

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



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

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## U.S. SENTENCING COMMISSION GUIDELINES MANUAL CASE ANNOTATIONS — SIXTH CIRCUIT

This document contains annotations to certain Sixth 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 Sixth 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. Williams*, 687 F.3d 283 (6th Cir. 2012). In a conviction for conspiracy to possess with intent to distribute cocaine base, the district court granted a downward departure for the defendant’s substantial assistance, and further varied downward because of its policy disagreement with the then-applicable crack cocaine guideline. The district court specifically acknowledged that when imposing the sentence, it took the crack and powder disparity into consideration. The government appealed, arguing that the variance was improper. The Sixth Circuit stated “like every other circuit to consider the issue, we hold that the only permissible basis for a below-minimum sentence is the defendant’s substantial assistance” and reasoned “[w]hen the Government waives a statutory minimum, pursuant to § 3553(e), the district court has wide discretion to impose the sentence that it believes is appropriate, given the context. But that discretion is not altogether unbridled; the district court may not consider factors unrelated to the value of the defendant’s substantial assistance.” The court vacated the sentence and remanded.

*United States v. Erpenbeck*, 532 F.3d 423 (6th Cir. 2008). The Sixth Circuit rejected the defendant’s argument that the district court’s imposition of an upward departure without advance notice to him constituted plain error in that it violated Fed. R. Crim. P. 32. The court acknowledged the Supreme Court’s decision in *Irizarry v. United States*, 553 U.S. 708 (2008), which overruled previous Sixth Circuit law holding that the notice rule applied equally to variances and departures. The court noted that: “[r]ule 32(h) continues to apply . . . to upward departures under the Guidelines;” the presentence report did not recommend the upward departure imposed by the district court; and “the district court’s reliance upon U.S.S.G. § 5K2.3 as a ground for upward departure was [therefore] somewhat problematic.” However, the court concluded, the sentence imposed “is nonetheless justified under § 3553(a) alone” because the court “discussed at length the 18 U.S.C. § 3553(a) factors and fully articulated her reasons under that statute for the . . . departure.” As a result, the court concluded that any error was harmless, and affirmed the sentence.

*United States v. Haygood*, 549 F.3d 1049 (6th Cir. 2008). The court failed to comply with Rule 32 when it deprived the defendant of his right of allocution at sentencing and instead simply advised the defendant of his Fifth Amendment right to remain silent. “[P]rejudice is effectively presumed when allocution is overlooked because of the ‘difficulty in establishing that the allocution error affected the outcome of the district court proceedings.’” The court remanded the case for resentencing.

*United States v. Sexton*, 512 F.3d 326 (6th Cir. 2008). “[T]he district court did not abuse its discretion by declining to order the preparation of new [pre-sentencing reports] on remand [pursuant to *Booker*]. . . . [the] defendants were not entitled to new [pre-sentencing reports] under either Fed. R. Crim. P. 32 or 18 U.S.C. § 3553.”

*United States v. Tarpley*, 295 F. App’x 11 (6th Cir. 2008). The defendant pleaded guilty to one count of conspiracy with intent to distribute a controlled substance and possession with intent to distribute a controlled substance. The applicable guideline range was level 37 with a Criminal History Category VI, for a guideline range of 360 months to life. However, the statutory maximum was 20 years. The court sentenced the defendant to 180 months. The defendant appealed arguing, in part, that his sentence was procedurally unreasonable, stating that the court violated Rule 32 by not ruling on his objection to the amount of drugs after the defendant controverted the amount in his allocution at sentencing. The Sixth Circuit held that the defendant’s allocution only contained a passing reference to the disputed quantity and his counsel made no objection at the hearing. Therefore, the sentence was procedurally reasonable.

*United States v. Vowell*, 516 F.3d 503 (6th Cir. 2008). “Whether a defendant ‘received ‘reasonable’ notice under Rule 32 is a context-specific question.’ If the issues in a case are particularly complex, or if the defendant could not reasonably contemplate the grounds for a sentencing enhancement, then we require that the defendant be afforded earlier notice of the court’s intent to depart. When cumulative evidence exists on the record, however, the defendant is already on notice and less preparation time is necessary. Similarly, less notice is required where the district court thoroughly explains the factual and legal grounds that justify a departure or a variance and permits counsel to comment prior to imposing a sentence.”

*United States v. Davidson*, 409 F.3d 304 (6th Cir. 2005). The appellate court stated that it shall “continue, in reviewing individual Guidelines determinations, to apply the standards of review [it] applied prior to *Booker*.”

*United States v. Hazelwood*, 398 F.3d 792 (6th Cir. 2005). The court explained that it reviews the district court’s factual findings for clear error and the district court’s conclusions of law *de novo*.

*United States v. Jones*, 399 F.3d 640 (6th Cir. 2005). The court of appeals held that when the defendant preserves the issue, the court will review constitutional *Booker* error *de novo*.

*United States v. Williams*, 432 F.3d 621 (6th Cir. 2005). The court stated that it will “review a district court’s departure from the recommended Guidelines sentence under an abuse of discretion standard.”

## **B. Confrontation Right**

*United States v. Stone*, 432 F.3d 651 (6th Cir. 2005). The Sixth Circuit explained that hearsay evidence is admissible at sentencing “[b]ecause *Crawford* was concerned only with testimonial evidence introduced at trial, [and thus] *Crawford* does not change our long-settled rule that the confrontation clause does not apply in sentencing proceedings.”

## **C. Acquitted Conduct**

*United States v. Sawyers*, 360 F. App’x 621 (6th Cir. 2010). The government appealed, arguing that the sentence was unreasonable because the sentencing court failed properly to consider the cross-reference at §2K2.1(c). The court held that the sentencing court erred in finding that it could not apply the cross-reference because there was not an underlying conviction for the offense it was asked to cross-reference, and stated that it has long held that the court may consider acquitted conduct.

*United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc). Courts may use acquitted conduct to calculate the guideline range, so long as the sentence does not exceed the statutory maximum authorized by the jury’s verdict. *See* section VI.C.

## **II. Departures**

*United States v. McBride*, 434 F.3d 470 (6th Cir. 2006). The court noted that “[b]ecause Guideline ‘departures’ are a part of the appropriate Guideline range calculation, . . . Guideline departures are still a relevant consideration for determining the appropriate Guideline sentence.”

*United States v. Puckett*, 422 F.3d 340 (6th Cir. 2005). The Sixth Circuit determined that it will not review a district court’s refusal to depart downward.

## **III. Specific 18 U.S.C. § 3553(a) Factors**

### **A. Unwarranted Disparities**

#### **1. Fast Track**

*United States v. Hernandez-Fierros*, 453 F.3d 309 (6th Cir. 2006). The Sixth Circuit held that “since the Attorney General and the United States Attorney for the district have determined that the departure is necessary for a particular district to function effectively, the reason for the different sentences is explained and is not based on treating individual defendants disparately because of their individual differences. Sentencing disparities can exist for many valid reasons, including giving lower sentences to individuals that cooperate with investigations and giving higher sentences to individuals for whom the Guidelines do not adequately account for their criminal history. In this case, fast-track guidelines reductions were specifically authorized by

statute due to the unique and pressing problems related to immigration in certain districts. As a result, such a disparity does not run counter to § 3553(a)'s instruction to avoid unnecessary sentencing disparities.”

## **2. Co-defendants**

*United States v. Wallace*, 597 F.3d 794 (6th Cir. 2010). The defendant challenged the procedural reasonableness of her sentence arguing that the sentencing court failed to consider her argument that her sentence was twice as long as a co-defendant's sentence even though he played a larger role in the conspiracy. The court stated that although “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct’ [under § 3553(a)(6)] does not apply to co-conspirators,” a district court may exercise its discretion to determine a sentence in light of a co-defendant's sentence. The court held that even under a plain error standard of review, because section 3553(c) implicates a substantial right and the district court did not make even a cursory mention of the disparity, a remand was appropriate to allow the sentencing court to consider the defendant's disparity argument.

*United States v. Conatser*, 514 F.3d 508 (6th Cir. 2008). The Sixth Circuit rejected the defendant's argument that his within-guideline sentence caused an unwarranted disparity between his sentence and that of his equally culpable co-defendant. Even if the two defendants were equally culpable, the Sixth Circuit held, the fact that the co-defendant pleaded guilty and cooperated with the government, therefore receiving the benefit of a plea bargain and downward departure motion, rendered them not “similarly situated” and therefore the disparity was not “unwarranted.”

*United States v. Smith*, 510 F.3d 603 (6th Cir. 2007). The Sixth Circuit rejected the defendant's argument that the disparity between his sentence and that “received by an individual who played an identical role in a related bank robbery” in another district rendered his sentence substantively unreasonable. The court held that the defendant had not demonstrated an “unwarranted disparity” because “[a] sample size of two defendants is not sufficient to show such a disparity” and holding otherwise “would allow defendants to bind district courts according to the most lenient sentence that another court had imposed for a similar crime.”

### **B. Public Protection**

*United States v. Tristan-Madrigal*, 601 F.3d 629 (6th Cir. 2010). The district court imposed an above guideline sentence in part because the recommended guideline range did not properly reflect the defendant's prior convictions for drunk driving, leading him to be quite dangerous to the public. On appeal, the defendant argued the court afforded too much weight to his criminal history, resulting in a substantively unreasonable sentence. The Sixth Circuit noted that the district court's consideration of his repeat and identical drunk-driving convictions reflected in part its belief that a lengthy sentence was needed to protect the public. The circuit court held that although the defendant's prior convictions had not resulted in harm to persons or property, the court did not abuse its discretion because the defendant presented no authority to support his argument that repeatedly committing a dangerous crime in a “victimless” manner

decreased the need to protect the public or warranted a lesser period of imprisonment. Therefore, the court's consideration of the defendant's criminal history and the weight it afforded that history was reasonable.

### **C. History and Characteristics of Defendant**

*United States v. Sprague*, 370 F. App'x 638 (6th Cir. 2010). The district court imposed a sentence twice as long as the advisory guideline sentence, based in part on the defendant's likelihood of re-offending. The court noted that the defendant was a child sexual predator "who has been actively seeking additional victims" and who had a high risk of recidivism, and found that factor was not accounted for in the guidelines for a typical child pornography conviction. In addition, the defendant argued that because he submitted a life expectancy table of 14 years based on a medical condition, the sentence was substantively unreasonable. However, the circuit court found that a district court is allowed to sentence someone to spend their life in jail, and it was clear that the district court did an appropriately thorough review of all of the section 3553(a) factors to determine that the defendant should "never have an opportunity to rejoin society."

### **IV. Forfeiture**

*United States v. Hall*, 411 F.3d 651 (6th Cir. 2005). The court of appeals held that a forfeiture does not implicate the Sixth Amendment because it is an indeterminate form of sentencing; a forfeiture is not subject to a statutory maximum or a guidelines system.

### **V. Restitution**

*United States v. Sosebee*, 419 F.3d 451 (6th Cir. 2005). The Sixth Circuit held that *Booker* does not apply to restitution because (1) restitution is authorized by statute, (2) the restitution statutes function independently from the guidelines, (3) a restitution order for the amount of loss cannot be said to exceed the statutory maximum under penalty statutes, and "the Victim and Witness Restitution Act and the Mandatory Victim Restitution Act specifically state that the amount of restitution should be equal to the 'amount of each victim's losses as determined by the court.'"

### **VI. Reasonableness Review**

#### **A. General Principles**

*United States v. Corum*, 354 F. App'x 957 (6th Cir. 2009). The court committed clear error when it impermissibly adopted a bright line rule not to consider post-arrest treatment efforts made by defendants rather than giving the required individualized assessment to the history and characteristics of the defendant as required by 18 U.S.C. § 3553(a), pursuant to *Gall v. United States*, 552 U.S. 38 (2007). Therefore the court had jurisdiction under Rule 35(a) to correct the sentence.

*United States v. Herrera-Zuniga*, 571 F.3d 568 (6th Cir. 2009). The defendant pleaded guilty to illegal reentry after previously being removed subsequent to a felony conviction, in

violation of 8 U.S.C. §§ 1326(a) and 1326(b)(1). The district court varied upward from the defendant's sentencing range of 24-30 months in prison, and sentenced the defendant to 48 months in prison. The court also imposed a 12-month concurrent sentence because the defendant had violated the terms of his supervised release. At the sentencing hearing,

the district court . . . expressed “astonish[ment]” that the base offense level prescribed under Sentencing Guideline § 2L1.2(a) for a violation of 8 U.S.C. § 1326(a) “is so low.” Observing that the statute “carries a maximum [sentence] of 120 months,” the court characterized the sentencing range recommended under the Guidelines as “arbitrar[y]” and “considerably out of balance” with Congress’ intent. According to the court, the “great variance” between the statutory maximum penalty and the “astonishingly” low offense level set forth in § 2L1.2(a) demonstrates that the Sentencing Commission had failed to fulfill its traditional “sentencing function,” and had instead “arbitrarily pick[ed] a number and assign[ed] that number to [this] criminal statute.” The court concluded that “there’s not a whole lot of persuasiveness in that.”

The district court “[r]eject[ed] the arbitrary ‘picking and choosing that the Commission has done’” in the illegal reentry guideline, and chose its own sentencing range that was “sufficient to comply with the federal sentencing statute, not the guidelines . . . .” The court affirmed the defendant’s sentence, extending beyond the crack-powder disparity context the district court’s authority to reject categorically on policy grounds an otherwise-applicable aspect of the sentencing guidelines. Regardless of whether *Kimbrough* and *Spears* are read that broadly (the court held that they should be), the court concluded that “the authority of district courts to reject the Guidelines on policy grounds follows inexorably from the Court’s holding in *Booker* that the Guidelines are advisory only.”

*United States v. Penson*, 526 F.3d 331 (6th Cir. 2008). The Sixth Circuit described the approach to reasonableness review as follows:

In *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc), this court sitting en banc bifurcated the procedural burden carried by defendants who seek to raise claims on appeal that their sentences were procedurally or substantively unreasonable. The majority held that while defendants do not need to raise the claim of substantive unreasonableness before the district court to preserve the claim for appeal, defendants must do so with respect to claims of procedural unreasonableness. Specifically, “if a sentencing judge asks th[e] question [whether there are any objections not previously raised, in compliance with the procedural rule set forth in *United States v. Bostic*, 371 F.3d 865 (2004)] and if the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court.” *Vonner*, 516 F.3d at 385. Plain-error review does not apply in this case, however, because the district court did not ask the *Bostic* question. . . . Therefore, we proceed to analyze the procedural reasonableness of [the defendant’s] sentence under an abuse-of-discretion standard.

As discussed in section VI.C. below, the Sixth Circuit held that the district court abused its discretion and vacated the sentence.

*United States v. Lalonde*, 509 F.3d 750 (6th Cir. 2007). The Sixth Circuit affirmed a within-guideline sentence for wire fraud, holding that, after *Gall*, the appeals court must first “ensure that the district court committed no significant *procedural* error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.” The district court’s “legal conclusion” concerning the correct guideline range is reviewed *de novo*. The circuit court “must ‘then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.’ Sentences falling within the applicable Guidelines range are afforded a rebuttable presumption of reasonableness.”

*United States v. Wilms*, 495 F.3d 277 (6th Cir. 2007). The Sixth Circuit vacated and remanded a within-guideline sentence imposed using the presumption of reasonableness, emphasizing *Rita*’s holding that the presumption is applicable only on appellate review and concluding: “Only when a sentencing judge makes an *independent* determination of what sentence is sufficient, but not greater than necessary, to comply with the purposes of § 3553(a) – taking into account the advisory Guidelines range, the relevant § 3553(a) factors, and any other nonfrivolous arguments presented in support of a particular sentence – can the appellate presumption of reasonableness permitted by *Rita* be more than a return to the pre-*Booker* mandatory-Guidelines regime.”

*United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006). The appellate court observed that “[the] rebuttable presumption [of reasonableness for a sentence within the guidelines range] does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence. Even when selecting a presumptively reasonable sentence within the Guidelines range, a district court must ‘articulate[ ] its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting’ the specific sentence within that range.” *But see United States v. Liou*, 491 F.3d 334 (6th Cir. 2007) (noting that “some . . . pre-*Rita* precedents – *Jones* and *Richardson* in particular – might be read to require district judges to recite and analyze explicitly each argument, whether frivolous or non-frivolous, that a defendant even *arguably* raises in support of a lower sentence. We do not read our precedents so robustly.”)

*United States v. Till*, 434 F.3d 880 (6th Cir. 2006). The Sixth Circuit stated that consideration of the § 3553(a) factors is an essential part of a reasonableness review.

*United States v. Stone*, 432 F.3d 651 (6th Cir. 2005). The circuit court held that “*Booker* did not eliminate judicial fact-finding. Instead, the remedial majority gave district courts the option, after calculating the Guideline range, to sentence a defendant outside the resulting Guideline range.”

## **B. Standard of Review**

*United States v. Klups*, 514 F.3d 532 (6th Cir. 2008). The Sixth Circuit upheld an above-guidelines sentence in this case involving travel with intent to engage in criminal sexual activity. The defendant's guideline range, without departures, was 24-30 months. The district court made alternate findings that (i) a departure was warranted pursuant to §5K2.3 in light of evidence presented at sentencing regarding severe psychological injury to the victim; or (ii) a variance sentence was appropriate. The district court based the variance on "the need to reflect the seriousness of the offense" and "the need to protect the public," commenting that "[t]his was not a one-time matter." On these grounds the district court imposed a sentence of 60 months. The Sixth Circuit acknowledged the Supreme Court's decision in *Gall* and its undermining of the circuit's previous "proportionality rule." It went on to quote *Gall* in concluding "that '[o]n abuse of discretion review, [we give] due deference to the [d]istrict [c]ourt's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.'" Because the court found that the variance was reasonable, it did not reach the issue of whether the departure was erroneous.

## **C. Procedural Reasonableness**

*United States v. Massey*, 663 F.3d 852 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 2761 (2012). The defendant appealed, arguing that the sentence was procedurally unreasonable because the court did not understand its discretion to vary based on the defendant's cooperation. The defendant requested a sentence below the mandatory minimum because he had anticipated a §5K1.1 motion from the government. Although the government did not file the motion, at sentencing the defendant continued his request. The Sixth Circuit clarified that "although departures under §5K1.1 require a motion from the government, variances do not," and that a district court retains discretion to take the defendant's cooperation into account under section 3553(a). However, the court was satisfied that the district court understood its discretion in this case, and found there was no error.

*United States v. Gunter*, 620 F.3d 642 (6th Cir. 2010). The Sixth Circuit stated that for a sentence to be procedurally reasonable, the court must determine whether, "based on the entirety of the sentencing transcript and written opinion, if any, we are satisfied that the district court fulfilled [its] obligation" to conduct a meaningful hearing and truly consider the defendant's arguments. "We are to focus less on what the transcript reveals that the court said and more on what the transcript reveals that the court did."

*United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009). The court held that the defendant's sentence was procedurally unreasonable because the district court improperly calculated the guidelines and failed to provide adequate explanation for its sentence. The district court's statement of reasons and written opinion, issued almost two months after the sentencing hearing, did not clarify the district court's chosen sentence.

*United States v. Fenderson*, 354 F. App'x 236 (6th Cir. 2009). The court vacated and remanded a within-guideline sentence when the district court simply recited the statutory language of 18 U.S.C. § 3553(a) but did not apply those factors to the facts in the case.

Although *Rita* made clear that “when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation,” the court found that “rote recitation of the statutory language does not provide this Court the ability to review the trial court’s exercise of its discretion.”

*United States v. Garcia-Robles*, 562 F.3d 763 (6th Cir. 2009). The court held that “the district court’s sentence was procedurally unreasonable because the district court failed to provide [the defendant] with an opportunity meaningfully to address the district court’s chosen sentence.” According to the court, because the government agreed that the guideline range was reasonable, the defendant “entered the sentencing hearing believing that he should be arguing against the backdrop of a 30-to-37 month sentence. [The defendant] was unaware that the district court was contemplating a significantly higher sentence and thus had no chance to argue against such a variance before the court announced its sentence.” Instead of allowing the defendant to address the variance during the hearing, the district court then told the defendant that it would be issuing a written opinion and that the defendant could make written objections to that opinion. The district court, however, “entered judgment before the time that he had granted [the defendant] to object had elapsed.” Under these circumstances, the court held, it must vacate and remand for resentencing.

*United States v. Houston*, 529 F.3d 743 (6th Cir. 2008). The Sixth Circuit held that the district court did not fail to take into account the factor in § 3553(a)(6) (unwarranted disparity), saying that “[b]y correctly calculating [the defendant’s] Guidelines range, the district judge had necessarily taken into account the need to avoid unwarranted sentence disparities, viewed nationally.” The Sixth Circuit rejected the defendant’s argument, presented in a Rule 35 motion after sentencing, that “supposed *local* sentence disparities . . . could be relevant” because such matters are “not . . . within the contemplation of § 3553(a)(6).”

*United States v. Penson*, 526 F.3d 331 (6th Cir. 2008). The Sixth Circuit reversed the sentence imposed both on grounds that it exceeded the statutory maximum and that it was procedurally unreasonable, as the district court “neither gave the defense counsel an opportunity to advocate for a particular sentence, nor considered the § 3553(a) factors, nor explained the basis for the sentence selected.”

*United States v. McConer*, 530 F.3d 484 (6th Cir. 2008). The Sixth Circuit reversed the sentence because the district court, in imposing the sentence, stated that it was applying a presumption of reasonableness to the guideline range. The Sixth Circuit held that, although the district court may have simply misspoken, *Rita* required that it vacate and remand the sentence.

*United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc). In a 9-6 decision, the circuit court rejected, *inter alia*, the defendant’s argument that his sentence was procedurally unreasonable. As an initial matter, the court concluded that the plain error standard of review applied to this claim, holding that when the defendant failed to object after pronouncement of the sentence, “it . . . undermine[d] his right to challenge the adequacy of the court’s explanation for the sentence . . .” Relying on § 3553(c) and *Rita*, the court held that, if a sentence is within the guideline range, a district court is permitted to provide less explanation than would be required if the sentence was outside the guideline range. For a within-range sentence, the court said, “the

question is whether ‘[t]he record makes clear that the sentencing judge listened to each argument,’ ‘considered the supporting evidence,’ was ‘fully aware’ of the defendant’s circumstances and took ‘them into account’ in sentencing him.” The court concluded that even if there was error, it was not plain. The court also rejected the defendant’s argument that Fed. R. Crim. P. 32(i)(3)(B) required the district court to rule explicitly on each of his arguments for a variance sentence, holding that the district court had “necessarily addressed [these arguments] by declining to grant a downward variance.”

*United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc). The Sixth Circuit held en banc an offense level under the guidelines withstands Sixth Amendment scrutiny “so long as the resulting sentence does not exceed the jury-authorized [statutory] maximums.” The court affirmed the defendant’s sentence, and agreed with other circuits that “insofar as enhancements based on acquitted conduct do not increase a sentence beyond the maximum penalty” provided by statute, use of acquitted conduct is constitutional. “Had the district court in this case relied on acquitted conduct *in determining the range under a mandatory guidelines regime*, that sentence would have violated the Sixth Amendment. . . . But these observations do not show that the Sixth Amendment prevents a district court from relying on acquitted conduct in applying an *advisory* guidelines system.”

*United States v. Hamad*, 495 F.3d 241 (6th Cir. 2007). The Sixth Circuit reversed a within-guideline sentence that was imposed based in part on information not provided to the defendant because the reliance on such information violated Rule 32; the court cited *Rita* in support of its conclusion that one purpose of Rule 32 is to promote adversarial resolution of guidelines issues.

*United States v. Husein*, 478 F.3d 318 (6th Cir. 2007). The Sixth Circuit held that the sentence was procedurally reasonable even though the district court “treated [the defendant’s] motion almost exclusively as one for a Guidelines departure” and only once mentioned section 3553(a). The Sixth Circuit said that, in this respect: “[t]he issue is not *how* the district court considered the relevant factors, but simply *whether* it considered them at all.”

*United States v. Liou*, 491 F.3d 334 (6th Cir. 2007). The Sixth Circuit affirmed a within-guideline sentence where the district court did not directly address one of the defendant’s arguments for a below-range sentence. Analyzing *Rita*’s impact on circuit law regarding post-*Booker* appellate review, the court emphasized that “. . . the better practice, post-*Rita*, is for a sentencing judge to ‘go further and explain why he has rejected [each of the defendant’s nonfrivolous] arguments’ for imposing a sentence lower than the Guidelines range.”

*United States v. Malone*, 503 F.3d 481 (6th Cir. 2007). The Sixth Circuit held that it was unreasonable as a procedural matter for a district judge to take into account the sentence that the defendant would have received had he been prosecuted for the same conduct in state court.

*United States v. Cruz*, 461 F.3d 752 (6th Cir. 2006). The court rejected defendant’s argument that the district court erred by imposing a “reasonable” sentence, stating: “we cannot agree with [defendant] that the court’s reference to imposing a ‘reasonable’ sentence under the

§ 3553(a) factors, as opposed to say an ‘appropriate,’ ‘sensible,’ or ‘fair’ sentence under those factors, warrants a third sentencing hearing.”

*United States v. Gale*, 468 F.3d 929 (6th Cir. 2006). The Sixth Circuit held that the district court’s reasoning for the sentence imposed was sufficient, stating that “[w]hen a district court adequately explains *why* it imposed a particular sentence, especially one within the advisory Guidelines range, we do not further require that it exhaustively explain the obverse – *why* an alternative sentence was *not* selected — in every instance.”

*United States v. Johnson*, 467 F.3d 559 (6th Cir. 2006). The circuit court found that the district court’s sentence was “not procedurally reasonable under *Booker*,” noting that the district court did not state on the record that it had considered the factors in section 3553(a). The appellate court observed that “the district court is required to provide this Court with some evidence on the record that the § 3553(a) factors were considered.”

*United States v. Jones*, 445 F.3d 865 (6th Cir. 2006). A divided panel of the Sixth Circuit upheld the reasonableness of the sentence imposed in the case, holding that the district court satisfied the procedural requirements of the circuit’s post-*Booker* case law. The defendant argued that the district court failed to consider his argument for a lower sentence on the basis of the fact that he had already served prison time for some of his relevant conduct, which the policy statement at §5K2.23 provides can serve as a basis for a downward departure.

#### **D. Substantive Reasonableness**

*United States v. Johnson*, 715 F.3d 179 (6th Cir. 2013). The district court had previously sentenced the defendant to 320 months for transporting child pornography, transmitting obscene material to a minor, and possession of child pornography, finding that he had been convicted in 2001 for transmitting child pornography and attempting to engage a minor in sexual activity. During sentencing, although the probation office had recommended a five-level enhancement for pattern of activity, the court did not make an explicit ruling on the applicability of the enhancement. Instead, it assigned an offense level two levels higher than had the enhancement not applied. On appeal the defendant argued the sentence was not substantively reasonable, and the Sixth Circuit remanded for resentencing, finding an ambiguity in whether the court had varied upward from the range without the pattern of activity enhancement or had varied downward from the range with application of the enhancement. On resentencing, the district court applied the 5- level enhancement and resentenced the defendant to 360 months. The defendant appealed again, arguing that the sentence was vindictive. The Sixth Circuit held that although a rebuttable presumption of vindictiveness applies when a sentence on remand is higher, it was apparent from the record that the district court relied on the remand order in calculating the sentence. In addition, the court found no factors under section 3553 justified a downward departure or variance, and it affirmed the sentence.

*United States v. Aleo*, 681 F.3d 290 (6th Cir. 2012). The Sixth Circuit reversed a statutory maximum sentence of 720 months as substantively unreasonable in a case involving production, possession, and transportation of child pornography. The guideline range was 235 to 293 months, which included an enhancement for both the commission of a sexual act and because the victim was in the care or custody of the defendant. The district court found that the

Commission could not have anticipated that a defendant, the victim's grandfather, would sexually abuse his granddaughter when it promulgated the guideline. The circuit court found that the district court did not provide sufficient justification for imposing a sentence at the statutory maximum, and that the sentence did not support either the "enormous" variance or the disparity such a sentence would cause with other, similar defendants. It stated that the district court's justification was not compelling because the Commission had considered sexual abuse of a minor, and the advisory guideline sentence did, in fact, "address[] the unique characteristics of [the] offense" and "took into account the very factors that the sentencing judge said that they did not." In addition, the circuit court found that the sentence imposed "threatens to cause disparities in sentencing, because it provides a top-of-the-[statutory] range sentence for what is not a top-of-the-range offense."

*United States v. Robinson*, 669 F.3d 767 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 929 (2013). The circuit court found that a one-day sentence representing a 78-month variance for possession of child pornography, was substantively unreasonable because the district court placed unreasonable weight on some section 3553(a) factors and disregarded others. Although the district court thoroughly considered the history and characteristics of the defendant and the need for the sentence to protect the public, the Sixth Circuit found that its reliance on the psychological evaluation to determine the defendant was not a pedophile was misplaced, because the crime of conviction was not sexual abuse of children. The court also found that the sentence did not reflect the seriousness of the crime because the district court did not address any of the enhancements that were applied (possession of over 7,100 images; images involving bondage, rape, and torture; and prepubescent children; subscription to a website). In addition, the court found that the district court's belief that the sentence provided deterrence because the defendant was required to register as a sex offender was inadequate because that consequence arose from the prosecution and conviction, not from the sentence, as required under section 3553(a). The Sixth Circuit vacated the sentence and remanded.

*United States v. Bistline*, 720 F.3d 631 (6th Cir. 2013). In a prior opinion, the Sixth Circuit had vacated the district court's variance from the guideline range and imposition of a one-day courthouse lockup and 30 days home confinement when the defendant was convicted for possession of child pornography, finding the sentence substantively unreasonable. The district court determined that §2G2.2 is seriously flawed based on the congressional involvement in drafting some specific offense characteristics, and because the guideline was not arrived at through empirical study and data. Although the court may disagree with §2G2.2 on policy grounds, the Sixth Circuit stated that the district court's concerns were misguided because "the Constitution merely tolerates, rather than compels, Congress's limited delegation of power to the Commission. . . . Congress can marginalize the Commission all it wants: Congress created it. Indeed, it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission." Therefore, the court found that a district court cannot reasonably reject any guideline on the ground that Congress exercised its power, although it further stated "[t]hat is not to say that a district court must agree with a guideline in which Congress has played a direct role. It is only to say that the fact of Congress's role in amending a guideline is not itself a valid reason to disagree with the guideline." On remand, the district court again sentenced the defendant to one day, but extended his period of home confinement to three years. The government appealed, and the Sixth Circuit held that the

district court repeated many of its prior errors by continuing to treat the guidelines validity “strictly as a question of social science” and continuing to diminish the seriousness of the defendant’s offense. Additionally, the court found that the sentencing court put an unreasonable amount of weight on the defendant’s age and health. The court found that the district court had once again abused its discretion and that the sentence was substantively unreasonable, and remanded and reassigned the case to a different district judge.

*United States v. Brooks*, 628 F.3d 791 (6th Cir. 2011). The defendant pled guilty to attempting to entice a minor, traveling to engage in sex with a minor, and distribution of child pornography. The sentencing court applied the cross-reference at §2G2.2(c) to §2G2.1 because the offense involved seeking, by notice or advertisement, a minor to engage in sex for the purpose of producing a visual depiction. The defendant argued that because §2G2.2 was used to calculate his actual offense level and is based on legislative enactments designed to increase the sentence instead of empirical evidence, his sentence was substantively unreasonable. The Sixth Circuit found that a district court may disagree with a guideline for policy reasons and may reject the guideline range because of that disagreement, pursuant to *Kimbrough*. However, it further held that the fact that a court may disagree does not mean that it must disagree, and therefore it affirmed the sentence.

*United States v. Walker*, 649 F.3d 511 (6th Cir. 2011). The defendant was convicted of escape and the sentencing court varied upward to sentence him to 36 months’ imprisonment, reasoning that a longer term of imprisonment would best serve the defendant by ensuring he received the benefit of treatment. The defendant appealed, arguing the sentence was substantively unreasonable because the court improperly relied on his need for rehabilitation and treatment. Because the Supreme Court held in *Tapia v. United States*, 131 S. Ct. 2382 (2011), that “a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation,” the court held the sentence was substantively unreasonable and remanded for resentencing.

*United States v. Hunt*, 521 F.3d 636 (6th Cir. 2008). The Sixth Circuit reversed as substantively unreasonable a sentence of five years’ probation for health care fraud. The applicable guideline range was 27-33 months’ imprisonment. The Sixth Circuit acknowledged the “limited abuse-of-discretion review prescribed by [*Gall*]” but concluded that the district court “appear[ed] to have relied in substantial part on its doubt that [the defendant] intended to commit fraud” and that such reliance was improper because it conflicted with the jury verdict. The Sixth Circuit noted that “it does not matter that the district court relied on a number, even a large number, of relevant facts in its sentencing, if it also relied on facts that it could not properly consider.”

*United States v. Polihonki*, 543 F.3d 318 (6th Cir. 2008). The Sixth Circuit upheld as reasonable the revocation of supervised release and requirement that the defendant serve a new 13-month term of imprisonment, that is a term 2 months longer than the applicable guideline range. The Sixth Circuit found that the sentence was substantively reasonable because the district court had noted on the record that the previous prison term, imposed following the defendant’s second round of supervised release violations, had failed to get his attention, providing a reasoned basis for the sentence imposed.

*United States v. Baker*, 502 F.3d 465 (6th Cir. 2007). The Sixth Circuit upheld a below-guideline sentence imposed in this case involving possession of an unregistered firearm. The defendant's guideline range was 27-33 months, but the district court varied downward and imposed a sentence of five years' probation, including house arrest for the first year of that probation. In granting the variance, the court relied most heavily on the defendant's family obligations, which included acting as a caregiver for his older son, who had undergone a heart transplant in 2002. It also relied on the defendant's demonstration of remorse for the offense. Although the weapon was discovered in the context of an alleged domestic dispute, the district court found that incarceration was not necessary to protect the defendant's wife or the public. The government appealed, challenging *inter alia* the substantive reasonableness of the sentence. In assessing substantive reasonableness, the Sixth Circuit discussed its use of proportionality review but also quoted an earlier case emphasizing that: ". . . the focus of our review of downward variances under the proportionality standard has been on the district court's reasons for varying from the advisory guideline range." The court then compared the sentence to two of its earlier cases involving variances of approximately 99 percent. In one such case, *United States v. Husein*, the sentence was upheld; in another, *United States v. Davis*, the sentence was reversed. The Sixth Circuit held that it could not "draw any meaningful distinction between the extraordinary circumstances" in this case and those presented in *Husein*, concluding:

The relevant family circumstance at issue in this case, like *Husein*, was the defendant's role as a caregiver for another family member. As the district court noted, Baker's older son, Jack, received a heart transplant in 2002, and Baker shares the burden of providing constant care for him. Furthermore, like Husein and unlike Davis, Baker demonstrated remorse for his crime. Therefore, because both the factors relied upon by the district court and the sentence imposed in this case are virtually identical to those in *Husein*, the same outcome is dictated here.

*United States v. Brooks*, 243 F. App'x 118 (6th Cir. 2007). The Sixth Circuit affirmed the within-guideline sentence in this case, rejecting the defendant's arguments that the age of his prior convictions, his good behavior in prison, and the hardship his imprisonment imposed on his family rebutted the presumption of reasonableness granted to his within-guideline sentence.

*United States v. Husein*, 478 F.3d 318 (6th Cir. 2007). The Sixth Circuit upheld the district court's grant of a significant downward departure on the grounds of extraordinary family circumstances. The circuit court concluded that the sentence was substantively reasonable because the offense of conviction was subject to no statutory mandatory minimum, that a sentence of essentially no jail time was necessary to serve the purpose of allowing the defendant to continue to support her family, and that it could imagine no guilty defendant more deserving of leniency than the defendant in this case.

*United States v. Poynter*, 495 F.3d 349 (6th Cir. 2007). The defendant, a repeat child sex offender, was subject to a guideline range of 188-235 months. The Sixth Circuit reversed an above-guideline sentence of 720 months, the statutory maximum, as unreasonable, concluding that *Rita* permits the use of the proportionality principle but finding the sentence unreasonable because the court "rel[ied] on a problem common to all repeat sex offenders (recidivism) in

increasing” the sentence and “fail[ed] to offer meaningful distinctions between the risk that [defendant] posed to the public and the risk that other sex offenders posed to the public.” The Sixth Circuit also observed that, “no less importantly,” §4B1.5 was promulgated explicitly to cover repeat sex offenders and that the increase required by that guideline “was meant to account for the problem of recidivism.”

*United States v. McBride*, 434 F.3d 470 (6th Cir. 2006). The Sixth Circuit clarified its view that, although the rule that a district court’s denial of a downward departure was unreviewable on appeal survived *Booker*, the rule did not impact the circuit court’s ability to review the substantive reasonableness of such a sentence. With respect to reviewing a district court’s consideration of the section 3553(a) factors, the circuit court emphasized: “While the district court need not explicitly reference each of the section 3553(a) factors, there must still be sufficient evidence in the record to affirmatively demonstrate the court’s consideration of them.”

*United States v. Williams*, 436 F.3d 706 (6th Cir. 2006), *overruled as stated in United States v. Wilms*, 495 F.3d 277 (6th Cir. 2007). The court of appeals held that a properly calculated within-guidelines sentence is presumptively reasonable.

#### **E. Plain Error/Harmless Error**

*United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010). The Sixth Circuit held that a sentence of five days already served, which the district court imposed upon remand, was substantively unreasonable because the court relied on discouraged factors in the guidelines. The court noted that while “the fact that a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing statutory factors apart from the guidelines,” section 3553(a) requires that the sentencing court consider both applicable policy statements and those factors disfavored by the guidelines. The court held that the district court abused its discretion when it found, without explanation, that the defendant’s educational and vocational skills in writing and composing music were a mitigating factor, and second, that the defendant’s family ties and responsibilities for the care of his mother were mitigating factors, because there was a feasible alternative available for her care. Additionally, the court held the sentence was substantively unreasonable because the district court’s inadequate explanation of its consideration of deterrence and potential disparity precluded meaningful appellate review.

*United States v. Blackie*, 548 F.3d 395 (6th Cir. 2008). The sentencing court committed plain error when it failed to refer to the applicable revised guideline range and failed to state specific reasons for a variance with the requisite level of specificity required under 18 U.S.C. § 3553(c)(2). The court revised the PSR by reducing two recommended enhancements but did not calculate the new offense level or the guideline range in open court. Further, it was not until the written judgment and commitment order was issued stating that the sentence was “above the guideline range” that it was apparent how the district court calculated the range. The case was remanded for resentencing.

*United States v. Vicol*, 514 F.3d 559 (6th Cir. 2008). The Sixth Circuit reaffirmed its pre-*Gall* position that ““where a district court makes a mistake in calculating a guidelines range for purposes of determining a sentence under section 3553(a), we are required to remand for resentencing unless we are certain that any such error was harmless.””

*United States v. Christopher*, 415 F.3d 590 (6th Cir. 2005). The Sixth Circuit held that objections based on *Blakely* preserve a *Booker* argument. Harmless error was shown when the district court followed a circuit directive and indicated the sentence it would have imposed if the guidelines were advisory; because the district court would have had more discretion in an advisory system, the refusal to give a lower sentence precludes any fair inference that it would give a lower sentence if the guidelines had been advisory.

*United States v. Hazelwood*, 398 F.3d 792 (6th Cir. 2005). The circuit court stated that “[b]ecause [the defendant] properly preserved his argument that the district court erred in applying the enhancement, we must determine whether any error in sentencing was harmless, as opposed to conducting a plain error analysis.”

## **VII. Revocation**

*United States v. Johnson*, 356 F. App’x 785 (6th Cir. 2009). The court held that 18 U.S.C. § 3583 remains constitutional after *Booker* in the context of supervised release revocation, because the defendant has already been convicted of the underlying crime and is not being subjected to further criminal prosecution. Further, in *United States v. Johnson*, 529 U.S. 694 (2000), the Supreme Court indicated that supervised release is part of the penalty for the initial offense, and “because ‘supervised release is authorized by the original conviction . . . so too are the consequences of its violation.’” (quoting *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005)).

*United States v. Bolds*, 511 F.3d 568 (6th Cir. 2007). The Sixth Circuit held “that there is no practical difference between the pre-*Booker* ‘plainly unreasonable’ standard of review of supervised release revocation sentences and our post-*Booker* review of sentences for ‘unreasonableness.’ Sentences imposed following revocation of supervised release are to be reviewed under the same abuse of discretion standard that we apply to sentences imposed following conviction.”

## **VIII. Retroactivity**

*Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005). The Sixth Circuit refused to apply *Booker* retroactively to cases already final on direct review.

## **IX. Crack Cases**

*United States v. Johnson*, 564 F.3d 419 (6th Cir. 2009). The court held that when a defendant is sentenced subject to a mandatory minimum term of imprisonment, the defendant is not eligible for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(2). The Commission’s crack cocaine amendment did not change the defendant’s guideline range; thus, the court concluded, “if [the defendant] were resentenced today, the amended Guidelines would still require a sentence of 240 months, and the court would be departing from this same 240-month baseline if again presented with the government’s substantial-assistance motion.”

*United States v. Metcalfe*, 581 F.3d 456 (6th Cir. 2009). The defendant appealed the order denying his motion for a reduction of sentence for conspiracy to distribute crack cocaine, pursuant to 18 U.S.C. § 3582(c)(2). The sentencing court denied his motion because it was based on a new objection to the drug quantity attributed to him as relevant conduct. The appellate court stated that the defendant had not preserved the issue of drug quantity, disagreeing with the defendant's argument that he had not waived the claim because at the time of the original sentence, he would not have benefitted by raising it since his offense level would have remained the same. The court agreed with the district court that § 3582(c)(2) is not "an 'open door' that allows any conceivable challenge to a sentence."

*United States v. Vandewege*, 561 F.3d 608 (6th Cir. 2009). The court remanded for resentencing based on the Commission's recent crack cocaine amendment, but stated in dicta that it had "additional grounds to remand the case for resentencing":

In a case similar to the instant case involving retroactive application of the crack cocaine guidelines, the Supreme Court recently clarified "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines." *Spears v. United States*, 555 U.S. 261 (2009). The district court here did not recognize that authority, stating, "I do believe that policy judgments of whether crack and powder are equivalent or not is not for me to make."

According to the court, "[t]he Supreme Court has made it clear that where a sentencing judge 'varies from the Guidelines . . . in a mine-run case' based on a policy disagreement or consideration of § 3553 standards, 'closer review may be in order.'"

## **X. Miscellaneous**

*United States v. Grant*, 636 F.3d 803 (6th Cir.), *cert. denied*, 132 S. Ct. 371 (2011). The government filed a Rule 35(b) motion requesting a sentence reduction for a defendant based upon his substantial assistance. The defendant argued that when Rule 35 was amended in 2002, it also allowed for consideration of 18 U.S.C. § 3553(a) factors for a sentence below the government's recommendation. The district court disagreed, and the defendant appealed. The Sixth Circuit held that because the amendment to the rule was merely a stylistic change, the only factor that continues to merit consideration in a Rule 35(b) motion is the defendant's cooperation.

*United States v. Judge*, 649 F.3d 453 (6th Cir. 2011). The defendant pleaded guilty to conspiracy to distribute ecstasy and the district court granted a downward variance based on his cooperation, although the government had not filed a motion under §5K1.1 because, in its view, the investigations and the defendant's cooperation were still ongoing, and it could not evaluate what relief the defendant would be entitled to. The defendant appealed, arguing that the court took into account future sentence relief under Rule 35. The Sixth Circuit determined that pursuant to its recent decisions in *United States v. Petrus*, 588 F.3d 347 (6th Cir. 2009), and *United States v. Blue*, 557 F.3d 682 (6th Cir. 2009), a court may grant variances at the defendant's request based on his substantial assistance to the government, and that when the

court does so, it must evaluate the value of the assistance without regard to any possible future motions based on further assistance. However, in this case the court found that the district court did not commit procedural error by merely mentioning possible future motions for sentencing relief by agreeing with the government that the investigation was still ongoing so that the value of the assistance could not be valued as though the investigation were complete.

*United States v. Santillana*, 540 F.3d 428 (6th Cir. 2008). The defendant pleaded guilty to two counts of using a firearm during and in relation to a drug trafficking offense pursuant to section 924(c). The statutory maximum was 7 years on the first count and 25 years to run consecutively on the second count, for a total of 384 months. The district court granted the government's motion for a downward departure under §5K1.1 and sentenced the defendant to 84 months and 156 months, respectively, for a total of 240 months. The district court denied the defendant's motion for a further downward departure based on his deportable status. The defendant appealed claiming the court was unaware of its discretion to further depart. The Sixth Circuit affirmed the sentence, holding that the court generally does not review a district court's decision not to depart downward and there was no clear evidence that the district court misunderstood its general discretion to depart.

*United States v. Ngamwuttibal*, 162 F. App'x 476 (6th Cir. 2006). The circuit court held that "where, as here, the district court imposed the mandatory minimum sentence provided by statute, remand is not required pursuant to *Booker* because the district court would not have discretion to impose a shorter term of imprisonment on remand."

*United States v. Smith*, 419 F.3d 521 (6th Cir. 2005). The court of appeals restated its holding from an earlier unpublished opinion that *Booker* does not apply to mandatory minimums.

## **CHAPTER ONE: Authority and General Application Principles**

### **Part B General Application Principles**

#### **§1B1.2 Applicable Guidelines**

*United States v. Bates*, 552 F.3d 472 (6th Cir. 2009). In this appeal, the court held that although "guilt for conspiracy may be premised upon a single overt act, a conspiracy conviction does not speak to how many of the charged object offenses the defendant conspired to commit." When a defendant is convicted of a general conspiracy count involving more than one object offense, and it is clear from the record that the district court made an implicit finding beyond a reasonable doubt that he conspired to commit a specific object offense, the court has complied with §1B1.2(d).

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

*United States v. Brogdon*, 503 F.3d 555 (6th Cir. 2007). Defendant was convicted of being a felon in possession of a firearm. The issue on appeal involved the proper calculation of his criminal history category, and this issue turned on the date that defendant's crime began. Although he admitted possessing a firearm as a convicted felon many years before, the instant possession had begun only recently and was separated from the earlier possession by a break of many years. He argued that his crime began only with the most recent instance of possession. The Sixth Circuit rejected this argument, holding that the initial possession in violation of federal law, despite a separation of several years from the instant possession, "was relevant conduct to the instant offense."

*United States v. Gonzalez*, 501 F.3d 630 (6th Cir. 2007). Defendant was convicted of possessing drugs with intent to distribute, but in a special jury verdict form the jury found that he had possessed less than 500 grams of cocaine, despite a stipulation that the drugs actually weighed almost one kilogram. At sentencing, the district court applied a "reasonable foreseeability" standard to determine what quantity of drugs he should be accountable for. On appeal, the government argued that the district court erred by applying a reasonable foreseeability test. The Sixth Circuit agreed, noting the different standards for liability for one's own conduct and the conduct of others. USSG §1B1.3(a)(1)(A) holds a defendant accountable for all of his own acts and does not include a reasonable foreseeability requirement. USSG §1B1.3(a)(1)(B) holds a defendant accountable only for the reasonably foreseeable consequences of coconspirators. Thus, "a defendant is responsible *both* for his own criminal acts under §1B1.3(a)(1)(A) *and* for the reasonably foreseeable criminal acts of others with whom he conspires in relation to the charged offense under §1B1.3(a)(1)(B)." Because the defendant here was charged as a principal, the district court should have calculated the guidelines based on the entire amount, regardless of the defendant's knowledge of that amount.

*United States v. Salas*, 455 F.3d 637 (6th Cir. 2006). In addition to drugs seized from the defendant, law enforcement officers found over \$20,000 hidden with the drugs. At sentencing, the district court concluded this cash was related to the defendant's drug offense and represented an additional kilogram of cocaine. Accordingly, the district court calculated the guideline range based on the actual quantity of drugs plus one kilogram. The circuit court held this was not clear error.

*United States v. McDaniel*, 398 F.3d 540 (6th Cir. 2005). Defendant was charged with bank fraud based on the use of stolen checks. He argued that the loss amount should exclude amounts for which he was convicted in state court. The Sixth Circuit rejected this argument, reasoning that the entire amount was relevant conduct.

*United States v. Settle*, 414 F.3d 629 (6th Cir. 2005). Section 2K2.1 applies to firearm possession crimes and includes a cross-reference where the gun was used in a crime. Here, the defendant's possession of a firearm on the date alleged in the indictment culminated in the intentional shooting of another person several days later. The Sixth Circuit held that such a crime, committed after the alleged possession, was relevant conduct and could be taken into

account under the cross-reference, even if the crime was committed with a different gun than the one possessed in the instant offense if there was “a clear connection between [the two guns].”

*United States v. Brown*, 332 F.3d 363 (6th Cir. 2003). Defendant’s involvement in a drug transaction seven years prior to the current crime was relevant conduct, given that both transactions involved cocaine.

*United States v. Gill*, 348 F.3d 147 (6th Cir. 2003). The quantity of drugs possessed for personal use was not relevant conduct for calculating the total quantity of drugs in a trafficking conviction: “[a]mounts possessed for personal consumption should not be included when calculating the amount of drugs to enter into the drug quantity table in U.S.S.G. §2D1.1(c).” In contrast, “separate incidents of possession with intent to distribute can be included . . . when they qualify as part of a ‘common scheme or plan’ or constitute the ‘same course of conduct’ under U.S.S.G. § 1B1.3.”

*United States v. Campbell*, 279 F.3d 392 (6th Cir. 2002). The district court found that the defendant was aware that the conspiracy was broader than the three transactions with which he was involved and that, as a result, the conduct of the conspiracy as a whole was reasonably foreseeable to the defendant. But the record did not indicate that the district court addressed the first part of the test — whether the acts of the co-conspirators were within the scope of the defendant’s agreement. Although the government argued that the defendant’s awareness of the broader conspiracy satisfies the first part of the test, the Sixth Circuit rejected that argument, explaining that the mere fact that the defendant was aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation.

*United States v. Corrado*, 304 F.3d 593 (6th Cir. 2002). “RICO predicate acts, then, for which a defendant is convicted necessarily constitute relevant conduct for the purpose of calculating the defendant’s base offense level for a RICO conspiracy conviction.”

*United States v. Ukomadu*, 236 F.3d 333 (6th Cir. 2001). “With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.” In this case, the defendant was convicted of possession of heroin with intent to distribute. The defendant objected to the drug quantity determination of 293.3 grams of heroin that was the basis for his sentence. Before the package of heroin was in the defendant’s possession, the customs officials had removed most of the heroin from the package, leaving behind approximately 6 grams in the package, later possessed by the defendant. On appeal, the Sixth Circuit held that because the defendant met the requirements of §1B1.3, Application Note 2, he was responsible for the entire 293.3 grams of heroin because it was “within the scope of the criminal activity that he jointly undertook.”

*United States v. Meacham*, 27 F.3d 214 (6th Cir. 1994). In this opinion, the court of appeals explained that the district court must make individualized findings about the scope of a drug conspiracy and the duration and nature of each defendant’s participation in the scheme. A

sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy.

*United States v. Partington*, 21 F.3d 714 (6th Cir. 1994). “Conduct which forms the basis for counts dismissed pursuant to a plea bargain may be considered in determining the base offense level under the guidelines.” In this case, the district court applied a 6-level enhancement to a sentence for illegal firearms dealing based on a sawed-off shotgun that was the basis of a dismissed count. The shotgun was missing a bolt and the defendant retained the weapon for parts. In considering whether possession of the sawed-off shotgun qualified as relevant conduct, the court of appeals analogized to law involving drug distribution charges and explained that for the purposes of applying the guidelines, no real difference exists between the possession of illegal drugs and the possession of firearms. The court of appeals explained that “[a]lthough the type of contraband differs, the same rationale applies.” The court of appeals recognized that possession of a particular firearm does not always qualify as relevant conduct when a defendant is convicted of illegal firearms dealing, but determined that the evidence supported the district court’s finding that “although the weapon was not actively marketed by defendant during his discussion with DEA agents prior to his arrest, he possessed the weapon, and the offense of conviction was intertwined with the possession and sale of firearms.”

*United States v. Pierce*, 17 F.3d 146 (6th Cir. 1994). “[C]onduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct, for the circuit has held that even conduct that comprised an offense for which the defendant has been acquitted may be so used.”

#### **§1B1.8**      Use of Certain Information

*United States v. Jackson*, 635 F.3d 205 (6th Cir. 2011). The defendant argued that §1B1.8 categorically precludes use of proffer-protected information in the PSR, but the Sixth Circuit held that the district court did not err in using proffered information in determining the defendant’s specific sentence. The court acknowledged a circuit split on this issue, with the Eighth Circuit holding that information disclosed under a promise of confidentiality cannot be included in the PSR, in *United States v. Abanatha*, 999 F.2d 1246 (8th Cir. 1993) and the Seventh Circuit which precluded the government from withholding any relevant information from the court, in *United States v. Rourke*, 74 F.3d 802 (7th Cir. 1996), but stated that the text of §1B1.8 unequivocally does not provide any further protection from proffer statements other than from use “in determining the applicable guideline range.” In addition, the court stated that the application note “specifically precludes the government from withholding information from the court – something that would be required” if the proffer information was not allowed in the PSR.

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

*United States v. Horn*, 679 F.3d 397 (6th Cir.), *cert. denied*, 133 S. Ct. 373 (2012). After the defendant was sentenced pursuant to §4B1.1 for being a career offender, the Commission promulgated Amendment 709 addressing the counting of prior sentences as single or separate sentences, but declined to make the amendment retroactive. The district court granted the

defendant relief pursuant to 18 U.S.C. § 3582(c)(2) for a second time, finding that the Commission's decision not to make Amendment 709 retroactive was "arbitrary and capricious." It further held that the Sentencing Reform Act "did not authorize the issuance of binding policy statements," and that "the issuance of binding policy statements violated the doctrine of separation of powers." The defendant argued on appeal that the policy statements in §1B1.10, which provides that the Commission's determination regarding retroactivity control whether a court can resentence a defendant, are "an unauthorized power grab by the Sentencing Commission." The circuit court held that Congress delegated the power to the Commission to issue binding policy statements. It further stated that the retroactivity determination was not arbitrary and capricious because the Commission's process, reflected through its meeting minutes, addressed the purposes of section 3553(a)(2). Last, it held that the binding policy statements do not violate the doctrine of separation of powers because Congress has the authority to direct the Commission to change its retroactivity determination. Therefore, the circuit court reversed the grant of relief.

*United States v. Pembroke*, 609 F.3d 381 (6th Cir. 2010). The defendant, convicted in 1997 of possession with intent to distribute crack cocaine, made a motion for reduction of sentence pursuant to section 3582(c)(2), arguing that Amendment 706 lowered his applicable guideline range. The district court denied the motion on the ground that the applicable guideline range was not his crack cocaine range but his career-offender range, which was not affected by the amendment. On appeal the defendant argued that the applicable guideline range was the crack cocaine guideline range after the court departed downward pursuant to §4A1.3. The Sixth Circuit held that pursuant to §1B1.10, the applicable guideline range "is 'the range [from the] sentencing table after a correct determination of the . . . total offense level and criminal history category but prior to any discretionary departures,'" and affirmed the sentence.

*United States v. Curry*, 606 F.3d 323 (6th Cir. 2010). The Sixth Circuit held that although district courts are only authorized to reduce a sentence that was based on a sentence range subsequently lowered by a retroactive amendment to the guidelines, the statement in §1B1.10(b)(2)(B) that "if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. [§] 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate" does not remove the district court's discretion to reduce a sentence when the original sentence was based on a subsequently lowered guideline range. This is true "even if the sentence originally imposed was below the otherwise-applicable guideline range, whether pursuant to a departure or a variance." As such, district courts are free to determine whether a further reduction is appropriate, "regardless of whether the original sentence incorporated a variance or a departure from the Guidelines."

*United States v. Moore*, 582 F.3d 641 (6th Cir. 2009). During sentencing, the court relied on the PSR which stated that for computation purposes, the defendant was being held responsible for at least 1.5 kilograms of crack cocaine. On appeal, the probation office determined that the defendant's criminal activity involved at least 4.5 kilograms of crack cocaine. The sentencing court accepted this amount and determined the defendant was not eligible for a sentencing reduction under §1B1.10, stating that "[h]is collateral challenge to the amount of drugs stated in the Presentence Report almost 8 years after the fact, is too late." The appellate court found, however, that because the PSR never stated the defendant was involved in possessing or

distributing more than 4.5 kilograms, the sentencing court committed an error that was not harmless, and the government could not make the necessary showing that the court would have imposed the same sentence absent its error. Because none of the facts in the original PSR rendered the defendant ineligible for a reduction under Amendment 706, the court remanded for consideration of the defendant's drug quantity calculation.

*United States v. Perdue*, 572 F.3d 288 (6th Cir. 2009). The court rejected the defendant's argument that the advisory nature of the guidelines permits a district court judge to disregard the limitations in §1B1.10, and reduce the defendant's sentence beyond the 2-levels authorized in Amendment 706. Even assuming that the Commission does not have authority to limit the district court's ability to reduce the defendant's sentence, the court stated, Congress does. According to the court, Congress "does so expressly in the text of 18 U.S.C. § 3582(c)(2)." The court stated that the statute applies only to a defendant whose sentence was "based on" a subsequently-lowered "sentencing range." Thus, the court held that "[b]ecause Amendment 706 has no effect on the ultimate sentencing range imposed on [the defendant] under the career-offender Guideline, the district court did not err in declining to grant his motion for a reduction in sentence." See also *United States v. Provitt*, 355 F. App'x 22 (6th Cir. 2009); *United States v. Berry*, 356 F. App'x 829 (6th Cir. 2009); *United States v. Gillis*, 592 F.3d 696 (6th Cir. 2009).

*United States v. Quinn*, 576 F.3d 292 (6th Cir. 2009). The defendant appealed his sentence based on the retroactive amendment relating to the crack cocaine/powder disparity, arguing that the 2-level decrease should have been applied to his final offense level, which had been determined pursuant to §3D1.4 for multiple counts. The sentencing court correctly held that the guideline range must be calculated with reference to §3D1.4 and that under §1B1.10, it could only substitute the relevant amendment for the guideline provisions applied at the original sentencing, leaving all other guideline application provisions that affect the final offense level unchanged. The defendant's resulting total offense level contained only a 1-level decrease because when "the severity of the crack-cocaine crimes was lessened by Amendment 706, the relative impact of the firearms possession on [his] Guidelines range increased" and there was therefore no error in the use of §1B1.10 and §3D1.4 to calculate the revised guideline range.

*United States v. Washington*, 584 F.3d 693 (6th Cir. 2009). Agreeing with most other circuits, the court found that a sentencing court does not have authority under *Booker* to reduce a sentence beyond the amended guideline range pursuant to §1B1.10. The defendant argued that §1B1.10, which forbids the reduction of a sentence to a term of imprisonment less than the amended guideline range, was a mandatory sentencing scheme, but the court held that "[w]hen Congress granted the district courts authority to reduce otherwise valid sentences pursuant to § 3582(c)(2), it explicitly restricted judicial discretion by incorporating the Commission's policy statements, which limit the extent of the reduction." The Commission's policy statements are binding as an exercise of that statutory authority.

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

*United States v. Welch*, 689 F.3d 529 (6th Cir. 2012). The defendant was convicted of counterfeiting by bleaching genuine federal reserve notes and printing a higher denomination on them. The district court sentenced the defendant pursuant to §2B5.1 (Counterfeit Bearer

Obligations) instead of §2B1.1, and he appealed, claiming his sentence violated the *Ex Post Facto* Clause. The Sixth Circuit found that at the time of the offense, the application note to §2B5.1 expressly excluded altered genuine notes and stated that “[o]ffenses involving genuine instruments that have been altered are covered under §2B1.1.” The court also stated that the Commission amended §2B5.1 to include alterations of currency by bleaching in November of 2009, after the defendant’s offense conduct had ceased. The court found that the rule of lenity applies, and vacated and remanded the sentence.

*United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010). Co-defendants were prison jailers who set up an inmate to be raped and subsequently covered up their crimes. The district court applied the 2002 Manual, the manual in effect at the time of the offense. The government appealed, arguing that the 2008 Manual should have been used and that application of the manual in affect at the time of sentencing was not a violation of the *Ex Post Facto* Clause under the new advisory guideline regime. The Sixth Circuit noted that the 2008 Manual established a more onerous offense level and held that the advisory nature of the guidelines does not eliminate *ex post facto* concerns.

*United States v. Davis*, 397 F.3d 340 (6th Cir. 2005). “Generally, the district court is instructed to apply the version of the Guidelines in place at the time of sentencing. However, the Guidelines clearly instruct the court to apply the version in place at the time the defendant’s offense was committed if applying the current Guidelines would amount to a violation of the *expost facto* clause. . . . The *ex post facto* clause is implicated where a law punishes retrospectively; ‘[a] law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’” The defendant in this case committed his offense in 1991, but was punished under the 2002 version of the guidelines. He complained on appeal that he should have been sentenced under the 1991 version because the application of the 2002 version resulted in a sentence that was three months longer than what could have been imposed under the 1991 version. The Sixth Circuit agreed, observing that the district court sentenced the defendant at the low end of the guidelines range under the 2002 version and may have sentenced the defendant to the low end of the guidelines range under the 1991 version. Consequently, an *ex post facto* problem existed and the district court should have sentenced the defendant under the 1991 version.

## **CHAPTER TWO: *Offense Conduct***

### **Part A Offenses Against the Person**

#### **§2A1.2 Second Degree Murder**

*United States v. Milton*, 27 F.3d 203 (6th Cir. 1994). “First degree murder is defined as any murder ‘perpetrated by poison, lying in wait, or any kind of wilful, deliberate, malicious, and premeditated killing.’ Second degree murder is defined as any other murder. Second degree murder, therefore, requires a finding of malice aforethought.” In this appeal, the Sixth Circuit determined that the defendant’s actions of shooting into the back window of a person’s car to scare him established malice aforethought sufficient to hold the defendant accountable for

second-degree murder because the defendant's conduct represented a gross deviation from a reasonable standard of care.

**§2A2.1**      Assault with Intent to Commit Murder; Attempted Murder

*United States v. Stewart*, 628 F.3d 246 (6th Cir. 2010). See §2B3.1.

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

*United States v. Angwin*, 560 F.3d 549 (6th Cir. 2009). The district court did not err in finding that the term "victim" as defined in §2A3.1 can apply even when an undercover police officer does not actually impersonate the minor and therefore the defendant does not communicate with the fictional minor with whom he intended to engage in a sexual act. Via the Internet, the defendant communicated with an undercover officer who posed as both a mother of two daughters and as the older daughter, age 12. The officer never posed as the younger daughter, age 7, for whom the enhancement was applied. The court found that the definition of "victim" evidences that the guideline was written to punish the intent of the defendant, which it stated was the same whether the defendant communicated with the fictitious minor or not.

*United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997). "Section 2A3.1 . . . provides for a base offense level of 27. In addition, section 2A3.1(b)(1) provides: 'If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.'" The court of appeals determined that the application of the enhancement was appropriate because the defendant brandished a razor mounted on a shaft while molesting a young boy. The court of appeals characterized a razor mounted on a shaft as a dangerous weapon under §1B1.1.

**§2A3.2**      Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

*United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2005). The enhancement under §2A3.2(b)(2)(B) for unduly influencing a minor to engage in prohibited sexual conduct does not apply where the victim was an undercover officer acting as a minor. The Sixth Circuit noted that the guidelines specifically define victim to include undercover agents posing as underage children, but concluded that this definition should not apply in provisions in which such a definition does not make sense.

**§2A6.1**      Threatening or Harassing Communications; Hoaxes; False Liens

*United States v. Newell*, 309 F.3d 396 (6th Cir. 2002). "The pivotal inquiry when determining the appropriateness of a §2A6.1(b)(1) enhancement is whether the defendant intended to carry out the threat, and the likelihood that he would actually do so. Accordingly, essential to the determination of whether to apply the six-point enhancement is a finding that a nexus exists between the defendant's conduct and the threats that form the basis of the indictment." In this case, the defendant was convicted of transmitting threatening interstate communications in violation of 18 U.S.C. § 875(c). The district court applied a 6-level

enhancement to the defendant's sentence pursuant to §2A6.1(b)(1). On appeal, the Sixth Circuit determined that the application of the 6-level enhancement was based on a finding that a nexus existed between the defendant's conduct and the threats that form the basis of the indictment. The Sixth Circuit held that the defendant's purchase and possession of a .32 caliber handgun in close temporal proximity to the making of the threats constituted conduct that sufficiently supported a 6-level enhancement under §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**

*United States v. Howley*, 707 F.3d 575 (6th Cir. 2013). The defendants were convicted of stealing trade secrets and wire fraud, and the government appealed the sentences. Although the government presented three alternative loss estimates based on the defendants' theft of proprietary information ranging from \$305,000 to \$20 million, the district court found that the government had failed to establish any loss, without further explanation. The Sixth Circuit states that with no loss calculation, the sentencing range would have been four to ten months, and had the district court gone with the smallest loss estimate, the advisory guideline range would have been 37 to 46 months. The district court sentenced the defendants to four months home confinement. The Sixth Circuit reversed and remanded to the district court, finding it imperative that the court engage in a "more thorough explication of its calculation," because the guidelines require a "reasonable" estimate of actual or intended loss within broad ranges.

*United States v. Wendlandt*, 714 F.3d 388 (6th Cir. 2013). The defendant appealed his sentence for conspiracy relating to mortgage fraud, arguing that the computation of financial loss incurred by HUD was unreasonable. The defendant first argued that he should have received a larger credit against the loss because the downturn in the housing market was not foreseeable. The Sixth Circuit found that the plain language of the guidelines does not require foreseeability with respect to the future value of the collateral, and does not "require that we factor extrinsic market conditions into the calculation of credits against loss." Further, the defendant argued that with respect to a loan modification obtained on one property, the loss to HUD should be calculated to be the difference between the appraised fair market value and the balance remaining on the loan. The court found that the cost of the subsequent loan modification constitutes a reasonably foreseeable loss to HUD and is therefore properly considered actual loss.

*United States v. Stubblefield*, 682 F.3d 502 (6th Cir. 2012). In a counterfeit securities and aggravated identity theft case, the district court applied the 2-level enhancement for the number of victims, finding that each individual Wal-Mart store was a separate victim because each took a loss before being reimbursed by the Wal-Mart Corporation. On appeal, the Sixth Circuit held that only the corporation suffered any actual loss because any loss to the individual stores was temporary, since the reimbursement from the corporation to the individual stores was automatic, and vacated the sentence.

*United States v. Dedman*, 527 F.3d 577 (6th Cir. 2008). The Sixth Circuit addressed the question of whether, in a case involving fraudulent receipt of government benefits, the amount of taxes withheld on the basis of the fraudulent benefits should be added to the payments actually received in calculating loss for purposes of §2B1.1(b)(1). The court held that §2B1.1 comment (n.3(F)(ii)) supported the conclusion that withheld taxes should be so included, noting that it “suggest[s] that the dollar amount that the defendant receives serves as a minimum value for the government’s loss, but that the government’s loss can exceed that value” and that “the ‘value of the benefits obtained’ is inclusive of more than simply the sum added to the defendant’s bank account.” The court concluded that “[t]o exclude the withheld taxes from the calculations of loss would create unfairness under the Guidelines” in that “[t]he Guidelines tie culpability to the length of punishment, and exclusion of withheld taxes would create the possibility that less culpable defendants would be punished more.”

*United States v. Erpenbeck*, 532 F.3d 423 (6th Cir. 2008). In a case involving a real estate developer who was convicted of bank fraud, the Sixth Circuit concluded that, in interpreting §2B1.1, the district court erred in determining that the homeowners whose property was involved in the scheme were not also victims for purposes of §2B1.1. The Sixth Circuit held that “[t]here is no question that the homeowners here suffered *a part* of the actual loss under the Guidelines when [the defendant] improperly diverted their money, leaving construction liens on their homes.” The court noted that “[j]ust because the homeowners were able to successfully band together in a class-action lawsuit to secure payment of their liens does not erase the fact that they suffered an actual loss . . . as a direct result of [the defendant’s] fraud.” The court distinguished the instant case from its earlier decision in *Yagar*, noting that in this case “the homeowners had no contract with a third party to cover their loss, nor was the loss short-lived.”

*United States v. Mason*, 294 F. App’x 193 (6th Cir. 2008). The defendant pleaded guilty to making false statements to obtain federal employees’ compensation benefits and bankruptcy fraud. The district court calculated the loss as the amount of benefits the defendant received as a result of the false statements. The defendant appealed, arguing that the amount of loss should have been reduced by the amount of retirement benefits to which he would have been entitled had he elected retirement instead of disability compensation, and that the district court violated Rule 32 by not ruling on the amount of loss when applying the enhancement. The Sixth Circuit found the district court did not fail to rule on any disputed issue that would have affected the sentence because it had communicated its finding that the proof belied the defendant’s argument that he would have been entitled to retirement benefits and ruled on the loss calculation. The court further held determination of the loss amount was not clearly erroneous.

*United States v. Simpson*, 538 F.3d 459 (6th Cir. 2008). The defendant pleaded guilty to mail fraud for underreporting the payroll information for his businesses to his worker’s compensation insurance carriers. The district court found that the proper measure of loss was the unpaid premiums for those unreported employees and that the fair market value of the insurance coverage the defendant took was the amount of those unpaid premiums. The defendant argued on appeal that the proper measure of loss was the amount the insurance carriers actually paid on claims. The circuit court affirmed, finding that the amount of loss was the amount in premiums that the insurance carriers would have charged had they received accurate payroll information.

*United States v. Ross*, 502 F.3d 521 (6th Cir. 2007). When the defendant raises a dispute to the loss calculation in a presentence report, the “court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence.” The sentencing court is required to make specific factual findings on the record to support the loss figure.

*United States v. Sosebee*, 419 F.3d 451 (6th Cir. 2005). “Calculations of loss under the sentencing guidelines are governed by . . . § 2B1.1. The commentary notes to § 2B1.1 state that ‘fair market value’ is ordinarily the proper determination of loss. We have developed a two-step process to guide district courts in determining the amount of loss. The initial determination is whether a market value for the stolen property is readily ascertainable. Second, if such a market value is ascertainable, we must determine whether that figure adequately measures either the harm suffered by the victim or the gain to the perpetrator, whichever is greater. The standard test for determining fair market value is to look at ‘the price a willing buyer would pay a willing seller at the time and place the property was stolen.’”

*United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005). “The term ‘actual loss’ is defined as ‘the reasonably foreseeable pecuniary harm that resulted from the offense.’ Furthermore, ‘pecuniary harm’ is defined as ‘harm that is monetary or that otherwise is readily measurable in money’ and ‘does not include emotional distress, harm to reputation, or other non-economic harm.’” In this case, the 2-level enhancement under §2B1.1(b)(2)(A) did not apply because some of the victims of a fraudulent scheme involving stolen checks only temporarily lost their funds because their banks fully reimbursed them for their financial losses.<sup>1</sup>

*United States v. Raithatha*, 385 F.3d 1013 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005). “[L]oss can be attributed to a [d]efendant based on a finding of actual loss or intended loss, and a finding of intended loss is not limited to those losses possible to inflict, or those gains possible for a [d]efendant to achieve.” The defendant ran a Medicare scheme in which he ordered unnecessary tests and billed Medicare fraudulently in order to recover a profit. The defendant argued that not all of the transactions were fraudulent. The defendant also argued that no loss should be attributed to him because it was impossible for him to have caused Medicare any loss. However, intended loss is not limited to those losses possible to inflict. The defendant’s intention to mislead Medicare dictate that the defendant be held accountable for intending to cause the amount of loss about which he intentionally lied.

*United States v. Williams*, 355 F.3d 893 (6th Cir. 2003). “Section 2B.1.1(b)(9)(C)(i) . . . authorizes a two-level increase in a defendant’s base offense level in cases in which the defendant has unlawfully used any means of identification without authorization to produce or obtain any other means of identification. . . . If after the two-level increase, the offense level is less than level 12, then the offense level is to be increased to level 12. . . . The minimum offense level of 12 accounts for the seriousness of the offense as well as the difficulty in detecting the crime prior to certain harms occurring, such as a damaged credit rating or an inability to obtain a loan. . . . The minimum offense level also accounts for the non-monetary harm associated with

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<sup>1</sup> Effective November 1, 2009, the Commission amended §2B1.1 to provide that such persons would be considered victims for purposes of the victim table. USSG App. C, Amd. 726.

these types of offenses, such as harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense." On appeal, one of the defendants argued that the bank loan number was not the equivalent of a false identification, and that she purchased the entire loan package, not a social security number. Another defendant argued that the enhancement did not apply to his conduct because he obtained the bank loan in his own name. The court noted that a bank loan number was an account number that can be used to obtain money and was a "means of identification" as that term was defined in 18 U.S.C. § 1028. Thus, according to the defendants, their situation was more analogous to making a purchase with a stolen credit card. The court further noted that a social security number was clearly defined as a "means of identification" and its use to obtain a loan fell within the scope of the statute and the sentencing guidelines even if another form was not used. Accordingly, the district court did not err in finding that the enhancement under §2B1.1(b)(9)(C)(I) applied.

**§2B1.2**            Receiving, Transporting, Transferring, Transmitting or Possessing Stolen Property (Deleted by consolidation with §2B1.1, effective November 1, 1993)

*United States v. Warshawsky*, 20 F.3d 204 (6th Cir. 1994). In a case of first impression, the Sixth Circuit addressed the interpretation of "in the business of receiving and selling stolen property," §2B1.2(b)(4)(A), and endorsed the tests set forth in *United States v. Esquivel*, 919 F.2d 957, 959 (5th Cir. 1990), and *United States v. Braslawsky*, 913 F.2d 466, 468 (7th Cir. 1990). Sentencing courts should examine "the defendant's operation to determine: (1) if stolen property was bought and sold, and (2) if the stolen property transactions encouraged others to commit property crimes."

**§2B3.1**            Robbery

*United States v. Coleman*, 664 F.3d 1047 (6th Cir.), *cert. denied*, 132 S. Ct. 1813 (2012). The defendant pleaded guilty to bank robbery and the sentencing court applied an enhancement under §2B3.1 because it found a person was physically restrained to facilitate commission of the offense when the defendant pointed a gun at a bank employee and ordered him to come out of his office. On appeal, the defendant argued the enhancement should not apply because his conduct did not involve any physical restraint or any sustained force. The court found that §1B1.1 defines "physical restraint" as "forcible restraint" and that "force" is defined in Black's Law Dictionary as to "compel by physical means" such as use of a gun to force a person to do some activity. It further stated that most circuits uphold the enhancement where a defendant limits a victim's freedom to move by brandishing a firearm and compelling the victim to move from one location to another, and held that the enhancement was properly applied.

*United States v. Stewart*, 628 F.3d 246 (6th Cir. 2010). The defendant was convicted of armed bank robbery during which he attempted to murder an assistant manager of the bank. The sentencing court noted that §2B3.1 Application Note 5 encouraged an upward departure if the defendant intended to murder the victim, and therefore varied from the applicable guideline range by applying §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). The defendant argued that the court improperly double counted the injury to the victim by factoring those injuries into the sentencing determination. The Sixth Circuit found that the court's upward departure to §2A2.1 was based on the defendant's intent to kill the victim, and therefore the court

could have departed to §2A2.1 under the application notes to the robbery guideline, regardless of whether the victim actually sustained serious physical injuries. Therefore, the addition of four offense levels under §2A2.1 because of its finding that the injuries were permanent and life-threatening was permissible because the sentencing court was counting the victim's injuries for the first time.

*United States v. Hazelwood*, 398 F.3d 792 (6th Cir. 2005). “The current Application Note 4 is clear that enhancements stemming from the ‘possession, brandishing, use, or discharge’ of a firearm related to the underlying offense cannot be imposed for acts related to the conduct for which a defendant was also convicted under 18 U.S.C. § 924(c).” During a bank robbery, the defendant pointed a semiautomatic pistol at bank tellers and stated “Do what I say or I will kill you!” The Sixth Circuit explained that the enhancement was improper because the threat of death related to the defendant's brandishing of a firearm.

*United States v. Smith*, 320 F.3d 647 (6th Cir. 2003). The defendant was convicted of armed bank extortion in violation of 18 U.S.C. §§ 2113(a) and (d) as well as bank robbery with forced accompaniment under §§ 2113(a) and (e). The defendant maintained that §2B3.2 (“Extortion by Force or Threat of Injury or Serious Damage”) — which has a lower base offense level — applied to his conduct rather than §2B3.1. The court of appeals explained that “[s]ection 2B3.1(b)(1) of the ‘Robbery’ guideline provides for a specific offense characteristic concerned with the type of institution robbed. In contrast, no offense characteristic under the ‘Extortion by Force or Threat of Injury or Serious Damage’ guideline contemplates the harm to a financial institution.” The court noted that the defendant did not limit his conduct to threatening future violence where the victims were forced to “pay up.” “From the outset, the conspiracy was directed at accomplishing one overarching objective — a bank robbery. The events that [the defendant] characterize[d] as indicative of extortion — invading branch managers’ homes, threatening their family members, and promising the release of their husbands in return for money — were merely intermediate steps toward completing the ultimate goal of robbing a bank.”

*United States v. Winbush*, 296 F.3d 442 (6th Cir. 2002). In this appeal, the Sixth Circuit determined that a robber's note saying “I have a gun” constituted a threat of death under §2B3.1(b)(2)(F), warranting a 2-level enhancement.

*United States v. Moerman*, 233 F.3d 379 (6th Cir. 2000). At the time of this appeal, §2B3.1 called for a 6-level increase if a firearm was “otherwise used” and a 5-level increase if a firearm was brandished, displayed, or possessed. In this case, the defendant pled guilty to three counts of armed bank robbery. In each robbery, the defendant did not directly threaten the tellers or the customers with the use of the firearm if they did not comply with the defendant's demands. On appeal, the defendant argued that the 6-level enhancement for “otherwise using” the firearm under §2B3.1 did not apply to his case because he only “brandished” the firearm and therefore should have received only a 5-level enhancement on each of the two counts. The Sixth Circuit agreed. In one bank robbery, the defendant pointed the firearm in a threatening manner. In another bank robbery, the defendant moved a customer aside with the barrel of the firearm without an accompanying threatening statement. The court held that the conduct of the

defendant did not go beyond brandishing the weapon and reversed and remanded the case to recalculate the sentence using the 5-level increase for brandishing the weapon.

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

*United States v. Hover*, 293 F.3d 930 (6th Cir. 2002). In this case, the Sixth Circuit rejected the defendant’s argument that the district court improperly increased his offense level using conduct that occurred outside of the United States based on the plain language of the guideline. “The plain language of [§2B5.1] does not require that a defendant possess express knowledge of any acts occurring outside of the United States. Instead, it provides for a [2]-level enhancement based solely on the fact that ‘any part’ of the act occurred outside of the United States. There is no basis for a knowledge requirement to be read into the Guideline.”

### **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. Johnson*, 706 F.3d 728 (6th Cir. 2013). The defendant was convicted for distribution of heroin resulting in death, and the district court found that his base offense level pursuant to §2D1.1(a)(1) was level 43 because “the defendant committed the offense after one or more prior convictions for a similar offense.” The defendant appealed, arguing that his prior conviction for delivery and manufacture of a controlled substance was not a “similar offense” to the offense of conviction because it did not result in death. The Sixth Circuit found that the commentary in a prior version of §2D1.1 explained that a “[s]imilar drug offense” as used in §2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. § 841(b) . . .” and that in deleting the language, the Commission stated that the purpose of the amendment was “to provide that subsection [ ] (a)(1) apply[s] only in the case of a conviction under circumstances specified in the statute[ ] cited.” Therefore, the court held that the Commission continued to direct courts to turn to the relevant statute to determine whether subsection (a)(1) is applicable, and further that the subsection “merely reinforces the enhanced penalty mandated by statute.” Taking into account the plain language of the guideline and the statute, it concluded that the Commission intended the term “similar offense” to be “synonymous with the term ‘felony drug offense,’” and affirmed.

*United States v. Woods*, 604 F.3d 286 (6th Cir. 2010). The district court applied the specific offense characteristic for possession of a firearm, finding that it was reasonably foreseeable that a co-conspirator would possess a firearm because of the “substantial” and “large quantity” of methamphetamine being manufactured over a three day period. On appeal, the government conceded that there was no evidence the defendant possessed a firearm or was aware that a firearm was present, but argued that there is a presumption that a firearm present at the site of the drug manufacturing is “attributable to [the] defendant ‘unless is it clearly improbable that the weapon was connected with the offense,’” citing to Application Note 3. The Sixth Circuit disagreed, stating that the application note only deals with whether a firearm is connected to the offense, and does not bear on whether the presence of the firearm was reasonably foreseeable, as required under §1B1.3. The circuit court noted that the district court relied on an inference that

if a conspiracy involves a substantial amount of drugs it is reasonably foreseeable that a co-conspirator would possess a firearm. However, the Sixth Circuit ruled that the defendant was only held responsible for 50 grams of a precursor to methamphetamine, which is not a massive quantity of narcotics that supports an inference of the presence of weapons. Further, when there is not a huge quantity of drugs involved, more evidence that the defendant expected a firearm to be present is required to support application of the enhancement.

*United States v. Cox*, 565 F.3d 1013 (6th Cir. 2009). The court held that for purposes of imposing a mandatory minimum sentence, the district court is not bound by the amount of drugs charged in the indictment. It is not necessary for the government to allege drug quantity in an indictment, and even if it does, the quantity alleged by the government “does not dictate the mandatory minimum that the court is required to impose.”

*United States v. Johnson*, 553 F.3d 990 (6th Cir. 2009). The defendant was sentenced pursuant to the November 1, 2007, amendment to the guidelines reducing the base offense level for crack cocaine offenses. The court vacated and remanded for resentencing in light of *Spears v. United States*, 555 U.S. 261 (2009), where the Supreme Court held that “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines” and may do so in a “mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the Guidelines’ sentencing range.” The sentence was remanded to give the district court the opportunity to impose a sentence with full awareness of this authority, even where the defendant was sentenced pursuant to the new guideline.

*United States v. Ward*, 506 F.3d 468 (6th Cir. 2007). The defendant received a 2-level enhancement under §2D1.1(b) for the presence of a firearm possessed by a co-defendant. The co-defendants were charged with conspiracy, but Ward was not. Ward argued that without a conspiracy charge, the district court erred in finding he was in constructive possession of the co-defendant’s firearm and could not apply the enhancement. The court of appeals disagreed, holding: “Application of [§2D1.1(b)] is no longer limited to occasions when a firearm is present during the defendant’s offense of conviction; it applies, more broadly, during ‘relevant conduct.’”

*United States v. Galvan*, 453 F.3d 738 (6th Cir. 2006). “The Guidelines instruct a court to add two points to a defendant’s base offense level ‘[i]f a dangerous weapon (including a firearm) was possessed.’ The enhancement applies whether a defendant actually or constructively possessed the weapon. A defendant constructively possesses a gun if he has ‘ownership, or dominion or control over the [firearm] itself, or dominion over the premises where the [firearm] is located.’” In this case, the Sixth Circuit determined the enhancement applied where the defendant’s co-conspirator testified that the defendant told him to “bring a gun” to a scheduled drug deal. The co-conspirator, in turn, told another co-conspirator to bring the weapon and he did.

*United States v. Gardner*, 417 F.3d 541 (6th Cir. 2005). “Where the quantity of drugs at issue cannot be easily determined, the district court may estimate the amount, but the ‘court must err on the side of caution.’” In this appeal, the defendant challenged whether the district court

erred in considering approximately \$16,000 as the proceeds of crack cocaine sales. The proceeds were found in the defendant's vehicle at the time of his arrest. Contrary to the defendant's position that \$11,000 of the \$16,000 were proceeds from the sale of furniture, the Sixth Circuit found sufficient evidence that the money came from the sale of crack cocaine. A later search of the defendant's apartment found jars and cooking utensils covered with cocaine residue, as well as packaging material and more crack cocaine. There was no evidence to support the defendant's claim that the cash was from the sale of other items. *But see United States v. White*, 563 F.3d 184 (6th Cir. 2009) (holding that the district court committed plain error by failing to notice a contradiction in the evidence establishing drug quantity, and not "taking the lesser of the two amounts to which [the witness] testified").

*United States v. Darwich*, 337 F.3d 645 (6th Cir. 2003).

[Section] 2D1.1(b)(1) orders sentencing courts to increase the defendant's sentence by two levels "[i]f a dangerous weapon (including a firearm) was possessed." The sentencing court is instructed to apply the two-level enhancement when a weapon is present, "unless it is clearly improbable that the weapon was connected with the offense." This requirement for a strict sentence enhancement "reflects the increased danger of violence when drug traffickers possess weapons." The government bears the burden of showing by a preponderance of the evidence that the defendant either "actually or constructively possessed the weapon." "Constructive possession of an item is the ownership, or dominion or control over the item itself, or dominion over the premises where the item is located." Once the government meets its burden of showing that the defendant possessed a weapon, a presumption arises that "the weapon was connected to the offense." The burden then shifts to the defendant to "show that it was 'clearly improbable' that the weapon was connected with the crime." The district court applies the two-level enhancement if the defendant fails to meet this burden. (Internal citations omitted).

In this appeal, the defendant argued that the weapons found in his home were not sufficiently linked to his drug activities so as to warrant application of the 2-level enhancement under §2D1.1(b)(1). The Sixth Circuit explained that while the defendant might be correct in his position that the government failed to demonstrate how these weapons were connected to the Canfield Market activities, the weapons surely could have been connected to the bagging operation that took place in the defendant's home. Accordingly, the Sixth Circuit determined that the district court did not err in applying the 2-level firearm enhancement.

*United States v. Johnson*, 344 F.3d 562 (6th Cir. 2003).

The sentencing guidelines provide that a defendant's base offense level should be increased by two levels if the court determines that he possessed a dangerous weapon during the commission of an offense involving drugs. The government must prove by a preponderance of the evidence "that (1) the defendant actually or constructively 'possessed' the weapon, and (2) such possession was during the commission of the offense." "Constructive possession of an item is the

‘ownership, or dominion or control’ over the item itself, ‘or dominion over the premises’ where the item is located.” If the offense committed is part of a conspiracy, it is sufficient if the government establishes “that a member of the conspiracy possessed the firearm and that the member’s possession was reasonably foreseeable by other members in the conspiracy.” Once it has been established by the government that a defendant was in possession of a firearm, the burden shifts to the defendant to establish that “it is clearly improbable that the weapon was connected to the offense.” The “safety-valve” provision of the sentencing guidelines states that “[i]f the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.” (internal citations omitted).

The Sixth Circuit explained that the district court properly enhanced the defendant’s sentence by two levels because the government proved by a preponderance of the evidence that it was reasonably foreseeable by the defendant that a co-conspirator would possess a firearm during the commission of a drug conspiracy. The Sixth Circuit further held that the district court’s determination that the defendant possessed a firearm rendered him ineligible to receive a 2-level safety valve reduction because he did not meet the conditions of §5C1.2(a)(2).

*United States v. Vasquez*, 352 F.3d 1067 (6th Cir. 2003). “Note 12 requires that courts use the agreed-upon quantity to determine the offense level, unless the defendant did not intend to provide or was not reasonably capable of providing the agreed-upon quantity. . . . [O]nce the government establishes the agreed-upon quantity, the defendant has the burden of proving that he or she either did not intend to provide or was not reasonably capable of providing that amount. ” In this case, the Sixth Circuit discussed the factors that might indicate a defendant’s intent and capability of providing an agreed-upon drug amount regardless of his role in the transaction; that is, “whether the defendant engaged in serious negotiations rather than mere ‘idle talk,’ whether the defendant participated in similar transactions on prior occasions, and whether the defendant hesitated before agreeing to the transaction.”

*United States v. Webb*, 335 F.3d 534 (6th Cir. 2003). “Under Sentencing Guidelines § 2D1.1(b)(1), the offense level may be increased by two levels if a dangerous weapon was possessed during an offense involving drugs. The commentary provides that the enhancement ‘should be applied if the weapon was present, unless it was clearly improbable that the weapon was connected with the offense.’ To start with, the government must prove by a preponderance of the evidence that the defendant actually or constructively possessed the weapon and that such possession was during the commission of an offense involving drugs. The burden then shifts to the defendant to prove that any connection between the drug offense and the weapon is clearly improbable.” In this appeal, the defendants challenged the sufficiency of the evidence supporting the enhancement by arguing that the government did not present sufficient evidence to establish that they were aware of the presence of the gun in their store. The Sixth Circuit observed that although the defendant’s wife testified that the gun belonged to her and that she kept the gun for protection, she was unable to identify the type of gun found at the defendant’s place of business or even describe what the gun looked like. Furthermore, the gun was found at the defendants’ adjacent business location where all of the undercover drug transactions

occurred. Based on this evidence, the Sixth Circuit determined the government had met its burden and the defendants failed to demonstrate that the gun's connection with the offense was clearly improbable.

*United States v. Powers*, 194 F.3d 700 (6th Cir. 1999). When a defendant in an LSD case is entitled to be sentenced under the "safety valve" established by 18 U.S.C. § 3553(f), statutory directions as to how the amount of the LSD should be determined do not control. Rather, in such cases, the LSD is to be weighed under the formula expressed in Amendment 488 to the federal sentencing guidelines. The guideline method is used because qualifying as a "safety valve" defendant removes that defendant from the scope of statutory (mandatory minimum) penalties.

*United States v. Ward*, 190 F.3d 483 (6th Cir. 1999). Even drug quantities involved in an acquitted count can be counted for sentencing purposes when the defendant's involvement with the drugs is proven by a preponderance of the evidence.

*United States v. Stevens*, 25 F.3d 318 (6th Cir. 1994).

The drug quantity table in § 2D1.1(c) . . . is used to determine the base offense level for defendants guilty of drug crimes. At each level of the table is a corresponding weight range for marijuana. For a defendant apprehended with a particular weight of marijuana leaves, determining the base offense level can be as easy as finding the level with which that weight corresponds.

When a person is apprehended with marijuana *plants*, however, the appropriate weight of the marijuana cannot be determined simply by weighing the plants, for Congress has criminalized possession of only consumable portions of the plant and thereby excepted the mature stalk. Following the drug quantity table is a provision that explains how to treat marijuana plants for sentencing purposes, which [the Sixth Circuit] refer[s] to as the 'equivalency provision.' . . .

When the equivalency provision is applied to 50 or more plants, it metes out a punishment that is usually much greater than that given for the consumable marijuana those plants produce. As the Guidelines state, the "average yield from a mature marihuana plant equals 100 grams of marihuana." Because of the equivalency provision, then, a person caught with 100 marijuana plants is sentenced as if he had been found with 100 kilograms of marijuana, even though the plants would probably produce only about 10 consumable kilograms of the drug. (internal citations omitted).

In this case, the district court erred because it calculated the drug quantity based on the number of marijuana plants the defendant's supplier grew instead of on the weight of the marijuana the two conspired to possess.

*United States v. Holmes*, 961 F.2d 599 (6th Cir. 1992). The Sixth Circuit held that the enhancement for cases involving 50 or more marijuana plants does not violate a defendant's right to equal protection.

## Part F Offenses Involving Fraud or Deceit

### §2F1.1 Fraud and Deceit<sup>2</sup>

*United States v. White*, 492 F.3d 380 (6th Cir. 2007). In prosecution for Medicare fraud by violation of the “related party” rule, the Sixth Circuit adopted the “net gain” method for calculating loss in such cases, as described in Fifth Circuit opinion *United States v. Jones*, 475 F.3d 701 (5th Cir. 2007).

*United States v. Sanders*, 95 F.3d 449 (6th Cir. 1996). “[Section] 2F1.1(b), which applies to fraud offenses, requires the district court to increase the defendant’s base offense level depending on the amount of loss caused by the fraud at issue.” This case involved a fraudulent insurance scheme. In calculating the amount of loss, the district court relied on the total amount of premiums collected by the conspiracy. On appeal, the defendant argued that only the amount of the victim’s actual loss should be considered for sentencing, but the court of appeals disagreed, explaining that:

[I]n fraudulent loan application cases, the victim may recoup some of the losses by selling collateral that the defendant used to secure the loan. In a fraudulent insurance scheme . . . , the victims are not left with any collateral to sell. The Sentencing Commission . . . [made] clear this distinction between secured loan fraud cases and other fraud cases in [the application notes to former §2F1.1]. Application Note 7(b) applie[d] only to fraudulent loan application and contract procurement claims and state[d] that the loss in those types of cases should be valued at the amount owed on the loan reduced by the amount recovered by the victim through the sale of assets used to secure the loan.

The Sixth Circuit explained that the Application Note clearly shows that the amount of loss should be the amount of premiums collected, and the entire amount involved in the conspiracy is attributable to the defendant, because “all the conspirators’ activities were reasonably foreseeable” to the defendant.

*United States v. Scott*, 74 F.3d 107 (6th Cir. 1996). “[Section 2F1.1] assigns a base offense level of six and then increases the offense level for different loss amounts beginning with \$2,000. . . . Subsection (b) of Application Note 7 states that in fraudulent loan application and contract procurement cases, the actual loss is offset by any collateral pledged to secure the loan or any amount the lending institution has recovered or can expect to recover.” In this case, the defendant used his position as a bank employee to defraud the bank, causing \$75,546.22 (including \$1,709 in interest on the account) to be placed into fictitious accounts that the defendant created. Prior to the termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled him to a \$64,712.40 commission. After he completed the negotiation, the bank retained the commission. At sentencing, the district court determined that the actual loss to the bank was \$74,546.22. The

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<sup>2</sup> (Deleted by consolidation with §2B1.1, effective November 1, 2001.)

defendant argued that the actual loss was only \$9,834.60 since the bank received \$64,712.40 from his commission. The court of appeals observed that the defendant's argument relied on the notion that collateral secured by the creditor in fraudulent-loan-transaction cases offsets the amount of the loss. The court's explanation for why this argument fails follows:

The fraudulent lease transactions here, like check-kiting, are distinct from fraudulent loan transactions in that the victim of the fraud was not given collateral to secure the fraudulently obtained funds. [The defendant's] commission was not the equivalent of collateral because it was earned and offered after the offense was detected. Subsequently making voluntary restitution is simply not the equivalent of posting collateral. Because the commission was earned after [the defendant] was caught, it is not an appropriate offset to the actual amount of loss and the district court properly calculated the loss for sentencing purposes at \$74,546.22.

*United States v. Sparks*, 88 F.3d 408 (6th Cir. 1996). "Under the Commentary, [the Sixth Circuit] has concluded that the amount of loss in a bank fraud case should ordinarily be determined as of 'the time the crime was detected rather than at sentencing.' The word 'loss' means and includes 'money which others may pay but are not obligated to pay on behalf of the defendant,' although a loss ordinarily 'should not include amounts that a bank can and does recover by foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies. . . .' In [this] case the debt was not repaid immediately by simple demand or through foreclosure, but by a third party more than a year after the discovery of the fraud. That [the defendant's] payments reduced the amount of the bank's ultimate loss does not alter the amount of 'actual loss' determinable at the time the crime was detected, because, at that time, the bank had no realistic expectation of 'immediate recovery [either] from the actual debtor,' or through 'legal remedies.'" (internal citations omitted).

*United States v. Flowers*, 55 F.3d 218 (6th Cir. 1995). In its first published opinion addressing the issue, the appellate court held that the amount of loss in a check-kiting case is determined "at the time the crime was detected, rather than at sentencing, and that defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by subsequently making voluntary restitution." The fact that the check-kiters made restitution to the bank prior to sentencing cannot alter the "fact of loss."

## **Part G Offenses Involving Prostitution, Sexual Exploitation of Minors & Obscenity**

**§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. Lay*, 583 F.3d 436 (6th Cir. 2009). The defendant argued that application of the use of a computer enhancement was impermissible where no discussion of sexual activity occurred via the computer. The court found even though the discussion of prohibited sexual

conduct with the minor occurred over the telephone, the enhancement was properly applied because the defendant and the minor first met and communicated over the Internet, the defendant's intent in developing the relationship was to have prohibited sexual conduct with the minor, and the defendant provided the minor with the phone used to continue the relationship.

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

*United States v. Corp*, 668 F.3d 379 (6th Cir. 2012). The defendant pleaded guilty to the sexual exploitation of a minor and production of child pornography. The district court applied the 4-level enhancement because the offense involved materials that depict sadistic or masochistic conduct. On appeal, the circuit court determined that application of the enhancement appeared to rely exclusively on the victim's description of a coerced sexual act involving urination that the defendant committed against her, even though that particular act was not depicted in any of the sexually explicit photographs the defendant produced. The court found that the undepicted act was irrelevant to the application of the enhancement. The government argued that the enhancement nevertheless should still apply because the defendant photographed the victim with his ejaculate on her face. The circuit court remanded for consideration whether that depicted conduct rises to the level of sadistic or masochistic conduct. It stated, however, that in this case, because the defendant was not actively engaged in the act of ejaculation, "the conduct that the government identifies as 'purposefully degrading and humiliating' . . . is not actually depicted in the photographs, although the photographs do show the results of that conduct."

*United States v. Brown*, 579 F.3d 672 (6th Cir. 2009). In determining whether the sentencing court correctly applied the special instruction at §2G2.1(d)(1) if the offense involved the exploitation of more than one minor, the court determined the legal standard for whether an image is "lascivious" permits "consideration of the context in which the images were taken, but limits the consideration of contextual evidence to the circumstances directly related to the taking of the images." Therefore, although the defendant took only one clearly lascivious photograph depicting one of his twin step-granddaughters lying nude on a bed touching her genitalia with her legs spread, the district court could properly look to more than the four corners of that photograph and consider the other numerous images showing both twins nude and focusing on their genitals in sequence and within minutes of the clearly lascivious image to determine that those images were also lascivious. The court found application of the enhancement at (d)(1) was appropriate because even though the sentencing court erred by taking into account other criminal acts committed by the defendant, including his possession of other pornographic images of minors, the error was harmless where the sentencing court explicitly stated it found all the images of the twins to be lascivious.

*United States v. Shafer*, 573 F.3d 267 (6th Cir. 2009). The defendant argued that the court erred in imposing a 2-level enhancement that applies when "the offense involved . . . the commission of a sexual act or sexual contact." The defendant claimed that the terms "sexual act" and "sexual contact" both require one individual to touch another and do not encompass self-masturbation. In an issue of first impression, the court concluded that self-masturbation

constitutes “sexual contact” sufficient to support the district court’s application of the enhancement. The court stated that “because Congress chose to use different language when defining ‘sexual contact,’ [than it used when defining ‘sexual act’] it seems clear that Congress intended not to limit ‘sexual contact’ in the same way it limited ‘sexual act.’”

*United States v. Martin*, 291 F. App’x 765 (6th Cir. 2008). The defendant, who held himself out to be a modeling instructor and photographer, pleaded guilty to production and possession of child pornography. The defendant appealed the application of the specific offense characteristic for the minor victims being in his care, custody, or supervisory control because his relationship to them was unlike the other caretakers listed in Application Note 3 as examples of those subject to the enhancement. The Sixth Circuit held the increase was properly applied because the specific offense characteristic is intended to have broad application and is to apply whether the minor was entrusted to the defendant temporarily or permanently.

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

*United States v. Bolton*, 669 F.3d 780 (6th Cir.), *cert. denied*, 133 S. Ct. 230 (2012). In an issue of first impression, the Sixth Circuit agreed with other courts and affirmed the imposition of an enhancement for distribution in a conviction for possession of child pornography. The defendant had used a peer-to-peer file-sharing program to conduct his offense, and his girlfriend testified that he was aware of the file-sharing nature of the program, and had chosen the particular program himself. The circuit court found that the evidence presented at the sentencing hearing was “more than adequate” to prove that the defendant knowingly distributed child pornography through the use of the program.

*United States v. Cunningham*, 669 F.3d 723 (6th Cir.), *cert. denied*, 133 S. Ct. 366 (2012). The district court imposed a within-guideline sentence for a defendant who pled guilty to receipt and distribution of child pornography. On appeal, the defendant argued that the enhancements in §2G2.2 are unreasonable and unreliable, based on their frequent application. The Sixth Circuit found that the Commission “moderated congressional influence on § 2G2.2 by implementing a base offense level near the statutory minimum” and undertook a proportionality review of the enhancements. The defendant also argued that the district court improperly relied on his legal conduct (*i.e.*, photos he had taken of his former girlfriend’s minor niece at a pool, focusing on her pubic area, that he had sent to other child pornographers, and a video of himself acting out a rape fantasy using a picture of a toddler during the act), to assess his risk of recidivism. The Sixth Circuit found that the sentencing court’s reliance on that conduct was appropriate because debate continues whether possession of child pornography correlates to the commission of a hands-on sexual offense, and “[u]ntil scientific evidence firmly discredits a purported causal link between the two kinds of offenses, we think it is acceptable for a district court to take a position on the question so long as the court appropriately explains its conclusion.” The court affirmed the sentence.

*United States v. McNerney*, 636 F.3d 772 (6th Cir. 2011). The district court applied the 5-level enhancement because the offense involved more than 600 images. On appeal, the defendant argued that only unique digital images can be counted in computing any enhancement for the number of images, although he admitted that duplicate hard copy images are counted separately under §2G2.2(b)(7). In an issue of first impression, the Sixth Circuit held that Congress has not differentiated between digital images and hard copy images for purposes of the enhancement. The court found that the enhancement applies equally to distribution and possession of child pornography, without being dependent on the capacity to distribute. Therefore, the defendant's "rationale for differentiating between duplicate hard copy images and duplicate digital images based on differences in distribution methods" failed.

*United States v. Battaglia*, 624 F.3d 348 (6th Cir. 2010). The sentencing court applied the 5-level enhancement because it found the defendant distributed child pornography for the receipt, or expectation of receipt, of a thing of value. The defendant argued the enhancement was double counting because both it and the counts of conviction punished him for the distribution of child pornography. The court held that the base offense level punishes the distribution, regardless of whether the defendant had an expectation of receiving an image in return, and the enhancement only applies to those who distribute child pornography because they have received, or expect to receive, child pornography in return. Therefore, it held that the sentence punishes distinct aspects of the offense conduct and no double counting had occurred.

*United States v. Lewis*, 605 F.3d 395 (6th Cir. 2010). The defendant argued on appeal that application of the 2-level enhancement for use of a computer constituted impermissible double counting because the use of a computer was a substantive element of the crime of conviction. The Sixth Circuit held that the fact that the statute allows computer use as one means of transporting the material does not mean that the use of a computer is a required element of the offense, and his use of a computer could appropriately be used as an offense characteristic to affect his sentence.

*United States v. Stall*, 581 F.3d 276 (6th Cir. 2009). The court found the sentencing court's explanation of the extent of a downward departure in a possession case to one day imprisonment and ten years supervised release was sufficient, where the sentence including the supervised release was 27 months longer than the total period of imprisonment and supervised release recommended by the government. The sentencing court noted that the lengthy period of supervised release would protect the public, restrict the defendant's freedom, deter the defendant and other similar offenders, and "otherwise vindicate the sentencing factors outlined by the [g]uidelines." Additionally, the court found that the sentencing court enumerated all of the 18 U.S.C. § 3553(a) factors and discussed the application at length to the facts in the case.

*United States v. Gawthrop*, 310 F.3d 405 (6th Cir. 2002). "Nothing in §2G2.2(b)(4) or its current commentary requires a temporal nexus between any instances of sexual abuse or exploitation." In this case, the defendant was convicted of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2). On appeal, the defendant argued that the district court erred in applying a 5-level enhancement under §2G2.2(b)(4) because his 1988 conviction for sexually abusing his daughter was too attenuated from the 1999 sexual abuse of his granddaughter to form a "pattern of activity" under §2G2.2(b)(4). The defendant claimed that

there must be a sufficient temporal nexus between instances of abuse or exploitation to establish a pattern of such activity. The issue on appeal was whether the 11-year span between these two events precluded each from being considered as a part of a pattern of such activity. The Sixth Circuit explained that the fact that the defendant's 1988 conviction could not be considered as part of his criminal history under §4A1.2 was of no consequence because §2G2.2(b)(4) does not require a temporal nexus between any instances of sexual abuse or exploitation. The abuse of his daughter and granddaughter — even though the events occurred 11 years apart — clearly constituted a “pattern of activity involving the sexual abuse or exploitation of a minor” sufficient to justify the district court's adjustment to his offense level.

## **Part J Offenses Involving the Administration of Justice**

### **§2J1.2            Obstruction of Justice**

*United States v. Roche*, 321 F.3d 607 (6th Cir. 2003). “[Section] 2J1.2(c) encompasses both the investigation and prosecution of a case.” In this case, the defendant was convicted of bank robbery in an earlier proceeding and submitted three documents to support his request for a downward departure. The trial court imposed a lighter sentence based in part upon the documents. The documents were later shown to be false. Because of the false documents, the defendant was charged with obstruction of justice, and the district court imposed an enhanced sentence for that conviction. The defendant argued that the false documents he submitted to the court for consideration in the sentencing procedure did not obstruct the investigation of the bank robbery case because “the case was for all intents and purposes ended.” The court of appeals disagreed because it determined that §2J1.2(c) encompasses both the investigation and prosecution of a case. The court of appeals explained that the sentencing stage of defendant's bank robbery conviction continued to entail the prosecution of the offense. Accordingly, the court upheld the application of the enhancement under §2J1.2(c).

*United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002).

When sentencing a defendant under § 2J1.2, the district court is “required to calculate the base offense level for the offense of conviction under *both* the ‘Obstruction of Justice’ guideline, U.S.S.G. § 2J1.2, and the ‘Accessory After the Fact’ guideline, § 2X3.1, and apply the greater of the two sentences.” It is not necessary for the government to prove facts sufficient to establish a defendant's guilt as an “Accessory After the Fact” in order to impose a sentence under § 2X3.1; the section merely serves as a tool to calculate the base offense level “for particularly serious obstruction offenses.” In fact, proof of the underlying offense is immaterial, since the point of the cross-reference is to “punish more severely . . . obstruction of . . . prosecutions with respect to more serious crimes.” (internal citations omitted).

In this case, the defendant argued that the district court should have applied §2J1.2 without also applying the §2X3.1 cross-reference provision. The court of appeals explained that application of the §2X3.1 cross-reference provision is mandatory and the defendant's claim that he was not

an accessory after the fact to the offense was irrelevant because he did not have to be guilty of the crime referenced in §2X3.1 for the higher sentence to apply.

*United States v. Levy*, 250 F.3d 1015 (6th Cir. 2001). “[Section] 2J1.2(a) provides the base offense level for obstruction of justice. The commentary to § 2J1.2 lists 18 U.S.C. § 1513 as one of the statutory provisions to which this guideline applies. . . . [That provision] criminalizes retaliations against witnesses that involve actual or *threatened* bodily injury. Accordingly, the base level applies to convictions under § 1513 regardless of whether bodily injury occurred. Hence, the [8]-level increase under § 2J1.2(b) for specific offense characteristics does not take into account conduct that was already taken into account in setting the base offense level.”

**§2J1.7**            Commission of Offense While on Release<sup>3</sup>

*United States v. Lanier*, 201 F.3d 842 (6th Cir. 2000). The 3-level enhancement under §2J1.7 applies even when the offense committed while the defendant is on release is failure to appear.

**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. Louchart*, 680 F.3d 635 (6th Cir. 2012). On appeal, the defendant argued that the district court erred when it enhanced his sentence based on the number of firearms that had been charged in the indictment although he had not admitted to that number during his plea. The district court concluded that he should be held accountable for the firearms charged in the indictment because he “affirmatively pled guilty to those counts.” The Sixth Circuit found that although a district court may enhance a sentence based on relevant conduct, the defendant’s guilty plea should not be treated as an admission of the number of firearms charged in the indictment because the quantity was not an element of the offense and the defendant did not admit to the quantity of firearms in the indictment, at the plea hearing or in the plea agreement. The court further found that “a guilty plea does not constitute an admission of facts included in an indictment when those facts were not necessary to sustain a conviction.” Therefore, it held that the facts cannot be used to increase a sentence without the court finding that the facts were supported by a preponderance of the evidence, and vacated the sentence.

*United States v. Freeman*, 640 F.3d 180 (6th Cir. 2011). The defendant was convicted of possession of stolen firearms and the district court applied a 4-level enhancement for trafficking. The application note in §2K2.1 states that the specific offense characteristic applies if the defendant knew or had reason to know that the firearms would be used by the individual unlawfully. The Sixth Circuit stated that the question of at what point the defendant should know or have reason to believe the person intended to use the firearm unlawfully for the enhancement to apply was an issue of first impression. It asserted that for this defendant,

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<sup>3</sup> This guideline was deleted and replaced by §3C1.3 effective November 1, 2006.

because the sale was made to the defendant's drug dealer early in the morning in exchange for heroin and cash, it was reasonable for the court to have applied the enhancement.

*United States v. Mosley*, 635 F.3d 859 (6th Cir. 2011). The Sixth Circuit determined that a state conviction for use of pepper spray amounts to a crime of violence for purposes of §2K2.1. It found use of the spray satisfies the residual clause in the definition in §4B1.2 because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." The defendant had argued that under *Begay v. United States*, 553 U.S. 137 (2008), the residual clause only covers purposeful, violent and aggressive conduct and the Michigan law could include even accidental discharges. The court stated that what matters for a crime of violence determination is the "ordinary case," not the "theoretical one." In addition, the court noted that it had earlier held unjustified use of pepper spray may constitute excessive force in violation of the Fourth Amendment, in *Grawey v. Drury*, 567 F.3d 302, 311 (6th Cir. 2009), and other courts of appeal have found that it is a dangerous weapon under §2B3.1(b)(2)(D) because it is "capable of inflicting death or serious bodily injury." (citing *United States v. Neill*, 166 F.3d 943, 949 (9th Cir. 1999)).

*United States v. Shields*, 664 F.3d 1040 (6th Cir. 2011). The Sixth Circuit held that because the Government did not demonstrate that the defendant's possession of a weapon was in connection with another felony, the enhancement at §2K2.1(b)(6) should not apply and therefore the sentence was procedurally unreasonable. The defendant was arrested when he was found in possession of a firearm after a police officer witnessed him get out of a vehicle with a handgun in his waistband. When the officer approached the defendant minutes later, he was sitting on a porch and threw the handgun into the grass. After he was detained, the police found his wallet on the porch, and two small bags of marijuana and cocaine residue were on top of the wallet. The court found that the crime of possession of a controlled substance is a felony under Tennessee law when the defendant has two or more prior drug convictions, as this defendant did, and therefore the district court did not err in finding that the defendant committed another felony offense. However, application of the specific offense characteristic was not appropriate because there was not a sufficient nexus between the firearm and the drugs, because the firearm did not facilitate or have the potential to facilitate that felony offense, as required by subsection (b)(6). See *United States v. McKenzie*, 410 F. App'x 943 (6th Cir. 2011).

*United States v. Coleman*, 627 F.3d 205 (6th Cir. 2010). The district court properly applied the 4-level enhancement in §2K2.1 for the defendant's possession of ammunition in connection with another felony. Noting that there was no binding case law directly on point, the court stated that §2K2.1 provides for an increased sentence "[i]f the defendant used or possessed any firearm or ammunition . . ." The court found that the defendant's possession of ammunition alone facilitated or had the potential to facilitate the felony drug trafficking offense because it increased the risk of violence by putting "the owner of the ammunition one step closer to having a loaded firearm."

*United States v. Sawyers*, 360 F. App'x 621 (6th Cir. 2010). The government appealed, arguing that the sentence was unreasonable because the sentencing court failed properly to consider the cross-reference at §2K2.1(c). The court held that the sentencing court erred in finding that it could not apply the cross-reference because there was not an underlying conviction

for the offense it was asked to cross-reference, and stated that it has long held that the court may consider acquitted conduct.

*United States v. Bartee*, 529 F.3d 357 (6th Cir. 2008). The Sixth Circuit addressed the issue of whether the defendant's prior conviction for criminal sexual contact with a minor could be considered a "crime of violence" for purposes of the enhancement at §2K2.1(a)(3). Ultimately, the Sixth Circuit concluded that the district improperly relied on the facts of the underlying conviction, rather than taking the "categorical approach" required by Supreme Court and circuit case law, and vacated the sentence. Additionally, the court discussed the Supreme Court's recent interpretation of § 924(c) in *Begay v. United States*, reaffirming "that the parallel provisions in the definitions of a 'violent felony' under the ACCA and a 'crime of violence' under USSG § 4B1.2(a)(2) should be interpreted in a consistent manner" and holding "that § 4B1.2(a)(2) also should be limited to crimes that are similar in both kind and in degree of risk to the enumerated examples –burglary of a dwelling, arson, extortion, or crimes involving the use of explosives."

*United States v. Baker*, 501 F.3d 627 (6th Cir. 2007). For a weapon to be considered part of a "collection" under §2K2.1(b)(2), which calls for an alternate base offense level of six if the weapon is solely for "sporting purposes or collection," factors must exist that show the weapon is truly a collectible item. If factors such as the weapon's being "stored in a manner showing that it was valued or treasured" or the weapon being "polished and treated as one would treat something that was part of a collection" are not present the reduction should not apply. "[S]entimental attachment alone does not earn the reduction. Not all heirloom firearms are possessed solely for collection."

*United States v. Burns*, 498 F.3d 578 (6th Cir. 2007). While merely possessing a firearm in the same residence as narcotics will not trigger the 4-level enhancement under §2K2.1(b)(6), if a "nexus" between the weapon and the narcotics can be established the enhancement applies. Proximity and access to the weapon are factors and "[t]he fact that the firearm was found in the same room where the cocaine was stored can lead to a justifiable conclusion that the gun was used in connection with the felony."

*United States v. Duckro*, 466 F.3d 438 (6th Cir. 2006). The Sixth Circuit held that the district court did err in increasing defendant's offense level when sentencing him under §2K2.1 for theft of firearms and use of firearms in connection with a drug transaction. The Sixth Circuit found that the district court committed impermissible double counting by applying a 2-level enhancement for stolen firearms to a sentence for the theft of firearms.

*United States v. Chandler*, 419 F.3d 484 (6th Cir. 2005). In this case, the Sixth Circuit determined that the defendant's Tennessee conviction for facilitation of aggravated assault constituted a crime of violence as defined in §4B1.2(a)(1). The Sixth Circuit explained that "by its nature, [the] conviction for facilitation of an aggravated assault inherently involves conduct that presents a serious potential risk of physical injury to another, and therefore constitutes a crime of violence as defined in § 4B1.2."

*United States v. Jackson*, 401 F.3d 747 (6th Cir. 2005). Section 2K2.1 “strictly enhances a sentence for possession of a ‘stolen’ firearm. The enhancement applies ‘whether or not the defendant knew or had reason to believe that the firearm was stolen . . . .’” In this case, the defendant maintained that the enhancement was improper because “he had not ‘stolen’ the gun, but had taken it with the intent to commit suicide. [The defendant] assumed the gun would eventually be returned to his father, and thus it was not ‘stolen.’” He contended that “stolen” means taking with the intent to permanently deprive the owner of his property. The Sixth Circuit, however, determined that a defendant’s intent to “permanently deprive” is not required in order for a firearm to be “stolen” for the purposes of the guideline.

*United States v. Boumelhem*, 339 F.3d 414 (6th Cir. 2003). “As used in subsection [(b)(5) . . . ‘another felony offense’ . . . refer[s] to offenses other than explosives or *firearms possession or trafficking offenses*. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.” In this case, the defendant argued that the enhancement did not apply because his offense of conviction — conspiracy to ship or transport firearms and ammunition in foreign commerce — was a “firearms trafficking offense.” The court of appeals agreed, explaining that “[a]s used in the application note, ‘firearms’ is a noun used as an adjective to modify ‘trafficking offenses.’” The court of appeals stated that “[c]onspiring to deliver firearms or ammunition for shipment to a common carrier in a manner that would violate 18 U.S.C. § 922(e) would clearly implicate an offense for firearms-related ‘commercial activity.’” Because the record did not indicate a situation like the one suggested in the application note— where firearms were possessed to facilitate the transport of other firearms — the court of appeals determined that the district court erred in enhancing the defendant’s sentence under §2K2.1(b)(5).

*United States v. Burke*, 345 F.3d 416 (6th Cir. 2003). “Section 2K2.1(b)(5)<sup>4</sup> instructs a court to increase a defendant’s felony offense by four levels ‘[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense[.]’ A court can apply this enhancement ‘only . . . if the Government establishes by a preponderance of the evidence that the defendant possessed or used a gun in connection with another felony.’ The section ‘was created in response to a concern about the increased risk of violence when firearms are used or possessed during the commission of another felony.’” In this case, the court of appeals found sufficient evidence to support the district court’s finding that guns were connected to the defendant’s VIN-flipping operation. “[T]he guns and the VIN paraphernalia were found in close proximity, [and] the illegal operation could have been protected by guns (*e.g.*, to fend off disgruntled car buyers, to deter thieves, and to defend the operation from the police) . . . .” (internal citations omitted).

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<sup>4</sup> In 2006, the Commission amended §2K2.1(b)(5) to resolve a circuit split concerning the application of the enhancement for the use of a firearm in connection with burglary and drug offenses. In the case of burglary, the enhancement applies to a defendant who takes a firearm in the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the burglary. In the case of a drug trafficking offense, the enhancement applies where the firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. *See* USSG App. C., Amd. 691.

*United States v. Clay*, 346 F.3d 173 (6th Cir. 2003). “[T]he presence of drugs in a home under a firearm conviction does not *ipso facto* support application of a § 2K2.1(b)(5)<sup>5</sup> enhancement[;]’ the district court must examine the specific facts of the case . . . to determine if the government established by a preponderance of the evidence that the defendant possessed or used a gun in connection with another felony. Although the ‘possession of firearms that is merely coincidental to the underlying felony offense is insufficient to support the application of § 2K2.1,’ [the Sixth Circuit] has expressly adopted the ‘fortress theory, which concludes that a sufficient connection is established if it reasonably appears that the firearms found . . . are to be used to protect the drugs or otherwise facilitate a drug transaction.’” (internal citations omitted). In this case, the Sixth Circuit determined the evidence was sufficient to support the district court’s finding that defendant used or possessed any firearm in connection with a drug offense. “[The defendant] was apprehended in an uninhabited apartment late at night with a bag of cocaine and a large amount of cash on his person. He testified that he was in the apartment to have his hair braided by a woman whom he had met ‘on the streets,’ although the alleged hairstylist was not in the building. Finally, [the defendant] was carrying a firearm.”

*United States v. Wheeler*, 330 F.3d 407 (6th Cir. 2003). “While violations of § 922(g)(1) are sentenced under U.S.S.G. § 2K2.1, an enhancement under subsection 2K2.1(a)(2) focuses on Defendant’s history of drug offenses, a different aspect of Defendant’s conduct than gun possession. Similarly, U.S.S.G. § 4A1.1(d) focuses not on gun possession alone, but on the fact that Defendant violated § 922(g)(1) while under another criminal justice sentence. Finally, the prior drug convictions for which Defendant received criminal history points under U.S.S.G. § 4A1.1 obviously included conduct other than gun possession. Although some of these points are based on the same drug convictions as Defendant’s enhancement under § 2K2.1(a)(2), the guidelines expressly provide that ‘[p]rior felony conviction(s) resulting in an increased base offense level under subsections . . . (a)(2) . . . are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).’” (internal citations omitted). In this case, the defendant contended that the district court double-counted because it used the same conduct — his possession of firearms — as the basis for sentencing him under §2K2.1, for enhancing his base offense level under §2K2.1(a)(2), for adding two criminal history points under §4A.1.1(d), and for adding three additional criminal history points under §4A1.1(a). The court of appeals explained that each of the applicable guidelines emphasizes different aspects of the defendant’s conduct other than gun possession or involved expressly-authorized double counting. As a result, the court of appeals did not find impermissible double counting.

*United States v. Raleigh*, 278 F.3d 563 (6th Cir. 2002). “[T]he Note 12 exception to the § 2K2.1(b)(4) enhancement d[oes] not apply, because of its plain language, to a defendant who was convicted as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and whose base offense level was determined under § 2K2.1(a)(4).”

*United States v. Cobb*, 250 F.3d 346 (6th Cir. 2001). “Sentencing guidelines should be read as they are written. As written, § 2K2.1(c)(1)(B) focuses on a defendant’s state of mind with respect to some other offense generally rather than on his or her state of mind with respect to some specific offense. If the defendant has the requisite state of mind with respect to that

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<sup>5</sup> Amendment 691 replaced this subsection with subsections (b)(6) and (c)(1) effective November 1, 2006.

general offense *and death results*, then § 2K2.1(c)(1)(B) is applicable.” In this case, the defendant argued that this “section requires knowledge of some specific offense, [but the Sixth Circuit explained that] the use of the word ‘another’ as the sole modifier of ‘felony offense’ does not command such a narrow reading. [The Sixth Circuit stated that] [a]s used in this context, ‘another’ merely means ‘additional, one more.’ While appellant would like the section to read ‘another *specific* felony offense,’ it does not.” (internal citations omitted).

*United States v. Mise*, 240 F.3d 527 (6th Cir. 2001). “[Section] 2K2.1(b)(5) provides for a four level enhancement ‘[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.’” (internal citations omitted). In this case, the defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal, he argued that the district court erred in applying a 4-level enhancement for possession or transfer with knowledge, intent, or reason to believe that the pipe bomb would be used or possessed in connection with another felony under §2K2.1(b)(5). The Sixth Circuit determined that the evidence supported the enhancement. “First, the evidence does not support a conclusion that [the defendant] knew that Ralph Case had abandoned his plan. Indeed, Diane Case testified that [the defendant] came to her home and said, ‘I have a pipe bomb that I went ahead and made for Ralph,’ thus indicating that [the defendant] made the bomb for Ralph rather than for Norman. [The defendant] also testified that ‘a pipe bomb is a destructive device used to hurt people.’ [The Sixth Circuit explained that] [a]lthough this is not conclusive alone, combined with the other evidence, it demonstrates [the defendant’s] knowledge or intent to produce the pipe bomb with intent to harm another.”

*United States v. Dalecke*, 29 F.3d 1044 (6th Cir. 1994). “[Section] 2K2.1 . . . identifies possession alone as a crime, separate and apart from unlawful receipt. The guideline’s title clearly refers to unlawful receipt and unlawful possession in the alternative. Thus, the Sentencing Commission recognized that the guideline would be applied to crimes involving mere possession of an illegal weapon, regardless of the circumstances under which it was acquired.”

## **Part L Offenses Involving Immigration, Naturalization, And Passports**

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

*United States v. Rede-Mendez*, 680 F.3d 552 (6th Cir. 2012). On appeal, the defendant argued that his prior conviction for “aggravated assault (deadly weapon)” under New Mexico law is not a crime of violence for purposes of the enhancement. The Sixth Circuit reiterated that to determine the nature of a prior conviction, it applies a categorical approach that looks to the statutory definition of the offense instead of the specific facts underlying a conviction, but that if it is possible to violate a statute in a way that would not be categorized as a crime of violence, it looks beyond the statutory language by examining certain court documents (the “Shepherd documents”) to determine whether the conviction depended on a crime of violence having been committed. The court stated that an assault can be committed under the state statute simply by the use of insulting language. Because the definition of aggravated assault is more broad than the generic definition, the Sixth Circuit found that the defendant’s conviction was not

categorically a crime of violence for purposes of §2L1.2. In looking at the Shepherd documents in this case, the court found that although the plea agreement and judgment from the state proceeding repeated the statutory language, they did not state which section of the statute had been violated. Therefore, the sentence was vacated and remanded.

*United States v. Soto-Sanchez*, 623 F.3d 317 (6th Cir. 2010). The defendant argued that the Michigan statute for attempted kidnapping is more broad than the generic offense contemplated by the guidelines and therefore that the sentencing court should have looked into the details of his conviction to determine whether it was properly considered a crime of violence for purposes of the 16-level enhancement in §2L1.2. The court found that under the categorical approach developed in *Taylor v. United States*, 495 U.S. 575 (1990), the sentencing court is required to consider only the fact of conviction and the statutory definition of the prior offense in its determination. Because the different types of conduct included in the state crime of kidnapping either fell within the generic meaning of kidnapping or included as an element the use of force, the court held that a sentencing court could not look beyond the statute, and affirmed the sentence.

*United States v. Hernandez-Fierros*, 453 F.3d 309 (6th Cir. 2006). The court held that the existence of a “fast-track” reduction in other districts did not create unwarranted disparity between those cases and the instant sentence imposed within the range of §2L1.2.

*United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). The court held that a conviction for "vehicular assault" in violation of Tenn. Code Ann. § 39-13-106(a) was not a "crime of violence" under §2L1.2(b)(1)(A)(ii) because it did not have an element that involved "the use, attempted use, or threatened use of physical force against the person of another."

*United States v. Zuniga-Guerrero*, 460 F.3d 733 (6th Cir. 2006). The court held that a prior conviction for using a communication facility to facilitate a controlled substance offense in violation of 21 U.S.C. § 843(b) was a drug trafficking offense subject to a 16-level enhancement because the conduct amounted to aiding and abetting a controlled substance offense.

*United States v. Bernal-Aveja*, 414 F.3d 625 (6th Cir. 2005). The fact that the defendant was charged with burglary of a dwelling did not establish that the defendant was convicted for such where his guilty plea was to a lesser included offense of generic burglary, which is not a "crime of violence" under §2L1.2(b)(1)(A)(ii).

*United States v. Ibarra-Hernandez*, 427 F.3d 332 (6th Cir. 2005). The court held that when calculating the guideline range under §2L1.2, even post-*Booker*, the district court lacked authority to depart downward from a 16-level enhancement on the ground that such an enhancement overstated the seriousness of the prior conviction.

*United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001). Defendant was previously convicted of second-degree sexual abuse, a misdemeanor. Based on the undisputed description of that crime in the PSR, the Sixth Circuit held that this conviction constituted sexual abuse of a minor and, therefore, an aggravated felony under 8 U.S.C. § 1101(a)(43). The fact that the prior

conviction was only a misdemeanor did not matter where the crime fell within the statutory definition of aggravated felony.

## **Part P Offenses Involving Prisons and Corrections Facilities**

### **§2P1.1**      Escape, Instigating or Assisting Escape

*United States v. Holcomb*, 625 F.3d 287 (6th Cir. 2010). The defendant escaped from a federal prison camp by walking through the front gate without permission. He contended that his return to the facility hours later, where a deputy pulled his car over, noticed the prison uniform, and transported him back to the facility, constituted a voluntary return and he was thus entitled to a 7-level decrease under §2P1.1(b)(2). In a matter of first impression for the court, it stated that it would join other circuits in finding that a “willingness to cooperate arising in connection with the possibility of imminent arrest is not the type of voluntary behavior” that the guideline’s downward departure is intended to reward, and affirmed the sentence.

### **§2P1.2**      Providing or Possessing Contraband in Prison

*United States v. Gregory*, 315 F.3d 637 (6th Cir. 2003). In this case, the court of appeals explained that for the purposes of applying the cross-reference in §2P1.2(c)(1), a “transfer” constitutes “distribution.”

## **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. Rutana*, 18 F.3d 363 (6th Cir. 1994). Section 2Q1.2 requires a 4-level increase if the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure. The court of appeals distinguished a “disruption” from an “impact,” explaining that a disruption is something more than a simple interference or interruption. The court of appeals determined that the evidence in this case indicated that the defendant’s actions resulted in a disruption of a public utility. The defendant discharged hazardous pollutants into a city sewer line that led directly to a waste water treatment plant, causing several bacteria kills at the plant and burning two plant employees. The defendant’s discharges caused the plant to violate its clean water permit. As a result of the defendant’s actions, the plant could not perform its essential function. The court of appeals stated that the expenditure of substantial sums of money is not required in order to prove that a disruption of a public utility occurred.

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

*United States v. Kuhn*, 345 F.3d 431 (6th Cir. 2003). “The application notes to each enhancement [under §2Q1.3] authorize downward or upward departures based on several factors.

For § 2Q1.3(b)(1)(B), applicable if the offense involved a discharge of a pollutant, [A]pplication [N]ote 4 contemplates an upward or downward departure based on ‘the harm resulting from the . . . discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation. . . .’ For § 2Q1.3(b)(4), applicable if the offense involved a discharge without a permit or in violation of a permit, [A]pplication [N]ote 7 contemplates an upward or downward departure based on ‘the nature and quantity of the substance involved and the risk associated with the offense. . . .’ “Section 2Q1.3(b)(1)(B) contemplates its application in the event of ‘a discharge,’ meaning a single discharge as does section 2Q1.3(b)(4).” “Section 2Q1.3(b)(1)(B) and section 2Q1.3(b)(4) are two distinct offense level adjustments within an offense guideline and are intended to be applied cumulatively. The guidelines instruct that ‘[t]he offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used.’”

## **Part S Money Laundering and Monetary Transaction Reporting**

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

*United States v. Anderson*, 526 F.3d 319 (6th Cir. 2008). The Sixth Circuit discussed the application of §2S1.1, holding that the district court properly applied §2D1.1 as a result of the cross-reference in §2S1.1(a)(1) to determine the base offense level, but erred in failing to apply the special offense characteristics in §2S1.1(b) to that base offense level to determine the total offense level.

## **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. Cseplo*, 42 F.3d 360 (6th Cir. 1994). In this opinion, the court of appeals explained why it was proper to aggregate the corporate tax loss and the individual tax loss in calculating the tax loss. *But see United States v. May*, 568 F.3d 597 (6th Cir. 2009) (holding that because the funds on which the defendant failed to pay taxes were only subject to being taxed once, the district court erred in counting the tax loss twice).

### **§2T1.4**      Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

*United States v. Goosby*, 523 F.3d 632 (6th Cir. 2008). The Sixth Circuit held that the district court properly based its tax loss calculation on IRS interviews with taxpayers over the defendant’s argument that such taxpayers “were not cross-examined” and their reliability “was not investigated.”

## Part X Other Offenses

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

*United States v. DeSantis*, 237 F.3d 607 (6th Cir. 2001). “[W]hether the § 2X1.1 reduction for mere attempts applies is controlled by whether ‘the defendant completed all the acts the defendant believed necessary for successful completion of the *substantive offense*.’ . . . [T]he relevant substantive offense for purposes of evaluating § 2X1.1(b)(1) attempts is the fraud itself, not fraudulent deprivation of a particular sum.”

## CHAPTER THREE: *Adjustments*

### Part A Victim-Related Adjustments

#### §3A1.1 Hate Crime Motivation or Vulnerable Victim

*United States v. Madden*, 403 F.3d 347 (6th Cir. 2005). In this case, the Sixth Circuit determined that three mentally ill people who sold their votes were not vulnerable victims under §3A1.1(b)(1). The defendant was convicted for violating the federal vote-buying statute by paying the three individuals to vote for a candidate for local office in a primary election. In determining that the vote-sellers were not vulnerable for the purposes of §3A1.1(b)(1), the Sixth Circuit reasoned as follows:

The Guidelines elsewhere acknowledge that for some crimes, including drug offenses, the victim is “society at large,” rather than any individual. If a drug buyer — who chooses to harm himself through drug consumption — is not a “victim,” then neither is someone who accepts payment for his vote. The vote-buying statute protects “society at large” from corruption of the electoral process; it does not protect, but rather restrains, individuals who value money more highly than their right to vote in a given election. Therefore, the vulnerable-victim enhancement was inappropriate here, because the alleged victims were not victims at all.

*United States v. Curly*, 167 F.3d 316 (6th Cir. 1999). “[An] adjustment [under §3A1.1] applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller’s position in a bank.

In an effort to resolve the inconsistent application of section 3A1.1(b), the United States Sentencing Commission deleted the ‘targeting’ language from the commentary following section 3A1.1 on November 1, 1995. The revised commentary states that the vulnerable victim provision ‘applies to offenses involving an unusually vulnerable victim in which the defendant

knows or should have known of the victim's unusual vulnerability.' Accordingly, most courts eliminated the 'targeting' element for sentencing enhancement purposes and simply require that the defendant knew of the victims' vulnerabilities. Because section 3A1.1 no longer requires proof of 'targeting' in light of the November 1, 1995 amendments to the sentencing guidelines, [the Sixth Circuit's] 1994 decision requiring proof of 'targeting' [(*United States v. Smith*, 39 F.3d 119, 124 (6th Cir.1994))] is no longer good law."

### **§3A1.2**      Official Victim

*United States v. Hudspeth*, 208 F.3d 537 (6th Cir. 2000). "[A]pplication of § 3A1.2(a) depends on the victim's status, not on whether he or she suffered harm. . . . [F]ederal criminal sentences may be enhanced pursuant to § 3A1.2(a) if the underlying conduct was motivated by the victim's status as a state or local government employee. . . . The meaning of § 3A1.2(a) is clear and . . . the history of the provision affirms [the] conclusion that conduct motivated by the work of state and local employees, or by their status as employees, is covered by this guideline."

### **§3A1.3**      Restraint of Victim

*United States v. Smith*, 320 F.3d 647 (6th Cir. 2003). "Section [3A1.3] . . . adjusts the base sentence upward by two levels where 'the victim was physically restrained in the course of the offense,' but also directs the court 'not [to] apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself.' Thus, in most circumstances where the victim is abducted, the limiting provision of §3A1.2 prevents the sentencing court from applying enhancements under both § 2B3.1(b)(4)(A) and § 3A1.2 since restraint often occurs as part of an abduction."

## **Part B Role in the Offense**

### **§3B1.1**      Aggravating Role

*United States v. Anthony*, 280 F.3d 694 (6th Cir. 2002). In this opinion, the Sixth Circuit discussed how to apply §3B1.1 and explained why the enhancement was not warranted where the general manager of a manufacturer of cigarette lighters removed safety devices from disposable cigarette lighters. About the distinction between "participants" and "non-participants," the Sixth Circuit explained that the cases on this issue "uniformly count as participants persons who were (i) aware of the criminal objective, and (ii) knowingly offered their assistance." With respect to the guideline's language "otherwise extensive," the Sixth Circuit explained that this was an alternative to the involvement of five or more participants, and held that in determining whether the language applies, ". . . the phrase authorizes a four-level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants." Additionally, the court addressed the method of determining the contributions of participants and non-participants, discussing Application Note 3 to the guideline and concluding that "the test for functional equivalence requires that a sentencing court consider how significant the role and performance of an unwitting participant was to the ultimate criminal objective."

### **§3B1.2**      Mitigating Role

*United States v. Groenendal*, 557 F.3d 419 (6th Cir. 2009). The Sixth Circuit held that the district court erred in refusing to apply a downward adjustment for the defendant's minor role in the offense of possession of child pornography. The court held that the adjustment can apply to convictions involving only one participant charged with criminal conduct because the guideline does not require that more than one participant be charged with a crime. "Even a sole defendant charged with criminal conduct is entitled to a reduction under § 3B1.2 if his conduct [wa]s less culpable than others involved in relevant conduct." In this case, because the defendant uploaded images to a computer website, the court found the defendant "cannot both be guilty of trafficking and also be the only participant in all relevant conduct. . . . Such activity cannot happen in isolation; the images must be sent to someone and received from someone." Therefore, the district court erred by not considering the reduction, and the case was remanded for resentencing.

*United States v. Campbell*, 279 F.3d 392 (6th Cir. 2002). "For sentencing purposes, '[t]he salient issue is the role the defendant played in relation to the activity for which the court held him or her accountable.' Defendants may be minimal or minor participants in relation to the scope of the conspiracy as a whole, but they are not entitled to a mitigating role reduction if they are held accountable only for the quantities of drugs attributable to them. In this case, the district court held [the defendant] accountable for at least 100, but less than 200 grams of cocaine, which was the 'amount of drugs that [the defendant] actually purchased and distributed or used.' The full amount of cocaine involved in the conspiracy was fifteen kilograms. Because the district court held [the defendant] accountable only for the quantity of drugs attributable to him, [the Sixth Circuit held] that the district court correctly denied [the defendant's] request for a downward adjustment pursuant to U.S.S.G. § 3B1.2. Moreover, [the Sixth Circuit has] held that downward departures under § 3B1.2 are available only to a party who is 'less culpable than most other participants' and 'substantially less culpable than the average participant.'"

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

*United States v. May*, 568 F.3d 597 (6th Cir. 2009). The court held that the district court erred by enhancing the defendant's sentence based on §3B1.3. The court reiterated that the abuse-of-trust enhancement can only apply "where the defendant abused a position of trust with the victim of his charged conduct." The court stated that in this case, the government had properly identified the IRS as the victim of the defendant's scheme. The court concluded, however, that the defendant was not in a position of trust in relation to the government. According to the court, the defendant "had no discretion. The law simply required [him] to collect the payroll taxes from his employees and transfer the funds to the IRS."

*United States v. Gilliam*, 315 F.3d 614 (6th Cir. 2003). "A 'position of trust' under the Guidelines is one 'characterized by professional or managerial discretion.' Moreover, '[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.' . . . '[T]he level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.'" In this case, the defendant maintained that he did

not abuse the public trust because he was employed by a government contractor rather than the government. The court of appeals rejected this distinction, observing that the defendant worked as a drug counselor for an employer that was under contract with the United States Probation Office to provide counseling services to individuals placed on probation. In this capacity, the court explained, the defendant occupied a position which implied that he served an essentially public function involving considerable responsibility with respect to both the government and society at large. The court stated that a “position of trust” arises almost as if by implication “‘when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other’s presumed better judgment some control over their affairs.’” As a probation counselor under contract with the United States Probation Office, the court of appeals concluded, the defendant was employed in a position of considerable trust, a position he abused by attempting to engage in illicit drug transactions with a client. Accordingly, the court of appeals found the enhancement was properly applied.

*United States v. Humphrey*, 279 F.3d 372 (6th Cir. 2002). “The . . . Guidelines commentary describes a position of trust as one ‘characterized by professional or managerial discretion ( *i.e.*, substantial discretionary judgment that is ordinarily given considerable deference).’ The application note specifies that the adjustment would apply to ‘a bank executive’s fraudulent loan scheme’ but not ‘embezzlement or theft by an ordinary bank teller.’ . . . [T]he level of discretion rather than the amount of supervision is the definitive factor in determining whether a defendant held and abused a position of trust. This discretion should be substantial and encompass fiduciary-like responsibilities.” In this appeal, the defendant argued that the adjustment should not apply to the position of vault teller. In addressing the question as a matter of first impression, the Sixth Circuit stated that a vault teller fell somewhere in the middle of the spectrum between a bank teller and a bank executive. The Sixth Circuit observed that the defendant’s level of discretion was greater than that of a regular teller but considerably less than that of a bank president. The Sixth Circuit explained that although the defendant appeared to have been under light or no supervision, she was not authorized to exercise substantial professional or managerial discretion in her position. The defendant did, however, take advantage of her seniority to other bank employees to control the daily cash count and to handle food stamps, but she was not in a trust relationship with the bank such that she could administer its property or otherwise act in its best interest. The Sixth Circuit determined that the defendant abused her clerical position and the bank’s apparent trust in her to embezzle cash from the bank, but concluded that she did not hold a position of trust. Consequently, the enhancement did not apply.

*United States v. Brogan*, 238 F.3d 780 (6th Cir. 2001). “A position of trust under the guidelines is one ‘characterized by professional or managerial discretion.’ The guidelines continue by explaining that ‘[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.’ Although a number of cases on this issue look to how well the individual in fact was supervised, [the Sixth Circuit has] recently reaffirmed that ‘the level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.’ The ‘position’ must be one ‘characterized by substantial discretionary judgment that is ordinarily given considerable deference.’”

*United States v. Godman*, 223 F.3d 320 (6th Cir. 2000). In this case, the defendant who pleaded guilty of counterfeiting Federal Reserve notes challenged the application of the enhancement based on his computer skills. The defendant had no formal computer training and only used an off-the-shelf software program which he learned in less than a week. The Sixth Circuit determined that the defendant's computer skills could not reasonably be equated to the skills possessed by the professionals listed in Application Note 3. The Sixth Circuit's explanation of why the defendant's computer skills were not special for the purpose of §3B1.3 follows:

Such [special] skills are acquired through months (or years) of training, or the equivalent in self-tutelage. Computer skills on the order of those possessed by [the defendant], by contrast, can be duplicated by members of the general public with a minimum of difficulty. Most persons of average ability could purchase desktop publishing software from their local retailer, experiment with it for a short period of time, and follow the chain of simple steps that [the defendant] used to churn out counterfeit currency. [The defendant's] computer skills thus are not "particularly sophisticated" . . . .

At a time when basic computer abilities are so pervasive throughout society, applying § 3B1.3 to an amateurish effort such as [the defendant's] would threaten to enhance sentences for many crimes involving quite common and ordinary computer skills. The Guidelines contemplate a more discriminating approach.

## **Part C Obstruction**

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

*United States v. Macias-Farias*, 706 F.3d 775 (6th Cir. 2013). The Sixth Circuit remanded a sentence because it found procedural error in the district court's application of an obstruction of justice enhancement. The court held that a district court must complete two tasks when applying the enhancement at §3C1.1; it must identify the portions of the testimony that is perjurious and it must either make a specific finding for each element of perjury or "make a finding that encompasses all of the factual predicates for a finding of perjury." Because the district court had concluded that the defendant perjured himself at trial, but did not identify the specific part of the testimony that it found constituted perjury, the Sixth Circuit stated that on remand, the district court must "identify with particularity the statements made . . . at trial that it considers to be perjurious, and [t]o make a specific finding that each such statement upon which it relies satisfies each of the elements of perjury."

*United States v. DeJohn*, 368 F.3d 533 (6th Cir. 2004). In this case, the defendant argued that "his perjury was insufficiently material to support an obstruction-of-justice enhancement," but the Sixth Circuit explained that "it is hard to imagine a perjurious statement more material to a conviction for conspiracy to distribute drugs than one claiming never to have distributed drugs."

*United States v. Hover*, 293 F.3d 930 (6th Cir. 2002). In this appeal, the Sixth Circuit determined that the defendant's perjured testimony in a prior trial which ended in mistrial could be considered obstruction of justice in sentencing him after the second prosecution for the same charges.

*United States v. Lawrence*, 308 F.3d 623 (6th Cir. 2002). "For a district court to enhance a defendant's sentence under § 3C1.1, the court must: 1) identify those particular portions of defendant's testimony that it considers to be perjurious; and 2) either make a specific finding for each element of perjury or, at least, make a finding that encompasses all of the factual predicates for a finding of perjury. . . . [T]he second requirement was held by the Supreme Court to be necessary under § 3C1.1. The first of these requirements, however, is a rule of our own creation to assist us in our review of sentence enhancements under § 3C1.1, though we have never insisted on a rigid adherence to its terms. Thus, a district court's findings will be adequate if: 1) the record is sufficiently clear to indicate which statements the district court considered perjurious; and 2) the district court found that the statements satisfied each element of perjury."

*United States v. Brown*, 237 F.3d 625 (6th Cir. 2001). "The obstruction adjustment does not . . . apply unless [the defendant] acted 'willfully.' It has been said that the term 'willful' has 'no fixed meaning.' However, the term generally connotes some kind of deliberate or intentional conduct." Here, the defendant was convicted of producing and possessing child pornography. Prior to the defendant's arrest, he threatened to stab a child whom he had repeatedly molested. On appeal, the defendant argued that the threats to the child did not warrant application of the enhancement under §3C1.1 because at the time he made the threats, the investigation had not focused on him so he could not have been *willfully* obstructing the investigation until after his arrest. The Sixth Circuit disagreed and joined the Fifth and Eighth Circuits in holding that "the obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the 'correct belief' that an investigation . . . is 'probably underway.'" The Sixth Circuit found that the defendant's chat room comment, "God, I hope he don't have any of my privates on there," was sufficient evidence to make it clear that he knew prior to his arrest that he was under investigation and concluded that application of the level enhancement under §3C1.1 was proper.

*United States v. Mise*, 240 F.3d 527 (6th Cir. 2001). "An adjustment for obstruction of justice applies to a defendant 'committing, suborning or attempting to suborn perjury.' A witness perjures himself if he 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.' . . . [To apply the enhancement], the district court . . . [must] fulfill two requirements: 'first, it must identify those particular portions of the defendant's testimony that it considers to be perjurious, and second, it must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury.'"

*United States v. Perry*, 30 F.3d 708 (6th Cir. 1994). Here, the Sixth Circuit determined that an enhancement under §3C1.1 constituted double-counting where the district court based the enhancement on the defendant's failure to appear clean-shaven for trial as directed by the district court. The Sixth Circuit stated that the defendant's contemptuous conduct could not serve as the basis for both an obstruction of justice enhancement and a contempt sentence. Having already

sentenced the defendant for contempt, the Sixth Circuit explained, “it was not appropriate for the court to enhance the sentence for the underlying offense based on the same conduct involved in the contempt.”

### **§3C1.2**      Reckless Endangerment During Flight

*United States v. Byrd*, 689 F.3d 636 (6th Cir. 2012). The defendant was a passenger in a getaway car after having committed bank robbery. The district court found the 2-level enhancement applied for reckless endangerment because the record “established ‘more than just a reasonable foreseeability of reckless conduct to get away’” because the defendant had been the original getaway driver before the co-defendants switched cars, and had fled on foot after his co-defendant crashed the car. The court also observed that the defendant had a record of vehicular flights from law enforcement including a prior flight with the same co-defendant years before. The defendant argued on appeal that there was a lack of direct evidence that he caused or encouraged the co-defendant to drive recklessly. The Sixth Circuit agreed, but held that direct evidence is not required, but may be inferred from “all the circumstances surrounding the robbery and flight.” The court affirmed the sentence.

*United States v. Dial*, 524 F.3d 783 (6th Cir. 2008). The Sixth Circuit held that “the district court must find a nexus between the offense for which the defendant was convicted and the conduct that involved reckless endangerment during flight.” The Sixth Circuit therefore adopted a five-part test for determining whether a §3C1.2 enhancement applies: “[T]he government must show that the defendant (1) recklessly, (2) created a substantial risk of death or serious bodily injury, (3) to another person, (4) in the course of fleeing from a law enforcement officer, (5) and that this conduct ‘occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.’” The latter criterion is a direct quotation from §1B1.3, which defines relevant conduct for guideline purposes. However, the court noted, the test “do[es] not suggest that causation should enter into the analysis” and therefore “[t]he government need not demonstrate that the underlying offense caused either the reckless endangerment during flight or the flight itself, only that a sufficient nexus lie between the underlying offense and the reckless flight.”

*United States v. Hazelwood*, 398 F.3d 792 (6th Cir. 2005). Section 3C1.2 provides for a 2-level enhancement for “reckless endangerment during flight.” The Sixth Circuit determined the enhancement applied to a high-speed case that followed a bank robbery. The evidence before the district judge included a video tape of a law enforcement officer who pursued the defendant. The officer on the videotape stated that the defendant was traveling in excess of 90 miles an hour. Based on the video tape, the district judge “found that the road was wet, that [the defendant] crossed the double yellow line several times while traveling at high speed, that there were numerous other vehicles on the road, and, most importantly, that at least one other car was forced to leave the pavement as [the defendant] abruptly turned right with his left blinker flashing.” The court of appeals stated that the district judge’s findings supported a finding of reckless endangerment.

## Part D Multiple Counts

### §3D1.2 Groups of Closely Related Counts

*United States v. Martin*, 438 F.3d 621 (6th Cir. 2006). The defendant pleaded guilty to production and possession of child pornography. The PSR indicated the applicable guideline range was 324 to 405 months. The court sentenced the defendant to 360 months for the production and 120 months for the possession, to run concurrently. The defendant appealed, arguing the district court failed to group the counts properly. The Sixth Circuit reversed and remanded, finding that although the court had properly applied a cross-reference in the possession guideline to the production guideline, it then failed to apply the production guideline in its entirety, leading to the improper application of two specific offense characteristics and therefore an improper adjusted offense level. The district court had also failed to group the counts under §3D1.2(a) even though the production count and the possession count involved the same victim and the same transaction.

*United States v. Green*, 305 F.3d 422 (6th Cir. 2002). Here, the Sixth Circuit sided with the other circuits that have determined that “grouping the failure to appear offense with the underlying offense for sentencing is appropriate based on the guidelines and the commentary.”

### §3D1.4 Determining the Combined Offense Level

*United States v. Quinn*, 576 F.3d 292 (6th Cir. 2009). See §1B1.10.

*United States v. Valentine*, 100 F.3d 1209 (6th Cir. 1996). In this opinion, the Sixth Circuit determined that seven units are not “significantly more than five” for the purposes of the commentary to §3D1.4. In reaching this conclusion, the Sixth Circuit explained the following:

The Guidelines established an elaborate system to weigh all, or virtually all, of the facets of an offender’s criminal activities. The base offense level assigned to a particular offense generally accounts for the seriousness of the offense, while the sections for specific offense characteristics and the various sections on adjustments for offender and victim characteristics account for these other variables. Section 3D1.4, on the other hand, is meant to account solely for the number of different offenses or groups of offenses that an offender committed. Departure from the chart in this section should thus be based solely on the number of units assigned to an offender, not the underlying nature of the units.

To approach this chart otherwise and interpret its concept of “significantly more than five” to involve some subjective weighing of the *social* significance of the underlying offenses usurps the role assigned to the Sentencing Commission in setting base offense levels, and turns the section into a catch-all provision justifying departure whenever a court simply believes an offender with more than five units deserves additional punishment. The whole point of the Guidelines is to reduce or remove this type of discretion from the sentencing process and assign certain numerical values to certain facets of an offender’s criminal activities. To

confound the facet of the Guidelines dealing with the magnitude of criminal activity with other facets of the Guidelines, such as the subjective social harm caused by the particular type of offenses involved, reduces the precision and uniformity of sentences.

## **Part E Acceptance of Responsibility**

### **§3E1.1**      Acceptance of Responsibility

*United States v. Collins*, 683 F.3d 697 (6th Cir.), *cert. denied*, 133 S. Ct. 571 (2012). On appeal, the defendant argued the district court erred in finding the government’s refusal to move for an additional 1-level reduction was not arbitrary. Although the defendant had accepted responsibility, the government refused to move for the reduction because it argued that the defendant required it to litigate his motion to suppress. The Sixth Circuit found that §3E1.1 permits the government to move for the additional level if the defendant timely notifies authorities of his intention to enter a plea of guilty, thereby allowing the government to avoid preparing for trial and permitting the government to allocate its resources efficiently. By requiring the government to litigate the motion to suppress, the defendant did not allow the government to efficiently allocate its resources, and the court found that avoiding litigation is rationally related to this legitimate government interest.

*United States v. Mackety*, 650 F.3d 621 (6th Cir. 2011). The Sixth Circuit held that the sentence was procedurally unreasonable because the district court failed to properly apply the guidelines by having implemented a blanket policy refusing defendants from receiving the additional 1-level reduction under §3E1.1 if that defendant waited until the pretrial conference to plead guilty. The court found that the policy usurps the discretion given to the government by Congress because it influenced the government not to move for or address a §3E1.1 reduction. Similarly, the Probation Office did not recommend a reduction because the defendant’s plea was “untimely” under the court’s policy. The Sixth Circuit advised the policy should be discontinued by any district court as inconsistent with congressional intent, and vacated the sentence and remanded for resentencing.

*United States v. Forrest*, 402 F.3d 678 (6th Cir. 2005). “The Sentencing Commission has explained that § 3E1.1 ‘is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.’ The application note containing this statement goes on to say that ‘[c]onviction by trial, however, does not automatically preclude a defendant from consideration’ for a § 3E1.1 reduction: ‘In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt . . . In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.’” (internal citations omitted). In this case, the court of appeals determined that the defendant’s situation was not one of the rare situations contemplated by the commentary to §3E1.1 where the defendant clearly demonstrated an acceptance of responsibility though pre-trial statements and conduct even though he proceeded to trial. The defendant

vigorously disputed his factual guilt at trial, arguing through his lawyer that the government’s witness lied about the defendant’s participation in the robbery, about simply being in the wrong place at the wrong time, and about ownership of money found on his person.

*United States v. Angel*, 355 F.3d 462 (6th Cir. 2004). The Sixth Circuit discussed several decisions in this opinion that illustrate circumstances where an acceptance-of-responsibility reduction is inappropriate. The Sixth Circuit then applied those decisions to the instant case and determined that the defendant was not entitled to a reduction for acceptance of responsibility. The Sixth Circuit explained that the defendant obstructed justice and made no effort to repudiate the obstruction, and that he would not admit that he offered a third party \$50,000 to kill the government witness even though the district court found that this event occurred. The Sixth Circuit stated that attempting to have a witness killed is far more serious than the conduct considered in prior appeals — *i.e.*, ignoring government orders, lying about a legal name and criminal history, and making false statements to the grand jury. The Sixth Circuit observed that the defendant’s obstructive conduct occurred after he was indicted and that the defendant never tried to undo that conduct. In addition, he provided no assistance to the authorities and proceeded to trial to challenge the essential factual elements of guilt. The Sixth Circuit characterized the defendant as “precisely the type of defendant mentioned in the notes to § 3E1.1 ‘who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.’”

*United States v. Brown*, 367 F.3d 549 (6th Cir. 2004). “[P]utting the government to its burden [does] not automatically preclude a reduction under § 3E1.1.”

*United States v. Smith*, 245 F.3d 538 (6th Cir. 2001). “Pursuant to the sentencing guidelines, a defendant may decrease his offense level by two levels if he ‘clearly demonstrates acceptance of responsibility for his offense.’” The defendant in this appeal argued that the district court erred in not granting him the additional one level for acceptance of responsibility under §3E1.1(b). The court determined that the defendant’s delay until the eve of the trial to enter a guilty plea compelled the government to prepare its entire case for trial. Consequently, the court upheld the 2-level reduction for acceptance of responsibility and affirmed the defendant’s sentence. *See also United States v. Lapsins*, 570 F.3d 758 (6th Cir. 2009) (holding that the government was not required to move for the third level where the government did not believe that the defendant had fully accepted responsibility for his actions).

*United States v. Castillo-Garcia*, 205 F.3d 887 (6th Cir. 2000). “Application Note 3 to the Guidelines instructs that while ‘[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility,’ this evidence may nonetheless ‘be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.’ Thus, merely pleading guilty does not entitle a defendant to an adjustment ‘as a matter of right.’” (internal citations omitted).

*United States v. Roper*, 135 F.3d 430 (6th Cir. 1998). The district court did not err in denying the defendant an acceptance of responsibility reduction when the defendant fabricated an entrapment defense.

*United States v. Surratt*, 87 F.3d 814 (6th Cir. 1996). “The defendant bears the burden of showing by a preponderance of the evidence that the reduction is justified. A defendant who pleads guilty is not entitled to a reduction as a matter of right. However, the ‘[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) . . . , will constitute significant evidence of acceptance of responsibility. . . .’” (internal citations omitted). In this appeal, the appellate court reversed the district court’s decision awarding the defendant a 2-level reduction for acceptance of responsibility under §3E1.1. The appellate court noted that whether the defendant has accepted responsibility for purposes of the guideline reduction is a factual determination which is accorded great deference, subject to reversal on appeal only if the decision was clearly erroneous. However, upon review of the entire record, the appellate court determined that the defendant had not carried his burden of showing by a preponderance of the evidence that he merited the reduction. The presentence report stated that the defendant persistently attempted to deny and minimize his criminal conduct. It specifically noted that the defendant blamed his abuse of his wife and daughter and his act of ordering child pornography on drug abuse. The appellate court explained that the district court “did not refer to the ‘appropriate considerations’ for such a determination listed in application note 1 to § 3E1.1.”

## **CHAPTER FOUR:** *Criminal History and Criminal Livelihood*

### **Part A Criminal History**

#### **§4A1.1**      Criminal History Category

*United States v. Shor*, 549 F.3d 1075 (6th Cir. 2008). In this appeal, the court held that a probationary period under Michigan’s youthful trainee statute under which the defendant pled guilty should be counted for criminal history purposes under §4A1.1(c). The key consideration under the guidelines is whether the defendant’s guilt was adjudicated or whether the conviction was expunged, and under the state law, a guilty plea was a precondition of eligibility into the youthful trainee program.

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

*United States v. Galaviz*, 645 F.3d 347 (6th Cir. 2011). The Sixth Circuit held that the 15-year time period for the counting of prior sentences exceeding one year and one month for criminal history purposes was procedurally unreasonable because the district court could not include any time that the defendant was incarcerated pending a mere determination whether a parole violation had occurred. The defendant had a prior Michigan state conviction from 1987 from which he was paroled on November 12, 1991. The instant offense for weapon possession took place on December 27, 2006, approximately six and a half weeks after the 15-year cutoff, as calculated by his November date of parole for that offense. However, on December 19, 1991, the defendant had been picked up on a parole violation based on a firearms charge. He was never convicted of that charge and parole was reinstated in February 1992, a date within 15 years of the instant offense. The court noted that an application note in §4A1.1 states that a revocation

of parole may affect the time period under which certain sentences are counted, and may bring a past conviction within that relevant time period. However, the court asserted that under Michigan law, a “revocation of parole” means something beyond detention on suspicion of a parole violation, and because the defendant was not ever found to have violated his parole and it was reinstated days after he was charged, the prior conviction could not be used for his criminal history calculation.

*United States v. Galvan*, 453 F.3d 738 (6th Cir. 2006). “To calculate criminal history points ‘[i]n the case of a prior revocation of probation,’ a court must ‘add the original term of imprisonment to any term of imprisonment imposed upon revocation.’ . . . [Section] 4A1.2(k)(1) contemplates that, in calculating a defendant’s total sentence of imprisonment for a particular offense, the district court will aggregate any term of imprisonment imposed because of a probation violation with the defendant’s original sentence of imprisonment, if any.”

*United States v. Martin*, 438 F.3d 621 (6th Cir. 2006). “[A] defendant seeking to show that offenses are related must prove that the crimes were jointly planned or that commission of one crime entailed committing the other crime or crimes.” “[C]rimes are related ‘only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another.’” “Moreover, ‘prior convictions are not ‘related’ merely because they are part of a crime spree.’” In this case, the defendant maintained that his four prior convictions for car theft were related. The Sixth Circuit observed that the car thefts took place in two different states on four separate occasions and that the defendant had presented no evidence that show the offenses were related. The Sixth Circuit stated that the “‘the simple sharing of a modus operandi cannot alone convert [separate offenses] into one offense by virtue of their being a single common scheme or plan.’ To the contrary, similar substantive crimes committed on different dates involving different victims are not considered related even if each ‘was committed with the same purpose or common goal,’ usually that of acquiring money. Although [the defendant] used the same tactics in stealing all four automobiles, the victim in each crime was different, and the commission of one theft did not necessarily entail committing the other thefts.” As a result, the car thefts were not related.

*United States v. Carter*, 283 F.3d 755 (6th Cir. 2002). “[C]rimes [are] part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. . . . [T]he commission of a crime spree does not render such offenses related. If the offenses were not jointly planned in the inception, or if the commission of one offense entailed the commission of another, under § 4A1.2(a)(2), the offenses are unrelated . . . and should be counted separately.” (internal citations omitted). In this case, the defendant maintained that his three prior state court drug convictions should have been treated as one offense for the purpose of calculating criminal history points under §4A1.2, but the court of appeals found no evidence the defendant jointly planned all three drug sales or that the commission of the first drug transaction entailed the commission of the following drug sales. As a result, the court of appeals upheld the application of the enhancement.

*United States v. Irons*, 196 F.3d 634 (6th Cir. 1999). “In deciding whether prior offenses are part of a ‘single common scheme or plan,’ as would render them ‘related’ under U.S.S.G. §

4A1.2(a)(2) for assigning criminal history points and for treating separate convictions as a single crime, we find that ‘scheme’ and ‘plan’ are words of intention, implying that [offenses] have been jointly planned, or at least that . . . the commission of one would entail the commission of the other as well.’ . . . [A] defendant has the burden of establishing that his crimes were jointly planned or that the commission of one entailed the other.” In this case, the defendant argued that two prior offenses — violation of a protection order and breaking and entering a former girlfriend’s home — were related because the offenses were part of a crime spree intended to harass the former girlfriend. The Sixth Circuit stated that “prior convictions are not ‘related’ merely because they are part of a crime spree.” The Sixth Circuit explained that “[a]lthough [the] defendant’s purpose to harass his former girlfriend may have been similar, . . . crimes are not ‘related’ merely because each was committed with the same purpose or common goal.” The Sixth Circuit further explained that in order to show that two offenses are related, the defendant must show that “he either intended from the outset to commit both crimes or that he intended to commit one crime which, by necessity, involved the commission of a second crime.” The defendant presented no evidence that at the time he violated the protection order, he decided to later break into his former girlfriend’s house, so the offenses were not related.

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

*United States v. Tristan-Madrigal*, 601 F.3d 629 (6th Cir. 2010). The district court imposed an above-guideline sentence for the defendant in part because the recommended guideline range did not properly reflect the defendant’s prior convictions for drunk driving. On appeal, the defendant argued the court afforded too much weight to his criminal history resulting in a substantively unreasonable sentence. The defendant claimed that the fact that the district court did not depart upward under §4A1.3(a) for an underrepresented criminal history provided evidence that the court relied too heavily on his criminal history for purposes of the section 3553(a) factors. In his view, because a departure was not warranted under the guideline, consideration of his criminal history for purposes of a variance was unreasonable. The Sixth Circuit held that a district court does not abuse its discretion when it considers criminal history that would not otherwise support a §4A1.3 departure when that history is relevant to the section 3553(a) factors, because the standards that justify a departure under the guidelines are more narrow than the factors enumerated in section 3553(a).

*United States v. Pembroke*, 609 F.3d 381 (6th Cir. 2010). The defendant, convicted in 1997 of possession with intent to distribute crack cocaine, made a motion for reduction of sentence pursuant to section 3582(c)(2), arguing that Amendment 706 lowered his applicable guideline range, and the district court denied the motion on the grounds that the applicable guideline range was not his crack cocaine range, but his career offender range, which was not affected by the amendment. On appeal, the defendant argued that the applicable guideline range was the crack cocaine guideline range after the court departed downward pursuant to §4A1.3. The Sixth Circuit held that pursuant to §1B1.10, the applicable guideline range is the range from the sentencing table after a correct determination of the total offense level and criminal history category but before any discretionary departures, and affirmed the sentence.

*United States v. Mayle*, 334 F.3d 552 (6th Cir. 2003). In this case, the defendant complained that the district court should not have considered evidence of his responsibility for

two previous deaths that were unrelated to his offenses of conviction (fraud, forgery, and false statement) because that evidence did not fall under any of five examples listed in the guidelines. The Sixth Circuit explained that the examples were illustrative and not exhaustive of the information that a district court can consider in determining the adequacy of the defendant's criminal history category. The Sixth Circuit explained that although the defendant's responsibility for the prior deaths was not similar to the offenses of conviction, the deaths were similar to the relevant conduct associated with a death related to the offenses of conviction, *i.e.*, causing the death of a third individual. The defendant caused all three deaths for the purpose of promoting his own financial gain and the defendant had made a career out of living off vulnerable victims. The Sixth Circuit stated that §4A1.3 is "broad enough to permit consideration of adult criminal conduct that is similar to the relevant conduct surrounding the offense of conviction, even if it is not similar to the offense of conviction itself." The Sixth Circuit explained that information that the defendant caused the deaths of two individuals to promote his own financial gain was relevant to his past criminal conduct and to the likelihood that he would commit other crimes. Consequently, increasing the defendant's criminal history score was appropriate.

*United States v. Barber*, 200 F.3d 908 (6th Cir. 2000). "Given . . . § 4A1.3, it is clear that the Sentencing Guidelines do not prohibit departures based upon a finding that the criminal history computation is simply not representative of a defendant's past criminal behavior nor indicative of future unlawful conduct. . . . [A] departure upon this basis is expressly encouraged by the Sentencing Guidelines." "Further, . . . § 4A1.3 authorizes the Court to consider, in addition to prior conviction, in the computation of criminal history, 'prior sentence(s) not used in computing the criminal history category.'" In this opinion, the court of appeals determined that the district court did not abuse its discretion in departing upward from Criminal History Category IV to Criminal History Category VI. There was ample support in the record to justify the district court's conclusion that, pursuant to §4A1.3, the defendant's criminal past and likelihood of recidivism were not adequately represented by his otherwise applicable guideline range:

At the time of sentencing, the defendant was 26 years old. Prior to sentencing, he had been sentenced to life imprisonment in Alabama and was released on February 14, 1994 on lifetime parole. Only a few months later, on May 17, 1994, he was charged with driving with a suspended license, fleeing a police officer and having alcohol in a motor vehicle. Two years later, he was convicted of carrying a concealed weapon and resisting and obstructing a police officer. One month later, the defendant was convicted of three counts of breaking and entering with intent to commit larceny.

*United States v. Thomas*, 24 F.3d 829 (6th Cir. 1994). In this case, the district court determined that criminal history category VI was inadequate and thus there was no next higher criminal history category for the sentencing court to use as a reference. The Sixth Circuit explained that the district court's upward departure could be upheld if the district court provided "a short clear statement from the bench explaining (1) what aggravating circumstances existed which were not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines; and (2) why the [sentence in the range of the next higher offense level] is the appropriate sentence given the facts of this case."

## Part B Career Offenders and Criminal Livelihood

### §4B1.1 Career Offender

*United States v. Meeks*, 664 F.3d 1067 (6th Cir. 2012). The Sixth Circuit held that a conviction for first-degree wanton endangerment under Kentucky law qualifies as a crime of violence for purposes of a career offender designation under §4B1.1. The inquiry for the court was whether the state crime is an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” under the residual clause of §4B1.2. In light of *Begay v. United States*, 553 U.S. 137 (2008), the court stated that not every crime that presents a serious potential risk of physical injury falls within the residual clause, and stated it therefore questions whether the crime presents a serious potential risk of violence akin to the listed crimes and whether the crime involves the same kind of purposeful violent and aggressive conduct as the listed crimes. In *Sykes v. United States*, 131 S. Ct. 2267 (2011), the Supreme Court further suggested that the “purposeful, violent, and aggressive conduct” inquiry is limited to strict liability crimes, negligence, and recklessness. The court found that because the state statute involves conduct that creates a substantial danger of death or serious physical injury, it necessarily involves a serious potential risk of violence akin to the listed crimes. Further, the court found that wanton endangerment is not based on strict liability, negligence, or recklessness because the defendant must have acted wantonly, and is therefore categorically a crime of violence for purposes of §4B1.1.

*United States v. Rodriguez*, 664 F.3d 1032 (6th Cir. 2011). The defendant appealed the district court’s finding that his conviction under Ohio law for fourth-degree aggravated assault qualified as a crime of violence under §4B1.1. The Sixth Circuit disagreed, and affirmed. In *United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010), the court had found that the term “aggravated assault” in the commentary to §4B1.2 refers to “generic aggravated assault,” including recklessly causing serious bodily injury under circumstances manifesting extreme indifference to human life. In *McFalls*, because the South Carolina statute at issue applied to cases involving mere reckless conduct, the court found it could not qualify as a crime of violence under §4B1.1. However, it stated that the Ohio statute at issue in this case qualifies as a crime of violence under §4B1.1 because although it generally tracks the generic aggravated assault offense, it does not apply to cases involving mere reckless conduct.

*United States v. Curb*, 625 F.3d 968 (6th Cir. 2010). The defendant appealed his status as a career offender for a drug trafficking conviction. The defendant argued that pursuant to *Kimbrough*, the district court may consider the 100:1 crack-to-powder ratio in determining whether he was a career offender, because §4B1.1 incorporates that ratio. The Sixth Circuit found that it could not determine from the sentencing transcript whether the sentencing court would have imposed the same sentence if it knew it had the authority to vary from the career offender guideline based on a policy disagreement with the 100:1 ratio. Therefore, it remanded for resentencing.

*United States v. Ford*, 560 F.3d 420 (6th Cir. 2009). Modifying prior decisions in the circuit, the Sixth Circuit held that a “walkaway” escape is not a crime of violence under §4B1.1,

relying on the Supreme Court’s recent decision in *United States v. Chambers*, 555 U.S. 122 (2009). In *Chambers*, the Supreme Court held that a failure to report is not a crime of violence, requiring the court to modify prior decisions suggesting that all types of escape convictions under Kentucky law constitute crimes of violence. The court found that a walkaway escape does not present the risk of physical injury to others and does not involve the same type of purposeful, violent and aggressive conduct that the listed crimes of violence in §4B1.1 do.

*United States v. Gillis*, 592 F.3d 696 (6th Cir. 2009). The defendant was sentenced as a career offender after being found guilty of possession with intent to distribute crack cocaine. The court found the sentencing court committed error harmful to the defendant when it relied on a Sixth Circuit case vacated by the Supreme Court and concluded that it must apply the career offender guideline whether or not it agreed with the legislator’s policy. Although the court stated that it independently found the defendant to be a career offender, because it sentenced the defendant to the lowest sentence available in the range, the court held it was not clear that the district court would have imposed the same sentence had it known it was not bound by the guideline. The sentencing court was reversed and remanded for re-sentencing.

*United States v. Michael*, 576 F.3d 323 (6th Cir. 2009). The defendant was convicted of seven drug (both crack and powder cocaine) and firearms offenses. Because he had two prior felony drug-trafficking convictions, the district court sentenced the defendant as a career offender under §4B1.1. The defendant received a total of 420 months in prison: 360 months for the drug counts and a consecutive 60-month sentence for possession of a firearm in furtherance of a drug-trafficking offense. The defendant appealed his sentence, arguing that “the district court failed to recognize its discretion to disagree with the . . . 100:1 ratio . . . as implicitly incorporated into the Sentencing Guidelines’ career-offender provisions.” The court agreed. The Sixth Circuit held that “[a] district court may lawfully conclude . . . that the policies underlying the career-offender provisions — including their implicit incorporation of the 100:1 ratio — yield a sentence ‘greater than necessary’ to serve the objectives of sentencing.” (quotation omitted). The court stated that 28 U.S.C. § 994(h), “which provides that ‘[t]he [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the [statutory] maximum term authorized’ for a career offender” only tells the Sentencing Commission what to do, not the courts. According to the court, “had Congress wanted to mandate certain sentences (as opposed to Guidelines ranges) for career offenders, it knew very well how to do so. And, as the Supreme Court’s decisions in *United States v. Booker*, 543 U.S. 220 (2005) and its progeny make clear enough, a directive that the Commission specify a particular Guidelines range is not a mandate that sentencing courts stay within it.” Despite this, the court found that the district court did not plainly err, and affirmed the defendant’s sentence.

*United States v. Wynn*, 579 F.3d 567 (6th Cir. 2009). The sentencing court erred in relying on the factual recitation in the PSR to conclude that the defendant’s guilty plea to sexual battery under Ohio law was a “crime of violence” for purposes of determining whether he was a career offender. The Supreme Court stated in *Begay* that when determining if a prior conviction constitutes a “violent felony” under the ACCA, “we consider the offense generically . . . [and] examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion,” and found that the court can examine

“the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant . . . or to some comparable judicial record of this information” when the statutory definition of the crime is ambiguous. The court stated that the Supreme Court had rejected consideration of police reports and criminal complaint applications in *Shepard* to support a finding of a “crime of violence” and found that factual descriptions in the PSR are “the sort of information that one might expect to find in a police report.” (quoting *United States v. Barteo*, 529 F.3d 357 (6th Cir. 2008)).

*United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006). In this opinion, the Sixth Circuit determined that the defendant’s two drug-related convictions under former Ohio Revised Code §§ 2925.03(A)(6) and (9) did not constitute predicate offenses for career offender status. To make this determination, the Sixth Circuit used the categorical approach and examined the statutory language for the two convictions at issue — Ohio Revised Code § 2925.03(A)(6) and Ohio Revised Code § 2925.03(A)(9). The Sixth Circuit determined that the plain language of the statutes indicated that each offense contained only the element of “possession” and did not contain the element of “intent to distribute.” Because neither offense contained an element of intent to distribute that would allow the defendant’s sentence to be enhanced under §4B1.1, the Sixth Circuit determined that an enhancement was inappropriate.

*United States v. Horn*, 355 F.3d 610 (6th Cir. 2004). “[C]rimes are part of the same scheme or plan only if the offenses are jointly planned, or, at a minimum, the commission of one offense necessarily requires the commission of the other. . . . ‘[T]he simple sharing of a modus operandi cannot alone convert [separate offenses] into one offense by virtue of their being a single common scheme or plan.’ . . . [M]erely because crimes are part of a crime spree does not mean that they are related. Nor are such offenses related because they were committed to achieve a similar objective, such as the support of a drug habit. Finally, offenses are not necessarily related merely because they were committed within a short period of time.” In this case, the Sixth Circuit determined that the district court properly determined that two robberies were not part of a common scheme or plan. The Sixth Circuit explained that the robberies were committed weeks apart at different locations; the offenses involved different victims; and the defendant had an accomplice in the first offense but not the second. The Sixth Circuit stated that no evidence indicated that the two armed robberies were jointly planned or that the commission of the first robbery entailed the commission of the second.

*United States v. Champion*, 248 F.3d 502 (6th Cir. 2001). The defendant argued that his violation of 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for the purpose of a visual depiction was not a crime of violence because it did not have “as an element, the use, attempted use, or threatened use of physical force against the person of another.” The court found that Congress itself had “undertaken the factfinding necessary to conclude that a violation of § 2251(a), by its very nature, presents a serious potential risk of physical injury” and held that the district court “properly concluded that [the] [d]efendant’s § 2251(a) conviction was a crime of violence.”

*United States v. Wood*, 209 F.3d 847 (6th Cir. 2000). In this case, the court of appeals held that Alabama’s offense of robbery in the third degree was a “crime of violence” because robbery was an enumerated offense and because the statutory definition for the offense has “as

an element the use, attempted use, or threatened use of physical force against the person of another.”

*United States v. Walker*, 181 F.3d 774 (6th Cir. 1999). The district court did not err in finding that the defendant’s prior state court conviction for solicitation to commit aggravated robbery was a “crime of violence” and, therefore, the defendant was properly sentenced as a career offender.

#### **§4B1.4**      Armed Career Criminal

*United States v. Johnson*, 707 F.3d 655 (6th Cir. 2013). The district court concluded that a prior offense of conviction for stalking under Kentucky state law is a violent felony for purposes of the Armed Career Criminal Act (ACCA), and the defendant appealed. The defendant argued that a person can be convicted under the statute for making threats that intentionally cause a person to fear physical harm, rather than for actually threatening physical harm, and that fearing physical harm does not require the use, attempted use, or threatened use of physical force. The Sixth Circuit found that under the statute, the definition of “sexual contact” is broad enough to cover a slight touch to a sexual or intimate part of another, and although a “threat to place someone in reasonable fear of such contact may involve a threat to use force, it does not necessarily require a threat to use violent force.” Therefore, the court found that a violation of the Kentucky state statute is not categorically a violent felony under the first prong of the ACCA. However, because placing someone in reasonable fear of death, serious bodily injury or even “the most innocuous sexual contact could elicit an intensified response that might result in violent confrontation,” the court found that the stalking law is the type of offense that is categorically a violent felony under the residual clause.

*United States v. Taylor*, 696 F.3d 628 (6th Cir. 2012). The defendant appealed, challenging the district court’s inclusion of a Michigan conviction for attempted larceny as a predicate offense to apply the ACCA. Under the state law, attempt requires that a defendant take “any act towards the commission of [the intended] offense.” The Sixth Circuit held that attempted larceny under Michigan law is a violent felony because the residual clause only requires a “serious potential risk of physical injury” and “we can fathom ‘no situation in which larceny from the person could occur without presenting’ such a risk,” nor “to the inchoate version of the offense, given that an attempt in Michigan requires the defendant to take some ‘direct movement’ toward commission of the offense.” In addition, relying on the Supreme Court’s discussion in *Begay*, the court found that attempted larceny from the person is “roughly similar, in kind as well as in degree of risk posed,” to the enumerated offenses, because the offense “is arguably more dangerous in terms of the risk of physical injury than burglary, for burglary does not require that the building or structure be occupied when burgled . . . while larceny from the person . . . requires another’s presence.” The court stated that its view is consistent with other circuits’ decisions finding that larceny is a violent felony under the residual clause.

*United States v. Banks*, 679 F.3d 505 (6th Cir. 2012). On appeal, the defendant challenged the applicability of an enhancement under the ACCA. He had previously been convicted as an adult for a robbery he committed at the age of 17, and the district court

concluded the conviction qualified as a violent felony. The Sixth Circuit stated that the definition of “violent felony” includes either a “crime punishable by imprisonment for a term exceeding on year” or “any act of juvenile delinquency involving the use or carrying of a firearm . . . that would be punishable by imprisonment for such term if committed by an adult.” The defendant argued that the robbery failed to qualify as an act of juvenile delinquency. The circuit court held that although the prior robbery was an act of juvenile delinquency, because the defendant was convicted as an adult, the conviction qualified as a violent felony and affirmed the sentence.

*United States v. Jones*, 673 F.3d 497 (6th Cir.), cert. denied, 133 S. Ct. 350 (2012). The defendant was sentenced to the mandatory minimum under the ACCA, and appealed, arguing that the district court erred when it treated two convictions as having been committed on separate occasions. The defendant had broken into a bedroom window of a residence and left after being confronted by someone in the house. An hour later, he returned and pointed a large caliber pistol at the same victim and fired shots. He was convicted of burglary and assault with intent to commit murder. Although offenses are separate if they meet any of three tests established by the Sixth Circuit in 2006 in *United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006), the court found that the burglary and assault convictions were clearly separate offenses under all three tests. It found that it was apparent when the first offense was completed and the second offense began; the defendant could have easily withdrawn from the criminal activity after the first offense; and that even though the offenses were committed in the same residence, “[o]ffenses are not committed on the same occasion simply because they occurred in the same residence.” The court affirmed the sentence.

*United States v. Kearney*, 675 F.3d 571 (6th Cir. 2012). In an issue of first impression for the Sixth Circuit, it found that a prior state conviction that was enhanced because of a state recidivism provision qualifies as a predicate violent felony for purposes of the ACCA. The defendant had previously been convicted under a Michigan statute of two misdemeanor domestic violence offenses for which he faced an enhanced sentence of two years’ imprisonment because of two earlier domestic violence convictions. The court looked to *United States v. Rodriguez*, 553 U.S. 377 (2008), where the Supreme Court held that evaluating a predicate conviction under the drug offense provision of the Act requires a court to consider prior recidivism enhancements, and found that congressional intent to “define a predicate offense with reference to underlying enhancements is clear.”

*United States v. Benton*, 639 F.3d 723 (6th Cir.), cert. denied, 132 S. Ct. 599 (2011). The defendant argued on appeal that a prior Tennessee state conviction for solicitation to commit aggravated assault was not a “violent felony” under the ACCA. The Sixth Circuit stated that whether solicitation of aggravated assault carries the “use of force” element needed was an issue of first impression. The court reasoned that because under Tennessee law solicitation is distinguished from criminal responsibility, it is not considered a lesser offense than the offense solicited, and is therefore of a lower degree of criminal culpability than the offense solicited. Therefore, the court found that the statutory definition of solicitation to commit aggravated assault does not require as an element “the use, attempted use, or threatened use” of force, and thus does not qualify as a violent felony under the first prong of the definition. However, under *Begay v. United States*, 553 U.S. 137 (2008), the second prong of the definition requires a two-

part test such that to be a violent felony, the offense has to “pose[] a serious potential risk of physical injury to others . . . and [has to] involve[] the same kind of purposeful, violent, and aggressive conduct as the enumerated offenses.” The court found that solicitation to commit aggravated assault under state law both presents a serious risk of physical injury because it “create[s] a heightened and serious potential risk of the occurrence of physical injury,” and involves purposeful conduct because it requires as an element that the person act “with the intent that the criminal offense be committed.” The offense, therefore, qualifies as a violent felony under the ACCA.

*United States v. Coleman*, 655 F.3d 480 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1045 (2012). The defendant was sentenced under the ACCA and appealed, arguing that Ohio’s third-degree burglary statute is not categorically a “violent felony.” The Sixth Circuit found that third-degree burglary under Ohio law, which provides that no person “by force, stealth, or deception” shall trespass in an occupied structure, meets the “otherwise involves” prong of the ACCA’s definition of a violent felony, because it creates a risk of physical injury that is similar to the risk posed by generic burglary.

*United States v. Gloss*, 661 F.3d 317 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1777 (2012). The district court sentenced the defendant under the ACCA because it found that his Tennessee conviction for facilitation of aggravated robbery was a violent felony, and he appealed. The Sixth Circuit held that facilitation of aggravated robbery fits within the first clause of the ACCA, because it “has an element the use, attempted use, or threatened use of physical force.” Under Tennessee law, a person commits that felony if he knowingly provided substantial assistance to another whom he knew intended to steal property by using a real or disguised weapon or by causing serious bodily injury. The Sixth Circuit reasoned that for a conviction to be sustained, the underlying crime must have actually occurred, and it makes no difference whether the defendant was the person who committed the aggravated robbery or not because it was established that he knowingly provided substantial assistance to the person who did.

*United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011). The district court sentenced the defendant under the ACCA and he appealed, arguing that his felony conviction for aggravated assault under Tennessee law, which includes reckless conduct, was not a “violent felony.” The Sixth Circuit agreed, finding first that aggravated assault under Tennessee law did not meet the “use of physical force” clause of the ACCA. The court found the Supreme Court’s reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which found that reckless conduct does not constitute a crime of violence under 18 U.S.C. § 16, persuasive because the “use of force” clause in section 16 is “in relevant part identical to the ‘use of force’ clause of the ACCA.” The court stated that its recent analysis in *United States v. Benton*, 639 F.3d 723 (6th Cir.) , *cert. denied* 132 S. Ct. 599 (2011), which found that the Tennessee crime of solicitation to commit aggravated assault is a violent felony under the ACCA, was not dispositive because the court’s statement that it “has already been established that the crime of aggravated assault has as an element the use or threat of force, and therefore qualifies as a ‘violent felony’ for ACCA purposes” was “‘not necessary to the outcome’ in that case” and was therefore dicta. Further, the court stated that the crime of aggravated assault under Tennessee law does not qualify under the “otherwise involves conduct that presents a serious potential risk of physical injury to another” clause in the ACCA. It found that the Supreme Court had held in *Begay v. United States*, 553

U.S. 137 (2008), that the “otherwise” clause includes only those crimes similar to enumerated crimes, rather than to every crime that presents a serious potential risk of physical injury, and “to qualify as a ‘violent felony’ under the ‘otherwise’ clause, the crime must ‘involve purposeful, violent, and aggressive conduct. Therefore, the Sixth Circuit held that after *Begay*, reckless aggravated assault does not qualify as a violent felony under the “otherwise” clause, and it vacated and remanded the sentence.

*United States v. Oaks*, 665 F.3d 719 (6th Cir. 2011). On remand for the district court to determine the status of the defendant’s custody at the time of his escape in light of *United States v. Chambers*, 555 U.S. 122 (2009), the district court indicated that the courtroom from which he escaped was not secure. The Sixth Circuit found that the defendant therefore escaped from “nonsecure custody” and pursuant to *Chambers*, the court must determine whether the defendant is “significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a ‘serious potential risk of physical injury.’” Relying on data from the Sentencing Commission in the appendix to *Chambers*, the court found that escape from nonsecure custody is rarely violent. Therefore, the court held that the escape was not a violent felony for sentencing purposes, and remanded for resentencing.

*United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011). The defendant had a prior conviction for facilitation of the burglary of a building in violation of Tennessee state law that was used to qualify him as an Armed Career Criminal. The Sixth Circuit noted that in *Begay v. United States*, 553 U.S. 137 (2008), the Supreme Court held that for a crime to qualify as a crime of violence, it must be “purposeful, violent, and aggressive.” Under the state law, to be criminally responsible for a facilitation of a felony, the person has to have knowledge that another intends to commit a specific felony, but be “without the intent required for criminal responsibility” but “knowingly furnish[ing] substantial assistance in commission of the felony.” The court stated that this case presents the novel question of “whether an individual commits a purposeful crime when he acts with the knowledge that another intends to commit a crime, but without the intent to commit or assist in the commission of the crime itself” and because the state law for facilitation of the burglary of a building includes those “who do not share the chief perpetrator’s intent to burglarize the building,” it does not qualify as a crime of violence.

*United States v. Eubanks*, 617 F.3d 364 (6th Cir. 2010). A Michigan state juvenile conviction may be considered for purposes of the ACCA even if it had been expunged by the state. The defendant was convicted of felonious assault as a juvenile and Michigan law requires that the record be destroyed once he turned 30 years old. The court found, however, that the state court rules also specifically provide that the destruction of the record does not negate, rescind, or set aside an adjudication. Further, the court rules do not prevent the use of the conviction by a sentencing judge in later state court proceedings. Therefore, the district court properly concluded that the defendant’s juvenile conviction was a predicate offense under the ACCA.

*United States v. LaCasse*, 567 F.3d 763 (6th Cir. 2009). The court held that the defendant’s conviction in Michigan for “fleeing and eluding” qualifies as a violent felony under the ACCA. The court distinguished fleeing and eluding from driving under the influence. While both crimes require the offender to be driving a car, the court stated that fleeing and eluding “is

distinguishable with respect to intent: the offender makes a conscious decision to flee rather than to stop his vehicle as requested by a police officer.” Further, “fleeing and eluding involves aggressive conduct; the offender is attempting to outrun a police cruiser either in a low speed-limit area or in a manner that results in a collision or an accident.”

*United States v. Goodman*, 519 F.3d 310 (6th Cir. 2008). The Sixth Circuit held that, although the defendant may have been correct that under Tennessee law his violation of house arrest should not have been charged as an “escape,” the district court correctly sentenced him under the ACCA as though he had been convicted of escape. The Sixth Circuit noted that “[t]he Supreme Court has instructed that sentencing under the ACCA is not the appropriate place for a defendant to mount a collateral attack on previous convictions” and concluded that if the defendant “believes that Tennessee courts would no longer uphold his 1993 escape conviction, his first step must be seeking to have Tennessee courts overturn or expunge the conviction.”

#### **§4B1.5**      Repeat and Dangerous Sex Offender Against Minors

*United States v. Brattain*, 539 F.3d 445 (6th Cir. 2008). The government appealed after the district court refused to apply a 5-level enhancement under §4B1.5(b) for a defendant who pleaded guilty to aggravated sexual abuse of a minor. The court had refused to apply the enhancement, stating it only applied to offenders who had abused multiple victims and the defendant had abused one victim over many years. The Sixth Circuit vacated the sentence, finding that the application note to the guideline that applies to defendants who abuse a single victim had been amended to eliminate the requirement of at least two minor victims.

### **CHAPTER FIVE: *Determining the Sentence***

#### **Part C Imprisonment**

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

*United States v. Branch*, 537 F.3d 582 (6th Cir. 2008). The Sixth Circuit affirmed the sentencing court’s previous correction of a sentence upon a Rule 35 motion. The government filed the motion after the sentencing court sentenced the defendant below the mandatory minimum pursuant to the safety valve provision. The district court agreed it had mistakenly altered the defendant’s criminal history score based on its conclusion that the score overstated the seriousness of the defendant’s past criminal conduct. The defendant appealed, arguing the district court lacked authority to modify the sentence. The Sixth Circuit found that Rule 35 allows the district court to correct its obvious error in finding the defendant eligible for the safety valve and that it had no authority to sentence him below the mandatory minimum.

*United States v. Bolka*, 355 F.3d 909 (6th Cir. 2004). “The application of a §2D1.1(b)(1) sentence enhancement does not necessarily preclude the application of a §5C1.2(a) ‘safety valve’ reduction. A defendant may be unable to prove that it is clearly probable that the firearm was not connected to the offense — the logical equivalent of showing that it is clearly improbable that the firearm was connected to the offense — so as to defeat a §2D1.1(b)(1) enhancement. However, that same defendant may, nevertheless, be able to prove by a preponderance of the

evidence that the firearm was not connected to the offense so as to satisfy §5C1.2(a)(2). The ‘clearly improbable’ standard is a higher quantum of proof than that of the ‘preponderance of the evidence’ standard. It does not deductively follow from a defendant’s failure to satisfy a higher quantum of proof on a particular issue that he cannot satisfy a lower quantum of proof on that same issue. It also does not necessarily follow from the existence of a preponderance of evidence demonstrating that a defendant possessed a firearm *during the time of the offense* — the government’s *prima facie* burden of proof for purposes of a § 2D1.1(b)(1) enhancement that there exists a preponderance of evidence demonstrating such possession *in connection with the offense* — contrary to the defendant’s burden of proof so as to defeat a §5C1.2(a) reduction. While they are quantitatively the same, these evidentiary standards are qualitatively distinct. Similarly, it does not deductively follow from the *presumption* that a defendant’s possession of a firearm was connected to the offense — arising from a preponderance of evidence demonstrating such possession during the time of the offense — for purposes of a §2D1.1(b)(1) enhancement that a preponderance of evidence demonstrating such a connection, in fact, exists for purposes of a §5C1.2(a) reduction. Consequently, a defendant’s conduct warranting a §2D1.1(b)(1) enhancement does not *per se* preclude that defendant from proving by a preponderance of the evidence that his possession of the firearm was not connected with his offense for purposes of a §5C1.2 (a) ‘safety valve’ reduction.”

*United States v. Penn*, 282 F.3d 879 (6th Cir. 2002). “The ‘safety valve’ provision of 18 U.S.C. § 3553(f) provides that in cases involving certain drug offenses, including violations of 21 U.S.C. § 841, the sentencing court may impose a sentence ‘without regard to any statutory minimum sentence,’ if the court determines that the five criteria listed in § 3553(f) are satisfied. The first criterion requires that ‘the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.’ Section 5C1.2 of the Sentencing Guidelines interprets the ‘safety valve’ exception.” In this appeal, the government complained that the defendant was not eligible for a reduced sentence under the “safety valve” provision because he had more than one criminal history point as calculated under §4A1.1. Specifically, the government argued that the district court erred in concluding that by granting a downward departure pursuant to §4A1.3, it was authorized to reduce the defendant’s criminal history points and thereby make him eligible for sentencing under the “safety valve.” The Sixth Circuit noted that the commentary to §5C1.2 is unambiguous and clearly limits a district court’s authority to apply the “safety valve” provision to cases where a defendant has not more than one criminal history point as calculated under §4A1.1, regardless of whether the district court determined that a downward departure in the defendant’s sentence is warranted under §4A1.3. In the instant case, the district court’s determination that the defendant was entitled to a downward departure under §4A1.3 had no effect on the defendant’s criminal history score as calculated under §4A1.1. “‘Section 4A1.3 [did] not authorize [the district court] to add or subtract individual criminal history points from a defendant’s record’; instead, it merely [allowed] the [district] court to impose a sentence outside the range prescribed by the guidelines for a defendant’s particular offense level and criminal history category.” That is, §4A1.3 allows a district court to “sentence a defendant with reference to the guideline range applicable to a defendant with another criminal history category, not to change the defendant’s actual criminal history category.”

*United States v. Maduka*, 104 F.3d 891 (6th Cir. 1997). In this opinion, the Sixth Circuit indicated that sentencing under the safety-valve provision requires a defendant convicted of distribution to provide complete and accurate information regarding the participation of other people in a drug offense.

*United States v. Adu*, 82 F.3d 119 (6th Cir. 1996). “When seeking a downward adjustment of a sentence otherwise required by the guidelines, a defendant has the burden of proving by a preponderance of the evidence his or her entitlement to a reduction. Thus, the party seeking a departure, either upward or downward from a presumptive guidelines sentence has the burden of proving entitlement to the departure.” In this case, the court of appeals determined that the defendant did not meet his burden of proving that he provided the government with all information and evidence he had concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The court of appeals explained that the defendant’s statement that he gave the government “all they asked” did not satisfy his burden of proof. The court of appeals stated that 18 U.S.C. § 3553(f)(5) and §5C1.2(5) require an affirmative act by the defendant to truthfully disclose all the information he possesses concerning his offense or related offenses.

*United States v. Bazel*, 80 F.3d 1140 (6th Cir. 1996). “Section 3553(f) [of title 18] and § 5C1.2 . . . require the [sentencing] court to make a finding *both* that the defendant was not an ‘organizer, leader, manager, or supervisor’ *and* that the defendant was not engaged in a [continuing criminal enterprise] in order to open the ‘safety valve.’” In this appeal, the defendant maintained that he was eligible for the safety valve because he was not engaged in a continuing criminal enterprise although the government demonstrated that he was an “organizer, leader, manager, or supervisor” of a criminal operation. The court of appeals explained that once the district court found that the defendant was an “organizer, leader, manager, or supervisor,” it could not make one of the findings necessary to opening the “safety valve.” Thus, the court of appeals stated that the district court properly denied the safety valve.

*United States v. Pratt*, 87 F.3d 811 (6th Cir. 1996). The safety-valve provision does not authorize a downward departure without an independent basis for the departure.

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

*United States v. Doyle*, 711 F.3d 729 (6th Cir. 2013). The defendant was convicted for failing to register as a sex offender and was sentenced, in part, to ten years supervised release with special conditions. The defendant had been previously convicted in state court for attempted sexual abuse in the first degree, and moved to a different state without registering under the Sex Offender Registration and Notification Act. One special condition of supervised release was that he not possess any pornography, including legal pornography. Although the district court acknowledged the case was “not about pornography,” it stated “we certainly don’t want to trigger those problems.” The Sixth Circuit stated that this explanation failed to state its rationale as required “because neither the offense for which [the defendant] was being sentenced . . . nor the previous offense . . . involved [the defendant’s] use or distribution of pornography.” Therefore, the court found the district court committed procedural error, and remanded for resentencing.

*United States v. Zobel*, 696 F.3d 558 (6th Cir. 2012), petition for cert. filed, No. 12-10703 (Jun. 5, 2013). The district court imposed a special condition on the defendant’s supervised release that he refrain from possessing or viewing pornography or “materials that are ‘sexually explicit or suggestive.’” The defendant had been convicted of coercing and enticing a minor to engage in sexual activity. The Sixth Circuit vacated the sentence, finding that the special condition was “capricious and thus problematic” because it would bar the defendant from “possessing or viewing anything containing a mere hint or suggestion of sex — an extremely wide prohibition that, in today’s society, would extend to a host of both high-brow and mainstream literature, art, music, television programs, and movies,” it called into question the “fairness of the proceedings because of the severity of the restriction.”

## **Part E Restitution, Fines, Assessments, Forfeitures**

### **§5E1.1        Restitution**

*United States v. Gifford*, 90 F.3d 160 (6th Cir. 1996). When restitution is a separate component of the judgment, a district court can continue a defendant’s restitution obligations even after revoking probation or supervised release.

*United States v. Scott*, 74 F.3d 107 (6th Cir. 1996). In this case, the defendant used his position as a bank employee to defraud the bank by causing \$75,546.22 (including \$1,709.00 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled the defendant to a \$64,712.40 commission. He completed the transaction, and the bank retained the commission money. Upon conviction, the district court ordered the defendant to pay \$74,547 in restitution to the bank. The defendant argued on appeal that the appropriate amount of restitution was \$7,500, which was the loss to the bank minus the amount of the commission that he was entitled to.

The Sixth Circuit agreed and explained that the “restitution ordered by the district court was improper because it imposed restitution ‘with respect to a loss for which the victim has received . . . compensation.’ There is no other way to characterize . . . [the] retention of the . . . commission except as acceptance of partial compensation for the loss. . . . Whether or not [the defendant] continued working on the deal at [the bank’s] behest, it was [the bank’s] decision to retain [the defendant’s] commission after he closed the deal and to therefore accept this compensation for its loss. . . . The restitution ordered by the district court therefore amount[ed] to a requirement that [the defendant] compensate [the bank] for more than it ultimately lost . . . .”

## **Part F Sentencing Options**

### **§5F1.5        Occupational Restrictions**

*United States v. Stepp*, 680 F.3d 651 (6th Cir. 2012). The defendant was convicted for conspiracy to possess with intent to distribute cocaine. The district court imposed a special condition of supervised release that prohibited the defendant from obtaining full-time

employment in the field of boxing, which had been the defendant’s work experience. On appeal, the circuit court found that although the defendant had informed the police officer that he was on his way to train at a boxing gym during the traffic stop in which the cocaine was found, this conduct did not rise to the level of establishing a “direct relationship . . . between the defendant’s occupation . . . and the conduct relevant to the offense of conviction.” On the contrary, because the district court had informed the defendant that it was “time to move on” from boxing, and “you really need to go ahead and move past it,” this indicated that the district court believed that the defendant was too old to maintain full-time work in that field. The court held that this belief was not a valid reasons for imposing the special condition, and reversed and remanded.

## **Part G Implementing the Total Sentence of Imprisonment**

### **§5G1.1      Sentencing on a Single Count of Conviction (Policy Statement)**

*United States v. Jones*, 569 F.3d 569 (6th Cir. 2009). The court acknowledged that there are two conflicting interpretations of the term “guideline range.” Section 5G1.1 could be interpreted to refer to two distinct concepts: “the ‘applicable guideline range’ and the ‘guideline sentence.’” The applicable ‘guideline range’ is determined by the sentencing court based on the defendant’s offense level and criminal history.” If the mandatory minimum term is higher than the top of that range, it trumps the guideline range and becomes the guideline sentence. Under the other interpretation, “when there is a mandatory minimum that is above the guideline range calculated by the sentencing court, that mandatory minimum, though a single point, becomes the ‘guideline range.’” The court held that, in light of these two interpretations, the provision in the plea agreement was ambiguous. The court construed the term against the government, and held that “the phrase ‘above the guideline range’ in the plea agreement means above the guideline range of 70 to 87 months of imprisonment calculated by the district court before it applied the mandatory minimums.”

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

*United States v. Hall*, 632 F.3d 331 (6th Cir. 2011). After having been convicted for two state offenses for murder and possession of a weapon, the defendant was convicted for distribution of cocaine base. He appealed, claiming that his sentence was procedurally unreasonable because the district court erroneously applied a presumptive sentence of 32 months under §5G1.3(c) when setting his sentence to run consecutively to the undischarged state sentences. In his view, because the district court applied the cross-reference at §2D1.1(d)(1) to §2A1.1, it should have applied §5G1.3(b), which applies “in cases in which *all* of the prior offense [ ] is relevant conduct to the instant offense.” He reasoned that the federal sentence resulted from the state offense which was relevant conduct and which was the basis for an increase in the offense level. The Sixth Circuit found that the district court correctly applied §5G1.3(c), which allows a sentence to be imposed either concurrently or consecutively to a prior undischarged term of imprisonment if only a *part* of the prior offense is relevant conduct to the instant offense. The court stated that the question is whether all of the previous offense conduct is relevant conduct to the instant offense, and that depends on whether the term “offense” can refer to more than one conviction. Agreeing with other circuits that have treated multiple

convictions as a single “offense” for purposes of §5G1.3, the Sixth Circuit found that because the defendant’s two state convictions are treated as the equivalent of one “offense” then §5G1.3(c) would apply because only a *part* of that prior “offense,” (*i.e.*, the murder) was used to enhance the base offense level, and the other *part* of that prior “offense” (*i.e.*, possession of the weapon) was instead used to enhance the defendant’s criminal history.

## **Part H Specific Offender Characteristics**

### **§5H1.1**      Age (Policy Statement)

*United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000). In an appropriate case, a district court may depart downward on the basis of a “discouraged” departure factor or, more frequently, on the basis of simultaneously present, multiple “discouraged” departure factors. However, there must be credible evidence of the existence and extent of the factors relied upon by the district court.

### **§5H1.4**      Physical Condition Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

*United States v. Thomas*, 49 F.3d 253 (6th Cir. 1995). The district court did not err in refusing to grant the defendant a downward departure because he was HIV positive, although he had not yet developed AIDS. The defendant argued that a downward departure was warranted because the guidelines had not taken into account recently available statistics showing the decreased life expectancy and increased cost of caring for people who are HIV positive. The circuit court agreed that these statistics were not available when the guidelines were written, but reasoned that the Commission had already considered the impact of the guidelines on persons who are HIV positive in its creation of §5H1.4. The circuit court, citing a Virginia district court’s rationale concerning the relationship between §5H1.4 and a defendant with AIDS, concluded that the defendant would be “entitled to a departure if his HIV has progressed into advanced AIDS, and then only if his health was such that it could be termed as an ‘extraordinary physical impairment.’” *United States v. DePew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990). The defendant was still in “relatively good health,” and thus was not entitled to a departure.

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

*United States v. Reilly*, 662 F.3d 754 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1939 (2012). The defendant pleaded guilty to distribution of child pornography and appealed, arguing that a within-guideline range sentence was substantively unreasonable because the district court did not take into account his decade of military service including three tours as an improvised explosive device (IED) inspector in Iraq and Afghanistan, including his final tour where an IED fractured his back. The Sixth Circuit found that although military service may be a possible ground for a downward departure in §5H1.11, Congress has determined that the sole grounds permissible for a downward departure are those expressly enumerated in Part 5K. Because a defendant’s military service is not enumerated in Part 5K, the guidelines prohibit a district court from departing downward based on this characteristic. Although his military service was a

possible consideration for a variance, a different sentence was not required, and his sentence was not substantively unreasonable.

## **Part K Departures**

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

*United States v. Gabbard*, 586 F.3d 1046 (6th Cir. 2009). The defendant argued that the district court wrongfully confused application of 18 U.S.C. § 3553(e) and §5K1.1 when his guideline range was determined by a statutory mandatory minimum, and failed adequately to explain its determination of the downward departure as between the statute and the guideline. The court found that the district court did not need to grant a motion under both section 3553(e) and §5K1.1 to sentence the defendant below the guideline range because “[w]here the statutory minimum sentence becomes the Guidelines sentence, . . . a government motion to depart below the Guidelines pursuant to U.S.S.G. § 5K1.1 is, as a practical matter, superfluous.” (quoting *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008)). In the instant case, however, the court found any error was harmless because the court granted the §5K1.1 motion and sentenced the defendant well below the statutory minimum.

*United States v. Gapinski*, 561 F.3d 467 (6th Cir. 2009). The Sixth Circuit vacated and remanded for resentencing when the district court granted a 2-level reduction for substantial assistance instead of the 4-level reduction requested by the government under §5K1.1 based on its finding that the government could seek a further sentence reduction under Rule 35 if the defendant testified in pending cases. The court found that the record did not show that the sentencing court ever considered or explained its reasons for rejecting the defendant’s argument for a lower sentence based on his substantial assistance. Further, the court erred when it looked to the possibility of a post-sentencing motion under Rule 35 in considering the government’s §5K1.1 motion at sentencing, and the sentence was procedurally unreasonable.

*United States v. Rosenbaum*, 585 F.3d 259 (6th Cir. 2009). The court held that the decision whether, and to what extent, to grant a §5K1.1 motion rests within the discretion of the district court, and that an impermissible factor for the sentencing court to consider is the potential of a Rule 35(b) motion in the future. The court found that the sentencing court considered the defendant’s cooperation and found that he had not begun cooperating until after co-defendants had agreed to cooperate and that his cooperation was incomplete at the time of sentencing. Therefore, although the court stated that its appraisal might change in the future if the defendant’s information produced results, it properly determined his assistance was not yet sufficiently substantial to warrant a reduction under §5K1.1.

*United States v. Truman*, 304 F.3d 586 (6th Cir. 2002). In the instant case, the district court held that §5K1.1 applied and that absent a motion from the government to depart, the district court lacked the discretion to do so. On appeal, the defendant argued that §5K1.1 was not the exclusive provision for dealing with all cooperation, but rather the court may consider a defendant’s cooperation not contemplated by §5K1.1 under the grant of discretion to sentencing judges embodied in §5K2.0. Relying on *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), the defendant argued that his cooperation was directed to state and local authorities and thus was

outside the scope and limitation of §5K1.1. The Sixth Circuit noted that there was a split among the circuits as to whether the substantial assistance mentioned in §5K1.1 was limited to federal authorities. *Compare United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998) with *United States v. Love*, 985 F.2d 732 (3d Cir. 1993). However the court noted that it did not need to decide this issue nor weigh in on the circuit division in order to resolve this appeal. The court stated that, by its terms, §5K1.1 applied only to substantial assistance in connection with the investigation and prosecution of another individual who has committed a crime. “Where the ‘substantial assistance’ [wa]s directed other than toward the prosecution of another person, the limitation of § 5K1.1 — i.e., the requirement of a government motion as a triggering mechanism — d[id] not apply.” The court noted that other courts had recognized this distinction and had observed that when the defendant’s cooperation did not involve investigating or prosecuting another person, the government’s power to limit the court’s exercise of discretion to depart downward did not apply. *See, e.g., United States v. Khan*, 920 F.2d 1100 (2d Cir. 1990). Accordingly the court held that when a defendant moved for a downward departure on the basis of cooperation or assistance to government authorities which did not involve the investigation or prosecution of another person, §5K1.1 did not apply and the sentencing court was not precluded from considering the defendant’s arguments solely because the government had not made a motion to depart. Consequently the district court erroneously concluded that it lacked discretion to consider the defendant’s asserted grounds for a downward departure absent a motion from the government; the sentence was vacated and the case was remanded.

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

*United States v. O’Georgia*, 569 F.3d 281 (6th Cir. 2009). The court held that the district court erred when it added a §5K2.0 departure onto the defendant’s §3C1.1 obstruction enhancement. The court stated that the district court “applied the § 5K2.0 departure because [the defendant’s] abysmal lawyering on his own behalf unnecessarily delayed the proceedings against him,” not based on “separate acts of obstructive conduct similar to those set forth in § 3C1.1.” The court concluded that “a § 5K2.0 departure may not be based on a defendant’s poor performance as a pro se advocate regardless of the district court’s conclusion that the defendant’s conduct ‘obstructed’ the proceedings.” The court also held that the district court committed procedural error when it imposed a 2-level upward departure pursuant to §5K2.7 (Disruption of Governmental Function (Policy Statement)). Because the underlying offense was failure to appear for sentencing — in which interference with a governmental function is inherent — the court held that the underlying guideline adequately took any additional harm into account.

#### **§5K2.1**      Death (Policy Statement)

*United States v. Mayle*, 334 F.3d 552 (6th Cir. 2003). This opinion recognizes that §5K2.1 “specifically provide[s] that if death resulted from the relevant offense conduct, the court may increase the sentence above the authorized guideline range.” A complete discussion of this opinion is provided at §4A1.3.

### **§5K2.2**      Physical Injury (Policy Statement)

*United States v. Baker*, 339 F.3d 400 (6th Cir. 2003). Section 5K2.2 permits an upward departure where significant physical injury resulted. In this case, the Sixth Circuit determined that a bank guard’s injury did not support the enhancement. The injury occurred during a bank robbery. Even though the bank guard immediately raised his arms upon encountering the robbers, a robber shot him and kicked him in the side and teeth. As the guard lost consciousness, he heard an order to shoot him should he move. “When he stirred, he was shot at again, this time with his own .22-caliber long-rifle revolver, but was not hit. The resulting injuries were severe enough to threaten his life and to necessitate the amputation of his dominant, right arm.” The Sixth Circuit explained that “[a]ppalling as the defendants’ conduct and its consequences were by the standards of any civilized person, it is no extreme outlier within the universe of robberies resulting in permanent or life-threatening injuries, for surely every such robbery is appalling. It was this universe of cases that the sentencing commission contemplated and determined to merit a six-level enhancement, not an eleven-level enhancement.”

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

*United States v. Bond*, 22 F.3d 662 (6th Cir. 1994). “The Guidelines state that ‘extreme psychological injury’ may justify an upward departure ‘[i]f a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense. . . .’” In this bank robbery case, the district court relied on testimony from a victim-impact hearing and departed “because it felt that the guidelines did not account properly for the extreme degree of brutality displayed by the defendants or the mental anguish suffered by the victims.” The court of appeals determined that the evidence did not “establish § 5K2.3’s requirements that the psychological injury be a ‘substantial impairment’ of the psychological functioning of the individual, that is of ‘extended or continuous duration,’ and that has manifested itself by ‘physical or psychological symptoms.’” The court of appeals explained that the evidence showed only that “the tellers suffered anxiety for several weeks after the robbery; but this would not be unusual for any victim of an armed bank robbery.”

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

*United States v. Bond*, 22 F.3d 662 (6th Cir. 1994). “Section 5K2.6 provides that a court may increase a sentence above the authorized guideline range if a weapon or dangerous instrumentality was used, possessed, or discharged during the crime. However, because the offense conduct guideline at issue, § 2B3.1, expressly takes account of the discharge of a firearm, a departure is not justified unless ‘the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense.’” In this bank robbery case, the “district court found that the circumstances of [the robber’s] discharge — narrowly missing the bank manager with a shotgun blast — and the fact that there were two separate shotgun blasts — one at the beginning and one at the end of this robbery — were aggravating factors not adequately considered by the guideline itself.” The Sixth Circuit disagreed. The Sixth Circuit explained that “robbers discharge firearms during robberies specifically to frighten the victims, to ensure cooperation with their demands, and to facilitate escape; the factors articulated by the district

court [did] not deviate substantially from that norm.” Consequently, the district court erred by applying the adjustment.

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

*United States v. O’Georgia*, 569 F.3d 281 (6th Cir. 2009), *see* §5K2.0.

**§5K2.8**      Extreme Conduct (Policy Statement)

*United States v. Baker*, 339 F.3d 400 (6th Cir. 2003). The contours of conduct that is “unusually heinous, cruel, brutal, or degrading” for the purpose of §5K2.8 are defined by case law. In this bank robbery case, the Sixth Circuit determined that the enhancement was appropriate. The Sixth Circuit’s explanation for why the offense conduct was “unusually heinous, cruel, brutal, or degrading” follows:

The defendants in the course of their robbery did not merely shoot [the bank guard] after he had raised his hands in surrender, inflicting permanent and life-threatening injuries on him. After they had shot and disarmed him, when all reasonable possibility of resistance on [the guard’s] part had vanished, they continued to brutalize him. They kicked his wounded body until he passed out, in the process moving his body a distance of about twenty to twenty-five feet across the kitchen floor. When he came to, his stirring was sufficient for the defendants to shoot at him again with his own gun, apparently following up on their threat to kill him if he moved. If the shooter’s aim had been better, this could very easily have been a murder case. These subsequent, gratuitous actions by the defendants were not accounted for in the offense level calculations and are sufficiently heinous to justify an upward departure.

**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. Hayes*, 171 F.3d 389 (6th Cir. 1999). “Evidence used at sentencing may not be kept from the defendant simply by failing to incorporate it into the presentence report.” In this case, the appellate court determined that the district court plainly erred by relying at sentencing on letters from victims which were not disclosed to the defendant. During sentencing, the court stated that it had received letters from people who were present during the defendant’s bank robbery and that the court took them very seriously. The defendant and his attorney were unaware of the letters, as they were not disclosed in the presentence report. The appellate court held that Rule 32 required that the letters be disclosed, and remanded for resentencing.

## **CHAPTER SEVEN: *Violations of Probation and Supervised Release***

*United States v. Kirby*, 418 F.3d 621 (6th Cir. 2005). “The district court must consider the policy statements set forth in Chapter Seven of the Sentencing Guidelines prior to imposing a sentence. The policy statements, however, are merely advisory. The district court is also required to consider the factors listed in 18 U.S.C. § 3553(a). The court need not recite these factors but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review.”

*United States v. Johnson*, 529 U.S. 53 (2000), *rev’g* 154 F.3d 569 (6th Cir. 1998). The Supreme Court held that under 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual “is released from imprisonment.” Therefore, the length of supervised release is not reduced by excess time served in prison.

### **Part B Probation and Supervised Release Violations**

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

*United States v. Cochrane*, 702 F.3d 334 (6th Cir. 2012). The Sixth Circuit vacated and remanded a consecutive sentence which was imposed for a firearms conviction and a violation of supervised release. It found that the district court did not provide a discernible reason on the record for the consecutive sentence, and stated that although the policy statement in §7B1.3(f) appears to be mandatory, it is not binding on the court and “construing it to be mandatory would be reversible error.” The court stated that when “deciding to impose consecutive sentences, we hold that a district court must indicate on the record its rationale, either expressly or by reference to a discussion of relevant considerations contained elsewhere.”

*United States v. Kontrol*, 554 F.3d 1089 (6th Cir. 2009). The sentence imposed upon revocation of supervised release was procedurally and substantively reasonable when the court sentenced the defendant to 15 months, above the guideline range of four to ten months because the defendant made threatening statements to his probation officer. Although those statements did not relate to his underlying offense for violations of his supervised release, the court correctly considered the section 3553(a) factors and properly found that they “bear on the circumstances of the underlying offense,” his “recalcitrance, the need to protect [the probation officer] and other probation staff,” and on “the prospect of deterring other defendants from going down a similar path.”

*United States v. Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007). The en banc court held that (1) a district court cannot impose a special condition of supervised release tolling the term of supervision while a defendant is out of the country (i.e., deported) and (2) the term of supervised release is not tolled while the defendant is out of the country.

*United States v. Kirby*, 418 F.3d 621 (6th Cir. 2005). “[A] court may consider evidence at a revocation hearing that would be inadmissible in a criminal prosecution.” In this case, the Sixth Circuit determined that the rule from *Crawford v. Washington*, 541 U.S. 36 (2004) — that out-of-court statements can only be used in court if the declarant was unavailable and the

accused was given a prior opportunity to cross-examine the declarant — did not apply to revocation of supervised release hearings.

*United States v. Coatoam*, 245 F.3d 553 (6th Cir. 2001). The appellate court held that a court must revoke probation for refusing a drug test if it is a term of probation. Section 3565(b)(3) requires mandatory revocation if a defendant refuses to comply with drug testing as imposed by section 3563(a)(4). Section 3563(a)(4) used to require a defendant to submit to drug testing as a mandatory condition of probation, that section was renumbered and is now found at section 3563(a)(5). The new section 3563(a)(4) imposes a mandatory condition of probation on the defendants convicted of crimes of domestic violence, and requires offender rehabilitation counseling. The defendant contended that section 3565(b)(3) did not apply to him because he was not convicted of a crime of domestic violence. The appellate court rejected this argument, concluding that Congress made a simple drafting error when it designated the mandatory condition for domestic violence at section 3563(a)(4), rather than (a)(5). The correct reading of section 3565(b)(3) is that the statute requires revocation of probation for failure to submit to drug testing when a defendant is required, as a condition of probation, to submit to drug testing.

*United States v. Lowenstein*, 108 F.3d 80 (6th Cir. 1997). “[A] court can modify the conditions of a defendant’s supervised release regardless of whether the defendant has violated his existing conditions.”

*United States v. Throneburg*, 87 F.3d 851 (6th Cir. 1996). The sentencing court did not err in holding the supervised release revocation hearing two years after the issuance of the violation warrant, or in imposing the resulting sentence consecutive to a state sentence being served for another crime. With respect to the timing of the revocation hearing, the court noted that the violation warrant issued well within the three-year term of supervised release and the hearing was held two years into the three-year period. The court rejected the defendant’s argument that his rights were prejudiced by this delay based on the assumption that if the federal court held the hearing and imposed the 24-month sentence earlier, the state Department of Corrections would have likely paroled the defendant to the federal sentence. The court adhered to the ruling of previous courts that delay violates due process only when it impairs the “defendant’s ability to contest the validity of the revocation.” In this case, the defendant admitted to violating the conditions of his supervised release and failed to provide support for his assertion that delay constitutes a due process violation. The court also rejected the defendant’s argument that his sentence upon revocation should be served concurrently with his state sentence. Although §7B1.3 contains a policy statement directing the sentencing court to impose revocation sentences consecutively to other terms of imprisonment, the court recognized its discretion in this matter and provided an explanation as to the reason for imposing consecutive rather than concurrent sentences.

*United States v. Twitty*, 44 F.3d 410 (6th Cir. 1995). “[A] defendant’s probation may be revoked for conduct which occurs prior to the actual commencement of the probationary sentence, but not for conduct which occurs prior to the date on which the defendant was sentenced to probation.”

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

*United States v. Hudson*, 207 F.3d 852 (6th Cir. 2000). “[W]hen assessing the penalty for a probation violation, the district court is not restricted to the range applicable at the time of the initial sentencing. Instead, the sentence need only be consistent with the provisions of subchapter A, the general provisions for sentencing set out at 18 U.S.C. §§ 3553 *et seq.*”

### **FEDERAL RULES OF CRIMINAL PROCEDURE**

#### **Rule 32**

*United States v. Erpenbeck*, 532 F.3d 423 (6th Cir. 2008). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), I.A.

*United States v. Haygood*, 549 F.3d 1049 (6th Cir. 2008). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), I.A.

*United States v. Sexton*, 512 F.3d 326 (6th Cir. 2008). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), I.A.

*United States v. Vowell*, 516 F.3d 503 (6th Cir. 2008). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), I.A.

### **OTHER STATUTORY CONSIDERATIONS**

#### **Fair Sentencing Act**

*United States v. Hammond*, 712 F.3d 333 (6th Cir. 2013). The defendant was convicted of possession with intent to distribute cocaine base and received a sentence of 121 months. He filed a motion for a reduction of sentence pursuant to the Fair Sentencing Act. The district court reduced his sentence to the mandatory minimum of 120 months, and the defendant appealed, claiming that the court should have applied the amended mandatory minimum sentence, based on *Dorsey v. United States*, 132 S. Ct. 2321 (2012). The Sixth Circuit stated that *Dorsey* held that in the context of a direct appeal, the mandatory minimums of the Act apply to offenders who committed the offense prior to the effective date of the Act but were sentenced after the effective date. The circuit court found that because the defendant’s sentencing range had not been subsequently lowered by the Commission and was not an amendment incorporated into the policy statement, the district court had no authority to further reduce his sentence and therefore did not err in its sentencing reduction. The court further held that *Dorsey* should not extend to sentence reduction sentencings because the opinion itself “disfavors such an application in the context of 3582. . . . [t]he ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.” Therefore, the reduced sentence was affirmed.

*United States v. Carradine*, 621 F.3d 575 (6th Cir. 2010). The defendant pleaded guilty to possession with intent to distribute cocaine and being a felon in possession of a firearm. He appealed his sentence, and on August 12, 2010, the defendant moved to file a supplemental brief, arguing that he is entitled to benefit from the Fair Sentencing Act. The Sixth Circuit held that the savings statute at 1 U.S.C. § 109 requires application of the penalties in place at the time the crime was committed, unless a new enactment expressly provides for retroactive application. Because the Fair Sentencing Act contains no express statement, the court held it must apply the penalty provision in place at the time the crime was committed, and affirmed the sentence.

### **18 U.S.C. § 924(c)**

*United States v. Ham*, 628 F.3d 801 (6th Cir. 2011). In keeping with the Supreme Court's decision in *Abbott v. United States*, 131 S. Ct. 18 (2010), the Sixth Circuit affirmed a five-year mandatory sentence pursuant to 18 U.S.C. § 924(c) even though the defendant also had a ten-year mandatory sentence pursuant to 21 U.S.C. § 841. In *Abbott*, the Supreme Court held that the language in 18 U.S.C. § 924(c) that "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law" refers only to other provisions that impose mandatory minimum sentences for conduct proscribed under section 924(c). *i.e.*, the possession of a firearm in connection with a predicate crime. "Under *Abbott*, a mandatory minimum sentence under § 924(c) must run consecutively with any mandatory sentences for predicate crimes, as well as for other unrelated crimes. The 'except' clause in § 924(c) prohibits only the imposition of multiple consecutive mandatory sentences under § 924 for using a firearm in the commission of a violent or drug trafficking crime."

### **18 U.S.C. § 3582(c)(2)**

*United States v. Valentine*, 694 F.3d 665 (6th Cir. 2012). The defendant moved for a sentencing modification under section 3582(c)(2) because of retroactive amendments to the crack cocaine guideline. The district court had originally held that "[w]hile the Court might have misgivings about the total amount of crack . . . I have no trouble finding that [the defendant] purchased and possessed at least 1.5 kilograms of crack cocaine." During the modification hearing, the district court held hearings on the co-defendants' modification requests, but did not hold a hearing on the defendant's request, determining instead that his co-defendants were responsible for more than 4.5 kilograms but stating that to find the defendant responsible for the same amount would be "functionally inconsistent" with the first court's "low end threshold" in the "original finding that [he] was responsible for 'at least 1.5 kilograms.'" The government appealed. Citing to *United States v. Moore*, 582 F.3d 641, 644 (6th Cir. 2009), the circuit court stated "if the record does not reflect a specific quantity finding but rather a finding or a defendant's admission that the defendant was responsible for 'at least' or 'more than' a certain amount, then the modification court must make supplemental findings based on the available record to determine if applying the retroactive amendment lowers the Guideline range." The court stated that its finding in *Moore* had clearly stated that "[s]ince 4.5 kilograms is more than 1.5 kilograms, a new factual finding of the higher quantity is not inconsistent with the court's determination at [the defendant's] original sentencing," consistent with other circuits that also allow fact finding during a modification hearing. Because the district court abused its discretion

when it granted the defendant's motion for a sentencing reduction, the circuit court reversed the order granting the motion and remanded the case.

*United States v. Smith*, 658 F.3d 608 (6th Cir. 2011). The defendant appealed the district court's denial of a motion to reduce his sentence pursuant to section 3582(c) after the Commission lowered the base offense level for crack cocaine offenses. Because he had entered into a plea agreement pursuant to Rule 11(c)(1)(C), the government opposed the motion, claiming he was not eligible for the reduction because his original sentence was based on a plea agreement and not on the guidelines range. The Sixth Circuit found that pursuant to the subsequently decided opinion in *Freeman v. United States*, 131 S. Ct. 2685 (2011), where a plurality of the Court held that a defendant who enters into a Rule 11(c)(1)(C) plea agreement is eligible to seek a reduction in his sentence pursuant to section 3582(c) based on a reduction in the guideline range, if a Rule 11(c)(1)(C) agreement expressly uses a guideline range applicable to the charged offense to establish a term of imprisonment, and that range is lowered by the Commission, the term of imprisonment is "based on" the range and the defendant is eligible for sentence reduction. The court vacated and remanded the sentence.

*United States v. Howard*, 644 F.3d 455 (6th Cir. 2011). The defendant received a sentence of 97 months for possession of crack cocaine, at the bottom of the guideline range. The court then granted a motion to reduce his sentence in part based on the two-point crack reduction. The district court then reduced his sentence to 88 months, and the defendant appealed, arguing that the court had not adequately explained its sentence pursuant to 18 U.S.C. § 3582(c). The district court had simply checked a box on a form that stated "[u]pon a motion of . . . the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has been subsequently lowered and made retroactive by the . . . Sentencing Commission . . . and taking into account the sentencing factors set forth in 18 U.S.C. § 3553(a)" the motion was granted. The Sixth Circuit agreed with the Seventh Circuit in *United States v. Marion*, 590 F.3d 475 (7th Cir. 2009) which ruled that a statement discussing the court's reasoning is necessary for meaningful review of a motion to reduce a sentence, and held that it was impossible for it to ensure no abuse of discretion because "the order shows only that the district court exercised its discretion rather than showing *how* it exercised that discretion," and remanded with instructions to provide a statement of reasons for its decision.

*United States v. Turnley*, 627 F.3d 1032 (6th Cir. 2010). The defendant, convicted for possession of crack cocaine with the intent to distribute, filed a motion pursuant to 18 U.S.C. § 3582(c)(2), for a lower sentence in accordance with the subsequently lowered guideline range. The district court held that *Booker* renders the guidelines advisory in section 3582(c)(2) resentencings, and resentenced the defendant below the mandatory amended guideline range. The government appealed. After the parties filed their briefs, the Supreme Court directly addressed the issue in *Dillon v. United States*, 130 S. Ct. 2683 (2010), and held that *Booker* does not require that the guidelines be considered advisory in section 3582(c)(2) resentencings because "proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." The court held, therefore, that the district court erred, and vacated and remanded the case for resentencing.

*United States v. Johnson*, 564 F.3d 419 (6th Cir. 2009). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), IX.

*United States v. Metcalfe*, 581 F.3d 456 (6th Cir. 2009). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), IX.

*United States v. Perdue*, 572 F.3d 288 (6th Cir. 2009). *See* §1B1.10.