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

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

This document contains annotations to selected Seventh 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 Seventh 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. Taylor, 660 F.3d 1000 (7th Cir. 2011). Rejecting the defendant's assertion that *Pepper v. United States*, 131 S. Ct. 1229 (2011), requires the district court to consider any and all arguments defendants raise upon a remand for resentencing, the Seventh Circuit held that "when a case is generally remanded . . . for re-sentencing, the district court may entertain new arguments as necessary to effectuate its sentencing intent, but is not obligated to consider any new evidence or arguments beyond that relevant to the issues raised on appeal."

United States v. Aguilar-Huerta, 576 F.3d 365 (7th Cir. 2009). The defendant challenged a 16-level increase in his offense level because he had been deported after being convicted of an aggravated felony, arguing that the enhancement was not based on empirical data, national experience, or input from experts. The Seventh Circuit held that a "sentencing judge is free . . . to reject a guideline as inconsistent with his own 'penal' theories . . . and as lacking a basis in data, experience, or expertise" but he is not *required* to consider such an argument. "For if he is required to do that, sentencing hearings will become unmanageable, as the focus shifts from the defendant's conduct to the 'legislative' history of the guidelines." It also held that a defendant may not assert a legal entrapment defense at a sentencing hearing following a guilty plea. The defendant may, however, raise a "sentencing entrapment" defense by accusing the government of inducing the defendant into conduct that would increase his sentence.

United States v. Alexander, 553 F.3d 591 (7th Cir. 2009). The district court was not obligated to apply a pending guideline amendment that the defendant did not cite at sentencing as a basis for a lower sentence.

United States v. Gibbs, 578 F.3d 694 (7th Cir. 2009). The district court committed procedural error when it failed to calculate or acknowledge the advisory guideline range for supervised release. The court sentenced the defendant to ten years' imprisonment and ten years of supervised release for distributing crack. The statutory minimum term of supervised release

was five years, and the statutory maximum term was life. The guideline range under §5D1.2(a)(1) was three to five years. Because the statutory minimum coincided with the top of the guideline range, the entire guideline range was simply five years. The Seventh Circuit vacated the sentence of supervised release because although the district court identified the statutory range of five years to life, it failed to calculate or even acknowledge the advisory guideline range. The procedural error entitled the defendant to a redetermination of his supervised release term.

United States v. Villegas-Miranda, 579 F.3d 798 (7th Cir. 2009). After serving a term of imprisonment on a state domestic battery conviction, the defendant pleaded guilty to a pending illegal reentry charge. At sentencing, he argued for a below-guideline sentence to credit him with the time served in state prison on the battery charge, because if the government had charged him with illegal reentry at any reasonable time prior to his release from state custody, the district court would have been able to sentence him concurrently with his state time. The district court did not address the argument at sentencing. The Seventh Circuit held that the district court's failure to address the defendant's principal argument, which had legal and factual merit, required that the defendant's sentence be vacated and remanded for resentencing.

United States v. Williams, 552 F.3d 592 (7th Cir. 2009). The district court lacked authority under the Assimilative Crimes Act to revoke the defendant's driving privileges except when he was on federal enclaves.

United States v. Griffin, 521 F.3d 727 (7th Cir. 2008). "[A] district court plainly errs by announcing its intended sentence before a criminal defendant's allocution." *See also United States v. Luepke*, 495 F.3d 443 (7th Cir. 2007); *United States v. Groves*, 470 F.3d 311 (7th Cir. 2006).

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008). "[T]he sentencing court may not presume that a within-Guidelines sentence is reasonable. We review *de novo* a claim that the district court failed to appreciate the advisory nature of the Guidelines."

United States v. Robinson, 435 F.3d 699 (7th Cir. 2006). The Seventh Circuit held that guidelines calculations are conducted the same way now as they were before *Booker*.

United States v. Valle, 458 F.3d 652 (7th Cir. 2006). The court stated:

> Before *Booker*, we recognized that district courts were required to sentence within the guideline range except in unusual cases, and anything but a loose comparison to pre-*Booker* departure cases would vitiate the post-*Booker* discretion that sentencing courts enjoy. All that is necessary now to sustain a sentence above the guideline range is an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant.

United States v. Walker, 447 F.3d 999 (7th Cir. 2006). The court explained that Rule 32(h) does not apply to a post-*Booker* variance—where the district court exercises

its discretion to impose a sentence based on the advisory guidelines range after consideration of the section 3553(a) factors, the court does not unexpectedly "depart" from a generally binding guidelines range based on information not addressed by the PSR or the parties' presentencing pleadings.

United States v. Bokhari, 430 F.3d 861 (7th Cir. 2005). The court stated:

> Without specific information pertaining to the district court's calculation of the total offense level, we cannot determine whether the sentence falls within the Guidelines range (and therefore is entitled to a presumption of reasonableness) or whether it falls outside of the recommended range (and therefore requires sufficient additional reasoning from the district court). . . . Thus, the proper course here is to allow the district court to make explicit and clear factual findings and determinations pertaining to the intended loss amount, as well as defendants' other objections to the [Presentence Report]. This will allow a proper calculation of each defendant's total offense level and sentencing range under the Guidelines. The district court may then resentence, providing, if necessary, sufficient rationale for any deviation from the recommended sentencing range under the Guidelines.

United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005). The court remanded a within-guideline sentence due to an "inadequate explanation for the sentence;" holding that "[a] judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight" and that the defendant was not required to object to "the judge's failure to explore [the defendant's] alleged lack of cooperation . . . and to articulate his reasons for rejecting the argument for a lighter sentence on the basis of [the defendant's] psychiatric problems and alcohol abuse."

United States v. Goldberg, 406 F.3d 891 (7th Cir. 2005). The court stated that if the appellant were to be resentenced, "it would be under a different standard, one that would entitle the judge to raise or lower the sentence, provided the new sentence was justifiable under the standard of reasonableness."

United States v. Rodriguez-Alvarez, 425 F.3d 1041 (7th Cir. 2005). The court stated:

> Sentencing courts must continue to calculate the applicable guidelines range even though the guidelines are now advisory. . . . Courts must also give defendants the 'opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence.' In entering the sentence, the judge must consider the sentencing factors in § 3553(a) and 'articulate the factors that determined the sentence that he has decided to impose.'

United States v. Schlifer, 403 F.3d 849 (7th Cir. 2005). The court recognized that although the Supreme Court's opinion in *Shepard v. United States*, 544 U.S. 13 (2005), called into question the exception articulated in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the fact that a defendant is a career offender still need not be found by a jury under the Sixth Amendment.

B. Burden of Proof

United States v. Hernandez, 544 F.3d 743 (7th Cir. 2008). Defendant's plea agreement included a stipulation that any enhancements would have to be established beyond a reasonable doubt. At sentencing, the district court concluded that the defendant was responsible for possession of 159 kilograms of cocaine, which resulted in a guideline range of 360 months to life. Had the quantity been just 9 kilograms lower, the range would have been 262–327 months. The court stated that it was no error to apply a higher burden of proof based on the plea agreement: "The parties can stipulate to a different burden of proof than that required by law." In the face of conflicting evidence, failure to explain the factual basis for the finding that defendant possessed 159 kilograms was clear error.

United States v. Griffin, 493 F.3d 856 (7th Cir. 2007). The court reversed a sentence imposed before *Demaree* (*see* § I.F. *Ex Post Facto*) where the district court said: "'[T]he burden's on the defendant to overcome the rebuttable presumption that a guideline sentence is appropriate. . . . I'm not in a position to find on this record that the presumption of reasonableness of the guideline sentence has been overcome.'"

C. Hearsay

United States v. Roche, 415 F.3d 614 (7th Cir. 2005). The court rejected the appellant's hearsay argument and explained that the guidelines permit judges to consider information that has "sufficient indicia of reliability to support its probable accuracy."

D. Acquitted Conduct

United States v. Price, 418 F.3d 771 (7th Cir. 2005). The court recognized that because the Supreme Court's holding in *United States v. Watts*, 519 U.S. 148 (1997), "remains the law after *Booker*," a sentencing court may still consider acquitted conduct. The court also noted that preventing the sentencing court from finding facts relevant to sentencing "would undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *See also United States v. Waltower*, 643 F.3d 572 (7th Cir. 2011) ("Every circuit to have considered the question post-*Booker*, including ours, has held that acquitted conduct may be used in calculating a guidelines sentence, so long as proved by a preponderance standard.").

E. Prior Convictions

United States v. Browning, 436 F.3d 780 (7th Cir. 2006). The Seventh Circuit held that a jury is not involved in the prior conviction finding under the Armed Career Criminal Act (ACCA.). The *Almendarez-Torres* exception for prior convictions still stands after *Shepard*. *See also United States v. Van Sach*, 458 F.3d 694 (7th Cir. 2006).

United States v. Hankton, 432 F.3d 779 (7th Cir. 2005). The Seventh Circuit held that a sentencing judge may consider virtually unlimited kinds of evidence relating to the defendant's criminal history, so long as the evidence is reliable. The appellate court added:

> The law is very clear that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." . . . A corollary to this general principle is the rule that a sentencing judge "may consider relevant information without regard to the rules of evidence . . . provided that the information has [a] sufficient indicia of reliability to support its probable accuracy." . . . Indeed, the federal criminal code makes clear that: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Accordingly, it is well-settled law that "hearsay is not only an acceptable basis for a sentencing determination," it is often an "integral part of the sentencing process."

United States v. Williams, 410 F.3d 397 (7th Cir. 2005). The court recognized that *Booker* does not apply to a district court's finding of a prior conviction.

F. Ex Post Facto

United States v. Jamison, 416 F.3d 538 (7th Cir. 2005). The court decided that retroactive application of the remedial decision in *Booker*, making the guidelines advisory, is not an *ex post facto* violation because the defendant had sufficient warning of possible consequences of his actions.

II. Departures

United States v. Higdon, 531 F.3d 561 (7th Cir. 2008). The court stated:

> It is apparent from *Kimbrough* . . . that the regime created by the *Booker* case, which demoted the guidelines from mandatory to advisory status, permits a sentencing judge to have his own penal philosophy at variance with that of the Sentencing Commission . . . . As a matter of prudence, however, in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission. The guidelines are advisory, but they are not advisory in the sense in which a handbook of trial practice is, which a trial lawyer could ignore completely if he wanted to. The judge must not merely compute the guidelines sentence, he must give respectful consideration to the judgment embodied in the guidelines range that he computes. That is why the scope of judicial review varies with the extent to which the judge's out-of-guidelines sentence departs from the guidelines range; the greater the departure, the more searching will be the appellate review of the judge's exercise of his sentencing discretion.

United States v. Grigg, 442 F.3d 560 (7th Cir. 2006). The court stated:

> According to § 3553(b)(2), when sentencing defendants for crimes involving children and sexual offenses, the district court "shall impose a sentence" within the calculated guidelines range, unless it finds mitigating circumstances that have "been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28." This language mirrors that of § 3553(b)(1); the sole difference between the two subsections is that § 3553(b)(2) restricts stringently the mitigating circumstances that qualify for a downward departure, whereas § 3553(b)(1) defines those circumstances more broadly. In reviewing § 3553(b)(2) in light of *Booker*, we conclude that it violates the Sixth Amendment by mandating a sentence within the range recommended by the Sentencing Guidelines. It was precisely this requirement that the Supreme Court found constitutionally objectionable in *Booker*. Given the similarities between the two subsections, we believe the same objections voiced by that Court also apply to § 3553(b)(2).

The court also held that the PROTECT Act does not make the guidelines binding on a district court in a child pornography case, adding:

> We are mindful of Congress' view, expressed in the PROTECT Act, regarding prosecuting and sentencing child kidnappers and sexual offenders. Although we must hold today that § 3553(b)(2) cannot constrain the discretion of a district court to impose a sentence outside the range recommended by the Sentencing Guidelines, we nevertheless believe that district courts, in the course of selecting an appropriate sentence, ought to give respectful attention to Congress' view that crimes such as Mr. Grigg's are serious offenses deserving serious sanctions.

United States v. Howard, 454 F.3d 700 (7th Cir. 2006). The Seventh Circuit affirmed a sentence above the guideline range. The court noted that "[a]fter *Booker*, the district court must first calculate the proper Guidelines range and then, by reference to the factors specified in 18 U.S.C. § 3553(a), select an appropriate sentence. Although a sentence outside the range does not enjoy the presumption of reasonableness that one within the range does, it does not warrant a presumption of unreasonableness. It does, however, necessitate a more thorough explanation based on the § 3553(a) factors; the further a sentence strays from the range, the more compelling the district court's explanation must be." The appellate court stated: "[T]he defendant's] argument in terms of 'departures' is misplaced because the concept has been rendered obsolete in the post-*Booker* world. Our only consideration is whether the district court's sentence . . . was appropriately justified under the § 3553(a) factors."

United States v. Jordan, 435 F.3d 693 (7th Cir. 2006). The Seventh Circuit held that a sentence outside the guideline range is not entitled to a presumption of reasonableness and upheld a 240-month, statutory maximum sentence over a guideline range of 110–137 months. This sentence, on a conviction for traveling in interstate commerce to engage in a sexual act with

a juvenile and for interstate stalking, was reasonable given the: seriousness of the crimes, aggravating circumstances, heightened risk of recidivism, and need for deterrence.

United States v. Mancari, 463 F.3d 590 (7th Cir. 2006). The court vacated a within-guidelines sentence based on the district court's refusal to grant a departure. The court noted that the district court "appears to have been under the misimpression that its discretion was cabined by the pre-*Booker* departure jurisprudence" and remanded "in order to give the district court an opportunity to exercise its discretion fully to determine a reasonable sentence in this case."

United States v. Rosby, 454 F.3d 670 (7th Cir. 2006). The Seventh Circuit affirmed the defendant's within-guideline range sentence. The appellate court noted that although the court stated that no departure is authorized, it was clear from the record that the court knew about section 3553(a).

United States v. Baretz, 411 F.3d 867 (7th Cir. 2005). "We do not have appellate jurisdiction to review a court's discretionary refusal to depart downward."

United States v. Johnson, 427 F.3d 423 (7th Cir. 2005). The Seventh Circuit held that the defendant's "framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory. Now, instead of employing the pre-*Booker* terminology of departures, we have moved toward characterizing sentences as either fitting within the advisory guidelines range or not."

III. Specific Section 3553(a) Factors

A. Unwarranted Disparities

1. Fast Track

United States v. Reyes-Hernandez, 624 F.3d 405 (7th Cir. 2010). The defendants argued that they should have received downward variances based on the unwarranted disparities occasioned by fast-track programs available elsewhere. Relying on the circuit's recent en banc opinion in *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (en banc), and the Supreme Court's recent opinion in *Vazquez v. United States*, 130 S. Ct. 1135 (2010), the court concluded that sentencing courts may consider the existence of such fast-track programs under a section 3553(a) analysis. It stated:

> As in *Corner*, we are compelled now to reconsider our prior interpretation of the fast-track guideline § 5K3.1. We now hold, consistent with the First, Third, and Sixth Circuits, that a district court may consider a fast-track argument when evaluating the applicable § 3553(a) factors. Although we previously held that Congress "expressly approved" fast-track sentencing disparities through the PROTECT Act—thus effectively constraining sentencing judges' discretion to consider the absence of a fast-track program in their districts under § 5K3.1—the

> Supreme Court's disposition in *Vazquez* reflects the understanding that Congressional "directives" to the Sentencing Commission are unlike statutes in that they are not equally binding on sentencing courts.
>
> This follows the new paradigm established by *Kimbrough* and *Spears* that permits district court judges to disagree categorically with those directives in providing an individual sentence. To the extent that our prior decisions might be read to treat §5K3.1 as if it had the effect or force of a statute, we were proceeding without the benefit of *Kimbrough*, *Gall*, *Spears*, *Vazquez*, and *Corner*. These new developments in the law now refocus our understanding of § 5K3.1 [Early Disposition Programs [Policy Statement]] and cause us to view it through a different lens.

The court held that sentencing courts may indeed consider "the absence of a fast-track program in crafting an individual sentence" as part of a "holistic and meaningful review of all relevant § 3553(a) factors."

United States v. Ramirez-Silva, 369 F. App'x 744 (7th Cir 2010). The court affirmed the defendant's sentence for illegal reentry, finding, among other things, that the district court was not required to address the defendant's claim of sentencing disparity created by the lack of a fast-track program in the district. The defendant failed to demonstrate or assert that he would be eligible for a fast-track reduction in any district.

2. Co-defendants

United States v. Boscarino, 437 F.3d 634 (7th Cir. 2006). The court explained why "a sentencing difference based on one culprit's assistance to the prosecution is legally appropriate."

> There would be considerably less cooperation--and thus more crime--if those who assist prosecutors could not receive lower sentences compared to those who fight to the last. Neither *Booker* nor § 3553(a)(6) removes the incentive for cooperation--and because this incentive takes the form of a lower sentence for a cooperator than for an otherwise-identical defendant who does not cooperate, the reduction cannot be illegitimate. After all, § 3553(a)(6) disallows "*unwarranted* sentence disparities" (emphasis added), not all sentence differences.

United States v. Mendoza, 457 F.3d 726 (7th Cir. 2006). The court held that the disparity between the defendant's and co-defendant's sentence was warranted and reasonable when the district judge found they were not similarly situated.

United States v. Pisman, 443 F.3d 912 (7th Cir. 2006). The court stated that comparison of a defendant with co-defendants is not a proper application of the mandate to minimize unwarranted disparities, in part, because that mandate focuses on unjustified differences in sentences across judges and districts, not among defendants in an individual case. The court stated:

> That comparison of co-defendants, however, is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences. First, the lower sentence for [a co-defendant] was attributable to his decision to plead guilty to the offense and his cooperation with the government, which is a legally appropriate consideration. The corresponding reduction in his sentence as compared to a non-cooperating defendant is not an "unwarranted" disparity. Moreover, the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts. (Citation omitted) In fact, the focus on the differences among defendants in an individual case in which one defendant cooperates could actually increase sentence disparity, because the resulting lower sentence for the offense to redress that disparity will be out of sync with sentences in similar cases nationwide in which there were not multiple defendants or in which one did not cooperate.

B. Other Factors

United States v. Powell, 576 F.3d 482 (7th Cir. 2009). The court remanded for the district court to consider the defendant's arguments about his advanced age and infirm health in light of the section 3553(a) factors. The district court stated that age, lack of criminal history, and health problems "weigh greatly on me and bear on the history and characteristics of the defendant, *but they are, of course, also taken into account by the guidelines themselves*." The Seventh Circuit held that "[a]lthough the guidelines do account for a defendant's criminal history . . . they do *not* factor in a defendant's age and health." Age and health are listed as grounds for departure in limited circumstances and are not ordinarily relevant.

United States v. Della Rose, 435 F.3d 735 (7th Cir. 2006). The Seventh Circuit stated that district courts remain obliged to consult the guidelines in arriving at an appropriate sentence and for that purpose they must apply the relevant guideline provision and make the necessary factual determinations just as they did before *Booker*. "A sentencing judge surely may elect to treat a defendant's contributions to his community as evidence of his redeeming qualities and as a ground for a less severe sentence, but such contributions do little to establish that a sentence within the Guidelines range is unreasonable."

IV. Forfeiture

United States v. Tedder, 403 F.3d 836 (7th Cir. 2005). The court explained that the Sixth Amendment does not apply to forfeitures because there is no statutory maximum forfeiture.

V. Restitution

United States v. Belk, 435 F.3d 817 (7th Cir. 2006). The Seventh Circuit held that *Booker* and *Apprendi* do not implicate restitution issues. The defendant's argument regarding "the amount of restitution likewise fails to the extent it rests on *Booker*, for restitution lacks a 'statutory maximum' and the whole *Apprendi* framework (of which *Booker* is an instance) therefore is inapplicable."

United States v. George, 403 F.3d 470 (7th Cir. 2005). The court held that the *Booker* Sixth Amendment issue does not apply to restitution because restitution has no statutory maximum, and it is a civil remedy, not a criminal punishment. *See also United States v. Swanson*, 394 F.3d 520 (7th Cir. 2005).

VI. Reasonableness Review

A. General Principles

United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012). The Seventh Circuit held that a "sentence within a properly calculated guidelines range is presumed to be reasonable; it is the defendant's burden to overcome the appellate presumption."

United States v. Kirkpatrick, 589 F.3d 414 (7th Cir. 2009). The court vacated and remanded a sentence that was nearly double the top of the guideline range, finding that the upward variance appeared to be chosen arbitrarily and that "a judge still must start by using the Guidelines to provide a benchmark that curtails unwarranted disparities." After the defendant was arrested for being a felon in possession of a gun, he confessed to four murders he did not commit and falsely stated that he put out a contract hit on a federal investigator. The sentencing court explained that the defendant's lies put the case agent in fear and wasted the time of the agents. The Seventh Circuit agreed that a higher sentence was justified but found that the court did not sufficiently justify sentencing him to an extra five years of prison time. The Seventh Circuit explained that a court cannot give proper weight to the section 3553(a) factors without first considering the guidelines approach to the sentence at issue.

United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009). The court stated that the Supreme Court's decisions in *Kimbrough* and *Spears* held that "a judge need not accept the Sentencing Commission's penological framework. The court may adopt its own." According to the court, this means that "§ 3553 permits a judge to reduce one defendant's sentence because of another's lenient sentence—not *because* of § 3553(a)(6), but *despite* it."

United States v. Abdulahi, 523 F.3d 757 (7th Cir. 2008). "As we have repeatedly explained, *Apprendi* has no application to cases like this one where the sentence is below the statutory maximum." *See also United States v. Hernandez*, 330 F.3d 964 (7th Cir. 2003) (collecting cases).

United States v. Bush, 523 F.3d 727 (7th Cir. 2008). "To determine a defendant's sentence, the district court must engage in a two-step process . . . . First it must calculate and consider the sentence recommended by the advisory sentencing guidelines . . . Then, to ascertain the actual sentence, it must apply the criteria set forth in [18 U.S.C.] § 3553(a) to the facts and circumstances of the defendant's particular case."

United States v. Farmer, 543 F.3d 363 (7th Cir. 2008). "A sentencing based on an incorrect Guidelines range constitutes plain error and warrants a remand for resentencing, unless we have reason to believe that the error in no way affected the district court's selection of a particular sentence."

United States v. McIlrath, 512 F.3d 421 (7th Cir. 2008). The Seventh Circuit has stated that its pre-*Gall* precedent was generally consistent with the Supreme Court's opinion in *Gall*. It described the holding in *Gall* as follows: "[A] sentence outside the guidelines range must not be presumed unreasonable by the appellate court, which also may not hogtie sentencing judges with a rigid formula for determining whether the justification for an out-of-range sentence is 'proportional' to the extent of the sentence's deviation from the range."

United States v. Sachsenmaier, 491 F.3d 680 (7th Cir. 2007). The court held that a presumption of reasonableness was consistent with *Rita*. "The *Rita* decision emphasized that this is a standard for appellate review only. The district courts must calculate the advisory sentencing guideline range accurately, so that they can derive whatever insight the guidelines have to offer, but ultimately they must sentence based on 18 U.S.C. § 3553(a) without any thumb on the scale favoring a guideline sentence. If, however, a district court freely decides that the guidelines suggest a reasonable sentence, then on appellate review the defendant must explain why the district court was wrong."

United States v. Blue, 453 F.3d 948 (7th Cir. 2006). The Seventh Circuit affirmed the defendant's sentence, which was within the guideline range. The defendant argued that the court did not take into account her substantial assistance to the government, which the government acknowledged at the sentencing hearing. The appellate court emphasized its task:

> Our task, we should again emphasize, is not to review in isolation the district court's rejection of the government's request for a below-Guidelines sentence, but rather to evaluate the overall reasonableness of the sentence imposed. Looking at the court's refusal to impose a sentence outside the advisory Guidelines range is an aspect of that assessment, but it is just one aspect. The district court must consider and balance the wide range of factors reflected in section 3553(a). We owe deference to the court's resolution of those factors, particularly when the court has imposed a sentence within the range recommended by the Guidelines. We may intervene if the district court has altogether ignored a relevant consideration, or has unreasonably discounted a factor so weighty as to compel a sentence outside of the Guidelines range. But it is not our province to second guess the district court's sentencing rationale. 'Rather, what we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a).'

United States v. Arnaout, 431 F.3d 994 (7th Cir. 2005). "[W]e continue to review the district court's factual findings at sentencing for clear error and the application of those facts to the [s]entencing [g]uidelines *de novo*."

United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005). The court held that a sentence of more than double the high end of the guideline range was unreasonable where the district court acknowledged the need to consider the section 3553(a) factors but failed to single out any factor except the defendant's criminal history. It noted that a useful starting point for determining reasonableness is to analogize to pre-*Booker* case law and ask how the sentence would have fared under decisions that analyze the reasonableness of departures. "All that is

necessary now to sustain a sentence above the guideline range is 'an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant.'"

B. Procedural Reasonableness

United States v. Figueroa, 622 F.3d 739 (7th Cir. 2010). The court remanded the within-guidelines sentence because the district court did not adequately explain its sentence and discussed "topics that are both outside of the record and extraneous to any proper sentencing consideration." Although the sentence may have been substantively reasonable, the court stated that "the process the district court used to get there—in particular, its extraneous and inflammatory comments during the sentencing hearing—cast doubt on the validity of the sentence."

> During the hearing, the district court digressed to discuss Figueroa's native Mexico, the immigration status of Figueroa and his sisters, and the conditions and laws in half a dozen other countries—not to mention unnecessary references to Hugo Chávez, Iranian terrorists, and Adolf Hitler's dog. We have no way of knowing how, if at all, these irrelevant considerations affected Figueroa's sentence. We therefore must remand, to ensure that the district court's choice of sentence was based only on the criteria that Congress has authorized. *See* 18 U.S.C.§ 3553.

United States v. Brown, 610 F.3d 395 (7th Cir. 2010). The court vacated and remanded a below-guideline sentence for crack distribution, stating: "Although a sentence so far below the recommended guidelines range lies within the court's power, and may even have been justified in this case, the record is too spare to support that conclusion at this point." The guideline range for the defendant, a career offender, was 262-327 months. The court imposed the mandatory minimum sentence of 120 months. The court stated: "In its terse explanation of the sentence, the district court mentioned only Brown's age (40 years old), the short length of his previous state sentences, and the conditions of his upbringing." It found the sentence procedurally unreasonable. "While the district court invoked several relevant sentencing factors, its brief explanation for departing from the guidelines fell far short of what *Gall* requires. . . . Thus, we have no trouble concluding that the district court failed here to articulate the necessary justification for such a sizable departure from the guidelines."

United States v. Panice, 598 F.3d 426 (7th Cir. 2010). The Seventh Circuit vacated the defendant's 360-month within-guidelines fraud sentence as procedurally unreasonable. The trial judge's comments suggested both that he may have viewed the guidelines as presumptively reasonable, despite the Supreme Court's declaration to the contrary in *Gall* and that he may not have given adequate consideration to the relevant 18 U.S.C. § 3553(a) factors. The court suggested that the district court did not adequately consider the disparities between the defendant's sentence and those given to other white collar offenders, including Conrad Black, John and Timothy Rigas, Jeffrey Skilling and Bernard Ebbers. It also was not clear whether the district court "gave meaningful consideration" to the other § 3553(a) factors argued by the defendant.

United States v. Young, 590 F.3d 467 (7th Cir. 2009). The court affirmed a within-guideline sentence for conspiracy to use interstate commerce to facilitate prostitution. It rejected the defendant's argument that the district court did not fully comply with its obligation to determine a reasonable sentence under 3553(a) because it did not explicitly address each of the mitigating factors the defendant argued in support of a below-guidelines sentence. It stated:

> The district court properly determined Young's offense level, and although the court did not expressly address the factors she cited in support of a below-Guidelines sentence, Young has not shown which of those factors, if any, was sufficiently meritorious to require explicit discussion by the court or to rebut the presumption of reasonableness that we attach to the within-Guidelines sentence that the court imposed.

United States v. Steward, 339 F. App'x 650 (7th Cir. 2009). The district court abused its discretion when it did not adequately explain defendant's sentence in light of the section 3553(a) factors. The district court applied the career offender enhancement for a low-level retail drug trafficker whose three previous convictions totaled less than six grams of cocaine and less than 25 grams of marijuana. Although the career offender enhancement technically applied and the court therefore correctly calculated the guideline range, the court must ultimately base its sentence on section 3553(a). Here, the district court merely stated in a sentence fragment that it considered the statutory factors. Defendant argued at sentencing that the enhancement's application resulted in a sentence greater than necessary under section 3553(a). Defendant pointed to a 1994 Sentencing Commission report that questioned the application of the career offender enhancement to retail-level drug traffickers because unlike violent criminals they are easily replaced (undermining the goal of incapacitating criminals) and because recidivism rates for drug traffickers sentenced as career offenders are much lower than others with a category VI criminal history. Like the rest of the guidelines, the career offender enhancement is advisory, and a district court is required to look beyond the enhancement to the individual situation of each defendant to determine a reasonable sentence under section 3553(a). The Seventh Circuit vacated the sentence and remanded to the district court for an adequate explanation of the sentence under section 3553(a).

United States v. Tahzib, 513 F.3d 692 (7th Cir. 2008). Mitigating factors that "are nothing more than stock arguments that sentencing courts see routinely [(*e.g.*, family ties, how criminal history category over-represents the seriousness of a prior conviction, and the extent to which the defendant accepted responsibility)] . . . are the type of argument that a sentencing court is certainly free to reject without discussion. . . . A court's discussion need only demonstrate its meaningful consideration of the [18 U.S.C.] § 3553(a) factors . . . ." *See also United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005).

United States v. Baker, 445 F.3d 987 (7th Cir. 2006). The court upheld an 87-month sentence imposed for distributing child pornography—a sentence below the advisory guidelines range of 108 to 135 months—although the district court's written statement of reasons was brief. The district court's oral consideration of the § 3553(a) factors was sufficiently proportional to the district court's deviation from the guidelines to assess the reasonableness of the sentence imposed.

United States v. Rodriguez-Alvarez, 425 F.3d 1041 (7th Cir. 2005). The court stated:

> When a district court does not make a finding of fact regarding a position advanced by a party during a post-*Booker* sentencing, this Court will assume, for the purposes of the reasonableness analysis, that it considered the submission in a light favorable to the offering party. If it can be effectively argued that the sentence was unreasonable, given favorable implicit factual determinations, the case will be remanded for the trial court to make explicit factual findings.

C. Substantive Reasonableness

United States v. Miller, 601 F.3d 734 (7th Cir. 2010). The circuit court held that a sentence 50 percent above the high end of the advisory guidelines range was substantively unreasonable for a female defendant convicted of traveling in interstate commerce to engage in prohibited sexual conduct with a 14-year-old girl. The district court stated that it "based its above-guidelines sentence at least partly on its belief that sex offenders have a higher-than-normal rate of recidivism, specific deterrence does not work for them, and as a result, lengthy incapacitation is the only way to protect the public." The circuit court noted that this reasoning would apply to all sex offenders, not just this defendant. Moreover, it concluded that the reasoning was not supported by any evidence presented to the court and was, in fact, subject to debate. It remanded for resentencing.

United States v. Carter, 538 F.3d 784 (7th Cir. 2008). "Statistical evidence . . . can no doubt be a helpful tool to a sentencing judge. Yet, there is certainly no evidence that Congress ever intended that such evidence rigidly cabin the discretion of the district court in exercising its duty under [18 U.S.C. §] 3553(a)."

United States v. Shrake, 515 F.3d 743 (7th Cir. 2008). The court held that, "[a]fter [*Gall*] stressed the extent of a district judge's discretion in sentencing, and the limits of appellate review, it is difficult to see how a mid-Guideline sentence could be upset unless the judge refuses to entertain the defendant's arguments or resorts to an irrational extra-statutory consideration."

United States v. Gonzalez, 462 F.3d 754 (7th Cir. 2006). The Seventh Circuit affirmed as reasonable a within-guidelines sentence for conspiracy to distribute marijuana, finding that the defendant provided "exceedingly poor reasons for questioning the reasonableness of his sentence" and concluding that the "factors that the defendant points to as mitigating his guilt are the normal incidents of a career in the illegal drug trade." After discussing the defendant's argument, the Seventh Circuit stated:

> All these points would hardly be worth repeating in an opinion were it not for our concern lest criminal defendants confuse a debatable sentence with an unreasonable one and as a result waste their time and ours by filing frivolous appeals. A sentence of 276 months is long, and since it is not a statutory minimum and the sentencing criteria in 18 U.S.C. § 3553(a) are vague, the judge would not have been acting unreasonably had he given Gonzalez a shorter sentence, though this would depend on how much shorter and on the judge's explanation for the

> sentence. But because the criteria *are* vague, a sentence that is within the guidelines range and thus coincides with the judgment of the Sentencing Commission not only is presumptively reasonable, as the cases say, . . . but, as this formula implies, will very rarely be upset on appeal.
>
> By the same token, a sentencing judge who, as he is required to do, deals conscientiously with the defendant's principal arguments for a sentence, below the guidelines range, that is based on the statutory criteria, . . . will be reversed only in a very exceptional case. . . . The present case, rather than being exceptional, is routine.

United States v. Leahy, 464 F.3d 773 (7th Cir. 2006). The Seventh Circuit held:

> The district court adequately explained the reasons for its sentence, examining the various § 3553(a) factors in detail. In particular, the district court mentioned the severity of the offenses, which defrauded victims of over one hundred million dollars. The offenses were not one-time affairs, but the long-term duping of the victims by flooding them with a coordinated attack of falsehoods. Even more troubling, Duff used and corrupted his employees and his own family, particularly his mother and wife, to satisfy his greed. Moreover, the district court also laid emphasis on Duff's ready willingness to flout laws to gain his criminal objectives and the apparent difficulty in deterring a man who would engage in these types of dealings for over a decade. The district court then assessed the nature and circumstances of Duff's character, which further condemned him. He acted out of avarice, not necessity, and, as became clear at trial, threatened and bullied others to get his way. In short, the district court had a thoughtful and meaningful analysis regarding why Duff's crimes merited 118 months of imprisonment. Our review is deferential, as the district court was in the best position to judge. The district court's evaluation gave a mountain of reasons for a sentence outside the guidelines range, and we find the sentence reasonable.

United States v. Owens, 441 F.3d 486 (7th Cir. 2006). The appellate court upheld the district court's sentence in a series of bank robberies, stating:

> The record reflects that the district court . . . first discussed the nature of Mr. Owens' offenses, noting that all three robberies were committed within a short, four-month time frame. It emphasized that, although not overtly violent, the robberies were nevertheless dangerous and unpredictable. These observations were directed to considerations included in § 3553(a). The court also weighed "the history and characteristics of the defendant," as required by § 3553(a)(2). It recognized that Mr. Owens had no criminal history and that he immediately assumed responsibility for his crimes. But, according to the district court, these facts were made less relevant by the nature and seriousness of the offense, and by the fact that Mr. Owens' prior experience working at a bank placed him on notice of the possible implications of his conduct, including that "things [could] just

> quickly get out of control." The fact-specific balancing of these factors is entitled to great deference by this court.
>
> Additionally, the court noted that Mr. Owens had accepted responsibility for his actions and exhibited remorse. It also assured him that the court considered his medical condition. Nevertheless, it found that, when one weighs these facts against the serious nature of the offenses and the short time frame in which they were committed, a lengthy term of imprisonment was desirable.

United States v. Rinaldi, 461 F.3d 922 (7th Cir. 2006). The court upheld a 21-month sentence (15–21 month range) and a $500,000 fine (based on the $250,000 maximum per count). The court observed that the district court had "distinguished the impact of Rinaldi's crime as one of non-violence and chose not to increase his term of imprisonment, but opted instead to increase the fine; punishing the perpetrator with a correlate of his own crime. Because of this thorough analysis of the nature, circumstances, and seriousness of the offense in consideration of § 3553(a), we cannot say that the district court's sentence was unreasonable."

United States v. Sharp, 436 F.3d 730 (7th Cir. 2006). The court held that where the parties agree that the sentencing court properly calculated the guideline range, the court of appeals will review a challenged sentence for reasonableness.

United States v. Dean, 414 F.3d 725 (7th Cir. 2005). The Seventh Circuit held that a judge need not apply section 3553(a) in a checklist fashion or rehearse on the record all considerations listed therein. Rather, an adequate statement of the judge's justification for the sentence imposed is sufficient so long as the justification is consistent with section 3553(a). The court stated that the greater the departure, "the more compelling the justification based on factors in § 3553(a) the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence." It stated: "With the guidelines now merely advisory, factfindings that determine the guidelines sentence do not determine the actual sentence, because the sentencing judge is not required to impose the guidelines sentence; and so the Sixth Amendment is not in play."

United States v. George, 403 F.3d 470 (7th Cir. 2005). The Seventh Circuit held that "[j]udges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence is outside it) this defendant deserves more or less."

United States v. Lister, 432 F.3d 754 (7th Cir. 2005). The Seventh Circuit affirmed, finding that the district court "explicitly considered § 3553(a)." It explained:

> [The Judge] reviewed Lister's history with drugs and attempts at rehabilitation, his criminal history, and the overall quantity of cocaine base he had admitted distributing. Moreover, he announced that Lister's term would "achieve the societal interest of punishing and deterring the defendant as well as protecting the community." In light of these statements, we cannot agree that the § 3553(a) factors were not adequately considered.

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005). The court adopted a presumption of reasonableness for sentences within the guidelines and held that a defendant can rebut the presumption only by demonstrating that his sentence is unreasonable when measured against the factors set forth in section 3553(a).

United States v. Williams, 425 F.3d 478 (7th Cir. 2005). The court held that a guidelines sentence is presumptively reasonable; in reviewing for reasonableness, the court must determine whether the sentence was imposed for reasons that are logical and consistent with the factors set forth in section 3553(a).

D. Plain Error / Harmless Error

United States v. Burke, 425 F.3d 400 (7th Cir. 2005). "[The defendant], however, preserved this argument below by objecting to his sentence on the grounds that it violated *Apprendi* . . . which presaged *Booker*. Thus, we review for harmless error." "An error is harmless only if it did not affect the district court's choice of sentence."

United States v. Carroll, 412 F.3d 787 (7th Cir. 2005). The court explained that a sentence at the top of the guideline range does not rule out the possibility that the district court might have imposed a lesser sentence had it known that the guidelines were advisory, and concluding that a remand is appropriate to determine whether the sentencing court would have imposed a different sentence had it not been bound by the guidelines; the court's decision did not include a harmless error review.

E. Waiver of Right to Appeal

United States v. Berheide, 421 F.3d 538 (7th Cir. 2005). A defendant is bound by concessions made in his plea agreement and has waived any right to benefit from subsequent changes in the law.

United States v. Bownes, 405 F.3d 634 (7th Cir. 2005). The court held that *Booker* did not create an exception to the rule requiring enforcement of an unqualified appeal waiver.

VII. Revocation of Supervised Release

United States v. Kelley, 446 F.3d 688 (7th Cir. 2006). The Seventh Circuit held that supervised release revocations hearings are not criminal prosecutions, so the Sixth Amendment right of confrontation and *Crawford* do not apply at this proceeding.

VIII. Retroactivity

McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005). The court stated that *Booker* does not apply retroactively to criminal cases that became final before its release.

IX. Crack Cases

United States v. Johnson, 643 F.3d 545 (7th Cir. 2011). The court, finding procedural error, vacated and remanded to give the district court "an opportunity to consider and address [defendant's] arguments for a reduced crack-to-powder ratio." The court stated that the defendant's arguments for a one-to-one crack/powder ratio was not so weak as to not merit discussion. In addition, the court stated, defendant made repeated requests for a reduced ratio at resentencing, he specifically referenced the court's authority to vary from the guidelines' ratios, and other courts had applied lower ratios.

United States v. Johnson, 635 F.3d 983 (7th Cir. 2011). The court vacated and remanded the defendant's within-range life sentence because the district court failed to adequately consider section 3553(a)'s parsimony clause, which requires that the court impose a sentence that is sufficient, but not greater than necessary, to serve the purpose of sentencing. The defendant was convicted of a drug trafficking conspiracy involving more than ten kilograms of crack, including engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. In imposing a life sentence, the district court concluded that it would not deviate from the guidelines; however it noted that the life sentence was "regrettably" very high, "repeated that Congress, not the court, should remedy any injustice in Mr. Johnson's life sentence," "stated that it wished to 'hold[] out hope' to Mr. Johnson that the disparity eventually would be resolved," and observed that he would likely obtain relief if Congress and the Commission made it available. The Seventh Circuit stated: "Considered in their totality, the district court's comments create an unacceptable risk that, in imposing a life sentence, it did not account appropriately for the parsimony clause in the governing statute or for the individual circumstances of Mr. Johnson's case."

United States v. Collins, 604 F.3d 481 (7th Cir. 2010). The court remanded a crack sentence because the district court believed that it could not take into account the disparity between the guideline ranges for powder and crack cocaine. The court stated:

> Legal developments after Collins' sentencing revealed that the district court erred, not through any fault of its own, but by following or anticipating this court's decisions before the Supreme Court's decision in *Kimbrough* authorized district courts to consider the disparity when exercising their discretion under 18 U.S.C. § 3553(a). *See* 552 U.S. at 108, 128 S. Ct. 558. Because Collins raised the sentencing disparity at sentencing, and because we cannot determine with any certainty whether the district court would have sentenced Collins differently if it had been aware of its discretion under *Kimbrough*, a remand for resentencing is warranted.

United States v. Bush, 523 F.3d 727 (7th Cir. 2008). The court stated:

> Before *Kimbrough* was decided, our position was that a district court may not reduce the 100:1 ratio when initially calculating the appropriate sentencing range for a crack-related offense . . . . In *Kimbrough*, however, the Supreme Court rejected the argument that Congress had mandated that sentencing courts apply the 100:1 ratio to all crack offenses . . . and noted that the Sentencing Commission

> itself disfavors the ratio. . . . The Supreme Court reaffirmed that the district court must continue to calculate and consult the guidelines, but it may sentence a crack offender below the guidelines range in a routine case if it believes the 100:1 ratio alone punishes the defendant in excess of what is justified under the § 3553(a) factors.

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008). The sentence was improper where "[t]he district judge's comments suggest that he thought the [congressionally enacted crack/powder] disparity was mandatory."

United States v. Romero, 528 F.3d 980 (7th Cir. 2008). "The district court must resentence [the defendant] in light of the non-mandatory nature of the 100-to-1 ratio. [*See Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007).] Even though we are vacating the sentence and [the defendant] will be sentenced anew, the district court must apply the guidelines as they existed at the time of his first sentencing . . . But this time around, the district court will view those guidelines through the lens of *Kimbrough*."

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Idowu, 520 F.3d 790 (7th Cir. 2008). The doctrine of "vagueness" (*i.e.*, the argument "that a person cannot be held liable for conduct he could not reasonably have been expected to know was a violation of law") is not applicable to the sentencing guidelines. *See also United States v. Brierton*, 165 F.3d 1133 (7th Cir. 1999).

United States v. Griffith, 85 F.3d 284 (7th Cir. 1996). The appellate court affirmed the defendant's conviction and sentence. Furthermore, the court noted that the defendant's suggestion that the money laundering guideline violated 28 U.S.C. § 994(j) by not prescribing a sentence other than a term of imprisonment for cases such as his was contradicted by Congress's rejection of the Commission's prior attempts to provide lower sentences for that offense.

Part B General Application Principles

§1B1.1 <u>Application Instruction</u>

United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012). The Seventh Circuit held that double counting is generally permissible unless the text of a sentencing guideline expressly prohibits it. Noting its case law was inconsistent about whether double counting is generally permissible or impermissible, the panel explicitly overruled *United States v. Bell*, 598 F.3d 366 (7th Cir. 2011), which held double counting impermissible where the applicable guideline did not expressly prohibit it.

United States v. Tockes, 530 F.3d 628 (7th Cir. 2008). "By statute, '[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the

purpose of imposing an appropriate sentence.' 18 U.S.C. § 3661. Under section 3553(a), the court is required to consider, among other things, the history and characteristics of the defendant."

United States v. Cruz-Guevara, 209 F.3d 644 (7th Cir. 2000). "[A]ny departure from the Sentencing Guidelines imprisonment range requires that the extent of the departure be tied to the structure of the guidelines."

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

United States v. Locke, 643 F.3d 235 (7th Cir. 2011). Defendant was convicted after trial on five counts of wire fraud relating to housing loans, and nine other counts were dismissed because the government failed to put forth evidence specific to those counts. At sentencing, the district court relied on the dismissed counts as relevant conduct to support a 2-level increase for more than ten victims under §2B1.1(b)(2)(A). The government did not put on evidence to support the relevant conduct finding, and the district court did not explicitly adopt the PSR. The district court also based more than $900,000.00 of its restitution order on non-convicted conduct. The Seventh Circuit held that the district court clearly erred when it failed to make specific findings related to the relevant conduct it relied on to impose the 2-level enhancement, did not explicitly adopt the PSR and simply referenced dismissed counts without any evidence showing that alleged conduct in the dismissed counts was attributable to the defendant and part of a single scheme common to the counts of conviction. Likewise, the district court erred when it ordered payment of restitution to victims not clearly harmed by the conduct in defendant's counts of conviction. The Seventh Circuit remanded for re-sentencing and reconsideration of the order of restitution.

United States v. Fox, 548 F.3d 523 (7th Cir. 2008). The district court erroneously enhanced defendant's sentence based on 40 grams of crack cocaine found in a codefendant's residence by focusing on the foreseeability requirement of relevant conduct and ignoring its other requirements. While the court properly considered whether the codefendant's possession was foreseeable, it failed to "consider that question in the context of a connection with the joint criminal activity" between the co-conspirators. "[R]easonable foreseeability requires more than just subjective awareness."

United States v. Martinez, 518 F.3d 505 (7th Cir. 2008). "Under the sentencing guidelines, a defendant in a drug case is liable for any amount that he was directly involved with, as well as any amount attributable to his coconspirators, so long as the additional amount was reasonably foreseeable to him. . . 'Reasonable foreseeability' is thus a qualification to holding one conspirator accountable for the conduct of others; it 'does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes.'" U.S.S.G. §1B1.3(a)(1)(A) cmt. n.2(ii).

United States v. McGowan, 478 F.3d 800 (7th Cir. 2007). The Seventh Circuit reversed a 132-month sentence for a cocaine trafficking conspiracy. The defendant was convicted of two counts of distributing cocaine (and acquitted on a conspiracy count), which involved 7.2 grams and 4.9 grams, respectively. These convictions yielded a guideline range of 27-33 months. The

district court then attributed at least 489 grams of cocaine to the defendant as relevant conduct, which increased the defendant's guideline range to 110-137 months. The court held that the district court's findings with respect to relevant conduct unreasonably held the defendant responsible for a large quantity of drugs that the government had not demonstrated were part of the same course of conduct or common scheme or plan.

United States v. Spano, 476 F.3d 476 (7th Cir. 2007). "Generally, the sentence of a late-joining conspirator is not enhanced because of the crimes that other conspirators committed before he joined. But if he helps to cover up those crimes, he becomes liable for a sentencing enhancement as an aider and abettor."

United States v. Bullock, 454 F.3d 637 (7th Cir. 2006). The Seventh Circuit vacated a 100-year sentence for a heroin dealer, finding that the district court's relevant conduct analysis was incorrect. The court noted that Bullock was at most responsible for approximately eight kilograms of heroin (but emphasized that the district court needed to support such a finding on the basis of the record), which would give him a base offense level of 34 and a maximum enhanced offense level of 39. With a criminal history category of IV, his recommended sentencing range would then be 360 months to life. The court added that Bullock was denied acceptance-of-responsibility points because he refused to admit involvement with another individual's conspiracy; because that conspiracy was not relevant conduct, Bullock's refusal to admit involvement in it cannot be considered falsely denying or frivolously contesting relevant conduct. Therefore, he would be entitled to at least a 2-level reduction, bringing his recommended range down to 292 to 365 months. The court vacated the defendant's sentence and remanded for resentencing by a different judge.

United States v. Ortiz, 431 F.3d 1035 (7th Cir. 2005). "The relevant conduct rule has limits . . . In assessing whether offenses are part of the same course of conduct, we look to whether there is 'a strong relationship between the uncharged conduct and the convicted offense, focusing on whether the government has demonstrated a significant similarity, regularity, and temporal proximity.'" *United States v. Acosta*, 85 F.3d 275, 281 (7th Cir. 1996).

United States v. Johnson, 347 F.3d 635 (7th Cir. 2003). The court vacated defendant's sentence, finding that the district court misinterpreted relevant conduct. At defendant's sentencing for conspiracy to produce and transfer fraudulent social security cards, the district court found that the defendant was involved in a bank fraud scheme. Because the bank fraud did not occur during the commission of the social security fraud, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for the fraud, the district court concluded that the defendant's actions were not relevant conduct. Nevertheless, the district court concluded that defendant's bank fraud activities warranted a 10-level upward departure. On appeal, the defendant argued that, once the district court found that the acts of bank fraud did not constitute relevant conduct, the judge could not then rely on those same acts to make an upward departure. The Seventh Circuit noted that the district court's misinterpretation was "readily resolved by [its] holding that the reference to subsections (1)(A) and (1)(B) in U.S.S.G. §1B1.3(a)(2) refers only to the subsections themselves and not the trailing clause. In other words, in the context of a groupable offense, when evaluating whether some action constitutes relevant conduct, a court must look to see whether the acts and omissions 'were part of the same

course of conduct or common scheme or plans as the offense of conviction.'" The district court's confusion was not entirely unwarranted, as the Seventh Circuit had not before explicitly held that the trailing clause of subsection (a)(1) was not incorporated in subsection (a)(2). The court noted that it became clear that this was the correct interpretation when looking at §1B1.3 as a whole.

> Subsection (a)(2) of the guideline specifically incorporated (a)(1)(A) and (a)(1)(B) but sa[id] nothing about the trailing clause. In contrast, subsection (a)(3) of the guideline referr[ed] to all of (a)(1) and not merely subsections (a)(1)(A) and (a)(1)(B). From this variation in the language, [it must be assumed] that the Sentencing Commission meant to include the trailing clause in subsection (a)(3) but not in subsection (a)(2).

The court held that because the district court misinterpreted the guideline on relevant conduct, it did not need to decide whether the departure was improper.

United States v. Schaefer, 291 F.3d 932 (7th Cir. 2002)**.** The defendant was shown to have fraudulently sold art objects. The only issue raised on appeal was the amount of loss to the defrauded purchasers under §2F1.1(b)(1). The defendant claims that "relevant conduct" under §1B1.3 is necessarily limited to criminal conduct. The court noted that "§1B1.3(a) explicates the fundamental rule that relevant conduct must be criminal in nature, though subsection (a)(4) indicates that each applicable guideline may also specify additional relevant factors." It stated that because "§2F1.1 is in Chapter Two, this framework necessarily applies to a §2F1.1(b)(1) loss calculation. Therefore, in addition to crimes that were committed in connection with the offense of conviction, *see* §1B1.3(a)(1), or criminal acts or omissions that were part of the same course of conduct or common scheme as the offense of conviction, *see* §1B1.3(a)(2), a loss calculation under §2F1.1(b)(1) also involves 'the value of the money, property, or services unlawfully taken.' §2F1.1, comment. (n.8)." The court explained that its holding, that relevant conduct under §1B1.3 of the guidelines is limited to criminal conduct, is amply supported by the case law in other circuits. Accordingly, the court held that for all of the defendant's business receipts to be included in a §2F1.1(b)(1) loss calculation, the government must demonstrate, by a preponderance of evidence, that all of his business activities were unlawful. It remanded the case with instructions to require the government to identify the specific unlawful conduct relied upon to justify the §2F1.1(b)(1) loss calculation.

United States v. Booker, 248 F.3d 683 (7th Cir. 2001). The district court did not err in finding that a quantity of drugs belonging to the defendant's friend was attributable to the defendant because they were part of a joint criminal undertaking. The defendant pled guilty to possession of cocaine base with the intent to distribute it within 1,000 feet of a public housing facility, and was sentenced to 168 months. As the search warrant was being executed upon the house, the defendant's friend ran out the back, and the police subsequently located a bag containing 19 grams of crack just outside the back door. The defendant admitted he had been selling crack for this friend for five days before his arrest and was present as his friend cut up four ounces of crack into smaller portions for resale. The circuit court found that the defendant must have expected some or all of the resale portions being prepared would end up in his

possession for resale. Therefore, the 19 grams of crack found by the back door were attributable to the defendant for sentencing purposes as part of the joint undertaking.

United States v. Guerrero-Martinez, 240 F.3d 637 (7th Cir. 2001). The district court did not err in its determination of relevant conduct attributed to the defendant. The defendant pled guilty to possession with intent to distribute in excess of 100 kilograms of marijuana and aiding and abetting the possession of that marijuana. The district court held that the entire shipment could be attributed to the defendant as relevant conduct because he oversaw the delivery, even though he only purchased a portion of the shipment himself. On appeal, the defendant claimed because he only purchased a small amount and did not aid in the sales to anyone else nor had any idea how much marijuana was in the shipment, it was not reasonably foreseeable to him that the shipment contained 1,500 pounds of marijuana. The Seventh Circuit found the defendant's argument to be without merit because he met with other co-conspirators prior to the shipment and was aware that the drugs he agreed to buy were just a part of the shipment. Further, he watched over the unloading of not only the boxes with the drugs for his payment but also those boxes which were being unloaded into a van belonging to another buyer. Therefore, the circuit court found the defendant liable under the aiding and abetting provision of §1B1.3 and held that the district court properly determined the quantity of drugs attributable to the defendant.

United States v. Sumner, 265 F.3d 532 (7th Cir. 2001). The district court erred by not explaining the connection between the uncharged conduct used in determining the defendant's sentence and the offense of conviction. After the defendant, aged 76, pled guilty to three counts of distributing cocaine, he was sentenced to 132 months. The defendant was charged with distributing 9.4 grams of cocaine, but the district court sentenced him under §1B1.3 on an additional distribution of 57.6 grams of crack. His sentencing range rose from 8 to 14 months to 121 to 151 months. On appeal, the defendant claimed the district court did not adequately explain why it included the crack cocaine as relevant conduct, because the sale of the crack occurred more than two years prior to the offense of conviction and lasted for only two months. The Seventh Circuit found that the district court had not made any express finding on the record that the sales of crack were part of the same course of conduct or common scheme or plan as the offense of conviction. The circuit court stated "[w]ithout temporal proximity, the government must make a stronger showing of the other factors, such as regularity and similarity of the acts." The circuit court held the failure to explain the connection between the uncharged conduct and the offense of conviction was erroneous, and remanded the case for resentencing.

United States v. Taylor, 272 F.3d 980 (7th Cir. 2001). The defendant was arrested on drug and weapon charges. While being processed, he escaped from custody and was arrested a second time a week later, and was charged with–but not convicted of–a shooting. His sentence was enhanced as if the penalty for attempted murder under §2A2.1 applied. The defendant appealed his sentence, focusing on the manner in which cross-references and "relevant conduct" provisions of the sentencing guidelines were applied to him. The court stated that it could not "conclude that every crime committed during the time a person is on escape status automatically becomes relevant conduct in regard to a crime committed before the escape." The court concluded that even if the government could establish that the shooting was relevant conduct to the escape, nothing would be gained because the guideline for escape does not include a cross-reference which would allow sentencing on the basis of attempted murder.

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000). The district court did not err in its calculation of the amount of drugs attributable to the defendant for sentencing purposes. After a jury trial, the defendant was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. At his sentencing, the district court attributed an amount of drugs found in a stash house to the defendant as relevant conduct. The defendant's arrest resulted in the search of an apartment to which he had a key. Two kilograms of methamphetamine and five kilograms of cocaine were found in the stash house, along with a number of the defendant's personal articles. On appeal, the defendant argued that even if he was involved in the drug delivery which led up to his arrest, the drugs found in the apartment were not within the scope of an alleged agreement to distribute the drugs. The circuit court found that the fact that the defendant had a key, had clothing and other items in the apartment, and admitted on the witness stand that he had seen a microwave on the bed in which the police had also found a wooden press used to form cocaine into bricks were all circumstantial evidence that he was not an unwitting participant, but was instead an active participant. Therefore, the Seventh Circuit held the district court did not commit clear error in including the quantity of drugs in the calculation of the defendant's sentence.

United States v. Hall, 212 F.3d 1016 (7th Cir. 2000). The district court did not err in applying the guideline in effect at the time of sentencing rather than the one in effect when the defendant's alleged participation ended. The defendant was convicted of various drug offenses in 1997, and the sentencing judge sentenced him to 87 months, based on the guidelines in effect at the time of his sentencing. On appeal, the defendant claimed his sentence violated the *ex post facto* clause because he was not an active participant of the conspiracy after June of 1995 and, therefore, the less severe guidelines in effect at that time should have been applied, pursuant to §1B1.11(b)(1). The circuit court found that the defendant was charged and convicted of conspiring to distribute methamphetamine and marijuana from 1993 to 1996, and he did not raise any objections to the information contained in the PSR which also concluded that the conspiracy continued through 1996. The court further found that as a member of a conspiracy, the defendant's relevant conduct for sentencing purposes included all reasonably foreseeable acts of others in furtherance of the activity, and the court held the sentence imposed under the version of the guidelines in effect at the time of sentencing did not violate the *ex post facto* clause.

United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences under §1B1.3. The defendants were convicted of conspiracy to commit mail fraud. The defendants were involved in committing arson for the insurance proceeds, and the district court included the arson as relevant conduct for purposes of enhancing each of their offense levels. On appeal, the defendants argued that the court erred when it found by a preponderance of the evidence that they had committed arson and that the arson could be used as relevant conduct. They argued that the clear and convincing evidence standard should have been applied instead. The circuit court found that the district court correctly used the acquitted offenses as relevant conduct to enhance the defendants' sentences even though they were acquitted at trial of the arson under a more stringent standard.

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in holding that uncharged bulk purchases of methamphetamine were properly considered as relevant conduct in determining the defendant's sentence. Upon the defendant's guilty plea to

distributing methamphetamine, charges relating to an earlier bulk purchase of the drug were dropped. The defendant was heavily involved in the purchase of methamphetamine from numerous suppliers, but only pled guilty to distribution of 4.25 grams. However, the sentencing court included as relevant conduct an estimated 90 ounces of methamphetamine from his bulk purchases. The circuit court found both a commonality of purpose; maintenance of a high-volume drug distributorship, and similarity of modus operandi; driving to his suppliers on a frequent, predictable schedule and paying in cash for small, fixed amounts. Therefore, his bulk purchases were properly considered as relevant conduct in determining his sentence.

§1B1.8 Use of Certain Information

United States v. Farmer, 543 F.3d 363 (7th Cir. 2008). The government agreed that it would not use any information learned from the defendant's proffer to enhance his sentence. However, after the defendant had made a proffer, a PSR prepared in his case included 197 kilograms of cocaine that were evidenced only by his proffer. The Seventh Circuit agreed that providing this information to the probation officer was a breach of the plea agreement and that the government could not rely on information it learned from the defendant's proffer.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Dixon, 687 F.3d 356 (7th Cir. 2012). The Seventh Circuit noted that, based on Justice Sotomayor's concurrence in *Freeman v. United States*, 131 S. Ct. 2685 (2011), a four to one to four split decision, there are two limited exceptions to the general rule that a sentence imposed pursuant to a binding plea agreement is based on the agreement so that relief under 18 U.S.C. § 3582(c)(2) is usually not available. The first exception is when a binding plea agreement itself calls for the defendant to be sentenced within a particular guidelines sentencing range, which the court then accepts. The second exception is when the plea agreement makes clear that the basis for the specified term is a guidelines sentencing range applicable to the offense to which the defendant pleaded guilty. Under both exceptions, the circuit court explained, *Freeman* requires evidence that the guidelines served as the basis of the agreed upon sentence must appear in the written agreement; reliance on the parties' negotiations and oral explanations are beyond the scope of the written agreement and cannot serve as evidence that the guidelines are the basis of the sentence.

United States v. Franklin, 600 F.3d 893 (7th Cir. 2010). The court affirmed a 157-month crack and powder cocaine sentence, denying defendant's motion for reduction of sentence based on the new crack guidelines. The court reasoned that the sentence was based on the stipulated plea agreement rather than the guidelines. Although the parties considered the guidelines range during plea negotiations and agreed to a sentence that was below the low end of the guidelines range, the plea agreement did not state that the stipulated term was based upon the guidelines and did not explain how the parties chose that term.

United States v. Taylor, 627 F.3d 674 (7th Cir. 2010). The court held that the defendant was not eligible for a sentence reduction based on amendment 706, even though the offense level used in defendant's original sentence was based on drug-quantity guidelines rather than

applicable career-offender guidelines, because the applicable guideline range under either guideline was the same. The court stated:

> The problem for Taylor is that the applicable guideline range for criminal history category VI and offense levels 37 and 38 is exactly the same: 360 months to life in prison. We conclude that an offender in this unusual situation is not eligible for relief under § 3582(c)(2). Relief under the statute is not available when a retroactive amendment "does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. §1B1.10(a)(2)(B).

United States v. Tyler, 393 F. App'x 388 (7th Cir. 2010). The court affirmed the district court's denial of a further sentence reduction below the retroactive guideline amendment range. Holding that a sentence modification was not a full resentencing and *Booker* did not apply to sentence modification proceedings, the court found that the district court, in resentencing the defendant based on a retroactive amendment to the crack guidelines, lacked authority to reduce defendant's sentence below the two levels permitted by the amended guidelines range.

United States v. Forman, 553 F.3d 585 (7th Cir. 2009). A reduction under section 3582(c)(2) is not available to a defendant who received a statutory minimum sentence, was sentenced to prison after violating the terms of supervised release, was sentenced as a career offender, or was held accountable at sentencing for more than 17.1 kilograms of crack cocaine. The district court was obligated to explain why it did not grant a section 3582(c)(2) reduction, despite the government's stipulation that a reduction was appropriate.

United States v. Hall, 582 F.3d 816 (7th Cir. 2009). In 2003, defendant pleaded guilty to possessing more than 50 grams of cocaine base and more than 5 kilograms of a mixture containing cocaine. In the written plea agreement, he acknowledged that the amount of crack involved in his offense was more than 1.5 kilograms. Pursuant to this plea agreement, defendant's base offense level was 38. In 2007, amendment 706 to the guidelines reduced the base offense level for offenses involving between 1.5 and 4.5 kilograms of cocaine base from 38 to 36. Defendant moved for a section 3582(c)(2) reduction of sentence because he admitted to possessing only more than 1.5 kilograms of cocaine base. The district court denied his motion, relying on other admissions in the plea agreement that provided support for attributing over 4.5 kilograms of crack and powder cocaine to defendant. On appeal, the Seventh Circuit held that the district court ignored ambiguity in the amount of crack versus powder cocaine in the plea agreement and therefore abused its discretion in denying the motion. The court remanded to the district court to determine how much more than 1.5 kilograms of crack the defendant possessed.

United States v. Jackson, 573 F.3d 398 (7th Cir. 2009). The defendant filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), claiming that he was eligible for the 2-level reduction for crack cocaine offenses because he was no longer a career offender. The defendant was sentenced as a career offender, but under subsequent Seventh Circuit case law, he would no longer be a career offender. The court held that the district court properly determined that it had no jurisdiction to reduce the defendant's sentence. Because the defendant was sentenced as a career offender, the crack amendment "does nothing to lower [the defendant's] guideline range." According to the court, however "unforgiving" this reality may be, the

defendant was sentenced prior to the change in the circuit's law. Thus, the defendant's "situation simply falls outside the limited exception providing a district court with jurisdiction to modify a sentence."

United States v. Johnson, 571 F.3d 716 (7th Cir. 2009). The defendant argued that he should be eligible for the 2-level reduction in his base offense level pursuant to the Commission's amendment to §2D1.1. The defendant claimed that the PSR contained a mathematical error that led to the district court's finding that the defendant was responsible for more than 4.5 kilograms of crack cocaine. The court held that the district court properly found that it did not have jurisdiction to revise the PSR. Under the revised §2D1.1, the court stated, "the two level reduction of a base offense level does not apply when the relevant conduct involved more than 4.5 kilograms of the drug." According to the court, because the defendant's "relevant conduct was found to be more than 4.5 kilograms, the district court did not have jurisdiction to adjust [the defendant's] sentence by revising the PSR."

United States. v. Marion, 590 F.3d 475 (7th Cir. 2009). The court remanded the district court's denial of defendant's motion for a sentence reduction, holding that the district court's order explaining its decision was insufficient. The defendant had moved for a sentence reduction based on the subsequently amended guidelines for crack. The district court denied his motion using a form order and a one-sentence explanation in the "Additional Comments" section of the form, stating that it had considered the statutory sentencing factors and determined a sentence reduction was not appropriate. The circuit court stated that it needed at least a brief statement of reasons for deciding a motion to reduce in order to "meaningfully review its decision."

Although the district court had explained the relevant factors at the original sentencing, several years had passed since then.

> We think that a district court's order on a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) should at least address briefly any significant events that may have occurred since the original sentencing. If the district court believes that nothing particularly noteworthy has changed concerning the basis for the defendant's original sentence, some simple explanation to that effect will apprise both the defendant and this court of that fact . . . .
>
> The problem with the order here is not that the district court used a form order, or even that the order contained only a one-sentence explanation. The problem arises from the fact that it is impossible for us to ensure that the district court did not abuse its discretion if the order shows only that the district court exercised its discretion rather than showing *how* it exercised that discretion. Some minimal explanation is required.

See also United States v. Wesson, 358 F. App'x 725 (7th Cir. 2009) (vacating and remanding because district court failed to explain its denial of application for sentence reduction under Amendment 505).

United States v. Poole, 550 F.3d 676 (7th Cir. 2008). The district court does not have jurisdiction under 18 U.S.C. § 3582(c)(2) to reduce a sentence imposed below a mandatory minimum based on the defendant's substantial assistance.

United States v. Tatum, 548 F.3d 584 (7th Cir. 2008). "[T]he proper vehicle for [a defendant] to seek retroactive relief under the revised guideline is a motion to the district court pursuant to § 3582(c)(2)."

United States v. McGee, 60 F.3d 1266 (7th Cir. 1995). The district court did not commit plain error in failing to apply the amended guidelines. The defendant argued that the statute mandating imprisonment for his violation of supervised release terms violated the *ex post facto* clause. The violations included cocaine possession and failure to submit to urinalysis. The circuit court rejected the defendant's argument that the 1994 amendment to 18 U.S.C. § 3583 altered the punishment for cocaine possession to his detriment. The circuit court followed the reasoning in *California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995), and held that the defendant was not subject to increased punishment under the amended statute. In that case, the Supreme Court stated that the *ex post facto* clause does not forbid "any legislative change that has any conceivable risk of affecting a prisoner's punishment. Rather, a court 'must determine whether [the legislative change] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" In the case at bar, the circuit court used this reasoning to hold that the amendment does not produce a detriment to the defendant; rather, it narrows the range of punishment to his benefit. Thus, the circuit court affirmed the district court's sentence of 24 months.

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

United States v. Anderson, 61 F.3d 1290 (7th Cir. 1995). The district court did not err in applying the sentencing guidelines in effect at the time of the defendant's sentencing. The district court, using the 1992 version of the sentencing guidelines, enhanced the defendant's sentence for possessing a firearm pursuant to §2D1.1 resulting in a sentence of 120 months. On appeal, the defendant challenged the district court's use of the 1992 version of the guidelines as violative of the *ex post facto* clause because the 1990 version, the guidelines manual in effect at the time the defendant committed his offense, contained a more lenient version of the weapon enhancement. The circuit court ruled that the district court did not err in applying the 1992 guidelines. It noted that "the Tenth Circuit ha[s] held [on] similar facts that there is no *ex post facto* problem when the *Guidelines Manual* in effect at sentencing, taken as a whole, cannot possibly generate a sentence more severe than the most lenient sentence available at the time the defendant committed his offense." *See United States v. Nelson*, 36 F.3d 1001, 1004 (10th Cir. 1994) (upholding use of 1992 guidelines even though defendant would have received lower enhancement under 1988 Guidelines because defendant received equivalent reduction in sentence under different provision of 1992 Guidelines). The circuit court recognized that decisions on this issue clearly indicate that guidelines amendments will not raise *ex post facto* concerns if, "taken as a whole," they are "ameliorative." *See also United States v. Medina*, 695 F.3d 702 (7th Cir. 2012) (rejecting defendant's argument to use the *Guideline Manual* in effect on the date of the offense, rather than on the date of sentencing).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

United States v. Thompson, 286 F.3d 950 (7th Cir. 2002). The court of appeals reversed the sentences of two defendants who were sentenced to life imprisonment on a drug conspiracy count pursuant to §2D1.1 after the district court concluded that the §2D1.1(d)(1) murder cross-reference was applicable. The defendants argued on appeal that the district court's findings were insufficient to support the application of the cross-reference. The court of appeals stated the district court inferred from the defendants' participation in the cover-up of the murder that they knew the victim had been murdered by someone as a result of his informant activities, which threatened to expose the conspiracy. The attempt to cover up the murder, the district court concluded, was done in furtherance of the goals of the conspiracy and in an attempt to avoid detection. Based on this logic, the district court applied the §2D1.1(d)(1) murder cross-reference. The court of appeals concluded that the fact that the defendants knew that the government informant had been murdered did not prove that the murder was reasonably foreseeable to them. And it certainly did not prove that it was reasonably foreseeable to them that the murder would occur with malice aforethought. The court of appeals noted that it has been willing to assume that carrying of weapons is foreseeable to most drug conspiracy members, in light of the violent nature of the drug business; however, even with this presumption of violence, the government is still required to prove that the conspiracy's actions were foreseeable to each defendant to whom it seeks to impute relevant conduct. Accordingly, the court had to find that it was reasonably foreseeable to each defendant that the government informant may be murdered with malice aforethought.

United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994). The defendants were convicted of explosives and firearms violations in connection with a bombing/burglary scheme that resulted in a death. The defendants challenged the application of §2A1.1, First Degree Murder, under the directive of §2K1.4(c) as the most analogous guideline to the offense conduct. The circuit court held that the sentencing court need not search for an exact match between the conduct covered under Chapter Two and the conduct under §2K1.4. Notwithstanding the absence of any fire, and the stipulation that the bomb was not detonated with the intention of killing someone, the circuit court found that the bombing was sufficiently similar to arson to apply the analogous first degree murder guideline.

§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. Mitchell, 353 F.3d 552 (7th Cir. 2003). The district court erred in applying a 2-level enhancement under §2A3.2(b)(2)(B); an enhancement under §2A3.2 could not apply in the case of an attempt where the victim was an undercover police officer.[1] The defendant pled guilty, admitting that he traveled in interstate commerce with the intent to engage

[1] Effective November 1, 2009, amendment 732 to the guidelines provided that the undue influence enhancement in §2A3.2(b)(2)(B)(ii) does not apply in a case in which the only "minor" involved is an undercover police officer.

in a prohibited sexual act with an undercover agent whom he believed to be a 14-year-old girl. During sentencing, the district court increased the defendant's offense level by two based on §2A3.2(b)(2)(B) which provided for a 2-level enhancement where the defendant unduly influenced a minor under the age of 16 to engage in prohibited sexual conduct. On appeal, the defendant argued that this enhancement could not apply when the victim was an imaginary teenager and where no sexual conduct had occurred. The Seventh Circuit stated that the guideline and its commentary indicated that the offender must have succeeded in influencing or compromising a minor. In other words, an enhancement could not apply where the offender and victim had not engaged in illicit sexual conduct. The court then noted that the defendant's second argument, that the guideline could not apply in the case of a sting operation, merged with defendant's first argument, because in a case where there was no real victim but only an undercover police officer, there would never be completed action on the part of the victim. The court noted that the commentary to §2A3.2 created a rebuttable presumption that the defendant unduly influenced the victim if he was at least ten years older than the victim. If the Sentencing Commission intended to allow a defendant to rebut the presumption of undue influence, it could not have meant to apply the presumption in the case of a sting operation where the government could manipulate the characteristics and actions of the victim to create undue influence in every single case. The court noted that if it were to follow this reasoning, there would never be a case involving a sting operation in which the enhancement did not apply. The court specifically declined to follow the Eleventh Circuit which had considered the same issue in a similar case and held that an enhancement could be applied in the case of a sting operation. *See United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). Finally, the court noted that even if it were to decide that the enhancement for "undue influence" could apply to sting operations, the district court had failed to make the necessary factual findings. The district court never made any findings that defendant's words or actions were so influential as to unduly influence any victim–regardless of her individual characteristics. Accordingly, the case was remanded for resentencing.

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[2]

United States v. Panice, 598 F.3d 426 (7th Cir. 2010). The court held that a victim who is fully reimbursed is a "victim" within the meaning of §2B1.1. In so holding, the Seventh Circuit sided with the First and Eleventh Circuits in an existing circuit split; the Third, Fifth and Sixth Circuits have concluded that fully-reimbursed victims are not victims under §2B1.1.

[2] Effective January 25, 2003, the Commission, in response to a congressional directive in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, made several modifications to §2B1.1 pertaining to serious fraud offenses involving a substantial number of victims and their solvency or financial security, destruction of evidence, and officers and directors of publicly traded companies who commit fraud offenses. *See* App. C, Amendment 647. Effective November 1, 2001, §§2F1.1 and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* App. C, Amendment 617.

United States v. Heckel, 570 F.3d 791 (7th Cir. 2009). The defendant was convicted of wire fraud after auctioning items on the Internet that he had no intention of delivering. The court affirmed the district court's application of the mass-marketing enhancement because the defendant "used the Internet to conduct large-scale advertising to attract bidders to his fraudulent online auctions." According to the court, the guideline suggests that the enhancement applies "to solicitation schemes reaching a large number of potential victims regardless of the number of actual victims."

United States v. Powell, 576 F.3d 482 (7th Cir. 2009). Defendants were convicted of wire fraud and conspiracy to commit theft of government funds surrounding defendants' brokerage of the sale of property owned by the Gary Historical and Cultural Society to the Gary Urban Enterprise Association. One of the goals of the Association was to purchase property for redevelopment. The defendants, one of whom was the attorney for the Historical Society, facilitated the sale of property owned by the Historical Society to the Association but kept $150,000 out of the $200,000 sale price. The defendants also illegally reduced the amount of outstanding property taxes that the county would have collected upon the sale of the property from $73,000 to $15,000. The district court calculated the amount of loss under §2B1.1(b)(1) by adding the loss of $150,000 incurred by the Historical Society from the sale of a property (which was alternatively calculated as the gain to the defendants) and the amount by which defendants illegally reduced the property taxes on the property ($58,000). The defendants argued that, by including both the loss to the Historical Society and the loss to the county, the district court double counted the loss amount. The Seventh Circuit held that because two separate entities suffered distinct losses, the district court properly calculated the loss amount. Defendants also argued that the property tax loss for which they were held responsible would have fallen on the seller (the Historical Society) absent defendants' fraud, and that the amount they paid in property taxes ($15,000) should be deducted from the $150,000 they received as gain from the sale of the property. The Seventh Circuit held that "expenses in furtherance of the unlawful activity need not be excluded from the gain."

United States v. Severson, 569 F.3d 683 (7th Cir. 2009). The defendant was convicted of a number of financial crimes, and argued on appeal that the district court miscalculated the amount of intended loss "when it refused to consider collateral later pledged as security on a loan." The court held that the district court did not err by refusing to subtract the sale amount of the later-pledged loan. It rejected the defendant's argument that the "moment to determine the loss is the moment the loss is detected." The court instead agreed with the district court that at the time of the fraud, the defendant "intended to keep the entire loan; a mortgage was not filed contemporaneously with the receipt of the loan proceeds." According to the court, "[i]f we boil it down, [the defendant] received an unsecured one million dollar loan that he could not repay. Borrowing money without the intention to repay is akin to theft." The court also affirmed the district court's decision to count the defendant's misdemeanor convictions, stating that "the district court was not absolutely bound by the sentencing commission's judgment since the Guidelines are merely advisory." The court stated that "[t]he district court always has the obligation in the first instance to apply the Guidelines as written and properly calculate the advisory sentencing range; then the court's discretion kicks in and the district court has the right to, for whatever reason and despite what we may think, determine that the unlicensed selling of liquor at a racetrack was more serious than the trivial crimes listed in § 4A1.2(c)(2)."

United States v. Sutton, 582 F.3d 781 (7th Cir. 2009). A jury convicted defendant of health care fraud. He fraudulently used more than 2,500 Medicaid numbers from individuals and billed Medicaid for services that were not provided. The district court increased the defendant's base offense level because the loss exceeded $7 million and because there were more than 250 victims. The defendant challenged both of these rulings on appeal. The Seventh Circuit upheld the amount of loss calculation under §2B1.1(b)(1) despite the fact that the government only verified 400 of the 84,000 fraudulent claims because of "compelling evidence" that the entire scheme was fraudulent given the number of claims and because defendant was the only person listed on the claims. In arguing against the adjustment based on the number of victims, the defendant maintained that the only two victims who suffered monetary loss were Medicaid and Medicaid Services – the entities that paid for the fraudulent services – not the 2,000-plus individuals whose Medicaid numbers the defendant had used. Guideline §2B11.1(b)(2)(c) defines a "victim" as "any person who sustained any part of the actual loss determined under subsection (b)(1)." The application notes explain that the loss must be "pecuniary harm that is monetary or that otherwise is readily measurable in money." The Seventh Circuit agreed with the defendant, stating that "the inchoate harm of having . . . benefits wrongly depleted never materialized into an actual monetary loss such as having to pay for benefits that would otherwise have been covered." Because there was no measurable pecuniary harm to the Medicaid recipients, the Seventh Circuit vacated the sentence.

United States v. Allen, 529 F.3d 390 (7th Cir. 2008). Under §2B1.1, the determination of loss for a defendant's sentencing range is different than that for his restitution obligations: "[w]hile for sentencing purposes 'loss' is defined as the greater of either the 'actual' or the 'intended' amount lost due to the fraud, for restitution purposes the statute implicitly requires that the restitution award be based on the amount of loss actually caused by the defendant's offense." It stated: "A court may find that a defendant intended a large amount of loss for sentencing purposes, but then order a much reduced amount in restitution in light of the actual losses suffered by the victims."

United States v. Caputo, 517 F.3d 935 (7th Cir. 2008). The court affirmed in part and reversed in part sentences in a case involving fraudulent marketing of medical devices. It affirmed the district court's use of total list price of devices sold to determine loss for purposes of §2B1.1, but rejected it for purposes of calculating restitution, instead requiring the district court on remand to determine the actual transaction price for each machine sold, taking into account discounts and excluding machines retained by customers after the recall period expired.

United States v. Wayland, 549 F.3d 526 (7th Cir. 2008). The enhancement for using sophisticated means, §2B1.1(b)(9)(c), was properly applied to a scheme, though poorly executed, that "lasted nine years and involved a series of coordinated fraudulent transactions" and "displayed a greater level of planning and concealment than the typical health care fraud . . . ."

United States v. Brownell, 495 F.3d 459 (7th Cir. 2007). The Seventh Circuit "has adopted a 'credit against loss' approach to the calculation of fraud victim loss amounts for sentencing guideline purposes' because the Sentencing Guidelines 'call for the court to determine the net detriment to the victim, rather than the gross amount of money that changes hands.'"

United States v. Gordon, 495 F.3d 427 (7th Cir. 2007). For the purposes of determining loss under §2B1.1, the Seventh Circuit held, "A court need only make a reasonable estimate of the loss, not one rendered with scientific precision. The district court correctly pronounced this theme noting that, '[a]ll the government has to prove is a reliable, reasonable estimate of what was taken; and this accounting has gone far beyond anything that I've ever seen before.' The district court judge is in the best position to assess the evidence and estimate the loss based on that evidence and thus this court must defer to the district court's determination of loss--and of course, its determination that the government has met its burden of providing a reasonable estimate of loss."

United States v. Harris, 490 F.3d 589 (7th Cir. 2007). The defendant was convicted of fraud and appealed the application of §2B1.1(b)(13)(B)(i), which provides a 4-level enhancement where the offense "substantially jeopardized the safety and soundness of a financial institution," because the firm at issue was a "hedge fund," not a "financial institution." The Seventh Circuit rejected this argument, stating, "Our case law evinces a broad understanding of the term 'financial institution.' For example, in *United States v. Randy*, 81 F.3d 65, 69 (7th Cir. 1996), we stated that, 'when it walks and talks like a financial institution, even if it's a phony one, it is, in our view, covered by [this provision].' Further, the list of financial institutions in the Guidelines note is non-exhaustive and contains a catch-all provision that requires that 'any similar entity' be considered a financial institution. U.S.S.G. § 2B1.1, Application Note 1. Furthermore, the Sentencing Commission explicitly stated that, in amending the guideline commentary, it intended to broaden the definition of a financial institution."

United States v. Rettenberger, 344 F.3d 702 (7th Cir. 2003). The appellate court affirmed the district court's calculation of the intended loss and the district court's enhancement for the use of "sophisticated means." A jury concluded that the defendants were partners in a scheme to defraud insurers, plus the Social Security Administration, by pretending that one of the defendants was disabled. On appeal, the defendants argued that the district court erred in calculating the intended loss when it assumed that the defendants would have continued faking disability until one of the defendants reached 65, the age at which most policies' coverage ended. The Seventh Circuit held that the district court did not err; the defendants set out to take the insurers for all they were worth, and that meant benefits through age 65. There seemed to be no evidence that would have induced them to disclaim benefits earlier. The court also affirmed the district court's 2-level increase for the use of "sophisticated means" pursuant to §2B1.1(b)(8)(c). The court noted:

> Careful execution and coordination over an extended period enabled [the defendants] to bilk more insurers and reduce the risk of detection. That [one of the defendants] eventually slipped up, and that the deception was caught as a result of his errors plus the private investigation, [did] not make the scheme any less complex.

See also United States v. Allan, 513 F.3d 712 (7th Cir. 2008).

§2B1.6 Aggravated Identity Theft

United States v. Dooley, 688 F.3d 318 (7th Cir. 2012). The Seventh Circuit vacated and remanded for resentencing a case involving convictions on three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, and six additional counts of other fraud offenses. The circuit court noted that section 1028 has an unusual penalty provision: every conviction is punishable by exactly two years, and every sentence must run consecutively to every sentence for a different crime, but multiple section 1028A convictions may run concurrently to each other. Thus, the district court here had three sentencing options of adding 24, 48, or 72 months for the three aggravated identity theft counts on top of the sentences for the six additional counts of other fraud offenses. In this case, the defendant was sentenced to 96 months, which consisted of 72 months for the aggravated identity theft convictions (*i.e.*, three 24-month consecutive terms) and a 24-month term for the other fraud convictions to be served consecutive to the aggravated identity theft terms. In cases of multiple section 1028A convictions, the commentary at §2B1.6 references §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance. *See* USSG §2B1.6, comment. (n.1(B)). USSG §5G1.2 comment. (n.2(B)) provides factors the sentencing court should consider when sentencing a defendant with multiple counts under section 1028A. However, in this case, the sentencing judge arrived at the 96-month term by primarily focusing on the 18 U.S.C. § 3553(a) factor of avoiding unwarranted sentencing disparity and never mentioned the considerations set out in §5G1.2 comment. (n.2(B)). The Seventh Circuit noted that while the 72-month term for the identity theft convictions may be appropriate, the sentencing court nevertheless failed to adhere to the sentencing process required by *Gall* and *Rita* by focusing on the section 3553(a) factors in lieu of the sentencing guidelines.

§2B3.1 Robbery

United States v. Warren, 279 F.3d 561 (7th Cir. 2002). The defendant pled guilty to armed bank robbery. On appeal, the defendant argued that he should not have received a 4-level upward adjustment under §2B3.1(b)(2)(D) for "otherwise using" a dangerous weapon. He contended that, at most, his conduct constituted mere "brandishing" of a dangerous weapon. The defendant described his conduct as "holding the gun in the vicinity of the teller's back." The court of appeals held that whether the defendant touched the teller's back with the gun or whether he simply came close to touching her was not an important distinction for purposes of determining the enhancement's applicability. It stated that physical contact between the weapon and the victim was not a prerequisite to finding that the defendant "otherwise used" a dangerous weapon.

United States v. Williams, 258 F.3d 669 (7th Cir. 2001). The district court did not err when it enhanced the defendant's sentence for subjecting the victim to permanent or life-threatening bodily injury. The defendant pled guilty to kidnapping and carjacking, and was sentenced to 315 months. The victim, a 71-year-old woman, required more than 300 stitches to close head wounds sustained in the carjacking, and suffered long-term after effects including dizziness and frequent, severe headaches. On appeal, the defendant argued that the evidence fell short of the standard as found in §2B3.1(b)(3) because the doctors testified that the victim's injuries "could have" been life-threatening. The circuit court held that the enhancement was properly applied because the evidence showed the victim was beaten over the head with a metal

club resulting in a loss of more than 25 percent of her total blood volume, and indicated that the beating she received permanently impaired her mental faculties.

United States v. Hargrove, 201 F.3d 966 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences for bodily injury. The defendants pled guilty to armed bank robbery, and their sentences were enhanced pursuant to §2B3.1(b)(3)(A) based on the victim-teller's neck injury sustained during the robbery. The circuit court found that sentencing courts have routinely held similar injuries and circumstances satisfy the requirements for enhancements under §2B3.1. Further, the court stated the injury the victim-teller sustained required medical attention, and therefore the district court did not err in enhancing the defendants' base offense levels.

United States v. Raszkiewicz, 169 F.3d 459 (7th Cir. 1999). The district court did not err in enhancing a bank robber's sentence for a threat of death when the robber pointed an unknown object at the teller and gestured with his hand in his jacket as if he had a gun. The Seventh Circuit found that a "reasonable" victim would fear death and, therefore, the (b)(2)(F) adjustment was proper.

United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994). The district court did not err in enhancing the defendant's sentence for bodily injury to the victim pursuant to §2B3.1(b)(3)(A), where the victim suffered bumps and bruises, had "the wind knocked out of him," and sustained a back injury requiring chiropractic treatment. The circuit court rejected the defendant's claim that "bodily injury" occurs only when the injury requires "medical treatment." Rather, the circuit court agreed with Fourth Circuit precedent that the degree of injury depends on a "myriad of factors" which the district court is best suited to assess. Here, the district court's determination that the injury was painful and obvious was supported by the facts and not clearly erroneous. Also, the district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1, where testimony given at trial was sufficient to show that, prior to the trial, the defendant attempted to convince a witness to give false testimony.

§2B5.1 <u>Offenses Involving Counterfeit Bearer Obligations of the United States</u>

United States v. Alldredge, 551 F.3d 645 (7th Cir. 2008). "[T]he Sentencing Guidelines implement a charge-offense system rather than a real-offense system." Although some enhancements "introduce some real-offense ingredients into the system," these enhancements apply only when they "are foreseeable parts of a scheme or plan that includes the offense of conviction." In this case, while mailing counterfeit funds from Canada to Wisconsin could theoretically qualify as conduct "committed outside the United States" under §2B5.1(b)(5), that conduct could not be assessed to the defendant because she did not participate in mailing the counterfeit money.

United States v. Ramacci, 15 F.3d 75 (7th Cir. 1994). In sentencing the defendant for conspiracy to counterfeit more than $600,000 in United States currency, the district court did not err in including approximately $260,000 in partially completed bills, printed on the back only, in its sentencing calculation. The circuit court reasoned that nothing in §2B5.1 requires that the counterfeit bills be complete to be included in sentencing at "face value." Application Note 2,

which requires that a bill be "falsely made or manufactured in its entirety," does not require that the bill be complete, but only that it not be a genuine instrument which has been altered. The circuit court cited other circuit precedent, legislative history, the rejection of a proposed application note, and the language of §2B5.1(b)(1) to conclude that a counterfeit bill need not be complete to be included in sentencing calculations. The circuit court also held that the record supported the district court's enhancement of the defendant's sentence under §3B1.1(c) for his role as an "organizer, leader, manager or supervisor."

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

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

United States v. Abbas, 560 F.3d 660 (7th Cir. 2009). The court held that a defendant who posed as an FBI agent in order to scam unsuspecting immigrants was not acting "under color of official right." The court declined to extend the term beyond public officials who misuse their office.

United States v. Anderson, 517 F.3d 953 (7th Cir. 2008). The court affirmed in part and reversed in part the sentence in a case involving bribery of a public official and wire and honest services fraud. It affirmed the district court's finding that the payments in question, as they were "attempt[s] to influence the future actions of a public official," were properly considered bribes, and therefore §2C1.1 was properly applied; finding that the district court erroneously included some relevant conduct in calculation of the "benefit received," but concluding that the error was harmless because the district court expressed its finding that the same sentence would be appropriate as a variance if the guideline calculation was incorrect, and that the sentence could reasonably be imposed under a properly-calculated guideline range.

Part D Offenses Involving Drugs and Narco-Terrorism

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

United States v. Walker, 2013 U.S. App. LEXIS 13567 (7th Cir. July 3, 2013). The Seventh Circuit held that while a district court generally need not find death reasonably foreseeable for the mandatory minimum sentence to apply in cases where a defendant directly distributes drugs or uses intermediaries to distribute drugs that result in death, the district court must find the distribution chain that ultimately led to an individual's death to be relevant conduct under §1B1.3(a)(1)(B) before a defendant can receive the twenty-year penalty at 18 U.S.C. § 841(b)(1)(A).

United States v. Are, 590 F.3d 499 (7th Cir. 2009). The court affirmed the drug conspiracy sentence, including the enhancement for being in possession of a dangerous weapon

in connection with a drug trafficking offense. The circuit court explained the "shifting of burdens" involved with application of the enhancement:

> Application of §2D1.1 involves a shifting of burdens. *United States v. Idowu*, 520 F.3d 790, 793 (7th Cir. 2008). The government bears the burden of first proving by a preponderance of the evidence that the defendant possessed the weapon. *Id.* (citing *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2005)). The defendant need not have actual possession of the weapon; constructive possession is sufficient. *Id.* If the government carries its burden, then the defendant must show that it was "clearly improbable" that the weapon was connected to the drug offense. *Id.*
>
> We have noted that when a gun is found in "close proximity" to illegal drugs the gun is presumed "to have been used in connection with the drug trafficking offense." *United States v. Souffront*, 338 F.3d 809, 833 (7th Cir. 2003). However, close proximity to drugs is not a requirement for application of the §2D1.1(b)(1) enhancement. We have upheld application of §2D1.1 where the weapon was not found in the same place as illegal drugs. *See, e.g., United States v. Parra*, 402 F.3d 752, 767 (7th Cir. 2005) (upholding the finding that it was not "clearly improbable" that gun was connected to drug offense where gun was found under the mattress in defendant's bedroom and defendant was selling drugs out of her house); *United States v. Grimm*, 170 F.3d 760, 767-68 (7th Cir. 1999) (concluding that §2D1.1(b)(1) could apply where defendant had a gun in the trunk of his car but no drugs were present where he had used the car to deliver drugs six weeks earlier).

United States v. Easter, 553 F.3d 519 (7th Cir. 2009). "[S]tatutory minimums do not hinge on the particular defendant's relevant conduct. In a drug conspiracy, the amount of drugs attributable to any one codefendant as 'relevant conduct' for guidelines purposes is limited to the reasonably foreseeable transactions in furtherance of that codefendant's 'jointly undertaken criminal activity,' but when it comes to the statutory penalties, every coconspirator is liable for the sometimes broader set of transactions that were reasonably foreseeable acts in furtherance of the entire conspiracy."

United States v. Edwards, 581 F.3d 604 (7th Cir. 2009). A jury convicted defendant of distributing five or more grams of crack. Upon his arrest, defendant had $765 in cash on his person. He claimed this money was the proceeds from the sale of a minivan. At sentencing, the district court disbelieved defendant's story and inferred that the cash was proceeds from a previous sale of crack. Based on this additional relevant conduct, the district court added 12.75 grams to the amount of crack attributable to the defendant in calculating his guidelines range. The Seventh Circuit held that merely disbelieving the defendant's minivan story could not justify the inference that the cash came from crack sales. Rather, in order for the district court to infer that the money did indeed result from the sale of crack, evidence from the prosecution or a finding by the district court was necessary. The Seventh Circuit vacated the sentence and remanded.

United States v. Idowu, 520 F.3d 790 (7th Cir. 2008). For the purposes of the firearm enhancement at §2D1.1(b)(1), "a defendant constructively possesses a weapon if he owns the premises on which the weapon and drugs are found and if the weapon is found at the same time as the drugs."

United States v. Chamness, 435 F.3d 724 (7th Cir. 2006). "Congress has found that the manufacture of methamphetamine 'poses serious dangers to both human life and to the environment,'" and as a result, directed the Sentencing Commission increase the base offense level for any methamphetamine manufacturing offense that "created a substantial risk of harm to human life." *See* Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310. The Commission added a 3-level enhancement at §2D1.1(b)(6)(B) to be applied "if an offense involved the manufacture of methamphetamine and created a substantial risk of harm to human life (other than a minor or incompetent) or to the environment." Because the chemicals used by the defendant to manufacture methamphetamine posed a serious risk of injuries from an explosion or fire, the circuit court affirmed application of the enhancement at §2D1.1(b)(6)(B).

United States v. Noble, 246 F.3d 946 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for possession of a firearm in connection with a drug offense. The defendant was convicted of possession of controlled substances with the intent to distribute, and the court enhanced his sentence pursuant to §2D1.1(b)(1). The defendant moved in with his girlfriend and when the police searched her apartment, they found drug proceeds in the bedroom they shared and found a gun in the bedroom closet. The girlfriend testified that the defendant placed the gun in the closet. The Seventh Circuit held that the district court did nor err in crediting the girlfriend's testimony. Given that the drug proceeds and the gun were found in the same room, the court was correct in enhancing the defendant's sentence. *See also United States v. Green*, 258 F.3d 683 (7th Cir. 2001) (district court did not err in calculation of drug quantity attributable to defendant for sentencing purposes where the amount was supported by sufficiently reliable evidence, including the testimony of the defendant's customer).

United States v. Payne, 226 F.3d 792 (7th Cir. 2000). The district court did not err in calculating the weight of the drugs to include empty grow pots for sentencing purposes. The defendant was convicted of conspiracy to manufacture and distribute marijuana, and he appealed his sentence. On appeal, he claimed the district court erred by including in its drug weight calculations 2,000 grow pots found to have been intended for a warehouse grow operation. The Seventh Circuit found substantial additional facts which showed the defendant had intended to grow a significant amount of marijuana and had taken substantial steps towards that goal; construction had begun to transform a warehouse into a place suitable for growing marijuana, including the installation of light racks and a shelving system, and the defendant had purchased a chemical additive for paint that would reduce the penetration of heat through the walls. Further, the circuit court found the defendant had demonstrated his ability to coordinate a successful grow operation. The circuit court found that under §2X1.1, the sentencing court is to apply the base offense level to include any adjustments for any intended offense conduct that can be established with reasonable certainty, and §2X1.1 directs the court to use §2D1.1 for the calculation of the defendant's offense level. Under §2D1.1, the 2,000 intended marijuana plants were correctly converted to 200 kilograms of marijuana. Thus, the district court did not commit error in including 200 kilograms for the intended marijuana plants.

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in enhancing the defendant's sentence two levels based on his possession of a firearm, pursuant to §2D1.1(b). The defendant pled guilty to two counts of distributing methamphetamine after police executed a search warrant on his car, finding cocaine, methamphetamine, and a loaded gun. The circuit court found the enhancement applied because under §2D1.1(b), a defendant need not possess the gun during the offense of conviction, but may also possess it during relevant conduct. When the defendant was found to be in possession of the gun, the relevant conduct period for the conspiracy charge which had been previously dismissed was still ongoing, and the defendant was retrieving drugs when police searched his car and found the gun. Therefore, the sentencing court did not err in finding that the defendant possessed the gun during conduct which was relevant to the offense of conviction. *See also United States v. Booker*, 248 F.3d 683 (7th Cir. 2001) (district court did not err in finding that defendant had used a dangerous weapon in connection with the offense; an informant found a gun on the couch next to the defendant during two separate purchases of drugs and on a third purchase saw a gun near the defendant while he was cutting up large amounts of crack, giving rise to the presumption that the gun was used in connection with the drug offense).

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and 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. Zahursky, 580 F.3d 515 (7th Cir. 2009). A jury convicted defendant of attempting to coerce a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). The defendant attempted to arrange a threesome with two underage girls; one was an undercover police officer and the other claimed on her profile to be 14. The district court applied a 2-level enhancement under §2G1.3(b)(2)(B) for unduly influencing a minor to engage in prohibited sexual contact. The Seventh Circuit considered whether the enhancement could apply in this case where a sting operation led to the conviction and thus no illicit sexual conduct with a minor occurred. The court analogized to the enhancement in §2A3.2(b)(2)(B)(ii) and held that in neither case can the enhancement apply absent actual prohibited sexual conduct. *See also United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003). One of the two girls was an undercover police officer and there was no evidence that any sexual meeting, let alone sexual contact, occurred with the other. Thus the district court erred in applying the enhancement. The error was not harmless because there was no indication from the district court that it would impose the same sentence absent the enhancement.[3]

United States v. Veazey, 491 F.3d 700 (7th Cir. 2007). Section 2G1.3 provides for a cross reference to §2G2.1 when the offense "involved caus[es] . . . a minor to engage in sexually

[3] Effective November 1, 2009, amendment 732 to the guidelines addressed this issue and provided that the undue influence enhancements in §2G1.3(b)(2)(B) and in §2A3.2(b)(2)(B)(ii) do not apply in a case in which the only "minor" involved is an undercover police officer.

explicit conduct for the purpose of producing a visual depiction of such conduct." *See* §2G1.3(c)(1). The Seventh Circuit stated:

> The guideline and Application Notes make clear that the cross-reference should apply if any one of the defendant's purposes in committing the offense was to create a visual depiction thereof. We therefore hold that the cross-reference applies when one of the defendant's purposes was to create a visual depiction of sexually explicit conduct, without regard to whether that purpose was the primary motivation for the defendant's conduct.

§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. Schmeilski, 408 F.3d 917 (7th Cir. 2005). The defendant pleaded guilty to one count of production of child pornography and one count of possession of child pornography. The district court applied enhancements for both multiple minor victims, §2G2.1(c)(1), and engaging in a pattern of prohibited sexual activity, §4B1.5(b)(1). The defendant appealed, arguing that application of both sentencing enhancements constituted impermissible double counting. The Seventh Circuit rejected this argument, stating:

> The application of §2G2.1(c)(1) punished [the defendant] for exploiting three different minors, while the §4B1.5 enhancement punished him for exploiting those minors on multiple occasions. The separate adjustments for the number of minors exploited and for the fact that minors were exploited on multiple occasions are not premised on the same conduct . . . . Therefore, because §2G2.1(c)(1) and §4B1.5 address distinct conduct, the application of both in calculating [the defendant's] sentence did not constitute impermissible double counting.

§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. Robinson, 714 F.3d 466 (7th Cir. 2013). The Seventh Circuit agreed with the Eighth Circuit's decision in *United States v. Durham*, 618 F.3d 921, 926-27 (8th Cir. 2010)—and thus disagreed with the Tenth Circuit in *United States v. Ray*, 704 F.3d 1307, 1311-12 (10th Cir. 2013)—that to apply the child pornography distribution enhancement at §2G2.2(b)(3)(F) the sentencing judge must find that the defendant either knew, or was reckless in failing to discover, that the files he was downloading could be viewed online by other people.

United States v. Garthus, 652 F.3d 715 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 2373 (2012). The court affirmed a within-guideline sentence of 360 months for transporting, receiving, and possessing child pornography, holding that the district court was entitled to rely

more heavily on its concern with the risk of recidivism than his arguments for lenience. First, in arguing for a lower sentence under §5K2.13, the defendant argued that he had "diminished capacity" to avoid committing the crimes and that the district court ignored that argument. The Seventh Circuit disagreed, stating that "diminished capacity" was not argued at sentencing and, further, such argument was "unsubstantiated." The Seventh Circuit next discussed the scientific literature regarding recidivism and child pornography and, noting that the defendant also committed a hands-on sex offense, found that "[t]his defendant's characteristics suggest that he is more dangerous than the average consumer of child pornography." The Seventh Circuit acknowledged that the sentencing judge's remarks were "cryptic" but explained that the reasons for the sentence were obvious. It stated:

> He made clear that he was more concerned with the risk of the defendant's repeating his crimes when released from prison than with the defendant's "issues," which is to say the arguments pressed by defense counsel for lenience. The judge wanted a "guarantee"; that is, he wanted to minimize the risk of recidivism. He was entitled to put incapacitation and specific deterrence ahead of just deserts.
>
> "The more obvious the reasons for the sentence, the less the need to announce them." [Citations omitted.] Defense counsel presented scanty evidence and feeble arguments that the defendant would be harmless when released from prison. There wasn't much more for the judge to say in the face of so one-sided a record.

Last, the defendant argued that the sentencing guidelines relating to sexual offenses are "empirically unsupported, vindictive, and excessively harsh." The Seventh Circuit stated that this argument would be "more properly addressed to the Sentencing Commission, or to Congress, which has greatly influenced the child-pornography guidelines." It explained:

> A sentencing judge is not required to "delve into the history of a guideline" in order to satisfy himself that "the process that produced it was adequate"; "sentencing hearings [would] become unmanageable, as the focus shifted from the defendant's conduct to the 'legislative' history of the guidelines."

In closing, the court concluded that "[d]efense counsel could not have picked a less auspicious vehicle for mounting a broad assault on the guideline provisions relating to child pornography."

United States v. Angle, 598 F.3d 352 (7th Cir. 2010). The Seventh Circuit upheld an above-guidelines sentence of 300 months' imprisonment for a defendant convicted of various child pornography crimes, despite the guidelines' advisory range of 97 to 121 months, which included a "pattern of abuse" upward adjustment under §2G2.2(b)(4). The appellate court affirmed the district court's reasoning that the defendant's case was significantly atypical to warrant a sentence even higher than that called for by the guidelines, on the basis that the defendant's pattern of abuse lasted more than 20 years, involved multiple victims, and involved the defendant's abuse of his position of trust as the uncle and step-father of many of the children abused. The defendant had also created child pornography, showed no remorse, and boasted of his exploits. Moreover, had the defendant been subject to the 2006 guidelines and not the 1998 version, his guideline range would have been 360 months to life.

United States v. Huffstatler, 571 F.3d 620 (7th Cir. 2009). The court held that the child pornography guidelines remain valid and that district courts are not *required* to disagree with them. The defendant pleaded guilty to producing child pornography, in violation of 18 U.S.C. § 2251(a). The district court varied upward from the guideline range (effectively 300-365 months), and sentenced the defendant to 450 months in prison. The court concluded that it did not have to "decide whether *Kimbrough* gives district courts the discretion to disagree with the child-pornography guidelines on policy grounds" because instead of arguing that the district court abused its discretion, the defendant argued that the child-exploitation guidelines are entirely invalid. According to the defendant, "not only *may* a district court sentence below the child-exploitation guidelines based on policy disagreements with them, it *must*." The court disagreed.

United States v. Osborne, 551 F.3d 718 (7th Cir. 2009). Defendant pled guilty to possessing and distributing child pornography, and the court at sentencing had to decide whether a prior conviction for touching a child in violation of Indiana Code § 35-42-4-9(b) was "abusive sexual conduct involving a minor or ward" for purposes of the enhanced penalty in 18 U.S.C. § 2252(b)(1). The district court held that, because the conduct covered by the state statute was not necessarily "abusive," a remand was necessary to determine whether the prior offense fell within this definition. "Unless the charging papers demonstrate that [the defendant] has been convicted of violating § 35-42-4-9(b) in a way that shows 'abusive' sexual behavior, as we have defined it, then the court must treat the 2002 conviction as non-abusive, because the elements of § 35-42-4-9(b) permit a conviction for many kinds of conduct that federal law does not call 'abusive.'"

United States v. Myers, 355 F.3d 1040 (7th Cir. 2004). The appellate court affirmed the district court's base offense level calculation under §2G2.2 and its application of a 4-level enhancement under §2G2.2(b)(3). On appeal, the defendant argued that the district court erred in calculating his base level as 17 pursuant to §2G2.2, receipt of child pornography, rather than a base level of 15 pursuant to §2G2.4, possession of child pornography. He also argued that the 4-level enhancement was improper because it constituted double-counting. The Seventh Circuit noted that the defendant pled guilty to both receipt and possession of child pornography. The defendant argued that the distinction between receipt and possession of child pornography was meaningless, because anyone in possession of child pornography must have received it at some point in time, and therefore he argued that it was irrational to impose a higher sentence for the receipt than for mere possession. Because possession and receipt were not the same conduct and threaten distinct harms, the court stated, the imposition of different base offense levels was not irrational and therefore the defendant's challenge failed. The court also found defendant's double counting argument without merit. The conduct for which the 4-level enhancement was applied was distinct from that which formed the base offense and which supported the 2-level enhancement.

United States v. Brown, 333 F.3d 850 (7th Cir. 2003). The defendant pled guilty to knowingly possessing child pornography. At sentencing, the defendant admitted he had exchanged pornographic images, but not for commercial purposes. The district court enhanced the defendant's sentence after determining that the defendant's trading qualified as "distribution" under §2G2.2(b)(2). The defendant appealed, arguing that his conduct did not qualify as

"distribution" because in order to qualify as distribution, an exchange must be made for pecuniary gain. The Seventh Circuit found that distribution required the expectation of something valuable in return. The court noted that, although Application Note 1 referred to "pecuniary gain," it also recognized that pecuniary gain is a broad concept, and that it does not exclude the concepts of "swaps, barter, in-kind transactions, or other valuable consideration." Therefore, any activity taking place through trades, barter and other transactions was covered by the term "distribution," even though this activity may not involve an exchange of money. *See also United States v. Carani*, 492 F.3d 867 (7th Cir. 2007); *United States v. Wainwright*, 509 F.3d 812 (7th Cir. 2007).

United States v. Griffith, 344 F.3d 714 (7th Cir. 2003). The appellate court affirmed the district court's upward departure pursuant to §2G2.2, Application Note 2 for distribution of child pornography. Defendant's sentencing range was 168 to 210 months; the court imposed a sentence of 262 months. The PSR noted that §2G2.2 of the guidelines allowed for a departure if the defendant received a 5-level upward adjustment for engaging in a pattern of sexual abuse of minors where that adjustment did not adequately reflect the seriousness of the sexual abuse or exploitation involved. *See* §2G2.2, Application Note 2. "Although the government did not seek a departure, the court nevertheless concluded that an upward departure was appropriate for several reasons. First, the court characterized the nature of the activity depicted in [defendant's] photographs 'as more aggravated that any [it had ever] been exposed to.'" The court was particularly troubled that defendant had created a web site to get more photographs. "Most importantly, the judge focused on [defendant's] criminal history and the unsuccessful attempts at rehabilitation." The court stated, "[i]f a judge determines that a defendant's conduct 'significantly differed from the norm,' the judge may depart from the applicable guideline range" and a "court may depart from the range even if the Sentencing Commission already incorporated the reason for departure in a sentencing adjustment so long as 'the court determined that, in light of the unusual circumstances, the weight attached to that factor under the guidelines was inadequate or excessive.'" *See* §5K2.0. Moreover, "a court is authorized to depart from [the] guideline range if the defendant's criminal history category 'does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.'" *See* §4A1.3. In the instant case, the Seventh Circuit found that the district court fully explained why it believed this case was unusual and outside the "heartland" of typical child pornography cases. The district court also departed upward because of defendant's future danger to society in light of his two prior offenses of sexually abusing minors and his three failed attempts at completing a treatment program for sexual offenders.

United States v. Gunderson, 345 F.3d 471 (7th Cir. 2003). The court affirmed the district court's sentence of 120 months for possession of child pornography, which included enhancements pursuant to §2G2.2(b)(4) and §2G2.2(b)(2).[4] The court found that the district court did not err in applying a §2G2.2(b)(4) upward adjustment because defendant was previously convicted for having sex with his 17-year-old girlfriend. The defendant then argued that the district court should not have assessed a 5-level increase for distribution under §2G2.2(b)(2) because he received no money from the people who downloaded his child

[4] These have been redesignated as §2G2.2(b)(5) and §2G2.2(b)(3), effective November 1, 2004, pursuant to Amendment 664.

pornography and because he set up his computer to automatically trade files even when he was not using the computer at the time. The court found that these types of swaps, barters and in-kind transactions were covered under §2G2.2(b)(2). The court also affirmed the finding that the defendant should not get an acceptance of responsibility adjustment.

United States v. Lovaas, 241 F.3d 900 (7th Cir. 2001). The district court did not err in using the defendant's decade-old sexual misconduct with juveniles as relevant conduct in enhancing his sentence five levels pursuant to §2G2.2(b)(4).[5] The defendant pled guilty to transporting and possessing material which depicted minors engaging in sexually explicit conduct, and was sentenced to 87 months. On appeal, the defendant argued that two instances of sexual misconduct with a juvenile upon which the court relied in enhancing his sentence were not relevant conduct. The Seventh Circuit found that the commentary to §2G2.2 made it clear that, to determine whether there was a pattern of activity involving the sexual abuse or exploitation of a minor, the district court must consider conduct that would not be considered relevant conduct in other circumstances. The circuit court held that it would give deference to the Commission, which explicitly stated in Appendix C that "the conduct considered for purposes of the pattern of activity enhancement is broader than the scope of relevant conduct typically considered under §1B1.3."

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. Hudson, 618 F.3d 700 (7th Cir. 2010). The court held that, as a matter of first impression, a prior crime involving a phony version of illegal drugs was properly characterized as a "controlled-substance offense" for purposes of an increased base offense level under § 2K2.1(a)(4)(A). The court adopted the district court and the government's plain-text reasoning that §4B1.2's "counterfeit substance" language reached the defendant's Indiana state court offense. The court noted first that at least four sister circuits had reached a similar conclusion. But it also discussed the fact that the Sentencing Commission, while not hesitating to make use of "explicit cross-references to incorporate one provision or definition into another," had declined to write into §2K2.1 a requirement to cross reference §2D1.1's "counterfeit substance" provision. The court stated that the court "must give meaning to the Sentencing Commission's silences as well as its words." The court also found that "practical reasons" prompted treating look-alike offenses as actual drug offenses: the former contribute to the illegal market occasioned by the latter.

United States v. Members, 376 F. App'x 633 (7th Cir. 2010). The court affirmed the sentence, finding that defendant's prior Indiana conviction for resisting law enforcement (Ind. Code § 35-44-3-3(b)(1)(A)) qualified as a crime of violence under the guidelines. Relying on prior Seventh Circuit cases, the court stated that it used a modified categorical approach in designating violent offenses.

[5] This has been redesignated as §2G2.2(b)(5), effective November 1, 2004, pursuant to Amendment 664.

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

United States v. Miller, 547 F.3d 718 (7th Cir. 2008). The court held that a defendant charged with firearms possession who seeks to benefit from the reduction in §2K2.1(b)(2) for collecting firearms is not necessarily disqualified from receiving that reduction by the fact that he sold some part of his collection. It explained:

> The sale of a single weapon does not inevitably prevent a person from being a collector under §2K2.1(b)(2). . . . The text of §2K2.1(b)(2) does not exclude from its coverage collectors who sell some holdings as a means of improving the collection as a whole. . . . [A] person who sells weapons can remain a collector, unless the sales are so extensive that the defendant becomes a dealer (a person who trades for profit) rather than a collector (a person who trades for betterment of his holdings). Being an unlicensed dealer is an aggravating rather than a mitigating circumstance.

United States v. Gresso, 24 F.3d 879 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's denial of a reduction for firearms that are possessed solely for lawful sporting purposes or collection. §2K2.1(b)(2). The defendant argued that the court should not base its determination on a literal reading of the phrase "sporting purposes or collection"; rather, he asserted that the court should consider the circumstances surrounding his firearm possession, namely self-protection. The circuit court followed the First, Fifth, and Sixth Circuits in concluding that the reduction is warranted only when the firearm is acquired for sporting uses or for collection and is possessed or used solely for those purposes.

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

United States v. Charles, 238 F.3d 916 (7th Cir. 2001). The district court did not err in increasing the defendant's sentence four levels for possession of a firearm in connection with another felony. The defendant was convicted of inducing a false and fictitious statement in connection with the purchase of a firearm and of being a felon in possession of a firearm, after he and a friend fired upon the residences of the mother and brother of his ex-girlfriend. The defendant testified at his sentencing hearing that after he received the gun, he sold it to the friend involved with him in the offense of conviction. The circuit court stated that pursuant to §2K2.1(b)(5)[6], a 4-level increase is appropriate for possessing a firearm in connection with another felony or transferring a firearm with knowledge, intent, or reason to believe that it would be used in connection with another felony. The circuit court found that although there was limited evidence presented by the government in support of the 4-level enhancement, the gun was found in a car occupied by the defendant and his friend, there was bad blood between the defendant and his former girlfriend's family, and the defendant had testified that he purchased the gun that was used to shoot at the residences. Therefore, the court found the enhancement was appropriate. *See also United States v. Markovitch*, 442 F.3d 1029 (7th Cir. 2006); *United States v. Wagner*, 467 F.3d 1085 (7th Cir. 2006).

[6] This has been redesignated as §2K2.1(b)(6), effective November 1, 2006, pursuant to Amendment 691.

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996). The district court properly enhanced the defendant's base offense level by four levels, pursuant to §2K2.1, based on its determination that the defendant possessed firearms in connection with a drug offense. The defendant maintained that the district court erred by enhancing his base offense level because the government failed to establish that the firearms found in his home were possessed "in connection with" his marijuana dealing. The appellate court rejected this argument, holding that the phrase "in connection with" should be given its logical and common meaning. The court further noted that the phrase, at a minimum, should be interpreted broadly to mean that firearms involved must have some purpose or effect with respect to the drug trafficking crime, and its presence or involvement cannot be the result of an accident or coincidence. Instead, the gun must facilitate, or have the potential of facilitating the drug trafficking offense. In the instant case, the defendant's firearms were concealed under the bed and in the closet, but there is no indication that the weapons were not readily accessible. Additionally, the court held that the seizure of the firearms in close proximity to illegal drugs was a powerful inference that the firearms were used in connection with the drug trafficking operation.

Other Issues

United States v. Jackson, 576 F.3d 465 (7th Cir. 2009). The district court sentenced defendant to 96 months after his conviction under 18 U.S.C. § 922 – more than twice the high end of the guideline range. The Seventh Circuit held the sentence reasonable because the court found defendant had used the gun he was convicted of possessing to shoot someone. The court also noted that the defendant shot people on two other occasions and had not adjusted well to parole. Defendant had been convicted of multiple violent crimes. "In short, it was not unreasonable for the court to conclude that Jackson is a menace, and therefore that an above-Guidelines sentence was needed to deter further criminal activity."

United States v. Podhorn, 549 F.3d 552 (7th Cir. 2008). Defendant was convicted of possessing a weapon that was both stolen in violation of 18 U.S.C. § 922(j) and kept without proper records in violation of 18 U.S.C. § 922(b)(5). He argued that imposing a guideline enhancement for a stolen weapon in §2K2.1(b)(4) would be impermissible double counting. The government responded that while the enhancement may not apply to the § 922(j) convictions, it would apply to the § 922(b)(5) convictions. The court agreed with the defendant, holding "that it would be double-counting to use the fact that the same weapons were stolen to enhance the advisory guideline range for the records offense. This is more than the presence of some overlap in the factual basis; the district court 'really drew from the same well.'"

United States v. Simmons, 485 F.3d 951 (7th Cir. 2007). The defendant was convicted of dealing in firearms without a license in violation of 18 U.S.C. §§ 922(a)(1)(A) and (2). He was sentenced pursuant to 18 U.S.C. § 921(a)(30), and §2K2.1(a)(5), because the weapon involved in the offense was considered a "semiautomatic assault weapon" under the definition given in the statute. The defendant appealed, noting first that "18 U.S.C. § 921(a)(30), which defined the term 'semiautomatic assault weapon,' was repealed . . . on September 13, 2004" and because "§2K2.1(a)(5) incorporated and depended on 18 U.S.C. § 921(a)(30), then § 2K2.1(a)(5) expired when § 921(a)(30) expired and it could not be used to calculate his sentence." The court rejected this argument, holding:

> While this issue is one of first impression in this circuit, our sister circuits have addressed this issue and unanimously have rejected [the defendant's] argument. We follow the Second and Tenth Circuits' well-reasoned approach and hold that the district court properly used §2K2.1(a)(5) to calculate [the] sentence.

United States v. Gardner, 397 F.3d 1021 (7th Cir. 2005). The Seventh Circuit held:

> For purposes of § 2K2.1, 'crime of violence' has the same meaning as in USSG § 4B1.2(a). *See* USSG § 2K2.1, comment. (n.1). Under § 4B1.2(a), an offense punishable by a term of imprisonment greater than one year constitutes a crime of violence if it "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In analyzing whether a particular offense qualifies as a crime of violence, the sentencing court may generally look only at the statutory elements and the charging instrument.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Perez-Ruiz, 169 F.3d 1075 (7th Cir. 1999). The district court did not err in deciding that the defendant had transported aliens "for profit" and thereby was not entitled to a 3-level reduction under §2L1.1(b)(1). The defendant helped another man transport illegal aliens by driving a van from Arizona to Chicago. The defendant's compensation was the value of a trip to Chicago, as the defendant had lined up a job in Chicago and needed transportation. The Seventh Circuit agreed that the defendant had received "in-kind" compensation, and he was not eligible for the other transfer profit reduction.

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

United States v. Lopez, 634 F.3d 948 (7th Cir. 2011). The court vacated and remanded the defendant's sentence for illegal reentry after an earlier felony conviction and deportation. Guideline §2L1.2 has a base offense level of eight, which is increased by 16 levels for, among other things, a prior conviction of a drug trafficking offense for which the sentence imposed exceeded 13 months; the increase is only 12 levels for a drug trafficking offense for which the sentence imposed was 13 months or less. The Seventh Circuit explained:

> The issue here is whether the sentencing court should measure the seriousness of an alien's prior drug trafficking conviction by the sentence imposed before the defendant's deportation and illegal reentry, or whether the court should take into account a later increase in the sentence as a result of a probation revocation. Based on the language of the guideline, we conclude that the seriousness of the

earlier conviction should be measured, for guideline purposes, based on the sentence imposed before the defendant's earlier deportation and illegal reentry.

United States v. Aviles-Solarzano, 623 F.3d 470 (7th Cir. 2010). The court held that the district court did not err in finding that defendant's aggravated battery conviction under Illinois law was a crime of violence even though the court relied on the PSI's unsubstantiated summary of the indictment charging the defendant with aggravated battery. The court stated that an unsubstantiated summary of an indictment in a PSI "does not satisfy the Supreme Court's requirement of a judicial record and thus is not (unless its accuracy is unquestioned - an important qualification to which we'll return) a proper basis for classifying a defendant's prior crimes for purposes of federal sentencing." It went on, however, to point out that the defendant's lawyer did not question the accuracy of the summary in the PSI, "even though she had access to the indictment," a public document.

United States v. Pacheco-Diaz, 513 F.3d 776 (7th Cir. 2008). The district court did not err in sentencing defendant for re-entry after being removed for an "aggravated felony" under §2L1.2(b)(1)(c) because his multiple simple possession convictions added up to a drug felony under 21 U.S.C. § 844(a). The defendant argued that he had not been convicted under any state recidivist statute. The Court of Appeals reasoned that while normally "federal courts look at the elements of the prior offense under which the defendant has been convicted," *Lopez v. Gonzales*, 549 U.S. 47 (2006), held that if defendant's convicted conduct would be a felony under federal law then §2L1.2(b)(1)(c) is applicable when it comes within the subject matter and length of sentence requirements of 21 U.S.C. § 1101(a)(43). The court stated that "the point of *Lopez* is that, when state and federal crimes are differently defined, the federal court must determine whether the conduct is a federal felony, not which statute the state cited in the indictment." When making such a determination, a court must "stick with the conduct reflected in the judgment of conviction" rather than look at "what the defendant actually did."

United States v. Lechuga-Ponce, 407 F.3d 895 (7th Cir. 2005). Defendant challenged a sentencing enhancement under §2L1.2(b)(1)(A)(ii) for a "crime of violence" arguing the enhancement was unconstitutional because the fact of his prior conviction was not proven beyond a reasonable doubt. The district court did not err because the fact of a prior conviction need not be proven beyond a reasonable doubt. *See Almendarez-Torres*. Both *Booker* and *Blakely* reiterate the Court's earlier holdings that the fact of a prior conviction does not need to be proven beyond a reasonable doubt.

United States v. Garcia-Lopez, 375 F.3d 586 (7th Cir. 2004). Defendant was indicted and pled guilty to a violation of 8 U.S.C. § 1326(a) and (b) for illegal reentry into the United States following his previous deportation and removal. The district court erred when it found that a crime of violence enhancement under §2L1.2(b)(1)(A)(ii) did not apply because the defendant's conviction had been vacated prior to his sentencing. The plain language of §2L1.2(b)(1)(A)(ii) indicates that the appropriate inquiry is whether the defendant had been convicted of a crime of violence at the time of his prior deportation. The court held that "[n]othing in the guideline suggests that the analysis should consider whether the conviction has been vacated subsequent to the deportation but prior to the sentencing for the reentry offense." *See also United States v. Gonzalez-Lara*, 702 F.3d 928 (7th Cir. 2012) (finding that "[n]othing in

the plain text of [§2L1.2(b)(1)(A)] supports [the] argument that the 16-level enhancement should only apply when a defendant's original pre-revocation sentence results in a term of imprisonment exceeding thirteen months.").

United States v. Vasquez-Abarca, 334 F.3d 587 (7th Cir. 2003). The appellate court affirmed the district court's 16-level increase of the defendant's offense level under §2L1.2 considering the defendant's prior conviction for aggravated criminal sexual abuse of a minor as a "crime of violence." The defendant had been convicted of aggravated criminal sexual abuse of a minor after he had touched the breast of a 12-year-old girl. The district court considered the defendant's prior conviction as a "crime of violence" and the defendant argued that his offense level should only have been increased by eight levels because the crime he committed qualified only as an "aggravated felony" under §2L1.2(b)(1)(c). More specifically, the defendant argued that a prior conviction is a "crime of violence" only if it involved force under §2L1.2 Application Note 1(B)(ii) subparagraph I and is one of the offenses enumerated in subparagraph II. The court held that under the plain language of Application Note 1(B)(ii) of §2L1.2, a "crime of violence" means those crimes described in subparagraph I and includes those crimes set forth in subparagraph II. Furthermore, the offenses enumerated in subparagraph II do not have to involve force to warrant an upward adjustment. Because defendant's prior conviction was specifically listed in subparagraph II, the district court did not err.

United States v. Chavez-Chavez, 213 F.3d 420 (7th Cir. 2000). The district court did not err when it made a discretionary decision not to depart downward further than it had already in sentencing the defendant on the ground that the criminal history category overstated the seriousness of his prior felony conviction. The defendant had pled guilty to unlawful re-entry after having been removed for aggravated criminal sexual abuse of an 11-year-old girl. The district court departed downward after concluding that the defendant's criminal history category overstated the seriousness of his prior offense. On appeal, the defendant contended that the district court should have departed even further, and requested an additional departure based on Application Note 5.[7] The Seventh Circuit stated that had the district court found the defendant ineligible under the application note, the decision would be reviewable for error. However, the court held that the district court found the defendant eligible, but undeserving. Therefore, the decision was unreviewable, and the appeal was dismissed.

§2L2.2 <u>Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport</u>

United States v. Earls, 704 F.3d 466 (7th Cir. 2012). The Seventh Circuit joined the Fifth, Eighth, Tenth, and D.C. Circuits by holding that Application Note 2 at §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)) does not apply when §2X1.1 is reached by cross reference from §2L2.2(c)(1)(A). The cross reference at §2L2.2(c)(1)(A) applies when the defendant uses a passport or visa in the commission or attempted commission of a felony offense. Application Note 2 defines "substantive offense" (*i.e.*, the "felony offense" at §2L2.2(c)(1)(A)) to mean "the offense that the defendant was

[7] This has since been amended in favor of the graduated enhancement scheme.

convicted of soliciting, attempting, or conspiring to commit." (Emphasis added). However, when §2X1.1 is reached by cross reference, the panel observed, it is rare that a defendant will have already been *convicted* of "soliciting, attempt, or conspiring to commit" the substantive/felony offense at the time of sentencing. Therefore, the Seventh Circuit concluded, the commentary in Application Note 2 is logically intended to be applied when §2X1.1 is applied directly, not when it is reached through cross reference from §2L2.2(c)(1)(A).

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Stalbaum, 63 F.3d 537 (7th Cir. 1995). In considering an issue of first impression, the circuit court held that under §2P1.1, "a federal prison camp is not similar to the community institutions referenced in §2P1.1(b)(3)." That section requires a reduction in sentencing for escapes from non-secure "community corrections centers, community treatment centers or halfway houses" or "similar" facilities, but provides no examples of what is "similar." The circuit court joined with six other circuits to conclude that federal prison camps are not similar to "community corrections centers, community treatment centers or halfway houses."

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors

United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994). The appellate court addressed an issue of first impression in interpreting the term "bid rigging" as used in §2R1.1 and the accompanying commentary, and in determining whether a "noncompetitive bid" under §2R1.1(b)(1) encompasses price-fixing. The court determined that price-fixing, while technically a "noncompetitive bid," does not merit the 1-level enhancement under §2R1.1(b)(1). The appellate court found no specific definition in the guideline, but looked to past practice and the guideline commentary to determine that the enhancement applied to bid rigging, and not to price-fixing. The district court therefore erred in applying the 1-level enhancement for bid rigging where the defendants had agreed to submit identical bids, which was merely price-fixing. The appellate court opined that the term "bid rigging" means conduct involving bid rotation agreements.

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. Krasinski, 545 F.3d 546 (7th Cir. 2008). The district court properly applied a 2-level enhancement under §2S1.1(b)(2)(B) for being convicted under 18 U.S.C. § 1956 because the international transfer of money from the United States to Canada to pay defendant for the drugs he supplied "promoted the carrying on" of the drug conspiracy.

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

United States v. Suarez, 225 F.3d 777 (7th Cir. 2000). The district court did not err in applying a 2-level enhancement for the defendant's knowledge or belief that the funds involved in the offense were the proceeds of unlawful activity. The defendant was convicted of making false statements to the United States Customs Service and for failing to report currency that she was attempting to transport into Mexico. On appeal, the defendant claimed the sentencing court erred in applying an enhancement under §2S1.3(b)(1) because it found that she "knew or believed that the funds were proceeds of, or intended to promote unlawful activity." The Seventh Circuit found that the defendant lied about the source of the money, by falsely claiming that it came from the sale of her home and found that the defendant had packed the money in her suitcase in such a way as to avoid detection by wrapping it between two pieces of plywood bound with cellophane tape. These facts supported the district court's conclusion that it was more likely than not that she knew or believed the funds were the proceeds of some unlawful activity or were intended to promote such activity, and the enhancement was properly applied.

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. Chavin, 316 F.3d 666 (7th Cir. 2002). The defendant, convicted of tax and bankruptcy fraud, contended that the court should have reduced the tax-loss figure by the amount of legitimate but unclaimed deductions on the tax return. The court of appeals affirmed the district court's calculation of tax loss under §2T1.1. It stated that it interprets the phrase "the object of the offense" in §2T1.1 to mean that the attempted or intended loss, rather than the actual loss to the government, is the proper basis of the tax-loss figure. The court found that the object of the offense was the amount by which the defendant underreported and fraudulently stated his tax liability on his return. It found that reference to other unrelated mistakes on the return such as unclaimed deductions says nothing about the amount of loss to the government that the defendant's scheme intended to create.

United States v. Twieg, 238 F.3d 930 (7th Cir. 2001). The district court did not err in holding that unpaid self-employment taxes were properly included in the calculation of "tax loss" under §2T1.1. The defendants pled guilty to three counts of filing false federal income tax returns, underreporting the receipts from their business by more than 1.3 million dollars. On appeal, the defendants contended the district court erred in increasing their base offense level by one level by including self-employment taxes under the definition of "loss" under §2T1.1. The circuit court found that the Application Note to §2T1.1 states that all violations of the tax laws should be considered in calculating the tax loss, and that the failure to pay self-employment taxes constituted conduct violating those laws. Therefore, by the plain language of the guideline, the amount of self-employment taxes was properly included in the calculation of tax loss.

Part X Other Offenses

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

United States v. Lamb, 207 F.3d 1006 (7th Cir. 2000). The district court erred in not reducing the defendant's sentence three levels for an uncompleted offense, under §2X1.1. The defendant broke into a bank to commit burglary, but the tools he used only succeeded in damaging the vault's handle and locking mechanism, making entry into the vault impossible. He was only able to get $350 from two coin vaults before the police answered the alarm. The district court increased the defendant's sentence because it found the value of loss to include the sum of the contents in the main vault and a storage compartment near the main vault, a total of $215,000, and concluded that the defendant intended to steal what he could. The Seventh Circuit found that Application Note 2 to §2B1.1 directs the sentencing judge to apply §2X1.1 for partially completed offenses. The court held that, although under §2X1.1 any intended offense conduct that can be established with reasonable certainty counts as loss for purposes of §2B1.1, the Commission has recognized that inchoate offenses are less serious than completed ones. Because the judge added extra levels under §2X1.1(a), he was required to subtract levels under §2X1.1(b)(1) unless the defendant completed all of the acts he thought necessary for his success, or he was about to complete them when he was caught. The circuit court remanded the case for a determination as to how much money was in the coin vaults and whether the defendant was about to open the storage compartment.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Johns, 686 F.3d 438 (7th Cir. 2012). The Seventh Circuit held that financial desperation is enough to make one vulnerable to financial crimes. For example, if a homeowner is in a position to lose the home at the time she became the victim of a fraudulent transaction, she would suffice as financially vulnerable, and thus should trigger the enhancement if deemed by the district court to have suffered a financial loss.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on the vulnerability of the victims. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over an 11-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. On appeal, the defendant contended that the district court erred in determining that he deliberately targeted the women whom he defrauded because of their vulnerability, and therefore

in applying §3A1.1. The circuit court found that the guideline was amended in 1995 and that the vulnerable victim enhancement no longer required a showing of targeting by the defendant. Even though some of the defendant's conduct took place prior to November of 1995, the defendant was properly sentenced under the amended version because most of his offenses occurred subsequent to the effective date of the amendment. *See also United States v. Williams*, 258 F.3d 669 (7th Cir. 2001) (district court did not err in enhancing the defendant's sentence based on §3A1.1 where the victim was 71 years of age, even though she was not particularly susceptible; Application Note 2 defines vulnerable victim as a victim of the offense who is vulnerable due to age or physical or mental condition).

United States v. Grimes, 173 F.3d 634 (7th Cir. 1999). The district court did not err in applying a vulnerable victim adjustment when the defendant defrauded individuals with bad credit who were seeking unsecured loans. Victims were told over the telephone to submit an application fee of approximately $200. The defendant merely kept the application fees without assisting the victims. The ads placed in newspapers were targeted at people who were financially desperate and only a desperate individual would pay a fee of $200 merely for the right to apply for a loan and, therefore, the adjustment was proper.

United States v. Kahn, 175 F.3d 518 (7th Cir. 1999). The district court did not err by departing upward an additional offense level as the defendant's criminal actions preyed upon multiple vulnerable victims. As part of the defendant's relevant conduct, he provided marijuana at a party he hosted for ten boys and girls aged 14 to 17. The defendant's count of conviction concerned another similar act on a different occasion, and, therefore, the 1-level departure in addition to the 2-level adjustment under §3A1.1 was proper.

§3A1.4 Terrorism

United States v. Parr, 545 F.3d 491 (7th Cir. 2008). Defendant was convicted at trial for threatening to use a weapon of mass destruction against a federal government building. The basis for this conviction was statements by the defendant to his cellmate that he intended to blow up a federal building. At sentencing, the district court imposed a 12-level enhancement under §3A1.4 for an "offense . . . that involved, or was intended to promote, a federal crime of terrorism." Although the statements to the cellmate were not "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," the district court reasoned that the threatened conduct—blowing up a federal building—certainly would have been, so the crime "involved" a federal crime of terrorism. On appeal, the Seventh Circuit rejected this reasoning on the ground that "the term 'involve' as used in the guidelines . . . means 'to include.'" Thus, "an offense 'involves' a federal crime of terrorism only if the crime of conviction is itself a federal crime of terrorism." Because the offense in this case was not such a crime, the enhancement was improper. On remand, however, the district court could still consider whether the offense *promoted* a federal crime of terrorism under this guideline.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Young, 590 F.3d 467 (7th Cir. 2009). The court affirmed defendant's sentence for conspiracy to use interstate facilities to promote prostitution, finding that "the evidence supports, although it may not compel, the finding that Young was a manager or supervisor of the spa's criminal activity." The defendant collected the proceeds and kept the ledger, paid the bills and paid the housekeeper, hired employees, reported to the owner when there were problems, and decided which of her coworkers would provide a massage to the customer. The court stated:

> Young may not have controlled her co-workers in the sense that she had the power to dictate their actions, but such control is not the sine qua non of a leadership role; one may still qualify as a manager or supervisor if she orchestrates or coordinates the activities of other participants in the crime.

United States v. Sheikh, 367 F.3d 683 (7th Cir. 2004). The defendants, storeowner and worker, appealed the district court decision to enhance their sentences for obstruction of justice under §3C1.1 on their conviction for food stamp redemption fraud. Defendant store owner challenged the enhancement of his sentence for a leadership role in the offense under §3B1.1(b). The Seventh Circuit affirmed the district court's decision. In enhancing both defendants' sentences, the district court found that both had committed perjury when they denied that they knowingly redeemed food stamps that were illegally obtained. The district court further stated that "both defendants' testimony was false, willfully given, and material." The defendants contended that the evidence did not support the district court's perjury findings and that the findings were insufficient because the court failed to delineate specific reasons for discrediting their testimony, but the Court of Appeals disagreed. One of the defendants also argued that the district court erred by enhancing his sentence due to his supervisory role in the offense under §3B1.1(b). The Seventh Circuit noted that the record revealed that the defendant made countless deposits of illegally obtained food stamps, obtained a large portion of the proceeds from the fraud as compared to other participants, exclusively ran the store and directed activities for a period of time during which the fraud continued, and terminated the services of the bookkeeping firm when it pointed out accounting irregularities. The defendant argued that those tasks were solely consistent with managing the market, as opposed to maintaining the fraud; however, given the nature of the fraud, *i.e.*, that it was intimately tied to the business, the court found that many functions inevitably overlap. On these facts, the circuit court concluded that it was not clearly erroneous for the district court to deem the defendant a "supervisor."

United States v. D'Ambrosia, 313 F.3d 987 (7th Cir. 2002). The defendants used a scheme to operate an illegal sports book-making operation and concealed income from the Internal Revenue Service. The defendants challenged the district court's application of a four-level enhancement to each defendant's sentence for being a leader or organizer of a tax conspiracy. The appellate court affirmed the district court's application of the enhancement, holding that the defendants were subject to the four-level "organizer-leader" enhancement regardless of whether the wagering offense and tax conspiracy offenses were analyzed separately

or grouped together under §3D1.2. The defendants contended that their participation in the tax conspiracy was limited to their role as clients of a third party. The court concluded that the defendants' argument failed to recognize that the determination of whether a defendant is an "organizer or leader" under §3B1.1 "is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct). . . .[T]here is no question that the defendants' operation of a multi-jurisdictional offshore sports bookmaking empire is clearly relevant in assessing their role in the tax conspiracy."

United States v. Noble, 246 F.3d 946 (7th Cir. 2001). The district court did not err when it enhanced the defendant's sentence four levels for his leadership role in the offense. After a jury trial, the defendant was convicted of conspiracy to distribute crack and distribution of crack, and he was sentenced to a 360 months' imprisonment. The district court found that the defendant had more than a buyer-seller relationship with five other participants. Instead, he provided the drugs for the whole distribution scheme, controlled the drug price and delivery, and fronted the drugs for one of the participants. Further, the court found that the defendant stored the drugs in one of the participant's trailers and in another's car, and retained a key to the trailer so he could access the drugs any time. Importantly, the district court found that the defendant exercised such psychological control over one of the participants that the person was willing to go to jail for the defendant. On appeal, the defendant asserted he was merely a distributor and noted that being a distributor does not justify application of the enhancement. The Seventh Circuit agreed with the sentencing court, and held that the defendant exercised the requisite control over the five participants to support the organizer or leader enhancement. *See also United States v. Carerra*, 259 F.3d 818 (7th Cir. 2001) (district court did not err in imposing an upward departure for defendant's leadership role where defendant obtained the drugs, set up the time and place for the delivery, recruited his brother as an accomplice, and claimed rights to more than 80% of the proceeds).

United States v. Payne, 226 F.3d 792 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on the defendant's supervisory and leadership role in the conspiracy. The defendant was convicted of conspiracy to manufacture and distribute marijuana, and he appealed his sentence. On appeal, the defendant argued that the district court erred in increasing his offense level by four levels pursuant to §3B1.1(a) based upon its determination that he maintained a supervisory and leadership role in the conspiracy. The Seventh Circuit found that the defendant directed the actions of others in the acquisition and distribution of drugs and in the collection of the drug proceeds, and held that the sentencing court's finding was well supported by the testimony.

§3B1.2 <u>Mitigating Role</u>

United States v. Leiskunas, 656 F.3d 732 (7th Cir. 2011). The Seventh Circuit found that the district court misinterpreted the application of §3B1.2 in two ways. "First, playing a necessary role does not definitively prevent the same role from being minor." And second, a criminal offender that commits a minor act is not necessarily precluded from consideration under §3B1.2 simply because the minor act is repeated.

United States v. Hill, 563 F.3d 572 (7th Cir. 2009). The court held that the district court erred when it found the defendant ineligible for a mitigating role reduction. The defendant pleaded guilty to possessing a firearm as a convicted felon. The firearms in question were obtained by the defendant's brother in a burglary. The defendant did not participate in the burglary, nor did he receive money from the sale of the firearms; rather, the defendant simply wrapped the firearms in blankets, and helped his brother deliver them to the buyer. The court held that §3B1.2 makes it clear that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) . . . not solely on the basis of the elements and acts cited in the count of conviction." According to the court, the defendant's "offense of conviction should not be treated as an isolated act in which only he was involved, but rather one step in a broader criminal scheme that involved multiple participants." *See also United States v. Saenz*, 623 F.3d 461 (7th Cir. 2010) (remanding for reconsideration of whether defendant, who received 293 month sentence for cocaine conspiracy, should receive minor role adjustment, given lack of evidence that he was involved on more than one solitary occasion).

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

United States v. Anderson, 259 F.3d 853 (7th Cir. 2001). The district court did not err when it enhanced the defendant's sentence for abuse of a position of trust. The defendant pled guilty to embezzling and willfully misapplying money which belonged to customers of the bank for which he worked, and he was sentenced to 41 months. The district court found that as an assistant branch manager, the defendant had access to and control over all customers' accounts and found that he withdrew money from customers' accounts. The district court further found he hid the money by opening an account in the name of his brother and by depositing a portion of the money into a CD account established in a friend's name. On appeal, the defendant argued that he did not occupy a position of trust because his illegal conduct involved his actions as merely a bank teller. The circuit court held that the district court properly applied the enhancement because the defendant was not employed as a bank teller, but as an assistant manager. In that position, he had the authority to withdraw funds from bank accounts over $1,000.00 without obtaining a supervisor's permission. The circuit court found that the transactions at issue were all over that amount. Further, as a supervisor, the defendant had knowledge of the codes to access the customers' accounts, information bank tellers did not have. Therefore, his position was correctly considered a position of trust for application of the enhancement.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on abuse of a position of trust. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over a 21-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. The district court enhanced the defendant's sentence two levels for his abuse of trust, pursuant to

§3B1.3. The circuit court found that the defendant had represented himself as a licensed money manager and had offered to invest money for one of the women he dated, stating he was knowledgeable about investments and that he regularly invested money for other people. The circuit court found these representations were sufficient to convince the woman to entrust the defendant with her money, thereby placing him in a position of trust. Because the defendant's abuse of this position of trust facilitated his commission of the fraud, the district court properly increased the defendant's sentence.

United States v. Bhagavan, 116 F.3d 189 (7th Cir. 1997). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust under §3B1.3. The defendant's challenge to the enhancement focuses on the nature of the victims of his scheme. The defendant relied primarily on the Seventh Circuit's opinion in *United States v. Hathcoat*, 30 F.3d 913 (7th Cir. 1994), and *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995), which both held that this enhancement could only be used when the victim had placed the defendant in a position of trust. The defendant claims that the victim in this case was the government. Additionally, the minority shareholders could not have placed him in a position of trust because he had full power to run the company without them. The circuit court rejected these arguments and held that the defendant's position as majority shareholder and president of the company brought with it fiduciary duties to act in the interests of the minority shareholders. Thus, in that sense he did occupy a position of trust vis a vis the minority shareholders. It was enough that identifiable victims of the defendant's overall scheme to evade his taxes put him in a position of trust and that his position "contributed in some significant way to facilitating the commission or concealment of the offense." The circuit court distinguished the other circuit opinions on several grounds by pointing to §3B1.3, comment. (n.1), which draws a clear distinction between one who has "professional or managerial discretion (*i.e*. substantial discretionary judgment that is ordinarily given considerable deference)" and those subject to significant supervision. In this case, unlike the other two, the defendant was found to possess both extensive managerial control and discretionary executive powers, making the actual abuse not a necessary element of the offense.

United States v. Ford, 21 F.3d 759 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's application of §3B1.3 to the defendants' RICO offenses. The defendants essentially challenged the enhancement as double-counting because the public bribery offenses which underlay their RICO counts necessarily involved abuse of a position of public trust. The defendants' argument centered on the application of §2E1.1, which instructs the sentencing court to apply the base offense level of the conduct underlying the racketeering activity if it is more than 19, the base offense level for all RICO offenses. §2E1.1(a). Here, application of §2E1.1(a) yielded a higher offense level which was subsequently enhanced pursuant to §3B1.3. However, had the defendants been sentenced under subsection (b), Application Note 3 of §2C1.1 would have precluded the enhancement for abuse of a position of trust. The circuit court concluded that unlike public bribery, not all RICO activity includes an abuse of trust "so that the minimum base offense level of 19 . . . does not already incorporate that element." The defendants' particular crimes are distinguished from other RICO offenses precisely because their activity did involve abuse of trust. Whether the defendants would have received the enhancement if they were sentenced under §2C1.1 is irrelevant.

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

United States v. Hodges, 315 F.3d 794 (7th Cir. 2003). The defendant was convicted of being a felon in possession of firearms and of receiving stolen firearms. The defendant appealed his sentence enhancement under §3B1.4, contending that the district court erred by concluding that he "used" a minor to commit a crime. He argued that he could not have "used" the minor because he did not know that the minor was coming to his home to deliver the stolen guns on the day of the robbery. The court of appeals affirmed the application of the enhancement under §3B1.4, stating that it made no difference whether the defendant knew the minor was coming that day. The defendant's criminal activity began, and essentially was completed, once the minor and the others arrived at the defendant's home with the guns and the defendant took possession of them. The court concluded that because the defendant knew the guns were stolen when he took possession of them, he was guilty at that moment. And, because he took possession of them with the minor's assistance, he was subject to the §3B1.4 enhancement for "using" a minor to commit a crime.

United States v. Anderson, 259 F.3d 853 (7th Cir. 2001). The district court did not err in applying an enhancement for the use of a minor to commit the crime. The defendant pled guilty to embezzling and willfully misapplying money which belonged to customers of the bank for which he worked and was sentenced to 41 months. The district court found that as an assistant branch manager, the defendant used a 17-year-old bank teller to conduct the withdrawals at issue. On appeal, the defendant argued that there was insufficient evidence to suggest that the bank teller made the withdrawals for him. The circuit court found that this teller's identification number accompanied each of the withdrawals. Further, the court found that even though the teller did not remember making these specific withdrawals for the defendant, she testified she often made such withdrawals for him in her role as a teller. Because there was sufficient evidence suggesting that the defendant was responsible for directing tellers to make these unauthorized withdrawals, the district court did not err in finding that the teller made these withdrawals for the defendant.

§3B1.5 Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

United States v. Haynes, 582 F.3d 686 (7th Cir. 2009). Defendant, a police officer involved in a conspiracy that used traffic stops and home invasions of drug dealers to seize drugs and money, pleaded guilty to drug offenses, robbery, and extortion. The district court applied the abuse of trust enhancement under §3B1.3 and an enhancement for use of body armor under §3B1.5. Defendant argued that the district court erred by applying both enhancements because the abuse of trust enhancement "may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." The defendant argued that body armor was part of his uniform as a police officer and therefore a specific offense characteristic. The Seventh Circuit held that "specific offense characteristic" in the guidelines refers to adjustments to the base offense level in chapter two. Adjustments, such as for abuse of trust and use of body armor, are found in chapter three and therefore are not "specific offense characteristics."

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Nduribe, 703 F.3d 1049 (7th Cir. 2013). The Seventh Circuit affirmed the district court's application of the obstruction of justice enhancement at §3C1.1 for a defendant who avoided arrest for five years by using aliases and traveling to foreign countries, even though Application Note 5 to §3C1.1 states "avoiding or fleeing from arrest" as a type of conduct that "ordinarily do[es] not warrant application of this adjustment." In arriving at this holding, the Seventh Circuit questioned the Second Circuit's decision in *United States v. Bliss*, 430 F.3d 640 (2d Cir. 2005), which vacated the application of the obstruction of justice enhancement for a defendant who evaded arrest for a year by fleeing across country, where he used aliases, gained weight, and grew facial hair to disguise his identity.

United States v. Bright, 578 F.3d 547 (7th Cir. 2009). The district court did not err when it found that a conviction for attempted escape was sufficient to require an enhancement for obstruction of justice. The enhancement requires that a defendant "willfully obstruct or impede, or attempt to obstruct or impede the administration of justice." The defendant argued that his attempted escape conviction required only that he *knowingly* escape from custody. Because his flight was instinctive and spontaneous, he lacked the deliberate and willful mens rea for the enhancement. In affirming the district court, the Seventh Circuit noted that prior cases hold that willful intent "cannot be presumed by the unauthorized flight of a handcuffed defendant from the back of an officer's car." The court also noted that Application Note 5(d) states that "avoiding or fleeing from arrest" does not ordinarily justify the enhancement. But in this case, the defendant was fleeing custody, not arrest. Application Note 4(e) states that "escaping or attempting to escape from custody" justifies the enhancement. The defendant attempted to escape while handcuffed and awaiting transfer to a different federal facility. This was not a spontaneous attempt to flee but a calculated attempt to escape when his chances were greatest.

United States v. Nurek, 578 F.3d 618 (7th Cir. 2009). Defendant pleaded guilty to receiving child pornography. The district court did not err in applying the obstruction of justice enhancement where the defendant violated the terms of his pretrial release by repeatedly contacting a victim and his family "in an attempt to maintain control over the family and otherwise influence their willingness to cooperate with the prosecution." Defendant argued that he had only friendly conversations with the victim and his family in order to maintain a close relationship with them and persuade them not to initiate a civil lawsuit against him. The Seventh Circuit held that a letter the defendant wrote to the victim telling the victim that he loved him, missed him, and cautioning him not to say anything to anyone about the letter validated the district court's decision to apply the enhancement.

United States v. Parr, 545 F.3d 491 (7th Cir. 2008). The court stated that enhancement for obstruction of justice is appropriate where the judge finds "that [the defendant] lied, that his lie was material, and that the lie was intentional."

United States v. Willis, 523 F.3d 762 (7th Cir. 2008). "[A] sentencing court should not apply [§3C1.1] more than once for multiple acts of obstruction . . . [W]e hold that multiple acts

of perjury produce a single two-level enhancement under §3C1.1 and possibly a higher or above-Guidelines sentence based on the discretion conferred by 18 U.S.C. § 3553(a), not the imposition of multiple obstruction-of-justice enhancements."

United States v. Carroll, 346 F.3d 744 (7th Cir. 2003). The district court misapplied §3C1.1 and consequently indirectly misapplied §3E1.1. The defendant served as a foreign service officer with the United States Department of State. In abuse of his capacity, the defendant coordinated the illegal sale of hundreds of fraudulent visas through local brokers with whom he shared an average of $10,000 in bribe proceeds per visa. At the sentencing, the district court concluded that the defendant's statements during the plea colloquy and to the probation officer merited a 2-level enhancement for obstruction of justice, and defendant was not entitled to a 3-level reduction for acceptance of responsibility. On appeal, the defendant challenged the district court's findings that he obstructed justice and that he did not accept responsibility for his actions. The Seventh Circuit noted that the defendant's statements to the district court and the investigating probation officer did not amount to material falsehoods within the meaning of §3C1.1. The court noted that nowhere in the record was there an attempt by the defendant to conceal assets. Furthermore, regardless of either the source of the funds in the six accounts or the exact amount of the defendant's legitimate assets, after the forfeiture of $2.5 million, the defendant retained nothing with which he might pay fines or restitution. Regarding the issue of acceptance of responsibility, the court noted that because the defendant did not obstruct justice within the meaning of §3C1.1, Application Note 4 of §3E1.1 was not applicable. The court also noted that the district court ignored the fact that the defendant engaged in numerous, intensive proffer sessions over a period of months, in which he described his illegal conduct in considerable detail. Accordingly, the district court's sentence was reversed and the case remanded for resentencing.

United States v. Tankersley, 296 F.3d 620 (7th Cir. 2002). The district court erroneously enhanced the defendant's sentence for obstructing the administration of justice under §3C1.1. The defendant was convicted of criminal contempt of court. The district court applied the enhancement based on its finding that the defendant continued to violate an injunction issued in a related civil suit. The court of appeals held that the conduct upon which the district court enhanced the defendant's sentence did not obstruct the investigation or prosecution of the instant offense; rather it obstructed the administration of justice with respect to the civil proceedings. Therefore, the court of appeals vacated the sentence.

United States v. Arambula, 238 F.3d 865 (7th Cir. 2001). The Seventh Circuit held that the obstruction of justice enhancement was erroneous because the defendant's false testimony did not constitute perjury, as perjury is false testimony of a material matter. There was no indication that the defendant's lies impeded or obstructed the investigation, sentencing, or prosecution of the co-conspirator, and the circuit court vacated and remanded the defendant's sentence.

United States v. Jefferson, 252 F.3d 937 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for his obstruction of justice. The defendant was convicted following a jury trial of five counts relating to the distribution of crack cocaine. On appeal, the defendant contended the district court erred in increasing his base offense level

pursuant to §3C1.1, based on a finding that he had committed perjury when he testified at trial, without first making specific findings of perjury. The circuit court found that the district court cited to several portions of the record in which the defendant denied selling crack cocaine and further found that denial was a falsehood which amounted to perjury. Thus, the circuit court stated that the defendant's contention that the district court did not find he willfully intended to provide false testimony failed, and it held that the enhancement properly applied. *See also United States v. Noble*, 246 F.3d 946 (7th Cir. 2001) (district court did not err in enhancing defendant's sentence where defendant committed perjury during his testimony by lying and by coaching and orchestrating another's false confession); *United States v. Carrera*, 259 F.3d 818 (7th Cir. 2001) (district court did not err when it failed to identify the perjurious statements and finding that the statements did not preclude an obstruction of justice enhancement where the court specifically pointed to testimony that conflicted with the agent's account of the defendant's post arrest statements); *United States v. Anderson*, 259 F.3d 853 (7th Cir. 2001) (district court did not err in finding uncharged relevant conduct established enhancement for obstruction of justice based on perjurious statements where the defendant lied and claimed he never intended to keep the funds he was charged with embezzling).

United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences for obstruction of justice. The defendants were convicted of conspiracy to commit mail fraud. The defendants were involved in committing arson for the insurance proceeds, and the district court found that each had obstructed justice by providing false testimony and lying to federal investigators about their role in the conspiracy. The circuit court found that two of the defendants obstructed justice by testifying falsely to exculpate other family members, and this evidence was sufficient to form the basis for a finding of obstruction of justice. The circuit court found that a third defendant provided a false alibi for the other two defendants. On appeal, that third defendant argued that any misstatements he made to the investigators were made early in the investigation and were therefore immaterial. The circuit court found that Application Note 6 defines materiality as "evidence. . . that, if believed, would tend to influence or affect the issue under determination" and that pretrial statements that significantly obstruct or impede an investigation are material and may serve as the basis for an enhancement. The Seventh Circuit held that this third defendant's pretrial statements were made willfully in an attempt to obstruct justice, and therefore the enhancement was properly applied. Finally, a fourth defendant's sentence was enhanced because she attempted to influence the testimony of a witness. The circuit court found that the defendant concocted a false set of facts that led investigators toward a witness whom she had attempted to influence. Thus, her behavior was material for the purpose of the obstruction of justice enhancement.

United States v. Menting, 166 F.3d 923 (7th Cir. 1999). The district court did not err in applying an obstruction of justice enhancement as the defendant committed perjury at trial. The defendant argued that the "two-witness rule" of the perjury statute, 18 U.S.C. § 1621, applied and prevented application of the enhancement. To prove a violation of section 1621, the government must provide testimony from two witnesses or one witness and "sufficient correlative evidence." The Seventh Circuit rejected the two-witness rule at sentencing, finding the sentencing court is permitted to consider a wide range of information, as long as the information is found to be reliable.

United States v. Cotts, 14 F.3d 300 (7th Cir. 1994). The district court did not wrongly enhance defendant Fernandez's sentence for obstruction of justice. A government agent, posing as a large scale drug trafficker, negotiated several reverse buys with the defendants. During the course of his dealings with the conspirators, the agent told a codefendant of a fictitious person whom he believed was an informant. Subsequent to this conversation, the defendant plotted to kill the fictitious informant. He challenged the obstruction of justice enhancement on the grounds that conspiring to kill a person who does not exist does not obstruct anything. He further stated that he did not intend to obstruct the investigation or prosecution but only to take revenge for the informant's betrayal. The appellate court rejected this argument and relied on the language of §3C1.1, which explicitly provides for an enhancement for "attempts to obstruct or impede." The district court based its enhancement on the defendant's attempt to obstruct justice "and by definition, attempt requires that one act with the purpose of effectuating the proscribed result." Further, although the district court was somewhat ambiguous in discussing the defendant's intent, the district court did expressly mention his retaliatory motive. Because Application Note 3(i) specifically refers to statutes encompassing retaliation against an informant, the court of appeals upheld the obstruction of justice enhancement.

See United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994), §2B3.1.

United States v. Wright, 37 F.3d 358 (7th Cir. 1994). The district court did not err in enhancing the defendant's base offense level for obstruction of justice pursuant to §3C1.1. The defendant, who pleaded guilty to armed bank robbery and to being a felon in possession, argued that his telephone messages to a co-conspirator did not constitute an obstruction of justice because he did not threaten physical harm. The circuit court disagreed. An attempt to influence a witness is an obstruction of justice even if the defendant did not threaten the witness as long as the influence is improper (*i.e.*, "that is having a natural tendency to suppress or [to] interfere with the discovery of truth"). The defendant's message that "I also know that you turned state's on me but I'll make sure you go down too Ba-by," implied that the defendant would testify against the co-conspirator if she provided testimony at his trial but would not testify against her if she remained silent. The circuit court found that this was a "clear invitation to . . . participate in a criminal conspiracy to obstruct justice."

Part D Multiple Counts

§3D1.2 <u>Groups of Closely-Related Counts</u>

United States v. Bahena-Guifarro, 324 F.3d 560 (7th Cir. 2003). The defendant pled guilty to two counts of illegal reentry following a conviction for an aggravated felony, in violation of 18 U.S.C. § 1326(a) and (b). In this case of first impression, the Seventh Circuit affirmed the district court's refusal to group the two counts under §3D1.2. On appeal, the defendant maintained that although his illegal reentries were separated in time, both crimes involved identical harm to societal interests and a common criminal objective. The court of appeals noted the commentary to the guideline provides that, for offenses in which there is no identifiable victim (such as drug or immigration offenses), the victim is the societal interest that is harmed. First, the court held that the defendant's offenses did not constitute a single, composite harm. Second, the court found that the defendant did not provide the court with any evidence that the crimes were committed as part of a common scheme or plan even though it was

his burden to do so. On the question of one composite harm, the appellate court noted that each time the defendant illegally reentered the United States the government incurred the cost of processing and deporting him. In addition, the court of appeals found that the community was subjected to separate instances of risk of harm from his continued criminal activities. The defendant, the court held, had not demonstrated anything more than conduct that "constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal."

United States v. Sherman, 268 F.3d 539 (7th Cir. 2001). The district court did not err in refusing to group counts for receiving, shipping and possessing child pornography. On appeal, the defendant challenged the district court's refusal to group the counts together, arguing that they all involved the same victim–society at large. The court determined that the "possession, receipt, and [distribution] of child pornography [does] directly victimize the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters." The Seventh Circuit ruled that the children exploited in the pornography were the primary victims of the crimes of possessing, receiving and distributing those materials. *See also United States v. Shutic*, 274 F.3d 1123 (7th Cir. 2001) (adopted holding in *Sherman* and held that the victim in child pornography is the child in the image, who suffers a direct harm through the invasion of his or her privacy).

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). The district court erred in failing to group the defendant's money laundering and mail fraud convictions pursuant to §3D1.2. The circuit court held that the defendant's convictions for mail fraud and money laundering in connection with a Ponzi scheme were "closely related counts" and clearly meet the criterion to be considered part of the same continuing common criminal endeavor. The money that the defendant laundered was money defrauded from investors, therefore, absent the fraud, there would have been no funds to launder. Moreover, the money laundering took place in an effort to conceal the fraud and keep the entire scheme afloat. The circuit court rejected the government's contention that the grouping of offenses was inappropriate because they involved different victims and different harms. Relying on similar decisions in the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the court held that money laundering served to perpetuate the very scheme that produced the laundered funds and was not an "ancillary" offense.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Mount, 675 F.3d 1052 (7th Cir. 2012). The Seventh Circuit held that the district court erred by denying the 1-level reduction at §3E1.1(b) after the government's motion certifying the defendant's assistance through a timely plea. The defendant escaped from a community center, but once apprehended entered into a plea agreement in which the government agreed to make motions for both the 2-level reduction at §3E1.1(a) and the one-level reduction at subpart (b) if the defendant accepted the proffered agreement, thus avoiding a trial. The defendant accepted the agreement. However, at sentencing the district court denied the 1-level reduction based upon the defendant's escape. The Seventh Circuit held that although the sentencing guidelines are now advisory, the one-level reduction must be applied if the defendant meets the three requirements at §3E1.1(b): (1) a decision that the defendant qualifies for the first two levels under subpart (a); (2) an offense level of 16 or greater before subpart (a) is applied;

and (3) a government motion certifying assistance through a timely plea. The Seventh Circuit emphasized that while "the court retains discretion to apply the factors outlined in 18 U.S.C. § 3553(a) to choose a proper sentence," it still "must begin . . . with the right reference point from the guidelines." Because these three requirements were met in this case, the court should have granted the 1-level reduction under §3E1.1(b).

United States v. Miller, 343 F.3d 888 (7th Cir. 2003). The defendant appealed his sentence for possession of child pornography on the ground that the court, *inter alia*, erred by failing to award him a 3-level reduction under §3E1.1. The defendant argued that he was entitled to a downward adjustment under §3E1.1 because he promptly admitted to possessing the unlawful images, expressed remorse and contrition for his acts, and entered a timely guilty plea. The court of appeals agreed with the Sixth Circuit rather than the Ninth Circuit in evaluating acceptance of responsibility. The court held that just because the defendant admitted to the elements of the offense did not mean that he is necessarily entitled to a downward adjustment– the court requires defendants to honestly acknowledge the wrongfulness of their conduct and not minimize it. The court held that the Seventh Circuit requires that a defendant do more than merely plead guilty, an approach consistent with that endorsed by the Sixth Circuit in *Greene*. The appeals court concluded that "[t]his approach also makes sense–otherwise, §3E1.1 would have been written to say that merely pleading guilty earns the reduction."

United States v. Sowemimo, 335 F.3d 567 (7th Cir. 2003). The appellate court affirmed the district court's denial of an additional 1-level reduction, pursuant to §3E1.1, because the defendant failed to enter his guilty plea prior to the pretrial conference. The district court found defendant's decision to plead guilty after the first day of a two-day trial not only an inefficient use of its resources, but very disruptive of the court's schedule. The Seventh Circuit noted this was the type of factual determination that it would not disturb on appellate review. In addition, it had no need to decide whether the stricter requirements for the additional adjustment imposed by PROTECT Act applied here because the defendant would lose even under the prior law.

United States v. Nielsen, 232 F.3d 581 (7th Cir. 2000). The district court did not err in denying the defendant's request for an additional downward adjustment based on an acceptance of responsibility. On the day before his scheduled trial date, the defendant pled guilty to conspiracy to collect extensions of credit by extortionate means, and the district court sentenced him to 96 months. Nine days before his trial was scheduled to begin, the defendant's counsel notified the government that the defendant intended to plead guilty, but he did not actually execute a plea agreement or plead guilty until the day before trial. The Seventh Circuit stated that by the time the defendant gave notice of his intention to plead guilty, the government had already invested substantial resources in trial preparation, brought in witnesses, issued subpoenas and made travel arrangements, and found the government could not stop preparing for trial even after the defendant gave notice of his intention to plead because of the possibility that his plea would not go through. The circuit court held that the district court did not err in its determination that the defendant did not plead guilty in a sufficiently timely manner to warrant an additional reduction under §3E1.1(b)(2).[8]

[8] Subsections (b)(1) and (b)(2) of §3E1.1 were stricken effective April 23, 2003 pursuant to Amendment 649.

United States v. Martinson, 37 F.3d 353 (7th Cir. 1994). The district court clearly erred when it found that the defendant had accepted responsibility pursuant to §3E1.1. The district court based its finding on the defendant's statements acknowledging that he took money from the distributors he defrauded, and that he still owed them the money. On cross-appeal, the government argued that the reduction was unwarranted because the defendant refused to plead guilty and because he continued to deny criminal intent. The circuit court agreed, and reversed the district court's decision. Although the circuit court acknowledged that a conviction by trial does not automatically preclude a defendant from receiving a reduction for acceptance of responsibility, this was not a case in which the defendant deserved the reduction even though he put the government to its proof at trial. Rather, the defendant's continuous denials of criminal intent and his blaming of other individuals was evidence sufficient to show that he did not accept responsibility for his criminal conduct.

United States v. McDonald, 22 F.3d 139 (7th Cir. 1994). In assessing an issue of first impression, the circuit court affirmed the district court's denial of an acceptance of responsibility adjustment based on the defendant's use of cocaine while awaiting sentencing. The defendant pleaded guilty to aiding and abetting the counterfeiting of obligations in violation of 18 U.S.C. §§ 471, 472. He argued that the sentencing court's denial was in error because it was based on uncharged conduct that was unrelated to the offense of conviction. Noting a split among several circuit courts, the Seventh Circuit joined the First, Fifth and Eleventh Circuits in holding that unrelated criminal conduct may be considered in determining whether a defendant has accepted responsibility. Application Note 1(b)'s broad language "indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally." It is reasonable for the sentencing court to view continued criminal activity, such as the use of a controlled substance, as being inconsistent with an acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Gajdik, 292 F.3d 555 (7th Cir. 2002). In 1997, the defendant was convicted of burglary in Illinois and sentenced to five years, but instead of serving five years, he completed boot camp and was released after 121 days. Because the Illinois court had sentenced the defendant to a term of five years, the district court determined that his prior sentence exceeded 13 months, warranting three criminal history points under §4A1.1(a). The court of appeals affirmed. The Seventh Circuit concluded that the Illinois program operated as a pardon or commutation rather than a suspension and that this conclusion was consistent with the purpose underlying the criminal history calculation of the sentencing guidelines–to assess a defendant's likelihood of recidivism by taking into account the seriousness of the defendant's past criminal conduct. Because the defendant's early release was not based on innocence or mistake of law, the district court correctly determined that his 1997 Illinois sentence was a prior sentence of imprisonment exceeding one year and one month and assigned three criminal history points.

United States v. Hopson, 18 F.3d 465 (7th Cir. 1994). The district court did not violate the defendant's due process rights by increasing the defendant's Criminal History Category from I to II after determining that his prior state misdemeanor conviction (possession of cocaine) was not related to the conspiracy charge (distribution of cocaine) for which he was being sentenced. Key factors the court considered in determining whether the offenses were connected included: the geographic and temporal proximity of the two offenses; the fact that the prior offense was not listed in the indictment; whether a common victim was involved; and whether the defendant was given the opportunity to demonstrate a relationship between the two offenses.

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

Buchmeier v. United States, 581 F.3d 561 (7th Cir. 2009). The defendant was sentenced as an armed career criminal following four firearms convictions. In a collateral proceeding, he contended that his eight prior state convictions for burglary do not meet the definition of a "crime punishable by imprisonment" under 18 U.S.C. § 921(a)(20) because a notice he received from the Illinois Department of Corrections upon the expiration of his state term and his release from all supervision constitutes a "restoration of civil rights" within the definition of section 920(a)(20). That section provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The Seventh Circuit held that "[b]ecause the state sent Buchmeier a document stating that his principal civil rights have been restored, while neglecting to mention the continuing firearms disability . . . his burglary convictions do not count for federal purposes."

See United States v. Severson, 569 F.3d 683 (7th Cir. 2009). The court affirmed the district court's decision to count the defendant's misdemeanor convictions, stating that "the district court was not absolutely bound by the sentencing commission's judgment since the Guidelines are merely advisory."

United States v. Damico, 99 F.3d 1431 (7th Cir. 1996). The district court properly assigned a criminal history point for the defendant's one year sentence of "conditional discharge" for careless or reckless driving. The defendant asserted that he should not have been assessed a point under §4A1.2(c)(1)(A), because the sentence was not for a term of probation of at least one year or a term of imprisonment of at least 30 days. The district court concluded that an Illinois sentence of conditional discharge is the equivalent to a sentence of probation for purposes of that guideline; the defendant maintained that the two are distinct and that his reckless driving sentence did not qualify as a "term of probation". The appellate court relied on *United States v. Caputo*, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is "unsupervised probation" and that the Sentencing Commission equates "unsupervised probation" with supervised probation. Conditional discharge is the same as probation, but without a probation officer, and that is a distinction without a difference so far as the purposes of the guideline exception are concerned.

United States v. Mitchell, 18 F.3d 1355 (7th Cir. 1994). The district court properly refused to entertain the defendant's collateral attack of a prior sentence used to determine his

criminal history category. The defendant claimed that his prior state conviction was invalid because his plea was not entered knowingly and voluntarily and lacked sufficient factual basis. The Seventh Circuit followed the First, Fourth, Sixth, Eighth, and Eleventh Circuits in holding that "a defendant may not collaterally attack his prior state conviction at [his federal] sentencing unless the conviction is presumptively void." The court of appeals reasoned that a sentencing hearing is not the proper forum in which to challenge the validity of a prior conviction because such a challenge requires a fact-intensive inquiry. Because inquiries are more appropriately handled in a state collateral proceeding or by federal habeas corpus. Since a review of the record from the defendant's state court conviction did not reveal a presumptively void plea, the defendant's collateral challenge must fail.

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

United States v. McIntyre, 531 F.3d 481 (7th Cir. 2008). "Since the Supreme Court decided *United States v. Booker*, . . . we do not require a district court to follow §4A1.3 when imposing an above-guidelines sentence. Indeed, we will uphold an above-guidelines sentence so long as the district court offered an adequate statement of its reasons, consistent with 18 U.S.C. § 3553(a), for imposing such a sentence."

United States v. Peterson, 256 F.3d 612 (7th Cir. 2001). The district court did not err in departing upward two levels pursuant to §4A1.3 because the departure was reasonable and sufficiently linked to the structure of the guidelines. The defendant pled guilty to bank fraud. On appeal, he argued that the district court relied solely on his criminal history points when it decided to impose an upward departure, which was not an adequate ground upon which to base a departure. The Seventh Circuit stated that if a defendant has been convicted for the same offense more than once, there is a need for greater sanctions for future deterrence. Seven of the defendant's eight convictions in the previous ten year period were for check deception, forgery, theft and identity theft. Therefore, the district court was correct in observing that the defendant had made a career of defrauding people and financial institutions and concluding there was a substantial amount of reliable information to indicate the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that he would commit future crimes. *See also United States v. Gallagher*, 223 F.3d 511 (7th Cir. 2000) (district court did not err in departing upward where the defendant was convicted for arson and his criminal history category did not adequately reflect his commission of an uncharged murder which occurred during the course of the arson; he had multiple motives for murdering the victim, he was the only suspect with opportunity to commit the murder, and the physical evidence linked the defendant to the murder).

United States v. DeAngelo, 167 F.3d 1167 (7th Cir. 1999). The Seventh Circuit ruled that the presentence report provided the defendant with adequate notice by noting that a departure might be warranted under §4A1.3. The mention of the departure under a specific guideline provision comported with established sentencing procedures.

United States v. Turchen, 187 F.3d 735 (7th Cir. 1999). The district court permissibly departed upward on the basis of the defendant's previous acquittal "by reason of mental defect."

The district court appropriately concluded that the defendant's mental instability constituted a higher likelihood of recidivism, thus justifying longer commitment to protect the public.

United States v. Walker, 98 F.3d 944 (7th Cir. 1996). The appellate court affirmed the district court's decision to depart upward based on the defendant's history of convictions which, while placing him in the highest criminal history category, understated his true criminal history. The defendant argued that the court, in departing upward, relied on not only permissible factors, but impermissible factors, such as the defendant's many arrests that did not result in convictions, and prior convictions which occurred too long ago to be included in the computation of criminal history points. The appellate court held that the outdated convictions for serious offenses were usable for purposes of making an upward departure pursuant to Application Note 8 to §4A1.2. The court reasoned that the previous offenses were pieces of a lifelong pattern of criminality and could be considered for the limited purpose of establishing the incorrigible character of the defendant's criminal propensities. The appellate court also held that the sentencing court's consideration of the defendant's 23 other arrests that did not result in conviction was harmless error, in light of the sentencing judge's comments that the 37-month sentence was light for someone who qualified as a career criminal on the basis of his convicted offenses. The appellate court found that the sentence would not have been lower had the presentence report left out the arrests.

United States v. Croom, 50 F.3d 433 (7th Cir. 1995). Pursuant to §4A1.3, the district court judge departed upward from Criminal History Category IV to Category VI, but did not explain why Category V was not sufficient. In making the departure, the district judge stated that the guidelines did not adequately reflect the seriousness of the defendant's past crimes, some of which were juvenile offenses not counted for criminal history purposes, the fact that he committed his first federal gun offense shortly after release from state imprisonment, and his propensity to commit more crimes in the future. The appellate court stated under 18 U.S.C. § 3553(b), "[a] district judge may give a sentence exceeding the range specified by the Sentencing Guidelines only on account of circumstances 'not adequately taken into consideration' by the Sentencing Commission." Two of the reasons given for the upward departure had been considered by the Commission, and therefore the appellate court remanded the case for resentencing under §4A1.3.

United States v. Fuller, 15 F.3d 646 (7th Cir. 1994). The defendant claimed that the district court abused its discretion by using his prior arrest record to depart upward under §4A1.3. Under §4A1.3(d) the district court may depart upward based on the seriousness of the defendant's past criminal conduct or the likelihood that he will commit future criminal conduct. The district court must rely on the facts underlying the defendant's prior arrests rather than the arrest record itself. In this case, the circuit court affirmed the departure because the district court relied on information contained in the presentence report, not the arrest record.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Smith, 2013 U.S. App. LEXIS 14189 (7th Cir. July 15, 2013). In a case of first impression, the Seventh Circuit rejected the defendant's argument that because §4B1.1 is

not empirically based, *Rita's* deference to the Commission's judgment does not apply and, therefore, no presumption of reasonableness arises. The Seventh Circuit joined with the other circuit court who have address the issue, stating "that the presumption applies even to sentences based on guidelines developed through congressional mandates because a sentence that agrees with the judgment of Congress is likely reasonable as well."

United States v. Womack, 610 F.3d 427 (7th Cir. 2010). The defendant was convicted of crack distribution and sentenced as a career offender to 360 months. The court found that the career offender enhancement was properly applied, but it remanded for resentencing in light of *United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc). It stated that "district courts may disagree with the career offender enhancement on policy grounds related to the crack/powder disparity and impose sentences accordingly." The court found that the district court did not appreciate its discretion under the guidelines "when it noted during the sentencing hearing that 'the crack powder disparity argument' was foreclosed" because the court had not yet decided *Corner*. It concluded: "The district court should have felt free to factor policy disagreements with the Guidelines into its consideration of the full panoply of sentencing factors."

United States v. Corner, 598 F.3d 411 (7th Cir. 2010). The *en banc* Seventh Circuit held that judges are free to disagree with §4B1.1 because it is a guideline rather than statutory rule for the purposes of *Booker* and *Kimbrough*, explicitly overruling prior precedents holding that 21 U.S.C. § 841 and 28 U.S.C. § 994(h) in combination required within-guideline sentences for career offenders who distribute crack cocaine. The Seventh Circuit's decision eliminated a split between the circuits, as it joined the First, Second, Sixth, and Eighth Circuits in concluding that sentencing judges may disagree with §4B1.1 for policy reasons. *See also United States v. Brown*, 617 F.3d 955 (7th Cir. 2010) (remanding for full resentencing because the district court imposed the crack sentence without knowing that it could disagree, and the court of appeals did not know how the court might have sentenced the defendant had it known it could address the crack/powder disparity in the career offender guideline).

United States v. Steward, 339 F. App'x 650 (7th Cir. 2009). The court vacated and remanded the defendant's career offender sentence, finding that the district court abused its discretion when it did not adequately explain the sentence in light of the section 3553(a) factors.

United States v. Bissonnette, 281 F.3d 645 (7th Cir. 2002). The district court did not err in determining that defendant's two prior state battery convictions constituted violent felony convictions for career offender purposes. The defendant, convicted of assault with intent to do bodily harm without just cause or excuse, had two prior battery convictions. The batteries of which he had been convicted were labeled misdemeanors under Wisconsin law and carried a term less than one year. On both batteries, defendant was given an enhanced sentence under Wisconsin's habitual criminality statute, which raised the maximum sentence on each battery to three years. The defendant was sentenced to two years on each offense. On appeal, the defendant argued that because his prior state convictions were misdemeanors with a statutory maximum of one year, they were not felony convictions for career offender purposes. The Seventh Circuit, citing *United States v. LaBonte*, 520 U.S. 751 (1997), determined that the "offense statutory maximum" was the base sentence plus enhancers. The court also noted that

this decision overruled its earlier decision, *United States v. Lee*, 78 F.3d 1236, 1241 (7th Cir. 1996) in which it previously concluded that the conduct a court may consider in determining the grade of a violation of supervised release under §7B1.1 "does not include sentence enhancements for habitual or recidivist offenders." *See also United States v. Trotter*, 270 F.3d 1150 (7th Cir. 2001) (held that the Supreme Court in *LaBonte* concluded that the term of punishment to which a person is exposed on violating a statute includes all enhancements–for quantity of drugs, for use of firearms, for violence during the offense, and for prior convictions).

United States v. Best, 250 F.3d 1084 (7th Cir. 2001). The district court did not err when it counted the defendant's prior state felony convictions separately for purposes of the career offender provision of §4B1.1. The defendant was convicted of conspiracy to possess with intent to distribute in excess of five grams of crack cocaine. The district court determined the defendant was a career offender because he had two qualifying prior convictions, one for battery with a deadly weapon and one for dealing a sawed-off shotgun. The district court sentenced him to 360 months. On appeal, the defendant argued that the convictions should not have been counted separately because they were consolidated on the state level for sentencing. The Seventh Circuit found that the counts occurred on separate days, and were disposed of by means of one plea agreement at a single sentencing for administrative convenience only. Therefore, the district court did not err in finding the prior convictions should be counted separately.

United States v. Maro, 272 F.3d 817 (7th Cir. 2001). The district court erred in determining that the defendant's federal conviction and state conviction based on a number of robberies were related, pursuant to §4A1.2, Application Note 3, and did not qualify as separate convictions for purposes of the career offender guideline. The defendant committed eight robberies in 1989, six in Illinois and two in Wisconsin, and was charged in both states. The defendant pled guilty to two counts from both indictments totaling four counts in all. In his plea agreement, defendant stipulated to the other robberies, and the others were listed in the presentence report. Citing *United States v. Brown*, 962 F.2d 560 (7th Cir. 1992), the court concluded that "concurrent sentences do not necessarily make crimes related." The court ruled that the prior state conviction retained sufficient independence to be considered a separate conviction for guideline purposes, enough to qualify the defendant as a career offender.

United States v. Damerville, 27 F.3d 254 (7th Cir. 1994). The district court did not err in using a conviction for conspiracy to commit a controlled substance offense to classify the defendant as a career offender. The circuit court rejected the defendant's argument that the Sentencing Commission exceeded the mandate of 18 U.S.C. § 944(h) by including "conspiracy" to commit a controlled substance offense among offenses that qualify for the career offender enhancement. The circuit court, citing the Eighth and Ninth Circuits' opinions in *United States v. Baker*, 16 F.3d 854, 857 (8th Cir. 1994); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir. 1994), ruled that even if the Sentencing Commission could not rely on § 994(h) to subject conspiracy convictions to career offender provisions, it could rely instead on its general authority under § 994(a) to specify terms for defendants not covered under § 994(h).

United States v. Killion, 30 F.3d 844 (7th Cir. 1994). The district court did not err in determining that the defendant was a career offender under §4B1.1. On appeal, the defendant argued that the district court erred when it relied upon a state court conviction that was wrought

by a plea agreement which, the defendant claimed, violated the *ex post facto* clause. The appellate court affirmed the judgment of the district court, holding that the *ex post facto* clause does not apply to judicial constructions of statutes. Rather, the *ex post facto* clause is merely a "limitation upon the powers of the Legislature" and "does not of its own force apply to the Judicial Branch of government." Thus, because the district court could constitutionally rely upon the defendant's state court conviction, the defendant could therefore be properly sentenced under §4B1.1.

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

United States v. Sonnenberg, 628 F.3d 361 (7th Cir. 2010). The court remanded for resentencing, holding that the district court erred in finding that the defendant's prior Minnesota conviction for "intrafamilial sexual abuse" was a "crime of violence." The court based its decision on the Supreme Court's decision in *Begay* and the Seventh Circuit's decision in *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010). The court found that the "first clause of the crime of violence definition does not apply here because the statute on its face does not require as an element 'the use, attempted use, or threatened use of physical force against the person of another.' . . . Nothing in the Minnesota statute requires proof of physical force against another." Discussing the second clause of the crime of violence definition and applying the "categorical approach," the court found that "the offense described in the Minnesota statute, 'in the typical or ordinary case,' would not meet *Begay's* requirement of purposeful, aggressive, and violent conduct." Discussing the facts of the defendant's Minnesota offense, the court also stated:

> We recognize that the categorical approach can seem artificial and abstract, though it helps to narrow the scope of recidivist statutes or sentencing guidelines that can impose dramatic enhancements on sentences for those defendants who clearly fall within their intended scope. If we could still use a different method, as we did in *Shannon*, and could focus on the defendant's actual conduct, we might reach a different conclusion about the career offender enhancement for Sonnenberg.

Welch v. United States, 604 F.3d 408 (7th Cir. 2010). A majority of the court affirmed the defendant's sentence for unlawful possession of a firearm by a felon under the ACCA, finding that the district court properly treated as a "violent felony" his prior conviction for the Illinois offense of aggravated fleeing or attempting to elude a police officer and his prior juvenile adjudication. After determining that the *Begay* rule could be applied retroactively, the court discussed case law relative to the Illinois statute of aggravated fleeing. It concluded that the Illinois statute required purposeful conduct and that the conduct proscribed by the statute was violent and aggressive as those terms were used by the Supreme Court in *Begay* and *Chambers*. It stated: "[W]e stand with the majority of circuits that have held that intentional vehicular fleeing is a violent felony within the meaning of the ACCA." The court also concluded, after analyzing cases in other circuits, that a prior juvenile adjudication is a "prior conviction" under *Apprendi*. In his dissent, Judge Posner argued that neither the juvenile conviction nor the conviction for aggravated fleeing was a "violent felony" within the meaning of ACCA.

United States v. Evans, 576 F.3d 766 (7th Cir. 2009). Defendant's prior conviction of aggravated battery under Illinois law was not a crime of violence within the meaning of §4B1.2(a) of the guidelines. The aggravated battery to which defendant pleaded guilty occurs when a person intentionally or knowingly makes physical contact "of an insulting or provoking nature" with an individual and knows the individual harmed is pregnant. The Seventh Circuit held that the first prong of §4B1.2(a) was not satisfied because "physical force" is not an element of "insulting or provoking" physical contact battery. Nor is the second prong satisfied because although "insulting or provoking" contact is intentional, it is not comparable to the other crimes listed in §4B1.2(a)(2), and it cannot be said to present a serious risk of injury.

United States v. Gear, 577 F.3d 810 (7th Cir. 2009). Reckless discharge of a firearm is not a crime of violence for career offender purposes. "[A] person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual." The statute is not divisible, and the "recklessness" component applies to all of its elements, including the discharge of the gun. "This means that conviction under 720 ILCS 5/24-1.5(a) need not denote the sort of purposeful, aggressive, and violent conduct that *Begay* requires for classification as a violent felony under the residual category."

United States v. Hampton, 585 F.3d 1033 (7th Cir. 2009). The court vacated and remanded the decision to sentence the defendant under the Armed Career Criminal Act (ACCA). Although the court agreed with the district court that "residential entry" under Indiana law qualified as a predicate violent felony, it discovered that another prior conviction, for criminal recklessness in Indiana, did not qualify as a predicate violent felony. It found that the court committed plain error on this issue, explaining that its conclusion was based on case law changes after Hampton's original sentence.

> [U]ntil we decided otherwise in *United States v. Smith*, a case issued after Hampton was sentenced, a conviction in Indiana for criminal recklessness served as a predicate violent felony under the ACCA. 544 F.3d 781, 787 (7th Cir. 2008) . . . . Our recent post- *Begay* precedent has further illuminated the proper analysis for determining whether a prior conviction qualifies for a recidivist enhancement. *See United States v. Woods*, 576 F.3d 400, 401 (7th Cir. 2009) (reiterating Smith's holding); *see also United States v. High*, 576 F.3d 429, 430 (7th Cir. 2009) (plain error occurs if a district court incorrectly classifies a defendant's prior conviction as a violent felony).

United States v. Hart, 578 F.3d 674 (7th Cir. 2009). The Seventh Circuit held that defendant's prior federal escape conviction was not a crime of violence under the career offender guideline. Following *Chambers v. United States*, 555 U.S. 122 (2009), the court utilizes a three-step inquiry to determine whether a conviction under a broadly-worded escape statute is a crime of violence. First, the court looks to whether the statute is divisible because it punishes more than one category of crime. Second, the court determines if any crimes within the scope of the statute are not crimes of violence. If so, the court then determines whether or not the crime committed by the defendant was a crime of violence. The federal escape statute at issue here, 18 U.S.C. § 715(a), "covers a wide range of conduct, from violent jailbreaks to quiet walkaways to passive failures to report. It does not, however, enumerate explicitly the different ways in which

the statute can be violated. Under [Seventh Circuit precedent] it is an indivisible statute." The court then held that because one can commit escape without putting anyone in harm's way, it is not a crime of violence under the guidelines.

United States v. Patterson, 576 F.3d 431 (7th Cir. 2009). The district court found that defendant's conviction for transporting a minor in interstate commerce for the purposes of prostitution in violation of 18 U.S.C. § 2423(a) was a "crime of violence" under §4B1.2. The Seventh Circuit held that the offense is similar in kind to the enumerated crimes in §4B1.2(2). The crime is "purposeful" because it requires the perpetrator to knowingly transport a minor and intend that the minor engage in prostitution. It is "aggressive" because it places the perpetrator in a position of power over the minor so that coercion is inherent in the crime. It is "violent" because the crime "exposes the crime's victim to a foreseeable risk of violence, physical injury, and disease."

United States v. Woods, 576 F.3d 400 (7th Cir. 2009). Defendant's prior conviction for involuntary manslaughter under Illinois law does not qualify as a prior violent felony under the residual clause of §4B1.2(a)(2). "Only offenses that reflect the same 'purposeful, violent, and aggressive manner' as the listed offenses satisfy the definition." The court held that the residual clause encompasses only purposeful crimes, and that crimes with the *mens rea* of recklessness do not fall within its scope. Involuntary manslaughter under Illinois law requires only a *mens rea* of recklessness, and therefore is not a crime of violence for career offender purposes.

United States v. Billups, 536 F.3d 574 (7th Cir. 2008). "The 'serious potential risk' language of the residual clause of §4B1.2(a) is indicative of probability, rather than inevitability; therefore, an offense need not pose a serious risk of harm in *every* conceivable factual manifestation in order to constitute a crime of violence."

United States v. Jennings, 544 F.3d 815 (7th Cir. 2008). Prior conviction for resisting officer through fleeing in violation of Indiana Code § 35-44-3-3 was a crime of violence under §4B1.2 because the conviction required proof that the defendant "created a 'substantial risk of bodily injury to another person' by an act of vehicular fleeing from a police officer by 'speed[ing], ignor[ing] traffic control devices, and thus . . . endanger[ing] other drivers,'" as required by *Begay v. United States*, 553 U.S. 137 (2008), which held that a crime of violence must involve purposeful and aggressive conduct.

United States v. Templeton, 543 F.3d 378 (7th Cir. 2008). In *Begay v. United States*, 553 U.S. 137 (2008), the Supreme Court held that a "violent felony" under the ACCA had to be purposeful, violent, and aggressive. Here, the Seventh Circuit held that *Begay* applies to §4B1.2, which uses identical language. "A walkaway [escape] is not a crime of violence under *Begay*. Nor is a simple failure to report to custody" because "[t]hese offenses do not involve 'aggressive' conduct against either a person (as in extortion) or property (arson)."

United States v. Brazeau, 237 F.3d 842 (7th Cir. 2001). The district court did not err in finding that possession of a short-barreled shotgun constituted a crime of violence for purposes of the guidelines. After police found the defendant in possession of a handgun and ammunition while searching for drugs, the defendant pled guilty to being a felon in possession of a firearm

because of a previous state conviction for selling a short-barreled shotgun. The district court assessed his base offense level at 20 after concluding that possession of the short-barreled shotgun constituted a "crime of violence" because it "involves conduct that presents a serious potential risk of physical injury to another." On appeal, the defendant argued that his prior state conviction was not a crime of violence, stating that Application Note 1 to §4B1.2 provides that the offense of being a felon in possession of a firearm is not a crime of violence. The circuit court found that the defendant's previous conviction was not for being a felon in possession of a firearm, but for possession of a sawed-off shotgun, and therefore Application Note 1 was inapplicable. Further, the Seventh Circuit found that three other circuits have held possession of a short-barreled shotgun constitutes a crime of violence, finding that possession of this type of gun always creates a serious potential risk of physical injury to another under the guidelines. The circuit court held that the district court did not commit error.

United States v. Hoults, 240 F.3d 647 (7th Cir. 2001). The district court erred in finding that a prior state conviction for burglary qualified as a crime of violence which could qualify the defendant for treatment as a career offender. Following a jury trial, the defendant was convicted of distributing cocaine base and was sentenced as a career offender pursuant to §4B1.2. On appeal, the defendant claimed the district court should not have characterized one of his prior felony convictions as a crime of violence. The district court had decided that the defendant's prior conviction for burglary of a building qualified as a crime of violence under §4B1.2 because the defendant had originally been charged with a residential burglary, even though the amended information charged only the offense of burglary of a building. The Seventh Circuit stated it was firmly established in the circuit that the sentencing court was required to confine its inquiry to the face of the charging instrument. The statutory definition of the state statute with which the defendant was charged stated that the term "building" specifically excluded a dwelling. Because the defendant was convicted of burglary which excluded a dwelling, the defendant was not convicted of a burglary that fit the definition of a crime of violence within the meaning of §4B1.2.

United States v. Mueller, 112 F.3d 277 (7th Cir. 1997). In an issue of first impression, the Seventh Circuit held that using a telephone to facilitate a drug offense, 21 U.S.C. § 843(b), constitutes a "controlled substance offense" under §4B1.1. The defendant appealed the sentencing judge's determination that the defendant be treated as a career offender based on a prior conviction under 18 U.S.C. § 843(b). The defendant asserted that because the Sentencing Commission deleted from §4B1.2 the specific list of statutory "controlled substance offenses" (which did not include § 843(b)) and deleted language indicating that the definition included "substantially similar" offenses, the Commission did not intend § 843(b) violations to be treated as controlled substance offenses. The circuit court found this argument conclusory and examined the language of §4B1.2(2)[9], which presents a two-part inquiry: First, the sentencing court must determine if the statute prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession with intent to do so. If it does, it is a controlled substance offense. If not, the offense will be deemed a controlled substance offense if the statute involves "aiding and abetting, conspiring, [or] attempting to commit such an offense." "Unlawful use of a telephone" offenses fall into the latter category because one cannot be

[9] Section 4B1.2(2) was amended by deleting "(2)" and inserting in lieu thereof "(b)" effective November 1, 1997 pursuant to Amendment 568.

convicted under §843(b) unless he also aids or abets, or attempts to commit, the drug offense itself. Two circuits have held that §843(b) effectively prohibits the same conduct as a controlled substance offense and, therefore, is a controlled substance offense. The court also noted the language in Application Note 1 to §4B1.2 which specifically denotes aiding and abetting as a controlled substance offense. Noting that the defendant did use a telephone to facilitate the manufacture and distribution of marijuana, as the plea hearing established, the court stated that such activity could occur only if the defendant had in fact manufactured or distributed marijuana. Consequently, a violation of 21 U.S.C. § 843(b) does qualify as a "controlled substance offense" under §4B1.2(2) for purposes of determining career offender status.

United States v. Coleman, 38 F.3d 856 (7th Cir. 1994). The defendant was sentenced as a career offender following his plea of guilty to burglary of a residence on federal land. Among other issues, he contended that his two prior convictions for drug offenses should not be counted for purposes of sentencing under the career offender guideline because he was only 17 years old at the time of the convictions, and received sentences to probation. The defendant argued that only the "most serious" crimes committed prior to age 18 should count for purposes of status as a career offender, and in support, cited a case where the government had conceded the point, the Ninth Circuit's opinion in *United States v. Carrillo*, 991 F.2d 590, 592 (9th Cir. 1993). This appellate court found that opinion to be "unpersuasive and in clear conflict with the Guidelines." The appellate court cited §§4B1.2 and 4A1.2, and the accompanying commentary, and held that a prior felony conviction is an offense punishable by a term of imprisonment exceeding one year, regardless of the sentence imposed, and is an "adult conviction" if it is so classified "under the laws of the jurisdiction in which the defendant was convicted." Section 4A1.2 contains no indication that only some of those offenses committed prior to age 18 may be counted. The district court properly used the defendant's prior drug convictions as predicate offenses for purposes of the career offender provision.

§4B1.4 Armed Career Criminal

United States v. Wright, 48 F.3d 254 (7th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on prior felony convictions which were more than 15 years old. The defendant claimed that convictions more than 15 years old were stale and should not be considered for ACCA purposes, much like the 15-year limit on the use of felonies for sentencing purposes under §4A1.2(e). In considering an issue of first impression, the Seventh Circuit joined with the Third, Fourth, Fifth, Eighth, and Eleventh Circuits in finding that no time limit exists on prior felony convictions for purposes of the ACCA. The appellate court examined the statute and concluded that if Congress intended a time restriction on the use of felonies under the ACCA it would have attached a time restriction.

Part C Imprisonment

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

United States v. Bonsu, 336 F.3d 582 (7th Cir. 2003). The appellate court affirmed the district court's denial of the "safety valve" provision under §5C1.2. The defendant was convicted of one count of conspiring to distribute heroin and seven counts of distributing heroin. On appeal, the defendant argued that the district court should have reduced his sentence pursuant to §5C1.2 because he cooperated fully with the government while he was sound of mind and ceased cooperation only when his mental condition deteriorated. The court noted that, although it was true that the defendant did offer to resume cooperation after he was restored to competency and before his sentencing hearing, the district court did not err by focusing on the entire time period after he was restored to competency and found fit to stand trial. During this period, the defendant insisted that his grand jury testimony was coerced and untruthful; the defendant also put the government to its burden at trial after he was restored to competency. Accordingly, the court could find no error in the district court's decision to deny him the benefits of the safety valve guideline.

United States v. Vega-Montano, 341 F.3d 615 (7th Cir. 2003). The Seventh Circuit affirmed the district court's denial of a "safety valve" departure. It stated that the "district court correctly concluded that it had no discretion to re-examine the validity of [the defendant's] prior criminal conviction and permit a downward departure."

United States v. Brack, 188 F.3d 748 (7th Cir. 1999). The government may not frustrate the defendant's attempt to qualify for "safety valve" status by rebuffing and refusing to meet with him after he affirmatively offered to meet and provide all information in his possession concerning the offense in question.

United States v. Arrington, 73 F.3d 144 (7th Cir. 1996). The district court did not err in refusing to apply the safety valve to the defendant. The defendant received a 3-level reduction for acceptance of responsibility under §3E1.1, but the district court determined that the defendant had not truthfully provided all the information concerning the offense under section 3553(f)(5). The circuit court concluded that the admission of responsibility to obtain a reduction under §3E1.1(a) is not necessarily sufficient to satisfy section 3553(f)(5) because section 3553 requires more cooperation than §3E1.1. To satisfy section 3553(f)(5), the defendant must provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan; whereas, §3E1.1(a) requires that the defendant only admit the conduct comprising the offense(s) of conviction–there is no duty to volunteer any information aside from the conduct comprising the elements of the offense. Additionally, section 3553 states that a defendant must disclosure "all information" concerning the course of conduct–not simply the facts that form the basis for the criminal charge.

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013). The Seventh Circuit held that §5D1.2's definition of "sex offense" did not include a simple failure to register as a sex offender as required by the Sex Offender Registration and Notification Act ("SORNA") because the offense was not "perpetrated against a minor."[10]

United States v. Schechter, 13 F.3d 1117 (7th Cir. 1994). The district court did not err in ordering as a condition of the defendant's supervised release that he notify his employers of his past criminal conduct and current status on supervised release. The defendant, who pleaded guilty to income tax evasion and failure to file an income tax return, argued that his occupation as a computer consultant would suffer once word of his criminal history spread to all those in what he describes as the small community of computer consultant employers. He claimed the effect the district court's order would have on his ability to obtain employment was a violation of his due process rights under the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. The circuit court rejected this argument, holding the district court's order was justified because the defendant had stolen a total of almost $100,000 from his last three employers and the district court did not want the defendant to be "in a position of either affirmatively or passively deceiving anybody." The circuit court concluded that 18 U.S.C. §§ 3553(a), 3563(b)(6) and 3583(d) authorized the district court to impose such a condition where justified, and the order did not result in a violation of the Fifth or Eighth Amendments. Also, the circuit court dismissed for lack of appellate jurisdiction the defendant's claim that the district court erred in denying him a downward departure under §5K2.13 for reduced mental capacity.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Hosking, 567 F.3d 329 (7th Cir. 2009). The court affirmed the district court's decision to include in the restitution amount the "time and effort spent by the bank's employees and outside professionals in unraveling the twelve-year embezzlement scheme . . . . " The court found that such expenses were "a direct and foreseeable result of the defendant's conduct that contributed to the diminution of the value of the bank's property."

§5E1.2 Fines for Individual Defendants

United States v. Ellis, 548 F.3d 539 (7th Cir. 2008). A sentencing judge may "disregard the suggested fines under the Sentencing Guidelines and instead impose an 'alternate fine based upon gain' to the defendant as a result of the violation." In this case, the district court did not commit clear error by imposing a $1,184,423.74 fine that reflected the amount of gain to the defendant from a crime for which the court could not impose restitution.

[10] The Sentencing Commission may review and amend §5D1.2's definition of "sex offense" in the current amendment cycle. Please monitor the Commission's webpage at http://www.ussc.gov for news regarding this issue.

United States v. Monem, 104 F.3d 905 (7th Cir. 1997). In reviewing the imposition of a fine for plain error, the appellate court remanded the case for the district court to make factual findings in support of the fine assessed against the defendant with respect to his conviction for using interstate facilities to carry on a prostitution business and laundering the proceeds. Sentencing judges have an affirmative duty to make specific findings with respect to seven factors before imposing fines. Among these factors, the court must consider evidence presented concerning the defendant's ability to pay and the burden a fine would place on the defendant's dependents. §5E1.2(d)(1)-(7). The sentencing court may "discharge its duty to make factual findings" by accepting the findings set forth in the presentence report. However, in this particular case, the presentence report indicated that the defendant was unable to pay a fine due to his lack of assets or monthly cash flow, but might be able to pay a fine in installments upon release from prison. Despite the probation officer's skepticism about the defendant's ability to pay, the sentencing court stated that it was adopting the findings of the presentence report and imposing a fine of $15,000. The circuit court rejected the lower court's blanket statement of adoption of the PSR because there was an unexplained contradiction between the findings of the PSR and the fine assessed. The circuit court remanded the case to the district court to allow the court to "clarify its reasons for imposing the fine in the amount of $15,000."

United States v. Sanchez-Estrada, 62 F.3d 981 (7th Cir. 1995). The district court did not err in its decision to garnish the defendants' prison wages to satisfy their fine obligations. *See* §5E1.2. The appellants argued that the imposition of fines on indigent inmates violates one of the fundamental tenets of the Sentencing Reform Act, that of reducing disparity in sentences for conduct similar in nature. The circuit court stated that it "has upheld the authority of the trial court to order that fines imposed may be satisfied by withdrawing sums of money from the inmate's prison earnings." *See United States v. Gomez*, 24 F.3d 924 (7th Cir. 1994); *United States v. House*, 808 F.2d 508 (7th Cir. 1986) (Indigency does not preclude an award of restitution to be paid from prison wages).

Part G Implementing the Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Jackson, 546 F.3d 465 (7th Cir. 2008). Although the district court was not required to impose defendant's federal sentence concurrent to a related state sentence, because it had discretion to do so, the failure to adequately explain the decision to run the sentences consecutively was reversible error. "[W]here [the defendant] made a non-frivolous argument for a concurrent sentence, which the district court had discretion to impose pursuant to USSG §5G1.3(c), and where the court exercised its discretion to deny [the defendant's] request, we do not think the court could simply have remained silent."

United States v. Tockes, 530 F.3d 628 (7th Cir. 2008). "[T]he guidelines are . . . advisory, and as a statutory matter, the court [is] free to impose the sentences concurrently or consecutively after considering the section 3553(a) factors. *See* 18 U.S.C. § 3584(b) ('The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).')."

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

United States v. Bangsengthong, 550 F.3d 681 (7th Cir. 2008). Defendant pled guilty to a series of armed bank robberies that also resulted in 20-year sentences in state court for attempting to kill a police officer during the robberies. At sentencing on the federal bank robberies, the district court imposed an 88 month sentence, which was below the guideline range of 151–188 months, to reflect the 20-year state sentence. On appeal, the defendant argued that the district court abused its discretion by imposing this sentence to run consecutive to the related state sentence. The Seventh Circuit disagreed, holding that the district court did not have to impose a concurrent sentence, especially where the federal sentence had been reduced to reflect the state sentence.

United States v. Schaefer, 107 F.3d 1280 (7th Cir. 1997). The district court properly held that §5G1.3(a) applied where the defendant's prior offense and the instant offense were related. The court determined that, because nothing in subsection (a) states that subsection (a) was inapplicable when the offenses were related, it applied, notwithstanding the fact that the offenses were related. Prior to the defendant's sentencing, the government objected to a recommendation in the PSR that the defendant's sentence run concurrent with the state sentence he was then serving. This recommendation was based on the fact that the state sentence had been imposed for the same drug conspiracy for which the defendant was being sentenced in the federal case. The government maintained that §5G1.3(a), not (b) applied. The government argued that required consecutive sentences because, while in prison, the defendant had directed a co-conspirator to act in furtherance of the conspiracy.

United States v. Plantan, 102 F.3d 953 (7th Cir. 1996). The district court properly imposed a 24-month consecutive sentence based on the defendant's criminal history. The defendant argued that the court erred in refusing to impose his sentence concurrently to the sentence he already was serving for a 1992 offense, in conformity with Application Note 3 of §5G1.3(c). The court rejected this argument, holding that the guidelines provide a formula for determining the sentence of a defendant who is already incarcerated. This formula was constructed to avoid disparity by ensuring that the total sentence for two offenses is the same regardless of whether the defendant was charged and convicted of the offenses at the same or different times. The Application Note provides that, in some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent. In the instant case, the judge imposed the entire sentence consecutively to the first sentence after determining that the former would not provide for a sufficient incremental penalty in light of the fact that the crime occurred three years after the one for which he was already incarcerated, and because of the extent of the defendant's ten-year criminal history.

United States v. Yahne, 64 F.3d 1091 (7th Cir. 1995). The district court did not err in refusing to group or consolidate the defendant's cases for sentencing purposes. The defendant pled guilty to charges of theft of interstate property in Illinois and Indiana, and his Rule 11(e)(1)(c) plea agreement included a downward departure for substantial assistance for the Illinois charges. The district court sentenced the defendant to 18½ months of incarceration. The defendant had already served his sentence for the Indiana theft and claimed on appeal that there

was a sufficient nexus between the two cases to be consolidated under the guidelines. The circuit court ruled that §5G1.3(b) does not apply to a defendant who has completely served his sentence prior to his second sentencing.

United States v. Bell, 28 F.3d 615 (7th Cir. 1994). The district court erred in enhancing the defendant's offense level for reckless endangerment during flight, §3C1.2, because it failed to consider §5G1.3(b). The defendant fired a shot at a police officer during the course of his flight from arrest and served a state sentence for this offense. He argued, and the government conceded, that §5G1.3(b) required the district court to give the defendant credit for time served in the state prison for the same offense. The circuit court agreed and remanded with instructions to the district court to consider §5G1.3.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Crickon, 240 F.3d 652 (7th Cir. 2001). The district court did not err when it denied the defendant a downward departure because of his age. The defendant, a 60-year-old man, was convicted of possession with intent to distribute methamphetamine, and was sentenced to 151 months. The district court found that the defendant's age was not so advanced as to warrant a downward departure. On appeal, the defendant argued that the district court misunderstood its discretion to depart from the guideline range, and that his age warranted a downward departure. The circuit court found that the defendant's request for a departure rested on his attorney's statement that he looked older than his 60 years due to his history of drug abuse, but stated that drug dependence or abuse is not a reason for imposing a sentence below the guidelines, pursuant to §5H1.4. Further, the circuit court found that the defendant's contention that he would die in prison if his sentence were not shortened would only be an important factor if buttressed by medical evidence, which was lacking.

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

United States v. Krilich, 257 F.3d 689 (7th Cir. 2001). The district court erred when it departed downward from the guidelines based on the defendant's medical condition. The defendant, a 69-year-old with age-related medical problems, was convicted of fraud and conspiracy to violate the RICO Act, and he was sentenced to 87 months. The district court departed downward five levels based on the defendant's health, finding that on the basis of a psychiatrist's testimony, the defendant suffered from chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain. The sentencing judge stated that the defendant's medical profile was outside the heartland of people remanded to the custody of the Bureau of Prisons. The government appealed, contending that an "unusual medical profile" is not a valid ground for departure. The Seventh Circuit agreed, finding that "older criminals do not receive sentencing discounts" unless the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it. Because it found that the prison could provide the defendant with the medical regimen that his doctors believed to be appropriate, the district court erred in departing downward.

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000). The district court did not err when it refused to depart downward from the guidelines on the ground that the defendant suffered from an extraordinary physical impairment. After a jury trial, the defendant was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. At his sentencing, the defendant argued that he was suffering from an extraordinary physical impairment, based on the testimony of a doctor that he suffered from cardiomyopathy and an enlarged heart. The circuit court noted that at no point did the defendant present any evidence regarding why his physical condition would preclude him from being incarcerated and cared for properly by the prison, and therefore it would have been inappropriate for the district court to grant a departure on that basis.

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

United States v. Schroeder, 536 F.3d 746 (7th Cir. 2008). "When a defendant presents an argument for a lower sentence based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant's absence on his family members."

United States v. Canoy, 38 F.3d 893 (7th Cir. 1994). The district court erred in refusing to consider a downward departure based on the defendant's extraordinary family circumstances. The district court had refused to depart because the Seventh Circuit's decision in *United States v. Thomas*, 930 F.2d 526 (7th Cir. 1991), prohibited departures based on family circumstances, even in extraordinary cases. The circuit court rejected the holding in *Thomas*, and followed other circuits' unanimous holdings that §5H1.6 permits departures from a guideline range to account for family circumstances that may be characterized as extraordinary.

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

United States v. Guzman, 236 F.3d 830 (7th Cir. 2001). The district court erred in departing downward in the defendant's sentence based on her cultural heritage. The defendant pled guilty to participating in a conspiracy to distribute methamphetamine, and the district court departed downward 25 levels, based partly on the defendant's ethnicity or cultural heritage. The government appealed the downward departure. The Seventh Circuit held that the district court abused its discretion in departing downward based on its finding that the defendant was more likely to participate in her boyfriend's criminal activities because as a Mexican woman, she was expected to submit to her boyfriend's will. The circuit court found that what the district court regarded as a "matter of cultural heritage" was actually the joinder of gender and national origin, and both factors are expressly forbidden considerations in sentencing.

Part K Departures

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

United States v. Lezine, 166 F.3d 895 (7th Cir. 1999). The district court erred in refusing to review the defendant's claim that he had provided substantial assistance, finding that the government's refusal to move for a downward departure was within its discretion. The Seventh

Circuit ruled that because the government entered into a plea agreement that stated "if the defendant provided full and truthful cooperation," a downward departure would be made–the government had limited its discretion. The government cannot unilaterally decide that a defendant has breached a plea agreement without an evidentiary hearing on the matter.

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997). The district court erred in granting only a 1-level downward departure pursuant to §5K1.1 for substantial assistance to authorities. The defendant argued that §5K1.1, comment. (n.2), provided in part that the sentencing reduction for assistance to authorities should be considered independently of any reduction for acceptance of responsibility. The government conceded that deducting credit for substantial assistance on the ground that the defendant had already been sufficiently rewarded for acceptance of responsibility was in error, but maintained that the error was harmless because the district court had articulated "some valid reasons" for the extent of its departure relating to the nature and extent of the defendant's assistance. The circuit court disagreed, holding that the district court's own summary of its reasoning explicitly tied the choice of a 1-level reduction to the "tremendous break" it believed the defendant had received for acceptance of responsibility. This did not appear to have been an idle or redundant observation, and thus, the appellate court concluded that it could not be confident that the district court considered the two provisions independently. Accordingly, the court vacated the defendant's sentence and remanded for resentencing.

United States v. Eppinger, 49 F.3d 1244 (7th Cir. 1995). The district court did not abuse its discretion by denying the defendant's request to present evidence *in camera* in support of her motion for a downward departure under §5K1.1. The defendant pleaded guilty to one count of conspiracy to distribute cocaine and was granted a downward departure of ten percent from the mandatory minimum sentence of ten years. The defendant claimed to be afraid to speak in open court about the circumstances surrounding her involvement in the drug trade because she had received a number of threats prior to the sentencing, and contended that the court may have granted a greater downward departure if it had allowed her to testify *in camera*. The circuit court ruled that the defendant failed to demonstrate compelling reasons requiring *in camera* testimony, and that the district court's decision did not constitute plain error.

United States v. Atkinson, 15 F.3d 715 (7th Cir. 1994). The defendant pleaded guilty to marijuana and financial structuring charges. The district court originally sentenced him to 25 years in prison based on a sentencing range of 30 years to life, less a five-year reduction under §5K1.1 for substantial assistance. The defendant successfully appealed this sentence based on the district court's incorrect determination of his criminal history category. At resentencing, the district court determined his correct guideline range to be 235-293 months then departed downward under §5K1.1 to 210 months, resulting in a total departure of two years and one month. The defendant appealed again, arguing that the district court abused its discretion by granting him a smaller departure at the second sentencing. The circuit court affirmed the sentence and departure holding that the district court was not bound to give the same downward departure upon resentencing. Vacating a sentence nullifies the previously imposed sentence, allowing the sentencing court to begin with "a clean slate."

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

United States v. Jones, 278 F.3d 711 (7th Cir. 2002). The district court did not err in applying an upward departure pursuant to §5K2.0 for the defendant's refusal to testify in compliance with a plea agreement. Prior to sentencing for drug convictions, the defendant entered into a cooperation agreement with the government in which the defendant agreed to "provide complete and truthful testimony to any grand jury, trial jury, judge, or magistrate in any proceeding in which he may be called to testify by the government." The government agreed to recommend, in exchange for defendant's cooperation, that the district court apply a downward departure which was later granted after defendant testified before the grand jury in the investigation of a codefendant's drug activities. On three occasions, after the defendant's initial cooperation, the defendant refused to testify before the grand jury. The defendant was charged in a superseding indictment with three counts of criminal contempt, for which he was subject to a sentencing range of four to ten months' imprisonment as calculated under §2J1.5. The government then moved for a 17-level upward departure if Jones's refusal to testify distinguished his case from the heartland cases covered by §2J1.5. The district court granted the 17-level upward departure as the amount necessary to take away the benefit conferred upon the defendant as a result of entering the plea agreement.

United States v. Hendrickson, 22 F.3d 170 (7th Cir. 1994). The district court erred in granting the defendant a downward departure for extraordinary acceptance of responsibility. The defendant pleaded guilty to money laundering and several counts of criminal forfeiture. Prior to his sentencing, he voluntarily paid the amount of forfeiture agreed to in his plea agreement. The district court considered this act to be evidence of the defendant's extraordinary acceptance of responsibility. The circuit court reversed, holding that, unlike the voluntary payment of restitution, which several courts have held may be a proper departure basis, forfeiture payments are statutorily mandated and cannot, as a matter of law, be a ground for a downward departure based on extraordinary acceptance of responsibility.

United States v. Rainone, 32 F.3d 1203 (7th Cir. 1994). The district court did not err in departing upwards based on the defendants' threats against the families of their extortion victims. The defendants claimed that the upward departure was unwarranted because the threats were not communicated to the family members. Relying on a subsequent amendment authorizing upward departures for threats of bodily injury and death, *see* §2B3.2(b)(1), the circuit court concluded that failure to communicate the threats to the family members did not affect the appropriateness of the upward departure. The appellate court also affirmed the district court's decision to depart upward because the defendants were engaged in organized crime. The defendants were part of the "Chicago Outfit" syndicate once led by Al Capone. The defendants argued that the high base offense level assigned to RICO convictions already reflected the seriousness of participation in a criminal syndicate and that an upward departure based on involvement in such criminal activity was impermissible double-counting. The circuit court rejected this argument because such an extensive, durable, and notorious criminal syndicate as the Chicago Outfit is outside the heartland of RICO enterprises contemplated by the guidelines.

§5K2.1 Death (Policy Statement)

United States v. Purchess, 107 F.3d 1261 (7th Cir. 1997). The district court properly departed upward to account for conduct that resulted in death. The defendant argued that the death of a co-conspirator should not be used as a basis for an upward departure because the death resulted from relevant conduct and not from the offense of conviction. The defendant further maintained that he was not the cause of the co-conspirator's death, but that the co-conspirator's own voluntary actions were the cause of his death. The issue of applying a §5K2.1 departure based on harm resulting from relevant conduct was one of first impression. Distinguishing two Seventh Circuit cases, the appellate court relied on the First, Second, and Ninth Circuits, which had all ruled that a court may depart upward based on harm resulting from relevant conduct. The court relied on the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996) about the amount of deference a district court enjoys in deciding whether to depart when the particular facts of a case fall outside the "heartland" of guideline cases. The court also rejected the defendant's argument that he should not be held accountable for his co-conspirator's death. Relying on *United States v. White*, 979 F.2d 539 (7th Cir. 1992), the court held that when a defendant knowingly risks a victim's life or puts into motion a chain of events that makes it foreseeable that death would result, a court can depart upward.

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

United States v. Horton, 98 F.3d 313 (7th Cir. 1996). The district court erred in enhancing the defendant's applicable guideline range eight levels for significantly disrupting a governmental function pursuant to §5K2.7. One day after a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, the defendant tried to enter a federal building in Springfield, Illinois and then called in a bomb threat. The defendant argued that the district court's decision to depart upward significantly was inappropriate, maintaining that a 2-level departure would have been more appropriate. The circuit court agreed, holding that a court should determine the extent of an upward departure by comparing the seriousness of the aggravating factors that motivate the departure with the adjustments in the base offense level prescribed by the guideline provisions that apply to conduct most closely analogous to the defendant's offense conduct. The circuit court reasoned that by linking the extent of the departure to the structure of the guidelines in this way, a district court could avoid the type of disparity in sentencing that the guidelines were originally designed to prevent. The circuit court concluded that the defendant in this case had not intended to carry out the "threat" and all parties agreed that the defendant had not demonstrated an "intent" to plant an explosive device. Given the difficulty inherent in comparing offense conduct that is aimed at creating a risk of actual injury to victims with the disruption resulting from a threat that is entirely empty, the court held that the upward departure was inappropriate and remanded for resentencing.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Matchopatow, 259 F.3d 847 (7th Cir. 2001). The government did not breach a plea agreement with the defendant by stating that it supported the district court's upward departure. The defendant pled guilty to second-degree murder and the district court imposed a 9-level upward departure due to the brutality and heinous nature of the defendant's

crime, pursuant to §5K2.8. On appeal, the defendant argued that the government breached the plea agreement because it had recommended only a 5-level enhancement, but supported the court's decision to depart even higher. The circuit court found not even a "scintilla of support" for the defendant's argument, stating that he even admitted he could not point to any language in the plea agreement that the government failed to perform. The government fulfilled its promise and the sentencing court's decision to disagree with the recommendation was not a breach of the agreement.

§5K2.16 Voluntary Disclosure of Offense (Policy Statement)

United States v. Lovaas, 241 F.3d 900 (7th Cir. 2001). The district court did not err in refusing to depart downward based on the defendant's voluntary confession about prior sexual conduct with a juvenile. The defendant pled guilty to transporting and possessing material which depicted minors engaging in sexually explicit conduct, and the district court sentenced him to 87 months. On appeal, the defendant argued that he should have received a downward departure based on his admission during the search that he had engaged in sexual conduct with minor males in the past. The circuit court found that the defendant was motivated to disclose this information not out of a sense of guilt but instead based on his belief that the conduct would be discovered inevitably in the course of the investigation. Because a departure under §5K2.16 only applies when a defendant is motivated by guilt, and discovery is unlikely, the district court was correct in denying the defendant's motion for a downward departure.

United States v. Besler, 86 F.3d 745 (7th Cir. 1996). The district court erred in granting a downward departure under §5K2.16 without making findings as to the likelihood that the offense of conviction would have been discovered absent defendant's disclosure. Departure under §5K2.16 requires the following: 1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to its discovery; and 2) the offense was unlikely to have been discovered otherwise. The court considered whether §5K2.16 allows downward departure in situations in which discovery is unlikely, regardless of whether the defendant is motivated by guilt or by fear of discovery. The court rejected defendant's argument that the relevant consideration is the defendant's subjective state of mind in disclosing details of the offense, and found that the last sentence of the guideline clarifies that departure does not apply when the defendant is motivated by fear. The court held that departure is justified only where the defendant's motivation is guilt, and discovery is unlikely. This reflected the court's belief that the drafters of §5K2.16 intended to focus on both the defendant's state of mind and the benefit derived by the government in receiving information otherwise undiscoverable. In order to apply this departure, a court must make "particularized findings" with respect to the objective likelihood of discovery.

CHAPTER SIX: *Sentencing Procedures, Plea Agreements, and Crime Victims' Rights*

Part A Sentencing Procedures

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

United States v. Kelly, 519 F.3d 355 (7th Cir. 2008). A sentencing court "may accept any undisputed portion of the presentence report as a finding of fact . . ." *See* Fed. R. Crim. P. 32(i)(3)(A); *see also United States v. Sanchez*, 507 F.3d 532 (7th Cir. 2007).

United States v. Abdulahi, 523 F.3d 757 (7th Cir. 2008). "Evidentiary standards are relaxed at sentencing; a sentencing court may consider information that has 'sufficient indicia of reliability to support its probable accuracy.' U.S.S.G. § 6A1.3(a)." *See also United States v. Johnson*, 489 F.3d 794 (7th Cir. 2007).

Part B Plea Agreements

§6B1.4 Stipulations (Policy Statement)

United States v. Cole, 569 F.3d 774 (7th Cir. 2009). The defendant argued that the appeal waiver in his plea agreement was unenforceable because the district court's independent calculation of drug quantity effectively nullified the agreement. In his plea agreement, the defendant acknowledged distributing less than 400 grams of heroin and less than a kilogram of marijuana. The district court found that the defendant was responsible for a much greater quantity of drugs, and adjusted the defendant's sentence accordingly. The court disagreed with the defendant's argument, holding that because the defendant's "drug-quantity admissions in the plea agreement . . . are . . . factual stipulations that fall outside Rule 11(c)(1)(C)'s scope," they did not bind the district court.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Anderson, 583 F.3d 504 (7th Cir. 2009). The Seventh Circuit discussed whether district courts may impose halfway-house confinement as a condition of supervised release under the catch-all language of 18 U.S.C. § 3583(d), or if the explicit omission of halfway-house confinement from the list of discretionary conditions of supervised release in the statute is a limitation on the court's power. The court held that "placement in a halfway house should be viewed as a legitimate additional condition [of supervised release] not affirmatively authorized by the statute, rather than one expressly forbidden. . . . The district court is therefore free to consider halfway-house placement as a possible condition of supervised release . . . ."

United States v. Fischer, 34 F.3d 566 (7th Cir. 1994). The district court did not err in determining that the defendant's failure to avoid contact with his ex-girlfriend was a violation of

his terms of supervised release. The defendant's probation officer had instructed the defendant to avoid contact with his ex-girlfriend. The defendant argued that failure to follow these instructions could not be a legitimate violation because the instruction was a nonministerial command properly the subject of a court-approved condition of release and not a condition that could be left to the discretion of a probation officer. The circuit court, while agreeing that the sentencing court and not the probation officer is responsible for setting the terms of supervised release, concluded that the district court's revocation of supervised release was not actually based on the defendant's failure to follow his probation officer's instructions, but rather on the independent grounds of the dangerous and anti-social nature of the defendant's contact with his ex-girlfriend.

§7B1.4 Term of Imprisonment

United States v. Doss, 79 F.3d 76 (7th Cir. 1996). The district court did not err in making an upward departure upon revocation of appellant's supervised release. The table in §7B1.4 recommended a sentencing range of 8-14 months, and the court departed upward to two years. Appellant argued that the judge was required to sentence within the guideline framework because the judge "talked in the language of sentencing guidelines" by using terms such as "depart upward." The circuit court found that §7B1.4 is entitled weight but is not binding; the judge has discretion to depart outside of the recommended range. The appellant also argued that the judge abused his discretion in setting the sentence. The circuit court held that the appropriate standard for reviewing a sentence that has no sentencing guideline is the "plainly unreasonable" standard. To determine whether the sentence was "plainly unreasonable," the circuit court questioned whether 18 U.S.C. § 3583 was complied with. Finding that the sentence was the maximum allowed under 18 U.S.C. § 3583(e)(3) and that the judge took the policy statements into account and noted his reasons for the sentence on the record, the sentence was affirmed.

OTHER STATUTORY CONSIDERATIONS

Fair Sentencing Act

United States v. Pittman, 470 F. App'x 515 (7th Cir. 2012). Based on the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012), that the reduced penalties in the Fair Sentencing Act may be applied retroactively to defendants committing offenses before the Act's effective data (Aug. 3, 2010), the Seventh Circuit reversed and remanded the case for resentencing under the terms of the Fair Sentencing Act. The panel noted that the decision in *Dorsey* reversed controlling precedent in the circuit. *See, e.g., United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011); *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010).

18 U.S.C. § 924(e)(1)

United States v. Smith, 544 F.3d 781 (7th Cir. 2008). "[A]fter *Begay*, the residual clause of the ACCA [Armed Career Criminal Act] should be interpreted to encompass only 'purposeful' crimes. . . . [C]rimes requiring only a *mens rea* of recklessness [or negligence]

cannot be considered violent felonies under the residual clause of the ACCA." Thus, a prior Indiana conviction for criminal recklessness was not a "violent felony" under the ACCA.

21 U.S.C. § 851(a)(1)

United States v. Williams, 584 F.3d 714 (7th Cir. 2009). The "notice of enhancement" statute obligates the government to notify the defendant of the prior convictions that may be used to enhance the defendant's sentence. The government did not list one of the two prior convictions that increased defendant's minimum sentence from 20 years to life. The notice did incorporate another document that contained a lengthy list of charges but did not indicate which the government intended to use to enhance defendant's sentence. The Seventh Circuit held that "as long as the defendant has actual notice of the intended use of a prior conviction to enhance his sentence, the statute has been substantially complied with and that is good enough." By incorporating by reference the other document containing the prior convictions, the defendant was on notice of the potential prior convictions that the government might use. Although sloppy compliance by the government risks that the court will find notice was inadequate or give the defendant a claim for ineffective assistance of counsel, in this case any error was harmless.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Griffin, 521 F.3d 727 (7th Cir. 2008). "[A] district court plainly errs by announcing its intended sentence before a criminal defendant's allocution." *See also United States v. Luepke*, 495 F.3d 443 (7th Cir. 2007); *United States v. Groves*, 470 F.3d 311 (7th Cir. 2006).

Rule 35(b)(2)

United States v. Shelby, 584 F.3d 743 (7th Cir. 2009). Rule 35(b)(2) authorizes the district court to reduce a sentence upon the government's motion made more than one year after sentencing if the assistance falls into specified categories. The government filed a Rule 35(b)(2) motion recommending a 30-month reduction and the district court granted a 115-month reduction, based on the section 3553(a) sentencing factors. The Seventh Circuit held that a district court may not consider the section 3553(a) factors in reducing a sentence under Rule 35(b)(2). To hold otherwise would create arbitrary distinctions between similarly situated defendants, and it would impair the objectives of Rule 35(b)(2), which is to assist law enforcement. Although a judge may reduce the sentence by more than the amount sought by the government, he may base the reduction only on the evaluation of the defendant's assistance.