if the probation office found that he met the requirement of §5C1.2 and the government agreed that the defendant had truthfully disclosed information and evidence of his involvement. The government then recommended to the probation office that the defendant receive an upward adjustment for aggravating role. The defendant complained that this recommendation was a breach of the plea agreement because any defendant found to have played an aggravating role is ineligible for the safety valve. The Ninth Circuit held that the conditional promise in the plea agreement to recommend the safety valve reduction was rendered a nullity if the government was permitted to take the position before the probation office that the defendant was ineligible.

United States v. Contreras, 136 F.3d 1245 (9th Cir. 1998). The Ninth Circuit held that the term "the government," as used in the provision of the safety valve statute (§5C1.2(5)), refers to the prosecuting attorney. The appellate court rejected the defendant's argument that his disclosures to his probation officer qualified him for a safety valve sentence reduction.

United States v. Miller, 151 F.3d 957 (9th Cir. 1998). The district court found that the defendant did not qualify for the safety valve because he failed to disclose all he knew about relevant conduct that was part of the same course of conduct or common scheme as the offense for which he was convicted. The defendant argued that use of the term "offense or offenses" in the safety valve statute limits the disclosure required to the offense of conviction. The court of appeals disagreed, reasoning that 18 U.S.C. § 3553(f)(5) requires disclosure "concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," and thus "plainly includes uncharged related conduct." Accordingly, a defendant who does not disclose all information he has concerning relevant conduct that is a part of the same course of conduct or common scheme of which he was convicted is not entitled to safety valve relief.

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Sanchez-Barragan, 263 F.3d 919 (9th Cir. 2001). Section 5D1.2 does not restrict the maximum term of supervised release permitted under 21 U.S.C. § 841(b)(1)(C).

§5D1.3 Conditions of Supervised Release

United States v. Wise, 391 F.3d 1027 (9th Cir. 2004). The mere fact that the condition of supervised release imposed on the defendant, that she have no contact with children under 18 years of age, was unrelated to her offense of attempting to defraud the Social Security Administration was not of itself a sound reason to vacate condition; but the district court should not have imposed the condition with no prior notice to the defendant or her counsel that the district court was contemplating such a condition.

United States v. Hugs, 384 F.3d 762 (9th Cir. 2004). A condition of supervised release which required the defendant to "cooperate in the collection of DNA as directed by the U.S. probation officer" was not impermissibly vague in violation of the due process clause.

United States v. Gallaher, 275 F.3d 784 (9th Cir. 2001). Citing §5D1.3(b)(2), the defendant argued that a condition of his supervised release prohibiting his possession of bows, arrows, or crossbows involved a greater deprivation of liberty than is reasonably necessary. Reviewing for an abuse of discretion, the court noted the defendant's history of violence and his ability to hunt with bows and determined that the district court did not abuse its discretion in imposing the prohibition.

United States v. Lopez, 258 F.3d 1053 (9th Cir. 2001). The defendant challenged the district court's order that he participate in a mental health program as a condition of supervision. Because the record amply supported the district court's order, it did not abuse its discretion.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. King, 257 F.3d 1013 (9th Cir. 2001). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering. The defendant challenged the restitution amount ordered, arguing that it was excessive. The appellate court rejected the defendant's argument that the district court should have reduced the restitution by the amount of a previous restitution that the defendant was court ordered to pay to the post office. The appellate court also determined that the district court had adequately considered the defendant's ability to pay the restitution when it calculated the amount and that the record satisfied the relatively lenient standard for determining a defendant's ability to pay, *i.e.*, "some evidence the defendant may be able to pay."

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998). Under the Victim and Witness Protection Act, a defendant can only be ordered to pay restitution for conduct that was part of the scheme, conspiracy, or pattern of criminal activity and the defendant's auto loan was not part of the tax fraud scheme of which he was convicted.

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998). Restitution can only include losses directly resulting from a defendant's offense; consequential expenses may not be legally included in an order of restitution.

United States v. Dubose, 146 F.3d 1141 (9th Cir. 1998). One defendant was convicted of a church arson which resulted in $121,403 in damages, and the other was convicted of bank robbery and ordered to pay restitution in the amount of $4,510. They contended that restitution orders, requiring full compensation in the amount of the victim's loss were grossly disproportionate to the crime committed and violated the Eighth Amendment's proscription against excessive fines. They also argued that the imposition of a restitution obligation enforceable through a civil action for 20 years after their release from prison was cruel and unusual punishment. The court rejected both arguments. The court reasoned that the full amount of restitution is inherently linked to the culpability of the defendant; the victim is limited to the recovery of specified losses, and restitution is ordered only after adjudication of guilt. Moreover, the district court has the discretion to impose a nominal payment schedule, and the defendant is not subject to resentencing for nonpayment unless he did not make bona fide efforts to pay.

§5E1.2 Fines for Individual Defendants

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (*en banc*). The district court ordered defendant to pay a fine within the applicable guideline range per §5E1.2(c)(3). The defendant appealed. The appellate court held that the defendant has the burden of proving that he cannot afford to pay a fine. The uncontroverted evidence established that the defendant had the assets to pay the fine and had numerous skills which could be reasonably expected to generate a good

income. The defendant refused to discuss his finances with the probation officer and thus failed to demonstrate that he could not pay the fine. *See also United States v. Robinson*, 20 F.3d 1030 (9th Cir. 1994) (holding that the district court erred in failing to determine at the time of sentencing the defendants' future ability to pay the fine imposed and imposing as an alternative a period of community service).

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (*en banc*). Where the guideline range sentence for multiple counts of convictions exceeds the statutory maximum for those convictions, §5G1.2(d) requires consecutive sentences to achieve the total punishment calculated by the guidelines.

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

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002), *overruled on other grounds by United States v. Gonzales*, 506 F.3d 940 (9th Cir. 2007). The district court must give the defendant notice of intent to impose, and grounds for imposing, consecutive sentences where consecutive terms were not indicated by the guidelines.

United States v. King, 257 F.3d 1013 (9th Cir. 2001). The appellate court affirmed the district court's decision when it declined to impose concurrent sentences based on a commonality between the convictions, but remanded so that the district court could determine, under §5G1.3(c) of the 1994 guidelines, to what extent the sentences should be run concurrent.

United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The district court did not err when imposing a consecutive sentence upon a defendant convicted of wire fraud and travel fraud who was serving time for escape, pursuant to §§5G1.3 and 7B1.3(f).

United States v. Chea, 231 F.3d 531 (9th Cir. 2000). A jury convicted the defendant of conspiracy and armed robbery, in violation of 18 U.S.C. §§ 1951(a) and 924(c). With no mention of §5G1.3, the district court sentenced defendant without considering a 116-month sentence the defendant was serving for a state armed robbery conviction. The defendant argued that the district court should have considered his current state conviction, and the court of appeals agreed. The district court was required to consider the defendant's undischarged term of imprisonment, and the court vacated the sentence and remanded for such consideration.

United States v. Kikuyama, 150 F.3d 1210 (9th Cir. 1998). The district court acted within its discretion in imposing consecutive sentences of 12 months' incarceration for violation of supervised release and 46 months' incarceration for bank robbery where the court cited three factors that weighed in favor of imposing consecutive sentences: the defendant's previous adjudications on several occasions as a juvenile, defendant's prior manslaughter conviction, and

defendant's escalating criminal behavior.

Part H Specific Offender Characteristics

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

United States v. Leon, 341 F.3d 928 (9th Cir. 2003). The defendant was convicted of preparing false income tax returns. At sentencing, the district court departed downward six levels based on defendant's indispensable role in caring for his wife, who recently had her kidney removed due to renal cancer and who had been diagnosed as being at risk of committing suicide if she were to lose her husband to death or incarceration. The court of appeals affirmed the departure, concluding that the district court properly placed special emphasis on the wife's poor emotional and physical health and the fact that defendant was the only person available to tend to her needs. Although the government argued that reliance on the wife's suicidal feelings would cause virtually every defendant to claim that he or she had a family member who might commit suicide upon such defendant's incarceration, the court of appeals found that defendant's wife's documented history of depression was significant.

Part K Departures

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

United States v. Auld, 321 F.3d 861 (9th Cir. 2003). The appropriate point of departure pursuant to §5K1.1 is the statutorily required mandatory minimum sentence, rather than the lower otherwise applicable guideline range.

United States v. Leonti, 326 F.3d 1111 (9th Cir. 2003). Right to effective assistance of counsel attaches to defendant's presentence attempts to cooperate with the government to obtain a downward departure for substantial assistance.

United States v. Quach, 302 F.3d 1096 (9th Cir. 2002). Because the terms of the plea agreement obligated the government to move for a §5K1.1 departure if the defendant had been fully cooperative and provided substantial assistance, the government was required to make a good faith evaluation at the time of sentencing whether the defendant had done so.

United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994). The district court had the authority to grant a downward departure for substantial assistance in the absence of a government motion where the refusal to file the motion was based on an unconstitutional motive.

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

Downward Departures

United States v. Tzoc-Sierra, 387 F.3d 978 (9th Cir. 2004). The district court was justified in making downward departure in the defendant's sentence due to sentence disparity, for his conviction on a charge of conspiracy to possess cocaine with intent to distribute. The sentences imposed upon similarly situated co-defendants were lower, there was no indication that the defendant was any more culpable than other defendants, and the defendant did not have any criminal history.

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002). In a case involving possession of child pornography, the district court departed downward based on its finding that the fact that the defendant had not affirmatively downloaded pornographic files, but that the files had downloaded automatically into his temporary internet cache file, took his conduct outside of the heartland of the sentencing guideline for the conduct. The court also departed downward based on its determination that the defendant's stature, demeanor, and naivete, as well as the nature of his offense, rendered him susceptible to abuse by other inmates. The government appealed, and the Ninth Circuit affirmed the district court's departures noting that the district court had conducted an evidentiary hearing and was in a superior position to evaluate the evidence.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court reasonably departed by three levels based on the defendants' decision to call for help and direct the rescuers to the immigrants instead of fleeing and did not abuse its discretion by determining the extent of the departure based on the level of assistance provided by each defendant.

United States v. Cruz-Guerrero, 194 F.3d 1029 (9th Cir. 1999). A district court may not depart downward from the guidelines on the basis of a defendant's substantial assistance to the government unless the government has moved for such a departure.

United States v. Stevens, 197 F.3d 1263 (9th Cir. 1999). The determination of whether the defendant's conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant's conduct with that of other offenders.

Upward Departures

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). Upward departure of two levels based on the defendant's role in coordinating the distribution of drugs and the defendant's use of his 18-year-old son in the drug dealing activities was warranted.

United States v. Scrivener, 189 F.3d 944 (9th Cir. 1999). The district court did not err in departing upward based on the targeting of the elderly in a telemarketing scheme.

United States v. Cuddy, 147 F.3d 1111 (9th Cir. 1998). The district court properly departed upward by two levels based on the defendants' threats to the extortion victim's daughter. The defendants were convicted of interference with interstate commerce by threats of violence after kidnaping the daughter of a hotel owner and demanding ransom. The district court departed upward based on §2B3.2, comment. (n.8), which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

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

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to §5K2.3 based on the psychological damage suffered by the family of a missing child when he falsely reported that he knew the whereabouts of the child's body and the identity of her assailant. The appellate court affirmed the departure, holding that the family was singled out by the defendant, and thus, along with the government, was a victim of his false statements. Furthermore, the evidence supported the finding that the child's mother suffered serious psychological injury and physical impairment. The appellate court also rejected the defendant's assertion that the departure would constitute impermissible double counting because the conduct was already punished under the Vulnerable Victim adjustment of §3A1.1. "There is no double counting if the extra punishment is attributable to different aspects of the defendant's criminal conduct." Section 5K2.3 focuses on the harm the defendant caused his victims, §3A1.1 punishes the defendant for his choice of a victim who is vulnerable to his offense.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court made an upward departure based on its finding that the defendant's conduct resulted in property damage or loss not taken into account by the guidelines, where the defendant caused a fatal automobile accident while he was intoxicated. The district court's calculation of $165,000 in damages included only $13,595.43 actually due to property damage and the remainder was based on consequential financial losses to the victim's widow. The appellate court reversed, reasoning that a departure under §5K2.5 may be based only on property damage or loss, and not other harms. In this case, the circuit court noted, the amount of actual property damages attributable to the defendant's conduct was not sufficient to warrant an upward departure.

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

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court departed upward based on a finding that the defendant's conduct resulted in a significant disruption of governmental function and significantly endangered the public welfare. The defendant caused an automobile accident resulting in the death of an officer of the Arizona Department of Public Safety. The circuit court reversed, holding that the evidence on which the departure was based, namely testimony from the victim's co-worker that the victim's death negatively affected other co-workers' concentration at work, was insufficient to support a finding that the department's

functioning was significantly impaired or that the public welfare was significantly endangered. The fact that officers were stressed by the victim's death, the circuit court reasoned, did not demonstrate any actual disruption of police activity.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant was convicted of obstruction of justice and lying to the FBI and grand jury. The district court granted an upward departure pursuant to §5K2.8, which punishes extreme conduct which was unusually heinous, cruel, degrading, or brutal to the victim. The court of appeals held that the district court properly departed based on the defendant's deliberate false statements that he knew the whereabouts of the body of a missing eight-year-old girl and the identity of her assailant. The crimes for which the defendant was sentenced did not account for extreme cruelty or degradation with which the defendant acted.

United States v. Quintero, 21 F.3d 885 (9th Cir. 1994). Heinous treatment of the victim's body clearly fell within the scope of "extreme conduct."

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Dela Cruz, 358 F.3d 623 (9th Cir. 2004). A defendant convicted of making telephonic bomb threats was ineligible for a departure under §5K2.13 because the crime involved a serious threat of violence.

United States v. Smith, 330 F.3d 1209 (9th Cir. 2003). The district court properly concluded that it lacked the discretion to depart pursuant to §5K2.13 because even though the defendant suffered from an extraordinary mental condition, he did not meet the other criteria of this section.

United States v. Davis, 264 F.3d 813 (9th Cir. 2001). Although the defendant suffered from an extraordinary mental disease, his substantial criminal history demonstrated a need for incarceration to protect the public, and, thus, precluded a departure under §5K2.13.

United States v. Walter, 256 F.3d 891 (9th Cir. 2001). The district court should have conducted an evidentiary hearing to determine whether the defendant had a diminished capacity where his crime did not involve a "serious threat of violence."

§5K2.20 Aberrant Behavior

United States v. Smith, 387 F.3d 826 (9th Cir. 2004). In the criminal proceedings for retaliating against a federal witness, the district court's finding that it could not depart downward on the basis of aberrant behavior because the defendant's case involved significant planning, went on for some period of time, and was not extraordinary was clearly erroneous. Although the defendant may have had time to plan the retaliatory act, that did not prove that the crime was, in fact, the product of significant planning. The crime only lasted for five or ten minutes. Many

letters of support were submitted on behalf of defendant indicating that the defendant had lived an exemplary life prior to the crime, and that the crime represented a departure from her normal way of life.

United States v. Guerrero, 333 F.3d 1078 (9th Cir. 2003). When applying §5K2.20, the sentencing court must conduct two separate and independent inquiries, both of which the defendant must satisfy before a departure can be granted. First, the court must determine whether the defendant's case is extraordinary and whether the defendant's conduct constituted aberrant behavior. Then, the offense conduct to be considered as aberrant behavior must have been committed without significant planning, be of limited duration, and represent a marked deviation by the defendant from an otherwise law-abiding life.

United States v. Vieke, 348 F.3d 811 (9th Cir. 2003). Aberrant behavior departure pursuant to §5K2.20 was affirmed where the government failed to properly preserve its objection to the departure for appeal.

United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002). The case was remanded for resentencing where the district court departed downward for aberrant conduct without making necessary findings.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hinojosa-Gonzalez, 142 F.3d 1122 (9th Cir. 1998). The district court erred by departing upward based on grounds of which the defendant did not receive adequate notice. Although the defendant knew the court might depart based on criminal history, the court ultimately departed on other grounds–a combination of prior unpunished criminal conduct and extraordinary drug quantity–which were not advanced until the sentencing hearing. The court of appeals emphasized that the defendant is entitled to notice of both the factual and legal grounds for upward departure.

§6A1.3 Resolution of Disputed Factors

United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002). It is mandatory for the district court to resolve disputed factors, or state that disputed factors would not be considered, on the record.

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under §3B1.1(a). Section 6A1.3(a) provides that such evidence can be considered "without regard to its admissibility under the rules of evidence applicable at trial, provided that

the information has sufficient indicia of reliability to support its probable accuracy." The court has qualified the admissibility of hearsay at sentencing by requiring that such statements have "some minimal indicia of reliability."

United States v. Pinto, 48 F.3d 384 (9th Cir. 1995). The district court did not commit plain error when it considered evidence not included in either the stipulation of facts in defendant's plea agreement or the sentencing report but which came from co-defendant's trial.

Part B Plea Agreements

§6B1.1 Plea Agreement Procedure (Policy Statement)

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994). The district court erred in departing downward based on its conclusion that "exceptional circumstances" justified disregarding the terms of the defendant's accepted Rule 11(e)(1)(c) plea agreement. Moreover, the government's 5K1.1 motion did not give the sentencing court discretion to depart downward "as much as it deemed appropriate without regard for the terms of the agreement." The dictates of Rule 11 trump the discretion afforded the district court under §5K1.1.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part A Introduction to Chapter Seven

United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The provisions of Chapter Seven are advisory policy statements but provide support for affirming a sentence that was imposed in accordance with one of their recommendations.

United States v. Trenter, 201 F.3d 1262 (9th Cir. 2000). Upon his conviction for aiding and abetting armed bank robbery, the defendant received a sentence that included five years of supervised release. After having served less than two months of that supervised release, the defendant violated several of its conditions when he fled the state. When the police arrested him two years later, the district court reinstated the original five-year term of supervised release, tolling the two years that the defendant was a fugitive. The defendant challenged this reinstatement, arguing that 18 U.S.C. § 3583(e) does not grant judges the authority to reinstate an original term of supervised release after the defendant violates it. The Ninth Circuit affirmed the sentence, holding that district courts do have the authority under section 3583(e) to reinstate an original term of supervised release after the defendant has violated its conditions.

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations (Policy Statement)

United States v. Broussard, 611 F.3d 1069 (9th Cir. 2010). When determining the appropriate sentence for a revocation based on a contempt violation, the district court should determine the most analogous underlying offense and look to the statutory maximum to determine which class of felony provides the appropriate guideline range. In this case, the district court properly analogized the contempt violation to escape, and therefore did not err in imposing a sentence for a Class D felony.

United States v. Denton, 611 F.3d 646 (9th Cir. 2010). The Ninth Circuit addressed the classification of supervised release violations that "wobble" between felony and misdemeanor status under California law. The court held that when the defendant has not actually been charged with the offense in question, the presumption that the offense is a felony (which applies where the offense is charged) does not apply; rather, no presumption applies and the classification falls within the district court's discretion. In such cases, the court said, the district court must determine whether a prosecutor in the relevant jurisdiction would have charged the offense as a felony or a misdemeanor, and whether the trial court would likely have imposed imprisonment or an alternative sentence.

United States v. Jolibois, 294 F.3d 1110 (9th Cir. 2002). The Ninth Circuit held that the district court properly determined that defendant's simple possession of drugs was a Grade B supervised release violation under state law that allowed punishment exceeding a year, although it would have been a Grade C violation if punished under federal law. Although the offense was arguably both a Grade B violation (under state law) and a Grade C violation (under federal law), the Ninth Circuit noted that the guidelines themselves provide that if violation includes conduct that constituted more than one offense, the most serious grade applies.

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

United States v. Garcia, 323 F.3d 1161 (9th Cir. 2003). A district court need not provide a defendant with notice before imposing a sentence upon revocation of probation that falls outside the Chapter Seven policy statements, so long as the court considers the policy statements before imposing sentence. Chapter Seven sentencing ranges are advisory, rather than binding. So long as the court considers the policy statements, it has the authority to impose any term up to the statutory maximum available. *See also United States v. Donaghe*, 50 F.3d 608 (9th Cir. 1994) (The district court did not err in imposing a three-year term of supervised release upon resentencing the defendant after probation revocation.)

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996). The district court imposed a $1.5 million fine on the defendant organization. The defendant argued that the district court's determination of the restitution amount was contrary to §8C3.3 because the amount imposed had potentially devastating implications to the corporation. The circuit court upheld the fine, holding that §8C3.3 permits, but does not require, a court to reduce a fine upon a finding that the defendant organization is not able to pay it. The only time that a fine reduction is mandated by §8C3.3 is when the amount of the fine would impair the defendant's ability to pay restitution to the victim(s).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3624(e)

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999). The defendant pled guilty in 1995 to illegal reentry by an alien in violation of 8 U.S.C. § 1326(a), and received a two-year sentence followed by a one-year term of supervised release. The defendant's term of supervised release commenced on February 4, 1997. On October 21, 1997, when he was indicted on a charge of illegal reentry, the defendant was placed in pretrial detention. On February 18, 1998, the district court judge revoked the one-year supervised release term from the earlier offense and imposed a one-year imprisonment term to run consecutive to the sentence to be imposed on the new reentry conviction. The defendant appealed, arguing that his supervised release term expired on February 4, 1998, and deprived the district court of jurisdiction to revoke the term. The appellate court agreed with the defendant, holding that pretrial detention does not operate to toll a term of supervised release under 18 U.S.C. § 3624(e). The appellate court stated that pretrial detention does not fit the definition of "imprisoned in connection with a conviction" because a person in pretrial detention has not been convicted and might never be convicted.