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

Prepared by
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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS FOR THE FIRST CIRCUIT

This document contains annotations to certain First 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 First 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. Murphy-Cordero, 715 F.3d 398 (1st Cir. 2013). While the guidelines are advisory post-*Booker*, and the guideline sentencing range is not controlling with respect to the reasonableness of a particular sentence, the fact that a sentence is within a properly calculated range bears directly on the needed degree of explanation: a within-the-range sentence typically requires a less elaborate explanation than a variant sentence. Where, as here, a sentencing court offers a plausible rationale in support of a within-the-range sentence, it need not wax longiloquent. "In this context, as elsewhere, brevity is sometimes a virtue rather than a vice."

United States v. Vargas, 560 F.3d 45 (1st Cir. 2009). Affirming a within-guidelines sentence at the bottom of the guidelines range, the court rejected the defendant's argument that the district court did not sufficiently explain why a below-guidelines sentence would not have satisfied the purposes of sentencing. The court agreed that "there is no doubt but that" sentencing courts must treat the guidelines sentencing range "merely as a starting point." However, this does not mean "that a sentencing court is required to provide a lengthy and detailed statement of its reasons for refusing to deviate" from that range. Additionally, the district court invited the defendant to argue under 18 U.S.C. § 3553(a) for a below-range sentence and cited specific considerations in rejecting these arguments.

United States v. Politano, 522 F.3d 69 (1st Cir. 2008). The First Circuit upheld as reasonable an upward variance for a defendant convicted of engaging in the business of dealing in firearms without a license. Despite the government's recommendation for a 12-month sentence (the guidelines range was 12–18 months), the district court imposed a sentence of 24 months based on its consideration of the § 3553(a) factors. The First Circuit found that the district court had the discretion to consider the particular community in which the offense arose, and whether the community-specific characteristics made the defendant's offense more serious and the need for deterrence greater than that reflected by the guidelines. It stated:

> Pre-*Booker*, this circuit had held that consideration of local community characteristics directly contravened the Sentencing Commission's policy choice "to dispense with inequalities based on localized sentencing responses." . . . After *Booker*, those Guidelines are no longer mandatory. Furthermore, the Supreme Court's decision in *Kimbrough* "opened the door for a sentencing court to deviate from the guidelines in an individual case even though that deviation seemingly contravenes a broad policy pronouncement of the Sentencing Commission."

It also found that the district court acted within its discretion in finding that the defendant's likelihood of recidivism was underestimated in the guidelines.

United States v. Vega-Santiago, 519 F.3d 1 (1st Cir. 2008) (en banc). The First Circuit joined the split among the circuits regarding whether Fed. R. Crim. P. 32(h) requires the district court to give advance notice to the parties before imposing a variance sentence. The First Circuit held that notice is not required for variances, though it continues to be required for departures. The majority opinion held that "adopting a mechanical rule would be a mistake: it would not respond to the realities of a system in which judges are afforded much broader discretion than in the recent past, it would reinforce guideline sentencing, and it would considerably complicate and prolong the sentencing process." Two judges dissented from the opinion.

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc) *abrogated by Gall v. United States*, 552 U.S. 38, 596-97 (2007).[1] The First Circuit agreed with the district court that (1) the guidelines are a place to start in imposing a reasonable sentence, (2) a sentencing court should give the guidelines substantial weight, but not controlling weight, and (3) a sentencing court should deviate from the guidelines for clearly identified and persuasive reasons. Moreover, the First Circuit emphasized the need for the district court to explain its reasons for a particular sentence.

United States v. Lizardo, 445 F.3d 73 (1st Cir. 2006). "*Booker* . . . was concerned only with 'sentence[s] exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict.' *Booker* left intact the Supreme Court's precedent in *Harris v. United States*, which allowed the use of judicially found facts to increase a mandatory minimum sentence . . . ." (citations omitted). Continued viability of *Lizardo* is in doubt following *United States v. Alleyne*, 133 S.Ct. 2151 (June 17, 2013) (any fact that increases mandatory minimum sentence for crime is "element" of crime, not "sentencing factor," that must be submitted to jury, overruling *Harris*).

United States v. Vázquez-Rivera, 470 F.3d 443 (1st Cir. 2006). The First Circuit explained that the sentencing court misconstrued the proper role of the guidelines.

> By stating that it will "heed" to the [s]entencing [g]uidelines, the sentencing court in the present case appeared to treat the [s]entencing [g]uidelines as presumptively applicable. By stating that it would apply the [g]uidelines in all but "unusual cases," the court's language arguably went even further than the language at issue in [*United States v.*] *Navedo-Concepción*, 450 F.3d [54] at 57 [(1st Cir. 2006)], that

[1] *E.g.*, *Diaz-Pena v. Warden, Fed. Corr. Inst., Ft. Dix, N.J.*, 586 F. Supp. 2d 1, 2 (D. Mass. 2008) (interpreting *Gall* as abrogating *Jimenez-Beltre*); *United States v. Griffin*, 566 F. Supp. 2d 59, 62 (D. Mass. 2008) (same).

> we described as a modest variance from *Jiménez-Beltre*. Our holding in *Jiménez-Beltre* makes it clear that a case need not be unusual for a sentencing court to consider the other factors in 18 U.S.C. § 3553(a).

Nevertheless, it upheld the defendant's sentence because it determined that the sentence was reasonable.

United States v. Diaz-Diaz, 433 F.3d 128 (1st Cir. 2005). The First Circuit explained that it has been "somewhat lenient, [about] construing any objection argued on the basis of *Apprendi*, *Blakely*, or general constitutional grounds, as sufficient to preserve the issue."

United States v. Fraser, 407 F.3d 9 (1st Cir. 2005). The First Circuit determined that *Booker* does not constitute extraordinary circumstances; recalling a mandate based solely on *Booker* would avoid the restrictions Congress has imposed on habeas review.

B. Burden of Proof

United States v. Malouf, 466 F.3d 21 (1st Cir. 2006). The First Circuit rejected a district court's use of facts found by a jury to determine drug quantity, reaffirmed the continuing viability of *Harris* (see *Lizardo*, above), and rejected the district court's alternative holding that the Due Process clause required facts that increase the minimum sentence to be found beyond a reasonable doubt.

United States v. Robinson, 433 F.3d 31 (1st Cir. 2005). The First Circuit held that despite *Booker*'s reasonableness standard, the appeals court continues to review the sentencing court's interpretations of the legal meaning of the guidelines *de novo* and its factual findings for clear error.

C. Hearsay

United States v. Luciano, 414 F.3d 174 (1st Cir. 2005). Rejecting the appellant's argument that his Confrontation Clause rights were violated because he could not cross-examine a hearsay witness at sentencing, the court explained that "[n]othing in *Crawford* requires us to alter our previous conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing" and also that neither *Blakely* nor *Booker* required such a change.

D. Prior Convictions

United States v. Ahrendt, 560 F.3d 69 (1st Cir. 2009). The court found that the district court committed no sentencing errors, but remanded to allow the district court "the opportunity to consider the Sentencing Commission's updated views" concerning the determination of whether prior convictions are to be considered separately or together under §4A1.2(a)(2). The Commission changed its approach to this determination while the defendant's appeal was pending. *See* USSG App. C., Amendment 709. While the Commission did not make this amendment retroactive, the court found that "the discretion vested in district courts after *Gall*" allowed a remand for resentencing.

United States v. Boardman, 528 F.3d 86 (1st Cir. 2008). The First Circuit held that a district court had discretion to impose a variance if it believed that the prior convictions at issue should not be considered predicate offenses for career offender purposes. Although the First Circuit had held that the type of offense at issue was a predicate offense (and had another case pending on the issue), the First Circuit vacated and remanded the case because the district court did not know it had the authority to vary under *Kimbrough*. It stated:

> [T]he Supreme Court held in *Kimbrough* . . . that district judges may deviate from the guidelines even on the basis of categorical policy disagreements with its now-advisory provisions. In *Kimbrough*, the disagreement was with the crack to cocaine ratio set forth in the guidelines . . . ; here, the district judge's comments at the sentencing hearing suggest disagreement with this court's *interpretation* of the guidelines . . . [] to include non-residential burglary as a predicate for the career offender enhancement. The district court properly recognized that it was bound [] to treat the guideline as we had interpreted it; but we do not see why disagreement with the Commission's policy judgment . . . would be any less permissible a reason to deviate than disagreement with the guideline policy judgment at issue in *Kimbrough*.

E. Ex Post Facto

United States v. Rodriguez, 630 F.3d 39 (1st Cir. 2010). Defendant pleaded guilty to various firearms offenses. In crafting its sentence, the trial court employed the 2009 sentencing guidelines which were then in force. The 2009 sentencing guidelines included a 4-level trafficking enhancement at §2K2.1(b)(5) that did not exist at the time defendant's criminal activity had ceased. Defendant appealed and argued that his sentence was unduly severe because the Ex Post Facto Clause should have precluded the sentencing court from considering the 2009 enhancement to §2K2.1(b)(5). This argument in the context of the now advisory guidelines has been answered different ways by various circuits.

The First Circuit considered this appeal on a plain error standard because the defendant did not advance his *ex post facto* argument in the trial court. Because the First Circuit decided that this appeal could be resolved with resort to its "practical approach" for deciding which *Guidelines Manual* applies, it did not weigh in on the constitutional issue raised by the defendant.

The First Circuit observed that, even in the current landscape of advisory guidelines, judges still must start out by calculating the proper guideline range, a step so critical that any error will usually require re-sentencing. While noting that the sentencing court could have imposed the same sentence even if it had used the *Guidelines Manual* urged by the defendant as its starting point, the First Circuit remanded the case in order for the trial court to reconsider the sentence and, if the same sentence was to be imposed, to explain the reasons for deviating from the correct guideline range.

United States v. Lata, 415 F.3d 107 (1st Cir. 2005). The First Circuit determined that the change from mandatory to advisory guidelines does not violate the Ex Post Facto Clause because the change occurred by judicial decision rather than by statute.

F. Retroactivity

United States v. Diaz, 670 F.3d 332 (1st Cir. 2012). The circuit court held that, although it had previously remanded cases for reconsideration of a sentence in light of a later non-retroactive amendment to the guidelines, that reasoning does not apply where the district court was made aware at sentencing of upcoming amendments and was not persuaded. In this case, the district court had been made aware of the proposed "recency" point amendments and chose not to eliminate them from the calculation.

II. Departures

United States v. Kornegay, 410 F.3d 89 (1st Cir. 2005). The First Circuit held that, as before *Booker*, it has jurisdiction to review a denial of a motion for downward departure only where the sentencing court failed to recognize its authority to depart; if the court did recognize its authority to depart but declined to do so, its decision is unreviewable. The First Circuit went on to note that "absent information in the record suggesting otherwise, we assume that the court understood that it could depart but decided not to do so as a matter of discretion."

United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005). The First Circuit held that, post-*Booker*, it still lacks jurisdiction to review a sentencing court's refusal to depart downward based on the court's belief that the defendant's circumstances do not warrant a departure. However, *Melendez-Torres* was recognized as inconsistent with *Booker* and *United States v. Anonymous*, 629 F.3d 68, 73–75 (1st Cir.2010), in *United States v. Battle*, 637 F.3d 44, FN. 6 (1st Cir. 2011).

III. Specific Section 3553(a) Factors

A. Unwarranted Disparities

United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008). The First Circuit found that the absence of a fast-track sentencing option for immigration offenses could be considered at sentencing to avoid unwarranted disparity under the totality of the statutory sentencing factors. The First Circuit, relying on *Gall* and *Kimbrough*, concluded that the analogy between the fast-track programs and the crack/powder ratio was "compelling." It stated:

> Like the crack/powder ratio, fast-track departure authority has been both blessed by Congress and openly criticized by the Sentencing Commission. Like the crack/powder ratio, the fast-track departure scheme does not "exemplify the Commission's exercise of its characteristic institutional role." In other words, the Commission has "not take[n] account of empirical data and national experience" in formulating them. Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract.

(Citations omitted). In vacating and remanding for resentencing, the First Circuit emphasized that "although sentencing courts can consider items such as fast-track disparity, they are not obligated to deviate from the guidelines based on those items" and "the district court can make its own independent determination as to whether or not a sentence tainted by the alleged

disparity is nonetheless consistent with the centrifugal pull of the constellation of [section] 3553(a) factors."

United States v. Navedo-Concepcion, 450 F.3d 54 (1st Cir. 2006). The First Circuit rejected the defendant's argument that his receipt of a longer sentence than that imposed on a co-defendant who pleaded guilty created unwarranted disparity between them, noting that "Congress's concern with disparities was mainly national . . . and focused on those similarly situated; defendants who plead guilty often get much lower sentences."

B. Protection of the Public

United States v. Vidal-Reyes, 562 F.3d 43 (1st Cir. 2009). The defendant, convicted of identity theft for conduct committed in 2002 and of aggravated identity theft for conduct committed in 2006, urged the district court to sentence him below the guideline imprisonment range for the identify theft offenses based in part on the two-year mandatory minimum sentence required for his aggravated identity theft offense. The government argued that such a reduction would violate 18 U.S.C § 1028A(b)(2) and (b)(3). The district court found that although it would have liked to sentence the defendant as he requested, the statute prohibited it. As a matter of first impression, the court held that a district court "is not precluded from taking § 1028A's mandatory sentence into account in sentencing a defendant on other counts of conviction charged in the same indictment that are not predicate felonies underlying the § 1028A conviction." Since the convictions for the 2002 conduct were not predicate felonies to the conviction for the 2006 conduct, the statute did not prohibit the district court from reducing the defendant's sentence. The court noted that "the effect of a mandatory consecutive sentence certainly bears upon the § 3553(a) factors to a certain extent," especially the need to protect the public at 18 U.S.C. § 3553(a)(2). It also disagreed with the government's assertion that allowing district courts to grant such reductions would be contrary to §5G1.2(a).

> A better reading of this provision — one that is supported by case law — would be that in requiring that a mandatory consecutive sentence be determined "independently," this provision merely specifies that the sentence for counts subject to a mandatory consecutive sentence should be calculated separately from the [guidelines sentencing range] on other counts.

IV. Restitution

United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005). The First Circuit concluded that, because restitution has no bearing on the defendant's guideline range or term of imprisonment, *Booker* does not apply to restitution.

V. Reasonableness Review

A. Procedural Reasonableness

United States v. Zavala-Marti, 715 F.3d 44, 51 (1st Cir. 2013). The imposition of a general sentence of life imprisonment was improper, as no count in the indictment supported such a sentence. The grand jury chose a drug quantity, reflected in its indictment, and thereby set specific, statutorily prescribed limits on the sentence. The district court imposed a term of

imprisonment that exceeded the statutory maximum for the drug quantity selected by the grand jury. Further, the district court relied on ex parte discussions with the probation office, disclosed for the first time to the defense at pronouncement of sentence. This gave defense counsel insufficient notice and no opportunity to develop a response to any adverse information communicated there. Because information gained through the improper ex parte meeting would be difficult, if not impossible, for a judge, no matter how sincere, to purge, defendant's sentence was vacated and remanded for resentencing before a different district judge.

United States v. Morales-Machua, 546 F.3d 13 (1st Cir. 2008). Defendant received a within-guidelines sentence of life imprisonment for his conviction for aiding the death of a security guard in the course of a robbery under 18 U.S.C. § 924(j). Affirming the district court's sentence, the court held that it was procedurally and substantively reasonable. The court found no procedural error because the district court properly calculated the guidelines range, treated the guidelines as advisory, considered the factors under 18 U.S.C. § 3553(a), and adequately explained the sentence it imposed. Holding that the sentence was also substantively reasonable, the court noted that while it might have imposed a lesser sentence had it been the sentencing court, "that is not a basis for reversal," and recognized that "there is not a single reasonable sentence but, rather, a range of reasonable sentences."

United States v. Dixon, 449 F.3d 194 (1st Cir. 2006).

> Reasonableness entails a range of potential sentences, as opposed to a single precise result. Consequently — leaving to one side errors of law — appellate review of a district court's post-*Booker* sentencing decision focuses on whether the court has "adequately explained its reasons for varying or declining to vary from the guidelines and whether the result is within reasonable limits." Where the district court has substantially complied with this protocol and has offered a plausible explication of its ultimate sentencing decision, we are quite respectful of that decision. . . . While a sentencing court must consider all of the applicable section 3553(a) factors, it is not required to address those factors, one by one, in some sort of rote incantation when explicating its sentencing decision. Nor is there any requirement that a district court afford each of the section 3553(a) factors equal prominence. The relative weight of each factor will vary with the idiosyncratic circumstances of each case and the sentencing court is free to adapt the calculus accordingly. That is a common-sense proposition: in the last analysis, sentencing determinations hinge primarily on case-specific and defendant-specific considerations.

(Citations omitted).

B. Substantive Reasonableness

United States v. Madera-Ortiz, 637 F.3d 26 (1st Cir. 2011), *cert. denied*, 131 S. Ct. 2982 (2011). The defendant pled guilty to transferring obscene material to a minor and was sentenced to 21 months in prison. Defendant appealed the length of his sentence as substantively unreasonable. The First Circuit affirmed the sentence and cited the advantages a district court enjoys in being familiar with all aspects of the case before it. The First Circuit also found it

significant that the sentence fell within the guideline sentencing range (GSR) and stated that: "Although such a sentence is not presumed to be reasonable, it requires less explanation than one that falls outside the GSR." The First Circuit affirmed due to its conclusion that the district court's sentence was amply supported and grounded in reason.

United States v. Martin, 520 F.3d 87 (1st Cir. 2008). The First Circuit, issuing its "first full-fledged application of the teachings of *Gall*," held that a 144-month sentence, which represented a 91-month downward deviation from the guidelines range, was substantively reasonable. The district court grounded its sentence on the support that the defendant stood to receive from his family, personal qualities indicating his potential for rehabilitation, and a perceived need to avoid disparity with coconspirators. The First Circuit stated that "[a] corollary of the broad discretion that *Gall* reposes in the district courts is the respectful deference that appellate courts must accord district courts' fact-intensive sentencing decisions." The First Circuit acknowledged the district court's institutional advantages in determining a sentence, and noted that the government had not alleged any procedural error. It observed that "it is not a basis for reversal that we, if sitting as a court of first instance, would have sentenced the defendant differently" and that "there is not a single reasonable sentence but, rather, a range of reasonable sentences." As a result, the First Circuit said, "reversal will result if — and only if — the sentencing court's ultimate determination falls outside the expansive boundaries of that universe."

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008). Reversing as unreasonable an upward variance that was two-and-a-half times greater than the guideline sentence, the First Circuit found that the district court's reasoning, that the defendant used weapons and engaged in violence during his drug offenses, was not sufficiently compelling to justify the degree of variance. The First Circuit stated:

> In sum, the district court's description of López-Soto's conduct, while justifying an upward variance, was not sufficiently compelling to support a statutory sentence of more than double the maximum of the applicable guidelines range. There was ample room for a variance above the guidelines and below the statutory maximum to accomplish the trial judge's stated purposes in sentencing López-Soto. Although "we emphasize that we do not reject the sentence imposed below solely because of the magnitude of its deviation from the guideline-recommended range," the statutory maximum forty-year (480-month) sentence simply does not stem from a plausible explanation, does not constitute a defensible result, and therefore cannot survive our review for reasonableness.

(Citation omitted.)

United States v. Politano, 522 F.3d 69 (1st Cir. 2008). The First Circuit held that the court was not required to give defendant advance notice of its intention to sentence above the guidelines range because, based on *Vega-Santiago*, notice is only required if the variance would have unfairly surprised competent and reasonably prepared counsel. It concluded that the three grounds the district court cited for its variance — the seriousness of the crime, the need for

deterrence, and the adequacy of the sentence in terms of recidivism — were all "garden variety" considerations under the statutory sentencing factors.

United States v. Russell, 537 F.3d 6 (1st Cir. 2008). Although the defendant was sentenced before *Kimbrough*, and *Kimbrough* was decided while the defendant's appeal was pending, the First Circuit affirmed the defendant's crack sentence, finding it both procedurally and substantively reasonable. The First Circuit stated: "This case crystalizes the difficulties confronted by defendants — and district court judges — as they navigate the turbulent waters of *Booker* and its aftermath." It found that the district court, in its third sentencing of the defendant, "anticipated the holding in *Kimbrough*, considered the crack/powder disparity as part of its individualized § 3553(a) analysis . . . and imposed a reasonable sentence." The First Circuit concluded that "the district court considered the crack/cocaine disparity as well as a host of other individualized factors in reaching a holistic assessment of the sentence called for by § 3553."

United States v. Cirilo-Muñoz, 504 F.3d 106 (1st Cir. 2007). In a per curiam decision with three separate opinions, a majority of the First Circuit vacated and remanded defendant's sentence for aiding and abetting murder. The defendant, convicted of a minor role in a murder and acquitted of several other charges, was sentenced to 27 years incarceration, a sentence 59 percent higher than the actual murderer, who cooperated with the government. The first opinion found the sentence (reduced upon earlier remand from life imprisonment to 27 years) unreasonably long. It explained its numerous reasons for remand:

> (1) [T]he scant reasoning provided by the sentencing judge is faulty and is not supported by the record; (2) the sentence fails to meet the objectives of § 3553(a) because it is substantially greater than necessary to comply with those basic aims; (3) the sentence fails to promote uniformity in sentencing when compared to similar sentences imposed in the federal system; and (4) the sentence is grossly disproportionate when the severity of the defendant's actions is considered. Cirilo-Muñoz's sentence also fails the *Webster's* test: it is unjust, immoderate, and intolerable.

The second opinion voted for remand because of the inadequacy of the sentencing explanation, and the third opinion dissented.

United States v. Milo, 506 F.3d 71 (1st Cir. 2007). The First Circuit vacated and remanded a sentence of time served (18 days) for marijuana conspiracy that had a statutory mandatory minimum sentence of 10 years. The district court had based its sentence on defendant's contrition and cooperation but the First Circuit found it was unreasonably lenient. The First Circuit stated:

> In this case, Milo gave substantial help to the government, and one can infer that some risk was involved. But the government ordinarily insists on results to justify any assistance reduction; results will often involve risks; and the district court said nothing of substance here to explain why the result or the risk in this case warranted a near-zero sentence. Indeed, assistance was stressed less than contrition, and contrition was not justification for so low a sentence. . . . Even taking account of

> both cooperation and contrition, it is far from clear that adequate basis could be furnished for a near-zero prison sentence.

United States v. Smith, 445 F.3d 1 (1st Cir. 2006). The First Circuit reluctantly vacated a sentence that was less than half the minimum range as unreasonable because "the offense is quite serious and the defendant's record unpromising, and there are no developed findings to indicate that rehabilitation is a better prospect than usual." It stated:

> That a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart from the guidelines. The guidelines — being advisory — are no longer decisive as to factors any more than as to results. About the best one can say for the government's argument is that reliance on a discounted or excluded factor may, like the extent of the variance, have some bearing on reasonableness.

United States v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006). The First Circuit vacated a 48-month prison sentence — a sentence eight times the maximum guideline range — as unreasonable because the district court's reasons for varying upward from the guidelines (that the defendant had been deported twice before and was subject to an unexecuted bench warrant for a prior arrest) were already addressed by the guidelines.

C. Plain Error / Harmless Error

United States v. Gonzalez-Castillo, 562 F.3d 80 (1st Cir. 2009). The district court committed plain error when it imposed a sentence at the top of the guidelines range based on unsupported facts. On appeal, the government conceded that the district court erred by stating that the defendant, convicted of illegal reentry, had "two illegal entries in a two-year period." The court found procedural error, held that the defendant's substantial rights were affected because there was a reasonable probability that the district court would have imposed a more favorable sentence but for its error in considering this erroneous fact, and stated that "basing a substantial criminal sentence on a non-existent material fact threatens to compromise the fairness, integrity, or public reputation of the proceedings."

United States v. Matos, 531 F.3d 121 (1st Cir. 2008). The First Circuit declined to vacate defendant's sentence based on his argument that the district court failed to address the reasonableness of the crack-powder cocaine disparity. Holding that there was no plain error, the court explained:

> Because we find no reason to treat plain error analysis in a *Kimbrough* context differently from plain error analysis in a *Booker* context, we conclude that Defendant here must demonstrate a reasonable probability that he would have received a more lenient sentence had the district court considered the crack to powder cocaine disparity when sentencing Defendant. Defendant, however, points to nothing in the record, nor can we find anything in the record, to suggest that the district court would have imposed a more lenient sentence had it been asked to consider the crack to powder disparity.

United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005). In a case of first impression, the First Circuit addressed the standard of review that the court would apply to unpreserved claims of *Booker* errors. The court stated that where the *Booker* error is that the defendant's guideline sentence was imposed under a mandatory system, the court intended to apply conventional plain-error doctrine. The court determined that the first two prongs for a plain error finding will be met whenever the sentencing court treated the guidelines as mandatory. For the third prong, the court held that the defendant bears the burden of persuasion with respect to prejudice and must point to circumstances creating a reasonable probability that the district court would impose a more favorable sentence under the new advisory guidelines regime. The court rejected a *per se* remand rule solely on the basis that a sentence was enhanced by judicial fact-finding or that the guidelines are no longer mandatory. The court offered various examples where a case would likely be remanded for plain error, including where the sentencing court has made an error under the guidelines, where a district judge has expressed that the sentence imposed was unjust, grossly unfair, or disproportionate to the crime committed and that he would have sentenced otherwise if possible, and if the appellate panel is convinced by the defendant, based on the facts of the case, that the sentence would, with reasonable probability, have been different.

United States v. Bailey, 405 F.3d 102 (1st Cir. 2005). The defendant argued that his case should be remanded for resentencing under *Booker*. Because the defendant did not preserve the error below, the First Circuit reviewed for plain error. The defendant made no argument regarding the probability of a sentence reduction in his case, as is required to prevail under the plain error test. Instead, the defendant argued that the court should disregard *Antonakopoulos* and hold instead that the burden should rest with the government to defend the pre-*Booker* sentence, and that the court should presume that the district court would have analyzed the case differently were it not for the mandatory nature of the guidelines. The court declined the defendant's invitation to ignore prior precedent, citing to case law requiring panels of the court to be bound by prior circuit decisions. Because the defendant entirely failed to advance any viable theory as to how the *Booker* error prejudiced his substantial rights, and because the court found nothing in the record to suggest a basis for such an inference, the court denied the defendant's request to remand for resentencing.

United States v. Benedetti, 433 F.3d 111 (1st Cir. 2005). Stating that "[a] preserved claim of *Booker* error is reviewed for harmlessness," the First Circuit decided that to show harmless error, "the government must convince the reviewing court that a more lenient sentence would not have eventuated had the sentencing court understood that the guidelines were advisory rather than mandatory." The First Circuit found that the government had met this burden when the district court refused to depart downward, explained why the top of the guidelines range produced a just result, and related that it would impose the same sentence even if it had discretion to disregard the guidelines entirely.

United States v. Estevez, 419 F.3d 77 (1st Cir. 2005). The First Circuit held that it would not be overly demanding when evaluating proof of a reasonable probability that the sentencing court would have imposed a different sentence because the sentencing court may not have expressed reservation about what it thought at the time of sentencing under a mandatory system;

however, the defendant must point to something in the record that shows a reasonable probability.

United States v. Serrano-Beauvaix, 400 F.3d 50 (1st Cir. 2005). On appeal, the defendant raised a *Booker* claim for the first time, arguing that the district court was clearly constrained by the guidelines during sentencing when it imposed the 63-month term, which was at the bottom of the applicable guideline range but above the statutory minimum of 60 months. In support, the defendant cited the court's statement at the sentencing hearing: "I have to consider the fact that I cannot sentence him to 60 months. The lowest I can sentence him on that particular situation is 63." The defendant argued that this statement made it clear that the district court would impose a lower sentence in an advisory guideline system, even though the defendant had stipulated to the role enhancement and prior conviction that resulted in the applicable guideline range used by the court. The First Circuit disagreed, noting that, even post-*Booker*, the district court "must consult those [g]uidelines and take them into account when sentencing." The court then held that the defendant failed to meet his burden under the plain error test of establishing a reasonable probability that the district court would impose a sentence more favorable to the defendant under the advisory guidelines system.

United States v. Vázquez-Rivera, 407 F.3d 476 (1st Cir. 2005). The First Circuit noted that the government bears an extremely difficult burden in applying the harmless error standard, but stated that it is not an impossible burden to meet. The First Circuit further held that even if a court-made finding is supported by overwhelming evidence, factual certainty alone is insufficient to show beyond a reasonable doubt that the court would have applied the same sentence under an advisory sentencing scheme.

D. Waiver of Right to Appeal

United States v. Eisom, 585 F.3d 552 (1st Cir. 2009). The trial court accepted defendant's plea to distributing five grams or more of cocaine base. The presentence report recommended that the defendant be held responsible for certain drugs seized by local authorities. Defendant's counsel filed a written objection to inclusion of these drugs in the defendant's drug quantity determination; however, the defendant's counsel unambiguously withdrew this objection at the sentencing hearing. Moreover, the defendant himself advised the sentencing court that he ratified his lawyer's action. When, on appeal, the defendant sought to relitigate the amount of drugs for which he was accountable, the First Circuit affirmed and held the defendant had waived his right to dispute the issue.

VI. Revocation

United States v. Work, 409 F.3d 484 (1st Cir. 2005). "Even before *Booker*, [the guidelines dealing with revocation of supervised release] were deemed advisory rather than mandatory. They remain advisory to this date. Consequently, resort to them cannot constitute *Booker* error." (Citation omitted).

VII. Miscellaneous

United States v. Sahlin, 399 F.3d 27 (1st Cir. 2005). The First Circuit decided that *Booker* does not render a plea involuntary.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Almeida, 710 F.3d 437, 441 (1st Cir. 2013). Under application note 1 to §1B1.2 and the introduction to the guidelines' Statutory Appendix, where the guidelines specify more than one offense guideline for a particular statutory offense and no plea agreement stipulates to a more serious offense, the district court must select the most appropriate guideline based only on conduct charged in the indictment, not additional conduct alluded to at trial.

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

United States v. Cortes-Caban, 691 F.3d 1, 26 (1st Cir. 2012). The quantity of drugs attributable to a defendant for sentencing purposes is based on both the charged conduct and the relevant uncharged conduct. In a drug conspiracy case, the amount of drugs seized can only be attributed to the defendant if they were reasonably foreseeable to him. In this case, the district court made individualized determinations that the quantity of drugs seized was reasonably foreseeable to the defendant and affirmed his sentence under the clear error standard.

United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008). The First Circuit affirmed the sentences of defendants convicted of weapons possession and conspiracy drug charges, finding that the sentencing court did not violate defendants' constitutional rights by applying the drug guidelines' murder cross-reference when the facts of the murders were proven only by a preponderance of the evidence. After considering section 3553, the sentencing court ultimately gave each defendant a sentence below the life imprisonment dictated by the guidelines. The First Circuit found that the "evidence amply supports the court's conclusion by a preponderance of the evidence that the murders had been committed in furtherance of the charged conspiracy." In addition, it stated:

> Avilés challenges the constitutionality of applying a [g]uidelines murder cross-reference that could subject a defendant to life imprisonment when the facts justifying the sentence have been proven only by a preponderance of the evidence. We once again reject this often raised argument because even the heightened sentence does not rise above the statutory maximum.

United States. v. Jaca-Nazario, 521 F.3d 50 (1st Cir. 2008). The First Circuit found that the defendant's conduct in smuggling "sham" cocaine supplied by an informant, which formed the basis for the first conspiracy prosecution, was relevant conduct for a second prosecution arising out of a parallel investigation involving defendant's trafficking of real cocaine, and vice

versa, since the offenses related to the same course of conduct. The court, in vacating and remanding for resentencing, stated:

> Jaca and his crew used the same means to place similar quantities of the same drug on the same airlines out of the same airport. And the last attempt in the sting occurred the day before the conduct at issue in the second sentence. While the regularity factor is somewhat attenuated, the strength of the similarity and temporality factors more than compensates. The district court, therefore, correctly considered the sham cocaine smuggling to be relevant conduct in the second sentence when it granted the "safety valve." Further, because the test for "same course of conduct" is by its terms symmetrical, the activity in the real cocaine smuggling must have been relevant conduct for the purposes of the first sentence. The contrary finding of the first sentencing court was, thus, clearly erroneous.

United States v. Rodriguez-Gonzalez, 433 F.3d 165 (1st Cir. 2005). Pursuant to §1B1.3, the defendant was sentenced based upon the total foreseeable losses that resulted from a credit card fraud conspiracy. The defendant appealed, arguing that because he joined the conspiracy well after it had commenced, he should not be sentenced based on losses that occurred before his participation. Citing the commentary at §1B1.3, comment (n.2), which states "[a] defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct," the circuit court remanded the case for further findings on 1) when the defendant actually joined the conspiracy and 2) what losses occurred after he joined, and instructed the district court to resentence the defendant based these facts.

United States v. Colon-Solis, 354 F.3d 101 (1st Cir. 2004). In a case of first impression, the First Circuit held that it was error for the sentencing court to apply a *per se* rule automatically attributing to the appellant the full amount of the drugs charged in the indictment and attributed to the conspiracy as a whole. The court further held that when a district court determines drug quantity for the purpose of sentencing a defendant convicted of participating in a drug trafficking conspiracy, the court is required to make an individualized finding as to drug amounts attributable to, or foreseeable by, that defendant. In the absence of such an individualized finding, the drug quantity attributable to the conspiracy as a whole cannot automatically be shifted to the defendant.

United States v. Cyr, 337 F.3d 96 (1st Cir. 2003). The defendant challenged the sentencing court's description of his prior state convictions for distribution of heroin as "unrelated" to his prior state convictions for distribution of Xanax, even though the arrests took place on the same day. He argued that the court should have grouped the offenses for criminal history purposes. The court of appeals explained that under the guidelines, the glue that binds prior sentences together under Application Note 3 may be different from the substantive similarities that render prior conduct "relevant" to an instant offense. In this case, the defendant's July Xanax and heroin sentences are related because (1) the offenses occurred on the same occasion, and (2) the cases were consolidated for trial. The court held that, despite the fact that the offenses were related, it was not improper for the district court to conclude that only the prior heroin offenses were relevant to the instant heroin conspiracy, while the prior Xanax

offenses were not. Accordingly, the court found no error in the district court's assignment of three criminal history points for defendant's prior Xanax sentences.

United States v. Maxwell, 351 F.3d 35 (1st Cir. 2003). The district court did not err in counting conduct not included in the offense of conviction as relevant conduct when sentencing the defendant. The defendant, convicted of wire fraud, was involved in a Ponzi scheme involving two sets of investors, one set recruited in October 1998, and the second in May 1999. The defendant argued that the district court erred in attributing the losses of the May 1999 investors to her as relevant conduct under §1B1.3, claiming there was an insufficient temporal relationship between the 1999 investors and the limited offense of conviction for a wire transfer in June 2000. The court found that the June 2000 wire transfer related to defendant's efforts to help the ringleader pay back the May 1999 investors and that the district court correctly concluded the wire transfer was in furtherance of the larger scheme. It reasoned that the one-year lag between defrauding the May 1999 investors and the June 2000 wire transfer did not undermine the court's conclusion, because the guidelines expressly state that "where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity" makes up for it. §1B1.3 comment. (n.9(B)). It concluded that all of the defendant's conduct was part of the continuing efforts to help defraud the investors.

United States v. Nieves, 322 F.3d 51 (1st Cir. 2003). The First Circuit rejected defendant's argument that she should not be held accountable for the sale of an additional 1.63 grams, an amount that subjected her to a mandatory minimum. Arguing that she had successfully withdrawn from the conspiracy prior to that date after disavowing drug use and distribution because of her pregnancy, the First Circuit found the defendant had not truly disavowed the purposes of the conspiracy because she later agreed to help the cooperating witness contact her coconspirator to procure drugs.

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court's inclusion of enhancements in the calculus of the defendant's offense level under §1B1.3 was not erroneous. The defendant argued that the state court had already accounted for the conduct upon which the enhancements were based. However, §1B1.3 requires that courts consider all relevant conduct when calculating the offense level, including conduct upon which a previous sentence was based. Furthermore, the First Circuit had previously ruled that the sentencing guidelines contemplated "multiple prosecutions for different offenses based on the same conduct" and permitted enhancements based on conduct underlying previous convictions. *United States v. Hughes*, 211 F.3d 676, 690 (1st Cir. 2000). The court affirmed this part of the sentence, ruling that, pursuant to §1B1.3, the district court was required to include the enhancements when calculating the offense level.

United States v. Santos Batista, 239 F.3d 16 (1st Cir. 2001). The district court did not err when it included in the sentencing calculus the drug quantities written in the ledger defendant was reviewing at the time of his arrest. Having been convicted of conspiracy and possession with intent to distribute cocaine, the defendant argued that the only drug quantity relevant to sentencing was that for which he was convicted. Section 1B1.3 mandates that the judge include all quantities that are "part of the same course of conduct or common scheme or plan as the offense of conviction." §1B1.3(a)(2). A "common scheme or plan" includes offenses

"substantially connected to each other by at least one common factor." §1B1.3, comment. (n.9). Affirming the decision, the court found that the totality of the record demonstrated that the transactions described in the ledger and the offense of conviction shared a "common scheme or plan." Not only was the defendant holding the ledger in his lap when the police arrived, but the district court determined that the defendant was a member of the conspiracy for which he was convicted during the times the transactions in the ledger were executed, establishing the "common factor" required under the guideline.

United States v. LaCroix, 28 F.3d 223 (1st Cir. 1994). The district court did not err in including as relevant conduct the acts of the defendant's co-conspirators when determining the amount of loss under §2F1.1.[2] The defendant was convicted of conspiracy to defraud a federally insured financial institution in violation of 18 U.S.C. § 371. He argued that the district court misinterpreted the "accomplice attribution test" because it based its foreseeability finding on the defendant's "awareness" of his co-conspirator's activities. The circuit court concluded that awareness is germane to the foreseeability prong of the "accomplice attribution test" when that awareness is a knowledge of the nature and extent of the conspiracy in which the defendant is involved. The time from which the sentencing judge should determine foreseeability is the time of the defendant's agreement.

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

United States v. Hogan, 12-1039, 2013 WL 3358928 (1st Cir. July 5, 2013). Under §1B1.10(b)(1), a court must first determine the amended guideline range that would have applied to the defendant if the guideline amendments specified in the policy statement (which include Amendment 750) were in effect at the time of the defendant's initial sentencing. In doing so, the court may substitute only the amended guideline and must "leave all other guideline application decisions unaffected." Application Note 1 prohibits courts from applying departures prior to the determination of the amended guideline range in a proceeding for a sentence reduction under 18 U.S.C. § 3582(c)(2). Such commentary provisions, which function to interpret a guideline or explain how it is to be applied, is binding as long as it does not conflict with the Constitution, a federal statute, or the guideline at issue. Further, §1B1.10(b)(2)(B) bars a district court from lowering a defendant's below-amended-guideline sentence unless the departure at his original sentencing was based on his substantial assistance to the government. A defendant's "amended guideline range" does not incorporate previously granted departures under §4A1.3. The court noted it was "troubled by the extent to which the amended policy statement and Application Notes severely limit the number of defendants (receiving below-guideline sentences at initial sentencing based on §4A1.3 departures unrelated to substantial assistance) who will be able to obtain relief under § 3582(c)(2) in light of the crack-cocaine guideline amendments," but concluded that in these instances a district court's hands will be tied.

United States v. Cardosa, 606 F.3d 16 (1st Cir. 2010). The First Circuit considered whether a defendant convicted of a crack offense and found to be a career offender under §4B1.1 was eligible for a resentencing based upon the Commission's retroactive lowering of crack sentences. The court held that in a case where the career offender guideline was the framework for the sentence, the defendant would be ineligible for a sentence reduction under section

[2] §2F1.1 was consolidated with §2B1.1 by Amendment 671, effective Nov. 1, 2001.

3582(c). In a case where the court departed from the career offender guideline, however, the defendant may be eligible for a sentence reduction if the "defendant's existing sentence [that is, the sentence imposed after the departure] was ultimately *determined* by the old crack cocaine guidelines rather than by the career offender guideline." In such a case, resentencing is within the discretion of the district court.

Chapter Two: *Offense Conduct*

Part A Offenses Against the Person

§2A2.2 Aggravated Assault

United States v. Zaragoza-Fernandez, 217 F.3d 31 (1st Cir. 2000). The district court properly applied the aggravated assault guideline in a case in which the defendant argued that there was no showing that he intended to cause the law enforcement officer serious bodily injury. The First Circuit held that the evidence showed that the defendant saw the law enforcement officer in front of his car, had reason to appreciate he was an officer, continued to drive at him, and was prepared to strike him with his car to effectuate his escape. The circuit court concluded that the defendant committed an aggravated assault on the officer.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Lorenzo-Hernandez, 279 F.3d 19 (1st Cir. 2002). The district court properly applied the one-level enhancement under §2A4.1(b)(4)(B) for not releasing the kidnapping victim within seven days. The defendant argued that even though the kidnapping victim had not been released before seven days had elapsed, he had only been a member of the conspiracy for five days and that therefore the enhancement should not apply to him. The First Circuit held that even if the defendant's claim was valid and he only joined the conspiracy at a later date (and there was a suggestion that the district court did not think this to be so), the enhancement would still apply. The court noted that the enhancement is driven by the release date of the victim, not the length of time of the defendant's involvement.

§2A6.1 Threatening or Harassing Communications

United States v. Freeman, 176 F.3d 575 (1st Cir. 1999). The district court did not err in denying the defendant a four-level reduction under §2A6.1(b)(6), which applies if "the offense involved a single instance evidencing little or no deliberation." The defendant pled guilty to transmitting a threatening communication in interstate commerce under 18 U.S.C. § 875. The defendant made a total of eight phone calls, at least two of which were threatening, to a hotline dedicated to locating missing children. The defendant's calls consisted of various statements about abducting, torturing, and sexually assaulting his stepdaughter. He continued to "update" the hotline operator. A defendant's communication is a threat if the defendant "'should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.'" The district court did not err in concluding that eight phone calls in two days were more than a "single instance." Finally, the court did not err in finding that the defendant's conduct amounted to more than "little or no deliberation." The defendant looked up the number,

spoke to the operator, remembered the contents of previous calls, and made up new ways to describe the torture.

§2A6.2 Stalking or Domestic Violence

United States v. Fiume, 708 F.3d 59 (1st Cir. 2013). The use in tandem of a base offense level dictated by §2A6.2(a), and an upward adjustment under §2A6.2(b)(1)(A), does not constitute impermissible double counting. In the world of criminal sentencing, double counting is a phenomenon that is less sinister than the name implies. Neither §2A6.2 nor its associated commentary contain any textual proscription against the use of a two-level upward adjustment under §2A6.2(b)(1)(A). The Sentencing Commission has explicitly banned double counting in a number of instances, and the Circuit will not infer such a prohibition where none exists in the text. Therefore, the two-level upward adjustment for violation of a court protection order did not constitute impermissible double counting, event though the violation of a court order was also an element of the offense of conviction. The base offense level accounts for the general nature of the offense of conviction as one of stalking or domestic violence, but does not account specifically for the violation of a court protection order; the two-level upward adjustment under §2A6.2(b)(1)(A) bridges the gap and accounts for the violation of a court protection order.

United States v. Walker, 665 F.3d 212 (1st Cir. 2011). The First Circuit affirmed the district court's upward departure where the sentencing court concluded that the defendant's interstate stalking offense was so serious as to take it out of the heartland of cases. Evidence in the case indicated that 1) the defendant made threats against the victims, his estranged wife and pre-teen child, over the course of several months and 2) the threats caused both victims to fear violence against them by the defendant (*e.g.*, defendant threatened to "blow [the child's] head off" with a shotgun). The panel noted that the district court "gave weight to the number and horrific nature of the [defendant's] threats, the length of time over which the threats were made, and the meticulousness of the [defendant's] plotting." *See* §2A6.2, comment. (n.5) (explaining that "an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time").

Part B Offenses Involving Property

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

Loss Issues (§2B1.1(b)(1))

United States v. Ihenacho, 716 F.3d 266 (1st Cir. 2013). Victims suffered a loss where defendants dispensed drugs to Internet customers in vials with labels bearing the name of a licensed pharmacy and the name of the purported prescribing physician, which were in fact false. Loss calculation under §2B1.1 was complex because the victims of the scheme got exactly what they wanted—prescription drugs for which they had not received proper prescriptions. They were complicit in the fraud and, in that sense, the drugs were not worthless to them. However, given the dangerous and harmful nature of medications dispensed without valid prescriptions, it

was reasonable for the district court to use defendants' gross receipts of $3.2 million as the loss amount in determining the guideline range.

United States v. Mardirosian, 602 F.3d 1 (1st Cir. 2010), *cert.denied*, 131 S. Ct. 287 (2010). The defendant was convicted of possession of stolen paintings. On appeal, he challenged the court's loss calculation which resulted in a 22-level sentencing enhancement. The trial court had calculated loss at $30.2 million, $29 million of which was attributable to a painting by Cezanne. The defendant came into possession of the stolen Cezanne in 1979 and secreted it for more than 20 years until trying to auction it unsuccessfully in 1999. Only then did he contact the rightful owner to negotiate its return. The defendant argued that the Cezanne should not have been included in the loss calculation because he returned it before his offense was detected and the return should therefore count as a credit against the loss under §2B1.1, comment. (n.3(E)). The defendant's argument centered around his claim that his offense had not been detected until his indictment in 2006. The First Circuit affirmed the 22-level enhancement, holding that the plain language of the application note did not require identification of the perpetrator, but rather the detection of the offense. Moreover, the court concluded that crediting the defendant with return of the painting would ignore the gravity of his crime by placing him on the same plane as a repentant thief who returned stolen property before the owner even noticed its absence.

United States v. Alli, 444 F.3d 34 (1st Cir. 2006). When a defendant sells stolen credit cards to others, the sentencing judge may fix the intended loss as the total credit limits of all of the credit cards involved. There is a "reasonable expectation" that the cards will be used to the fullest extent possible.

United States v. Cacho-Bonilla, 404 F.3d 84 (1st Cir. 2005). Property that is forfeited by the defendant in the same or related proceeding will not be credited to the defendant's loss figure. It is well established that return of property after the crime is discovered will not warrant a reduction in the loss calculation.

United States v. Flores-Seda, 423 F.3d 17 (1st Cir. 2005). The determination of actual loss need not be precise, merely a reasonable estimate based on available information. For instance, a sentencing judge can rely on the hearsay testimony of the victim's attorney to estimate actual loss when the defendant does not impeach that testimony or offer an alternative.

United States v. Rodriguez-Gonzalez, 433 F.3d 165 (1st Cir. 2005). A defendant's relevant conduct for the purposes of determining loss does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of the conduct. *See* §1B1.3, comment (n.2).

United States v. Coviello, 225 F.3d 54 (1st Cir. 2000). The district court did not err when it calculated the loss from the transfer of stolen property pursuant to §2B1.1(b)(1). The defendants participated in a scheme to sell Microsoft software stolen from a computer disk manufacturer. The First Circuit affirmed the calculation of loss based on Microsoft's wholesale prices rather than the value of the lost disks. It found that the fair market value of the property was the appropriate measure of the loss, as opposed to the replacement cost of the disks or the

defendants' financial benefit. In addition, the district court did not err when it enhanced the defendants' sentences by four levels under §2B1.1(b)(4)(B) (now §2B1.1(b)(4)) for being in the business of receiving and selling stolen property.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not err when it calculated loss based on the total amount embezzled by the defendant rather than the loss suffered by the victim. Over a period of three years, the defendant made several withdrawals from his company's profit sharing plan, totaling $933,369, but ultimately left a shortfall of less than $500,000 because he had repaid some of the money during that time. The First Circuit affirmed the calculation of loss based on the total amount embezzled and not the actual shortfall. It found that each illegal withdrawal constituted an act of embezzlement and, regardless of repayment, each time the defendant unlawfully withdrew money he risked the business's ability to maintain its financial obligations. The court noted that the defendant's acts of repayment could be grounds for departure under other guidelines.

United States v. Edelkind, 467 F.3d 791 (1st Cir. 2006). The 2-level enhancement for deriving more than $1,000,000 in gross receipts from one or more financial institutions will apply regardless of the "formal legal control" of the receipts. In this case the defendant argued that since his wife controlled the funds in question he should not get the enhancement. The sentencing court reasoned that the enhancement applies whether the fraud proceeds are attributed to the defendant or the defendant "causes them to be lodged in another with the expectation that he will enjoy the benefits."

Victim Table (§2B1.1(b)(2))

United States v. Stepanian, 570 F.3d 51 (1st Cir. 2009). The court held that individuals who were reimbursed for financial losses are "victims" within the meaning of the multiple victims enhancement in §2B1.1(b)(2). The defendants conspired to steal debit card numbers, personal identification numbers, and credit card numbers from the customers of a convenience store. The district court applied a 6-level enhancement because the offense involved more than 250 victims. The district court noted that while the victims were reimbursed, each victim did suffer a loss, whether for a day, a week, or two weeks. Rejecting the Sixth Circuit's decision in *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005), the court agreed that the definition of "victim" in §2B1.1 "does not have a temporal limit or otherwise indicate that losses must be permanent." The court concluded that because the card holders in this case were unable to access their money for some period of time, they should be included as victims.

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

United States v. Pizarro-Berrios, 448 F.3d 1 (1st Cir. 2006). The enhancement for "theft from the person of another" under §2B1.1(b)(3) does not apply unless the property was being held by another or within arm's reach.

Counterfeit Access Device (§2B1.1(b)(10))

United States v. Evano, 553 F.3d 109 (1st Cir. 2009). The defendant was convicted of various types of fraud, including identity theft, and was sentenced to 63 months in prison.

Affirming the sentence, the court held that the government is not required to prove that the defendant knew that the means of identification used belonged to another person in order to obtain an enhancement under §2B1.1(b)(10)(C). Unlike the statutory enhancement for aggravated identity theft at 18 U.S.C. § 1028A(a)(1), this guideline enhancement "does not use the word 'knowingly.'" Sentencing enhancements can apply without a mental state requirement, and review of the Sentencing Commission's reason for amendment regarding the promulgation of this enhancement shows that this guideline provision "sought to address Congress' concern with the harm suffered by the victims rather than the mens rea of the defendant." The court also held that the sophisticated means enhancement was properly imposed, and that the district court reasonably found that the defendant's criminal history was not overstated.

United States v. Jones, 551 F.3d 19 (1st Cir. 2008). As a matter of first impression, the court held that "production," for purposes of the enhancement at §2B1.1(b)(10), includes the "physical act of popping small air bubbles with a straight pin." It held that this act constitutes a meaningful alteration, coming within the guidelines definition of "production" at §2B1.1, comment. (n.9). While the court acknowledged that the bubble-popping in this case was a small act, it noted that "it was this act of alteration that transformed the flawed driver's license into a usable counterfeit access device." Upholding the district court's sentence of 70 months for conspiracy to commit bank fraud, aiding and abetting bank fraud, and aggravated identity theft, the court also held that there was not unwarranted disparity between the defendant's sentence and her codefendant's sentence, and that the district court properly calculated the loss amount.

§2B3.1 <u>Robbery</u>

United States v. Rivera-Rivera, 555 F.3d 277 (1st Cir. 2009). The district court's determination that the total loss was over $10,000 was correct, even though the items taken were recovered and returned. Loss is the value of the property taken, and permanent and temporary takings are not distinguished when calculating loss under §2B3.1(b)(7).

United States v. Martinez-Bermudez, 387 F.3d 98 (1st Cir. 2004). The cross-reference in §2B3.1(c) that a sentencing court apply the guideline for first degree murder (§2A1.1), when a death results during the underlying robbery, will apply when a defendant causes a death in flight from the authorities. In this case, the defendant struck a police officer in a vehicle he had just carjacked.

United States v. Wallace, 461 F.3d 15 (1st Cir. 2006). The two-level enhancement under §2B3.1(b)(4)(B) for "physical restraint" will apply when a defendant keeps a victim "physically immobile" even without actually touching the victim. In this case, the defendant barred the escape of the victims by "repeatedly telling them not to move," blocking their path, and pointing weapons at the victims.

United States v. Savarese, 385 F.3d 15 (1st Cir. 2004). The 2-level enhancement for carjacking, §2B3.1(b)(5), will apply even if the vehicle is not in the immediate area around the victim. In this case, the defendant restrained the victim inside his residence, took the keys to his vehicle parked outside, and subsequently stole the vehicle. The court reasoned that "person or presence" is based on property being "in the presence of a person if it is so within his reach,

inspection, observation or control, that he could if not overcome by violence or prevented from fear, retain his possession of it."

United States v. Whooten, 279 F.3d 58 (1st Cir. 2002). The district court did not err in applying the 4-level enhancement under §2B3.1(b)(4)(A) for abduction. The First Circuit found that the defendant forced the victim at gunpoint to move outside and into the parking lot while threatening to kill her, and that this constituted a forced move to a different location. In addition, by forcing the victim to move, the defendant shielded himself from detection and provided himself with a potential hostage, thereby facilitating his escape. Moreover, the abduction enhancement is designed to deter conduct that results in a victim's isolation, which can result in additional harm to the victim.

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court erred when it included the value of a stolen car as a robbery-related loss for purposes of enhancing the defendant's sentence under §2B3.1. The defendant was convicted of various state and federal charges stemming from a bank robbery that ended in a high-speed car chase and a house invasion. Based on a loss calculation that included the value of a car stolen on the morning of the bank robbery, the district court raised the offense level under §2B3.1(b)(7). The court held that despite the fact that the defendant stole the car to provide transportation for the bank robbery, the car theft and the bank robbery were too disparate for the value of the car to be included in the loss from the bank robbery. "[T]he two offenses [were] not a continuous event and [were] somewhat attenuated." Furthermore, "robbery is only secondarily about value," and the value of the car was the only link established at sentencing between the car theft and the bank robbery. The court ruled that the 1-level enhancement based on a loss calculation that included the value of the car was erroneous and vacated that part of the sentence.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The district court did not err in finding that the defendant made a threat of death during a robbery that warranted application of a two-level enhancement under §2B3.1(b)(2)(F). The defendant, who did not have a gun, handed the teller a note which read, "Give me all your money or I'll start shooting," and told the teller "that he was not playing a prank." After the teller relinquished cash, the defendant apologized. A defendant need not explicitly communicate an intent to kill to be subject to the enhancement. *See* §2B3.1, comment. (n.6). The test is whether the defendant's conduct would instill in a reasonable person a fear of death. The circumstances of this case indicate that the defendant threatened to use a lethal weapon, and the teller had no way of knowing that the defendant did not actually possess a gun.

§2B3.2 <u>Extortion by Force or Threat of Injury or Serious Damage</u>

United States v. Hughes, 211 F.3d 676 (1st Cir. 2000). The district court properly sentenced the defendant under §2A1.1, the first degree murder guideline, cross-referenced under §2B3.2(c)(1). A jury convicted the defendant of attempted extortion, in violation of 18 U.S.C. § 1951, after the defendant murdered the president of the company for which he worked, then told the company's management that the president had been kidnapped and attempted to get ransom money from the company. The defendant was convicted of the company president's homicide in Mexico. The defendant first argued that §2B3.2(c)(1) was superseded by 18 U.S.C. § 1119, which prohibited prosecution under 18 U.S.C. § 1111 of United States nationals who kill

other United States nationals outside the United States "'if prosecution has been previously undertaken by a foreign country for the same conduct.'" Rejecting the argument, the court noted that the defendant was prosecuted and punished under the extortion statute (§ 1951), not under § 1111, and that § 1119 prohibits prosecutions, not sentencing enhancements. Furthermore, the Supreme Court permits the enhancement of sentences based on acts underlying previous prosecutions, including situations where "the defendant is subject to *separate prosecutions* involving the same or overlapping relevant conduct." (Quoting *Witte v. United States*, 515 U.S. 389 (1995) (internal quotation marks omitted)). The court also rejected the defendant's argument that the district court should have found that he committed voluntary manslaughter instead of murder, thus precluding the application of §2B3.2(c)(1). The evidence that the defendant "purchased a gun, devised a plan to transport it to Mexico, surveyed the area of the crime to choose a suitable location to kill [the decedent], and planned for [the decedent] to arrive late at night" supported a finding of murder. Finally, the court rejected the defendant's argument that §2B3.2(c)(1) only applies if the extortion victim, here the company, dies. Drawing an analogy to §2B3.2's multiple-victim enhancement provision, the court found that despite the defendant's failure to demand money from the decedent, the decedent was still a victim of the defendant's attempted extortion.

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

United States v. Wester, 90 F.3d 592 (1st Cir. 1996). The district court erred in calculating loss under §2B4.1 based upon the defendant's release from personal liability on a $12.4 million commercial real estate loan (obtained in exchange for arranging the $2.3 million loan to his partners in a land development project). The First Circuit agreed, noting the guidelines' commentary that the face value of the loan is not necessarily an appropriate figure to use for the purpose of calculating loss because, depending upon the circumstances, the value of a loan may be no greater than the difference in the interest rate obtained through the bribe. At least one court has found that "the value of a transaction is often quite different than the face amount of that transaction." *United States v. Fitzhugh*, 78 F.3d 1326, 1331 (8th Cir. 1996). The court concluded that it was plain error for neither the parties, nor the probation officer, to make any attempt to estimate reasonably the value of the release.

Part D Offenses Involving Drugs

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

Drug Quantity (§2D1.1(a)(5))

United States v. Rodriguez, 731 F.3d 20, 28 (1st Cir. 2013). Drug-quantity calculation must be based on an individualized determination of the defendant's relevant conduct. District court did not err in finding that approximately nine percent of the conspiracy's estimated crack sales during the time of defendant's participation in the conspiracy were foreseeable to him and within the scope of his conspiratorial agreement. Drug-quantity findings, even if imprecise, will be upheld if they are based upon conservative estimates or favorable assumptions derived from information with sufficient indicia of reliability to support their probable accuracy.

United States v. Marquez, 699 F.3d 556 (1st Cir. 2012). Vacating and remanding a sentence where the district court improperly attributed two purchases of 154 grams of crack to the defendant. The court found that the second attribution of 154 grams was improper extrapolation because it could not be properly established from the defendant's admission. In doing so, the court found that "extrapolation is usually based on a known quantity or readily calculable number of transactions involving clearly established or conservatively estimated quantities. And reliability depends heavily on the predicate figures employed." The court also considered the defendant's claim that any use of the recordings where he admitted the quantities of crack he had purchased was improper because they were not independently corroborated. The court found that "in federal sentencing, there is no such flat requirement for proof over and above statements made by a defendant identifying the quantity of a current or proposed drug transaction in which he is involved."

United States v. Gonzalez-Velez, 587 F.3d 494 (1st Cir. 2009). The sentencing court correctly determined that the conspiracy-wide drug amount should be assigned to the defendant because each co-conspirator in a drug conspiracy is responsible not only for the amount of drugs he personally handles but also for the total amount of drugs that he could reasonably anticipate to be related to the conspiracy.

United States v. Charles, 213 F.3d 10 (1st Cir. 2000). The First Circuit upheld a sentence based on total drug weight, rejecting the defendant's argument that the government did not introduce sufficient scientific evidence to show that the substance at issue was crack. The First Circuit stated that it requires evidence only "'proving that, chemically, the contraband was cocaine base' . . . the government [can] bridge the evidentiary gap between cocaine base and crack cocaine by presenting lay opinion evidence . . . from 'a reliable witness who possesses specialized knowledge' (gained, say, by experience in dealing with crack or familiarity with its appearance and texture)." The government did not have to introduce evidence about the melting point or water solubility of the contraband because two chemists had already introduced evidence proving that the seized substance was cocaine base and the trooper testified about its appearance and consistency. Furthermore, the Supreme Court established that a drug's purity level is irrelevant to sentencing. "'Congress adopted a "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.'" The guidelines adopt this policy, stating that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." §2D1.1(c), note (A).

United States v. Brassard, 212 F.3d 54 (1st Cir. 2000). The district court properly calculated the defendant's sentence in a reverse sting operation. The defendant argued that because he could not have purchased the quantity of drugs to which he had agreed, the district court should have "'exclude[d] from the offense level determination the amount of controlled substance that . . . he . . . was not reasonably capable' of purchasing" (quoting §2D1.1, comment. (n.12)). In affirming the sentence, the First Circuit cited to Note 12: "'[I]n a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense . . . .'"

United States v. Gomes, 177 F.3d 76 (1st Cir. 1999). The First Circuit affirmed the district court, finding that there was no error in holding the defendant accountable for an agreed-upon quantity of cocaine for a deal never made rather than the small sample provided during negotiations. Citing the example in Application Note 12 to §2D1.1, the defendant argued that the delivered (one ounce), rather than the amount agreed-upon (one kilo), amount should be used to determine the offense level. The court did not find that the lesser amount "more accurately reflect[ed] the scale of the offense," because the defendant conspired with the supplier to make a kilo sale, and the only reason the sale did not take place was because the informant did not accept the full amount.

United States v. Mateo-Sanchez, 166 F.3d 413 (1st Cir. 1999). The district court did not err in finding two of five defendants accountable for the entire amount of cocaine involved in the conspiracy. The defendants were present at the site of a drug drop involving five or six individuals carrying sacks of cocaine and four vehicles. The defendants argued that 380 kilograms of cocaine was too large an amount to be foreseeable. The court found that this was a large-scale operation and therefore that it was proper to attribute to the defendants the entire amount of cocaine.

United States v. Boot, 25 F.3d 52 (1st Cir. 1994). *Chapman v. United States*, 500 U.S. 453 (1991), held that the entire weight of the carrier medium must be used to determine the amount of LSD attributable to a defendant. Subsequent to this ruling, Amendment 488 became effective, prescribing a 0.4 milligram per-dose formula in calculating LSD quantity. The defendant argued that Congress, by permitting Amendment 488 to take effect, was establishing a unitary per-dose "mixture and substance" formula for calculating LSD weight in both statutes containing mandatory minimum sentencing provisions and guideline sentencing range sentences. In deciding this issue of first impression, the circuit court held that "*Chapman* governs the meaning of the term 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v)." The amendment to the guideline did not override the applicability of that term for the purpose of applying any mandatory statutory sentence.

United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993). The defendant was convicted of a cocaine and marijuana distribution conspiracy. The defendant purchased drugs from other members of the conspiracy for resale. On appeal, he argued that cocaine purchased from the other members for personal use should not be considered when determining his offense level under §2D1.1. The circuit court held that the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy."

Dangerous Weapon (§2D1.1(b)(1))

United States v. Thongsophaporn, 503 F.3d 51 (1st Cir. 2007). The First Circuit affirmed the application of a 2-level enhancement for possession of a dangerous weapon. It stated:

> The question . . . is whether the district court properly inferred a nexus between the presence of the guns in the house and the drug trafficking operation. A sentencing court may make reasonable inferences from the facts in evidence as long as "a

> rational connection" exists "between the facts proved and the fact presumed." . . . While the evidence of a drug conspiracy between defendant and [his co-defendant] is not overwhelming, the necessary "rational connection" exists here. . . . Indeed, this court has held that the "mere presence of a firearm in the same residence which is used as a site for drug transactions *may* allow a sentencing court to make the inference that the weapon was present for the protection of the drug operation."

Operator of Aircraft or Vessel (§2D1.1(b)(2))

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by two levels under §2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. §§ 952(a) and 963, as well as attempting to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. §§ 952(a) and 963, and 18 U.S.C. § 2. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty'" (quoting §2X1.1(a)).

Cross Reference (§2D1.1(d)(1))

United States v. Padro Burgos, 239 F.3d 72 (1st Cir. 2001). The district court did not err when it imposed a life sentence under §2D1.1. The defendant had been convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846, and of using a firearm in relation to a crime of violence and aiding and abetting, under 18 U.S.C. §§ 924(c)(1) and 2. The court sentenced the defendant to life imprisonment under §2D1.1(d)(1), which requires the application of the first degree murder guideline when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. The court rejected defendant's argument that the district court failed to make detailed findings regarding the quantity of drugs attributable to him. Because the sentence was based on the fact that deaths had occurred, and not the quantity of drugs, the court found that any failure to make such findings was harmless. The court also rejected the defendant's argument that the murders should not have driven his sentence because they were not separately charged or proven beyond a reasonable doubt. Under §2D1.1(d)(1), the murders need only be proven by a preponderance of the evidence.

Constitutional Issues

United States v. Ekasala, 596 F.3d 74 (1st Cir. 2010). The defendant argued on appeal that the Commission's Amendment 657, which increased the marijuana equivalent for oxycodone, was so arbitrary and capricious as to violate the Due Process Clause of the Fifth Amendment. The First Circuit affirmed the sentence, finding that there was a rational basis for Amendment 657 because it addressed "'proportionality issues in the sentencing of oxycodone trafficking offenses' that arose under the pre-amendment marijuana equivalent [for oxycodone]."

See United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008), §1B1.3.

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996). The circuit court declined to decide the question of whether the Fourth Amendment exclusionary rule was applicable in the context of guideline sentencing proceedings. The court upheld the sentence imposed by the district court based solely on the conclusion that it was adequately supported by the facts established in the unobjected-to portions of the presentence report. The defendant argued that the district court erroneously included as "relevant conduct" his possession of a substantial quantity of cocaine that the court had earlier suppressed as the product of an illegal search. The district court held "that the defendant's possession of the cocaine found at his apartment constituted 'part of the same course of conduct . . . as the offense of conviction' [pursuant to §1B1.3(a)(2)]." The district court, relying on cases from other circuits, held that the exclusionary rule did not apply in the sentencing context. *See, e.g.*, *United States v. Tejada*, 956 F.2d 1256, 1262 (2d Cir. 1992); and *United States v. Torres*, 926 F.2d 321, 325 (3d Cir. 1991). The appellate court declined to decide this case based on this issue because it did not think that the case presented a proper occasion to decide such an important question. Instead, the court held that the exclusionary rule did not bar the district court from considering the defendant's own voluntary statements included in the presentence report. The portion of the presentence report that recounted the defendant's statements, to which he declined to object, provided an independently sufficient ground for the district court's finding at sentencing that the defendant possessed the cocaine at issue.

United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994). The district court did not err when it rejected defendant's argument that stiffer penalties for crack as opposed to cocaine powder offenses violate the defendant's right to equal protection under the law. The defendant offered evidence in the district court to demonstrate that the sentencing distinction between crack and powder is either irrational, racially motivated, or both. On appeal, the defendant argued that the district court erroneously applied the relevant constitutional principles at the sentencing hearing. The First Circuit disagreed, and stated: "'Congress had before it sufficient . . . information to make distinctions that would justify . . . more severe sentences for trafficking in or using cocaine base or crack than cocaine itself'" and there are "racially neutral grounds for the classification that more 'plausibly explain' its impact on blacks." Thus, "there is insufficient evidence 'that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission.'"

Part E Offenses Involving Criminal Enterprises and Racketeering

§2E1.4 Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

United States v. Vasco, 564 F.3d 12 (1st Cir. 2009). The district court did not err when it applied a cross reference from §2E1.4 to §2A1.5 (Conspiracy or Solicitation to Commit Murder). The court stated that while "[t]he reference in §2E1.4 to a BOL of the greater of thirty-two or 'the offense level applicable to the underlying conduct' is curious, as virtually every time a defendant is charged with the use of interstate commerce facilities in the commission of murder-for-hire, the underlying unlawful conduct will be solicitation to commit murder," there is nothing wrong with the district court applying the higher BOL of 33 from the murder guideline.

§2E2.1 Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by four levels under §2E2.1(b)(3)(A) for abduction in order to facilitate the commission of an offense. The defendant pled guilty to, *inter alia*, conspiracy, racketeering, and extortion offenses, after assaulting a man who had defaulted on a loan owed to the defendant. He either followed his victim from a wake to a restaurant, behind which he assaulted the man, or, as the defendant argued, he tricked his victim into going to the restaurant by telling him that a long-time friend wanted to meet him there. Rejecting the defendant's argument that when he took his victim behind the restaurant he displayed none of the physical force necessary to constitute an abduction, the court joined other circuits when it ruled that the force required under §2E2.1(b)(3)(A) need not be violent or physical. Moreover, the court found that a narrow interpretation of force under §2E2.1(b)(3)(A) would constitute ineffective policy because "[a]n abduction accomplished by use of threat and fear carries the same dangerous consequences as an abduction accomplished by use of physical force . . . ."

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

§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. Chiaradio, 684 F.3d 265 (1st Cir. 2012). The defendant "argued that a two-level enhancement for distribution "of pornography under USSG §2G2.2(b)(3)(F) resulted in improper double counting because distribution also gave him a higher base offense level. The court rejected his argument, holding that double counting in the sentencing context is not prohibited unless there is an express guideline directive against it or a compelling basis for implying such a prohibition. Here, the structure of section 2G2.2 "strongly suggests the opposite." "[T]he sentencing guidelines broadly cover all child pornography offenses and use the offense level spread and subsequent adjustments to reach appropriate benchmarks for different permutations of possession, solicitation, and distribution." In sum, the court found "absolutely no basis for an inference that the Sentencing Commission intended to preclude double counting under these circumstances."

United States v. Woodward, 277 F.3d 87 (1st Cir. 2002). The defendant, convicted of child pornography and firearms charges, challenged the district court's application of the enhancement in §2G2.2(b)(4), which provides for a 5-level increase if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.[3] The First Circuit found that the defendant's "previous exploitative conduct involved multiple victims in numerous incidents over a four-year period" and the enhancement was appropriate. In so finding, the court rejected the defendant's claim that the previous instances of misconduct were too outdated

[3] §2G2.2(b)(4) was redesignated as (b)(5) effective Nov. 1, 2004 pursuant to Amendment 664.

(having occurred approximately 20 years earlier) to be properly considered. The court also rejected a claim that the past misconduct had to be "linked" to the offense of conviction to be considered a "pattern."

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

United States v. Dyer, 589 F.3d 520 (1st Cir. 2009). The defendant pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B). In a matter of first impression, the First Circuit upheld the sentencing court's application of the cross reference from §2G2.4(c)(2) to §2G2.2, noting that the defendant used file sharing software to download child pornography and knew that the images would be shared with other users of the software. The court concluded that, for the purposes of §2G2.4, "trafficking" includes trade or barter without a financial stake and that the government need show only a general intent to distribute materials rather than an active and subjective desire to allow others access to images of child pornography.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

United States v. Molak, 276 F.3d 45 (1st Cir. 2002). The defendant was convicted of willfully failing to pay child support, in violation of 18 U.S.C. § 228. In calculating the guideline range, the district court looked to §2J1.1, which in turn directed the court to apply §2X5.1. Pursuant to that guideline, the court is directed to apply the "most analogous" guideline. Application Note 2 to §2J1.1 states that for violations of 18 U.S.C. § 228, the most analogous guideline is §2B1.1, and that the amount of loss is the amount of child support that the defendant had failed to pay. The defendant claimed that the amount of loss under §2B1.1 should not include support obligations accrued after the child's 18th birthday and should not include interest or costs. The First Circuit, looking to the language of the statute, legislative history, and case law, rejected this challenge. However, "the *Molak* court does not address the amendments to Application Note 3(D)(i) of U.S.S.G. §2B1.1, which took effect only two months before the case was decided. These amendments specifically state that interest shall not be included in loss calculations." *United States v. Dunn*, 300 F. App'x 336, 338 (6th Cir. 2008).

Part K Offenses Involving Public Safety

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

United States v. DiSanto, 86 F.3d 1238 (1st Cir. 1996). The district court correctly applied §2K1.4(a)(1), the higher of two offense levels under the arson guideline, when computing the defendant's sentence and did not err in its finding that he "knowingly" created a substantial risk of death or bodily injury. The defendant argued that the overwhelming evidence at trial established that his primary purpose in setting the fire was to defraud the insurance company, not to create a substantial risk of serious bodily injury to bystanders. Similarly, the defendant argued that the district court's findings that he "knowingly" created this risk was not supported by a preponderance of the evidence. The appellate court held that the district court

[4] Guideline deleted by consolidation with §2G2.2.

correctly applied §2K1.4(a)(1) based on its findings that the defendant had created a substantial risk of bodily injury. The circuit court treated the issue of whether the defendant knowingly created that risk as one of first impression, in that the court had not previously determined what level of knowledge was required under §2K1.4(a)(1)(A). The circuit court applied a two-prong test: (1) whether the defendant's actions created a substantial risk; and (2) whether the defendant acted knowingly to create that risk.

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

Crime of Violence (§2K2.1(a))

United States v. Jonas, 689 F.3d 83 (2012). Massachusetts' assault and battery on a correctional officer statute falls under §4B1.2(a)'s definition of a crime of violencebecase it "presents a sufficiently serious potential risk of injury to another … [and is] sufficiently similar in kind to the offenses enumerated in connection with the 'otherwise' clause the career offender guideline."[5] See also *United States v. Dancy*, 640 F.3d 455 (1st Cir. 2011) (holding that Massachusetts' assault and battery statute on a police officer is a crime of violence)

United States v. Herrick, 545 F.3d 53 (1st Cir. 2008). Defendant's Wisconsin conviction for motor vehicle homicide did not constitute a "crime of violence" for purposes of the higher base offense level at §2K2.1(a)(4), and the district court erred in so classifying it. In deciding whether or not a conviction constitutes a "crime of violence," courts must employ the categorical approach and the test enunciated by the Supreme Court in *Begay v. United States*, 553 U.S. 137 (2008). The court held that, even though this offense of conviction presents a serious potential risk of physical injury to another person, it is not a "crime of violence" because it does not necessarily involve aggressive conduct and so is not similar in kind to the offenses enumerated in §4B1.2(a).

United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998). The district court did not err in finding that the defendant's prior felony conviction for second degree child molestation under Rhode Island law was for a crime of violence. "The Rhode Island statute under which Sherwood was convicted, at the time he was charged, prohibited 'sexual contact' with a person under 13 years of age." The court agreed with the Fifth Circuit in *United States v. Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996), that child molestation crimes "typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures." The court concluded that it was a crime of violence because there was "a significant likelihood that physical force would be used to perpetrate [such a] crime."

United States v. Damon, 127 F.3d 139 (1st Cir. 1997). The district court erred in determining that the defendant's prior conviction for aggravated criminal mischief was a crime of violence and thereby calculating his base offense level to be 20 under §2K2.1(a)(4)(A). The court of appeals held that, under the Supreme Court's categorical approach to the nature of the crime set forth in *Taylor v. United States*, 495 U.S. 575 (1990), it was error for the district court

[5] USSG §2K2.1 cross-references the career offender guideline to supply the definition of crime of violence.

to look at the facts of the offense. It stated that the court should have looked at the statutory definition of aggravated criminal mischief which, under *Taylor*, qualifies as a crime of violence if and only if a serious potential risk of physical injury to another is a normal, usual, or customary concomitant of the predicate offense as set forth in the statute. Finding that the crime of conviction did not necessarily involve a serious potential risk of physical injury to another, it states that the inquiry is limited to the "'usual type of conduct that the statute purposes to proscribe,' and does not explore 'the outer limits of the statutory language or the myriad of possibilities girdled by that language'" (citations omitted). It held that the district court was precluded under *Taylor* from looking into the nature of the predicate offense.

United States v. DeLuca, 17 F.3d 6 (1st Cir. 1994). The district court correctly determined the defendant's base offense level based on his prior state conviction for extortion, R.I. Gen. Laws § 11-42-2. The defendant challenged the §2K2.1(a)(2) enhancement as a "crime of violence" because the government failed to identify the nature of the threat which formed the basis of his prior state conviction for extortion. The First Circuit rejected this argument, finding that the state statute's broad definition of extortion fell well within the reach of §4B1.2(1)(ii) [now §4B1.2(a)(2)].

Destructive Device (§2K2.1(b)(3))

United States v. McCarty, 475 F.3d 39 (1st Cir. 2007). The "destructive device" enhancement under §2K2.1(b)(3) will apply to a sawed-off shotgun without being double counting. While the calculation of the underlying offense level does consider the fact that a sawed-off shotgun was used, the enhancement for "destructive device" considers that it poses "considerably greater risk to public welfare than other National Firearms Act weapons."

Stolen or Altered Firearm (§2K2.1(b)(4))

United States v. Marceau, 554 F.3d 24 (1st Cir. 2009). The district court properly applied the 8-level offense level increase under §2K2.1(a)(4)(B), even though Congress allowed the statutory ban against possessing semi-automatic weapons to expire in 2004. The Sentencing Commission did not exceed its authority when it voted to retain the enhancement in 2006. Affirming the sentence, the court also held that there was sufficient evidence that the defendant was a prohibited person and that he trafficked firearms, that the obliterated serial number enhancement is a legal guidelines provision promulgated within the Sentencing Commission's authority, and that the disparity between the defendant's sentence and his codefendant's sentence was not unwarranted.

United States v. Brown, 169 F.3d 89 (1st Cir. 1999). The district court's application of a 2-level increase under §2K2.1(b)(4) was not double-counting, even though the defendant was convicted of possession of a stolen firearm under 18 U.S.C. § 922(j). The base offense level takes into account the stolen nature of the firearm if "(1) the only offense to which §2K2.1 applies for a given defendant is 18 U.S.C. § 922(j), and (2) the defendant's base offense level is determined under subsection (a)(7)" (citing §2K2.1, comment. (n. 12)). Here, the defendant's base offense level was calculated under subsection (a)(2), based on at least two prior felony convictions of either violent crimes or drug crimes.

In Connection with Another Felony Offense (§2K2.1(b)(6))

United States v. Paneto, 661 F.3d 709 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 2411 (2012). The First Circuit affirmed the district court's application of §2K2.1(b)(6) based on the sentencing court's determination that the defendant engaged in felonious drug trafficking when the defendant was acquitted at trial by a jury of the drug trafficking charge. The panel stated that sentencing factors need only be proven by a preponderance whereas guilt in a criminal case must be proven beyond a reasonable doubt. The circuit court noted that there was sufficient evidence in the record to support the sentencing court's determination that the defendant engaged in felonious drug trafficking.

United States v. Peterson, 233 F.3d 101 (1st Cir. 2000).[6] The district court did not err when it enhanced the defendant's sentence by four levels under §2K2.1(b)(5) for possession of a firearm in connection with another felony offense, after the defendant was convicted of narcotics and firearms violations. Broadly construing the phrase "in connection with," the First Circuit stated that it would affirm the enhancement so long as possession of the firearm has "the potential to aid or facilitate" the other felony (citation omitted). The court held that the readily accessible and proximate location of firearms in two apartments where the defendant had stored drugs supported the district court's conclusion that "it was [the defendant's] 'modus operandi to have guns near his stash of marijuana'" (citation omitted).

Upward Departure (§2K2.1 Application Note 11, formerly Application Note 16)

United States v. Diaz, 285 F.3d 92 (1st Cir. 2002). The First Circuit found that the district court erred in departing upward, pursuant to Application Note 16 to §2K2.1, comment. (n.16). It concluded that the defendant's actions in "brandishing a single small weapon in a single episode, with no evidence of an intent to fire, is insufficient to support a departure aimed at punishing conduct that puts multiple individuals at substantial risk of injury or death."

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Li, 206 F.3d 78 (1st Cir. 2000). The First Circuit held that the district court did not err by adjusting upward defendant's sentence under §2L1.1(b)(2)(C) and refusing to adjust downward under §2L1.1(b)(1). The court ruled that the enhancement properly applied because the offense included 109 aliens, only four of whom could not be counted because they were codefendants, and it was irrelevant whether it was committed for profit. It also rejected defendants' argument that they should have received a downward adjustment under §2L1.1(b)(1) for not committing the offense for profit because their sole reward for participation in the conspiracy was free transportation. While not in complete agreement with the district court, the

[6] The court also reversed the district court decision to sentence the defendant as a career criminal under §4B1.4. The court ruled that because the defendant's previous state conviction for breaking and entering did not involve criminal intent, it did not constitute a "violent felony" for which he could be sentenced as an armed career criminal under 18 U.S.C. § 924(e).

First Circuit deferred to the district court and affirmed the finding that the defendants' valuable roles and responsibilities indicated that they would be paid beyond the benefit of free passage.

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

United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001). The district court did not err by finding that the defendant's previous state conviction for forgery constituted an aggravated felony for enhancement purposes. The commentary to §2L1.2 specifies that "aggravated felony" has the meaning given it in 8 U.S.C. § 1101(a)(43). That statute states that an aggravated felony includes "an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year." Because the defendant received a one-year prison sentence for his forgery conviction, the crime constitutes an aggravated felony under § 1101.

United States v. Luna-Diaz, 222 F.3d 1 (1st Cir. 2000). The First Circuit vacated and remanded the sentence, finding that the district court abused its discretion when it failed to count the defendant's vacated conviction as an aggravated felony for enhancement purposes under §2L1.2(b)(1)(A). The district court had rejected the government's argument that the appropriate measure for sentencing was not the defendant's current status, but rather his status at the time he was deported, and it declined to apply the aggravated felony enhancement because a state court had overturned the defendant's prior aggravated felony conviction for which he was deported. The First Circuit found that the appropriate time frame for determining whether to apply the enhancement was at deportation, and his status at sentencing was irrelevant.

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). The district court did not err in applying the aggravated felony enhancement in the earlier version of §2L1.2. The defendant argued that the enhancement he received was improper because neither of the two previous offenses he committed before being deported were a conviction for an "aggravated felony" and at least one of the offenses was not a "conviction" under state law. The circuit court rejected the defendant's arguments and joined the Fifth, Ninth, and Eleventh Circuits in holding that whether a particular disposition counts as a "conviction" in the context of a federal statute is to be determined in accordance with federal law. The appellate court also relied upon the Supreme Court's interpretation in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), in which the court held that "[w]hether one has been convicted within the language of [a federal] statute[] is necessarily . . . a question of federal, not state, law, despite the fact that the predicated offense and its punishment are defined by the law of the State." Additionally, the appellate court noted that even if the defendant's second prior possession offense was not a "conviction," his challenge to the application of the enhancement failed because his earlier conviction for cocaine possession was itself for an "aggravated felony."

United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994). The defendant was deported to Columbia after he was convicted for two aggravated felonies. He illegally reentered the United States on September 5, 1991. He was "found" in the United States on December 19, 1991. Between September 5 and December 19, §2L1.2(b)(2) was amended to require, rather than suggest, an increase in the base offense level for an alien whose deportation followed conviction for an aggravated felony. The district court was correct in sentencing the defendant under the amended version of the guideline because the act of illegally entering the United States can occur on three separate occasions: (1) when she/he enters the United States, (2) when she/he

attempts to illegally enter the United States, (3) when she/he is "found" in the United States. Regardless of when the defendant entered the United States, he violated the statute when he was "found" in the United States and was properly sentenced in accordance with the guidelines in effect on that date.

Part S Money Laundering and Monetary Transaction Reporting

§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. Beras, 183 F.3d 22 (1st Cir. 1999). The district court did not err in assessing a seven-point enhancement for "loss" exceeding $120,000 under §2F1.1(b)(1)(h).[7] The defendant was convicted of failing to report that he was transporting over $10,000 out of the United States. The defendant's argument that the offense involved no "loss" is without merit because §2S1.3, the applicable guideline, provides a base offense level of "6 plus the number of offense levels from the table in §2F1.1 [now §2B1.1] . . . corresponding to the value of the funds." The $138,794 was the "value of the funds" the customs officers found on the defendant and codefendant.

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. Thomas, 635 F.3d 13 (1st Cir. 2011). The defendant pled guilty to tax evasion. The district court included interest and penalties on the unpaid taxes in calculating the defendant's tax loss for purposes of setting the base offense level. While interest and penalties are not normally included in establishing the amount of tax loss at §2T1.1, an exception exists for "willful evasion of payment cases." *See* §2T1.1 comment. (n.1). The defendant argued that he had not pled guilty to evasion of payment, but instead had pled guilty to evasion of tax assessment. The district court found this to be a distinction which made no difference because the underlying purpose behind the defendant's criminal activity was to avoid payment of taxes. The First Circuit stated that a defendant's relevant conduct includes even conduct that is not formally charged or is not an element of the offense of conviction and affirmed the sentence.

United States v. McElroy, 587 F.3d 73 (1st Cir. 2009). The trial court determined that the defendants, who were convicted of federal tax evasion, should be accountable not only for tax loss incident to their federal conviction, but also that state tax losses to the Commonwealth of Massachusetts that were part of the same course of conduct should amplify the total tax loss for federal sentencing purposes. The First Circuit rejected the defendant's argument that tax loss under §2T1.1 may include only federal tax loss and held that, under relevant conduct principles, state crimes that are substantially connected via common victims, common purpose, or similar modus operandi to a federal offense may provide a basis to enhance a federal sentence.

[7] §2F1.1 was consolidated with §2B1.1 by Amendment 671, effective Nov. 1, 2001.

Part X Other Offenses

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

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by two levels under §2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import and attempting to import more than 5,000 pounds of marijuana. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty'" (quoting §2X1.1(a)).

§2X3.1 Accessory After the Fact

United States v. Vega-Coreano, 229 F.3d 288 (1st Cir. 2000). The district court did not commit clear error when it declined to cap the defendant's offense level at 20 for conduct limited to harboring a fugitive, pursuant to §2X3.1. The defendant pled guilty to violating 18 U.S.C. § 3 for being an accessory to a robbery after the fact. Finding that the record reflected actions exceeding merely harboring a fugitive, the court affirmed. Besides renting hotel rooms for therobbery participants to hide, the defendant assisted in the concealment of the stolen money and relayed important information between parties.

CHAPTER THREE: *ADJUSTMENTS*

Part A Victim-Related Adjustments

§3A1.2 Official Victim

United States v. Lee, 199 F.3d 16 (1st Cir. 1999). The district court did not err when it enhanced the defendant's sentence by three levels under §3A1.2(b). After a traffic stop, the defendant struggled with several officers before they subdued him and found a loaded weapon in his waistband. The First Circuit found that the defendant's actions satisfied the assault requirement of the enhancement even though the district court made no finding as to the defendant's state of mind at the time. It reasoned that a defendant need only have knowledge that his actions will cause fear to commit assault under §3A1.2(b) and, in this case, the defendant must have known that his efforts to draw his gun would almost certainly alarm the officers. The court added that there is a fine line, often just "a matter of degree," between a three-level official victim enhancement under §3A1.2(b) and a two-level reckless endangerment adjustment under §3C1.2, and that it would likely defer to the district court's better "feel for the factual subtleties involved" in determining which adjustment was appropriate.

Part B Role in the Offense

§3B1.1 Aggravating Role

Organizer or Leader (§3B1.1(a))

United States v. Tavares, 705 F.3d 4 (1st Cir. Jan. 14, 2013). As an issue of first impression in the circuit, the court held that a "participant" can be an immunized witness against the defendant. Therefore, the district court did not err in imposing an "organizer or leader" enhancement under §3B1.1(c) where the prostitutes the defendant employed received immunity from prosecution. The guidelines' commentary at §3B1.1 cmt. n.1 makes clear that a "participant" need not be convicted of the offense.

United States v. Arbour, 559 F.3d 50 (1st Cir. 2009). The district court correctly applied §3B1.1(a), resulting in a four-level enhancement for the defendant's leadership role in drug and firearms offenses. "In order to invoke §3B1.1(a), a district court must make a finding as to scope—that the criminal activity involved five or more participants or was otherwise extensive—and a finding as to status—that the defendant acted as an organizer and leader of the criminal activity." These findings must meet the preponderance of the evidence standard. Courts may consider all relevant conduct and the totality of the circumstances when determining whether a criminal activity is extensive. The defendant's argument that he was involved in four separate clusters of criminal activity and not a single extensive activity is unpersuasive, because there was "significant evidence of cross-pollination between [the defendant's] drug and firearms dealings." Additionally, the defendant organized one or more of the individuals involved in this activity. Only proof that a defendant had a leadership role with respect to one of the participating individuals is required by §3B1.1, comment. (n.2).

United States v. Picanso, 333 F.3d 21 (1st Cir. 2003). Affirming defendant's role enhancement for being an organizer or leader, the court found that the defendant was essentially a drug wholesaler, who dealt in greater quantities of drugs than did his co-conspirators and received larger profits. However, the court noted that the greater quantities and larger profits cannot alone trigger the role enhancement because the base offense level already takes quantity (and, implicitly, profit) into account. The court found additional circumstances that, when taken together, warranted the role enhancement in this case; specifically, the defendant supplied a substantial network of retailers, set the terms for his own transactions with them, was regarded as the kingpin by other conspirators, and had some influence over the operations of the retailers themselves.

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001). Affirming defendant Patrick's enhancement for being an organizer or leader under §3B1.1(a), the court found that he was the "ultimate decisionmaking authority in the [gang]," determining who could sell drugs and when to fight rival dealers, as well as recruiting accomplices and supplying large amounts of drugs. It also affirmed co-defendant Arthur's supervisory role enhancement based on evidence that he "owned and distributed large quantities of crack . . . gave orders to younger [gang] members, and used violence to eliminate rivals."

United States v. Li, 206 F.3d 78 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by four levels under §3B1.1(a) for his role as a leader or organizer in a conspiracy to smuggle illegal aliens into the United States. The First Circuit found that the enhancement was warranted because the defendant inspected the vessel to be used to bring the aliens to the United States, conducted negotiations with the undercover agents serving as owners of the vessel, and handled the finances regarding its use, sufficiently indicating that the defendant controlled the stateside branch of the conspiracy. Moreover, even if the district court had erred, such error would have been harmless because under either circumstance the court would have raised the defendant's guideline range to the statutory minimum for the offense.

Manager or Supervisor (§3B1.1(b))

United States v. Al-Rikabi, 606 F.3d 11 (1st Cir. 2010). The defendant challenged the two-level enhancement for managerial role at §3B1.1(c) imposed by the district court. The First Circuit held that the enhancement may not be imposed without proof that the defendant stood in a relationship to a subordinate that allowed him to order that subordinate about or direct his activities in some manner. In defendant's case, the only other persons involved in the defendant's criminal activity were the person who bought drugs from him and the undercover agent who introduced the buyer to him. While the defendant and his buyer were both breaking the law, the supervisor/subordinate relationship that is necessary for the imposition of the managerial role enhancement was not satisfied. Accordingly, the case was remanded for resentencing.

United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009). The court held that the district court erred when it enhanced the defendant's sentence for his role as a manager or supervisor. The court found that the defendant's role in the drug conspiracy was one of a "runner," and that "keeping the drug point well-stocked and collecting the proceeds to deliver to the drug-point's owners or leaders is insufficient to establish the requisite control over another criminal actor" that the First Circuit's case law requires.

United States v. Brown, 298 F.3d 120 (1st Cir. 2002). The First Circuit affirmed an enhancement for playing a managerial role in a drug conspiracy, explaining that evidence supported the fact that the defendant supplied the drugs for the conspiracy that bore his alias; that he established a customer base; that the codefendant acted as a go-between or finder, with the defendant personally involving himself in completing the larger sales; that the defendant used the codefendant's apartment for transactions and as a safe house; that he exercised dominion over virtually all of the known quantities of drugs; and that he kept the great majority of the proceeds.

United States v. Gonzalez-Vazquez, 219 F.3d 37 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence under §3B1.1(b) for his role as a manager or supervisor. The court ruled that the record sufficiently supported the role enhancement. The defendant "was second in command at the drug [distribution] point . . . [and] played a leadership role in arranging with [the confidential informant] to use her apartment for drug packaging."

United States v. Cali, 87 F.3d 571 (1st Cir. 1996). The district court's holding enhancing the defendant's sentence based on his role as a manager was in error because the defendant

managed property, but not people. However, the district court's alternative holding that a three-level upward departure was warranted because of the defendant's management of gambling assets was a proper assessment of an encouraged departure factor. §3B1.1, comment. (n.2). The sentence was affirmed.

§3B1.2 Mitigating Role

United States v. Santos, 357 F.3d 136 (1st Cir. 2004). The defendant pled guilty to conspiring and attempting to possess in excess of five kilograms of cocaine, and the sentencing court–which expressly found that there was a sound factual basis for the plea–was entitled to accept that concession at face value and to draw reasonable inferences from it. The sentencing court carefully appraised the defendant's involvement, considering his presence during a discussion with co-conspirators, the size of the down payment, and the amount of cocaine displayed on the table when the defendant first entered the garage for a scheduled pick up of the drug quantity. The appellate court determined that he properly should be classified as a minor, not a minimal, participant and affirmed the district court's conclusion.

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court did not err when it refused to reduce the defendant's sentence under §3B1.2 for minimal or minor participation. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. The court rejected the defendant's argument that his participation consisted of "infrequent, relatively low-level tasks." The record revealed that the defendant "had unloaded a sizable drug shipment and had conducted surveillance" to support the conspiracy, which is sufficient to preclude a sentence reduction. Moreover, the district court's calculation of his offense level had already addressed the defendant's concern. Despite the seizure of about 1,000 kilograms of cocaine and substantial quantities of heroin, marijuana, and other contraband during the course of the smuggles in which defendant participated, the district court only attributed to the defendant 50 to 150 kilograms of cocaine. Ruling that a sentencing court can decide not to grant a particular reduction if it finds that another adjustment has adequately addressed the specific offense characteristic, the court affirmed the denial of the role-in-the-offense reduction.

United States v. Portela, 167 F.3d 687 (1st Cir. 1999). The district court did not err in failing to notify the defendant in advance of the sentencing hearing that the court intended to reject the presentence report's recommendation that the defendant receive a two-level adjustment under §3B1.2 for being a "minor participant." The government waited until the sentencing hearing to object to the PSR recommendation, but the court stated it would not have granted the adjustment even if the government had not objected. A defendant is not entitled to notice of a court's intention to diverge from adjustments recommended in the presentence report. "So long as the court's determination involved adjustments *under* the provisions of the guidelines and not departures *from* the guidelines, 'the guidelines themselves provide notice to the defendant of the issues about which he may be called upon to comment.'" (citation omitted).

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994). The district court did not err in determining that the defendant's participation in an attempted robbery fell between a minor and a minimal role, thus warranting a three-level reduction in base offense level. The government had challenged the reduction, arguing that the district court impermissibly based this determination on the fact that the defendant's role as a lookout was less reprehensible than the roles of his

codefendants, and not because he was less culpable. The circuit court rejected this argument, concluding that the record established the defendant was both less culpable than most of his codefendants and less culpable than the "average person" who commits the same offense. *See* §3B1.2, comment. (nn.1-3).

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

United States v. Sicher, 576 F.3d 64 (1st Cir. 2009). This case involved a defendant who was the sole employee of an ophthalmologist in his private practice and in the charitable foundation the ophthalmologist created. Although defendant's title was merely that of "secretary," the First Circuit affirmed the district court's decision to impose a two level enhancement pursuant to §3B1.3 for abuse of position of trust. The testimony indicated that the defendant's actual activities in her dual role went well beyond those that were secretarial in nature. She was particularly autonomous in the management and operation of the foundation and was essentially unsupervised in the receipt and disbursement of funds donated to it. Also, she ran the foundation's fundraisers unilaterally and, thus, became the de facto manager and director of the foundation. The actual scope of her duties and the degree to which she was able to exercise discretion was more germane to the decision to impose the enhancement than the title she held. *But see* dissent by Judge Lipez.

United States v. Stella, 591 F.3d 23 (1st Cir. 2009). The First Circuit found that a nurse who was convicted of tampering with and stealing pain killing medications from the "meds room" of the hospital where she was employed, and thus deprived patients under her care of their full prescriptions of pain killing medication, was deserving of a sentencing enhancement under §3B1.3 for an abuse of a position of trust. The Court ruled that the nurse's position of trust derived from her professional discretion as a person licensed to administer controlled substances.

United States v. Chanthaseng, 274 F.3d 586 (1st Cir. 2001). The district court did not err when it enhanced the defendant's offense level under §3B1.3. The defendant, a mid-level bank employee with the titles of vault teller and branch operations supervisor, was convicted of making false bank statements relating to a scheme to steal nearly one million dollars from the bank at which she worked. The First Circuit stated that the enhancement is proper if the defendant "(1) occupied a position of trust *vis-á-vis* her employer; and (2) utilized this position of trust to facilitate or conceal her offense." The court emphasized that the inquiry is not whether the defendant's title or job description includes a discretionary element; rather, the inquiry is whether the person in fact had such trust. With respect to the first requirement, the defendant occupied a position of trust because she was one of only a few employees allowed to countersign rapid deposit tickets (which facilitated her scheme) and her supervisor consistently failed to review these approvals, thus rendering her the branch's sole decision-maker for these transactions. The second requirement was also clearly established in this case.

United States v. O'Connell, 252 F.3d 524 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence for abuse of trust under §3B1.3 after he pled guilty to making, possessing, and uttering counterfeit and forged securities. The district court disagreed with the defendant's argument that he did not hold a position of trust because he could not sign checks and because an accountant oversaw his actions. Affirming the enhancement, the court ruled that the defendant's authority to access the line of credit to the business's checking account

"suggest[ed] significant managerial discretion" and his close relationship with the owners of the business "rendered him uniquely trusted as an employee."

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998). The district court erred in finding that the defendant's position as a switchboard operator at police headquarters was a "position of trust." When the defendant noticed a large group of DEA agents gathering at the station, she alerted her drug dealer friend who canceled a sizable marijuana delivery that would have taken place that evening. The cancellation thwarted the law enforcement agents. The court of appeals stated that the district court should first have decided where there was a position of trust, and not simply gone to the second step of the analysis, whether the defendant used her position to facilitate a crime. Critical to the first step in the analysis is the question of whether the position embodies managerial or supervisory discretion, the signature characteristic of a position of trust, according to the application notes. The defendant had no such discretion and so could not receive the enhancement.

United States v. Noah, 130 F.3d 490 (1st Cir. 1997). The district court did not err in finding that the combination of abilities necessary to prepare and file tax returns electronically qualified as a special skill subject to enhancement under the guidelines. The defendant argued that electronic filing was a task anyone can master. The court of appeals noted that even if an average person can accomplish a specialized task with training, it does not convert the activity into an ordinary or unspecialized activity. "The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public."

§3B1.4 Using a Minor to Commit a Crime

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001). The court affirmed the defendant's §3B1.4 enhancement in a conspiracy case, despite the absence of evidence that he had employed minors. The court determined that, under §1B1.3(a), which requires that this enhancement be derived from "'all reasonably foreseeable acts . . . of others in furtherance of the jointly undertaken criminal activity,'" a conspirator's sentence can be enhanced based on the "reasonably foreseeable" use of minors by co-conspirators in furtherance of the crime.

Part C Obstruction and Related Enhancements

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

United States v. Fournier, 361 F.3d 42 (1st Cir. 2004). The defendant, sentenced for drug distribution, argued that the sentencing court erred by (1) increasing his base offense level for obstruction of justice under §3C1.1, and (2) refusing to reward him with a two-level reduction for acceptance of responsibility, pursuant to §3E1.1. He contended that the district court should have made a particularized finding as to whether he had the specific intent to obstruct justice. The appellate court held that it did not have to decide whether there had to be a specific finding, as the evidence here clearly supported the district court's ultimate finding that the defendant intended to obstruct justice as defined by the guidelines; the record amply showed that he violated multiple bail conditions in an attempt to flee and obstruct justice. Moreover, "[g]iven that 'conduct resulting in an enhancement [for obstruction of justice] ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct,'" and that

the defendant has not shown any "'extraordinary circumstances' to merit the reduction", the appellate court affirmed the district court's sentencing decision.

United States v. McGovern, 329 F.3d 247 (1st Cir. 2003). The appellate court affirmed the decision of the district court to impose a two-level upward enhancement pursuant to Note 4(c) to §3C1.1. The defendant was convicted of Medicare and Medicaid fraud, obstruction of a federal audit, and money laundering. The defendant contested the district court's ruling that the obstruction occurred "during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." He argued that the submission of false information to federal auditors took place before there was any criminal investigation and that the Medicaid/Medicare audits were not investigations of the offense of conviction. The court noted that it had already rejected both of these temporal and identity types of arguments.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not abuse its discretion when it declined to enhance defendant's sentence under §3C1.1. The government argued that its rebuttal witness's testimony, inconsistent with that of the defendant, demonstrated that the defendant had committed perjury at the sentencing hearing. However, the government witness had previously made a statement to defense counsel inconsistent with his rebuttal testimony and in support of defendant's testimony, of which the government was aware. Rejecting the government's argument that it was in no position to give notice because it could not know ahead of time how the defendant would testify or that it would seek a §3C1.1 enhancement, the district court ruled that, as a factual matter, the government should have given the defense notice of the change in its witness's testimony, making it clear that false testimony from the defendant would lay the foundation for an enhancement. Recognizing the substantial deference to be paid to the district court regarding this discretionary matter, the court affirmed the district court decision. "Unfair surprise in witness testimony is one instance where the judicious management of the trial process by the trial judge plays a critical role." Here, the government knew that the defense was relying on erroneous information when it introduced the defendant's testimony.

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

United States v. Carrero-Hernández, 643 F.3d 344 (1st Cir. 2011), *cert. denied* 132 S.Ct. 1052 (2012). The First Circuit affirmed the district court's application of §3C1.2 contrary to the defendant's argument that his flight from police did not create a substantial risk of death or serious bodily injury. The defendant attempted to evade police by driving through a residential neighborhood at forty-five miles per hour. A police officer involved in the pursuit described the chase as brief and implied that the streets were free of pedestrians and traffic at the time. Although the panel noted that the conduct in the case did not involve factors typically present in other §3C1.2 cases (*e.g.*, high speeds, rammed police cars, driving on sidewalks, crashing vehicles), the circuit court observed that the defendant took several turns at a high rate of speed and drove over a hill where a driver could not see what was on the other side. Such conduct, the district court determined, and the First Circuit agreed, created a high likelihood of collision with pedestrians and oncoming traffic.

§3C1.3 Commission of Offense While on Release

United States v. Duong, 665 F.3d 364 (1st Cir. 2012). The First Circuit affirmed application of an adjustment under §3C1.3 after resolving a conflict between the guideline's text and the commentary to §2J1.6. The defendant was convicted of failing to surrender for service of sentence, a violation of 18 U.S.C. § 3146, and was sentenced pursuant to §2J1.6. The commentary at §2J1.6 states that Chapter Three, Part C (Obstruction and Related Adjustments) does not apply except in specific circumstances not present in this case. *See* USSG §2J1.6, comment. (n.2). However, the defendant was subject to the statutory sentencing enhancement for the commission of an offense while on release at 18 U.S.C. § 3147, which §3C1.3 implements. The court noted that while guideline commentary is generally authoritative, it carries no weight when it is inconsistent with a guideline's text or contrary to law. *See United States v. Piper*, 35 F.3d 611 (1st Cir. 1994). In this case, following §2J1.6, comment. (n.2), would contravene §3C1.3's requirement to increase the defendant's offense level and the plain terms of section 3147.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Sedoma, 332 F.3d 20 (1st Cir. 2003). The defendant was convicted of conspiracy to possess with intent to distribute marijuana, conspiracy to defraud, mail fraud, and wire fraud. The defendant challenged the sentence on the ground that the district court erred in failing to group the drug conspiracy and conspiracy to defraud counts. He argued that the conduct embodied in the conspiracy to defraud count–defrauding the public of its intangible right to the defendant's honest services–formed the basis of the upward adjustment to the drug conspiracy count for abuse of a position of public trust under §3B1.3. The appellate court agreed with the defendant and found that the district court committed plain error in failing to group the drug conspiracy and conspiracy to defraud counts under §3D1.2(c).

United States v. Nedd, 262 F.3d 85 (1st Cir. 2001). The defendant was convicted of four counts relating to interstate threats and one related count of an interstate violation of a restraining order. There were three primary victims of the threats, and the district court had applied the grouping rules by victim. The First Circuit held that this was error, and that the court should have instead bundled the counts so that those that contained the exact same primary victims would be grouped, and those that had different permutations of victims would not. The district court's error was harmless because the correct grouping analysis would result in the same guideline range.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

See United States v. Fournier, 361 F.3d 42 (1st Cir. 2004), §3C1.1.

United States v. Landron-Class, 696 F.3d 62 (1st Cir. 2012). The facts of this case did not present one of the "rare situations" in which going to trial is compatible with a § 3E1.1(a)

reduction. While appellant initially acknowledged his conduct to investigators, he did not do so at trial. His defense at trial was not based on issues other than his factual guilt; rather, he disputed every aspect of the government's case and denied his role in the conspiracy. Given this conduct, his reasons for rejecting the government's offered plea agreement are immaterial, and the court did not err in deciding that his decision to go to trial and deny his factual guilt disqualified him from receiving a § 3E1.1(a) reduction.

United States v. Stefanik, 674 F.3d 71 (1st Cir. 2012). The defendant requested a 2 level reduction for acceptance of responsibility, which the district court denied. The circuit court recognized that the reduction might be warranted for a defendant who decides to proceed to trial, but it noted that the decision creates a rebuttable presumption against that defendant. Stefanik argued that he went to trial "not to raise issues related to factual guilt but to challenge the applicability of the criminal statute to the complained conduct." The circuit court held that the District Court did not abuse its discretion in finding that Stefanik declined to accept full responsibility during the trial. *See also United States v. Cash*, 266 F.3d 42 (1st Cir. 2001) and *United States v. Franky-Ortiz*, 230 F.3d 405 (1st Cir. 2000).

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999). The district court's decision not to reduce the defendants' sentences by two levels under §3E1.1(a) was not clearly erroneous. The defendants, who had gone to trial, objected to the enhancement on grounds that "they cannot be punished for preserving their constitutional right to appeal by maintaining their innocence." Joining other circuits, the court affirmed the sentences, stating that a §3E1.1 reduction is a "special leniency" granted to remorseful defendants who accept responsibility early in the proceedings, the absence of which is not a punishment for defendants who assert their rights. It found that the reality that defendants must make a "difficult choice" about whether to accept responsibility does not violate their right to trial or to appeal. The court also rejected Javier's argument that he had expressed remorse.

CHAPTER FOUR: CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

Part A Criminal History

§4A1.1 Criminal History Category

Mateo v. United States, 398 F.3d 126 (1st Cir. 2005). The First Circuit affirmed the defendant's criminal history calculation where a prior state conviction had been vacated after the defendant's original sentencing. The government appealed the district court's decision to eliminate criminal history points after a state's *nunc pro tunc* order terminating the defendant's state probation period on a date before the federal charges were filed. The points originally had been assessed under §4A1.1(d) for committing an offense while under any criminal justice sentence and under §4A1.2 if an outstanding violation warrant from a prior offense exists. Once the defendant's prior state drug conviction had been vacated, the district court eliminated those points. While the First Circuit declined to speculate on whether or not the state's *nunc pro tunc* order would justify the elimination of the criminal history points, which were the grounds used by the district court, the court held that the state order vacating the conviction did justify the elimination of the criminal history points. The court noted that the reason given by the state

when it vacated the conviction was grounded in the constitutional requirement that a guilty plea be knowing and voluntary. This reason, concluded the court, satisfied the requirements for excluding the prior state conviction under §4A1.2.

United States v. Fraser, 388 F.3d 371 (1st Cir. 2004). Affirming the sentence, the First Circuit held that a continuance without a finding is counted as a sentence for purposes of calculating criminal history points in sentencing, even if the defendant was less than 18 years of age when he committed the offense, as long as the sentence was imposed within five years of the present offense. The First Circuit further noted that it is of no consequence that the state-court disposition was diversionary in nature because under §4A1.1, a conviction does not formally need to be entered, and an admission of sufficient facts is considered "an admission of guilt" for purposes of criminal history. Further, because the continuance is countable in calculating criminal history, it is also countable for purposes of calculating the defendant's base offense level under §2K2.1, comment. (n.15).

United States v. Torres-Rosa, 209 F.3d 4 (1st Cir. 2000). The district court did not err when it included two prior Puerto Rico felony convictions in the criminal history calculus under §4A1.1. The defendant pled guilty to conspiracy to possess within intent to distribute cocaine. The defendant argued that his Puerto Rico convictions should not count because the sentencing guidelines make no specific mention of Puerto Rico when they describe the jurisdictions from which relevant convictions can originate for purposes of calculating criminal histories. *See* §4A1.1, comment. (backg'd). The court had previously rejected the same argument, ruling that because Congress has granted to Puerto Rico "'the degree of autonomy and independence normally associated with States of the Union,'" there could be no clear error unless the defendant showed "'that the Sentencing Commission meant to exclude felony convictions in Puerto Rico Commonwealth Courts for enhancement purposes.'" (citations omitted). The defendant failed to satisfy this burden; the court affirmed the criminal history calculation.[8]

§4A1.2 <u>Definitions and Instructions for Computing Criminal History</u>

United States v. Maldonado, 614 F.3d 14 (1st Cir. 2010). Defendant's crime carried a mandatory minimum sentence. He was denied "safety valve" consideration under 18 U.S.C. § 3553(f) because one of the prerequisites for such treatment is that the defendant not have more than one criminal history point. Defendant argued that one of the two criminal history points assessed against him should have been excluded under USSG §4A1.2(c). The offense at issue – attachment of a license plate to a vehicle owned by another person, a misdemeanor under Massachusetts law – carried a maximum penalty of ten days' imprisonment. Defendant maintained that the point assessed for this conviction should have been excluded because it was similar to two "listed offenses," driving without a license and furnishing false information to a

[8] The defendant also argued that he should have been able to withdraw his plea because he did not know when he pled guilty that the Puerto Rico convictions would be calculated into his sentence. The court rejected the argument for several reasons. The court found such ignorance to be implausible, the defendant waited more than one month after the PSR was filed before he moved to withdraw his plea, and the defendant failed to profess his innocence or identify any error in the plea proceedings. Moreover, the defendant did receive the benefit of the plea bargain, despite the increase in the government's recommended sentence. Pursuant to the plea agreement, the district court reduced his sentence for acceptance of responsibility, attributed a lower quantity of drugs to him, and dismissed other charges; the agreement did not stipulate a criminal history level.

police officer, for which criminal history points are not to be assessed. The First Circuit reviewed the commentary to §4A1.2(c) and found that the criteria to be used for determining similarity to a listed offense compelled the conclusion that defendant's license plate offense was of the type that the Commission did not intend should produce criminal history points. Accordingly, the case was remanded for a determination of whether the "safety valve" should be applied and a different sentence imposed.

United States v. Caldwell, 358 F.3d 138 (1st Cir. 2004). The First Circuit affirmed the district court's calculation of the defendant's criminal history and its imposition of a 223-month sentence of imprisonment but remanded for the limited purpose of having the district court indicate whether that sentence is imposed concurrently with or consecutively to the defendant's undischarged state sentences. After a spree of state crimes, time in a drug treatment program, and a more dangerous spree of federal offenses, including an armed bank robbery, the defendant challenged his criminal history calculation under §4A1.2. Because it would not have changed his criminal history category, the court concluded that any error in the district court's calculation of the defendant's criminal history was harmless. The defendant also challenged the district court's refusal to order that his federal sentence run concurrently to his four undischarged state sentences. The Court of Appeals agreed with the district court that it lacked the power to order the defendant's state sentences to begin to run, and that, "under the unusual circumstances of this case, the district court's lack of power to order a state sentence to begin to run poses a significant practical impediment to [the defendant's] achieving concurrent service of his state and federal sentences, should the federal sentences be imposed to run concurrently." However, the court found no basis for concluding that these practical problems deprived the district court of its discretion, or the power to exercise that discretion, to impose its sentence concurrently or consecutively to the undischarged state sentences. (§5G1.3 (c)). Accordingly, the court remanded "to permit the district court to exercise its discretion to impose [the defendant's] federal sentence to run concurrently, partially concurrently or consecutively to his undischarged state sentences."

United States v. Castro, 279 F.3d 30 (1st Cir. 2002). The defendant challenged the district court's consideration of his prior probationary sentence for disorderly conduct when it calculated the defendant's criminal history. According to the defendant, a violation of his probation for this charge could not have resulted in jail time and, as a result, the sentence was not the type of "probation" contemplated by the guidelines. The First Circuit rejected this argument, noting that §4A1.2(c) provides that sentences for disorderly conduct are counted if "the sentence was a term of probation of at least one year . . . ." Since Castro's probationary sentence was at least one year, the district court had been correct in counting it.

United States v. Dubovsky, 279 F.3d 5 (1st Cir. 2002). The First Circuit affirmed the district court's consideration of an earlier state case in which the defendant had admitted facts sufficient to support a conviction, which was continued without a finding of guilt, and was later dismissed. The First Circuit cited its earlier precedent, *United States v. Morillo*, 178 F.3d 18 (1st Cir. 1999), for the proposition that a Massachusetts "continuance without a finding" is considered a prior sentence under §4A1.1. With respect to whether this sentence had been expunged, the First Circuit pointed to the language of Application Note 10 to §4A1.2 and found that "expungement within the meaning of the [g]uideline's structure is best determined by

considering whether the conviction was set aside because of innocence or errors of law." The court found that the Massachusetts case had not been dismissed or sealed based on innocence or legal errors.

United States v. Gonzalez-Arimont, 268 F.3d 8 (1st Cir. 2001). The First Circuit found that juvenile convictions under Puerto Rico law are sealed and kept confidential but are not "expunged" within the meaning of the guidelines. It was therefore proper for the district court to take them into account in determining criminal history.

United States v. DiPina, 230 F.3d 477 (1st Cir. 2000). The district court appropriately included the defendant's juvenile disposition when it determined his criminal history category under §4A1.2, thus preventing the application of the safety valve provision. The court rejected the defendant's argument that his juvenile disposition for unlawful delivery of heroin was a diversionary disposition and thus, under §4A1.2(f), could not be counted as a prior sentence.[9] Because the guidelines do not define a diversionary disposition, the court reviewed examples of such dispositions from this and other circuits. Discussing previous decisions, the First Circuit held that cases where courts do not defer adjudication or sentencing, but rather enter a finding and impose a sentence immediately after hearing arguments, do not constitute diversionary dispositions. In addition, the court rejected the defendant's arguments that his admission of sufficient facts did not constitute a guilty plea for purposes of §4A1.2(a)(1). The court had concluded earlier that in order for an admission of sufficient facts to constitute a guilty plea, the court must find that "the defendant has confessed to certain events or that other evidence proves such events, and that the events constituted a crime." The court found that the record reflected that the defendant's admission of sufficient facts satisfied that standard.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The First Circuit held that the district court did not err in assessing one criminal history point for the defendant's prior adjudication for theft even though the state law bars consideration of the adjudication by "any court subsequently sentencing the juvenile after the juvenile has become an adult." The court found that states may not "dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes." The court also did not err when it assessed a criminal history point for a misdemeanor conviction the defendant received without being represented by counsel. Because the defendant received only time-served for the offense, the district court stated that the defendant bore the burden of proving that he had not waived his right to counsel. The defendant's "proof of a defective conviction was inadequate."

United States v. Morillo, 178 F.3d 18 (1st Cir. 1999). The district court did not err in counting as a prior sentence a state court sentence of "a continuance without a finding" (CWOF) for violating a domestic violence restraining order. The defendant filed an "admission to facts sufficient for a finding of guilty" and executed a written waiver of his constitutional rights. The defendant was required to complete one year of unsupervised probation, during which he was charged in federal court with drug distribution. The court assessed one point for the CWOF under §4A1.1(c) and two points under §4A1.1(d) because the defendant was arrested for the federal offense while on CWOF probation. The CWOF amounted to a diversionary disposition

[9] The defendant made the same arguments for two other juvenile dispositions, but the court did not address them because including the heroin disposition alone precluded the application of the safety valve provision.

resulting from an admission of guilt under §4A1.2(f) because under state law the defendant's "admission" is considered a "tender of a plea of guilty."

United States v. Ticchiarelli, 171 F.3d 24 (1st Cir. 1999). In resentencing the defendant after the case had been remanded, the district court erred in including as a "prior sentence" under §4A1.2(a)(1) a sentence imposed after the original sentencing. After the defendant's original sentencing on the instant offense, he was convicted and sentenced for a Florida offense. He then appealed his original district court sentence based on the district court's drug calculation for an offense involving hashish oil and marijuana, and the case was remanded with instructions that the district court treat hashish oil as marijuana. When an original sentence is vacated and remanded only for resentencing, "prior sentence" means a sentence prior to the original sentence. Law of the case doctrine and the mandate rule do not permit *de novo* resentencing on all sentencing issues. Accordingly, the court concluded that, upon resentencing, the court may not treat the Florida offense as a prior sentence.

United States v. Troncoso, 23 F.3d 612 (1st Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the lower court's determination that the defendant's state sentence for sale of cocaine was a "prior sentence" within the meaning of §4A1.2. The defendant was in the United States illegally after he had been previously deported in 1988. He was convicted on a state offense for the sale of cocaine for which he received a suspended sentence in April 1993. In August 1993, he was convicted of violating 8 U.S.C. § 1326 based on his earlier deportation and was sentenced. He argued that the state offense of selling cocaine was part of the instant offense because he was arrested for the state offense while committing the federal offense. The circuit court joined the Sixth and Tenth Circuits in concluding that the relevant inquiry is "whether the 'prior sentence' and the instant offense involve conduct that is severable into two distinct offenses." Since the state drug conviction required proof of elements different from the immigration offense, the two constituted severable offenses and the state conviction was properly determined to be a "prior sentence" for criminal history purposes.

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

United States v. Joseph Lozada-Aponte, 689 f.3d 791 (1st Cir. 2012). Upholding as reasonable a two category upward departure under §4A1.3(a)(1). The court found that although the defendant's three prior convictions resulted in zero criminal history point due to their age, they could be properly considered under this section. The court also held that a series of past arrests could be considered as a basis for a departure due to underrepresentation of criminal history.

United States v. Mayes, 332 F.3d 34 (1st Cir. 2003). The defendant argued on appeal that his criminal history category over-represented the actual seriousness of his criminal history and the likelihood that he would commit further crimes, basing his argument on (1) the relatively small quantity of drugs involved in the offense of conviction; and (2) the court's failure to take into account his prior drug rehabilitation efforts. The First Circuit held that although drug rehabilitation efforts may warrant a departure under §4A1.3, it is for the defendant to demonstrate that any such efforts were in fact "exceptional" (citing *United States v. Craven*, 239 F.3d 91, 99-100 (1st Cir. 2001) ("The touchstone of extraordinary rehabilitation is a fundamental

change in attitude.”). The appellate court affirmed the district court’s decision, noting that whether the district court believed it lacked the discretionary power to depart downward did not matter because any departure under §4A1.3 would have constituted an abuse of discretion. The court found that the defendant’s efforts at drug rehabilitation consisted of “two short-lived, unsuccessful, court-imposed, drug-treatment regimens [that] utterly failed to meet the required benchmark” and that his criminal history placed him squarely within the career-offender “heartland.”

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001). The district court’s upward departure pursuant to §4A1.3 on grounds that the defendant’s criminal history was under-represented was not erroneous. The defendant argued that the district court did not provide a sufficient rationale for the five-level departure, making a determination based solely on his criminal history score without considering the nature and context of his prior convictions. Understanding that there was no specific test for determining the reasonableness of a decision, the First Circuit did not require a detailed analysis of a sentencing decision such as “explaining in mathematical or pseudo-mathematical terms each microscopic choice made in arriving at the precise sentence,” but merely required a reasonable justification from which the appellate court can “gauge the reasonableness of the departure’s extent.” In light of the deferential standard of review, the court found that, in addition to excessive criminal history points, the concern the district court expressed regarding the defendant’s “consistent recidivism” and the “violent nature” of the defendant’s burglaries represented sufficient reasoning for the departure.

United States v. Snyder, 235 F.3d 42 (1st Cir. 2000). The district court did not err when it refused to depart downward under §4A1.3 on grounds that the defendant’s criminal history category overstated the severity of his criminal record. The defendant argued that the district court failed to recognize his §4A1.3 request for downward departure because the district court mistook his claim for an argument for departure based on extraordinary rehabilitation. Rejecting the defendant’s argument, the court ruled that there was no evidence to show that the district court misunderstood the request. Furthermore, the defendant’s record of violent crime justified the sentence. The sentence was affirmed.

United States v. Brewster, 127 F.3d 22 (1st Cir. 1997). The district court did not err in departing upward based on defendant’s lengthy history of uncharged spousal abuse, even though this conduct was dissimilar to the defendant’s offense of conviction. The court of appeals held that a departure based on the inadequacy of a defendant’s criminal history score can be based on prior dissimilar conduct that the defendant was not charged with or convicted of, if the conduct is so serious that, unless it is considered, the criminal history category will be manifestly deficient as a measure of the defendant’s past criminal behavior or likely recidivism.

United States v. Mendez-Colon, 15 F.3d 188 (1st Cir. 1994). The district court departed upward after determining that the defendant’s criminal history score under-represented his criminal history. The defendant claimed the extent of the departure was unreasonable and appealed. The circuit court found that although the district court properly explained why it was departing, it did not explain why this case was so egregious as to warrant departure beyond category VI. It remanded for reconsideration in light of §4A1.3, which directs the sentencing court to move horizontally across the sentencing table until it finds a criminal history category

which provides a more appropriate punishment. It stated that the court should only depart beyond category VI when the case involves "an egregious, serious criminal record," in which case the sentencing court must "explain carefully" why the circumstances are "special enough" to warrant such a departure.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Curet, 670 F.3d 296 (1st Cir. 2012). The circuit court ruled that a Massachusetts state-court "guilty-filed" disposition qualified as a "conviction" for purposes of the career offender guideline. The "guilty-filed" disposition occurs after either a verdict or plea establishes the defendant's guilt but imposition of sentence is suspended in the court's discretion by reason of extenuating circumstances. Under Massachusetts law, a judgment of conviction does not enter unless a sentence is imposed. However, for purposes of the guidelines, federal law controls, and under federal law, diversionary dispositions resulting from findings or admissions of guilt are considered convictions.

United States v. McGhee, 651 F.3d 153 (1st Cir. 2011). The defendant was convicted of drug crimes and determined to be a "career offender" under USSG §4B1.1. Classification as a "career offender" requires a determination that a defendant had "at least two prior felony convictions of either a crime of violence or a controlled substance offense". One of the defendant's predicate convictions was a juvenile conviction. A prior holding of the First Circuit, *United States v. Torres*, 541 F.3d 48 (2008), held that a juvenile conviction could be counted towards career offender status without consideration of the state's classification of the offense. Based on *Torres*, the district court correctly treated the defendant as a career offender. On appeal by the defendant, the First Circuit reversed its holding in *Torres* and ruled that the manner in which a state classifies an offense is highly relevant to whether that offense can be treated as a predicate of career offender status. Because Massachusetts law makes a sharp distinction between juvenile and adult offenses, the defendant's juvenile crime could not properly support his designation as a career offender. The case was remanded for a determination whether the sentence should be altered or whether defendant's incorrect characterization as a career offender was harmless error.

United States v. Willings, 588 F.3d 56 (1st Cir. 2009). Defendant's prior conviction for escape from custody was determined to be a crime of violence under the career offender guideline, §4B1.1. The First Circuit based its conclusion on the findings that escape from custody, "like the exemplar crimes enumerated in the career offender guideline," is "roughly similar, in kind as well as in degree of risk posed" to those enumerated crimes (quoting *Begay v. United States*, 553 U.S. 137(2008)).

United States v. Almenas, 553 F.3d 27 (1st Cir. 2009). The defendant was convicted of selling crack cocaine, found to qualify as a career offender, and sentenced to a term of imprisonment that was 43 months below the bottom of the guidelines range. Affirming the district court's sentence, the court held that the defendant's Massachusetts misdemeanor conviction for resisting arrest was properly considered a predicate for the career offender enhancement. Although the defendant received a fine only for this conviction, the offense

proscribed by this statute is punishable by two and one-half years' imprisonment, and meets the definition of "prior felony conviction" under §4B1.2. It is a "crime of violence" because it creates a serious risk of physical injury to another, it poses an even greater risk than the offenses enumerated in §4B1.2(a)(2), and it involves purposeful, violent, and aggressive conduct.

See United States v. Boardman, 528 F.3d 86 (1st Cir. 2008), Section I.

United States v. Giggey, 551 F.3d 27 (1st Cir. 2008) (en banc). Non-residential burglary is not *per se* a "crime of violence" under the career offender guideline. Abrogating its prior opinion to the contrary—*United States v. Sawyer*, 144 F.3d 191 (1st Cir. 1998)—the court said: "We now reverse course and hold that a prior conviction for burglary not of a dwelling is not per se a 'crime of violence.' We hold that whether a prior conviction for non-residential burglary is a 'crime of violence' turns on the application of a categorical approach under §4B1.2(a)(2)'s residual clause." The court remanded to the district court in order to apply the categorical approach, perform *Begay*'s comparative-degree-of-risk and similarity-in-kind analyses, and decide whether or not the defendant's Maine burglary conviction constitutes a "crime of violence."

United States v. Brown, 500 F.3d 48 (1st Cir. 2007). In a matter of first impression, the First Circuit concluded that a prior conviction for attempted possession of a controlled substance was a predicate "felony drug offense" under the sentencing enhancement provisions of the Controlled Substances Act.

United States v. Delgado, 288 F.3d 49 (1st Cir. 2002). The district court did not err in relying on a police report relating to prior state court conviction to determine that the state charge of breaking and entering was a "crime of violence" for purposes of the career offender guideline. Under §4B1.2, a crime of violence includes a felony burglary of a dwelling and, although the district court recognized that the police report may not be reliable in all respects, it was reliable with respect to where the breaking and entering took place, in this instance a dwelling.

United States v. Fernandez, 121 F.3d 777 (1st Cir. 1997). The district court did not err in concluding that the defendant's prior conviction for assault and battery on a police officer qualified as a predicate crime of violence for career offender purposes. Although the defendant argued that, under Massachusetts law, the crime can include both violent and non-violent variants, the court of appeals held that the offense usually involves force against another, and "requires purposeful and unwelcomed contact with a person the defendant knows to be a law enforcement officer [on duty]." The fact that violence and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer was sufficient to make the crime, categorically, a crime of violence. *See also United States v. Glover*, 558 F.3d 71 (1st Cir. 2009) (holding, post-*Begay* and post-*James*, that conviction for Massachusetts assault and battery with a dangerous weapon constitutes a predicate crime of violence for career offender purposes).

United States v. Santos, 131 F.3d 16 (1st Cir. 1997). The district court was correct in concluding that the defendant's act in sending a threatening letter to the President of the United States was a crime of violence for career offender purposes. The court of appeals noted that the offense has as an element the threatened use of physical force against another and held that it was irrelevant that the defendant either did not intend to carry out the threat or lacked the ability to do so.

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

United States v. Ramirez, 708 F.3d 295 (1st Cir. 2013). To determine whether a defendant's prior crime qualifies as a crime of violence, the First Circuit takes a categorical approach, with a focus on the legal definition of the crime and not the defendant's particular conduct in committing the offense. The court first identifies the offense of conviction and looks to see whether the statutory definition of that offense meets the requirements of a "crime of violence" under §4B1.2(a). Because burglary of a dwelling under Florida law has no element related to the threat or use of physical force, it does not qualify as a crime of violence under §4B1.2(a)(1). The inclusion of "curtilage" makes Florida's definition of burglary of a dwelling broader than the generic meaning of burglary of a dwelling under the guidelines, so it cannot be classified as a crime of violence under the enumerated "burglary of a dwelling" offense in §4B1.2(a)(2). However, the court holds that burglary of a dwelling under Florida law is similar in kind and in risk to the enumerated burglary of a dwelling offense, and therefore qualifies as a crime of violence under the §4B1.2 (a)(2) residual clause ("involves conduct that presents a serious potential risk of physical injury to another").

United States v. Jones, 700 F.3d 615 (1st Cir. 2012). It is "settled law" that all of the branches of Massachusetts's assault and battery on a police officer statute, including recklessness, qualify as crimes of violence under §4B1.2(a). Conduct punished under that statute must be "purposeful" and "knowing," and therefore qualifies as a predicate offense for career offender purposes.

See United States v. Delgado, 288 F.3d 49 (1st Cir. 2002), §4B1.1.

United States v. Dueno, 171 F.3d 3 (1st Cir. 1999). The district court erred in counting as a career offender predicate the defendant's prior conviction for breaking and entering. The statute defining the offense made it a crime to "in the night time, break[ing] and enter[ing] a building, ship, vessel, or vehicle, with intent to commit a felony." When a statute encompasses conduct that would constitute a crime of violence and conduct that would not, the court "may not hold a mini-trial on the particular facts underlying the prior offense in an effort to determine whether the defendant's conduct was violent," although it may "peek beneath the coverlet" to examine the indictment, complaint, and/or jury instructions. Here, it was not clear from the complaint whether the defendant entered a dwelling or a vehicle. Although the presentence report described the prior offense as an invasion into a home followed by vandalism, the description was based on a police report that was not part of the court file. Because the evidence was insufficient as a matter of law to support finding that the prior conviction constituted a crime of violence, the case was remanded.

United States v. Jenkins, 680 F.3d 101 (1st Cir. 2012). The court held that the generic definition of kidnapping contains three elements: (1) restraining another, (2) by unlawful means, and (3) an additional nefarious purpose beyond the mere restraint of the victim. The court considered the defendant's argument that his offense of conviction did not qualify as a violent crime because, under the state statute, it could be committed in a non-violent manner. The court held that as long as "an indictment charges the commission of a state offense having a definition that falls within the generic definition of an offense specifically named, it is irrelevant that the indictment may be proven by one of the quieter alternative means of commission."

§4B1.4 Armed Career Criminal

United States v. Pratt, 568 F.3d 11 (1st Cir. 2009). Following the Supreme Court's remand pursuant to its decision in *Chambers*, the court reversed its earlier decision that all escape crimes should be treated equally. Looking at the statutory elements of the defendant's offense, the charging documents, the terms of his plea agreement, and the transcript of his plea colloquy, the court determined that the defendant's escape was not a failure-to-report crime, but an escape from secure custody. He had crawled under a fence at a county jail. The court joined a number of other circuits in determining, post-*Chambers*, that "escape from secure custody is a violent felony within the meaning of the ACCA."

United States v. Sanchez-Ramirez, 570 F.3d 75 (1st Cir. 2009). The court held that the defendant's prior Florida third-degree burglary convictions were "violent felonies" pursuant to the Armed Career Criminal Act. Applying the categorical approach, the court determined that the defendant's burglary of unoccupied churches "otherwise involve[d] conduct that presents a serious potential of physical injury to another." According to the court, the same dangers inherent in attempted burglary of a dwelling—specifically "the possibility of confrontation with police or bystanders who might investigate"—were present in the defendant's burglary convictions. *See also United States v. Pakala*, 568 F.3d 47 (1st Cir. 2009) (holding that the defendant's prior Florida conviction for third-degree burglary fit within the residual clause of the ACCA, and concluding that although the statute includes the burglary of the curtilage of a structure, burglary of such an area "presents a serious potential risk of physical injury to another").

United States v. Fortes, 141 F.3d 1 (1st Cir. 1998). Possession of a sawed-off shotgun is a "violent felony," for purposes of the Armed Career Criminal Act. The court of appeals held that although possession of a firearm by a felon is not a violent felony, certain specialized weapons, such as silencers, machine guns, and sawed-off shotguns, have been found by Congress to be inherently dangerous and lacking in lawful purpose. The court relied on analogies to the career offender guideline's definition of "crime of violence."

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Zayas, 568 F.3d 43 (1st Cir. 2009). The court rejected the defendant's argument that the district court was prohibited from making judicial fact-findings that rendered him ineligible for safety valve relief. The court held that the "refusal to reduce a statutory sentence based on judicial factfinding does not violate the Sixth Amendment."

United States v. Hunt, 503 F.3d 34 (1st Cir. 2007). Affirming the district court's denial of the safety valve, the First Circuit stated: "We, like the district court, recognize that following the Sentencing Guidelines in this case effected a harsh result. A span of only four months prevented Hunt's qualification for the safety valve provision. We have no authority, however, to bypass the plain command of the safety valve provision, 18 U.S.C. § 3553(f)(1), that an offender can have, at most, a single criminal history point in order to qualify and that the point must be 'determined under the sentencing guidelines.' The 'limitations' in U.S.S.G. § 4A1.3 are not mere suggestions, and *Booker* did not render the calculation of criminal history points for this purpose discretionary. Consequently, Hunt had two criminal history points under the Sentencing Guidelines, which precluded the district court from granting Hunt the benefit of the safety valve."

United States v. Marquez, 280 F.3d 19 (1st Cir. 2002). The defendant challenged the district court's failure to grant him a reduction under the safety valve. The district court had found that although the defendant had met the first four criteria, his proffer had been insufficient to satisfy the fifth requirement that he truthfully provide to the government all information and evidence relating to the offense. The First Circuit affirmed, holding that the government does not need to produce rebuttal evidence in order for the district court to find that the defendant had not been fully forthcoming. Rather, a "sentencing court may reject a safety valve proffer based on its reasoned assessment of the defendant's credibility in light of the facts – and [ ] the court may do so without the benefit of independent rebuttal evidence." In addition, the court rejected the defendant's argument that the safety valve reduction can only be denied if the withheld information is "material." The court noted that the safety valve requires the defendant to provide "'all' information to the government."

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court erred when it refused to sentence the defendant under the safety valve provision. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. Despite the fact that the defendant satisfied the qualifying criteria in §5C1.2, the district court refused to impose the safety valve on grounds that the plea agreement, which prohibited "'adjustments to the [] offense level'" beyond those "expressly delineated in the [a]greement," prohibited such application. In reversing this decision, the court found that the agreement, which addresses adjustments, does not preclude the use of the safety valve. While adjustments under Chapter Three of the *Guidelines Manual* address offense levels, Chapter Five consists of "other provisions that guide the ultimate sentencing determination." It remanded the case for resentencing, stating that because "the safety valve is a congressional directive, [t]he court

cannot reject it on equitable grounds, but must sift through the statutory criteria and, if it determines that those criteria have not been met, must elucidate specific reasons why the provision does not apply."

United States v. Woods, 210 F.3d 70 (1st Cir. 2000). The district court did not clearly err when it denied the defendant's safety valve request under §5C1.2 on grounds that the defendant did not "truthfully provide [] to the Government all information and evidence . . . concerning the offense." The defendant was convicted of attempting and conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Affirming the decision, the court found that the defendant's history of involvement in drug conspiracies, including weekly cocaine sales of 5,000 kilograms, reasonably implied that the defendant knew more information than he disclosed, such as the identities of other participants in the drug distributions.[10]

United States v. Jimenez Martinez, 83 F.3d 488 (1st Cir. 1996). The First Circuit, in an issue of first impression, held that the safety valve requires the defendant to provide information to the prosecutor, not to the probation officer. The district court denied the defendant the safety valve because he did not provide information to the "Government" as required under §5C1.2(5). The defendant appealed, arguing that his disclosure to the probation office satisfied the requirement of "providing information to the Government." The circuit court concluded that the "Government" in §5C1.2(5) and § 3553(f)(5) refers to the prosecuting authority rather than the probation office. The circuit court noted that §5C1.2 is properly understood in conjunction with §5K1.1, and "it seems evident that section 5K1.1's reference to the 'government' and to 'substantial assistance in the investigation or prosecution of another person' contemplates the defendant's provision of information useful in criminal prosecutions." The court added that the legislative history of §5C1.2 requires disclosure of information that would aid prosecutors' investigative work. The circuit court noted that while full disclosure to the probation officer may assist the officer in preparing the defendant's presentence report, the probation officer does not create a presentence report with an eye to future prosecutions or investigations.

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision; however, the district court did err in concluding that §5C1.2 requires the defendant to offer himself for debriefing in order to satisfy the requirement that the defendant truthfully provide to the government all information and evidence that he possessed. In this case, the defendant pled guilty to conspiracy to distribute drugs and to five substantive counts of possession with intent to distribute. In denying the defendant's request for a safety valve reduction, the district court ruled that Congress had intended the safety valve for defendants who tried to cooperate by being debriefed by the government. On appeal, the defendant argued that no debriefing requirement exists. Agreeing with the defendant, the court noted that nothing in 18 U.S.C. § 3553(f) specifies the form or place or manner of the disclosure. However, because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and

[10] The defendant also argued that the district court should have sentenced him based on two kilograms of cocaine, the amount he had intended to purchase, and not four kilograms, which the undercover officer urged him to buy. The court found that this single transaction did not represent an "extreme and unusual case" of sentencing factor manipulation. The transaction involved a reasonable market price, the undercover agents did not pressure the defendant or show any indication of an illegitimate motive, and the defendant was a seasoned drug dealer.

evidence to the government, the defendant who declines to offer himself for a debriefing takes a very dangerous course. When a defendant's written disclosure is drawn almost verbatim from a government affidavit, nothing prevents the government from pointing out suspicious omissions or the district court from deciding, as it did in this case, that it is unpersuaded of full disclosure.

United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995). The defendant contended that by unwittingly being recorded by an undercover agent while discussing his plans to distribute cocaine and admitting the allegations by pleading guilty, he has satisfied the truthfulness requirement of 18 U.S.C. § 3553(f). The circuit court rejected the defendant's argument, holding that "a defendant has not 'provided' to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversation conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation." In addition, the circuit court held that the requirement is not satisfied merely because a defendant pleads guilty.

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Riggs, 347 F.3d 17 (1st Cir. 2003). The First Circuit held that the government did not breach a plea agreement by recommending a term of imprisonment at the high end of the sentencing range and that the district court's imposition of five years of supervised release did not exceed the range. The defendant first argued that the government breached the plea agreement by suggesting defendant receive the maximum sentence after it agreed to recommend a sentence based on an agreed upon drug quantity. The court noted that while the government's recommendation was at the high end of the range, it was within the guidelines for the agreed drug quantity and did not violate the plea agreement. Second, because no drug quantity was alleged in the indictment or determined by the court beyond a reasonable doubt, the defendant claimed he could not receive greater than the maximum supervised release for an unspecified quantity of cocaine under 21 U.S.C. § 841(b)(1)(C) – two to three years. *See* §5D1.2(a)(2) (providing a term of supervised release for a Class C felony shall be "at least two years but not more than three years"). Instead, the court noted, the defendant pled guilty to possession of between 35 and 49 grams of cocaine, making it a 21 U.S.C. § 841(b)(1)(B) offense, which is a class B felony under the guidelines. As such, §5D1.2(a)(1) became the applicable guideline, which calls for "at least three years but not more than five years" of supervised release. Accordingly, the district court's imposition of a five-year term did not exceed the guideline range.

§5D1.3 Conditions of Supervised Release

United States v. Morales-Cruz, 712 F.3d 71 (1st Cir. 2013). There are limitations on a district court's power to fashion conditions of supervised release; the critical test is whether the condition is reasonably related to one or more of the goals of supervised release. In this case, the district court made that link in imposing sex offender treatment conditions where the instant offense was a failure to register under SORNA. SORNA registration serves a purpose: to protect the community from the risks posed by convicted sex offenders by requiring registration and then by providing notification. Given the defendant's manifest lack of respect for the SORNA

registration requirements, and the reasonable inference that his refusal to comply with these requirements poses a risk of recidivism, the district court's imposition of sex-offender treatment was reasonably related to defendant's present offense as well as to his criminal history, which included a recent assault on an adult female. There was no abuse of discretion.

United States v. Sebastian, 612 F.3d 47 (1st Cir. 2010). The defendant, convicted of leading a conspiracy to distribute cocaine, was sentenced to 193 months' imprisonment and a ten year term of supervised release. As a condition of supervised release, the trial court imposed a special condition that the defendant participate in a sex-offender treatment program due to a previous conviction for a sexual assault. Defendant appealed and argued that there was not a reasonable relation between the instant conviction and the requirement that he participate in a sex-offender treatment program. The First Circuit ruled that the fact that a condition of supervised release is not directly related to the crime of conviction does not necessarily render the condition invalid. The First Circuit also concluded, citing research about the risk of recidivism posed by sex offenders, that the condition imposed by the trial court was not unreasonable.

United States v. Perazza-Mercado, 553 F.3d 65 (1st Cir. 2009). In ordering conditions of supervised release, the district court erred by imposing a total ban on home internet use and by failing to explain its total ban on pornography. The defendant, an educational technician for the Department of Defense who supervised special needs students, was convicted of unlawful sexual contact with a minor. The district court banned all home internet use by the defendant, and prohibited him from possessing any pornography. As a matter of first impression, the court held that the restrictions were too broad and not supported by the evidence, and remanded for resentencing. The court noted that while the guidelines "do not require a direct relationship between the offense and the condition" of supervision, they do require courts to consider the relationship between the condition and the defendant's history and characteristics, as well as whether the condition deprives a defendant "of more liberty than is reasonably necessary to achieve the goals that the statute describes." Also important to its decision was a determination that supervised release conditions are "supposed to advance the rehabilitation of the defendant."[11]

United States v. Brown, 235 F.3d 2 (1st Cir. 2000). The district court did not commit plain error when it required the defendant to abstain from consuming alcohol as a condition of his supervised release under §5D1.3. Holding that advance notice is not necessary if the condition is one which falls within the range of standard conditions articulated in the guidelines, the court ruled that the condition imposed by the district court was merely an extension of §5D1.3(c)(7), which prohibits excessive drinking. The court then rejected the defendant's argument that the record revealed no reasonable rationale for imposing the condition. Several circuits have recognized that the "critical test is whether the challenged condition is sufficiently

[11] There is a circuit split on this issue. "Two circuits have held in circumstances similar to those presented here that such a ban is impermissible. *See United States v. Perazza-Mercado,* 553 F.3d 65, 75–79 (1st Cir.2009); *United States v. Voelker,* 489 F.3d 139, 150–53 (3d Cir.2007). However, at least one circuit has reached a different conclusion. *See United States v. Bee,* 162 F.3d 1232, 1234–35 (9th Cir.1998)." *United States v. Mike*, 632 F.3d 686, 700 (10th Cir. 2011).

related to one or more of the permissible goals of supervised release." The defendant's criminal record, which included several alcohol-related offenses, showed not only that the defendant had a longstanding history of alcohol abuse, but also that alcohol played a significant role in the commission of his prior offenses, reflecting the defendant's tendency to commit crimes while intoxicated. Furthermore, the district court's finding that the defendant became a drug dealer to support his addiction suggested that the condition might serve as a deterrent from future criminal activity.

United States v. Merric, 166 F.3d 406 (1st Cir. 1999). The district court did not err in imposing as a condition of supervised release a requirement that the defendant repay the government $3,000 in counsel fees paid for his representation. The condition is "reasonably related" to deterrence, which is a statutory consideration required by Congress. The defendant can afford to pay. The condition is consistent with the guidelines because §5D1.3 contains numerous repayment provisions, and although the Commission did not include payment of counsel fees as a standard condition of supervised release, the guideline does state that the court may impose other conditions consistent with 18 U.S.C. § 3583(d).

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Salas-Fernandez, 620 F.3d 45 (1st Cir. 2010). Defendant pled guilty to armed robbery and firearms offenses. His plea agreement was silent as to the amount of restitution to be imposed. The trial court accepted the probation officer's recommendation in the PSR that restitution in the amount of $944,225 should be apportioned equally among the defendant and five accomplices. The defendant raised no objection to the restitution award at the time of sentencing but, on appeal, contended that the restitution award was invalid because it was not apportioned with respect to the relative culpability of the co-defendants. The First Circuit affirmed the restitution order and stated that a sentencing court is not required to consider an individual's role in the offense when awarding restitution.

United States v. D'Andrea, 107 F.3d 949 (1st Cir. 1997). The district court did not err in assessing restitution against the defendant in the amount of $2.2 million, despite the defendant's claimed inability to pay. A sentencing court must consider the following factors in assessing restitution: amount of loss sustained by the victim; the financial resources of the defendant; the financial needs and earning ability of the defendant; the defendant's dependents; and such other factors as the court deems appropriate. Despite the sentencing court's skepticism as to the defendant's ability to make restitution payments, the restitution order is valid. There is no requirement that the defendant be found to have an ability to repay the amount ordered. Instead, there must only be an indication that the sentencing court considered all of the relevant factors in making its determination.

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996). The district court erred in ordering the defendant to make restitution to banks whose loss, although caused by the defendant, was not caused by the specific conduct that was the basis of the offense of conviction. The defendant was convicted of conspiring to make false statements on 21 loan applications to three FDIC-insured financial institutions. Several additional banks, however, had been defrauded during the

course of the defendant's criminal conduct. At sentencing, the district court noted that in 1990 Congress broadened the definition of "victim" in the Victim and Witness Protection Act ("VWPA") to include "any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Applying 18 U.S.C. § 3663(a)(2), the district court ordered the defendant to make restitution to all of the banks defrauded as a result of the criminal conduct. On appeal, the court noted that the retroactive application of 18 U.S.C. § 3663(a)(2) violated the Ex Post Facto Clause. In so holding, the court aligned itself with the appellate courts that have already addressed the issue (the Eleventh and Sixth Circuits).

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996). In considering this issue of first impression, the district court did not err in applying the 1990 amendments to the Victim and Witness Protection Act, which provide that "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." This amendment replaced prior court rulings which had limited restitution to "loss caused by the specific conduct that was the basis of the offense of conviction." The court required the defendant to make restitution payments to computer companies which were not listed as defrauded in the indictment, but whose contact with the defendant occurred during the same period and in the same manner as the fraud for which the defendant was convicted. The circuit court rejected the defendant's argument that the instance of fraud not contained in the indictment did not fit within the "specifically defined" scheme for which he was responsible. The courts of appeals have consistently upheld restitutionary sentences based on "evidence sufficient to enable the sentencing court to demarcate the scheme, including its 'mechanics . . . the location of the operation, the duration of the criminal activity and the methods used' to effect it." (citation omitted). The determination as to whether there exists a unitary scheme should be based on the "totality of the circumstances." Undisputed evidence supported a finding in this case that the defendant undertook to defraud multiple computer companies by renting several drop boxes, placing all orders within a two-week period, using interstate wires and paying for the goods with counterfeit instruments in each case.

Part G Implementing The Total Sentence of Imprisonment

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

See United States v. Caldwell, 358 F.3d 138 (1st Cir. 2004), §4A1.2.

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court did not double count under §5G1.3(c). The defendant was convicted in a Massachusetts state court for crimes committed there while fleeing police after robbing a New Hampshire bank. He was later convicted of federal charges of bank robbery, use of a firearm in a crime of violence, possession of a firearm by a prohibited person, interstate transportation of stolen property, and interstate transportation of a stolen vehicle, all stemming from the same incident. The defendant argued that comments made by the state court judge showed that the state court held him accountable for conduct on which federal sentencing enhancements were based, violating §5G1.3's goal of preventing duplicative penalties. Finding the state court's comments to be "oblique and ambiguous at best," the court ruled that the state court did not sentence defendant for any

conduct outside the scope of the state convictions. Therefore, because the state had not already punished the defendant for conduct the federal sentence had fully taken into account, there was no risk of duplicative punishment in violation of §5G1.3.

Part H Specific Offender Characteristics

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

United States v. Prosperi, 686 F.3d 32 (1st Cir. 2012). Upholding sentences of six months home monitoring, 1,000 hours of community service, and three years of probation against a guideline range of 87 to 108 months. The district court emphasized that its finding on the amount of loss caused by the crimes, the most significant factor in determining the guideline range, was imprecise and did not fairly reflect the defendants' culpability. In addition, the defendants did not profit from their misconduct nor create a significant safety hazard. These "critical findings" were supplemented with considerations of individual circumstances supporting probationary sentences. In light of these findings, the district court did not abuse its discretion.

United States v. Mejia, 309 F.3d 67 (1st Cir. 2002). The district court did not err in refusing to grant the defendant a downward departure on the grounds that his motivation for committing the crime of illegal reentry was to care for his daughter. The appellate court found that the defendant's "motivation" argument was semantically and practically equivalent to a motion based on family ties and responsibilities. Nothing in §5H1.6 suggests that family ties and responsibilities is a discouraged factor only with respect to assessing the consequences of defendant's incarceration; it also is discouraged with respect to assessing the culpability for a crime.

Part K Departures

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

United States v. Pacheco, 727 F.3d 41 (1st Cir. 2013). Where the government filed notice shortly before sentencing that it would not file a § 5K1.1 motion, denial of defendant's motion to continue was not an abuse of discretion. Absent a government motion, no amount of additional information obtained by the defendant could have allowed the court to grant a substantial assistance departure. Defendant's sentencing memorandum arguing for a variance was considered at sentencing.

United States v. Landron-Class, 696 F.3d 62 (1st Cir. 2012). In determining the appropriate sentence within the guidelines, or in varying from the guidelines, a sentencing court has discretion to consider the defendant's cooperation with the government as a § 3553(a) factor, even if the government has not made a §5K1.1 motion for a downward departure.

United States v. Poland, 562 F.3d 35 (1st Cir. 2009). The defendant successfully cooperated post-sentencing and sought a sentence below the government's recommended reduction, under Federal Rule of Criminal Procedure 35(b), from 63 to 48 months. He based his request on all factors in 18 U.S.C. § 3553(a). The district court concluded that a reduction to a term of 40 months in prison properly accounted for the defendant's cooperation, found that it did

not have authority to grant a further reduction based on § 3553(a) factors, but noted that if it did have such authority, a term of 30 months in prison would be appropriate in light of the disparity between the defendant's sentence and his cousin's sentence. The defendant appealed the Rule 35 order, arguing that the district court erred in finding that it did not have authority to consider the sentence disparity in reducing the defendant's sentence. The court affirmed the district court's conclusion, holding that Rule 35(b) does not permit a district court to consider factors other than the defendant's cooperation when reducing a sentence below a statutory mandatory minimum based on a government motion under this rule. The court considered the history of the rule and of §5K1.1, and construed Rule 35(b) in conformity with 18 U.S.C. § 3553(e), which limits reductions below mandatory minimums to those imposed "so as to reflect a defendant's substantial assistance."

United States v. Mills, 329 F.3d 24 (1st Cir. 2003). The First Circuit vacated a sentence of 18 years for racketeering after the government recommended a sentence of ten years in its §5K1.1 motion. At sentencing, the district court declined to follow the parties' sentencing recommendations in light of the defendant's involvement in several murders and his leadership role in a dangerous, violent enterprise. It explained its refusal to depart, concluding that "I treat murder different. I think that's the appropriate judgment of society." The First Circuit concluded that the district court's use of a self-imposed sentencing practice in evaluating a substantial assistance motion presented the possibility, if not the likelihood, that the mandate of §5K1.1 to conduct an individualized evaluation could have been violated. The court held that while the district court did not explicitly say that it would never depart where the defendant was guilty of murder conspiracy, the court felt that it was unable to determine whether the district court engaged in an appropriate §5K1.1 individualized evaluation.

United States v. Doe, 170 F.3d 223 (1st Cir. 1999). The district court denied the defendant's request for specific performance of a plea agreement, which provided that the government had "sole discretion" over whether to file a motion for a downward departure based on substantial assistance in two cases. The government agreed to recommend a downward departure in two cases - a 1995 drug case and a later indictment - if the defendant provided substantial assistance. The plea agreement stated that the government would have "sole discretion" on whether to file a motion and "the defendant's failure to 'make a case' shall not relieve the government of exercising its discretion" under Fed. R. Crim. P. 35(b) or §5K1.1. The First Circuit found that the defendant could not show "bad faith" and, in the case not under consideration by the appellate court, the district court found that the defendant did not provide substantial assistance.

United States v. Torres, 33 F.3d 130 (1st Cir. 1994). The circuit court rejected the defendant's equal protection challenge to the substantial assistance rubric under 18 U.S.C. § 3553(e) and §5K1.1. The First Circuit concluded that the fact that a low-level drug offender with little substantial assistance to offer may receive a higher sentence than a high-level drug dealer who has plenty of information to trade does not render the substantial assistance departure unconstitutional. Rather, the equal protection challenge is easily defeated because the government's interest in offering leniency in exchange for useful information is rationally based. The circuit court also rejected the defendant's claim that the substantial assistance departure conflicts with Congress's objective of achieving fairness in sentencing because Congress had

objectives other than fairness in sentencing. The circuit court added that an argument not raised but worth noting is whether limiting substantial assistance under §5K1.1 as only that assistance that results in further arrests or prosecutions is too narrow and should include "good faith" efforts to assist.

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

United States v. Marsh, 561 F.3d 81 (1st Cir. 2009). The First Circuit affirmed as reasonable a one-year upward departure from the mandatory minimum penalty of ten years in prison for crack cocaine distribution. The departure was based on conduct underlying certain state-court convictions that had been vacated less than two weeks before the federal sentencing. The defendant argued that the district court incorrectly applied §5K2.0 to account for under-representation of past criminal conduct. At sentencing, the district court stated that it would impose the same sentence under 18 U.S.C. 3553(a). Accordingly, the First Circuit found that any alleged procedural error would not have affected the court's sentence.

United States v. Bogdan, 284 F.3d 324 (1st Cir. 2002). The district court had granted the defendant a downward departure based on a combination of factors–the defendant's role as a father, his efforts to make amends with his ex-wife, his introspection and the appreciation he had shown for his wrongful conduct. The government appealed and the First Circuit reversed. The First Circuit noted that the defendant's parental role and efforts to make amends with his ex-wife fell within the category of family ties, which is a discouraged factor under the guidelines. In addition, the defendant's introspection and appreciation for his criminality had been taken into account by the acceptance of responsibility credit. Since all of the factors upon which the district court relied were either discouraged or taken into account by the guidelines, a departure on these grounds could only be justified if the factors were present, either individually or in combination, in some exceptional degree. The court found that in this case they were not.

United States v. Louis, 300 F.3d 78 (1st Cir. 2002). The district court did not err in refusing to grant a departure based on the defendant's family ties and responsibilities. The defendant had argued that because his son was biracial, it was important for the parent of color to be present and involved in the son's life. The appellate court found that the hardship that would be visited on the defendant's family by virtue of his incarceration would not match the hardship suffered by other families in cases where no departure was granted. The defendant's family ties and circumstances simply did not remove his case from the "heartland."

United States v. Sachdev, 279 F.3d 25 (1st Cir. 2002). The First Circuit affirmed the district court's refusal to downwardly depart on the basis of duress, rejecting the defendant's claim that he was in physical danger. The defendant had claimed that he had committed the offense (cashing bad checks) because he had felt threatened to repay money invested by a former friend in his business. The First Circuit held that the guidelines ordinarily require a threat of physical harm, and the district court had found that no such explicit threats had been made. It explained that, in assessing whether implicit threats were made, a court should consider (1) the actual intent of the threat-maker; (2) the subjective understanding of the defendant; and (3) whether as an objective matter a person in defendant's position would reasonably consider the act/statement to be a serious threat of physical injury (or other type of threat recognized by

§5K2.12). In addition, the defendant must have committed the offense "because of" the coercion, blackmail or duress.

United States v. Vasquez, 279 F.3d 77 (1st Cir. 2002). The First Circuit upheld the district court's refusal to grant the defendant a downward departure based on the range of adverse collateral consequences he faced as a convicted alien (*e.g.*, ineligibility for prison boot camp and certain rehabilitative programs). Applying the principles enunciated in *Koon v. United States*, 518 U.S. 81 (1996), the First Circuit found that the only persons sentenced within §2L1.2, the applicable guideline, would be deportable aliens. As a result, it reasoned that the Sentencing Commission "must have taken into account not only the immigration status of prospective offenders but also the collateral consequences that would flow from that status within the federal prison system." Accordingly, consequences such as those faced by the defendant could not remove the case from the heartland.

United States v. Craven, 239 F.3d 91 (1st Cir. 2001). The First Circuit held that the district court erred when it departed downward under §5K2.0 for extraordinary presentence rehabilitation based in large part on an *ex parte* conversation with a court-appointed expert. The court ruled that an *ex parte* conversation with a court-appointed expert could not be used to obtain critical information relied upon in determining a sentence, stating that the district court "must either (1) make a written request for a supplemental report" which it must provide to all parties pursuant to 18 U.S.C. § 3552(d), "or (2) bring the expert into court to be questioned in the presence of the parties." The court further determined that because the *ex parte* conversation tainted the basis of the departure decision, the court could not decide whether the departure was warranted. Furthermore, the district court summary of the conversation was the only available record of the conversation. Finally, applying Seventh Circuit rationale, the court held that a different judge should re-sentence the defendant because it would be too difficult for the current judge to maintain an appearance of impartiality and disregard the information she had received during the *ex parte* conversation. Accordingly, the First Circuit annulled the departure, vacated the sentence, and remanded for resentencing before a different judge.

United States v. Padro Burgos, 239 F.3d 72 (1st Cir. 2001). The First Circuit affirmed the district court's decision not to depart downward, rejecting the defendant's claim that the district court did not know that it had authority to depart downward to resolve the disparity between the life sentence imposed and the quantity-based sentence he would have received had no deaths occurred. The defendant had been convicted of conspiracy to distribute drugs and of using a firearm in relation to a crime of violence. The court sentenced the defendant to life imprisonment under §2D1.1(d)(1), which requires the application of the First Degree Murder guideline (§2A1.1) when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. Finding no evidence to show either that the district court was unaware that it had authority to depart or that it would have preferred to depart, the court rejected the defendant's argument and affirmed the life sentence. It found that the district court demonstrated no reluctance to impose a life sentence, noting that the district court had commented that the life sentence would "serve both as a punitive factor against this defendant and as a deterring factor to those . . . that lack respect for life and for the law[]."

United States v. Pereira, 272 F.3d 76 (1st Cir. 2001). The First Circuit reversed a downward departure based on extraordinary family circumstances, finding that the defendant's care of his elderly parents was not "irreplaceable." The court found that "[a]s long as there are feasible alternatives of care that are relatively comparable to what the defendant provides, the defendant cannot be irreplaceable," and "[g]iven the network of friends and family to care for [the] parents in his absence, we find nothing extraordinary or exceptional about [his] family circumstances."

United States v. Amirault, 224 F.3d 9 (1st Cir. 2000). The district court did not err when it departed upward under §5K2.0 after the defendant pled guilty to possessing items containing visual depictions of minors engaged in sexually explicit conduct. Drawing an analogy to §2G2.2(b)(4), which provides for an increase in offense level if the defendant participates in a pattern of conduct involving sexual abuse of minors, the district court departed upward because the defendant had sexually assaulted his minor sisters-in-law 20 years earlier. The court rejected the defendant's argument that the guidelines prohibited departures based on analogies to other guidelines, and found that there is no temporal limit to the use of misconduct for enhancement purposes. It stated: "[U]pward departures are allowed for acts of misconduct not resulting in conviction, as long as those acts . . . relate meaningfully to the offense of conviction." The First Circuit also found that the departure was not an *ex post facto* violation, despite the fact that the conduct occurred before either possession of child pornography became a federal crime or the sentencing guidelines were enacted, because the enhancement punished the current crime of possession of child pornography.

United States v. Brennick, 134 F.3d 10 (1st Cir. 1998). The district court departed downward in sentencing the defendant for failure to pay to the government his employees' wage and social security taxes. The court of appeals held that the first reason cited by the district court for departure, the defendant's intent to eventually pay the taxes, could take the case out of the heartland of the tax evasion guideline. Because usually a tax evader intends to deprive the government of the taxes owed, the defendant's apparent intent only to delay payment was not typical of the heartland case of tax evasion. The second reason cited, however, that the tax loss to the government overstated the seriousness of the offense because the losses were due to multiple causes, was not a proper basis for departure. The district court "borrowed" this departure factor from the fraud guideline, but the court of appeals held the factor was inappropriate. The court of appeals remanded for the district court to explain more adequately the decision to depart and extent of departure.

United States v. Snyder, 136 F.3d 65 (1st Cir. 1998). The district court erred in departing downward based on the disparity between the sentence the defendant would have received if convicted under state law and the sentence mandated under the Armed Career Criminal guideline. The court of appeals held that the disparity was not a mitigating circumstance that took the case out of the heartland of armed career criminal cases. Moreover, it found that the district court's concern for the unreviewable discretion of the United States Attorney in prosecuting the matter in federal court (when it is proscribed by both state and federal law) was not a valid basis for departure.

United States v. Twitty, 104 F.3d 1 (1st Cir. 1997). The First Circuit upheld the district court's upward departure based on the large number of guns involved in the offense and the endangerment to public safety. Agreeing with the finding that this was an unusual case falling outside the "heartland," the appellate court found that the sentencing court was in a superior position to determine whether the defendant's responsibility for putting more than 225 handguns with obliterated serial numbers onto the street warranted a more severe penalty than that called for under the enhanced guidelines range. It also rejected the defendant's argument that a penalty for endangerment to public safety was inherent in the guidelines and accounted for by the enhancement provisions, so that imposing an additional departure was "double dipping."

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996). The district court did not err in granting an upward departure based upon either the defendant's criminal history involving similar offenses or the type of weapons involved in the offense. With respect to 'defendant's prior criminal activity, §4A1.3 specifically encourages upward departures based on reliable information that a defendant previously engaged in prior similar adult criminal conduct not resulting in a conviction. Given the defendant's recent, persistent and escalating record of violent behavior, the appellate court found it was not an abuse of discretion for the sentencing court to depart upward. In reaching this conclusion, the circuit court rejected the argument that the Commission's decision against making weapon type a specific offense characteristic under §2K2.1 precluded a judicial finding that some types of weapons are more dangerous than others. In this particular case, the use and indiscriminate disposal of multiple weapons elevated the dangerousness of the offense, in keeping with the fact that heightened dangerousness occasioned by the usage and indiscriminate abandonment of the firearms is an encouraged factor for departure. Because this departure was based on both §§4A1.3 and 5K2.0, the court upheld it as a justified unguided departure.

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996). The district court erred in holding that the loss of jobs to innocent employees occasioned by defendants' imprisonment was categorically excluded as a basis for departure by §5H1.2, which lists "vocational skills" as a discouraged factor for consideration in the departure decision. The First Circuit discussed the Supreme Court's reasoning in *Koon v. United States*, 518 U.S. 81 (1996), which noted that if a special factor under consideration is a discouraged factor, the court should depart only if the factor is present to an exceptional degree or if the case in some way differs from the ordinary case. Further, the circuit court disagreed with the government's argument that the loss of employment to innocent employees fell within the meaning of "vocational skills." Given these conclusions and the court's desire to allow the parties to produce qualitative and quantitative evidence which may have been precluded by the district court's categorical approach, the case was remanded for further findings.

United States v. Morrison, 46 F.3d 127 (1st Cir. 1995). The First Circuit affirmed the district court's decision not to depart, rejecting the defendant's argument that he was not a typical career offender and his criminal history category over-represented his criminal history. He argued that the offense of conviction, a robbery, should be merged with one of the predicate offenses, because they were part of a "downward spiral" brought on by alcohol abuse and depression. He argued that the district court mistakenly believed that it did not have the authority to depart because it stated: "if I felt I had the authority to depart, I would." Rather than

considering "any single statement in a vacuum," the appellate court held that it should "consider the totality of the record and the sentencing court's actions reflected therein." Viewing the circumstances as a whole, it concluded that the district court knew that it had authority to depart, but chose not to exercise that power under the facts presented in the case.

United States v. Pierro, 32 F.3d 611 (1st Cir. 1994), abrogation on other grounds recognized by *United States v. Anonymous Defendant*, 629 F.3d 68, 73 (1st Cir. 2010) (all sentences under the advisory guidelines are open to reasonableness review, including discretionary departures or the extent of departure). The First Circuit affirmed the district court's decision not to depart downward after defendant was convicted of interstate transportation of stolen property and money laundering. First, it rejected the defendant's argument that the district court incorrectly believed it lacked the legal authority to depart. It also rejected the defendant's argument that the district court should have departed downward because the only reason he laundered money was to further his underlying crime and because his offense was impermissibly "double counted." The court found that the defendant was merely being punished for his offenses separately. Finally, the circuit court rejected the defendant's claim that the sentencing court should have departed downward because his sentence was disproportionate to those of his co-conspirators.

§5K2.2 Physical Injury (Policy Statement)

United States v. Sanders, 197 F.3d 568 (1st Cir. 1999). The district court did not err when it departed upward by 144 months under §5K2.2 based on significant personal injury to the victim. After shooting his girlfriend in the head, permanently disabling her, the defendant pled guilty to being a felon in possession of a firearm and of using of a firearm during a drug trafficking crime. As part of the plea agreement, the government did not pursue a state conviction for attempted murder. The defendant appealed the enhancement based on the absence of a full explanation and the unreasonable extent of the departure calculation, which significantly exceeded the mandatory minimum and nearly doubled the guideline maximum. Rejecting the defendant's arguments, the court ruled that attempted murder combined with serious physical harm to the victim warranted such a significant departure. Moreover, while the 324-month sentence far exceeded the 235-month maximum sentence for second degree murder, the court stated that the discrepancy only demonstrates that there are different methods of measuring departures. "The concepts of 'reasonable' departure and 'abuse of discretion' reflect the reality that there are often a set of permissible outcomes available to the district court." For example, one could argue that an analogy to the second degree murder guideline is too lenient because it does not account for the brutality of the defendant's actions, the victim's permanent injury, or the effect of her injuries on her family.[12]

[12] The defendant also argued that the 24-month increase at resentencing was unconstitutional. Despite a warning from the district court that it could result in a higher sentence, the defendant requested a resentencing after an intervening Supreme Court decision prompted the district court to vacate the defendant's conviction for using a firearm during a drug trafficking crime. Affirming the sentence, the court noted that "this and other courts have permitted a new sentence to be calculated after one element has been eliminated, without treating *parts* of the prior sentence as a limit on the new one."

§5K2.11 Lesser Harms (Policy Statement)

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996). The district court erred in concluding that §5H1.4 barred a downward departure under §5K2.11. The facts indicate that the defendant used marijuana to cope with depression and to prevent suicide. Although finding that a reduced sentence under §5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide, the district court believed that §5H1.4, which states that drug dependence is not a reason for a departure, precluded such a departure. The circuit court explained that §5K2.11 is set forth in a different part than §5H1.4, and §5H1.4 is not intended to negate departures set forth in Chapter Five, Part K. Noting that the avoidance of suicide, rather than the drug use itself, drives the application of §5K2.11, the circuit court stated that the interest in punishing drug manufacturing could be thought to be reduced in this case because the alternative to the defendant's drug use was suicide. The circuit court vacated the defendant's sentence and remanded for resentencing with the instruction that the defendant's sentence be reduced to the mandatory minimum of 60 months, instead of the 70-month guideline sentence.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Aker, 181 F.3d 167 (1st Cir. 1999). The district court erred in failing to state clearly the grounds for refusing to grant a downward departure based on diminished capacity. The First Circuit found the record confusing as to what standard the district court applied in denying the departure because it stated several times that a §5K2.13 departure was "discouraged" and certainly not "encouraged." Because it was uncertain what standard the district court applied, the case was remanded.

§5K2.20 Aberrant Behavior (Policy Statement)

United States v. Rivera-Rodriguez, 318 F.3d 268 (1st Cir. 2003). The First Circuit held that the district court correctly denied defendant's motion for a downward departure based on aberrant behavior reasoning that the defendant's money laundering scheme neither lacked significant planning nor was limited in duration.

CHAPTER SIX: SENTENCING PROCEDURES AND PLEA AGREEMENTS

Part A Sentencing Procedures

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

United States v. Claudio, 44 F.3d 10 (1st Cir. 1995). The district court did not abuse its discretion in refusing to postpone the defendant's scheduled sentencing to hear live medical testimony relating to his family circumstances. The district court later offered to accept at the sentencing hearing a proffer of what the absent medical expert's testimony would have been. The circuit court, citing *United States v. Tardiff*, 969 F.2d 1283, 1286 (1st Cir. 1992), reasoned that there is no automatic right to present live testimony at sentencing, and that "testing the value of proposed live testimony by proffer–especially where a postponement would be involved–accords with common practice and good sense." The circuit court concluded that none of the

defendant's arguments showed that the proffer was inadequate in conveying the substance of the medical testimony.

United States v. Garafano, 36 F.3d 133 (1st Cir. 1994). The First Circuit found that it was unclear whether the jury convicted the defendant of multiple briberies and the date of the conduct. Accordingly, it remanded the case, for sentencing purposes, for the trial court to make an independent assessment of the trial evidence to determine the amount and dates of the bribes.

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. Franquiz-Ortiz, 607 F.3d 280 (1st Cir. 2010). The defendant violated his supervised release. At the hearing to determine his penalty, the parties made a joint recommendation of 12-months imprisonment to the court. The court rejected the joint recommendation, which was above the guideline range, and imposed the statutory maximum sentence of 24 months imprisonment. The district court's explicit statement about the sentence did not sufficiently explain why the court imposed the maximum sentence and the circuit court was unable to infer the court's rationale from the record on appeal, which reflected on input from the probation officer, no sentencing memoranda, and no statements from the prosecutor at the sentencing. Because there was no discussion of any sentencing factor set out in 18 U.S.C. § 3583, the First Circuit concluded that it could not determine whether the sentence imposed was procedurally or substantively reasonable and remanded the case for resentencing.

United Sates v. Vixamar, 679 F.3d 22 (1st Cir. 2012). Upward departures from the Guidelines for revocation violations may be warranted if the original sentence for the original crime resulted from a downward departure.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

See United States v. Mardirosian, 602 F.3d 1 (1st Cir. 2010), §2B1.1.

CONSTITUTIONAL CHALLENGES

Due Process

See United States v. Ekasala, 596 F.3d 74 (1st Cir. 2010), §2D1.1.

Ex Post Facto

See United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994), §2L1.2.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3582

United States v. Rivera-Martinez, 665 F.3d 344 (1st Cir. 2011). The First Circuit held that the defendant was ineligible for a sentencing reduction under 18 U.S.C. § 3582(c)(2) because his Federal Rule of Criminal Procedure 11(c)(1)(C) (a "C-type") plea agreement did not identify a sentencing range agreed to by the parties. The First Circuit reasoned that the narrowest ground on which five justices agreed in *Freeman v. United* States, 131 S. Ct. 2685 (2011), was the exception articulated by Justice Sotomayor that a defendant is eligible for a sentencing reduction where his C-type agreement "expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered." Because the defendant's plea agreement did not contain an express sentencing range, the defendant was ineligible for a sentencing reduction.

See United States v. Cardosa, 606 F.3d 16 (1st Cir. 2010), §1B1.10.

18 U.S.C. § 3583

See United States v. Franquiz-Ortiz, 607 F.3d 280 (1st Cir. 2010), §7B1.3.

Fair Sentencing Act of 2010

U.S. v. Goncalves, 642 F.3d 245 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 596 (2011). The defendant was convicted under 21 U.S.C. § 841 which, at the time of his offense conduct, carried a mandatory minimum sentence of imprisonment for 20 years. He was sentenced on March 9, 2010. The Fair Sentencing Act of 2010, which reduced the mandatory minimum penalty for the amount of crack with which the defendant was associated, was signed into law on August 3, 2010. Defendant argued on appeal that the Fair Sentencing Act of 2010 should be applied retroactively to reduce his sentence. The First Circuit joined ten other circuits in ruling that the FSA may not be retroactively applied to persons sentenced before its enactment.

U.S. v. Douglas, 644 F.3d. 39 (1st Cir. 2011). The defendant pled guilty to distribution of more than 50 grams of crack in violation of 21 U.S.C. § 841(a). While the crime was committed in 2009, the Fair Sentencing Act of 2010, which created a new, less onerous mandatory minimum for the defendant's offense and mandated a less punitive modification of the U.S. Sentencing Guidelines, became law before the defendant was sentenced. At sentencing, the district court afforded the defendant the benefit of the reduced statutory maximum penalty. The government appealed on the basis that Congress had not expressly made the reduced penalties of the FSA retroactive. The First Circuit applied the reduced penalty retroactively due to necessary implication, stating: "It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums."