Selected Chapter Three Guideline Application Decisions

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TABLE OF CONTENTS

Page

FIRST CIRCUIT

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

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 the 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. 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. 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. 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. 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. 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. Nai Fook 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.

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.'"

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). Defendant was the sole employee of an opthamologist and of the charitable foundation the opthamologist 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 §3B1.2 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 was therefore 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.

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 hospital where she was employed, thereby depriving patients under her care of their full prescriptions of pain killing medication, was deserving of a sentencing enhancement under §3B1.1 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 $1 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 "suggested significant managerial discretion" and his close relationship with the owners of the business "rendered him uniquely trusted as an employee."

United States v. Sotomayor-Vazquez, 249 F.3d 1 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence by two levels for abuse of a position of trust under §3B1.3. The defendant was convicted of conspiracy, two counts of embezzlement, and 24 counts of money laundering.. The court rejected the defendant's arguments that he could not be characterized as one in a position of trust because he did not have the power to make decisions and other persons in the business had the authority disregard his advice. Citing precedent establishing that to warrant an enhancement, "a defendant need not legally occupy a formal 'position of trust,' nor have 'legal control,'" the court found that the defendant enjoyed the "type of discretion contemplated by the enhancement." The defendant controlled the company's finances, as well as played a significant role in the decisions made by other businesses with whom the company had direct relationships.

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

§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, given 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.

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. Cash, 266 F.3d 42 (1st Cir. 2001). Prior to defendant's sentencing for bank robbery, he attempted to escape from jail and assaulted his cell mate. In seeking a downward adjustment for acceptance of responsibility, the defendant argued that even if he was unrepentant about the escape attempt and assault, he could be repentant about the underlying bank robbery and deserving of the acceptance of responsibility adjustment. The court rejected this argument, finding that although a court may not require a defendant to accept responsibility beyond the offense of conviction, in this case, the defendant's behavior suggested that he had not truly accepted responsibility for the bank robbery because he had tried to escape sentencing for the bank robbery.

United States v. Franky-Ortiz, 230 F.3d 405 (1st Cir. 2000). The district court did not abuse its discretion when it refused to lower the defendant's offense level under §3E1.1, after the defendant went to trial. A jury convicted the defendant of conspiring to distribute controlled substances and using and carrying firearms during and in relation to the commission of a drug-trafficking offense. Relying on commentary to §3E1.1 discouraging its application in situations where the defendant proceeds to trial, "denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse," the court also noted that throughout the five-week trial, the defendant vehemently refuted the essential facts upon which he was convicted, and admitted guilt and remorse only after being convicted and confronted with a life sentence. Moreover, the court found that the defendant's argument that he proceeded to trial because he was dissatisfied with the plea offer did not support his acceptance of responsibility claim.

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.

SECOND CIRCUIT

Part A Victim-Related Adjustments

§3A1.4 Terrorism

United States v. Stewart, 2009 WL 4975286 (2d Cir. Dec. 23, 2009). The district court

refused to apply the terrorism enhancement to defendant Yousry's sentence on the basis that this defendant (1) did not himself commit a federal crime of terrorism and (2) did not act with the specific intent to promote a federal crime of terrorism. The application notes to §3A1.4 incorporate 18 U.S.C. § 2332b(g)(5) by reference and § 2332b(g)(5), in turn, defines a "Federal crime of terrorism" as an offense that, *inter alia*, is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. On appeal, the government argued that any motivational requirement for the enhancement could be imputed from his co-conspirators' relevant conduct under §1B1.3(a), asserting that it was "reasonably foreseeable" to Yousry that his co-conspirators' actions were calculated to "influence or affect the conduct of government." The circuit court rejected the argument because §1B1.3 applies to "acts and omissions," while section 2332b(g)(5) describes a motivational requirement (specific intent). Therefore, the appellate court declined to conflate Yousry's acts with his co-conspirators' mental states.

As to defendant Sattar, the district court imposed the terrorism enhancement and, after considering the section 3553(a) factors, imposed a downward variance from the guideline range of life imprisonment to 288 months' imprisonment on the basis that: (1) the terrorism enhancement overstated the seriousness of the offense because Sattar was convicted of conspiracy to murder, not of murder itself; (2) the terrorism enhancement put the defendant in the highest criminal history category without a single criminal history point, thus overstating Sattar's past conduct and future likeliness to recidivate; and (3) he had been under extremely restrictive conditions for 4.5 years and would likely serve his term under conditions more severe than the average federal prisoner. The circuit court affirmed the sentence, finding that the enhancement at §3A1.4 may be applied to a range of defendants with different levels of culpability and the district court has a responsibility under section 3553(a)(6) to avoid unwarranted sentencing disparities among similarly situated defendants. The circuit court also noted that the district court was in the best position to assess the defendant's history and characteristics and to adjust the individualized sentence accordingly and that it was not unreasonable to consider the severity of Sattar's conditions confinement when determining the sentence.

United States v. Salim, 549 F.3d 67 (2d Cir. 2008). The government appealed the district court's decision against applying the 12 level enhancement for a "federal crime of terrorism" at U.S.S.G. §3A1.4. The district court had declined to apply §3A1.4 because the defendant's conduct was not "transnational." The Second Circuit reversed and held that the definition of "Federal crime of terrorism" for purposes of §3A1.4 has the meaning given that term at 18 U.S.C. §2332b(g)(5). *See* §3A1.4, Application Note 1. Observing that the statutory definition "encompasses many offenses, none of which has an element requiring conduct transcending national boundaries," the Second Circuit remanded the case for re-sentencing in accord with the opinion.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Ware, 577 F.3d 442 (2d Cir. 2009). The district court imposed a four-level upward adjustment pursuant to §3B1.1(a), citing to the language of §3B1.1(a) and stating only "I think that this covers this defendant." The Second Circuit held that the court had failed to make specific findings as to why the adjustment applied, as required by *United States v. Espinoza*, 514 F.3d 209 (2d Cir. 2008), and the precedents to which the *Espinoza* case cited. The circuit court noted further that the district court did not satisfy its obligation by adopting the factual statements in the pre-sentence report ("PSR"), because, in this case, the PSR did not contain sufficient facts to support the enhancement.

United States v. Salazar, 489 F.3d 555 (2d Cir. 2007). Defendant received a sentence of imprisonment of 168 months for participating in a conspiracy to distribute 4.8 kilograms of cocaine in violation of 21 U.S.C. § 841. The sentence was based partially on the trial court's determination, by a preponderance of the evidence, that Defendant was a "leader" of the conspiracy pursuant to §3B1.1 (a). Defendant's appeal asserted that the trial judge had erred in applying the leadership enhancement without requiring proof beyond a reasonable doubt that he held that status as purportedly required by the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005). The Second Circuit affirmed and held "… that, notwithstanding *Booker,* because district courts remain statutorily obliged under 18 U.S.C. § 3553 (a) to 'consider' the Guidelines, they remain statutorily obliged to calculate a Guidelines range and to do so in the same manner as they did pre-*Booker*." *See also United States v. Crosby*, 397 F.3d 103, 111-12 (2d Cir. 2005).

United States v. Burgos, 324 F.3d 88 (2d Cir. 2003). The defendant challenged a three-level upward adjustment to his base offense level premised on his role as manager or supervisor. The Second Circuit held that the district court erred in concluding that the defendant was a "manager" or "supervisor" of the offense. The court found that the defendant (as broker) was serving his co-conspirator as his co-conspirator (as thief) was serving the defendant. The court stated that a demand that a debtor pay up, or make an advance, does not support an inference that the debtor is a subordinate. If anything, the debtor's nonpayment to the defendant suggests independence.

United States v. Blount, 291 F.3d 201 (2d Cir. 2002). The district court did not err in its analysis that defendant Blount was a manager or supervisor. The Second Circuit held that the record, which showed that Blount was in charge of the day-to-day operations of the drug distribution conspiracy and also that he regularly supervised other members of the conspiracy to make certain that distribution was running smoothly, was sufficient for a finding that he played an aggravating role in the conspiracy.

United States v. Dennis, 271 F.3d 71 (2d Cir. 2001). The district court did not err in

allowing the use of special interrogatories on drug quantity determinations and on imposing an enhancement under §3B1.1(b) because the resulting sentence did not exceed the statutory maximum. The court has already upheld the use of special interrogatories on drug quantities to be used in sentencing. *See United States v. Jacobo*, 934 F.2d 411, 416-417 (2d Cir. 1991); *United States v. Campuzano*, 905 F.2d 677, 678 (n.1) (2d Cir.), *cert. denied*, 498 U.S. 947 (1990). In addition, "his [Dennis'] sentence of 168 months was well below the sentence he could have received with no finding of drug quantity whatsoever." The court also rejected the defendant's argument that his sentence was improperly enhanced under §3B1.1. Consistent with previous decisions within the Second Circuit, the court held that *Apprendi* did not affect the district court's authority to determine facts for sentencing at or below the statutory maximum. *See United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 533 U.S. 960 (2001).

United States v. Paccione, 202 F.3d 622 (2d Cir. 2000). The defendants were convicted of arson, conspiracy to commit arson, and mail fraud. The court concluded that in addition to the two defendants, three other individuals were knowingly involved in the crime. The court upheld the district court's finding that the defendants were organizers and leaders of criminal activity involving five or more participants in a mail fraud ring also involving arson and conspiracy to commit arson. Specifically, the court held that "a defendant may be included as a participant when determining whether the criminal activity involved 'five or more participants' for purposes of a leadership role enhancement under §3B1.1. This decision is consistent with the rulings on this issue among sister circuits. *See United States v. Hardwell*, 80 F.3d 1471, 1496 (10th Cir. 1996), *cert. denied*, 523 U.S. 1100 (1998); *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990); *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

United States v. Jimenez, 68 F.3d 49 (2d Cir. 1995). The district court erred in failing to enhance the defendant's sentence based on his managerial role. The defendant was convicted of conspiracy to distribute narcotics and was sentenced to 262 months' imprisonment. On appeal, the government argued that the district court was obligated to enhance the defendant's sentence for his aggravating role because it had explicitly found that the defendant was a manager of the drug conspiracy. The circuit court ruled that the language of §3B1.1 "is mandatory once its factual predicates have been established." The circuit court noted that since the district court had explicitly determined that the defendant was a manager or supervisor of a drug organization, an enhancement was required.

§3B1.2 Mitigating Role

United States v. Rivera, 28 Fed. App.55 (2d Cir. 2002). The Second Circuit affirmed the district court's refusal to grant the defendant a decrease under §3B1.2(b) for being a minor participant in the criminal activity. The district court found that the defendant packaged the drugs to be distributed and was privy to detailed methods of the operation. The court held that "given Rivera's responsibilities in the conspiracy and her proclaimed intimate knowledge of its operations and personnel, we see no clear error in the court's finding that Rivera did not play

merely a minor role."

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001). The district court refused to grant the defendant a downward departure for playing a "minor" or "minimal" role in the offense for which he was convicted. On appeal the defendant argued that his level of culpability in the crime was less than that of his co-conspirators. Citing *United States v. Ajmal*, 67 F.3d 12, 18 (2d Cir. 1995), the Second Circuit stated that even if the defendant's contention were true, the defendant would have to show that his role was "minor" or "minimal" relative to both his co-conspirators in this crime and to participants in other arson conspiracies leading to death. At trial, evidence established that the defendant not only agreed to the essential nature of the plan, but was one of the architects of the conspiracy. The role defendant played in the crime did not meet the definitions of "minor" or "minimal" found in §3B1.2. *See United States v. Yu*, 285 F.3d 192 (2d Cir. 2002) (holding that where a defendant's action was not minor compared to an average participant even if it was minor compared to his co-conspirators, he is not generally entitled to a minor role adjustment).

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

United States v. Stewart, 590 F.3d 93 (2d Cir. 2009). The government appealed Lynn Stewart's sentence and the Second Circuit held, *inter alia*, that the district court failed to adequately articulate why Stewart's actions as a member of the bar did not warrant a punishment greater that it was. On remand, the Second Circuit required that the district court "consider whether Stewart's conduct as a lawyer triggers the special-skill/ abuse-of-trust enhancement under the Guidelines, *see* U.S.S.G. § 3B1.3, and reconsider the extent to which Stewart's status as a lawyer affects the appropriate sentence." The appellate court specifically indicated that it had "specific doubts" that the sentence given to Stewart was reasonable but thought it appropriate to hear from the district court further before deciding the issue.

United States v. Friedberg, 558 F.3d 131 (2d Cir. 2009). The appellate court held that the district court properly applied the abuse-of-trust enhancement in a tax evasion case that was part of a larger scheme to embezzle funds and hide the defendant's income. The circuit court found that the defendant "effectuated the scheme by abusing his position . . . and shielding the illicit income from the government." The circuit court held that uncharged relevant conduct can support an abuse-of-trust enhancement in a tax evasion conviction, and that the abuse of trust inherent in the defendant's embezzlement "victimized both the government and [the organization at which he worked] by depriving them of funds rightfully theirs."

United States v. Reich, 479 F.3d 179 (2d Cir.), *cert denied* 128 S.Ct. 115 (2007). Defendant was convicted of corruptly obstructing a judicial proceeding in connection with fabricating a bogus court order. Defendant had attempted to convince an adverse party in a civil suit that the Magistrate Judge overseeing that litigation had elected to recuse himself by crafting a fake Order and forging the Magistrate Judge's signature. The sentencing court imposed a two-level enhancement for abuse of a special skill pursuant to §3B1.3. Defendant argued on appeal

that the only basis for the charge against him was his use of the fax machine, which, he asserted did not involve his legal skills. The Second Circuit disagreed and detailed defendant's crafting of the forged order as necessarily involving "his special skills as a lawyer." The trial court's imposition of the §3B1.3 enhancement was affirmed.

United States v. Nuzzo, 385 F.3d 109 (2d Cir. 2004). The defendant was an inspector for the INS at JFK airport who was later fired because he was recruited by a drug smuggling operation to assist in smuggling cocaine into the United States from Guyana. After his termination he was arrested as he arrived at the airport from Guyana with a suitcase containing 12 kilograms of cocaine. The Second Circuit rejected the application of an abuse of trust enhancement under §3B1.3 because there was insufficient evidence that the defendant used his former position to facilitate the crimes with which he was charged.

United States v. Downing, 297 F.3d 52 (2d Cir. 2002). The defendants, a certified public accountant and a former employee of the same firm, were convicted of conspiracy to commit wire fraud and securities fraud. The appellate court held that the district court properly increased the defendants' base offense level by two pursuant to §3B1.3. The defendants argued that §3B1.3 should not apply to them because the conspiracy never progressed to a stage at which they used their accounting skills in a manner that significantly facilitated the commission or concealment of the offense. Despite the absence of binding precedent in the case law, the court concluded, on the basis of general principles set forth in the guidelines and the approach to similar cases taken by other circuits, that §3B1.3, like most specific offense characteristics, applies to inchoate crimes if the district court determines "with reasonable certainty" that a defendant "specifically intended" to use a special skill or position of trust in a manner that would have significantly facilitated the commission or concealment of the conspiracy.

United States v. Barrett, 178 F.3d 643 (2d Cir. 1999). The district court found that a vice-president of the sales department of a corporation abused his position of trust by submitting false invoices and check requests to embezzle $714,000. On appeal, the defendant argued that he did not hold a fiduciary position with his employer because he was involved in sales rather than financial operations. The Second Circuit found that the defendant's position as vice president facilitated his crime because he was able to submit requests for checks without review and had access to records that enable him to create false invoices. His position provided freedom to commit a difficult-to-detect wrong. The Second Circuit also rejected the defendant's assertion that the adjustment was inapplicable because he held no position of trust with the bank. The defendant's relationship with his employer, which had a relationship with the bank, enabled the defendant to commit and conceal his crime. *See also United States v. Crisci*, 273 F.3d 235 (2d Cir. 2001).

United States v. Ntshona, 156 F.3d 318 (2d Cir. 1998). The district court enhanced the sentence of the defendant's physician for abuse of a position of trust because she signed false certificates of medical necessity for Medicare reimbursement. On appeal, the defendant argued that an abuse of trust is the essence of the crime of Medicare fraud and therefore already

accounted for in the base offense level. Rejecting this argument, the Second Circuit held that a doctor convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under §3B1.3. *See United States v. Rutgard*, 116 F.3d 1270, 1293 (9th Cir. 1997); *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995).

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

United States v. Lewis, 386 F.3d 475 (2d. Cir. 2004). The defendant conspired with others to distribute large amounts of heroin, cocaine, and crack at a housing project. The district court applied the two-level enhancement under §3B1.4 for using a minor to commit an offense. The Second Circuit affirmed the enhancement because the defendant does not need to have actual knowledge that the person committing the offense is a minor, and the use of a minor by one of the defendant's co-conspirators was a reasonably foreseeable act in furtherance of the conspiracy.

Part C Obstruction

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

United States v. Byors, 586 F.3d 222 (2d Cir. 2009). The defendant was charged with bank fraud and he thereafter attempted to obstruct justice by contacting witnesses. He was then indicted on fraud and money laundering counts. He eventually pleaded guilty to sixteen counts of fraud and money laundering. The district court applied a two-level enhancement for obstruction of justice. On appeal, the defendant argued that the court erred in applying this enhancement because his obstruction of justice related to his underlying fraud offenses and not to the money laundering offenses. Application Note 2(c) of the money laundering guideline, section 2S1.1 states, in relevant part, that: "application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offenses from which the laundered funds were derived." The Second Circuit held, on an issue of first impression, that Application Note 2(C) to section 2S1.1 of the guidelines does not preclude an enhancement for obstruction of justice pursuant to §3C1.1 of the Guidelines where a defendant's obstruction relates to an offense underlying a money laundering offense but not to the money laundering offense itself.

United States v. Blount, 291 F.3d 201 (2d Cir. 2002). The Second Circuit affirmed the district court's application of the adjustment under §3C1.1 for defendant's perjurious testimony. On appeal, the defendant argued that there were discrepancies as to whether he testified that he had never distributed cocaine or whether he had never distributed it in certain contexts. The Second Circuit held that his claim was without merit based on the trial court transcripts.

United States v. Feliz, 286 F.3d 118 (2d Cir. 2002). The district court determined that the defendant's willful attempt to support a false alibi based on the lies of others to the police

constituted obstruction of justice under §3C1.1. On appeal, the defendant argued that willful obstruction of justice only includes "unlawful attempts to influence witnesses once formal proceedings have been initiated." The Second Circuit disagreed, noting that §3C1.1 specifically includes obstruction during investigation, prosecution, or sentencing. Citing *United States v. White*, 240 F.3d 127 (2d Cir. 2001), *cert. denied*, 124 S. Ct. 157 (2003), the court held that obstruction of justice may occur both pre- and post-arrest.

United States v. Crisci, 273 F.3d 235 (2d Cir. 2001). The defendant was convicted of bank fraud (18 U.S.C. §1344) and making false statements to federal law enforcement agents (18 U.S.C. §1001). The district court applied the obstruction of justice adjustment. The Second Circuit held that the district court properly applied the adjustment, noting that there does not need to be a specific finding regarding intent to obstruct justice and that the court could rely on the false statements conviction. The court cited Application Note 7, to §3C1.1 in support of its holding.

United States v. Carty, 264 F.3d 191 (2d Cir. 2001). The district court did not err in imposing an obstruction of justice enhancement after the defendant willfully fled to the Dominican Republic and stayed there to avoid sentencing. The defendant claimed that the guideline did not apply because the court did not make a requisite finding that he had the "specific intent to obstruct justice." The Second Circuit held that the defendant's willful avoidance of a judicial proceeding was inherently obstructive of justice and worthy of a two-level enhancement under §3C1.1. The court held that because the defendant's actions were made in order to avoid sentencing, he acted with specific intent to obstruct justice, making it unnecessary for the court to use the precise words "intent to obstruct justice."

United States v. Cassiliano, 137 F.3d 742 (2d Cir. 1998). On appeal, the defendant challenged the obstruction of justice enhancement to her sentence for conviction of wire fraud. The district court granted the adjustment because of her obstructive conduct in alerting another individual that he was a target of an investigation. The Second Circuit affirmed the district court's enhancement, holding that the defendant's obstructive conduct was willful and that the defendant's own statements acknowledged that she was fully cognizant of the fact that her tips would prevent the further collection of evidence. *See also United States v. Riley,* 452 F.3d 160 (2d Cir. 2006) (upholding enhancement for defendant who repeatedly told his girlfriend to keep his guns away from the authorities, either by concealing them or disposing of them).

United States v. Vegas, 27 F.3d 773 (2d Cir. 1993). Contrary to the government's argument, *United States v. Dunnigan*, 507 U.S. 87 (1993), and *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993), do not stand for the assertion that every time a defendant is found guilty, despite his testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, these decisions hold that when the court wishes to impose the enhancement over the defendant's objection, the court must consider the evidence and make findings to establish a willful impediment or obstruction of justice. In this case the district court determined that the evidence of perjury was not sufficiently clear to determine whether perjury

had or had not been committed. Therefore an additional penalty for obstruction of justice was not appropriate.

§3C1.2 Reckless Endangerment During Flight

United States v. Morgan, 386 F.3d 376 (2d Cir. 2004). The Second Circuit affirmed a reckless endangerment enhancement under §3C1.2 for throwing a loaded handgun into an area where children were playing. Such conduct created a substantial risk of death or serious bodily injury to those children and to the other bystanders, and was a gross deviation from the standard of care that a reasonable person would exercise in a similar situation.

Part D Multiple Counts

§3D1.1 Procedure for Determining Offense Level on Multiple Counts

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), §3D1.2.

§3D1.2 Groups of Closely Related Counts

United States v. Hasan, 586 F.3d 161 (2d Cir. 2009). The defendant was convicted of kidnapping, conspiracy to commit kidnapping, and passport fraud. At sentencing, the district court grouped the kidnapping and conspiracy to commit kidnapping counts under §3D1.2, but did not include the passport fraud conviction in this grouping. On appeal, the defendant argued that the three convictions should have been grouped because all three charges arose from a common scheme as a part of "a single criminal episode" pursuant to Application Note 3 to §3D1.2. The Second Circuit rejected this argument, stating that, pursuant to §3D1.2(a)-(b), convictions are grouped only when they involve the same victim and, in this case, the victim of the kidnapping and conspiracy charges were the same two individuals, while "society at large . . . was the victim of [the defendant's] passport fraud."

United States v. Vasquez, 389 F.3d 65 (2d Cir. 2004). The defendant, a prison guard, engaged in unlawful sexual activity with a single inmate on two separate occasions. The district court did not group the sexual offenses against the single inmate, pursuant to §3D1.2(b), which states that counts involve substantially the same harm "when counts involve the same victim and two or more acts or transactions connected by a common criminal objection or constituting a common scheme or plan." On appeal, the defendant argued that the examples provided in Application Note 4 to §3D1.2 indicate that grouping of the same crimes involving the same person is appropriate whenever the crimes do not involve the use of force. The Second Circuit disagreed, holding that the use of force is not a requirement for placing the same crimes against the same person in separate groups. The appellate court reasoned that crimes do not necessarily "involve substantially the same harm" just because force is not used and, moreover, regardless of force, "two episodes of sexual conduct that society has legitimately criminalized occurring with

the same person on difference days are not 'substantially the same harm.'"

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002). The district court erred by grouping the defendant's offenses under §3D1.2(c) rather than under §3D1.2(d). The government claimed that there was error in the grouping of the defendant's mail fraud and tax evasion counts. Essentially the government claimed that the grouping should have been under §3D1.2(c)–which groups offenses that are "closely related"–rather than under §3D1.2(d)–under which crimes are grouped that are of the "same general type." The Second Circuit held that grouping of offenses is not optional, but rather is required by the guidelines. Section 3D1.2(d) was the appropriate guideline for fraud and tax evasion cases. If there is a choice to be made between guidelines, crimes that fall within a quantifiable harm fall under §3D1.2(d). Finally, the Second Circuit held that this error was a substantial harm to society because the defendant received a much more lenient sentence than would otherwise have been imposed. Therefore, the sentence was vacated and the case remanded.

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

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002).

§3D1.4 Determining the Combined Offense Level

United States v. Vasquez, 389 F.3d 65 (2d Cir. 2004). Noting that "[t]he Guidelines provide a set of grouping rules to guard against the risk that technically distinct but related forms of criminal conduct, capable of being charged in separate counts, do not result in excessive punishment," the Second Circuit cited §3D1.4 as "modulat[ing] the degree of increased punishment by a formula that increases the adjusted offense level by small increments depending primarily on the number of groups."

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), §3D1.2.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002). The district court did not err in finding that the defendant's post-plea conduct was inconsistent with a finding of acceptance of responsibility. Although the district court agreed that the defendant pled guilty in a timely fashion, his conduct after that plea, including his presence at the Department of Motor Vehicles (the scene of his crimes) and his association with people "from his criminal past" while there were indicative that he continued to engage in criminal behaviors. The Second Circuit held that it will only overturn a district court decision with regard to acceptance of responsibility if the

factual determination is without foundation. *See also United States v. McLean*, 287 F.3d 127 (2d Cir. 2002).

United States v. Rood, 281 F.3d 353 (2d Cir. 2002). The district court erred in deciding not to award the defendant the three-level decrease available for acceptance of responsibility based on §3E1.1(b). The district court granted the defendant the two-level decrease for acceptance of responsibility based on §3E1.1(a) but refused to grant him the three-level decrease basing its decision on "conduct other than the factors and criteria listed in" the subsection. The Second Circuit held that because §3E1.1(b) delineates specific factors that the defendant must meet in order to qualify for the reduction, if the defendant meets those factors, the sentencing court does not have discretion not to award the reduction.

United States v. Yu, 285 F.3d 192 (2d Cir. 2002). The district court did not err in refusing to grant the defendant an extra point reduction for acceptance of responsibility where the belated plea was not sufficiently timely so as to conserve government resources.

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The district court did not err when it refused to grant the defendant a two-level adjustment for acceptance of responsibility. The court followed the PSR's recommendation against a reduction for acceptance of responsibility because the defendant's statements reflected a lack of recognition that he had committed the crime. The PSR revealed that the defendant stated that the crime had nothing to do with him, that he was paid to do the job, that he was only a "middle person," and that he did not understand how the jury could have convicted him. The court ruled that these grounds were sufficient to deny the adjustment.

United States v. Ortiz, 218 F.3d 107 (2d Cir. 2000). The court concluded that the district court's denial of §3E1.1 adjustment based on defendant's continued and repeated use of marijuana while on pretrial release, after plea, and after being specifically admonished to discontinue use, was not an abuse of discretion.

United States v. Austin, 17 F.3d 27 (2d Cir. 1994). The defendant challenged the district court's refusal to grant a reduction for acceptance of responsibility. The circuit court remanded for resentencing, and held that the district court had no basis to deny the defendant a reduction for acceptance of responsibility when the defendant refused to provide information that was outside the "fruits and instrumentalities " of the offense of conviction. The court held that the refusal to accept responsibility for conduct beyond the offense of conviction may only be used to deny a reduction under §3E1.1 when the defendant is under no risk of subsequent criminal prosecution for that conduct. However, a defendant's voluntary assistance in recovering "fruits and instrumentalities" outside the offense of conviction may be considered as a factor for granting acceptance of responsibility. *See United States v. Oliveras*, 905 F.2d 623, 628-30 (2d Cir. 1990).

THIRD CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997). The district court properly applied the vulnerable victim enhancement to the defendant's sentence pursuant to §3A1.1(b). The appellate court found that the enhancement was appropriate regardless of the fact that the victim was only a passenger in a carjacked vehicle and the crime was not committed with a view to her vulnerability. The defendant, relying on the Sixth Circuit minority position, argued that in order to apply the enhancement properly, the victim must be the actual victim of the offense of the conviction. The appellate court, relying on the majority of circuits, rejected this reasoning and held that the courts should not interpret §3A1.1(b) narrowly but should look to the defendant's underlying conduct to determine whether the enhancement may be applicable. *See also U.S. v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 652 (2008).

§3A1.2 Official Victim

United States v. Fisher, 502 F.3d 293 (3d. Cir. 2007). Defendant pled guilty to being a felon in possession of a firearm. After conducting an evidentiary hearing, the trial court found that defendant pointed a gun at a law enforcement officer, began to pull trigger, and moved the barrel of the firearm in a menacing fashion. Based upon these factual findings, the trial court applied both a four-level enhancement for possession in relation to another felony offense pursuant to §2K2.1(b)(5)[1] and a six-level increase for creating a risk of serious bodily injury pursuant to §3A1.2(c)(1). The Third Circuit upheld the enhancements, holding that both enhancements could be simultaneously applied, despite the defendant's double-counting argument, because the §2K2.1 enhancement involved the use of a firearm whereas the §3A1.2 enhancement involved a law enforcement victim.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying an upward adjustment for the defendant's leadership role in the offense. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in property derived from specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. The defendant disputed that he was a leader in the

[1] Redesignated as §2K2.1(b)(6), effective November 1, 2006, by amendment 691.

fraud and claimed that even if he was a leader in the fraud, he was not a leader in the subsequent money laundering activities. The Third Circuit found that the defendant specifically admitted he exercised a managerial function with respect to the secretarial staff, and the record showed he instructed two staff members to submit fraudulent deferment and forbearance forms and to mail checks on behalf of student borrowers nearing default. The adjustment was therefore proper.

United States v. DeGovanni, 104 F.3d 43 (3d Cir. 1997). The district court erred in enhancing the defendant's sentence as a "supervisor" for purposes of §3B1.1(c) based on his *de jure* position as a squad sergeant in the police department, without any evidence that he actually supervised the illegal activity of the other police involved in the offenses. The defendant pleaded guilty to interference with interstate commerce by robbery and obstruction of justice but asserted that the meaning of "supervisor" as defined by the guidelines was beyond the scope of his activity. He characterized his role as no more than a secondary passive one in the offense. The circuit court agreed and held that, in the context of §3B1.1(c), the two-level enhancement applies only when the "supervisor" is a supervisor in the criminal activity. The case was remanded for resentencing.

§3B1.2 Mitigating Role

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The defendant pled guilty to possession with intent to distribute cocaine. The total amount of cocaine attributed to the conspiracy was 50 kilograms, and the defendant admitted being a distributor and that 10 kilograms were attributable to him. The district court did not clearly err in finding that a distributor in a conspiracy to distribute ten kilograms is not entitled to a mitigating role adjustment.

United States v. Haut, 107 F.3d 213 (3d Cir.1997). The district court did not err in finding that the defendants were minimal participants under §3B1.2(a). At the defendants' sentencing for conspiracy to commit malicious destruction of property by means of fire, in violation of 18 U.S.C. § 371, the district court decreased the defendants' offense levels by four levels based on minimal participation in the offense. The government challenged this finding. The commentary to §3B1.2 states that minimal participants are "among the least culpable of those involved in the conduct of a group." The district court found that the defendants did not have a financial interest in the bar they had burned and did not financially benefit from the arson. The circuit court stated that it was correct to examine the economic gain and physical participation of the defendants, as well as to assess "the demeanor of the defendants and all the relevant information to ascertain [their] culpability in the crime."

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The district court erred in granting the defendant a three-level downward departure based on his mitigating role in an offense of possession of child pornography, 18 U.S.C. § 2252(a)(4). The defendant pleaded guilty to possession of child pornography and the government recommended a 12-month sentence, the bottom of the 12- to 18-month sentencing range. Although a mitigating role

reduction was not available to the defendant under §3B1.2 because the offense of possession is a "single person" act that does not involve concerted action with others, the district court departed down from the guidelines by analogy to that guideline. The district court sentenced the defendant to three years' probation, six months of which would be served in home confinement, and a $5,000 fine, citing the Third Circuit's opinion in *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990). The *Bierley* court had permitted a departure based on an analogy to the mitigating role reductions where the defendant, convicted of receipt of child pornography, would have qualified for such a reduction had the other participants in the offense not been undercover agents. The government argued that the district court improperly departed under the holding in *Bierley* because to qualify for a mitigating role reduction, or an analogous departure, the offense must involve more than one participant. The circuit court declined to extend *Bierley* to single actor offenses, agreeing with the government's position.

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

United States v. Thomas, 315 F.3d 190 (3d Cir. 2002). The district court did not err in applying the §3B1.3 enhancement for abuse of a position of trust to the defendant, who was a home aid to her elderly victim. The defendant held a position of trust vis-á-vis her employer in that she was trusted to open the victim's mail and had authority to pay the victim's bills. These tasks demonstrated that the victim had counted upon the judgment and integrity of the defendant, who defrauded the victim by inducing the victim to sign and vouch for checks that the defendant cashed for her own benefit.

United States v. Cianci, 154 F.3d 106 (3d Cir. 1998). The district court did not err in considering uncharged conduct in applying an enhancement for abuse of a position of trust. The defendant was convicted of tax evasion after he used his position as an executive in an electronics firm to devise a scheme involving a shell corporation and falsified documents to embezzle and sell the company's products. He then concealed income from these sales from the IRS. The district court applied the abuse of trust enhancement based on the trust relationship the defendant had with his employer. The court of appeals held that, even though the defendant's employer was not the victim of the tax evasion, the offense of conviction, the defendant's uncharged criminal conduct toward the company was relevant for purposes of the enhancement. No language in the applicable guideline requires that the victim in the trust relationship be the victim of the offense of conviction. *See also, U.S. v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 652 (2008); *but see*, *e.g.*, *United States v. Guidry*, 199 F.3d 1150 (10th Cir. 1999).

United States v. Urban, 140 F.3d 229 (3d Cir. 1998). The district court did not err in enhancing the defendant's sentence for use of a special skill. The defendant, who was convicted of possession of an unregistered destructive device (components of a canister grenade) argued that he had received no special training or education. The court of appeals held that it was sufficient that the defendant was self-taught in the construction of the destructive device, using his mechanical background and training and his own research and experimentation.

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

United States v. Pojilenko, 416 F.3d 243 (3d Cir. 2005), *cert. denied*, 128 S. Ct. 883 (2008). The defendant was part of a criminal enterprise that committed various crimes including robbery, extortion, fraud, and drug trafficking. The Third Circuit rejected a §3B1.4 increase for using a minor. The court determined that the record did not support a finding that the defendant committed an affirmative act beyond mere partnership. A co-conspirator recruited and directed the minor before the defendant became involved in the robbery. No other affirmative action was taken by the defendant regarding the minor's participation. The court also ruled that the defendant could not be held accountable for a co-conspirator's reasonably foreseeable use of the minor. The use of the minor enhancement must be based on an individualized determination of each defendant's culpability.

United States v. Thornton, 306 F.3d 1355 (3d Cir. 2002). The district court did not err in applying the §3B1.4 enhancement for using a minor to commit the offense. The defendant, who was convicted of conspiring to distribute crack cocaine, argued that the enhancement should not apply because he had not known that one of his distributors was a minor. The Third Circuit upheld the use of the enhancement, joining two other circuits in holding that §3B1.4 does not include a scienter requirement.

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000). The district court did not err in applying a two-level upward adjustment for the defendant's use of a minor in committing the offense. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute crack cocaine. He conceded that an individual involved in the conspiracy was not over 18 years of age throughout the course of the conspiracy. However, he argued the district court erred in raising the applicability of the enhancement *sua sponte*, and that it erred in imposing the adjustment, claiming the record lacked "a factual basis for determining that [the juvenile] became part of the conspiracy while still a minor." The Third Circuit found the district court did not err by raising the issue because the parties had been notified and given an opportunity to brief the issues prior to sentencing. Further, the court held the defendant's contention that the record was not clear contradicted his concession before the district court that "[the juvenile] was not over 18 years of age throughout the course of the conspiracy."

Part C Obstruction

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

United States v. Clark, 316 F.3d 210 (3d Cir. 2003). The district court erred in applying the §3C1.1 obstruction of justice enhancement to the defendant because the conduct upon which the enhancement was based was coterminous with the conduct for which he was convicted. The defendant had been convicted of falsely representing himself to be a citizen of the United States by claiming that he had been born in the U.S. Virgin Islands instead of Jamaica. On several different occasions, the defendant made such false representations to representatives of the INS

and other federal officials. He then tried to buttress his claim with a bogus birth certificate from the Virgin Islands. At sentencing, the district court applied the §3C1.1 enhancement based on the defendant's use of the birth certificate. The Third Circuit held that this conduct was encompassed within the offense of conviction and that accordingly the enhancement was not proper.

United States v. Jenkins, 275 F.3d 283 (3d Cir. 2001). The district court erred in applying the obstruction of justice enhancement in §3C1.1 because the defendant's failure to appear in state court in a case that was related to the federal investigation did not compromise the federal investigation in any way. According to the Third Circuit, the defendant need not be aware of the federal investigation at the time of the obstructive conduct in order for the enhancement to apply. However, "there must be a nexus between the defendant's conduct and the investigation, prosecution, or sentencing of the federal offense," that is, "the federal proceedings must be obstructed or impeded by the defendant's conduct." In this case, that requirement was not met.

United States v. Imenec, 193 F.3d 206 (3d Cir. 1999). The Third Circuit held that §3C1.1 requires a two-level enhancement for obstruction of justice when a defendant fails to appear at a judicial proceeding, state or federal, relating to the conduct underlying the federal criminal charge. The defendant was arrested after selling crack cocaine to undercover Philadelphia police officers and charged in state court. He was ordered to appear in state court for a preliminary hearing. Before the hearing, the court issued a federal arrest warrant for federal drug offenses based on the same events. Federal authorities intended to arrest the defendant when he attended the preliminary hearing but he never appeared in state court. The following year, a federal grand jury returned an indictment against the defendant. After his arrest a few years later, the defendant pled guilty to conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846, and the court sentenced him to 151 months' imprisonment. In rejecting the defendant's argument that §3C1.1 was inapplicable, the appellate court held that the term "instant offense" in §3C1.1 refers to the criminal conduct underlying the specific offense of conviction and that the term was not limited to the specific offense of conviction itself. The appellate court reasoned that the rationale underlying the obstruction of justice enhancement (*i.e.*, that "'a defendant who commits a crime and then . . . [makes] an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy' the criminal justice process") applies with equal force whether the investigation is being conducted by state or federal authorities. *Id*. at 208 (internal quotations and citations omitted).

United States v. Williamson, 154 F.3d 504 (3d Cir. 1998). The district court did not err in concluding that an upward adjustment for obstruction of justice was mandatory once the court had determined that obstruction had occurred. The defendant argued that the failure of §3C1.1 to include words such as "must" or "shall" renders the guideline ambiguous as to whether the adjustment must follow a determination that the defendant has engaged in obstructive conduct. Under the rule of lenity, this ambiguity must be interpreted in a defendant's favor, the defendant argued. The court of appeals rejected this contention, finding that the logical structure of the guideline clearly commands that the increase be applied following a finding that the defendant

willfully obstructed the administration of justice. This holding is consistent with that of all other circuits which have considered the question.

United States v. Kim, 27 F.3d 947 (3d Cir. 1994). The district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1. The defendant was originally indicted for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841. He argued that his false cooperation related only to the conspiracy count of which he was acquitted; thus the obstruction of justice could not relate to the "instant offense." *See* §3C1.1. Although the circuit court acknowledged that the defendant's false cooperation related to the conspiracy count, that fact alone did not preclude the obstruction of justice from also relating to the possession count. The facts as a whole supported the conclusion that the defendant's conduct affected the "investigation, prosecution, or sentencing" of the possession offense even though the defendant's possession was complete when the government took the drugs.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Cordo, 324 F.3d 223 (3d Cir. 2003). The defendant was convicted of mail fraud and money laundering. The Third Circuit reversed the district court's decision that the defendant's mail fraud and money laundering convictions should not have been grouped under §3D1.2. The Third Circuit noted that the circumstances under which money laundering charges should be grouped with charges for other related conduct was an issue that was frequently confronted by the district courts, but had been only rarely addressed by the Third Circuit. At issue here was subsection (b) to §3D1.2, which provides that counts involve substantially the same harm when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." The defendant urged that the identifiable victims of both his acts of fraud and money laundering were the same. The government asserted that there were different victims involved: the mail fraud victimized the investors themselves, whereas the money laundering offenses effected only a societal harm. The government asserted further that where the money laundering victims were identical to the victims of the related offenses, the counts should be grouped. The Third Circuit concluded that it could not agree with the district court that the money laundering in the instant case had no identifiable victim. The court held that in this case the acts of money laundering and mail fraud were all "in furtherance of a single fraudulent scheme" to defraud identifiable victims–unsuspecting investors and funeral homes. Thus, grouping under 3D1.2 was required.

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). The appellate court held that the defendant was not entitled to have his wire fraud and tax evasion offenses grouped for sentencing purposes. The district court refused to group the counts, and used the multi-count rules under §3D1.4 to increase the defendant's base offense level two levels, based on the number of units.

The defendant argued that the wire fraud and tax evasion counts should be grouped under §3D1.2(c) because the wire fraud embodies conduct that is treated as a specific offense characteristic of the tax evasion count. The appellate court upheld the district court's decision not to group the offenses, relying on its decision in *United States v. Astorri*, 923 F.2d 1052 (3d Cir.), *cert. denied*, 502 U.S. 970 (1991). The appellate court noted that if the counts are to be grouped "there would be no accounting in the sentence for the fact that Vitale had evaded taxes, and in effect his conviction on that count would be washed away." *Vitale* at 814. The court added that the two-level enhancement to the tax evasion count (raising it from level 21 to 23) cannot affect the offense level of the higher wire fraud charge (level 25). The court stated: "[b]ecause the two-point adjustment to the tax evasion offense level has no significance to and does not in fact adjust the overall sentence, it does not cause the kind of adjustment referred to in §3D1.2(c)." The court concluded that evading taxes on $12 million is patently "significant additional criminal conduct" which would not be punished if the counts were grouped.

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). The appellate court reversed and remanded the defendant's sentence for offenses involving the transportation and distribution of child pornography in interstate commerce in violation of 18 U.S.C. §§ 2252(a)(1), (a)(2), and (a)(4)(B). The district court correctly refused to group the defendant's offenses pursuant to §3D1.2(b) because each count involved different victims. The appellate court held that the primary victims that Congress sought to protect in the various sections of the Protection of Children Against Sexual Exploitation Act were the children, and not just society at large. Section 2252, by proscribing the subsequent transportation, distribution, and possession of child pornography, discourages its production by depriving would-be producers of a market. Therefore, since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted in the pornographic materials, and because the defendant's four counts of conviction involved different children, the district court correctly concluded that grouping the defendant's offenses pursuant to §3D1.2(b) was inappropriate. Nevertheless, the appellate court reversed the defendant's sentence because it found that the court's application of the five-level increase under §2G2.2(b)(4) for engaging in "a pattern of activity involving the sexual abuse or exploitation of a minor" was inappropriate. The court explained that "sexual exploitation" is a term of art, and that "a defendant who possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed `involve' such sexual exploitation by the producer." "Section 2G2.2(b)(4) of the guidelines singles out for more severe punishment those defendants who are more dangerous because they have been involved first hand in the exploitation of children."

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Williams, 344 F.3d 365 (3d Cir. 2003). The defendant appealed his conviction for carrying a firearm. The government cross-appealed the decision to grant the defendant an offense level reduction under §3E1.1 as to a separate count for bank robbery. The

defendant received the acceptance of responsibility reduction for pleading guilty to the bank robbery charge, in spite of the fact that he contested the section 924(c) charge. The government argued that the district court failed to take into account that the defendant denied "relevant conduct" as defined in Application Note 1(a) to §3E1.1, which provides in pertinent part that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The Third Circuit held that the government wrongly treated Application Note 1(a) as establishing a *per se* bar to a reduction for acceptance of responsibility. The court found that even if the defendant "falsely" denied, or frivolously "contested, relevant conduct," the guidelines make clear that this is an "appropriate consideration[ ]" for a court to take into account "in determining whether a defendant qualifies" for the reduction, but not the only consideration. *See* §3E1.1, comment. (n.1(a)) (stating that a court is "not limited to" the listed considerations). The court also explained that it could be argued that the gun activity on which the defendant proceeded to trial was not "relevant conduct" as that term is defined under the guidelines. The court noted that in *United States v. Cohen*, 171 F.3d 796, 806 (3d Cir. 1999), it discussed a situation similar to that presented here, calling it an "unusual situation" where "the defendant has pleaded guilty to some of the charges against him . . . while going to trial on others." *Id*. at 806. The court stated that in such a case, "the trial judge has the obligation to assess the totality of the situation in determining whether the defendant accepted responsibility.' " Id. at 806. The court therefore concluded that, because the defendant pled guilty to the bank robbery charge, the reduction in his sentence for acceptance of responsibility with regard to that count was not improper, and deferred to the district court.

United States v. Zwick, 199 F.3d 672 (3d Cir. 1999). The district court erred in not considering an additional one-level reduction in the offense level for acceptance of responsibility. The defendant pled guilty to bank fraud and mail fraud. After trial, the defendant was convicted of theft or bribery concerning programs receiving federal funds. At sentencing, the district court awarded the defendant a two-level reduction for his acceptance of responsibility, but rejected the additional one-level reduction, stating he was not entitled because the government was required to prepare for trial on one count. The Third Circuit held §3E1.1(b) requires that the defendant timely provide complete information or notice of an intention to plead guilty but did not require, either expressly or impliedly, that the defendant actually forego a trial. The Court further stated if the Commission intended to "limit the award of the point to situations in which a plea was entered, or resources were actually conserved, they could have crafted the language to reflect this intention."

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred when it awarded the defendant a two-level reduction for acceptance of responsibility, after the defendant was convicted at trial on some charges and then pled guilty to the remaining charges. The government argued that the defendant should not have received the reduction because he went to trial on some of the counts. Under §3E1.1, comment. (n.2), subject to rare exceptions, the adjustment for acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential elements of guilt, is convicted,

and only then admits guilt and expresses remorse." The application note does not violate a defendant's right to trial but creates a constitutional incentive for a defendant to plead guilty. The guidelines require the court to group the multiple counts of conviction before determining whether to apply the adjustment for acceptance of responsibility. The determination requires the court to make a "totality" assessment as to whether credit for acceptance of responsibility is appropriate, given the defendant's decision to plead guilty to some of the counts only after being convicted of the other counts.

United States v. Sally, 116 F.3d 76 (3d Cir. 1997). As an issue of first impression for the Third Circuit, the court held that "post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." The circuit court, adopting the Fourth Circuit's decision in *United States v. Brock*, 108 F.3d 31, 32 (4th Cir. 1997), and its analysis of *Koon v. United States*, 518 U.S. 81 (1996), held that the factor of "post-offense rehabilitation" had not been forbidden by the Sentencing Commission as a basis for departure under the "appropriate" circumstances. The case was remanded for the district court to determine whether the defendant's post-conviction rehabilitation efforts were so extraordinary or exceptional as to qualify him for a downward departure.

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996). In this case of first impression, the Third Circuit joined with the First, Fifth, Seventh, Eighth and Eleventh Circuits in holding that a sentencing judge may consider unlawful conduct committed by the defendant while on pretrial release awaiting sentencing, as well as any violations of the conditions of this pretrial release, in determining whether to grant a reduction in the offense level for acceptance of responsibility under §3E1.1. The appellate court noted that §3E1.1, comment. (n.1), sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts under §3E1.1, comment. (n.1(g)). Because courts consider a defendant's post-offense rehabilitative efforts in granting an acceptance of responsibility adjustment, it is consistent to consider the absence of such efforts in denying an adjustment.

FOURTH CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The district court erred in applying the vulnerable victim two-level enhancement pursuant to §3A1.1. Although it was indisputable that the victims were elderly, and many of them likely suffered from both mental

and physical ailments, there were no factual findings showing that the vulnerability of the Emerald Health's residents facilitated the defendant's offenses. Furthermore, there were no factual findings supporting the idea that these residents were targeted because of their unusual vulnerability.

United States v. Hill, 322 F.3d 301 (4th Cir. 2003). The Fourth Circuit noted that under §3A1.1 a defendant should receive a two-level enhancement if he knew or should have known that a victim of the offense was a vulnerable victim. In the instant case, the victim was in his mid-sixties, had suffered a stroke, and lived like a hermit. The court held that there was more than enough evidence to support the district court's finding that the vulnerable victim enhancement applied.

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The adjustment under §3A1.1 for a vulnerable victim applied only to the victim's vulnerability and not to the duration of the offense.

§3A1.2 Official Victim

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). The district court correctly applied adjustments for assault on an officer and reckless endangerment during flight under §§3A1.2(b) and 3C1.2. Defendants Harrison and Burnett pled guilty to armed bank robbery, 18 U.S.C. § 2113(a), (d), and using or carrying a firearm in a crime of violence, 18 U.S.C. § 924(c). After robbing a bank, the defendants engaged police in a high-speed multiple car chase during which an accomplice fired shots at officers and both vehicles crashed. The defendants argued that the adjustments made were based on the same conduct. The Fourth Circuit found that the adjustments made under §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct. The court also held that the district court did not err in finding that the unarmed codefendant could reasonably foresee that one of his armed codefendants could fire a weapon that would create a risk of serious bodily injury and that the defendant aided and abetted conduct that created a substantial risk of death or serious bodily injury to the children in the getaway cars and the public during the high-speed flight that followed the robbery.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cameron, 573 F.3d 179 (4th Cir. 2009). The district court erred when it applied §3B1.1 because the government failed to present evidence that the defendant actually exercised authority over other participants in the operation or actively directed its activities. Rather, the evidence indicated only that the defendant supplied counterfeit currency to the operation and the supplying of contraband to other participants in a conspiracy and involvement in illegal transactions, without more, cannot sustain the application of the leadership enhancement. *See also United States v. Sayles*, 296 F.3d 219, 224 (4th Cir. 2002) (discussing the seven-factor test at §3B1.1, Application Note 2, used to determine the defendant's leadership and organizational role in the offense).

United States v. Rashwan, 328 F.3d 160 (4th Cir. 2003). The Fourth Circuit noted that, in order to increase a sentence under §3B1.1, a sentencing court should consider whether the defendant exercised decision making authority for the venture, whether he recruited others to participate in the crime, whether he took part in planning or organizing the offense, and the degree of control and authority that he exercised over others. Furthermore, the court noted that leadership over only one other participant is sufficient to support the adjustment as long as there was some control exercised.

United States v. Nicolaou, 180 F.3d 565 (4th Cir. 1999). The district court did not err in applying a leadership enhancement after the defendant's related offenses were grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. Furthermore, the appellate court concluded that the defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for "the money laundering." Without the gambling operation, there would have been no ill-gotten gains to launder.

United States v. Turner, 198 F.3d 425 (4th Cir. 1999). Because the offense of intentionally killing and causing the intentional killing of an individual while engaging in a continuing criminal enterprise did not include a supervisory role as an element of the offense, a two-level adjustment pursuant to §3B1.1(c) for the defendant's role in the offense was not impermissible double counting.

§3B1.2 Mitigating Role

United States v. Pratt, 239 F.3d 640 (4th Cir. 2001). Whether the defendant is a minor participant in the conspiracy is measured not only by comparing his role to that of his codefendants, but also by determining whether his "'conduct is material or essential to committing the offense.'"

United States v. Washington, 146 F.3d 219 (4th Cir. 1998). The district court erred in relying on the defendant's statements, which were protected under the defendant's plea agreement, to his probation officer regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant.

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

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005). The facts set forth in the presentence report did not support the imposition of the §3B1.3 enhancement. Representatives of the victimized federal agencies, in awarding contracts to the defendant's company, relied on the defendant's assertions that he was certified by state and federal regulating agencies as a bomb-sniffing canine team handler. The presentence report describes an arms-length commercial relationship where trust is created by the defendant's personality or the victim's credulity. These facts cannot justify the abuse of trust enhancement.

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The Fourth Circuit noted that, under §3B1.3, an adjustment in the base offense level was authorized if the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. Furthermore, the court noted that the question of whether an individual occupied a position of trust should be addressed from the perspective of the victim. In the instant case, the victims were Medicaid and the American taxpayers. Medicaid entrusted the defendant with thousands of dollars in prospective payments to Emerald Health that were to be used for the benefit of its Medicaid beneficiaries. Her abuse of that authority contributed significantly to the commission and concealment of the fraud scheme. Accordingly, the court affirmed the district court's application of the "abuse of position of trust" adjustment.

United States v. Caplinger, 339 F.3d 226 (4th Cir. 2003). The district court erred in applying a two-level enhancement under §3B1.3 on the ground that the defendant abused a position of trust when he misrepresented himself as a prominent physician in an effort to attract investors. Application of an enhancement under §3B1.3 required more than a mere showing that the victim had confidence in the defendant; something more akin to a fiduciary function was required. The fact that the defendant posed as a physician did not by itself mean that he occupied a position of trust. The defendant did not assume a physician-patient relationship with any of the victims. Rather, the victims were simply investors who invested their money in IPI. The court concluded that although the defendant's assumed status as an accomplished physician was used to persuade the investors to place money into the defendant's venture, the facts did not support the conclusion that the defendant, by posing as a physician, occupied a position of trust with the victims as that term was used in §3B1.3 of the guidelines. Accordingly, the district court erred in applying a two level enhancement under §3B1.3.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001). Adjustment for an abuse of trust was permitted because the sentencing court found ample evidence to support the adjustment. The evidence included the defendant's solicitation of investors through her work as an accountant and as a tax preparer, as well as testimony from witnesses who stated that they gave money to the defendant because they trusted her.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The district court erred in applying a §3B1.3 special skill enhancement. The defendant operated a tax preparation business out of his convenience store. He was not an accountant and had no special training in the area of tax preparation. The district court applied a §3B1.3 special skills enhancement, relying on the fact that the defendant used some special skills, and that he availed himself of services of co-conspirators who had special skills. The appellate court reversed, concluding that the defendant did not have special skills, and that his co-conspirators' skills were not relevant to the enhancement. The appellate court noted that "role in the offense" adjustments, such as the special skill enhancement, are based on a defendant's status, not based on a co-conspirator's action. Therefore, to the extent the district court relied on the special skills of the defendant's co-conspirators, it committed clear error. The district court also erred in its interpretation of the guidelines by concluding that tax preparation as practiced by the defendant was a special skill. The appellate court noted that a special skill usually requires substantial education, training or

licensing, and that the record reflected that the defendant did not have any formal training in the areas of tax preparation.

United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999). The Fourth Circuit has rejected a mechanistic approach to abuse of trust that excludes defendants from consideration based on their job titles. Instead, several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant has either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The appellate court stated that in reviewing the factors in the defendant's case, the district court did not err in determining that the defendant held a position of trust. First, the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The appeals court affirmed the district court's application of a two-level enhancement for an abuse of trust. The defendant, a group leader in the Sales Audit Department at Woodward and Lothrop, used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The district court enhanced the defendant's sentence two levels under §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argued that the enhancement was unwarranted because her position did not fall within the definition of "public or private trust." The defendant argued that her position was functionally equivalent to an ordinary bank teller. The district court rejected the defendant's argument. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions.

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability and cannot be based solely on the acts of co-conspirators.

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

United States v. Murphy, 254 F.3d 511 (4th Cir. 2001). The plain language of the congressional directive to "promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense," did not expressly prohibit a younger defendant from receiving such an enhancement.

Part C Obstruction

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

United States v. Sun, 278 F.3d 302 (4th Cir. 2002). The district court did not err when it enhanced the sentence of a defendant because he willfully made materially false statements when he testified at trial. The district court found that the defendant made several materially false statements concerning his reliance on the advice of counsel, on the advice of a State Department official, and in his denial of his intent when he committed the illegal act. Because the defendant lied about these material issues and matters at the heart of the case, the court found sufficient willful intent to deceive and rejected the defendant's challenge to the two-level increase.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001). The district court correctly enhanced the defendants' sentence for obstruction of justice under §3C1.1. The Fourth Circuit stated that §3C1.1 permits an increase in the defendant's offense level by two levels if the defendant commits perjury by giving "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The defendant pled guilty to drug trafficking and was released on bond pending sentencing. He then failed to appear at his sentencing hearing because he feared the length of his upcoming sentence. The defendant failed to appear at scheduled meetings and avoided apprehension by police for more than six months. The district court refused to enhance the defendant's sentence because it accepted his explanation for his absence. The Fourth Circuit held that his flight served as a willful obstruction of justice and remanded the case for resentencing.

United States v. Stewart, 256 F.3d 231 (4th Cir. 2001). The district court did not err by finding that the defendant obstructed justice where the defendant engaged in continuous misconduct throughout the trial, making gun-like hand gestures and shouting outside the jury room in an attempt to intimidate the jurors.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The defendant was convicted of conspiracy to defraud the United States and filing fraudulent tax return claims in connection with a rapid refund enterprise. The defendant appealed only his sentence specifically with respect to an enhancement for obstruction of justice and an enhancement for use of a special skill. After the trial, but before sentencing, the probation officer charged with preparing the presentence report interviewed the defendant. According to the probation officer, the defendant denied knowingly listing false information on the tax returns, recording only the information provided to him by his clients, the validity of which he did not investigate. As a result, the defendant denied engaging in any criminal activities. Noting a "denial of guilt" exception to the obstruction of justice enhancement, the appellate court nevertheless affirmed its application inasmuch as the defendant's statements to the probation officer "went beyond merely denying his guilt and

implicated his taxpayer clients in the scheme to defraud the IRS," and were material inasmuch as the statements could have affected the sentence ultimately imposed.

§3C1.2 Reckless Endangerment During Flight

See United States v. Chong, 285 F.3d 343 (4th Cir. 2002), §1B1.3.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). It is permissible to make adjustments under both §§3A1.2 and 3C1.2 because each adjustment is based upon separate conduct.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). Fraud and money laundering offenses should only be grouped when they are closely related. The defendants' money laundering activities were essential to achieving the improper extraction of monies from Medicaid, and their money laundering and fraud activities were part of a continuous, common scheme to defraud Medicaid. The court concluded that the district court had properly grouped the fraud and money laundering offenses.

United States v. Pitts, 176 F.3d 239 (4th Cir. 1999). The appellate court upheld the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court determined that the defendant's conduct was not a single course of conduct with a single objective as contemplated by §3D1.2. The appellate court held if the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal, then the district court should not group the offenses.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence involving mail fraud and money laundering. The district court grouped the counts together pursuant to §3D1.2(d) and applied the higher base offense level for money laundering under §3D1.3(b). Along with other adjustments, the defendant received a four-level specific offense characteristic increase under the money laundering guideline because the fraudulent scheme involved between $600,000 and $1,000,000. The defendant argued that in determining his specific offense characteristic, the district court should have considered only $5,051.01 in fictitious interest payments specifically identified in the money laundering counts of the indictment. The government argued that all of the allegations in the mail fraud counts, which the defendant conceded involved $850,913.59, were incorporated into the money laundering counts by the grand jury. Furthermore, the facts of the case established that the mail fraud and money laundering crimes were interrelated. The Fourth Circuit held that the defendant's money laundering was part of the fraudulent scheme because the funds were used to make fictitious interest payments. Additionally, the circuit court found that

the sentencing guidelines permitted the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002). The district court did not err in its refusal to reduce the defendant's base offense level for acceptance of responsibility because the defendant clearly did not accept responsibility. The defendant filed an appeal denying the amount of drugs ascribed to him by the court under a relevant conduct analysis and denied his culpability in the murders listed as relevant conduct by the court. Such denials do not constitute acceptance of responsibility.

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the district court's decision to grant the defendant a reduction in his sentence under §3E1.1 for acceptance of responsibility. The defendant pled guilty to drug trafficking but had engaged in conduct that constituted obstruction to justice. The Fourth Circuit found that the reduction was precluded.

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). The defendant was convicted of conspiring to transport stolen property and aiding and abetting. The defendant appealed the district court's denial of granting an adjustment for acceptance of responsibility, arguing that it was clear error for the district court to refuse to consider his polygraph evidence at sentencing given that such evidence clearly entitled him to a downward departure. The polygraph evidence, however, only indicated the defendant's continued denial of responsibility because it only served as evidence that he did not realize that the property was stolen, *i.e.*, that he did not commit the crime for which he was charged. Consequently, the district court did not commit any error in denying the decrease for acceptance of responsibility.

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility and for reducing his sentence pursuant to §3E1.1. The district court based its decision to grant the adjustment on two grounds: the defendant saved both the court and the government real time by having a bench trial; and the defendant never indicated at trial that he did not accept the fact that he lied. The Fourth Circuit reversed, reasoning that the guidelines make no distinction between a bench and a jury trial, but rather between a defendant who puts the government to its burden of proof at trial and a defendant who does not. Additionally, the circuit court found that, at least in part, the defendant went to trial to attempt to prove that his lies to the grand jury were not material. Because materiality is an essential element of any perjury offense, the defendant challenged his factual guilt. For these reasons, the defendant was not entitled to an acceptance of responsibility reduction.

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

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

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

United States v. Garza, 429 F.3d 165 (5th Cir. 2005), *cert. denied*, 546 U.S. 1220 (2006). "[S]usceptibility to the defendant's scheme alone is not enough to qualify victims as unusually vulnerable. The victims must also be 'vulnerable . . . members of society' and 'fall in the same category' as 'the elderly, the young, or the sick.'" *Id.* at 173-74 (citations omitted). In this case, the court determined that the victims of the defendant's mail fraud scheme—undocumented aliens—were unusually vulnerable because of their poverty, language problems, and fears of deportation.

United States v. Brugman, 364 F.3d 613 (5th Cir. 2004). "For the two-level enhancement under §3A1.1(b)(1) to apply, the victim must be 'unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct.'" *Id*. at 621. In this case, the defendant, a Border Patrol agent, was convicted of depriving an illegal alien of his constitutional rights while acting under color of law. The victim had been apprehended by other agents, was sitting on the ground when he was kicked by the defendant. The defendant also assaulted a second alien. The Fifth Circuit affirmed a §3A1.1(b)(1) vulnerable victim increase based on fact that victim alien was immobile, sitting on the ground, and under the supervision of another Border Patrol agent when defendant took advantage of this susceptibility and assaulted him.

United States v. Lambright, 320 F.3d 517 (5th Cir. 2003). "The sentencing guidelines provide for a two-level increase in the base offense level '[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim.' For the enhancement under §3A1.1(b)(1) to apply, the victim must be 'unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct.'" *Id.* at 518 (citations omitted). In this case, the defendant-prison-guard assaulted an inmate and maintained on appeal that the district court erred in finding that the inmate was a vulnerable victim. The Fifth Circuit disagreed and explained that the enhancement was appropriate because the inmate "was completely dependent upon the care of the correction officers, . . . was locked in his cell prior to the assault, and . . . could not protect himself
from the assault." *Id*.

§3A1.2 Official Victim

United States v. Williams, 520 F.3d 414 (5th Cir.), *cert. denied*, 129 S.Ct. 111(May 27, 2008). The court resolved an issue of first impression by holding that the enhancement under §3A1.2(b) for an assault "motivated by" the "status of the victim" of the offence (when the victim is a government officer), would apply even in a case where the defendant assaulted a prison guard who the defendant felt had improperly touched him. The court reasoned that the sole reason the otherwise personal dispute between the defendant and victim arose was due to the victim's employment and thus concluded that the enhancement properly applied.

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

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

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Bringier, 405 F.3d 310 (5th Cir. 2005). Section §3B1.1 calls for a two-level enhancement where the defendant was an organizer, leader, manager, or supervisor in any criminal activity involving less than five participants. In this case, the court found sufficient evidence to show that the defendant was a leader or organizer in a drug scheme. The evidence showed that the defendant bought and sold over $12 million worth of cocaine, used a courier to

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

United States v. Turner, 319 F.3d 716 (5th Cir.), *cert. denied*, 538 U.S. 1017 (2003). A sentence enhancement under §3B1.1(c) is appropriate when the evidence shows the defendant directed another in his drug trafficking activities.

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). "Proof that the defendant supervised only one other culpable participant is sufficient to make the defendant eligible for the enhancement under [§3B1.1]. There can also be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." *Id*. at 247 (citations omitted); *see also United States v. Boutte*, 13 F.3d 855 (5th Cir. 1994), *cert. denied*, 513 U.S. 815 (1994)(Individuals involved in a criminal activity other than the defendant need not be charged or convicted with the defendant in order to count as participants under §3B1.1.).

§3B1.2 Mitigating Role

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

United States v. Atanda, 60 F.3d 196 (5th Cir. 1995). "[W]hen a sentence is based on an activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." *Id*. at 199.

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

United States v. Ollison, 555 F.3d 152, (5th Cir. 2009). An employee who embezzles or steals from his or her employer is never automatically abusing a "position of trust," because merely having access to an opportunity that is not available to the general public is not sufficient. The inquiry should be whether the defendant had a position that required "professional or

managerial discretion and minimal supervision." The court concluded that Ollison's duties were clerical in nature and did not provide her with "substantial discretionary judgement."

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

United States v. Kay, 513 F.3d 432 (5th Cir. 2007), *cert. denied*, 129 S.Ct. 42 (2008). An enhancement for "abuse of trust" is appropriate in cases involving the Foreign Corrupt Practices Act because it is similar to the court's previous holdings in fraud and embezzlement cases. A company official who bribes a foreign government official does occupy a "position of trust" with respect to the foreign government and the shareholders of his company. The foreign government and the company's shareholders need not be "the main victims" of the offense for the enhancement to apply. The court notes that the defendant, based on his authority within the company, "significantly facilitated" the offense and the sentencing court committed no error in applying the enhancement.

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

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

United States v. Buck, 324 F.3d 786 (5th Cir. 2003). The guidelines provide that an adjustment may not be applied under §3B1.3 if an abuse of trust or skill is included in the base offense level or specific offense characteristic. The defendant argued that the enhancement did not apply to her fraud conviction because fraud inherently includes an abuse of trust. The court determined that the enhancement applies to a fraud sentence "where the defendant employed discretionary authority given by her position in a manner that facilitated or concealed the fraud." *Id*. at 793. The court explained that "whether a defendant occupied a position of trust must be assessed from the perspective of the victim." *Id*. at 794. The court determined that the enhancement applied in this case because the defendant was in a unique position, in terms of discretion and ability, to conceal her false reports from the government.

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

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

Part C Obstruction

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

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

United States v. Wright, 496 F.3d 371 (5th Cir. 2007). A defendant that has been told he's "about to be arrested," who then closes the front door, flees out of the back door, and remains out of custody for six weeks will not receive an enhancement for obstruction of justice as he was never in custody. The court ruled that to be liable for an obstruction enhancement for avoiding arrest or escape the defendant must have been under "formal control or restraint." *See also United States v. Brown*, 470 F.3d 1091 (5th Cir. 2006).

United States v. Ahmed, 324 F.3d 368 (5th Cir. 2003). The guidelines call for a two-level enhancement under §3C1.1 if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the offense of conviction. A defendant willfully obstructs or impede, or attempt to obstruct or impede, an investigation if he makes material statements to law enforcement officers that significantly impede the investigation. In this appeal, the court found no evidence that the defendant's statements caused the law enforcement agents "to go on a 'wild goose chase,' or in any other way misled the agents in the sort of manner that has traditionally been the basis for enhancement." *Id*. at 373.

United States v. Searcy, 316 F.3d 550 (5th Cir. 2002). A "threat not directly communicated to the intended target may serve as the basis for a §3C1.1 enhancement." *Id*. at 551. "[N]othing in the text of the guideline or commentary . . . restricts application of §3C1.1 only to situations in which the defendant directly threatens a witness or communicates the threat

to a third party with the likelihood that it will in turn be communicated to the witness." *Id*. at 553.

United States v. Clayton, 172 F.3d 347 (5th Cir. 1999). A defendant's conduct that violates a federal obstruction-of-justice statute supports the application of an enhancement under §3C1.1 only when the conduct occurs during an investigation of the defendant's instant offense, not when the conduct occurs before an investigation begins.

United States v. Greer, 158 F.3d 228 (5th Cir. 1998). A defendant who unsuccessfully feigns incompetence in order to delay or avoid trial and punishment qualifies for an offense level enhancement for obstruction of justice. So long as the obstruction is willful, the enhancement may apply to defendants with psychological problems or personality disorders. *See also United States v. Juarez-Duarte*, 513 F.3d 204 (5th Cir.), *cert. denied*, 128 S. Ct. 2452 (2008)(Falsely claiming the need for an interpreter is a "material falsehood" that calls for the enhancement when the false claim "raises uncertainty" in the court's mind as to the validity of the defendant's arraignment, guilty plea, and other proceedings).

§3C1.2 Reckless Endangerment During Flight

United States v. Gould, 529 F.3d 274 (5th Cir. 2008) (Simply running from armed officers who had instructed the defendant to stop was not sufficient to sustain the enhancement for reckless endangerment).

United States v. Southerland, 405 F.3d 263 (5th Cir. 2005). Section 3C1.2 provides for a two-level enhancement if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. Because §1B1.3(a)(1) specifically requires the connection of the enhancement not only to commission, preparation, or evasion, but also to the specific offense of conviction, the court determined that a nexus must exist between the underlying offense and the reckless endangerment during flight for an enhancement under §3C1.2 to apply. The court explained that "[t]he government need not demonstrate that the underlying offense caused either the reckless endangerment during flight or the flight itself, only that a sufficient nexus lie between the underlying offense and the reckless flight." *Id*. at 268.

United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001). The Fifth Circuit upheld the enhancement under §3C1.2 where the defendant's "high-speed chase endangered both police officers and others." *Id*. at 510.

§3C1.3 Commission of Offense While on Release

United States v. Dison, 573 F.3d 204 (5th Cir. 2009). The court held that the sentencing court properly concluded that the guidelines permit the application of the enhancement at §3C1.3 to a conviction of 18 U.S.C. § 3146 (failure to surrender for service of sentence). The court

found the language of the statute to be "unambiguous" and that it did not lead to an "absurd" result.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

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

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

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). Under §3D1.2, the sentencing judge must group all counts involving substantially the same harm together into a single group. Grouping of money laundering counts with drug trafficking counts is appropriate where the defendant knew that the laundered funds were the proceeds of an unlawful activity involving the distribution of drugs.

United States v. Rice, 185 F.3d 326 (5th Cir. 1999). A defendant's convictions of drug trafficking offenses should be grouped, under §3D1.2, with his convictions of laundering the proceeds of the drug trafficking. Here, the defendant's money laundering sentence was enhanced under §2S1.1(b) on the basis of his knowledge that the money he was laundering was the proceeds of drug trafficking. Accordingly, the defendant's money laundering and drug trafficking counts should have been grouped under §3D1.2(c) which provides that counts should be grouped when one count embodies conduct that is treated as a specific offense characteristic, or other adjustment to, the guideline applicable to another of the counts. In so holding, the court distinguished *United States v. Gallo*, 927 F.2d 815 (5th Cir. 1991), which held that money laundering convictions were not to be grouped with convictions for underlying offenses, because *Gallo* did not address subsection (c) of §3D1.2 and instead relied on *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997), which concerned a defendant who was convicted of fraud and of failing to report the proceeds from the fraud on his income taxes.

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

United States v. Martinez, 263 F.3d 436 (5th Cir. 2001). "Under §3D1.3(a) . . . , when counts are grouped together, the applicable offense level is the highest offense level of the counts in the group." *Id*. at 437.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

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

United States v. Newson, 515 F.3d 374 (5th Cir.), *cert. denied*, 128 S.Ct. 2522 (2008). Prosecution's failure to move for an additional one-level acceptance of responsibility sentencing decrease for timely notice of defendant's intention to plead guilty, based solely on defendant's refusal to waive his right to appeal and other postjudgment relief, was not arbitrary or capricious, nor did it amount to unconstitutional motive. The prosecution's decision was rationally related to purpose of the sentencing decrease, which was to conserve prosecutorial and judicial resources.

United States v. Partida, 385 F.3d 546 (5th Cir. 2004). "[A] defendant is not automatically precluded from receiving a reduction for acceptance of responsibility if he exercises his right to trial." *Id*. at 563. Here, the court explained that a defendant may demonstrate an acceptance of responsibility even though he proceeds to trial if he does so to assert and preserve issues unrelated to factual guilt. In this case, the defendants asserted that they went to trial to preserve the legal issue of entrapment. The court determined the defendants were not entitled to an adjustment for acceptance of responsibility because the entrapment defense challenges criminal intent and thus culpability.

United States v. Outlaw, 319 F.3d 701 (5th Cir. 2003). "[A] district court lacks discretion to deny the additional one-level reduction under subsection (b) if the defendant is found to have accepted responsibility under subsection (a), the offense level prior to this two-level reduction is sixteen or greater, and the defendant has complied with the conditions specified in either subsection (b)(1) or subsection (b)(2)." *Id*. at 706. "[A]lthough subsection (b) is part of the 'acceptance of responsibility' guideline, the measure of a defendant's acceptance of guilt or

contrition is generally irrelevant to the subsection (b) inquiry. Rather, while the key inquiry for purposes of subsection (a) is whether the defendant has truly demonstrated contrition, once the district court finds the defendant evinces adequate acceptance of his guilt, the inquiry under subsection (b) focuses instead on the functional issues of timeliness and efficiency, with timeliness being 'at the very heart of the third element, assisting authorities.'" *Id*. (citations omitted). *See also United States v. Leal-Mendoza*, 281 F.3d 473 (5th Cir. 2002)("[A] sentencing judge's reluctance in awarding the two-point reduction for acceptance of responsibility under . . . §3E1.1(a) [has no] bearing on the independent inquiry of whether to award another level reduction under . . . §3E1.1(b)").

United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). "A defendant cannot accept responsibility within the meaning of the sentencing guidelines if his acceptance is the product of repeated warnings by the judge at the sentencing hearing." *Id*. at 293.

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

United States v. Pierce, 237 F.3d 693 (5th Cir. 2001). "In determining acceptance of responsibility, . . . the sentencing judge is not limited to the narrowest set of facts constituting the offense, but may consider Defendant's statements regarding 'relevant conduct' as well." *Id*. at 695.

United States v. Tello, 9 F.3d 1119 (5th Cir. 1993). "[T]he timeliness required for the defendant to be entitled to the extra 1-level decrease [under §3E1.1(b)(2)] applies specifically to the governmental efficiency to be realized in two-but only two-discrete areas: 1) the prosecution 's not having to prepare for trial, and 2) the court's ability to manage its own calendar and docket, without taking the defendant's trial into consideration." *Id*. at 1125-26. "[T]he timeliness of step (b)(2) does not implicate: time efficiency for any other governmental function, including without limitation the length of time required for the probation office to conduct its presentence investigation, and the 'point in time' at which the defendant is turned over to the Bureau of Prisons to begin serving his sentence." *Id*. at 1126

SIXTH CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

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

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

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

In an effort to resolve the inconsistent application of section 3A1.1(b), the United States Sentencing Commission deleted the 'targeting' language from the commentary following section 3A1.1 on November 1, 1995. The revised commentary states that the vulnerable victim provision 'applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability.' Accordingly, most courts eliminated the 'targeting' element for sentencing enhancement purposes and simply require that the defendant knew of the victims' vulnerabilities. Because section 3A1.1 no longer requires proof of 'targeting' in light of the November 1, 1995 amendments to the sentencing guidelines, [the Sixth Circuit's] 1994 decision requiring proof of 'targeting' [(*United States v. Smith*, 39 F.3d 119, 122 (6th Cir.1994))] is no longer good law."

§3A1.2 Official Victim

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

§3A1.3 Restraint of Victim

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

Part B Role in the Offense

§3B1.1 Aggravating Role

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

§3B1.2 Mitigating Role

United States v. Groenendal, 557 F.3d 419 (6th Cir. 2009). The Sixth Circuit held that the district court erred in refusing to apply a downward adjustment for the defendant's minor role in the offense of possession of child pornography. The court held that the adjustment can apply

to convictions involving only one participant charged with criminal conduct because the guideline does not require that more than one participant be charged with a crime. "Even a sole defendant charged with criminal conduct is entitled to a reduction under §3B1.2 if his conduct was less culpable than others involved in relevant conduct." In this case, because the defendant uploaded images to a computer website, the court found the defendant "cannot be both guilty of trafficking and also be the only participant in all relevant conduct. Such activity cannot happen in isolation; the images must be sent to someone and received from someone." Therefore, the district court erred by not considering the reduction, and the case was remanded for resentencing.

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

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

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

United States v. Gilliam, 315 F.3d 614 (6th Cir. 2003). "A 'position of trust' under the [g]uidelines is one 'characterized by professional or managerial discretion.' Moreover, '[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.' '[T]he level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.'" In this case, the defendant maintained that he did not abuse the public trust because he was employed by a government contractor rather than the government. The court of appeals rejected this distinction, observing that the defendant worked as a drug counselor for an employer that was under contract with the United States

Probation Office to provide counseling services to individuals placed on probation. In this capacity, the court explained, the defendant occupied a position which implied that he served an essentially public function involving considerable responsibility with respect to both the government and society at large. The court stated that a "position of trust" arises almost as if by implication "'when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other's presumed better judgment some control over their affairs.'" As a probation counselor under contract with the United States Probation Office, the court of appeals concluded, the defendant was employed in a position of considerable trust, a position he abused by attempting to engage in illicit drug transactions with a client. Accordingly, the court of appeals found the enhancement was properly applied.

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

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

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

> Such [special] skills are acquired through months (or years) of training, or the equivalent in self-tutelage. Computer skills on the order of those possessed by [the defendant], by contrast, can be duplicated by members of the general public with a minimum of difficulty. Most persons of average ability could purchase desktop publishing software from their local retailer, experiment with it for a short period of time, and follow the chain of simple steps that [the defendant] used to churn out counterfeit currency. [The defendant's] computer skills thus are not "particularly sophisticated" . . . .
>
> At a time when basic computer abilities are so pervasive throughout society, applying §3B1.3 to an amateurish effort such as [the defendant's] would threaten to enhance sentences for many crimes involving quite common and ordinary computer skills. The Guidelines contemplate a more discriminating approach.

Part C Obstruction

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

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

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

United States v. Lawrence, 308 F.3d 623 (6th Cir. 2002). "For a district court to enhance a defendant's sentence under §3C1.1, the court must: 1) identify those particular portions of defendant's testimony that it considers to be perjurious; and 2) either make a specific finding for each element of perjury or, at least, make a finding that encompasses all of the factual predicates for a finding of perjury. . . . [T]he second requirement was held by the Supreme Court to be necessary under §3C1.1. The first of these requirements, however, is a rule of our own creation

to assist us in our review of sentence enhancements under §3C1.1, though we have never insisted on a rigid adherence to its terms. Thus, a district court's findings will be adequate if: 1) the record is sufficiently clear to indicate which statements the district court considered perjurious; and 2) the district court found that the statements satisfied each element of perjury."

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

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

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

§3C1.2 Reckless Endangerment during Flight

United States v. Dial, 524 F.3d 783, (6th Cir.), *cert. denied*, 129 S. Ct. 232 (2008). The Sixth Circuit held that "the district court must find a nexus between the offense for which the defendant was convicted and the conduct that involved reckless endangerment during flight."

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

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

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

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

§3D1.4 Determining the Combined Offense Level

United States v. Quinn, 576 F.3d 292 (6th Cir. 2009). The defendant appealed his sentence based on the retroactive amendment relating to the crack cocaine/powder disparity, arguing that the two-level decrease should have been applied to his final offense level, which had been determined pursuant to §3D1.4 for multiple counts. The sentencing court correctly held that the guideline range must be calculated with reference to §3D1.4 and that under §1B1.10, it could only substitute the relevant amendment for the guideline provisions applied at the original sentencing, leaving all other guideline application provisions that affect the final offense level unchanged. The defendant's resulting total offense level contained only a one-level decrease because when "the severity of the crack cocaine crimes was lessened by Amendment 706, the

relative impact of the firearms possession on [his] Guidelines range increased" and there was therefore no error in the use of §1B1.10 and §3D1.4 to calculate the revised guideline range.

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996). In this opinion, the Sixth Circuit determined that seven units are not "significantly more than 5" for the purposes of the commentary to §3D1.4. In reaching this conclusion, the Sixth Circuit explained the following:

> The [g]uidelines established an elaborate system to weigh all, or virtually all, of the facets of an offender's criminal activities. The base offense level assigned to a particular offense generally accounts for the seriousness of the offense, while the sections for specific offense characteristics and the various sections on adjustments for offender and victim characteristics account for these other variables. Section 3D1.4, on the other hand, is meant to account solely for the number of different offenses or groups of offenses that an offender committed. Departure from the chart in this section should thus be based solely on the number of units assigned to an offender, not the underlying nature of the units.
>
> To approach this chart otherwise and interpret its concept of "significantly more than five" to involve some subjective weighing of the social significance of the underlying offenses usurps the role assigned to the Sentencing Commission in setting base offense levels, and turns the section into a catch-all provision justifying departure whenever a court simply believes an offender with more than five units deserves additional punishment. The whole point of the [g]uidelines is to reduce or remove this type of discretion from the sentencing process and assign certain numerical values to certain facets of an offender's criminal activities. To confound the facet of the [g]uidelines dealing with the magnitude of criminal activity with other facets of the [g]uidelines, such as the subjective social harm caused by the particular type of offenses involved, reduces the precision and uniformity of sentences.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

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

statements and conduct.'" In this case, the court of appeals determined that the defendant's situation was not one of the rare situations contemplated by the commentary to §3E1.1 where the defendant clearly demonstrated an acceptance of responsibility though pre-trial statements and conduct even though he proceeded to trial. The defendant vigorously disputed his factual guilt at trial, arguing through his lawyer that the government's witness lied about the defendant's participation in the robbery, about simply being in the wrong place at the wrong time, and about ownership of money found on his person.

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

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

United States v. Smith, 245 F.3d 538 (6th Cir. 2001). "Pursuant to the sentencing guidelines, a defendant may decrease his offense level by two levels if he 'clearly demonstrates acceptance of responsibility for his offense.'" The defendant in this appeal argued that the district court erred in not granting him the additional one level for acceptance of responsibility under §3E1.1(b). The court determined that the defendant's delay until the eve of the trial to enter a guilty plea compelled the government to prepare its entire case for trial. Consequently, the court upheld the two-level reduction for acceptance of responsibility and affirmed the defendant's sentence.

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

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

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

SEVENTH CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on the vulnerability of the victims. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over an 11-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. On appeal, the defendant contended that the district court erred in determining that he deliberately targeted the women whom he defrauded because of their vulnerability, and therefore in applying §3A1.1. The circuit court found that the guideline was amended in 1995 and that the vulnerable

victim enhancement no longer required a showing of targeting by the defendant. Even though some of the defendant's conduct took place prior to November of 1995, the defendant was properly sentenced under the amended version because most of his offenses occurred subsequent to the effective date of the amendment. *See also United States v. Bragg*, 207 F.3d 394, 400 (7th Cir. 2000) (superseded by regulation on other grounds) (district court did not err in adjusting the defendant's sentence upward based on the victim's vulnerability regardless of whether vulnerable victims were targeted); *United States v. Williams*, 258 F.3d 669, 672-73 (7th Cir. 2001) (district court did not err in enhancing the defendant's sentence based on §3A1.1 where the victim was 71 years of age, even though she was not particularly susceptible; Application Note 2 defines vulnerable victim as a victim of the offense who is vulnerable due to age or physical or mental condition).

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

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

§3A1.4 Terrorism

United States v. Parr, 545 F.3d 491 (7th Cir. 2008), *cert. denied,* 129 S. Ct. 1984 (2009). Defendant was convicted at trial for threatening to use a weapon of mass destruction against a federal government building. The basis for this conviction were statements by the defendant to his cellmate that he intended to blow up a federal building. At sentencing, the district court imposed a 12-level enhancement under §3A1.4 for an "offense . . . that involved, or was intended to promote, a federal crime of terrorism." Although the statements to the cellmate were not "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," the district court reasoned that the threatened conduct—blowing up a federal building—certainly would have been, so the crime "involved" a federal crime of terrorism. On appeal, the Seventh Circuit rejected this reasoning on the ground that "the term 'involve' as used in the guidelines . . . means 'to include.'" Thus, "an offense 'involves' a federal crime of terrorism only if the crime of conviction is itself a federal crime of terrorism." Because the offense in this case was not such a crime, the enhancement was improper. On remand, however, the district court could still consider whether the offense *promoted* a federal crime of terrorism under this guideline.

Part B Role in the Offense

§3B1.1 Aggravating Role

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

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

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

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

holding that the defendants were subject to the four-level "organizer-leader" enhancement regardless of whether the wagering offense and tax conspiracy offenses were analyzed separately or grouped together under §3D1.2. The defendants contend that their participation in the tax conspiracy was limited to their role as clients of a third party. The court concluded that the defendants' argument fails to recognize that the determination of whether a defendant is an "organizer or leader" under §3B1.1 "is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct). The court stated that there is no question that the defendants' operation of a multi-jurisdictional offshore sports bookmaking empire is clearly relevant in assessing their role in the tax conspiracy. It agreed with the district court that "it is not determinative whether the defendants exercised a leadership role over a third party in the tax conspiracy because they exercised a leadership role over the entire scheme, a part of which was to hide assets and income through an illegal tax shelter.

United States v. Noble, 246 F.3d 946 (7th Cir. 2001). The district court did not err when it enhanced the defendant's sentence four levels for his leadership role in the offense. After a jury trial, the defendant was convicted of conspiracy to distribute crack cocaine and distribution of crack cocaine, and he was sentenced to a term of life imprisonment and 240 months' imprisonment. The district court found that the defendant had more than a buyer-seller relationship with five other participants. Instead, he provided the drugs for the whole distribution scheme, controlled the drug price and delivery, and fronted the drugs for one of the participants. Further, the court found that the defendant stored the drugs in one of the participant's trailers and in another's car, and retained a key to the trailer so he could access the drugs any time. Importantly, the district court found that the defendant exercised such psychological control over one of the participants that the person was willing to go to jail for the defendant. On appeal, the defendant asserted he was merely a distributor and noted that being a distributor does not justify application of the enhancement. The Seventh Circuit agreed with the sentencing court, and held that the defendant exercised the requisite control over the five participants to support the organizer or leader enhancement. *See also United States v. Carerra*, 259 F.3d 818, 826 (7th Cir. 2001) (district court did not err in imposing an upward departure for defendant's leadership role where defendant obtained the drugs, set up the time and place for the delivery, recruited his brother as an accomplice, and claimed rights to over 80 percent of the proceeds).

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

United States v. Bragg, 207 F.3d 394 (7th Cir. 2000). The district court did not err by impermissibly double-counting the defendants' aggravating role in the offense. The defendant

pled guilty to engaging in conspiring to knowingly remove asbestos and fraudulently using social security numbers to obtain false identification cards for asbestos workers. The defendant recruited workers from homeless shelters in another state to work on an asbestos removal project. The district court enhanced one of the defendants' sentences four levels for his leadership role in a conspiracy as an organizer or leader of a criminal activity involving five or more persons, and enhanced two defendants' sentences three levels because they were determined to be merely managers or supervisors of a criminal activity. On appeal, the defendants argued their aggravating criminal conduct was double counted when it was used to justify an adjustment and to attach liability in the underlying conspiracy involving a violation of the Clean Air Act. The circuit court stated that the bar on double-counting "comes into play only if the [underlying] offense itself necessarily includes the same conduct as the [adjustment]." *Id.* at 400. Liability attaches under the Act to an owner or operator of pollution, defined as any person who owns, leases, operates or controls or supervises the facilities or any person who owns, leases, operates, controls or supervises the operation. The court found, however, that in order for one to be classified as a leader or supervisor for purposes of §3B1.1, a defendant must have been the organizer, leader, manager or supervisor of one or more other participants. Because an owner or operator's criminal liability under the Act would not necessarily result in a sentencing adjustment for his aggravating role, the circuit court rejected the defendants' double-counting argument. Thus, the circuit court held the sentencing court properly enhanced the defendants' sentences under §3B1.1.

§3B1.2 Mitigating Role

United States v. Hill, 563 F.3d 572 (7th Cir.), *cert. denied*, 130 S. Ct. 623 (2009). The court held that the district court erred when it found the defendant ineligible for a mitigating role reduction. The defendant pleaded guilty to possessing a firearm as a convicted felon. The firearms in question were obtained by the defendant's brother in a burglary. The defendant did not participate in the burglary, nor did he receive money from the sale of the firearms; rather, the defendant simply wrapped the firearms in blankets, and helped his brother deliver them to the buyer. The court held that §3B1.2 makes it clear that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), . . . not solely on the basis of the elements and acts cited in the count of conviction." According to the court, the defendant's "offense of conviction should not be treated as an isolated act in which only he was involved, but rather one step in a broader criminal scheme that involved multiple participants."

United States v. Brumfield, 301 F.3d 724 (7th Cir. 2002). The district court did not err by denying a downward adjustment for a minor or minimal role under §3B1.2, where the defendant was held accountable only for the drugs that he personally handled. The court of appeals found that it would be incongruous to find that the defendant functioned as a minimal or minor participant with regard to conduct in which he personally was involved.

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

United States v. Haynes, 582 F.3d 686 (7th Cir. 2009). Defendant, a police officer involved in a conspiracy that used traffic stops and home invasions of drug dealers to seize drugs and money, pleaded guilty to drug offenses, robbery, and extortion. The district court denied defendant a minor role reduction and applied the abuse of trust enhancement. On appeal, defendant argued that he was entitled to a minor role reduction under §3B1.2(b) because he was not necessary to the conspiracy and because the district court did not compare his role in the conspiracy to that of the average member. Defendant argued that his role as a police officer had no relevance to his role in the conspiracy as compared to others. The Seventh Circuit affirmed, reasoning that defendant's position as a police officer was essential to the conspiracy. The conspiracy would have been more difficult and more dangerous absent police participation that lent to the drug dealer victims the impression of legitimacy. The defendant also argued that the district court engaged in impermissible double counting by using the same reasoning for not giving him a minor role reduction – his status as a police officer and the accompanying authority and power – to apply an enhancement for abuse of trust under §3B1.3. The Seventh Circuit held that double counting occurs when the district court imposes two or more upward adjustments based on the same set of facts. Here, the district court imposed one upward adjustment (for abuse of trust) and declined to make a downward adjustment (for minor role). This is not double counting.

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

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on abuse of a position of trust. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a

large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over an 11-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. The district court enhanced the defendant's sentence two levels for his abuse of trust, pursuant to §3B1.3. The circuit court found that the defendant had represented himself as a licensed money manager and had offered to invest money for one of the women he dated, stating he was knowledgeable about investments and that he regularly invested money for other people. The circuit court found these representations were sufficient to convince the woman to entrust the defendant with her money, thereby placing him in a position of trust. Because the defendant's abuse of this position of trust facilitated his commission of the fraud, the district court properly increased the defendant's sentence.

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

United States v. Ford, 21 F.3d 759 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's application of §3B1.3 to the defendants' RICO offenses. The defendants essentially challenged that the enhancement amounted to double-counting because the public bribery offenses which underlay their RICO counts necessarily involved abuse of a position of public trust. §2C1.1, comment. (n.3). The defendants' argument centered on the application of §2E1.1, which instructs the sentencing court to apply the base offense level of the conduct underlying the racketeering activity if it is more than 19, the base offense level for all RICO offenses. §2E1.1(a). Here, application of §2E1.1(a) yielded a higher offense level which was subsequently enhanced pursuant to §3B1.3. However, had the defendants been sentenced under subsection (b), Application Note 3 of §2C1.1 would

have precluded the enhancement for abuse of a position of trust. The circuit court concluded that unlike public bribery, not all RICO activity includes an abuse of trust "so that the minimum base offense level of 19 . . . does not already incorporate that element." The defendants' particular crimes are distinguished from other RICO offenses precisely because their activity did involve abuse of trust. Whether the defendants would have received the enhancement if they were sentenced under §2C1.1 is irrelevant.

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

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

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

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

United States v. Haynes, 582 F.3d 686 (7th Cir. 2009). Defendant, a police officer involved in a conspiracy that used traffic stops and home invasions of drug dealers to seize drugs and money, pleaded guilty to drug offenses, robbery, and extortion. The district court applied the abuse of trust enhancement under §3B1.3 and an enhancement for use of body armor under §3B1.5. Defendant argued that the district court erred by applying both enhancements because

the abuse of trust enhancement "may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." The defendant argued that body armor was part of his uniform as a police officer and therefore a specific offense characteristic. The Seventh Circuit held that "specific offense characteristic" in the guidelines refers to adjustments to the base offense level in chapter two. Adjustments, such as for abuse of trust and use of body armor, are found in chapter three and therefore are not "specific offense characteristics."

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

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

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

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

United States v. Willis, 523 F.3d 762 (7th Cir. 2008). "[A] sentencing court should not apply [§3C1.1] more than once for multiple acts of obstruction . . . [W]e hold that multiple acts of perjury produce a single two-level enhancement under §3C1.1 and possibly a higher or

above-Guidelines sentence based on the discretion conferred by 18 U.S.C. § 3553(a), not the imposition of multiple obstruction-of-justice enhancements."

United States v. Carroll, 346 F.3d 744 (7th Cir. 2003). The district court misapplied §3C1.1 and consequently indirectly misapplied §3E1.1. The defendant served as a foreign service officer with the United States Department of State. In abuse of his capacity, the defendant coordinated the illegal sale of hundreds of fraudulent visas through local brokers with whom he shared an average of $10,000 in bribe proceeds per visa. At the sentencing, the district court concluded that the defendant's statements during the plea colloquy and to the probation officer merited a two-level enhancement for obstruction of justice, and defendant was not entitled to a three-level reduction for acceptance of responsibility. On appeal, the defendant challenged the district court's findings that he obstructed justice and that he did not accept responsibility for his actions. The Seventh Circuit noted that assuming the defendant's statements to the district court and the investigating probation officer were knowingly inaccurate, it found that they did not amount to material falsehoods within the meaning of §3C1.1. The court noted that nowhere in the record was there an attempt by the defendant to conceal assets. Overestimating the amount of legitimate assets commingled with illicit assets was a far cry from concealing their existence. Furthermore, the defendant's ability to pay fines or restitution was not at issue here because the substitute forfeiture provision of 21 U.S.C. § 853 subjected the defendant's every last penny to forfeiture. In other words, regardless of either the source of the funds in the six accounts or the exact amount of the defendant's legitimate assets, after the forfeiture of $2.5 million, the defendant retained nothing with which he might pay fines or restitution. Regarding the issue of acceptance of responsibility, the court noted that since the defendant did not obstruct justice within the meaning of §3C1.1, application note 4 of §3E1.1, which provides that obstructive conduct resulting in an enhancement pursuant to §3C1.1 ordinarily indicates that a defendant has not accepted responsibility for his crime, was not applicable. The court also noted that the district court ignored the fact that the defendant engaged in numerous, intensive proffer sessions over a period of months, in which he described his illegal conduct in considerable detail. Accordingly, the district court's sentence was reversed and the case remanded for resentencing.

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

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

United States v. Jefferson, 252 F.3d 937 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for his obstruction of justice. The defendant was convicted following a jury trial of five counts relating to the distribution of crack cocaine. On appeal, the defendant contended the district court erred in increasing his base offense level pursuant to §3C1.1, based on a finding that he had committed perjury when he testified at trial, without first making specific findings of perjury. The circuit court found that the district court cited to several portions of the record in which the defendant denied selling crack cocaine and further found that denial was a falsehood which amounted to perjury. Thus, the circuit court stated that the defendant's contention that the district court did not find he willfully intended to provide false testimony failed, and it held that the enhancement properly applied. *See also United States v. Noble*, 246 F.3d 946, 955 (7th Cir. 2001) (district court did not err in enhancing defendant's sentence where defendant committed perjury during his testimony by lying and by coaching and orchestrating another's false confession); *United States v. Carrera*, 259 F.3d 818, 831 (7th Cir. 2001) (district court did not err when it failed to identify the perjurious statements and finding that the statements did not preclude an obstruction of justice enhancement where the court specifically pointed to testimony that conflicted with the agent's account of the defendant's post arrest statements); *United States v. Anderson*, 259 F.3d 853, 860 (7th Cir. 2001) (district court did not err in finding uncharged relevant conduct established enhancement for obstruction of justice based on perjurious statements where the defendant lied and claimed he never intended to keep the funds he was charged with embezzling).

United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences for obstruction of justice. The defendants were convicted of conspiracy to commit mail fraud. The defendants were involved in committing arson for the insurance proceeds, and the district court found that each had obstructed justice by providing false testimony and lying to federal investigators about their role in the conspiracy. The circuit court found that two of the defendants obstructed justice by testifying falsely to exculpate other family members, and this evidence was sufficient to form the basis for a finding of obstruction of justice. The circuit court found that a third defendant provided a false alibi for the other two defendants. On appeal, that third defendant argued that any misstatements he made to the investigators were made early in the investigation and were therefore immaterial. The circuit court found that Application Note 6 defines materiality as "evidence, that, if believed, would tend to influence or affect the issue under determination" and that pretrial statements that significantly obstruct or impede an investigation are material and may serve as the basis for an enhancement. *Id.* at 907. The Seventh Circuit held that this third defendant's pretrial statements were made willfully in an attempt to obstruct justice, and therefore the enhancement was properly applied. Finally, a fourth defendant's sentence was enhanced because she attempted to influence the testimony of a witness. The circuit court found that the defendant concocted a false set of facts that led investigators toward a witness whom she had attempted to influence. Thus, her behavior was material for the purpose of the obstruction of justice enhancement.

United States v. Menting, 166 F.3d 923 (7th Cir. 1999). The district court did not err in applying an obstruction of justice enhancement as the defendant committed perjury at trial. The defendant argued that the "two-witness rule" of the perjury statute, 18 U.S.C. § 1621, applied and

prevented application of the enhancement. To prove a violation of section 1621, the government must provide testimony from two witnesses or one witness and "sufficient corrolative evidence." The Seventh Circuit rejected the two-witness rule at sentencing, finding the sentencing court is permitted to consider a wide range of information, as long as the information is found to be reliable.

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

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

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Bahena-Guifarro, 324 F.3d 560 (7th Cir. 2003). The defendant pled guilty to two counts of illegal reentry following a conviction for an aggravated felony, in violation of 18 U.S.C. § 1326(a) and (b). In this case of first impression, the defendant appealed the district court's refusal to group the two counts under §3D1.2. The Seventh Circuit affirmed.

The defendant was born in Mexico but came to the United States in 1979 as an infant and lived in Illinois most of his life. He became a lawful permanent resident in 1989. In 1996, he was convicted in Lake County, Illinois of burglary, robbery and aggravated battery and sentenced to concurrent six-year terms of imprisonment. After serving part of his sentence, he was placed on supervised release and transferred to INS custody. In 1997 an immigration judge ordered the defendant deported to Mexico, and he was removed from the United States in 1998. The defendant illegally reentered the U.S. in 1999. A few months later, he was convicted of burglary in Lake County, Illinois and sentenced to three years of incarceration. After serving part of his term, he was again placed on supervised release and transferred to INS custody. An immigration judge held another hearing and ordered him deported in April 2000. He was again removed from the United States and returned to Mexico. Once again, the defendant illegally reentered the United States. In June 2001, he was arrested in Lake County, Illinois for driving under the influence of alcohol. After his conviction (he was sentenced to time served), he was again transferred to INS custody. This time he was charged with two counts of illegal reentry of an alien who has previously been removed from the United States subsequent to a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b). The defendant pled guilty to both counts. In the PSR, the probation officer concluded that the two counts should be grouped under §3D1.2(b) because they involved the same type of offense and the same victim, and because the two acts were connected by a common scheme or plan. The government disagreed and analogized the defendant's offenses to two bank robberies committed a year apart, or two assaults against the same victim committed a year apart, which would not be grouped. The district court agreed with the government, finding that "these previous convictions do not lend themselves to . . . grouping." Because there was no evidence in support of the defendant's position, the court rejected his argument that he had returned to the United States for the same purpose each time, to be back with his family. On appeal, the defendant maintained that although his illegal reentries were separated in time, both crimes involved identical harm to societal interests and a common criminal objective. The court of appeals noted the commentary to the guideline provides that, for offenses in which there is no identifiable victim (such as drug or immigration offenses), the victim is the societal interest that is harmed. The appellate court also noted that no other court of appeals had addressed the question presented in this case.

The circuit court was persuaded that the district court did not err in declining to group the two counts of illegal reentry for two reasons. First, the court held that the defendant's offenses did not constitute a single, composite harm. *See United States v. Cueto*, 151 F.3d 620, 638 (7th Cir. 1998) (section 3D1.2 does not authorize the grouping of offenses that do not represent essentially one composite harm). Second, the court found that the defendant did not provide the court with any evidence that the crimes were committed as part of a common scheme or plan even though it was his burden to do so. On the question of one composite harm, the appellate court noted each time the defendant illegally reentered the United States, the government incurred the cost of processing and deporting him. Moreover, each time he reentered the United States, the court considered that he committed a crime in addition to the illegal reentry. In addition to the separate instances of harm incurred in the cost of processing and deporting the defendant each time, the court of appeals found that the community was subjected to separate instances of risk of harm from his continued criminal activities. The appellate court held that the

defendant's two illegal reentries were akin to two counts of escape from prison–although the defendant who escapes engages in the same type of conduct each time and harms the same societal interest each time, each escape is a separate and distinct offense that may not be grouped. The defendant bore the burden of demonstrating that the two illegal reentries were part of a common scheme or plan. The court found that he proffered no evidence regarding his reasons for returning to the United States each time, and the court found that it was not obliged to accept counsel's characterization of the defendant's motives at face value. *See United States v. Pitts*, 176 F.3d 239, 245 (4th Cir. 1999) ("[A] defendant cannot merely define his scheme in broad fashion and argue that all of his conduct was undertaken to satisfy that broad goal. Rather, a more particularized definition of the defendant's intent is required."). The defendant, the court held, had not demonstrated anything more than conduct that "constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal." *Pitts*, 176 F.3d at 245. Therefore, the appellate court held that the district court was correct not to group the offenses.

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

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

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Miller, 343 F.3d 888 (7th Cir. 2003). The defendant appealed his sentence for possession of child pornography on the ground that the court, *inter alia*, erred by failing to award him a three-level reduction under §3E1.1. The defendant was convicted of possession of child pornography after his wife discovered images on a computer. A search of the computer revealed 700 to 750 images of child pornography. The defendant admitted his guilt and sought a downward adjustment for acceptance of responsibility. The trial court denied a downward adjustment, finding that the defendant was minimizing or rationalizing his behavior to get a favorable change in the conditions of his release. Specifically, the court found that the defendant was trying to convince the court that he was not a danger to the community to enable him to leave the halfway house and live with family members. On appeal, the defendant argued that he was entitled to a downward adjustment under §3E1.1 because he promptly admitted to possessing the unlawful images, expressed remorse and contrition for his acts, and entered a timely guilty plea. The court of appeals agreed with the Sixth Circuit rather than the Ninth Circuit in evaluating acceptance of responsibility. The court held that just because the defendant admitted to the elements of the offense did not mean that he is necessarily entitled to a downward adjustment–the court requires defendants to honestly acknowledge the wrongfulness of their conduct and not minimize it. *See United States v. Lopinski*, 240 F.3d 574, 575 (7th Cir. 2001) (recognizing that the purpose of §3E1.1 is not only to induce guilty pleas, but also to reduce recidivism by having defendants face up to the wrongfulness of their conduct); *see also United States v. Travis*, 294 F.3d 837, 840-41 (7th Cir. 2002); *United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999); *United States v. Grimm*, 170 F.3d 760, 766 (7th Cir. 1999); *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997). The court held that the Seventh Circuit requires that a defendant do more than merely plead guilty, an approach consistent with that endorsed by the Sixth Circuit in *Greene*. The appeals court concluded that this approach also makes sense–otherwise, §3E1.1 would have been written to say that merely pleading guilty earns the reduction.

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

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

United States v. Bean, 18 F.3d 1367 (7th Cir. 1994). The district court erred in awarding a six-level downward departure under §5K2.0 for "extraordinary acceptance of responsibility," based on the defendant's repayment of an unauthorized bank loan. The trial court chose not to reduce the defendant's offense level for acceptance of responsibility under §3E1.1 because the defendant went to trial and contested his guilt. Any reduction greater than that which would have been available under §3E1.1 must depend on a "strong reason to believe, not only that the victims were not at substantial risk, but also that repetition is unlikely." This was the defendant's third conviction for defrauding a financial institution . . . "a far cry from acceptance of responsibility."

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

United States v. McDonald, 22 F.3d 139 (7th Cir. 1994). In assessing an issue of first impression, the circuit court affirmed the district court's denial of an acceptance of responsibility adjustment based on the defendant's use of cocaine while awaiting sentencing. The defendant pleaded guilty to aiding and abetting the counterfeiting of obligations in violation of 18 U.S.C. §§ 471, 472. He argued that the sentencing court's denial was in error because it was based on uncharged conduct that was unrelated to the offense of conviction. Noting a split among several circuit courts, the Seventh Circuit joined the First, Fifth and Eleventh Circuits in holding that

unrelated criminal conduct may be considered in determining whether a defendant has accepted responsibility. *See United States v. O'Neil*, 936 F.2d 599 (1st Cir. 1991); *United States v. Watkins*, 911 F.2d 983 (5th Cir. 1990); *United States v. Scroggins*, 880 F.2d 1204 (11th Cir. 1989); *but see United States v. Morrison*, 983 F.2d 730 (6th Cir. 1993) (court should not have considered conduct unrelated to the offense of conviction). Application Note 1(b)'s broad language "indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally." It is reasonable for the sentencing court to view continued criminal activity, such as the use of a controlled substance, as being inconsistent with an acceptance of responsibility.

EIGHTH CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Vega-Iturrino, 565 F.3d 430 (8th Cir. 2009). Defendant objected to a two-level adjustment pursuant to §3A1.1(b)(1) for an offense involving vulnerable victims. Here, while defendant targeted victims 80 years of age and older in a credit card theft scheme, no evidence was presented in the presentence report or at sentencing why the victims were unusually vulnerable. In remanding for resentencing the court stated:

> To apply an enhancement under §3A1.1(b)(1), "the sentencing court must still determine whether a victim was . . . unusually vulnerable due to age or some other characteristic." . . . "In making this determination, we do not apply a blanket assumption that an advanced age is sufficient to render a victim vulnerable." . . . This enhancement "requires a fact-based explanation of why advanced age or some other characteristic made one or more victims 'unusually vulnerable' to the offense conduct, and why the defendant knew or should have known of this unusual vulnerability." (Internal citations omitted).

United States v. Schwalk, 412 F.3d 929 (8th Cir. 2005). The district court did not err in finding that the vulnerability of a four-year-old victim of assault at the hands of his father warranted an upward departure in addition to the vulnerable victim enhancement. The court found that the child's vulnerability was of a degree not adequately taken into consideration by the Sentencing Commission, since as a young child dependent on his parents, he was especially vulnerable to abuse.

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003). The Eighth Circuit affirmed in part, but remanded the sentence to determine whether the offense involved a large number of vulnerable victims within the meaning of §3A1.1(b)(2). The defendant argued that a vulnerable victim enhancement should not be upheld absent a finding of "particularized vulnerability." The Eighth Circuit noted that its early decisions applying §3A1.1 supported this contention,

repeatedly stating that unless the criminal act was directed against the young, the aged, the handicapped, or unless the victim was chosen because of some unusual personal vulnerability, §3A1.1 could not be applied. In the instant case, the Eighth Circuit decided to remand the case for further fact finding.

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The district court properly imposed the vulnerable victim enhancement where the victim was asleep when the defendant entered her residence and began to assault her.

United States v. Washington, 255 F.3d 483 (8th Cir. 2001). The district court did not err in applying the vulnerable victim enhancement in a prosecution for mail fraud where the defendants targeted the elderly in need of money and had acquired specific knowledge about the victims' ages, infirmities, and vulnerabilities.

United States v. Hernandez-Orozco, 151 F.3d 866 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for a vulnerable victim. The defendant was convicted of kidnaping his sister-in-law from a small village in Mexico and transporting her to Nebraska. The victim was 15 years old on the day of the kidnaping, had never traveled more than a four-hour drive from her village, and did not speak English, which made her more vulnerable in the United States.

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994). The district court did not err by enhancing the defendants' sentences for conspiracy to violate civil rights pursuant to §3B1.1. The trial evidence established that the victims were racially isolated and were thus particularly susceptible to threats of racial violence, their young ages made them particularly vulnerable, and one child was in a wheelchair.

§3A1.2 Official Victim

United States v. Hampton, 346 F.3d 813 (8th Cir. 2003). The §3A1.2 (Official Victim) sentencing enhancement was not supported by the record where the officer was struck by the defendant's vehicle after the defendant lost control during a car chase. Section 3A1.2 does not apply to reckless behavior, but rather requires that the defendant's action be akin to aggravated assault, when the actual and intended victim was a law enforcement officer.

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The defendant was convicted of conspiracy to distribute cocaine base and possession with intent to distribute cocaine base, and was sentenced to concurrent terms of life imprisonment. The district court enhanced the defendant's sentence on the ground that he assaulted a corrections officer during his escape from custody while awaiting sentencing. Section 3A1.2 specifies that the enhancement "is proper only where the 'offense of conviction' is motivated by the victim's status." Because the defendant's offenses of conspiracy and possession to distribute cocaine base were not targeted at the corrections officer, application of the enhancement was not proper but was harmless error where a life sentence was still required after the enhancement was removed.

§3A1.3 Restraint of Victim

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The district court correctly applied the restraint of victim sentencing enhancement to a defendant who broke into a house at night and dragged the victim from bed to an adjoining room. This conduct is akin to "being bound by something" because the defendant physically restrained the victim's arms.

United States v. Waugh, 207 F.3d 1098 (8th Cir. 2000). The district court did not err in enhancing the defendant's sentence two levels for restraint where the defendant pinned the victim's arms behind her back. The enhancement was permissible because restraint is not an element of the assault offense itself.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Shallal, 410 F.3d 434 (8th Cir. 2005). The district court did not err in applying the aggravating role adjustment under §3B1.1(b) because the defendant need only supervise one person in an extensive conspiracy to qualify for the enhancement.

United States v. Placensia, 352 F.3d 1157 (8th Cir. 2003). The district court correctly applied a two-level enhancement for the defendant's aggravated role in the offense where the defendant recruited accomplices and directed their activities.

United States v. Austin, 255 F.3d 593 (8th Cir. 2001). The district court did not err in applying a two-level enhancement based on the defendant's leadership role where two of the defendant's codefendants testified extensively as to the defendant's influential role in the offense and the defendant's only witnesses were properly discounted after they refused to submit to cross-examination. Because the district court found that the defendant was a supervisor or manager but did not make a finding that his criminal operation involved more than five other participants or was otherwise extensive, the district court properly applied only a two-level enhancement for the defendant's role.

United States v. Womack, 191 F.3d 879 (8th Cir. 1999). The district court enhanced the defendant's sentence upon a finding that the defendant was an organizer or leader of the conspiracy. The evidence established that five people were involved in the conspiracy, at least four of whom assisted the defendant in obtaining drugs from different sources. The defendant set the price for the cocaine base, tried to control and create territories for the sale of drugs in another city, and attempted to recruit new members into the conspiracy. This evidence supported the district court's finding that the defendant was a leader in the conspiracy.

§3B1.2 Mitigating Role

United States v. Johnson, 408 F.3d 535 (8th Cir. 2005). The district court did not err in denying a reduction for a minor role to a defendant who was responsible for finding a large supplier of pseudoephedrine for his co-conspirators' methamphetamine lab. A less culpable defendant is not entitled to a reduction if he was deeply involved.

United States v. Morehead, 375 F.3d 677 (8th Cir. 2004). The district court improperly referred to contested portions of the presentence report in denying defendant a role reduction as a minor participant under sentencing guidelines. When a defendant disputes material facts in his presentence report, the sentencing court must either refuse to take those facts into account or hold an evidentiary hearing. Because the circuit court was unable to determine if the trial court's reliance on the disputed portions of the presentence report was harmless error, the court remanded for resentencing.

United States v. Speller, 356 F.3d 904 (8th Cir. 2004). The defendant pled guilty to conspiracy to distribute 500 grams or more of cocaine, conspiracy to distribute cocaine and cocaine base within 1,000 feet of a playground. The district court denied the defendant a two-level minor role reduction because the defendant was only held responsible for drugs she personally distributed and not for any drugs others distributed. On appeal, the Eighth Circuit affirmed, noting that the propriety of a downward adjustment was determined by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense. Reduction for a defendant's role in an offense was not warranted when the defendant was not sentenced upon the entire conspiracy but only upon his own actions. Therefore, the district court did not err in denying the reduction. *See also United States v. Ramirez*, 181 F.3d 955 (8th Cir. 1999) (stating that because the government agreed to hold the defendant accountable only for the amount of drugs found in his car from the single episode of his arrest, and the defendant was not substantially less culpable than any other defendant for that amount of drugs); *United States v. Carpenter*, 487 F.3d 623 (8th Cir. 2007) ("[T]his court has consistently rejected the argument that a distributor of controlled substances deserves a minor-role reduction simply because of the presence of a larger-scale upstream distributor.")

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003). The district court erred in granting the defendant a four-level minimal role reduction. The defendant offered no evidence at sentencing to show her minimal participation. The court stated that whether a downward adjustment was warranted was determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable, but also by measuring each participant's individual acts and relative culpability against the elements of the offense. The defendant fully satisfied the elements of each offense of which she was convicted, and certain aspects of her criminal activity exceeded the minimum necessary to be found guilty of the offense. The court left the defendant with a two-level minor role reduction because the presentence report recommended it and the government did not object to it.

United States v. Nambo-Barajas, 338 F.3d 956 (8th Cir. 2003). The appellate court affirmed the district court's denial of a four-level minimal-role-in-the-offense downward adjustment to a defendant who was an integral part of the conspiracy because the defendant supplied the drugs for delivery.

United States v. Bush, 352 F.3d 1177 (8th Cir. 2003). The defendant pled guilty to conspiracy to possess cocaine base with intent to distribute and argued for a minor role reduction. The sentencing court granted the role reduction, until it realized that recent amendments to the guidelines would result in an offense level cap of 30. The court then denied the adjustment in part on its assessment that the sentence resulting from the adjustment would be too lenient. The defendant appealed. The Eight Circuit rejected the defendant's argument that she was less culpable than the other defendants and thus entitled to a minor role reduction. Consequently, the court held that the district court did not err when it determined that the defendant did not play a minor role. The court remanded for resentencing, however, because the district court erred in basing its decision about the adjustment in part on the length of the sentence the adjustment would compel. The court stated that when considering guidelines enhancements, the district court may exercise its discretion only in finding whether the facts that triggered the enhancement existed and not in deciding whether application of the enhancement would have a desirable effect on the defendant's punishment.

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003). The appellate court affirmed the district court's refusal to grant a two-level minor-role reduction, holding that the mere fact that a defendant was less culpable than his codefendants did not entitle the defendant to a minor participant status.

United States v. Christmann, 193 F.3d 1023 (8th Cir. 1999). The district court did not err in denying the defendant a reduction in his sentence for his minor role because although the defendant was less culpable than the actual robber, he was more culpable than a third participant.

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). The district court erred in concluding that the defendant was ineligible for a minor participant reduction because he was charged with a sole participant possession offense rather than conspiracy to distribute. The defendant presented undisputed evidence that he was not the only participant in the scheme to distribute marijuana and that his role was limited compared with that of others involved. The court of appeals vacated and remanded, holding that §3B1.2 directs consideration of the contours of the underlying scheme, not just of the elements of the offense. The court concluded that a defendant convicted of a sole participant offense may be eligible for a mitigating role reduction if he can show: (1) that the relevant conduct for which the defendant would otherwise be accountable involved more than one participant and (2) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s).

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir. 1994). The defendant was not entitled to role reduction where the defendant's role as transporter was integral in the advancement of the conspiracy.

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

Abuse of Position of Trust

United States v. Hayes, 574 F.3d 460 (8th Cir. 2009). "Whether the defendant may occupy a position of trust is a question of law; if so, whether she did is a question of fact." For "the abuse-of-trust adjustment to apply in the fraud context, there must be a showing that the victim placed a special trust in the defendant beyond ordinary reliance on the defendant's integrity and honesty that underlies every fraud scenario." Within the health care fraud context, the Eighth Circuit joined the majority of circuits that have addressed the question and "held that health care providers who defraud Medicaid or Medicare may be subject to the abuse-of-trust enhancement." However, the district court erred in finding defendant occupied a position of trust as "the district court's superficial reasoning [did] not demonstrate that Hayes and Medicaid's relationship was such that it went beyond the ordinary commercial relationship which is insufficient to invoke the abuse-of-trust enhancement."

United States v. Septon, 557 F.3d 934 (8th Cir. 2009). Defendant was convicted of bank fraud and conspiracy to commit mail and bank fraud where he submitted numerous fraudulent loan applications to banks and mortgage lending companies. Many fraudulent loans went into default causing losses in excess of $2 million. Citing recent circuit precedent, the court affirmed an abuse-of-trust enhancement involving an arms-length commercial relationship between a mortgage broker and lender. The court said due to the nature of the mortgage industry, the loan application process cultivates trust between brokers and lenders. The lenders rely upon the statements of brokers, who they have repeated dealings with, that they have verified all relevant information before submitting loan applications. The court quoted the Fifth Circuit with approval: "Although there is no legally recognized-relation of trust between brokers and lenders, such legal recognition is not required . . . . The relationship here is not lender-borrower, which we agree will seldom be a relationship of trust. It's lender-middleman, and there is a difference."

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003). The defendant appealed a two-level upward adjustment for abusing a position of private trust. The court noted that defendant sold many of his victims annuities offered by insurance companies and living or family trusts, transactions that acquainted him with their investable assets. He then persuaded these clients to exchange the annuities and other investments for "private tender offers" in the Premier Group. These fraudulent investments gave him complete discretion over client funds. The defendant commingled those funds, which facilitated both the commission and the concealment of his fraud offenses. Under these circumstances, the district court did not err in imposing the abuse-of-trust enhancement.

United States v. Trice, 245 F.3d 1041 (8th Cir. 2001). The defendant pled guilty to making a fraudulent statement and his sentence was enhanced two levels for abuse of a position of trust. The defendant was a president of the board of a non-profit corporation formed to build a housing complex for handicapped individuals. The defendant falsely stated on a HUD form that

he had never been convicted of a felony. The Eighth Circuit remanded for resentencing, holding the abuse of trust enhancement only applies "where the defendant has abused discretionary authority entrusted to the defendant by the victim; arm's length business relationships are not available for the application of this enhancement." Because the victim of the defendant's offense was the United States and the defendant was not in a position of trust *vis-á-vis* the United States, the district court erred in applying the enhancement.

United States v. Baker, 200 F.3d 558 (8th Cir. 2000). The district court did not err in applying a two-level upward adjustment on the ground that the defendant abused a position of private trust where the defendant, an insurance agent, persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those funds.

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999). The district court erred in finding that the defendant's position as a messenger for an armored car company was a position of trust within the meaning of the guideline. The position required the defendant to deliver and pick up money at various businesses, and was not characterized by professional or managerial discretion.

United States v. Johns, 15 F.3d 740 (8th Cir. 1994). The district court enhanced the defendant's sentence for abuse of a position of trust. The defendant practiced the spiritual traditions of the Ojibwa Indians and assumed the role of father and spiritual leader of his live-in girlfriend's daughter. For seven years, the defendant sexually abused the daughter, using his position as a spiritual leader to justify time alone with the victim, who was his primary assistant in performing ceremonies, and his role as a parent to justify his abusive behavior. The court of appeals concluded that the abuse of position of trust enhancement was proper based on these facts.

Use of Special Skill

United States v. Bush, 252 F.3d 959 (8th Cir. 2001). The district court did not err in applying a two-level enhancement based upon the defendant's use of his special skills, where the defendant was a former investment counselor and manager at a major national brokerage firm, and his extensive experience allowed him to bring victims into the securities fraud scheme more easily than someone without his skills.

United States v. Covey, 232 F.3d 641 (8th Cir. 2000). The defendant was convicted of conspiracy to commit money laundering and aiding and abetting money laundering. The district court determined that the defendant had used his special skills and experience as an accountant to effectuate the money laundering scheme, that he had prepared an amortization schedule, a loan agreement, and other loan-related financial documentation, and that he had used multiple bank accounts in order to carry out the scheme. The Eighth Circuit upheld the district court's application of the adjustment, holding that the legal question is not whether the task could be performed by a person without special skills, but whether the defendant's special skills aided him in performing the task.

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

United States v. Williams, 590 F.3d 616 (8th Cir. 2010). Defendant pled guilty to making a threatening telephone communication. Defendant called his mother and instructed her to initiate a three-way call to defendant's estranged wife. Defendant's mother put defendant's 16 year-old niece on the phone, and defendant relayed a threatening message, through his niece, on his wife's voicemail. The district court added a two-level enhancement for use of a minor. Defendant argued that, because it was his mother, and not him, who put the niece on the phone, the enhancement does not apply. The Eighth Circuit held that §3B1.4 uses the term "use" to include "directing or commanding" a minor in the commission of an offense, which defendant clearly did.

United States v. Birdine, 515 F.3d 842 (8th Cir. 2008). The district court did not err by finding the evidence sufficient to enhance the defendant's sentence based on the use or attempted use or a minor. The defendant argued that "he did not 'use' a minor, because the minor who was involved in his offense was the drug supplier and the leader or supervisor of the criminal activity." The court found, however, that "there [wa]s sufficient evidence that [the defendant] directed, commanded, encouraged, intimidated, counseled, trained, procured, recruited or solicited [the minor] to commit the offense during [the minor's] minority."

United States v. Tipton, 518 F.3d 591 (8th Cir. 2008). The defendant was convicted of hiring, harboring, and conspiring to hire and harbor aliens working at her restaurant. The district court increased the defendant's offense level under §3B1.4 for use of a minor to commit the offense. The court held that the district court's finding that two of the aliens were minors was sufficient to support the increased sentence, and that, under a plain error standard, hiring and harboring the minors is enough to warrant the increase, "regardless of special advantage to the defendant." According to the court, "[t]he purpose of the enhancement—'to protect minors as a class'—is served by punishing the use of minors whether or not there was a comparative advantage in using minors rather than adults."

Part C Obstruction

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

United States v. Wahlstrom, 588 F.3d. 538 (8th Cir. 2009). The court rejected defendant's argument that the obstruction enhancement does not apply where a defendant targets a prosecutor or his family. The application notes to §3C1.1 cover "attempt[s] to obstruct or impede[] the administration of justice" and it makes no distinction between different actors involved in the justice system. Although prosecutors are not specifically named in the application notes, the nature and seriousness of the conduct is more important than the particular targets. Furthermore, defendant's claimed motivation of revenge, rather than of a desire to affect his case, is immaterial.

United States v. Whiting, 522 F.3d 845 (8th Cir. 2008). The court stated that "[a] defendant commits perjury by testifying falsely under oath in regard to a material matter and by doing so willfully, rather than out of confusion, mistake, or faulty memory," and suborns perjury by "procuring another to commit perjury." According to the court, "[b]efore imposing an enhancement under §3C1.1, the district court 'must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice.'" The court held that the district court did not err by finding that the defendant both committed and suborned perjury, stating that "[a] sentencing enhancement under U.S.S.G. §3C1.1 may be based on the experienced trial judge's finding that the defendant lied to the jury." Further, the court acknowledge that, "[w]hile 'it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding,' it is sufficient if 'the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury.'" Because the district court pointed to specific instances in which it believed the defendant and his witness lied to the jury, the adjustment was proper. *See also United States v. Tyndall*, 521 F.3d 877 (8th Cir. 2008) ("[W]e once again emphasize the importance of detailed findings to the effect that the defendant testified falsely about a material matter with a willful intent to deceive the factfinder.").

United States v. Thundershield, 474 F.3d 503 (8th Cir. 2007). The defendant argued on appeal that the "district court failed to apply an 'objective standard' under which no enhancement may be imposed if a reasonable factfinder could have believed him." The defendant relied primarily on *United States v. Iversen*, 90 F.3d 1340 (8th Cir.1996), and *United States v. Cabbell*, 35 F.3d 1255 (8th Cir.1994). The circuit court noted that "[b]oth of those cases . . . were decided under an earlier version of §3C1.1, which contained the following commentary: 'In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.'" Since the 1997 amendment to §3C1.1, which removed this "most favorable" language and substituted the following: "[T]he court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice," the district court is to "apply a preponderance-of-the-evidence standard, under which a district court's choice between two permissible views of the evidence cannot be considered clearly erroneous."

United States v. Ellerman, 411 F.3d 941 (8th Cir. 2005). The obstruction enhancement applied where the defendant informed co-conspirators that the undercover agent was a police officer. The defendant earlier signed an agreement to cooperate with law enforcement. The testimony of the co-conspirator corroborated with the co-conspirator's changed demeanor and later method of transacting business.

United States v. Finck, 407 F.3d 908 (8th Cir. 2005). Although false statements alone do not rise to the level of obstruction of justice, the district court did not err when it found the defendant's false statements impeded the progress of the investigation and thus applied the obstruction of justice enhancement.

United States v. Lincoln, 408 F.3d 522 (8th Cir. 2005). The district court properly applied the obstruction of justice guidelines when assessing a two-level enhancement when the defendant failed to appear in court for jury selection when his brother could not give him a ride to the courthouse.

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004). The defendant, an investment advisor who embezzled his clients' funds and provided them with fraudulent account statements over a period of 26 years, pled guilty to two counts of mail fraud. At sentencing, the district court imposed an upward adjustment pursuant to §3C1.1 because the defendant had deleted files relating to the fraudulent conduct from his computer. At the time he did so, no official criminal investigation had commenced. The Eighth Circuit stated that an obstruction adjustment was unavailable in the present circumstances because no official investigation relating to the defendant's offenses was underway when he directed that the computer files be deleted. The court concluded that the temporal limitations in §3C1.1 required a holding that the defendant's obstructive conduct fell beyond the reach of that guideline.

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003). The defendant was convicted of conspiring to distribute, possession with intent to distribute, and distributing methamphetamine. At trial, the defendant denied he participated in any conspiracy to distribute methamphetamine and denied several other material matters. The district court refused to find obstruction of justice because there were several contradictions in various witnesses' testimony; a probable lie by one of the prosecution's witnesses; the jury deliberated for a day and a half; the defendant did not look evasive; and because the defendant merely made unembellished denials. In other words, the district court was of the view that the defendant's "no's" were not perjurious. The Eighth Circuit affirmed because the district court believed that the government did not prove by a preponderance of the evidence that the defendant was lying.

United States v. O'Dell, 204 F.3d 829 (8th Cir. 2000). The defendant was convicted of conspiracy to commit money laundering, money laundering, and conspiracy to distribute controlled substances. The district court found that the defendant committed perjury when he testified before a magistrate judge in a bond revocation hearing held after he was charged with a drug crime he committed while he was out on pretrial release. At that hearing, the defendant testified that he did not know he had the drugs on his person. On appeal, the defendant challenged the decision to increase his offense level for obstruction of justice. He argued that the perjury must be material to the underlying offense to qualify for the enhancement. The Eighth Circuit disagreed and held that an adjustment under §3C1.1 was appropriate even where the perjurious testimony did not go to the underlying charge. The circuit court stated that the issue being determined by the court was whether the defendant's pretrial release should be revoked, and thus, his perjurious testimony had the potential to influence or affect that determination. *See also United States v. Martinez*, 234 F.3d 1047 (8th Cir. 2000) (holding that the district court did not err in applying the obstruction of justice enhancement where the defendant absconded from a halfway house prior to a bond-revocation hearing and failed to appear for the hearing).

United States v. Thompson, 210 F.3d 855 (8th Cir. 2000). The district court did not err in applying the obstruction of justice enhancement where the evidence showed the defendant directed acts of intimidation toward two prosecution witnesses. *See also United States v. Carrillo,* 380 F.3d 411 (8th Cir. 2004) (The defendant was properly sentenced to a two-level enhancement for obstruction of justice for his participation in assault of the codefendant who had furnished information against the defendant and was scheduled to testify against the defendant; a prison videotape caught part of the attack on tape and the defendant also threatened violence against the codefendant's family during the attack).

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999). The district court erred in applying a two-level adjustment for obstruction of justice where the government failed to prove that the defendant perjured himself at trial regarding the existence of certain trusts. To apply the adjustment based on statements of the defendant, a district court "must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice." Accordingly, the court of appeals reversed and remanded.

United States v. Honken, 184 F.3d 961 (8th Cir. 1999). The district court determined that the defendant's case was an "extraordinary" case justifying a downward adjustment for acceptance of responsibility as well as an adjustment for obstruction of justice. The district court concluded that because the defendant's obstruction occurred prior to pleading guilty and he committed no further obstruction of justice between the plea and sentence, the case must be considered extraordinary. The appellate court held that whether a case is extraordinary must be determined based on the totality of the circumstances, "including the nature of the obstructive conduct and the degree of appellee's acceptance of responsibility." Here, the appellate court found the defendant's acceptance of responsibility was minimal, and the defendant denied the conduct alleged to support the enhancement for obstruction of justice. What the appellate court found extraordinary about this case was the "extensive evidence gathered and presented concerning the defendant's continuing efforts to obstruct justice," including attempts to kill witnesses, to escape, and to conceal evidence. Accordingly, the appellate court reversed and remanded for resentencing.

United States v. Moss, 138 F.3d 742 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for obstruction of justice after he made a cutthroat gesture toward an adverse witness during a recess at trial.

Hall v. United States, 46 F.3d 855 (8th Cir. 1995). The presentence report stated that the defendant and his brother had confronted a potential witness in a bar and told him that if he testified, "they would get him" and "he would be beaten." The defendant denied that this occurred. The district court failed to find whether the threat occurred but denied an adjustment for obstruction of justice because "recognizing reservation life in this context for what it is, . . . this type of barroom conversation should [not], when disputed, be elevated to something causing a potential additional 12 months of incarceration." The government appealed, contending that the district court erred by failing to find whether a threat occurred. The circuit court agreed, noting that §3C1.1 does not limit the enhancement to particular factual contexts,

such as the bar room setting, or make exceptions for social circumstances, such as the realities of reservation life. Accordingly, the circuit court remanded the case to the district court to determine whether the defendant threatened the witness, and if so, to apply the obstruction of justice enhancement.

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir. 1994). The district court properly increased the offense level for obstruction of justice where the court found that the defendant perjured himself at trial.

§3C1.2 Reckless Endangerment During Flight

United States v. McDonald, 521 F.3d 975 (8th Cir. 2008). The district court properly applied an adjustment for reckless endangerment during flight. The defendant barricaded himself in a hotel room for over two hours, claimed to be armed with a gun, and hurled furniture through a closed second story window. "Even though [the defendant] lied about having a gun, officers were nevertheless at heightened risk of physical injury as a result of having to enter [the defendant's] hotel room with force to arrest him."

United States v. Pierce, 388 F.3d 1136 (8th Cir. 2004). Imposition of a sentencing enhancement was warranted for the defendant's conduct in recklessly creating a substantial risk of death or serious bodily injury to others while fleeing from law enforcement. When police officers attempted to apprehend the defendant, he rammed an officer's vehicle with his truck multiple times, and then collided with parked cars.

United States v. Moore, 242 F.3d 1080 (8th Cir. 2001). The district court did not err in enhancing the defendant's sentence pursuant to §3C1.2. The police identified themselves as police officers and two were in front of the defendant's car wearing raid vests with the word "POLICE" on them when the police turned on their flashing lights in their car and pursued the defendant. The defendant raced down a highway, ran lights, and threw a scale from his car. This conduct established that the defendant recklessly created a substantial risk of death or serious injury while fleeing the police.

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The district court applied an adjustment for reckless endangerment while fleeing a law enforcement officer. The defendant pushed his minor child in his sole care and custody into the path of an oncoming police car as he fled from law enforcement officers attempting to execute a search warrant on his home. This conduct qualified him for the enhancement even though he was not under arrest or otherwise required to submit to the officers when he fled.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Espinosa, 539 F.3d 926 (8th Cir. 2008). The defendant pleaded guilty to two methamphetamine manufacturing counts and entered an *Alford* plea to possession of a firearm as an unlawful user of methamphetamine. For purposes of sentencing, the district court grouped the two methamphetamine counts, but not the firearm count. The court affirmed, holding that the district court did not clearly error in finding that the firearms were not connected to the defendant's manufacture of methamphetamine. The court stated that, while the guns were found in the same garage as the items associated with the manufacture of methamphetamine, that fact "does not dictate a conclusion that the guns and drugs were connected." The court pointed out that: 1) the firearms were stolen at the same time as a variety of other personal property, and it is possible the defendant used the garage for the storage of stolen goods as well as the manufacture of methamphetamine; 2) the drugs and guns were not an enhancement for each other in this case; and 3) none of the firearms were loaded, and all were long rifles or shotguns.

United States v. Brown, 287 F.3d 684 (8th Cir. 2002). The defendant was convicted of three counts of assault resulting in substantial bodily injury to a child under 16 and one count of assault resulting in serious bodily injury. The grouping rules required the court to disregard the less severe crimes of assault when determining the combined offense level. As a result, the district court departed upward under §3D1.4. The appellate court expressly concurred with the lower court that the defendant's case was an unusual circumstance where the sentencing range was too restrictive to compensate for the disregarded counts. Thus, the district court did not err in departing upward.

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

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000). The defendant was convicted of manufacturing and attempting to manufacture methamphetamine and endangering human life while doing so. The court grouped the counts for sentencing and used the offense level applicable to the endangering-life count. On appeal, the defendant argued that the group's offense level should be set by the manufacturing count because it carries the maximum term of imprisonment (life) and not by the endangering-life count (10 years). The circuit court held that the most serious count was not the count with the greatest available maximum statutory term of imprisonment, but it was the count with the highest offense level.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Crumley, 528 F.3d 1053 (8th Cir. 2008). The district court did not err in refusing to grant the defendant an acceptance of responsibility reduction where the defendant did not put on any witnesses at trial, but her attorney cross-examined the government's witnesses and

argued that the evidence was insufficient to support a verdict. "'[A] reduction is [generally] not appropriate if the Government goes through the burden of proving its case at trial, unless the defendant was merely ascertaining the viability of an issue unrelated to [the defendant's] guilt, such as a constitutional challenge to a statute.'"

United States v. Mousseau, 517 F.3d 1044 (8th Cir. 2008). The defendant's appeal waiver, which foreclosed the defendant's ability to appeal the district court's denial of acceptance of responsibility was not a miscarriage of justice because the defendant's sentence was "authorized by the judgment of conviction" and was not "greater or less than the permissible statutory penalty for the crime."

United States v. Bradford, 499 F.3d 910 (8th Cir. 2007), *cert. denied* 128 S. Ct. 1446 (2008). A defendant may remain silent in respect to relevant conduct evidence and still receive acceptance of responsibility reductions, but a defendant who contests or denies relevant conduct that the court later determines to be true does not merit acceptance of responsibility.

United States v. Bell, 411 F.3d 960 (8th Cir. 2005). The district court did not err in denying the defendant convicted at trial a reduction for acceptance of responsibility. Although in a "rare situation," a defendant convicted at trial may receive the reduction, he does so only in cases where the purpose at trial was to assert issues unrelated to factual guilt. The defendant in this case moved twice for acquittal on the insufficiency of the evidence and employed other tactics aimed at challenging the government's evidence against the defendant, thus not relieving the government of its burden of proof at trial. In addition, the defendant's pretrial conduct also was inconsistent with acceptance of responsibility or cooperation with the government.

United States v. Morton, 412 F.3d 901 (8th Cir. 2005). Where the government breaches a plea agreement by failing to move for an additional one-level reduction pursuant to §3E1.1 but the defendant has honored the agreement, the defendant is entitled to resentencing.

United States v. Patient Transfer Service, Inc., 413 F.3d 734 (8th Cir. 2005). Acceptance of responsibility, particularly when the defendant goes to trial, must consist not only of accepting responsibility for managing company accused of committing crimes, but also accepting responsibility for committing those crimes.

United States v. Harris, 390 F.3d 572 (8th Cir. 2004). Any error in giving the defendant a two-level downward adjustment for acceptance of responsibility, instead of a three-level adjustment he requested, was harmless. The district court indicated an unwillingness to impose a lesser sentence within the overlapping area between the two putative ranges even if the defendant had received further adjustment.

United States v. Ortiz, 242 F.3d 1078 (8th Cir. 2001). The district court did not err in only granting a two-level acceptance of responsibility reduction where the defendant communicated to the government his intention to proceed to trial after petitioning to plead guilty,

causing the government to prepare for trial even though he later changed his mind and pled guilty.

United States v. Goings, 200 F.3d 539 (8th Cir. 2000). The defendant pled guilty to involuntary manslaughter based on driving while under the influence of alcohol. At sentencing, the defendant requested an adjustment for his acceptance of responsibility, but the district court denied the request. Even though the defendant pled guilty, he failed to complete a court-ordered alcohol treatment program. The district court reasoned that the defendant had not yet appreciated the gravity of his criminal conduct. The circuit court held that this determination was not clearly erroneous.

United States v. Lim, 235 F.3d 382 (8th Cir. 2000). The district court did not err in denying a reduction for acceptance of responsibility where the defendant pled guilty and admitted guilt to all relevant conduct but also firmly refused to assist in any way in the recovery of the stolen jewelry and showed no remorse for his conduct.

United States v. Martinez, 234 F.3d 1047 (8th Cir. 2000). The district court did not err in denying a reduction for acceptance of responsibility, in light of the defendant's presentence misbehavior. The defendant failed alcohol and drug tests while under court-ordered supervision at a halfway house, absconded from the halfway house prior to bond-revocation hearing, and failed to appear for the hearing.

United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997). The defendant committed embezzlement while she was free on bond pending her federal sentencing. Based on her continued criminal conduct, the district court declined to grant the request for a two-level reduction under §3E1.1. Evidence of acceptance of responsibility may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility and further criminal conduct.

United States v. Barris, 46 F.3d 33 (8th Cir. 1995). The defendant raised an insanity defense at his trial for threatening to kill the President. The insanity defense was rejected by the jury. At sentencing, the defendant requested a two-level reduction for acceptance of responsibility under §3E1.1. The district court held that the insanity defense is inconsistent with acceptance of responsibility as a matter of law. The Eighth Circuit reversed, holding that a "defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility reduction under the sentencing guidelines." The court then remanded the case for resentencing to allow the district court to decide whether the defendant had accepted responsibility.

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Rising Sun, 522 F.3d 989 (9th Cir. 2008). The Ninth Circuit reversed the district court's application of the vulnerable victim enhancement because the only stated basis for imposing the enhancement was the remote location in which the victims were attacked. The court noted that it had previously "interpreted the 'otherwise particularly susceptible' language [in the commentary to §3A1.1] as requiring the sentencing court to consider both the victim's characteristics and the 'circumstances surrounding the criminal act.'" However, the court held that "there must be something about the victim that renders him or her more susceptible than other members of the public to the criminal conduct at issue" and that "[a] remote crime location alone is not enough to sustain the enhancement." If it were enough, the court said, the effect would be to "broaden[] the enhancement to a point where it might be applied to almost any case where a crime was committed in an unprotected or sparsely populated area."

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

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

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002), overruled on other grounds by *United States v. Williams*, 506 F.3d 240 (2007). The vulnerable victim enhancement does not apply if the factor that makes the victim vulnerable is not "unusual" for victims of the offense.

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

United States v. Mendoza, 262 F.3d 957 (9th Cir. 2001). Pursuant to §3A1.1(b)(1), the district court imposed a two-level enhancement, because the defendant targeted illegal aliens in committing the offense of selling false employment documents. The defendant contested "class-based" vulnerability. The court explained that what made the victims vulnerable was not that they were Hispanic but that they were in the United States illegally (and thus would not investigate or report the defendant), they were unfamiliar with immigration law, they were not well educated, they could not speak or read English, and the defendant held himself out as sophisticated and knowledgeable in INS procedures. The defendant was convicted of three offenses: 1) conspiracy to commit an offense against the United States, 2) sale of immigration documents, and 3) pretending to be a federal employee and obtaining money by so pretending. Because of the breadth of these convictions, the court ruled that not all of the victims are vulnerable in the same way for the same reasons. Therefore, the characteristics that made the victims vulnerable were not typically associated with the victims of the offenses and thus the district court did not clearly err in applying the enhancement.

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

§3A1.2 Official Victim

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The (disbarred attorney) defendant appealed a three-level "official victim" enhancement under §3A1.2(a) because he threatened two members of the Montana Supreme Court Commission on Practice, which oversaw the defendant's disbarment. The defendant maintained that those two individuals were state employees and that the enhancement only applies to victims who are federal officials. The court first noted that §3A1.2(a) does not limit the term "government officer or employee" to federal officials and employees. Moreover, the individuals were clearly government officials at the time of the threats and thus the enhancement applied. Finally, the court ruled that it was not impermissible double counting to apply the enhancement even though §2A6.1 already incorporated the status of the victims in setting the offense level.

§3A1.4 Terrorism

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

Part B Role in the Offense

§3B1.1 Aggravating Role

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

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under §3B1.1(a).

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

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

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). The district court did not err in applying a two-level enhancement based on two equally adequate guideline provisions–defendant's aggravating role in the offense under §3B1.1, or the involvement of his 18-year-old son in the criminal enterprise under the §5K2.0 policy statement for circumstances that fall outside the "heartland" of the sentencing guidelines. The defendant was convicted of two counts of distribution of cocaine and was sentenced to a term of 64 months' imprisonment. The court held that the determination that the defendant was the "organizer, leader, manager, or supervisor" of a criminal enterprise that involved less that five people and was not otherwise

extensive was not clearly erroneous. There was sufficient evidence to establish that the defendant "coordinated the distribution of drugs," "initiated drug deals with the undercover officer and negotiated the terms," and "exercised authority over his son and others." 249 F.3d at 1154-55. Furthermore, according to Application Note 2, it is sufficient that the defendant exercises control over *at least one* other person in order to qualify for the enhancement under §3B1.1(c). The court also upheld the district court's conclusion that the two-level departure was supported by §5K2.0, which allows a departure when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The district court did not abuse its discretion when it held that involving one's son in a criminal enterprise, in light of the confidential relationship between father and son, is one of such circumstances.

§3B1.2 Mitigating Role

United States v. Cordova Barajas, 360 F.3d 1037 (9th Cir. 2004). The district court did not clearly err in finding, for purposes of sentencing, that the defendant did not have a minor role in the offense of aiding and abetting the cultivation of marijuana, and thus was not entitled to a downward adjustment. The defendant presented no evidence that his role was minor, but instead testified that he had no role in offense, in that he was a gullible tomato picker who found himself in wrong place at wrong time.

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

United States v. Smith, 282 F.3d 758 (9th Cir. 2002). The defendant who traveled extensively to facilitate drug importation was not entitled to a "minor role" downward adjustment in his sentence.

United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001). The district court did not err when it declined to reduce the defendant's sentence for being a minor or minimal participant where the evidence showed that the defendant was planning on making several stops and that defendant had acted as a drug courier several times before this incident.

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

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

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

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

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

United States v. Peyton, 353 F.3d 1080 (9th Cir. 2003). As a supervisor with the U.S. Postal Service, the defendant possessed managerial discretion to access a secured roster listing the names and social security numbers of postal employees so that she could authorize over-time. The defendant's position allowed her to use the personal information of her fellow postal employees to commit fraud in their names without being easily detected or observed. Based on these facts, the court held that the defendant occupied a position of trust with respect to the postal employees under §3B1.3.

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

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002). The defendant's security guard position was not a position of public or private trust.

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

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). The Ninth Circuit held that the secretary/treasurer of an asbestos remediation corporation did not abuse a position of public trust; could have used a "special skill" in his offense; and did occupy a position of private trust, which, if abused, would support an enhancement. With regard to public trust, the Ninth Circuit noted that the position of trust must be established from the position of the victim. Here, the public and the government were the victims. And, notwithstanding his government

contract and his license to abate asbestos, the Ninth Circuit held that the secretary/treasurer was not in a position of trust with the government or the public and therefore the enhancement could not be supported on this ground. The Ninth Circuit also noted, however, that the license to abate asbestos would support a special skills enhancement (if the defendant had not already received an aggravating role enhancement), and that it is possible that the defendant abused a position of private trust with respect to his employees.

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

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

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

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

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

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court erred when it increased defendant's sentence by two levels under §3B1.4 for using a minor to commit a crime. The appellate court held that, "in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery, beyond merely acting as his partner," "a defendant's participation in an armed bank robbery with a minor does not warrant a sentence enhancement."

Part C Obstruction

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

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

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

United States v. Alvarado-Guizar, 361 F.3d 597 (9th Cir. 2004). The district court declined to impose a two-level enhancement for obstruction of justice under §3C1.1 and refused to reduce his sentence for acceptance of responsibility or to grant a reduction of sentence under 18 U.S.C. § 3553's "safety valve" provision. The defendant timely appealed his convictions, and the government cross-appealed. The appellate court noted that the enhancement for obstruction of justice was not mandatory because the district court had not found all the factual predicates that supported a finding of perjury. The appellate court next considered whether the district court was required to make factual findings to support its decision not to impose a sentencing enhancement under §3C1.1. The requirement that a district court make factual findings that encompass all the elements of perjury "is a procedural safeguard designed to prevent punishing a defendant for exercising her constitutional right to testify." There is no parallel requiring the same result when a defendant is not receiving a longer sentence. Therefore, the Ninth Circuit affirmed the district court's decision.

United States v. Cordova Barajas, 360 F.3d 1037 (9th Cir. 2004). The district court did not clearly err in deciding that the defendant committed perjury, warranting an obstruction of justice adjustment in his offense level for aiding and abetting cultivation of marijuana. The district court found, given the fact that the defendant had lived in the area for more than 20 years and had worked as a tomato picker in the past, that his testimony that he followed strangers into a remote area of the foothills in the later part of the year merely to pick tomatoes was "almost outrageous." The district court further found that it was implausible that the defendant possessed a can of beer at a bar, maintained possession of it during his journey into the foothills, and that the can somehow ended up at the second site, 400 yards away. The Ninth Circuit found that the district court's finding that the *Dunnigan* elements were met "is plausible in light of the record viewed in its entirety" and held that the district court did not clearly err in adjusting the defendant's sentence upward two levels pursuant to section 3C1.1.

United States v. DeGeorge, 380 F.3d 1203 (9th Cir. 2004).[2] The defendant attempted to defraud an insurance company and committed perjury during the civil trial. He was then charged with mail fraud and wire fraud. During the criminal sentencing phase, the prosecutor requested a two-level enhancement for obstruction of justice under §3C1.1, arguing that failure to apply the enhancement would allow the defendant to unfairly benefit by eliminating any sentencing enhancements for his civil perjury. The appellate court reversed application of a two-level enhancement for obstruction of justice, holding that §3C1.1 requires that the perjury occur "during the course of the [criminal] investigation," and ruled that the perjury was not an "obstruction offense" for the purposes of the enhancement.

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

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The district court clearly erred in applying the obstruction of justice enhancement based on defendant's false testimony at trial because the district court did not expressly find that the false testimony was material.

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

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001). The obstruction enhancement was properly applied because the state officials to whom the defendant directed his obstructive conduct were investigating the same robbery offense to which he later pled guilty in federal court.

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

§3C1.2 Reckless Endangerment During Flight

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

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

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

United States v. Luna, 21 F.3d 874 (9th Cir. 1994). While fleeing the scene of an armed bank robbery, the defendants ran three stop signs, stopped the car in the middle of the road and when they were approached by a police officer, defendant Luna reached down to the floorboards (where a gun was later recovered). After the police officer retreated, the defendants accelerated, forcing the police officer to make chase, and then the defendants jumped out of the vehicle while it was still moving. The district court adjusted by two levels defendant Torres' offense level for reckless endangerment. Defendant Torres argued that the traffic violations did not amount to reckless endangerment and that Luna's movement towards the gun was merely preparatory and could not form the basis of a §3C1.2 enhancement. The circuit court concluded that the traffic violations did constitute a gross deviation from ordinary care because the conduct occurred in a residential area and created a substantial risk of serious bodily injury or death and declined to decide whether preparatory conduct to avoid arrest could constitute reckless endangerment.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

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

United States v. Melchor-Zaragoza, 351 F.3d 925 (9th Cir. 2003). The indictment alleged that defendants conspired to kidnap 23 illegal aliens from a group of smugglers. The sentencing court divided the conspiracy conviction into separate count groups based on the number of victims under §1B1.2(d) and §3D1.2 and increased the combined offense level by five levels. The issue on appeal was whether a conspiracy to take several hostages should be treated as separate “offenses” committed against separate victims for purposes of §§3D1.2 and 1B1.2. The Ninth Circuit held that where a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into that same number of distinct crimes for

sentencing purposes. In the instant case, the 23 victims who were held hostage suffered separate harms. Consequently, the district court did not err in treating the taking of each hostage as a separate offenses under §§3D1.2 and 1B1.2(d) and dividing the conspiracy conviction into 23 separate count groups.

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

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

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err when it determined that the defendant's two convictions were not "closely related" for grouping purposes under §3D1.2. The defendant pled guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued that the possession was a "count embodied" in a specific offense characteristic used to enhance his base offense level because the district court relied on his possession of the firearm to increase his sentence for conduct evidencing an intent to carry out the threat under §2A6.1. Although the circuit court found that the district court relied on the possession of the weapon to apply the §2A6.1(b)(1) enhancement, it held that the counts were not groupable. "[T]he conduct embodied in being a felon in possession of a firearm is not substantially identical to the specific offense characteristic of engaging in conduct evidencing an intent to carry out a threat against the President [since] [c]onduct evidencing an intent to carry out a threat may be manifested in many different ways."

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

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

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

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

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

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

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

United States v. Wilson, 392 F.3d 1055 (9th Cir. 2004). The district court did not err in determining that defendant convicted of drug-related offenses had not clearly accepted responsibility for all of his relevant conduct and, thus, that he was not entitled to a downward adjustment in his sentence. The defendant went to trial on every single count charged in the indictment and contested essential elements of his guilt. The defendant's confessions were incomplete and vague, and he consistently tried to minimize his involvement in the conspiracy. The defendant outright denied conduct for which he was convicted, defendant offered trial testimony that the district court found not credible, and the defendant's attempts to help law enforcement were not motivated by sincere contrition, but were an attempt to secure immunity and to avoid taking responsibility for any of his conduct.

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

balanced all the relevant factors, or if the district court believed that the defendant was ineligible because he had contested his guilt at trial, the Ninth Circuit remanded for re-consideration.

United States v. Jeter, 236 F.3d 1032 (9th Cir. 2001). The district court erred by allowing only a one-level adjustment for acceptance of responsibility. The Ninth Circuit held that the adjustment was erroneous and clearly at odds with the plain language of §3E1.1, which only allowed a two-level decrease for acceptance of responsibility. The court remanded for a reconsideration of the adjustment, especially in light of the fact that the obstruction of justice enhancement may preclude any downward adjustment at all.

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001). After conviction at trial, a defendant may still exhibit sufficient contrition to gain an adjustment under §3E1.1, and the district court should determine whether the defendant demonstrated contrition for his offense by considering the factors in Application Note 1.

United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000). It is not plain error to deny an acceptance of responsibility reduction to a defendant who presents a thorough defense at trial, challenging the legal and factual validity of the government's case.

United States v. Sanchez Anaya, 143 F.3d 480 (9th Cir. 1998). The district court properly deducted levels for role in the offense prior to determining whether the defendant qualified for the additional offense level reduction for acceptance of responsibility. After the adjustment for minor role, the defendant's offense level was 14, which meant that he was entitled to no more than two levels for acceptance of responsibility. The guidelines instruct that the role points should be deducted before turning to the provision for acceptance of responsibility.

TENTH CIRCUIT

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1013 (2009). The district court committed procedural error when it failed to make findings concerning whether or not the offense involved a large number of vulnerable victims under §3A1.1(b)(2). This guideline does not define the term "large number," but commentary accompanying another guideline—§2H4.1, which concerns sentences for involuntary servitude crimes—indicates that ten victims constitutes a large number. The district court should apply this standard to the defendants in this case, whose "offenses include involuntary servitude convictions."

United States v. Caballero, 277 F.3d 1235 (10th Cir. 2002). The defendants were convicted of charges related to a conspiracy involving a scheme to defraud immigrants seeking

legal permanent residence. The district court applied a two-level enhancement for exploitation of vulnerable victims and an additional two-level enhancement for the large number of vulnerable victims involved. The defendants challenged the enhancement on appeal. Sixteen victims testified before the district court, illustrating their language problems, unfamiliarity with the laws of the United States, and illegal status which the court used to dub them as "vulnerable." Concluding that the district court did not merely apply a class-based enhancement to the group of illegal aliens because the victims differed in the type of vulnerabilities from which they suffered, the court affirmed the sentence. *See also United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (defendant's victim, who suffered from diminished mental capacity, seizures, and partial paralysis, was vulnerable; the district court properly applied the vulnerable victim enhancement).

United States v. Proffit, 304 F.3d 1001 (10th Cir. 2002). The district court erred when it enhanced the defendant's offense level based on the victim's vulnerability. Victim vulnerability is reserved for exceptional cases in which the victim is unusually vulnerable or particularly susceptible to the crime committed. Although the victim had recently learned that he had cancer and might only have a few months to live, the victim was a sophisticated and successful businessman. The link between the victim's illness and the defendant's success in defrauding him was indirect. The court held that allowing a vulnerable victim enhancement based on illness alone would suggest that sick individuals as a group qualify as vulnerable victims. *See also United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008) (victim's vulnerabilities—her small and fragile physical size, her immaturity, and her runaway status—were known or should have been known to defendant at the time he placed her in his car and transported her across state lines, and supported an enhancement under §3A1.1(b)(1); these vulnerabilities were not incorporated in another guideline provision, and so their consideration under this enhancement did not constitute double counting).

§3A1.2 Official Victim

United States v. Rakes, 510 F.3d 1280 (10th Cir. 2007). The district court properly applied §3A1.2 to enhance defendant's advisory guideline range as calculated under §2A6.1, which does not include the official status of a victim in its base offense level.

United States v. Coldren, 359 F.3d 1253 (10th Cir. 2004). The defendant was convicted of being a felon in possession of a firearm. He argued on appeal that the district court impermissibly double counted the fact that he pointed a rifle at a police officer because this conduct served as the factual basis for both the four-level increase under §2K2.1(b)(5) (use of the weapon in connection with another felony) and the three-level increase under §3A1.2(b)(1) (assaulting a police officer). The court held that these sentence enhancements did not result in impermissible double counting. Although both enhancements to the defendant's offense level were based on the same incident, they were based on distinct aspects of the defendant's conduct.

United States v. Blackwell, 323 F.3d 1256 (10th Cir. 2003). The district court erred in enhancing the defendant's sentence under §3A1.2(a) where his offense of conviction was possession of a weapon by a felon. The court held that application of §3A1.2(a) applies only to

the offense of conviction, not the offense accompanied by relevant conduct. The offense of conviction must be motivated by the status of an "official victim" in order for the enhancement to apply.

§3A1.3 Restraint of Victim

United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002). The district court did not err in applying the enhancement for events that occurred "in the course of the offense," which included conduct for which the defendant was accountable under §1B1.3. Although the restraint of the victim occurred more than six weeks prior to the offense for which the defendant pled guilty, the language of the guideline allows relevant conduct through its wording "in the course of the offense."

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. VanMeter, 278 F.3d 1156 (10th Cir. 2002). The district court did not err in applying a two-level enhancement to a defendant who supervised another participant in a criminal scheme. Although the accomplice that the defendant supervised was not a "participant" in the commission of the crime for which the defendant was convicted, the §3B1.1 enhancement was properly applied based on the defendant's supervision of the accomplice's participation in other relevant crimes. *See also United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008) (government must prove that the defendant supervised at least one criminal participant to warrant an enhancement under §3B1.1, even when the allegation underlying the enhancement is that the criminal activity was "otherwise extensive").

United States v. Cruz Camacho, 137 F.3d 1220 (10th Cir. 1998). Whether a defendant held an aggravating role is a question that requires fact-finding and legal analysis. A district court's fact-finding attendant to this mixed question of law and fact is subject to a clear error standard on appellate review. *See also United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (district's court reasoning in failing to impose an upward adjustment for aggravating role was not definite and clear; remanding for further fact-finding and explanation pursuant to Federal Rule of Criminal Procedure 32(i)(3)(B)); *United States v. Chisum*, 502 F.3d 1237 (10th Cir. 2007) (district court did not clearly articulate the reasons for enhancing defendant's sentence; remanding for further fact-finding and articulation of reasoning), *cert. denied*, 128 S. Ct. 1929 (2008).

United States v. Lacey, 86 F.3d 956 (10th Cir. 1996). "Participant" under §3B1.1 can include persons who are acquitted of criminal conduct for purposes of determining the defendant's role in the offense.

§3B1.2 Mitigating Role

United States v. Salazar-Samaniega, 361 F.3d 1271 (10th Cir. 2004). The defendant, convicted for possession of cocaine with intent to distribute, was not entitled to a sentence reduction for a minor role. The evidence established that the defendant transported cocaine from one state to another, and he bought and insured the carrier car. The only evidence that the defendant was not more than a transporter came from the defendant himself. The court held that a defendant's own testimony that others were more heavily involved in a criminal scheme may not suffice to prove his minor or minimal participation, even if uncontradicted by other evidence, and found that the district court's conclusion that the defendant did not have a minor role was not clearly erroneous. *See also United States v. Martinez*, 512 F.3d 1268 (10th Cir.) (district court did not err in denying defendant's request for application of the minor role adjustment where he was a mere courier but was equally culpable as his codefendant, and where his relevant conduct included only the amount of drugs he actually carried), *cert. denied*, 128 S. Ct. 2461 (2008).

United States v. Jeppeson, 333 F.3d 1180 (10th Cir. 2003). A role in offense reduction under §3B1.2 is unavailable to a defendant who qualifies as a career offender under §4B1.1.

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

United States v. Edwards, 325 F.3d 1184 (10th Cir. 2003). The defendant objected to the district court's application of the adjustment under §3B1.3 for abusing a position of trust, arguing that she did not occupy the type of position for which §3B1.3 was designed: a position "characterized by professional or managerial discretion." The defendant's tasks were solely ministerial and the defendant had no authority to exercise discretionary judgment with respect to any part of her job. Job titles do not control whether §3B1.3 applies. In the instant case, the evidence did not support the district court's application of the abuse of position of trust adjustment. *See also United States v. Spear*, 491 F.3d 1150 (10th Cir. 2007) (defendant lacked substantial discretionary authority in her job as an examinations assistant; district court erred in imposing an upward adjustment for abuse of position of trust).

United States v. Haber, 251 F.3d 881 (10th Cir. 2001). The district court did not err in applying the enhancement to defendant under §3B1.3 for misrepresenting himself as a manager of an investment firm. The defendant was entrusted with the supervision and management of the investment funds of his investors in Israeli operations, which he later converted for his personal use. By his own admission the defendant acknowledged that he was the "key man" in the purported business and that no one else had the connections he had with anyone in Israel or knew how to conduct the business. *See also United States v. Arreola*, 548 F.3d 1340 (10th Cir. 2008) (defendant "exercised substantial discretionary authority" in her procurement department job; district court correctly imposed an upward adjustment for abuse of position of trust); *United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (because defendant's special skill as a medicine man afforded him unquestioned access to the victim and shielded him from detection, the district court correctly enhanced defendant's sentence for abuse of position of trust); *United States v. Ma*, 240 F.3d 895 (10th Cir. 2001) (district court did not err in applying the sentence enhancement

provision of §3B1.3 to the defendant who was a postal employee convicted of theft of undelivered United States mail while working in that position).

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

United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003). The appellate court affirmed the district court's finding that, under §3B1.4, an enhancement can be applied for the use of a minor to the defendants between the ages of 18 and 21, even though the congressional directive leading to promulgation of this section required the Sentencing Commission to promulgate sentence enhancements for a "defendant 21 years of age or older . . . if the defendant involved a minor [less than 18 years old] in the commission of the offense." *See also United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (Congress originally directed the Commission to promulgate an enhancement for use of a minor by defendants over 21 years old, but the Commission did not include an age limitation or a limitation based on age proximity).

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). Application of the enhancement does not require proof that a minor was knowingly solicited to participate in the offense.

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Contreras, 506 F.3d 1031 (10th Cir. 2007). When a defendant's obstructive conduct impedes or delays prosecution by both federal and state authorities, an enhancement pursuant to §3C1.1 may be warranted. The district court correctly enhanced defendant's sentence, where the federal and state charges were based on the same underlying conduct but the obstructive conduct preceded the federal indictment.

United States v. Bedford, 446 F.3d 1320 (10th Cir. 2006). The district court correctly enhanced the defendant's sentence pursuant to §3C1.1 where the defendant actually swallowed crack cocaine during an arrest, and later attempted to hide its presence in his vomit at the police station. The district court found that the defendant's actions had prevented the police from determining the quantity of the controlled substance, and the court concluded that these actions were not excepted by application note 4(d) of the commentary to §3C1.1 because, on the whole, they did not constitute an attempt but instead were a successful obstruction, and they were not "spontaneous or reflexive" but "deliberate action[s]." The court also held that, although the "material hindrance" requirement in application note 4(d) applies only to conduct contemporaneous with the arrest, even if it were to apply the requirement the "conspicuously low" threshold of materiality was easily satisfied given the importance of drug evidence and drug quantity in such prosecutions. *See also United States v. Smith*, 534 F.3d 1211 (10th Cir.) (district court correctly applied §3C1.1's enhancement based on indirect threats to a witness, because the guideline commentary contemplates indirect threats, and defendant presented no evidence that the commentary "violates her constitutional or statutory rights"), *cert. denied*, 129 S. Ct. 654 (2008).

United States v. Guzman, 318 F.3d 1191 (10th Cir. 2003). The district court's adoption of the presentence report to support its finding regarding the disputed enhancement for obstruction of justice under §3C1.1 was in error. Such finding shifted the burden of proof to the defendant regarding the enhancement rather than to the government where it belongs.

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in enhancing the defendant's sentence after he failed to give his proper name to a magistrate judge. The court held that the type of conduct to which this guideline applies includes "providing materially false information to a judge or magistrate." Withholding one's identity is material within the meaning of the guideline. The defendant's continued failure to identify himself properly at his subsequent court hearings is more than sufficient to allow a conclusion that an adjustment was warranted.

United States v. Chavez, 229 F.3d 946 (10th Cir. 2000). The district court did not err by imposing a two-level enhancement for obstruction based on the defendant's perjury during her trial testimony. On appeal, the defendant argued that her testimony did not rise to the level of perjury merely because the jury and the court did not believe her. The court disagreed and held that the defendant's story was "inherently unbelievable." There was ample evidence in the record that the defendant expected a drug delivery at night and went out to meet the courier, and this evidence completely contradicted the defendant's explanations at trial. *See also United States v. Salazar-Samaneiga*, 361 F.3d 1271 (10th Cir. 2004) (upholding application of obstruction increase for perjury at suppression hearing).

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Battle, 289 F.3d 661 (10th Cir. 2002). The district court committed error when it grouped Chapter Two, Part A offenses under the guideline, rather than determining the combined offense level under §3D1.4. Section 3D1.2 specifically states that offenses to which Chapter Two, Part A applies cannot be grouped. The error was harmless, however, because the calculation resulted in a lower offense level for the defendant. *See also United States v. Martin*, 528 F.3d 746 (10th Cir.) (district court properly grouped charges, where beatings and rapes happened over the course of a few hours and were part of one attack), *cert. denied*, 129 S. Ct. 433 (2008); *United States v. Hasson*, 287 F. App'x 712 (10th Cir. 2008) (district court committed non-harmless procedural error when it grouped two separate counts of conviction prior to applying a specific offense characteristic; this error increased defendant's advisory imprisonment range and directly contradicted instructions in §3D1.2(d) and §1B1.1).

United States v. Peterson, 312 F.3d 1300 (10th Cir. 2002). The court ruled that mail fraud and tax evasion were properly not grouped together. The court's reasoning was that mail fraud and tax evasion convictions are based on different elements, affected different victims, and involved different criminal conduct. Furthermore, to commit these crimes, the defendant had to

make separate decisions to violate different laws. These differences, as well as the different harms, demonstrate the convictions are not "closely related" for purposes of §3D1.2.

United States v. Malone, 222 F.3d 1286 (10th Cir. 2000). The district court did not err in failing to group the U.S. Express robbery and the carjacking under §3D1.2(c). On appeal, the defendant argued that because the carjacking was a specific offense characteristic of robbery under §2B3.1(b)(5), the court was required to group the offenses. The court disagreed and held that the harm caused by the U.S. Express robbery was not the same as the harm caused by the carjacking. The two offenses posed threats to distinct and separate societal interests-those of the U.S. Express and those of the victim. *See also United States v. Parker*, 551 F.3d 1167 (10th Cir. 2008) (grouping of multiple counts is not appropriate where, as here, multiple victims were affected by the offense; district court appropriately separated the two counts and afforded an upward adjustment under §3D1.4).

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

United States v. Evans, 318 F.3d 1011 (10th Cir. 2003). The court affirmed the district court's application of the grouping rules under §3D1.3(b) in a case involving five counts relating to the manufacture of methamphetamine. The selection of the guideline that produces the highest offense level is not dictated by the offense with the highest statutory maximum.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Muñoz-Nava, 524 F.3d 1137 (10th Cir. 2008). The district court properly granted a third level for acceptance of responsibility under §3E1.1(b) over government objection, where the government asserted only that defendant took six weeks to notify it of his intent to plead guilty, and where it engaged in no trial preparation.

United States v. Brown, 316 F.3d 1151 (10th Cir. 2003). The district court erred when it concluded that §3E1.1(a) allowed a compromise one-level downward adjustment for acceptance of responsibility. The court held that §3E1.1(a) must be interpreted in a binary fashion: either the defendant qualifies for the full two-level acceptance of responsibility adjustment or the defendant gains no acceptance of responsibility adjustment at all. *See also United States v. Lozano*, 514 F.3d 1130 (10th Cir. 2008) (district court erred in granting only a one-level downward adjustment, after articulating several reasons for granting acceptance of responsibility after defendant proceeded to trial).

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001). The district court did not err in refusing to apply a two-level reduction to the defendant's sentence for acceptance of responsibility. Although the district court was correct that assertion of an entrapment defense does not bar the defendant from receiving the reduction, the defendant also did not show any reason that he should receive the reduction. The defendant claimed that he should receive the

reduction simply because he testified truthfully at trial. The court held, however, that the district court's finding that the defendant never engaged in any conduct indicating that he accepted responsibility was not clearly erroneous. Because the inquiry into acceptance of responsibility is heavily fact-based, the court deferred to the judgment of the district court.

United States v. Prince, 204 F.3d 1021 (10th Cir. 2000). The district court did not err in considering reports of the defendant's criminal conduct in prison while awaiting sentencing when determining whether acceptance of responsibility applied. The court held that the government did not violate the plea agreement by supplying the probation department with the reports of the defendant's post-plea agreement conduct. The court further held that the guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility under §3E1.1. *See also United States v. Wooten*, 377 F.3d 1134 (10th Cir. 2004) (acknowledging the wrongfulness of one's conduct after conviction, without more, is insufficient to warrant a decrease for acceptance of responsibility); *United States v. Salazar-Samaneiga*, 361 F.3d 1271 (10th Cir. 2004) (reversing acceptance reduction for committing perjury at a suppression hearing and denying guilt at trial); *United States v. Archuletta*, 231 F.3d 682 (10th Cir. 2000) (holding that two-level reduction for acceptance of responsibility was precluded because the defendant obstructed justice by fleeing before her original sentencing hearing); *United States v. Saffo*, 227 F.3d 1260 (10th Cir. 2000) (holding that acceptance of responsibility reduction does not apply to a defendant who did not deny that she committed the acts that occurred but never admitted any culpability for those acts); *United States v. Patron-Montano*, 223 F.3d 1184 (10th Cir. 2000) (holding that the court can properly consider a defendant's lie about relevant conduct in evaluating the defendant's eligibility for a §3E1.1 acceptance of responsibility reduction).

United States v. Portillo-Valenzuela, 20 F.3d 393 (10th Cir. 1994). A downward adjustment for acceptance of responsibility may apply where a defendant goes to trial only to preserve legal arguments. *See also United States v. Ellis*, 525 F.3d 960 (10th Cir.) (only in rare cases does an adjustment for acceptance of responsibility apply where a defendant has proceeded to trial), *cert. denied*, 129 S. Ct. 318 (2008); *United States v. Collins*, 511 F.3d 1276 (10th Cir. 2008) (district court can, but is not required to, grant an adjustment for acceptance of responsibility when a defendant proceeds to trial; factors under application note 1 may also be considered); *United States v. Tom*, 494 F.3d 1277 (10th Cir. 2007) (district court erred by granting an adjustment for acceptance of responsibility where defendant, who admitted his participation in events leading to victim's death, proceeded to trial and denied having the requisite *mens rea*); *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999) (district court properly afforded defendant an adjustment for acceptance of responsibility, even though he proceeded to trial).

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court upheld the sentencing court's application of the vulnerable victim enhancement to a defendant lawyer, convicted of distributing cocaine to a person under 21 years of age, who had supplied cocaine to his client who he was representing on drug charges, finding that the client's drug addiction rendered him unusually vulnerable to being supplied with drugs. The court noted that not every drug addict is a vulnerable victim within the meaning of §3A1.1. "Applying this enhancement is highly fact-specific and must take into account the totality of the circumstances" (citations omitted).

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). The district court applied the vulnerable victim enhancement because the bank tellers in a bank robbery were vulnerable victims. Although bank tellers are not automatically vulnerable victims by virtue of their position, here, the defendant selected the bank to rob because it was a rural bank with little law enforcement in the area. The enhancement thus applied.

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995). The defendant argued on appeal that the district court erred in applying §3A1.1 because vulnerability for sentencing purposes is measured at the time of the commencement of the crime and the victim's vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court ruled that the enhancement was properly applied in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding that the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim where the thrust of the wrongdoing was continuing in nature.

§3A1.2 Official Victim

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. App'x 657 (11th Cir. 2005). The defendant was convicted of drug trafficking, unlawful firearms possession, and attempting to kill an official in the performance of official duties with intent to interfere therewith. The district court applied the official victim increase under §3A1.2. The defendant claimed that he was not aware of the official status of the police officer before shooting him. The Eleventh Circuit affirmed, holding that the record supported the lower court's conclusion that the police announced their presence before entering the residence where the defendant was located so that the defendant knew of the victim's status before shooting him.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). The defendant was convicted of possession of a firearm by a convicted felon. The district court concluded that, during his arrest, the defendant had reached for his gun during the struggle with the arresting officers, thus justifying a four-level increase for possession of the firearm in connection with another felony offense under §2K2.1. The district court also applied a three-level enhancement under §3A1.2(b) for having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer. The Eleventh Circuit determined that both enhancements were properly applied and did not constitute impermissible double counting.

§3A1.3 Restraint of Victim

United States v. Hidalgo, 197 F.3d 1108 (11th Cir. 1999). The district court did not err by enhancing the defendant's offense level for restraint of victim even though the victim was a co-conspirator. The co-conspirator was suspected of betraying the other defendants and was restrained by the defendants. The Eleventh Circuit held the sentence was properly enhanced because the guideline contemplates the restraint of any victim, co-conspirator or otherwise.

§3A1.4 Terrorism

United States v. Garey, 546 F.3d 1359 (11th Cir. 2008). The defendant's offense level was increased by 12 levels and his criminal history category was increased from category III to category VI based on the presentence report's conclusion that he had been convicted of a felony that "involved or was intended to promote a 'federal crime of terrorism.'" The commentary defines a "federal crime of terrorism" by reference to 18 U.S.C. § 2332b(g)(5). §3A1.4, comment.(n.1). The defendant's conduct met the definition but he claimed that the enhancement further required that the offense conduct transcend national boundaries. The court rejected that argument, noting that the 1996 and 1997 amendments to the guidelines removed any requirement that international terrorism be implicated by the offense of conviction. The court further relied on precedent affirming application of this enhancement to purely domestic conduct. *See United States v. Mandhai*, 375 F.3d 1243 (11th Cir. 2004) and *United States v. Jordi*, 418 F.3d 1212 (11th Cir. 2005).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Martinez, 584 F.3d 1022 (11th Cir. 2009). Defendant admitted that he "orchestrated" drug shipments, and that he "utilized other individuals" to send and receive drug shipments, and that he was "directly involved in the wire transfer of" drug proceeds. The Eleventh Circuit held that these undisputed facts were insufficient to support a §3B1.1 leadership role enhancement, as they did not establish any of the seven factors set out in §3B1.1 comment (n.4) showing an aggravating role. The government had asserted in the Presentence Report that the other individuals involved in the drug shipments were in fact co-conspirators, and that Martinez had exercised control and leadership. However, after Martinez's objection to the contents of the Presentence Report, the government failed to provide any additional evidence to support a leadership role enhancement. Thus the district court committed clear error by applying the enhancement.

United States v. Valladares, 544 F.3d 1257 (11th Cir. 2008). Adjustments under chapter three of the guidelines, including an enhancement for role, are based on relevant conduct. The district court properly applied the role enhancement based on the defendant's role in uncharged conduct that was part of the "same course of conduct or common scheme or plan as the offense of conviction," under §1B1.3(a)(2).

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The district court erred in applying an enhancement under §3B1.1(b) based on a finding that the defendant was a manager or supervisor, in contravention of *United States v. Glover*, 179 F.3d 1300 (11th Cir. 1999), which held that management over the assets of a conspiracy is not sufficient to qualify a defendant for an aggravating role increase under § 3B1.1. The enhancement is inapplicable in the absence of a finding that the defendant exercised control or influence over at least one other participant in the crime. The government argued that there was evidence that supported the enhancement, but the court refused to assume that the district court would have made that finding, and it remanded the case for the district court to consider whether to apply the enhancement based on findings other than the defendant's management of assets.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). Abundant evidence supported the two-level enhancement for leadership role, pursuant to §3B1.1(c): The defendant did most of the planning and preparation for the bank robbery, including selecting the bank. The defendant first suggested the idea of a bank robbery, selected the bank, provided the guns, and agreed to "take care of the details." The defendant trained accomplices, diagramed the bank, and purchased a police scanner and monitored it from the getaway car during the robbery.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002). A four-level enhancement for leadership role in drug conspiracy was proper because the defendant planned and organized hiding places, ordered co-conspirators, and was responsible for overseeing the distribution of drugs.

United States v. Mesa, 247 F.3d 1165 (11th Cir. 2001). The defendant's sentence had previously been vacated by the Eleventh Circuit and remanded for a more specific finding of fact on whether the defendant was an organizer or leader in the offense. On remand, the district court made a series of specific findings of fact to show that the defendant was an organizer or leader. On a second appeal, the defendant argued that the findings of fact were clearly erroneous because they were not supported by the record. The circuit court found the evidence presented in the PSR and in testimony supported a finding of fact that the defendant controlled and directed the acts of several people involved in the drug conspiracy, including at least three people who stored and delivered cocaine for him, others who unloaded and prepacked vehicles, and at least one interpreter who translated during drug transactions. Therefore, the district court did not err in finding that he acted as an organizer or leader and the enhancement was properly applied. *See also United States v. Flowers*, 275 F. App'x 904 (11th Cir. 2008)(holding that the defendant was more than a mere supplier. He exercised decision-making authority and had a high degree of participation in the conspiracy, as well as extensive control and authority over others in what the district court properly found to be an "otherwise extensive" drug distribution conspiracy); *United States v. White,* 270 F. App'x 824 (11th Cir. 2008) (holding that the defendant arranged drug transactions, negotiated sales, and hired others to work for the conspiracy, and the district court did not err in concluding that the defendant was a manager or supervisor and that the criminal activity involved five or more participants or was otherwise extensive).

United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000). The district court did not err in applying a two-level enhancement for defendant's role as a supervisor when he maintained control or influence over only one individual. The Eleventh Circuit found testimony that the defendant's girlfriend had to consult with him before she could agree to sell methamphetamine and taped telephone conversations indicating that the girlfriend would consult with the defendant who could be heard in the background were sufficient to support the enhancement.

§3B1.2 Mitigating Role

United States v. Rodriguez-DeVaron, 175 F.3d 930 (11th Cir. 1999) (*en banc*). Affirming the decision of the district court in denying the defendant's request for a minor role adjustment, a majority of the *en banc* Court of Appeals for the Eleventh Circuit announced the principles for determining whether a defendant qualifies for a "mitigating role" adjustment. The Eleventh Circuit held that the first, and most important, assessment a sentencing court must make is whether the defendant played a minor or minimal role in the relevant conduct used to calculate the base offense level. The same conduct is used both to set the defendant's base offense level and as the chief determinant of the defendant's role in the offense. If the defendant's relevant conduct and actual conduct are identical, the defendant cannot prove entitlement to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable. Second, the sentencing court may measure the defendant's culpability in comparison to that of other participants in the relevant conduct. The district court should consider only the conduct of persons who are identifiable or discernible from the evidence and who were involved in the relevant conduct attributable to the defendant. The district court must determine that the defendant was less culpable than "most

other participants" in an average, similar scheme, rather than just less culpable than the other discernible participants in the present scheme, in order to be entitled to a minor role adjustment. Finally, the court held that a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled. *See also United States v. Boyd*, 291 F.3d 1274 (11th Cir. 2002) (holding that the district court did not err in denying role reduction where it properly analyzed the defendant's role in light of the relevant conduct for which he was held responsible and measured the defendant's role against the other participants in that relevant conduct which analysis revealed the defendant's integral role in the offense); *United States v. De La Garza*, 516 F.3d 1266 (11th Cir. 2008) (holding that the defendant's role as a mechanic servicing boats for a drug smuggling operation did not qualify as a "minor role").

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

Abuse of Trust

United States v. Louis, 559 F.3d 1220 (11th Cir.), *cert. denied*, 129 S. Ct. 2453 (2009). After summarizing in detail its precedents upholding application of the abuse-of-trust enhancement, the court held that the enhancement does not apply to a federally licensed gun dealer who makes an illegal sale to a convicted felon. Such firearms dealers are closely regulated and do not exercise the substantial discretion necessary for a position of public trust.

United States v. Louis, 559 F.3d 1220, (11th Cir. 2009). After summarizing in detail its precedents upholding application of the abuse-of-trust enhancement, the court held that the enhancement does not apply to a federally licensed gun dealer who makes an illegal sale to a convicted felon. Such firearms dealers are closely regulated and do not exercise the substantial discretion necessary for a position of public trust.

United States v. Njau, 386 F.3d 1039 (11th Cir. 2005). The defendant recruited two other individuals to receive mailings of the Social Security cards that he had fraudulently arranged to be issued to illegal aliens, and recruited another individual to refer illegal aliens to him for Social Security numbers. The district court found that the defendant exercised supervisory authority over at least one other "participant" in the Social Securities fraud scheme. The appellate court held that this finding was not clearly erroneous, and supported the district court's three-level enhancement of the defendant's base offense level, notwithstanding the allegedly passive nature of the roles played by these three individuals in providing a place for cards to be mailed or in referring aliens to the defendant.

United States v. Britt, 388 F.3d 1369 (11th Cir. 2004). The defendant, a part-time clerk for the Social Security Administration, pled guilty to conspiracy to unlawfully process Social Security cards. The district court applied an abuse of trust increase under §3B1.3, which the defendant challenged on appeal. The appellate court upheld application of the adjustment. The record evidenced that the defendant was not a closely supervised employee with little discretion. Rather, she had discretion to accept, reject, or report for further investigation documentary

evidence submitted to her in support of applications for Social Security cards, and was so loosely supervised that she was able, over a period of more than four years, to approve fraudulent Social Security card applications without detection.

United States v. Hall, 349 F.3d 1320 (11th Cir. 2003), *aff'd on other grounds*, 543 U.S 209 (2005). The defendant was convicted of mail fraud and money laundering conspiracy. On appeal, the defendant argued that the district court erred by enhancing his sentence under §3B1.3 for abuse of position of trust due to his status as a pastor. The Eleventh Circuit noted that within the context of fraud it had found a position of trust to exist in two instances: 1) where the defendant stole from his employer, using his position in the company to facilitate the offense, and 2) where a fiduciary or personal trust relationship existed with other entities, and the defendant took advantage of the relationship to perpetrate or conceal the offense. The court noted that the instant case fell within the second situation, so to conclude that the defendant occupied a position of trust, the court had to find a personal trust relationship between the defendant and the victims. The defendant's status as a pastor did not necessarily create a personal trust relationship between himself and the victims. With respect to the victims that the government presented, there was no personal trust relationship with the defendant so as to place him in a position of trust under the guidelines. Accordingly, the district court erred in applying a two-level enhancement under §3B1.3.

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002). The defendant was represented by his co-conspirators as a professional trader and a licensed attorney. The Eleventh Circuit ruled that the enhancement cannot apply based solely on the representations of others. The defendant's status as an attorney does not necessarily mean he abused a position of trust. Instead, it must be shown that the attorney-defendant occupied a particular position of trust in relation to the victims. The same fact-specific inquiry applies to financial advisors. More than discretion or control is required to justify the enhancement. Here, the fiduciary or trustee relationship necessary for a trader to abuse a position of trust with investors was not present and thus the enhancement did not apply, requiring reversal of the district court's sentence.

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The court held that a physician occupies a position of trust in relation to Medicare when that physician submits false claims or otherwise engages in fraud related to his or her position of trust. In this case the defendant was found to have abused that position of trust when he received kickbacks for patient referrals, even when the referrals were medically necessary and the defendant did not falsify patient records or submit fraudulent claims. The court concluded that the abuse of trust enhancement applied.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced the defendant's sentence for violations of absentee voter laws by one level for abuse of a position of trust where the defendant was a county deputy registrar. The fact that a codefendant who did not hold the same position of deputy registrar was convicted of the same offenses does not mean the defendant could not have significantly facilitated the commission of any of her offenses through her position. The Eleventh Circuit found the guideline does not require the

position to be essential to a defendant's commission of the offense, only that the position facilitated this particular defendant's commission of it.

United States v. Ward, 222 F.3d 909 (11th Cir. 2000). The district court erred in applying the position of trust enhancement for an armed security guard who was not in a position of public or private trust. The circuit court held that because the security guard defendant had very little discretion in performing his duty and had no managerial authority, he was not in a position of trust sufficient to apply the enhancement.

United States v. Linville, 228 F.3d 1330 (11th Cir. 2000). The district court properly enhanced the defendant's base offense level for abuse of position of trust even though the employer who "footed the bill" for the bank fraud, and not the bank, conferred that position of trust. The defendant used his signature authority given by his employer, a car dealership, to forge checks which he converted to his personal use. The circuit court concluded an enhancement for abuse of a position of trust is appropriate whenever the defendant was in that position with respect to the victim of the crime. Since the employer was also a victim, the enhancement was properly applied.

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust. While employed by the Red Cross, Harness was named director of Project Happen which was responsible for the distribution of HUD funds. This position gave Harness check signing authority over Project Happen's accounts. Harness used his position to illegally divert Project Happen's funds and used his position to conceal his and his codefendants' fraudulent activities.

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). The district court erred in applying an enhancement for abuse of a position of trust where the defendant was convicted of Medicare fraud. The defendant, the owner and chief executive officer of a home healthcare provider, and her company did not report directly to Medicare but to a fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. Because of this removed relationship to Medicare, plus the intermediate review of the Medicare requests, the defendant was not directly in a position of trust in relation to Medicare.

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997). The district court erred in imposing the abuse of trust enhancement on the defendant because any abuse of his position at the Housing Authority was unrelated to the offense for which he was convicted, tax evasion. The court reasoned that the sentencing guidelines themselves say that the defendant's abuse of trust must "significantly facilitate the commission or concealment of the offense." In this context, "offense" must be read as "offense of conviction" in order to maintain consistency with the definition of relevant conduct in §1B1.3(a).

United States v. Long, 122 F.3d 1360 (11th Cir. 1997). The district court applied a §3B1.3 enhancement for abuse of a position of trust. While employed as a food service foreman

in the United States Penitentiary-Atlanta, defendant was arrested while attempting to carry 85.1 grams of cocaine into the prison. Long acknowledged that the Bureau of Prisons "trusted" him in the colloquial sense but argued that he did not occupy a "position of trust." The Government countered that Long occupied a position of trust because prison officials did not search him when he entered the prison. The circuit court held that Long did not occupy a "position of trust" as §3B1.3 defines that term; the Government's reading would extend to virtually every employment situation because employers "trust" their employees; the guideline does not intend coverage this broad.

Special Skill

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The court upheld a special skill enhancement applied to a defendant who was convicted of conspiracy to gather and transmit national security information and who was specially trained in radio intelligence, radio and computer encrypton and decryption, and civil engineering. The court rejected the defendant's claim that his training was indistinguishable from his criminal conduct, finding that the defendant possessed legitimate skills that were turned to a criminal purpose.

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999). The district court did not err by applying an enhancement for "special skill" for a defendant who acted as the pilot in a conspiracy to import marijuana. The defendant contended that the two-level enhancement for "special skill" did not apply to a person who flies airplanes only as a hobby. The circuit court found the commentary defines "special skill" as "any skill not possessed by members of the general public" which "usually requires substantial education, training or licensing" and does not distinguish between professionals and amateurs.

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998). The district court did not err in enhancing the defendant's sentence under §3B1.3 for use of a special skill where the defendants were convicted of altering or removing vehicle identification numbers from stolen automobile parts. The remote locations of the VINs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical skill. Dismantling cars–not to mention abandoning them, recovering the shells, and then putting the cars back together–involves a combination of skills not possessed by the general public.

United States v. Foster, 155 F.3d 1329 (11th Cir. 1998). The district court did not err in applying a §3B1.3 enhancement to the defendant's sentence for use of a special skill where the defendant possessed the skill of printing and used the skill to significantly facilitate the commission of his counterfeiting crime. Although printing does not require licensing or formal education, it is a unique technical skill that clearly requires special training such as setting up and calibrating the machinery and assisting in the operation of the printing machines. The defendant had worked in a legitimate printing business for about a year and possessed such special skills which he used to facilitate the crime.

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

United States v. Futch, 518 F.3d 887 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 396 (2008). The enhancement for use of a minor is only warranted when the defendant takes some affirmative step to involve a minor. In this case the defendant placed an infant on top of a package of cocaine. The court ruled that the enhancement applied in such a case.

United States v. McClain, 252 F.3d 1279 (11th Cir. 2001). The Eleventh Circuit held that §3B1.4, which provides a two-level enhancement to a defendant's base offense level if he uses or attempts to use a minor in the commission of the crime, does not contain a scienter requirement. The circuit court further held that the enhancement could be applied to participants in any criminal enterprise in which the use of a minor was reasonably foreseeable, regardless of whether a given participant personally recruited or used the minor.

Part C Obstruction

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

United States v. Campa, 529 F.3d 980 (11th Cir 2008). The court rejected the defendant's claim that an enhancement for obstruction of justice was improper because the obstructive conduct, giving a false name to a magistrate at a pretrial detention hearing was part of the crime of espionage. So long as the obstructive conduct occurred during the course of the investigation, prosecution or sentencing, the enhancement is proper.

United States v. Campbell, 491 F.3d 1306 (11th Cir. 2007). In a case where the defendant took records from a witness in his criminal case with the intent to conceal evidence "material to an official investigation," an enhancement for obstruction of justice was warranted.

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court adopted the reasoning of other circuits in holding that obstructive conduct occurring before a formal investigation into the offense of conviction may support a §3C1.1 enhancement if it foreseeably related to that offense.

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. App'x 657 (11th Cir. 2005). The district court applied an obstruction of justice enhancement, predicated upon the defendant's testimony at his suppression hearing that he did not hear the police announce their presence. The district court expressly found that this testimony was false and that the defendant manipulated his testimony to avoid responsibility for any knowledge that law enforcement was entering the house. The Eleventh Circuit affirmed, concluding that the district court's findings established the defendant's willful intent to provide false testimony.

United States v. Uscinski, 369 F.3d 1243 (11th Cir. 2004). The defendant withdrew for his own use about $1.5 million dollars from a client's account in Austria. The government had

previously informed the defendant that all his client's funds were drug-tainted and forfeitable to the government. When asked about the location of the money and purpose of the transfers, the defendant lied, stating that the money was to support his client's family. As a result, the government enlisted the help of foreign governments to trace the money and discovered that it had been used for the defendant's own use. The Eleventh Circuit affirmed an obstruction of justice increase in the offense level for defendant's tax evasion conviction. The court concluded that the defendant did not simply deny guilt, but rather concocted a false, exculpatory story that misled the government.

United States v. Frasier, 381 F.3d 1097 (11th Cir. 2004). The defendant was being held in the county jail as a pretrial detainee, having been charged by the State of Florida with the bank robberies that led to his federal conviction. An FBI agent came to the jail and informed the defendant that the federal government was investigating the robberies and that he was a target of the investigation. Following the agent's visit, appellant attempted to escape from the jail. The district court applied a §3C1.1 increase because it found that the defendant had attempted to escape from a county jail to avoid federal prosecution. The defendant argued that the obstruction increase was inapplicable to him because no federal charges were pending at the time of the attempted escape. The Eleventh Circuit held that the district court properly applied the adjustment, because a federal agent had informed the defendant prior to his attempted escape that the federal government was going to prosecute him.

United States v. Banks, 347 F.3d 1266 (11th Cir. 2003). The defendant pled guilty to purchasing goods with credit cards issued to others, a violation of 18 U.S.C. § 1029. The defendant had given the police a false name upon arrest, a fact discovered after he bonded out. The PSR recommended a two-level sentence enhancement under §3C1.1, obstruction of justice, for providing materially false information to a law enforcement officer. The court adopted the PSR recommendation over the defendant's objection. The appeals court stated that adopting the PSR recommendation was not enough. A factual determination was needed to determine that the defendant's actions actually hindered the investigation and/or prosecution. It was not enough that the defendant intended to hinder, but that there had to be an actual obstructive effect before the enhancement could be applied. The sentence was vacated and the case remanded for further fact finding and resentencing.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed an obstruction of justice enhancement, pursuant to §3C1.1, for threatening a witness where there was no finding that the threats were communicated to the witness. The issue was whether indirect threats made to third parties constitute obstruction absent a showing that they were communicated to the target. Recognizing a circuit split, the court held that indirect threats can warrant the enhancement where, as here, a United States Marshal testified that other inmates informed him that the defendant had made threats against him and another inmate, both of whom were witnesses against the defendant.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The defendant was convicted of telephone fraud in which he used local and long distance service providers to allow third-parties

to make foreign calls, for which he collected a fee, and then he would relocate without paying the telephone service providers. The defendant challenged a perjury-based obstruction of justice enhancement, pursuant to §3C1.1. Here, the district court made the requisite specific factual findings necessary to support the obstruction of justice enhancement. The district court determined that the defendant lied regarding material matters, and the Eleventh Circuit held that this finding was not clearly erroneous.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced codefendant's offense level for obstruction of justice by influencing an affiant to testify falsely and to identify material facts about which affiant testified falsely and for which codefendant was responsible. The circuit court found that the codefendant did not request more specific findings of fact by the district court, and it was too late to complain in circuit court. Further, the circuit court found that detailed findings were not necessary.

§3C1.2 Reckless Endangerment During Flight

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004). The district court applied a reckless endangerment enhancement under §3C1.2, predicated upon the defendant's flight from law enforcement officers. An agent who chased the defendant and tackled him to the ground, sustained a sprain to his left finger. The Eleventh Circuit held that the enhancement was not properly applied because flight alone is insufficient to warrant an enhancement under this section. This guideline requires that the defendant "recklessly create[] a substantial risk of death or serious bodily injury to another person." The defendant's conduct, not that of the pursuing officers, must recklessly create the substantial risk of death or serious bodily injury to others. Since the defendant's flight by itself cannot be said to have recklessly created this level of risk, the district court erroneously imposed the enhancement.

United States v. Cook, 181 F.3d 1232 (11th Cir. 1999). The two defendants before the court took part in a three-man robbery of a credit union. Soon after an unmarked police vehicle took up pursuit of the trio, the defendants exited their car. The third participant proceeded to drive at a high rate of speed until he collided with a police vehicle. The district court ruled that the chase was a reasonably foreseeable consequence of their conspiracy to rob the credit union and that the defendants could therefore be held accountable for it under §3C1.2.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003). The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count of using and carrying a firearm during and in relation to a federal crime of violence. At sentencing, the district court divided the defendant's offense into three groups pursuant to §§1B1.2(d) and 3D1.2 based on the three victims. On appeal, the defendant argued that the district court erred by dividing his offenses into three distinct groups based on three victims

pursuant to §§1B1.2(d) and 3D1.2. The Eleventh Circuit held that where a conspiracy involved multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into the same number of distinct crimes for sentencing purposes. Accordingly, the district court did not err in dividing defendant's conspiracy count into three separate groups under §3D1.2 based on three distinct victims.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed the district court's refusal to group his two counts of escape convictions under §3D1.2. Reviewing with due deference, the court noted that §3D1.2 provides four bases for grouping counts, but that the defendant did not specify on which grounds he relied. The court reviewed each basis and concluded that the district court did not err in declining to group the counts.

United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002). The district court erred in treating as eight separate sentencing guidelines groups one count of conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors since only a single act of conspiracy was alleged against the defendant.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Barner, 572 F.3d 1239 (11th Cir. 2009). The district court erred when it denied the defendant a three-level reduction for acceptance of responsibility. The court concluded that this was one of those "unusual case[s]" in which the defendant went to trial, but "confessed to the factual elements of the crime of conviction." The court pointed out that the defendant

> had declined to plead guilty to the full indictment to pursue legal defenses as to the remaining counts-namely, that the conspiracy in which he participated was not a drug conspiracy, and that the Hobbs Act did not apply to his conduct. He was vindicated when the district court directed a verdict in his favor on Counts Two through Nine, and the jury acquitted him on Count One. Significantly, [the defendant] did not take the stand in his defense, and never denied having possessed the ecstasy.

The court remanded the case to the district court for reconsideration of the issue.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The district court's determination of acceptance of responsibility is reviewed for clear error. Its determination that a defendant is not entitled to acceptance of responsibility will not be set aside unless the facts in the record clearly establish that a defendant has accepted personal responsibility. Because the district court determined that the defendant committed perjury at his sentencing hearing and that he only

admitted to a minor part of his crimes, the district court properly refused acceptance of responsibility credit.

United States v. Thomas, 242 F.3d 1028 (11th Cir. 2001). A defendant who pled guilty to unlawful possession of firearms by a convicted felon was not entitled to a two-level reduction in his offense level for acceptance of responsibility when he forced the government to go to trial on two counts of possession with intent to distribute crack cocaine. The Eleventh Circuit agreed with other circuits and found that when a defendant indicted on multiple counts goes to trial on any of those counts and is therefore unwilling to accept responsibility for some of the charges, he has not really "come clean" or faced up to the full measure of his criminal culpability and is entitled to nothing under §3E1.1.

United States v. Starks, 157 F.3d 833 (11th Cir. 1998). The district court did not err in refusing to grant defendant a reduction for acceptance of responsibility where defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility. The court recognized that a defendant may, in rare situations, be entitled to a reduction for acceptance of responsibility even if he goes to trial, but here, the defendant denied having any fraudulent intent, an essential element of the charges on which he was convicted. The defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility.

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997). The district court did not err in allowing only a two-level reduction for the defendant's acceptance of responsibility, as his guilty plea on the last count was not timely. The court of appeals reasoned that when there are multiple counts of conviction, an adjustment for acceptance of responsibility is applied after all the offenses have been aggregated pursuant to §1B1.1. To be entitled to an adjustment, a defendant must accept responsibility for each crime to which he is being sentenced.

United States v. Smith, 127 F.3d 987 (11th Cir. 1997). The district court did not err in considering the nature of the challenges to the presentence report in determining whether the defendant should receive a reduction for acceptance of responsibility. In his objections to the PSR, the defendant contended that he did not possess fraudulent intent with respect to both offense conduct and relevant conduct. These objections were factual, not legal, and amounted to a denial of factual guilt.

DISTRICT OF COLUMBIA CIRCUIT

Part A Victim-Related Adjustments

§3A1.2 Official Victim

See United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999), §2K2.1, p. 14.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. McCoy, 242 F.3d 399 (D.C. Cir. 2001). The defendant argued that the two-level enhancement she received for being an "organizer, leader, or manger," pursuant to §3B1.1(c), was inappropriate because, as the PSR reported, those that she directed were "unwitting participants." The court agreed that the participants must have known of the criminal activity in order to be considered criminally responsible participants as required by §3B1.1(c). Therefore, the court remanded for further proceedings with respect to the aggravating role enhancement and affirmed the rest of the sentence.

United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001). Upholding the "organizer or leader" enhancement, the D.C. Circuit held that the court should inquire solely into the number of people involved in determining whether criminal activity is "otherwise extensive" for the purposes of §3B1.1(a). The court found that the defendant was an "organizer or leader" because of evidence that he had decision making authority, recruited others, and claimed a larger share of the proceeds. The court vacated the portion of the sentence based on the "otherwise extensive" finding because the unknowing participants performed ordinary and automatic duties, such as opening credit card accounts, and could not be included under factors set forth in *Carrozzella*.[3]

§3B1.2 Mitigating Role

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2001). The D.C. Circuit upheld the denial of a §3B1.2(b) minor role reduction because the defendant had been involved in phone calls in which he and others "discussed, planned, and arranged" a large drug delivery.

United States v. Olibrices, 979 F.2d 1557 (D.C. Cir. 1992). The D.C. Circuit upheld the denial of a §3B1.2 adjustment. The district court had found that the defendant was responsible only for the quantity of drugs in a single transaction and not the entire amount of drugs distributed by the conspiracy. In addition, the district court determined that the defendant was not entitled to a mitigating role adjustment because the defendant was a major participant in the crime of conviction upon which the base offense level was calculated. It stated: "To take the larger conspiracy into account only for purposes of making a downward adjustment in the base

[3]The circuits are split regarding the test to determine whether criminal activity was "otherwise extensive." Some circuits examine the totality of the circumstances; some focus on the number of individuals involved. The court chose to follow the test enunciated by the Second Circuit in *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), and adopted by the Third Circuit in *United States v. Helbling*, 209 F.3d 226 (3d Cir. 2000), which allows the court to consider: "(1) the number of knowing participants; (2) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent [as opposed to mere service providers]; and (3) the extent to which the services of the unknowing participants were peculiar or necessary to the criminal scheme [rather than fungible with others generally available to the public]."

level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme."

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

United States. v. Tann, 532 F.3d 868 (D.C. Cir.), *cert. denied*, 129 S. Ct. 772 (2008). The D.C. Circuit found that the district court erred in applying an enhancement for abuse of a position of trust to a fraud defendant, agreeing with the defendant that her position in the office was "ministerial." The circuit court stated: "Tann may have occupied a position of trust in the colloquial sense that she was trusted not to use her access for nefarious purposes; in that sense, so is every bank teller who has access to the bank's money and every janitor who cleans an office where desk drawers are left unlocked. Like the bank teller or the janitor, however, Tann did not have a job that required her to exercise professional or managerial discretion, which is the standard set forth in the application note to the Guideline."

United States v. Robinson, 198 F.3d 973 (D.C. Cir. 2000). The defendant, president of a school for emotionally disturbed children, was convicted after a jury trial on 11 counts of defrauding the D.C. school system by misappropriating funds and using his position to facilitate bank fraud. The circuit court upheld the district court's sentencing enhancement for abuse of a position of trust based on the defendant's job title and position, control over the finances, managerial discretion, and lack of outside supervision.

United States v. Young, 932 F.2d 1510 (D.C. Cir. 1991). The defendant, convicted of conspiracy to manufacture and distribute PCP, argued on appeal that there was no proof that he abused a "special skill" within the meaning of §3B1.3. The D.C. Circuit agreed and reversed the district court's sentence, noting the lack of evidence that the defendant was a "chemist" in the ordinary sense of the term and rejecting the government's contention that the defendant possessed a "special skill" because the general public does not know how to manufacture PCP. The court stated that neither the criminal statute nor §2D1.1 distinguishes between the manufacture and distribution of PCP, suggesting that Congress and the Sentencing Commission determined that, all other things being equal, those who manufacture PCP and those who distribute it deserve equal sentences. Adoption of the government's position, however, would undermine that principle by resulting in an across-the-board divergence in the sentences for the manufacture and distribution of PCP.

Part C Obstruction

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

United States v. Brockenborrugh, 575 F.3d 726 (D.C. Cir. 2009). The court affirmed the district court's obstruction of justice enhancement, concluding that the district court did not clearly err in finding that the defendant lied on the stand. The dissent disagreed, arguing that

none of the factual findings supporting the enhancement could survive clear error review. It stated: "In our legal system different roles are assigned to trial and appellate courts, and it behooves this court not to blur the lines. . . . [T]he court infers findings that the district court did not make."

United States v. Henry, 557 F.3d 642 (D.C. Cir. 2009). The court found that §3C1.1 requires "willful" conduct, which means "that a §3C1.1 enhancement is only appropriate where the defendant acts with the intent to obstruct justice." Harassing phone calls made by the defendant to the family of a government auditor did not necessarily constitute obstruction of justice under §3C1.1 because the defendant disguised his voice and did not link the calls to the auditor's investigation of him. "[W]here a defendant offers evidence that he acted without any subjective motivation to obstruct justice, a court must evaluate that evidence and can apply a §3C1.1 enhancement only upon finding the defendant acted 'with the purpose of obstructing justice.'" In this case, the conduct was not inherently obstructive because "[i]t is possible to harass an investigator or witness without obstructing the investigation," as could have been the case here where the defendant tried to keep his identity secret. The D.C. Circuit remanded the case to the district court to clarify the factual basis for the enhancement.

United States v. Maccado, 225 F.3d 766 (D.C. Cir. 2000). Affirming the sentencing court's decision, the D.C. Circuit held that §3C1.1 does not require a showing of a substantial effect on the proceedings. The defendant had failed to comply with a court order for a handwriting exemplar but the failure did not delay any scheduled proceeding. On appeal, the defendant argued that he should not have received the obstruction enhancement because his delay had no substantial effect on the investigation or prosecution of his case. In the alternative, the defendant argued that any obstruction was cured by his guilty plea. The court held that refusal to comply with a court order compelling out-of-court conduct would tend to frustrate the judicial process and did not justify the heightened requirement that the proceedings be substantially affected.

United States v. Monroe, 990 F.2d 1370 (D.C. Cir. 1993). The D.C. Circuit held that the district court improperly gave an upward adjustment for obstruction of justice under §3C1.1 for willful failure to appear for her arraignment or to turn herself in. The defendant had presented unrebutted evidence that the letter announcing the arraignment arrived at her address one day after the hearing took place and thus her initial failure to appear could not have been labeled "willful." Regarding defendant's failure to turn herself in, the record indicated that she made affirmative and documented efforts to determine what action was required of her by placing several calls to Pretrial Services.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Kirkland, 104 F.3d 1403 (D.C. Cir.1997). The defendant was convicted by a jury of distributing drugs within 1,000 feet of a school. He appealed the district court's

denial of a downward adjustment under §3E1.1 because he had argued to the jury that he had been entrapped. The D.C. Circuit affirmed the district court's refusal to give a reduction for acceptance, stating: "It has been generally held that a defendant's challenge to the requisite intent is just another form of disputing culpability." The court stated that it could think of no hypothetical in which a plea of entrapment was consistent with acceptance of responsibility but, acknowledging a circuit conflict on the issue, stated that "[i]t may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we doubt it."

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996). The district court did not err in denying the defendant's request for a two-level reduction under §3E1.1 because he lied about the extent of his wife's participation in his prison escape. Section 3E1.1 Application Note 1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with acceptance of responsibility, but differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category. Although the circuit court doubted that the guidelines create an absolute bar to the reduction, it did not resolve the issue.

United States v. Thomas, 97 F.3d 1499 (D.C. Cir. 1996). The defendant appealed the district court's refusal to grant him a two-level downward adjustment for acceptance of responsibility pursuant to §3E1.1. The defendant went to trial, pleading an entrapment defense. The D.C. Circuit noted that Application Note 2 to §3E1.1 states that conviction by trial does not automatically preclude a defendant from consideration for such a reduction, but the application note was not applicable here because the defendant persisted in his entrapment defense from trial through sentencing and offered not one word of remorse, culpability or human error.

United States v. Williams, 86 F.3d 1203 (D.C. Cir. 1996). The defendant argued on appeal that he was entitled to an additional one-level reduction pursuant to §3E1.1(b)(2) for having "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." The district court had determined that the defendant was not entitled to the additional one-level reduction under §3E1.1(b)(2) because his decision to plead guilty was untimely and did not permit the court to allocate its resources efficiently. The D.C. Circuit affirmed, concluding that "[a] defendant does not receive the subsection (b)(2) one-level reduction unless the record manifests that he assisted the government with sufficient timeliness to (1) permit the prosecution to avoid trial preparation *and* (2) permit the court to allocate its resources efficiently."

United States v. Jones, 997 F.2d 1475 (D.C. Cir. 1993) (*en banc*). After the defendant was convicted at trial, the sentencing court granted a §3E1.1 reduction but did not sentence at the bottom of the guidelines range because the defendant went to trial. The D.C. Circuit distinguished the enhancement of a sentence for going to trial (which would be unconstitutional) and the withholding of leniency in sentencing (which would be constitutional). The dissent stated that, regardless of how the action is characterized, it was unconstitutional for the trial

judge to de facto increase the defendant's sentence because he chose to go to trial rather than plead guilty.