

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



**Prepared by
the Office of General Counsel
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Table of Contents

	<u>Page</u>
ISSUES RELATED TO <i>UNITED STATES V. BOOKER</i>, 543 U.S. 220 (2005).	1
I. Procedural Issues.	1
A. Sentencing Procedure Generally.	1
B. Confrontation Right.	2
C. Acquitted Conduct.	3
II. Departures.	3
III. Specific 18 U.S.C. § 3553(a) Factors.	3
A. Unwarranted Disparities.	3
B. Public Protection.	4
C. History and Characteristics of Defendant.	5
IV. Forfeiture.	5
V. Restitution.	5
VI. Reasonableness Review.	5
A. General Principles.	5
B. Standard of Review.	7
C. Procedural Reasonableness.	8
D. Substantive Reasonableness.	11
E. Plain Error/Harmless Error.	13
VII. Revocation.	14
VIII. Retroactivity.	14
IX. Crack Cases.	14
X. Miscellaneous.	15
CHAPTER ONE: <i>Authority and General Application Principles.</i>	16
Part B General Application Principles.	16
§1B1.2	16
§1B1.3.	16
§1B1.10.	19
§1B1.11.	20
CHAPTER TWO: <i>Offense Conduct.</i>	21
Part A Offenses Against the Person.	21
§2A1.2.	21
§2A2.1.	21
§2A3.1.	21
§2A3.2.	22
§2A6.1.	22
Part B Offenses Involving Property.	23
§2B1.1.	23
§2B1.2.	25
§2B3.1.	25

	<u>Page</u>
§2B5.1.	27
Part D Offenses Involving Drugs.	27
§2D1.1.	27
Part F Offenses Involving Fraud or Deceit.	31
§2F1.1.	31
Part G Offenses Involving Prostitution, Sexual Exploitation of Minors & Obscenity. . .	33
§2G1.3.	33
§2G2.1.	33
§2G2.2.	34
Part J Offenses Involving the Administration of Justice.	35
§2J1.2.	35
§2J1.7.	36
Part K Offenses Involving Public Safety.	36
§2K2.1.	36
Part L Offenses Involving Immigration, Naturalization, And Passports.	41
§2L1.2.	41
Part P Offenses Involving Prisons and Corrections Facilities.	42
§2P1.1.	42
§2P1.2.	42
Part Q Offenses Involving the Environment.	42
§2Q1.2.	42
§2Q1.3.	43
Part S Money Laundering and Monetary Transaction Reporting.	43
§2S1.1.	43
Part T Offenses Involving Taxation.	43
§2T1.1.	43
§2T1.4.	44
Part X Other Offenses.	44
§2X1.1.	44
CHAPTER THREE: <i>Adjustments.</i>	44
Part A Victim-Related Adjustments.	44
§3A1.1.	44
§3A1.2.	45
§3A1.3.	45
Part B Role in the Offense.	45
§3B1.1.	45
§3B1.2.	46
§3B1.3.	46
Part C Obstruction.	48
§3C1.1.	48
§3C1.2.	50
Part D Multiple Counts.	50

	<u>Page</u>
§3D1.2.	50
§3D1.4.	51
Part E Acceptance of Responsibility..	51
§3E1.1.	51
CHAPTER FOUR: <i>Criminal History and Criminal Livelihood.</i>	53
Part A Criminal History.	53
§4A1.1.	53
§4A1.2.	54
§4A1.3.	55
Part B Career Offenders and Criminal Livelihood.	57
§4B1.1.	57
§4B1.4.	59
§4B1.5.	60
CHAPTER FIVE: <i>Determining the Sentence.</i>	61
Part C Imprisonment.	61
§5C1.2.	61
Part E Restitution, Fines, Assessments, Forfeitures.	63
§5E1.1.	63
Part G Implementing the Total Sentence of Imprisonment.	63
§5G1.1.	63
Part H Specific Offender Characteristics.	64
§5H1.1.	64
§5H1.4.	64
Part K Departures.	64
§5K1.1.	64
§5K2.0.	66
§5K2.1.	66
§5K2.2.	66
§5K2.3.	67
§5K2.6.	67
§5K2.7.	67
§5K2.8.	67
CHAPTER SIX: <i>Sentencing Procedures and Plea Agreements.</i>	68
Part A Sentencing Procedures.	68
§6A1.2.	68
CHAPTER SEVEN: <i>Violations of Probation and Supervised Release.</i>	68
Part B Probation and Supervised Release Violations.	69
§7B1.3.	69

	<u>Page</u>
§7B1.4	70
FEDERAL RULES OF CRIMINAL PROCEDURE.	70
Rule 32.....	70
OTHER STATUTORY CONSIDERATIONS.....	71
18 U.S.C. § 924(c).....	71
18 U.S.C. § 3582(c)(2).....	71

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

This document contains annotations to certain Sixth Circuit judicial opinions that involve issues related to the federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate some relevant authorities involving the federal sentencing guidelines. The document is not comprehensive and does not include all authorities needed to apply the guidelines correctly. Instead, it presents authorities that represent Sixth Circuit jurisprudence on selected guidelines and guideline issues. The document is not a substitute for reading and interpreting the actual *Guidelines Manual* or researching specific sentencing issues; rather the document serves as a supplement to reading and interpreting the *Guidelines Manual* and researching specific sentencing issues.

ISSUES RELATED TO *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Erpenbeck, 532 F.3d 423 (6th Cir.). The Sixth Circuit rejected the defendant's argument that the district court's imposition of an upward departure without advance notice to him constituted plain error in that it violated Fed. R. Crim. P. 32. The court acknowledged the Supreme Court's decision in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), which overruled previous Sixth Circuit law holding that the notice rule applied equally to variances and departures. The court noted that: "rule 32(h) continues to apply . . . to upward departures under the Guidelines;" the presentence report did not recommend the upward departure imposed by the district court; and "the district court's reliance upon USSG § 5K2.3 as a ground for upward departure was [therefore] somewhat problematic." However, the court concluded, the sentence imposed "is nonetheless justified under § 3553(a) alone" because the court "discussed at length the 18 U.S.C. § 3553(a) factors and fully articulated her reasons under that statute for the . . . departure." As a result, the court concluded that any error was harmless, and affirmed the sentence.

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

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

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

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

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

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

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

United States v. Williams, 432 F.3d 621 (6th Cir. 2005). The court stated that it will "review a district court's departure from the recommended [g]uidelines sentence under an abuse of discretion standard."

B. Confrontation Right

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

C. Acquitted Conduct

United States v. Sawyers, 360 F. App'x 621 (6th Cir.), *cert. denied*, 2010 WL 1531502 (May 17, 2010). The government appealed, arguing that the sentence was unreasonable because the sentencing court failed properly to consider the cross-reference at §2K2.1(c). The court held that the sentencing court erred in finding that it could not apply the cross-reference because there was not an underlying conviction for the offense it was asked to cross-reference, and stated that it has long held that the court may consider acquitted conduct.

United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2071 (2009). Courts may use acquitted conduct to calculate the guideline range, so long as the sentence does not exceed the statutory maximum authorized by the jury's verdict. *See* section VI.C.

II. Departures

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

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

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

A. Unwarranted Disparities

1. Fast Track

United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006). The Sixth Circuit held that “since the Attorney General and the United States Attorney for the district have determined that the departure is necessary for a particular district to function effectively, the reason for the different sentences is explained and is not based on treating individual defendants disparately because of their individual differences. Sentencing disparities can exist for many valid reasons, including giving lower sentences to individuals that cooperate with investigations and giving higher sentences to individuals for whom the [g]uidelines do not adequately account for their criminal history. In this case, fast-track guidelines reductions were specifically authorized by statute due to the unique and pressing problems related to immigration in certain districts. As a result, such a disparity does not run counter to § 3553(a)'s instruction to avoid unnecessary sentencing disparities.”

2. Co-defendants

United States v. Wallace, 597 F.3d 794 (6th Cir. 2010). The defendant challenged the procedural reasonableness of her sentence arguing that the sentencing court failed to consider her

argument that her sentence was twice as long as a co-defendant's sentence even though he played a larger role in the conspiracy. The court stated that although the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct under 3553(a)(6) does not apply to co-conspirators, a district court may exercise its discretion to determine a sentence in light of a co-defendant's sentence. The court held that even under a plain error standard of review, because section 3553(c) implicates a substantial right and the district court did not make even a cursory mention of the disparity, a remand was appropriate to allow the sentencing court to consider the defendant's disparity argument.

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

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

B. Public Protection

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

C. History and Characteristics of Defendant

United States v. Sprague, 370 F. App'x 638 (6th Cir.), *cert. denied*, 131 S. Ct. 223 (2010). The district court imposed a sentence twice as long as the advisory guideline sentence, based in part on the defendant's likelihood of re-offending. The court noted that the defendant was a child sexual predator "who has been actively seeking additional victims" and who had a high risk of recidivism, and found that factor was not accounted for in the guidelines for a typical child pornography conviction. In addition, the defendant argued that because he submitted a life expectancy table of 14 years based on a medical condition, the sentence was substantively unreasonable. However, the circuit court found that a district court is allowed to sentence someone to spend their life in jail, and it was clear that the district court did an appropriately thorough review of all of the section 3553(a) factors to determine that the defendant should "never have the opportunity to rejoin society."

IV. Forfeiture

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

V. Restitution

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

VI. Reasonableness Review

A. General Principles

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

United States v. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009). The defendant pleaded guilty to illegal reentry after previously being removed subsequent to a felony conviction, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(1). The district court varied upward from the defendant's sentencing range of 24-30 months in prison, and sentenced the defendant to 48

months in prison. The court also imposed a 12-month concurrent sentence because the defendant had violated the terms of his supervised release. At the sentencing hearing,

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

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

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

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

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

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

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

United States v. Richardson, 437 F.3d 550 (6th Cir. 2006). The appellate court observed that “[the] rebuttable presumption [of reasonableness for a sentence within the guidelines range] does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence. Even when selecting a presumptively reasonable sentence within the [g]uidelines range, a district court must ‘articulate[] its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting’ the specific sentence within that range.”

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

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

B. Standard of Review

United States v. Klups, 514 F.3d 532 (6th Cir. 2008). The Sixth Circuit upheld an above-guidelines sentence in this case involving travel with intent to engage in criminal sexual activity. The defendant’s guideline range, without departures, was 24-30 months. The district court made alternate findings that (i) a departure was warranted pursuant to §5K2.3 in light of evidence presented at sentencing regarding severe psychological injury to the victim; or (ii) a variance sentence was appropriate. The district court based the variance on “the need to reflect the

seriousness of the offense” and “the need to protect the public,” commenting that “[t]his was not a one-time matter.” On these grounds the district court imposed a sentence of 60 months. The Sixth Circuit acknowledged the Supreme Court’s decision in *Gall* and its undermining of the circuit’s previous “proportionality rule.” It went on to quote *Gall* in concluding “that ‘[o]n abuse of discretion review, [we give] due deference to the [d]istrict [c]ourt’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.’” Because the court found that the variance was reasonable, it did not reach the issue of whether the departure was erroneous.

C. Procedural Reasonableness

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

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

United States v. Fenderson, 354 F. App’x 236 (6th Cir. 2009). The court vacated and remanded a within-guideline sentence when the district court simply recited the statutory language of 18 U.S.C. § 3553(a) but did not apply those factors to the facts in the case. Although *Rita* made clear that “when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation,” the court found that “rote recitation of the statutory language does not provide this Court the ability to review the trial court’s exercise of its discretion.”

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

United States v. Houston, 529 F.3d 743 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2764 (2009). The Sixth Circuit held that the district court did not fail to take into account the factor in § 3553(a)(6) (unwarranted disparity), saying that “[b]y correctly calculating [the defendant’s] Guidelines range, the district judge had necessarily taken into account the need to avoid unwarranted sentence disparities, viewed nationally.” The Sixth Circuit rejected the defendant’s argument, presented in a Rule 35 motion after sentencing, that “supposed *local* sentence disparities . . . could be relevant” because such matters are “not . . . within the contemplation of § 3553(a)(6).”

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

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

United States v. Vonner, 516 F.3d 382 (6th Cir.) (en banc). In a 9-6 decision, the circuit court rejected, *inter alia*, the defendant’s argument that his sentence was procedurally unreasonable. As an initial matter, the court concluded that the plain error standard of review applied to this claim, holding that when the defendant failed to object after pronouncement of the sentence, “it . . . undermine[d] his right to challenge the adequacy of the court’s explanation for the sentence.” Relying on § 3553(c) and *Rita*, the court held that, if a sentence is within the guideline range, a district court is permitted to provide less explanation than would be required if the sentence was outside the guideline range. For a within-range sentence, the court said, “the question is whether ‘[t]he record makes clear that the sentencing judge listened to each argument,’ ‘considered the supporting evidence,’ was ‘fully aware’ of the defendant’s circumstances and took ‘them into account’ in sentencing him.” The court concluded that even if there was error, it was not plain. The court also rejected the defendant’s argument that Fed. R. Crim. P. 32(i)(3)(B) required the district court to rule explicitly on each of his arguments for a variance sentence, holding that the district court had “necessarily addressed [these arguments] by declining to grant a downward variance.”

United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2071 (2009). The Sixth Circuit held en banc an offense level under the guidelines withstands Sixth Amendment scrutiny “as long as the resulting sentence does not exceed the jury-authorized [statutory] maximums.” The court affirmed the defendant’s sentence, and agreed with other circuits that “insofar as enhancements based on acquitted conduct do not increase a sentence beyond the maximum penalty” provided by statute, use of acquitted conduct is constitutional. “Had the district court in this case relied on acquitted conduct in determining the range under a mandatory guideline regime, that sentence would have violated the Sixth Amendment. . . . But

these observations do not show that the Sixth Amendment prevents a district court from relying on acquitted conduct in applying an advisory guidelines system.”

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

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

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

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

United States v. Cruz, 461 F.3d 752 (6th Cir. 2006). The court rejected defendant’s argument that the district court erred by imposing a “reasonable” sentence, stating: “we cannot agree with [defendant] that the court’s reference to imposing a ‘reasonable’ sentence under the § 3553(a) factors, as opposed to say an ‘appropriate,’ ‘sensible,’ or ‘fair’ sentence under those factors, warrants a third sentencing hearing.”

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

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

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

D. Substantive Reasonableness

United States v. Brooks, — F.3d —, 2011 WL 31414 (6th Cir. Jan. 6, 2011). The defendant pled guilty to attempting to entice a minor, traveling to engage in sex with a minor, and distribution of child pornography. The sentencing court applied the cross reference at §2G2.2(c) to §2G2.1 because the offense involved seeking, by notice or advertisement, a minor to engage in sex for the purpose of producing a visual depiction. The defendant argued that because §2G2.2 was used to calculate his actual offense level and is based on legislative enactments designed to increase the sentence instead of empirical evidence, his sentence was substantively unreasonable. The Sixth Circuit found that a district court may disagree with a guideline for policy reasons and may reject the guideline range because of that disagreement, pursuant to *Kimbrough*. However, it further held that the fact that a court may disagree does not mean that it must disagree, and therefore it affirmed the sentence.

United States v. Hunt, 521 F.3d 636 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2157 (2009). The Sixth Circuit reversed as substantively unreasonable a sentence of 5 years’ probation for health care fraud. The applicable guideline range was 27-33 months’ imprisonment. The Sixth Circuit acknowledged the “limited abuse-of-discretion review prescribed by [*Gall*]” but concluded that the district court “appear[ed] to have relied in substantial part on its doubt that [the defendant] intended to commit fraud” and that such reliance was improper because it conflicted with the jury verdict. The Sixth Circuit noted that “it does not matter that the district court relied on a number, even a large number, of relevant facts in its sentencing, if it also relied on facts that it could not properly consider.”

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

United States v. Baker, 502 F.3d 465 (6th Cir. 2007). The Sixth Circuit upheld a below-guideline sentence imposed in this case involving possession of an unregistered firearm. The defendant’s guideline range was 27-33 months, but the district court varied downward and imposed a sentence of five years’ probation, including house arrest for the first year of that probation. In granting the variance, the court relied most heavily on the defendant’s family obligations, which included acting as a caregiver for his older son, who had undergone a heart

transplant in 2002. It also relied on the defendant's demonstration of remorse for the offense. Although the weapon was discovered in the context of an alleged domestic dispute, the district court found that incarceration was not necessary to protect the defendant's wife or the public. The government appealed, challenging *inter alia* the substantive reasonableness of the sentence. In assessing substantive reasonableness, the Sixth Circuit discussed its use of proportionality review but also quoted an earlier case emphasizing that: ". . . the focus of our review of downward variances under the proportionality standard has been on the district court's reasons for varying from the advisory guideline range." The court then compared the sentence to two of its earlier cases involving variances of approximately 99 percent. In one such case, *United States v. Husein*, the sentence was upheld; in another, *United States v. Davis*, the sentence was reversed. The Sixth Circuit held that it could not "draw any meaningful distinction between the extraordinary circumstances" in this case and those presented in *Husein*, concluding:

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

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

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

United States v. Poynter, 495 F.3d 349 (6th Cir. 2007). The defendant, a repeat child sex offender, was subject to a guideline range of 188-235 months. The Sixth Circuit reversed an above-guideline sentence of 720 months, the statutory maximum, as unreasonable, concluding that *Rita* permits the use of the proportionality principle but finding the sentence unreasonable because the court "rel[ie]d on a problem common to all repeat sex offenders (recidivism) in increasing" the sentence and "fail[ed] to offer meaningful distinctions between the risk that [defendant] posed to the public and the risk that other sex offenders posed to the public." The Sixth Circuit also observed that, "no less importantly," §4B1.5 was promulgated explicitly to cover repeat sex offenders and that the increase required by that guideline "was meant to account for the problem of recidivism."

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

United States v. Williams, 436 F.3d 706 (6th Cir. 2006). The court of appeals held that a properly calculated within-guidelines sentence is presumptively reasonable.

E. Plain Error/Harmless Error

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

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

United States v. Christman, 607 F.3d 1110 (6th Cir.), *cert. denied*, 131 S. Ct. 488 (2010). The Sixth Circuit held that a sentence of five days already served which the district court imposed upon remand was substantively unreasonable because the court relied on discouraged factors in the guidelines. The court noted that while "the fact that a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing statutory factors apart from the guidelines," section 3553(a) requires that the sentencing court consider both applicable policy statements and those factors disfavored by the guidelines. The court held that the district court abused its discretion when it found, without explanation, that the defendant's educational and vocational skills in writing and composing music were a mitigating factor, and second, that the defendant's family ties and responsibilities for the care of his mother were mitigating factors, because there was a feasible alternative available for her care. Additionally, the court held the sentence was substantively unreasonable because the district court's inadequate explanation of its consideration of deterrence and potential disparity precluded meaningful appellate review.

United States v. Christopher, 415 F.3d 590 (6th Cir. 2005). The Sixth Circuit held that objections based on *Blakely* preserve a *Booker* argument. Harmless error was shown when the district court followed a circuit directive and indicated the sentence it would have imposed if the

guidelines were advisory; because the district court would have had more discretion in an advisory system, the refusal to give a lower sentence precludes any fair inference that it would give a lower sentence if the guidelines had been advisory.

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

VII. Revocation

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

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

VIII. Retroactivity

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

IX. Crack Cases

United States v. Johnson, 564 F.3d 419 (6th Cir.) *cert. denied*, 130 S. Ct. 318 (2009). The court held that when a defendant is sentenced subject to a mandatory minimum term of imprisonment, the defendant is not eligible for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(2). The Commission’s crack cocaine amendment did not change the defendant’s guideline range; thus, the court concluded, “if [the defendant] were resentenced today, the amended Guidelines would still require a sentence of 240 months, and the court would be departing from this same 240-month baseline if again presented with the government’s substantial-assistance motion.”

United States v. Metcalfe, 581 F.3d 456 (6th Cir. 2009). The defendant appealed the order denying his motion for a reduction of sentence for conspiracy to distribute crack cocaine,

pursuant to 18 U.S.C. § 3582(c)(2). The sentencing court denied his motion because it was based on a new objection to the drug quantity attributed to him as relevant conduct. The appellate court stated that the defendant had not preserved the issue of drug quantity, disagreeing with the defendant's argument that he had not waived the claim because at the time of the original sentence, he would not have benefitted by raising it since his offense level would have remained the same. The court agreed with the district court that § 3582(c)(2) is not "an 'open door' that allows any conceivable challenge to a sentence."

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

In a case similar to the instant case involving retroactive application of the crack cocaine guidelines, the Supreme Court recently clarified "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines." *Spears v. United States*, 129 S. Ct. 840 (2009). The district court here did not recognize that authority, stating, "I do believe that policy judgments of whether crack and powder are equivalent or not is not for me to make."

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

X. Miscellaneous

United States v. Grant, — F.3d —, 2011 WL 71475 (6th Cir. Jan. 11, 2011). The government filed a Rule 35(b) motion requesting a sentence reduction for a defendant based upon his substantial assistance. The defendant argued that when Rule 35 was amended in 2002, it also allowed for consideration of 18 U.S.C. § 3553(a) factors for a sentence below the government's recommendation. The district court disagreed, and the defendant appealed. The Sixth Circuit held that because the amendment to the rule was merely a stylistic change, the only factor that continues to merit consideration in a Rule 35(b) motion is the defendant's cooperation.

United States v. Santillana, 540 F.3d 428 (6th Cir.). The defendant pleaded guilty to two counts of using a firearm during and in relation to a drug trafficking offense pursuant to section 924(c). The statutory maximum was 7 years on the first count and 25 years to run consecutively on the second count, for a total of 384 months. The district court granted the government's motion for a downward departure under §5K1.1 and sentenced the defendant to 84 months and 156 months, respectively, for a total of 240 months. The district court denied the defendant's motion for a further downward departure based on his deportable status. The defendant appealed claiming the court was unaware of its discretion to further depart. The Sixth Circuit affirmed the sentence, holding that the court generally does not review a district court's decision not to depart

downward and there was no clear evidence that the district court misunderstood its general discretion to depart.

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

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

CHAPTER ONE: Authority and General Application Principles

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Bates, 552 F.3d 472 (6th Cir.) *cert. denied*, 130 S. Ct. 166 (2009). In this appeal, the court held that although guilt for conspiracy may be premised upon a single overt act, a conspiracy conviction “does not speak to how many of the charged object offenses the defendant conspired to commit.” When a defendant is convicted of a general conspiracy count involving more than one object offense, and it is clear from the record that the district court made an implicit finding beyond a reasonable doubt that he conspired to commit a specific object offense, the court has complied with §1B1.2(d).

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

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

United States v. Gonzalez, 501 F.3d 630 (6th Cir. 2007). Defendant was convicted of possessing drugs with intent to distribute, but in a special jury verdict form, the jury found that he had possessed less than 500 grams of cocaine, despite a stipulation that the drugs actually weighed almost one kilogram. At sentencing, the district court applied a “reasonable foreseeability” standard to determine what quantity of drugs he should be accountable for. On appeal, the government argued that the district court erred by applying a reasonable foreseeability test. The Sixth Circuit agreed, noting the different standards for liability for one’s own conduct and the conduct of others. USSG §1B1.3(a)(1)(A) holds a defendant accountable for all of his

own acts and does not include a reasonable foreseeability requirement. USSG §1B1.3(a)(1)(B) holds a defendant accountable only for the reasonably foreseeable consequences of coconspirators. Thus, “a defendant is responsible *both* for his own criminal acts under §1B1.3(a)(1)(A) *and* for the reasonably foreseeable criminal acts of others with whom he conspires in relation to the charged offense under §1B1.3(a)(1)(B).” Because the defendant here was charged as a principal, the district court should have calculated the guidelines based on the entire amount, regardless of the defendant’s knowledge of that amount.

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

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

United States v. Settle, 414 F.3d 629 (6th Cir. 2005). Section 2K2.1 applies to firearm possession crimes and includes a cross reference where the gun was used in a crime. Here, the defendant’s possession of a firearm on the date alleged in the indictment culminated in the intentional shooting of another person several days later. The Sixth Circuit held that such a crime, committed after the alleged possession, was relevant conduct and could be taken into account under the cross reference, even if the crime was committed with a different gun than the one possessed in the instant offense if there was “a clear connection between [the two guns].”

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

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

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002). The district court found that the defendant was aware that the conspiracy was broader than the three transactions with which he was involved and that, as a result, the conduct of the conspiracy as a whole was reasonably foreseeable to the defendant. But the record did not indicate that the district court addressed the first part of the test—whether the acts of the co-conspirators were within the scope of the

defendant's agreement. Although the government argued that the defendant's awareness of the broader conspiracy satisfies the first part of the test, the Sixth Circuit rejected that argument, explaining that the mere fact that the defendant was aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation.

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

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

United States v. Meacham, 27 F.3d 214 (6th Cir. 1994). In this opinion, the court of appeals explained that the district court must make individualized findings about the scope of a drug conspiracy and the duration and nature of each defendant's participation in the scheme. A sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy.

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

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

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

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

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

United States v. Moore, 582 F.3d 641 (6th Cir. 2009). During sentencing, the court relied on the PSR which stated that for computation purposes, the defendant was being held responsible for at least 1.5 kilograms of crack cocaine. On appeal, the probation office determined that the defendant’s criminal activity involved at least 4.5 kilograms of crack cocaine. The sentencing court accepted this amount and determined the defendant was not eligible for a sentencing reduction under §1B1.10, stating that “his collateral challenge to the amount of drugs stated in the Presentence Report almost 8 years after the fact is too late.” The appellate court found, however, that because the PSR never stated the defendant was involved in possessing or distributing more than 4.5 kilograms, the sentencing court committed an error that was not harmless, and the government could not make the necessary showing that the court would have imposed the same sentence absent its error. Because none of the facts in the original PSR rendered the defendant ineligible for a reduction under Amendment 706, the court remanded for consideration of the defendant’s drug quantity calculation.

United States v. Perdue, 572 F.3d 288 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1537 (2010). The court rejected the defendant’s argument that the advisory nature of the guidelines permits a district court judge to disregard the limitations in §1B1.10, and reduce the defendant’s sentence beyond the two-levels authorized in Amendment 706. Even assuming that the Commission does not have authority to limit the district court’s ability to reduce the defendant’s sentence, the court stated, Congress does. According to the court, Congress “does so explicitly in the text of 18 U.S.C. § 3582(c)(2).” The court stated that the statute applies only to a defendant whose sentence was “based on” a subsequently-lowered “sentencing range.” Thus, the court held that “[b]ecause Amendment 706 has no effect on the ultimate sentencing range imposed on [the defendant] under the career-offender Guideline, the district court did not err in declining to grant his motion for a reduction in sentence.” See also *United States v. Provitt*, 355 F. App’x 22 (6th Cir. 2009); *United States v. Berry*, 356 F. App’x 829 (6th Cir. 2009); *United States v. Gillis*, 592 F.3d 696 (6th Cir. 2009).

United States v. Quinn, 576 F.3d 292 (6th Cir. 2009). The defendant appealed his sentence based on the retroactive amendment relating to the crack cocaine/powder disparity, arguing that the 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. Washington, 584 F.3d 693 (6th Cir. 2009), *cert. denied*, 2010 WL 1739324 (June 21, 2010). Agreeing with most other circuits, the court found that a sentencing court does not have authority under *Booker* to reduce a sentence beyond the amended guideline range pursuant to §1B1.10. The defendant argued that §1B1.10, which forbids the reduction of a sentence to a term of imprisonment less than the amended guideline range, was a mandatory sentencing scheme, but the court held that when “Congress granted the district courts authority to reduce otherwise valid sentences pursuant to § 3582(c)(2), it explicitly restricted judicial discretion by incorporating the Commission’s policy statements, which limit the extent of the reduction.” The Commission’s policy statements are binding as an exercise of that statutory authority.

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

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

onerous offense level and held that the advisory nature of the guidelines does not eliminate *ex post facto* concerns.

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

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.2 Second Degree Murder

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

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

United States v. Stewart, — F.3d —, 2010 WL 4923321 (6th Cir. Dec. 6, 2010). *See* §2B3.1.

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

United States v. Angwin, 560 F.3d 549 (6th Cir. 2009). The district court did not err in finding that the term “victim” as defined in §2A3.1 can apply even when an undercover police officer does not actually impersonate the minor and therefore the defendant does not communicate with the fictional minor with whom he intended to engage in a sexual act. Via the Internet, the defendant communicated with an undercover officer who posed as both a mother of

two daughters and as the older daughter, age 12. The officer never posed as the younger daughter, age 7, for whom the enhancement was applied. The court found that the definition of “victim” evidences that the guideline was written to punish the intent of the defendant, which it stated was the same whether the defendant communicated with the fictitious minor or not.

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

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

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

§2A6.1 Threatening or Harassing Communications

United States v. Newell, 309 F.3d 396 (6th Cir. 2002). “The pivotal inquiry when determining the appropriateness of a §2A6.1(b)(1) enhancement is whether the defendant intended to carry out the threat, and the likelihood that he would actually do so. Accordingly, essential to the determination of whether to apply the six-level enhancement is a finding that a nexus exists between the defendant’s conduct and the threats that form the basis of the indictment.” In this case, the defendant was convicted for transmitting threatening interstate communications in violation of 18 U.S.C. § 875(c). The district court applied a six-level enhancement to the defendant’s sentence pursuant to §2A6.1(b)(1). On appeal, the Sixth Circuit determined that the application of the six-level enhancement was based on a finding that a nexus existed between the defendant’s conduct and the threats that form the basis of the indictment. The Sixth Circuit held that the defendant’s purchase and possession of a .32 caliber handgun in close temporal proximity to the making of the threats constituted conduct that sufficiently supported a six-level enhancement under §2A6.1(b)(1).

Part B Offenses Involving Property

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

United States v. Dedman, 527 F.3d 577 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009). The Sixth Circuit addressed the question of whether, in a case involving fraudulent receipt of government benefits, the amount of taxes withheld on the basis of the fraudulent benefits should be added to the payments actually received in calculating loss for purposes of §2B1.1(b)(1). The court held that §2B1.1 cmt. n.3(F)(ii) supported the conclusion that withheld taxes should be so included, noting that it “suggest[s] that the dollar amount that the defendant receives serves as a minimum value for the government’s loss, but that the government’s loss can exceed that value” and that “the ‘value of the benefits obtained’ is inclusive of more than simply the sum added to the defendant’s bank account.” The court concluded that “[t]o exclude the withheld taxes from the calculations of loss would create unfairness under the Guidelines” in that “[t]he Guidelines tie culpability to the length of punishment, and exclusion of withheld taxes would create the possibility that less culpable defendants would be punished more.”

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

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

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

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

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

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

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

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

to inflict. The defendant's intention to mislead Medicare dictate that the defendant be held accountable for intending to cause the amount of loss about which he intentionally lied.

United States v. Williams, 355 F.3d 893 (6th Cir. 2003). "Section 2B1.1(b)(9)(C)(I) . . . authorizes a two-level increase in a defendant's base offense level in cases in which the defendant has unlawfully used any means of identification without authorization to produce or obtain any other means of identification. . . . If after the two-level increase, the offense level is less than level 12, then the offense level is to be increased to level 12. . . . The minimum offense level of 12 accounts for the seriousness of the offense as well as the difficulty in detecting the crime prior to certain harms occurring, such as a damaged credit rating or an inability to obtain a loan. . . . The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, such as harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense." On appeal, one of the defendants argued that the bank loan number was not the equivalent of a false identification, and that she purchased the entire loan package, not a social security number. Another defendant argued that the enhancement did not apply to his conduct because he obtained the bank loan in his own name. The court noted that a bank loan number was an account number that can be used to obtain money and was a "means of identification" as that term was defined in 18 U.S.C. § 1028. Thus, according to the defendants, their situation was more analogous to making a purchase with a stolen credit card. The court further noted that a social security number was clearly defined as a "means of identification" and its use to obtain a loan fell within the scope of the statute and the sentencing guidelines even if another form was not used. Accordingly, the district court did not err in finding that the enhancement under §2B1.1(b)(9)(C)(I) applied.

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

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

§2B3.1 Robbery

United States v. Stewart, — F.3d —, 2010 WL 4923321 (6th Cir. Dec. 6, 2010). The defendant was convicted of armed bank robbery during which he attempted to murder an assistant manager of the bank. The sentencing court noted that §2B3.1 Application Note 5 encouraged an upward departure if the defendant intended to murder the victim, and therefore varied from the applicable guideline range by applying §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). The defendant argued that the court improperly double counted the injury to the victim by factoring those injuries into the sentencing determination. The Sixth Circuit found that the court's upward departure to §2A2.1 was based on the defendant's intent to

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

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

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

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

United States v. Moerman, 233 F.3d 379 (6th Cir. 2000). At the time of this appeal, §2B1.2 called for a 6-level increase if a firearm was “otherwise used” and a 5-level increase if a firearm was brandished, displayed, or possessed. In this case, the defendant pled guilty to three counts of armed bank robbery. In each robbery, the defendant did not directly threaten the tellers or the customers with the use of the firearm if they did not comply with the defendant's demands. On appeal, the defendant argued that the six-level enhancement for “otherwise using” the firearm under §2B3.1 did not apply to his case because he only “brandished” the firearm and therefore should have received only a 5-level enhancement on each of the two counts. The Sixth Circuit agreed. In one bank robbery, the defendant pointed the firearm in a threatening manner. In another bank robbery, the defendant moved a customer aside with the barrel of the firearm without an accompanying threatening statement. The court held that the conduct of the

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

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

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

Part D Offenses Involving Drugs

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

United States v. Woods, 604 F.3d 286 (6th Cir. 2010). The district court applied the specific offense characteristic for possession of a firearm, finding that it was reasonably foreseeable that a co-conspirator would possess a firearm because of the “substantial” and “large quantity” of methamphetamine being manufactured over a three day period. On appeal, the government conceded that there was no evidence the defendant possessed a firearm or was aware that a firearm was present, but argued that there is a presumption that a firearm present at the site of the drug manufacturing is attributable to the defendant unless it is clearly improbable the weapon was connected to the offense, citing to Application Note 3. The Sixth Circuit disagreed, stating that the application note only deals with whether a firearm is connected to the offense, and does not bear on whether the presence of the firearm was reasonably foreseeable, as required under §1B1.3. The circuit court noted that the district court relied on an inference that if a conspiracy involves a substantial amount of drugs it is reasonably foreseeable that a co-conspirator would possess a firearm. However, the Sixth Circuit ruled that the defendant was only held responsible for fifty grams of a precursor to methamphetamine, which is not a massive quantity of narcotics that supports an inference of the presence of weapons. Further, when there is not a huge quantity of drugs involved, more evidence that the defendant expected a firearm to be present is required to support application of the enhancement.

United States v. Cox, 565 F.3d 1013 (6th Cir.), *cert. denied*, 130 S. Ct. 764 (2009). The court held that for purposes of imposing a mandatory minimum sentence, the district court is not bound by the amount of drugs charged in the indictment. It is not necessary for the government to allege drug quantity in an indictment, and even if it does, the quantity alleged by the government “does not dictate the mandatory minimum that the court is required to impose.”

United States v. Johnson, 553 F.3d 990 (6th Cir. 2009). The defendant was sentenced pursuant to the November 1, 2007, amendment to the guidelines reducing the base offense level for crack cocaine offenses. The court vacated and remanded for resentencing in light of *Spears v.*

United States, 129 S. Ct. 840 (2009), where the Supreme Court held that “district courts are entitled to reject and vary categorically from the crack cocaine guidelines based on a policy disagreement with those guidelines” and may do so in a “mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the guidelines’ sentencing range.” The sentence was remanded to give the district court the opportunity to impose a sentence with full awareness of this authority, even where the defendant was sentenced pursuant to the new guideline.

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

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

United States v. Gardner, 417 F.3d 541 (6th Cir. 2005). “Where the quantity of drugs at issue cannot be easily determined, the district court may estimate the amount, but the ‘court must err on the side of caution.’” In this appeal, the defendant challenged whether the district court erred in considering approximately \$16,000 as the proceeds of crack cocaine sales. The proceeds were found in the defendant’s vehicle at the time of his arrest. Contrary to the defendant’s position that \$11,000 of the \$16,000 were proceeds from the sale of furniture, the Sixth Circuit found sufficient evidence that the money came from the sale of crack cocaine. A later search of the defendant’s apartment found jars and cooking utensils covered with cocaine residue, as well as packaging material and more crack cocaine. There was no evidence to support the defendant’s claim that the cash was from the sale of other items. *But see United States v. White*, 563 F.3d 184 (6th Cir. 2009) (holding that the district court committed plain error by failing to notice a contradiction in the evidence establishing drug quantity, and not “taking the lesser of the two amounts to which [the witness] testified”).

United States v. Darwich, 337 F.3d 645 (6th Cir. 2003). “[Section] 2D1.1(b)(1) orders sentencing courts to increase the defendant’s sentence by two levels ‘[i]f a dangerous weapon (including a firearm) was possessed.’ The sentencing court is instructed to apply the two-level enhancement when a weapon is present, ‘unless it is clearly improbable that the weapon was

connected with the offense.’ This requirement for a strict sentence enhancement ‘reflects the increased danger of violence when drug traffickers possess weapons.’ The government bears the burden of showing by a preponderance of the evidence that the defendant either ‘actually or constructively possessed the weapon.’ ‘Constructive possession of an item is the ownership, or dominion or control over the item itself, or dominion over the premises where the item is located.’ Once the government meets its burden of showing that the defendant possessed a weapon, a presumption arises that ‘the weapon was connected to the offense.’ The burden then shifts to the defendant to ‘show that it was ‘clearly improbable’ that the weapon was connected with the crime.’ The district court applies the two-level enhancement if the defendant fails to meet this burden.” In this appeal, the defendant argued that the weapons found in his home were not sufficiently linked to his drug activities enough to warrant application of the two-level enhancement under §2D1.1(b)(1). The Sixth Circuit explained that while the defendant might be correct in his position that the government failed to demonstrate how these weapons were connected to the Canfield Market activities, the weapons surely could have been connected to the bagging operation that took place in the defendant’s home. Accordingly, the Sixth Circuit determined that the district court did not err in applying the two-level firearm enhancement.

United States v. Johnson, 344 F.3d 562 (6th Cir. 2003). “The sentencing guidelines provide that a defendant’s base offense level should be increased by two levels if the court determines that he possessed a dangerous weapon during the commission of an offense involving drugs. The government must prove by a preponderance of the evidence ‘that (1) the defendant actually or constructively ‘possessed’ the weapon, and (2) such possession was during the commission of the offense.’ ‘Constructive possession of an item is the ‘ownership, or dominion or control’ over the item itself, ‘or dominion over the premises’ where the item is located.’ If the offense committed is part of a conspiracy, it is sufficient if the government establishes ‘that a member of the conspiracy possessed the firearm and that the member’s possession was reasonably foreseeable by other members in the conspiracy.’ Once it has been established by the government that a defendant was in possession of a firearm, the burden shifts to the defendant to establish that ‘it is clearly improbable that the weapon was connected to the offense.’ The ‘safety-valve’ provision of the sentencing guidelines states that ‘[i]f the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.” The Sixth Circuit explained that the district court properly enhanced the defendant’s sentence by two levels because the government proved by a preponderance of the evidence that it was reasonably foreseeable by the defendant that a co-conspirator would possess a firearm during the commission of a drug conspiracy. The Sixth Circuit further held that the district court’s determination that the defendant possessed a firearm rendered him ineligible to receive a two-level safety valve reduction because he did not meet the conditions of §5C1.2(a)(2).

United States v. Vasquez, 352 F.3d 1067 (6th Cir. 2003). “Note 12 requires that courts use the agreed-upon quantity to determine the offense level, unless the defendant did not intend to provide or was not reasonably capable of providing the agreed-upon quantity. . . . [O]nce the government establishes the agreed-upon quantity, the defendant has the burden of proving that he or she either did not intend to provide or was not reasonably capable of providing that amount. ” In this case, the Sixth Circuit discussed the factors that might indicate a defendant’s intent and

capability of providing an agreed-upon drug amount regardless of his role in the transaction; that is, whether the defendant engaged in serious negotiations rather than mere “idle talk”; whether the defendant participated in similar transactions on prior occasions; and whether the defendant hesitated before agreeing to the transaction.

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

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

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

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

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

When a person is apprehended with marijuana *plants*, however, the appropriate weight of the marijuana cannot be determined simply by weighing the plants, for Congress has criminalized possession of only

consumable portions of the plant and thereby excepted the mature stalk. Following the drug quantity table is a provision that explains how to treat marijuana plants for sentencing purposes, which [the Sixth Circuit] refer[s] to as the ‘equivalency provision.’ . . .

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

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

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

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit²

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

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

[I]n fraudulent loan application cases, the victim may recoup some of the losses by selling collateral that the defendant used to secure the loan. In a fraudulent insurance scheme . . . , the victims are not left with any collateral to sell. The Sentencing

² (Deleted by consolidation with §2B1.1, effective November 1, 2001)

Commission . . . [made] clear this distinction between secured loan fraud cases and other fraud cases in [the application notes to former §2F1.1]. Application Note 7(b) applie[d] only to fraudulent loan application and contract procurement claims and state[d] that the loss in those types of cases should be valued at the amount owed on the loan reduced by the amount recovered by the victim through the sale of assets used to secure the loan.

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

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). “[Section 2F1.1] assigns a base offense level of six and then increases the offense level for different loss amounts beginning with \$2,000. . . . Subsection (b) of Application Note 7 states that in fraudulent loan application and contract procurement cases, the actual loss is offset by any collateral pledged to secure the loan or any amount the lending institution has recovered or can expect to recover.” In this case, the defendant used his position as a bank employee to defraud the bank, causing \$75,546.22 (including \$1709 in interest on the account) to be placed into fictitious accounts that the defendant created. Prior to the termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled him to a \$64,712.40 commission. After he completed the negotiation, the bank retained the commission. At sentencing, the district court determined that the actual loss to the bank was \$74,546.22. The defendant argued that the actual loss was only \$9,834.60 since the bank received \$64,712.40 from his commission. The court of appeals observed that the defendant’s argument relied on the notion that collateral secured by the creditor in fraudulent-loan-transaction cases offsets the amount of the loss. The court’s explanation for why this argument fails follows:

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

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996). “Under the Commentary, [the Sixth Circuit] has concluded that the amount of loss in a bank fraud case should ordinarily be determined as of ‘the time the crime was detected rather than at sentencing.’ The word ‘loss’ means and includes ‘money which others may pay but are not obligated to pay on behalf of the defendant,’ although a loss ordinarily ‘should not include amounts that a bank can and does recover by foreclosure, setoff, attachment, simple demand for payment, immediate recovery from

the actual debtor and other similar legal remedies. . . .’ In [this] case the debt was not repaid immediately by simple demand or through foreclosure, but by a third party more than a year after the discovery of the fraud. That [the defendant’s] payments reduced the amount of the bank’s ultimate loss does not alter the amount of ‘actual loss’ determinable at the time the crime was detected, because, at that time, the bank had no realistic expectation of ‘immediate recovery [either] from the actual debtor,’ or through ‘legal remedies.’”

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

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

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

United States v. Lay, 583 F.3d 436 (6th Cir. 2009). The defendant argued that application of the use of a computer enhancement was impermissible where no discussion of sexual activity occurred via the computer. The court found even though the discussion of prohibited sexual conduct with the minor occurred over the telephone, the enhancement was properly applied because the defendant and the minor first met and communicated over the Internet, the defendant’s intent in developing the relationship was to have prohibited sexual conduct with the minor, and the defendant provided the minor with the phone used to continue the relationship.

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

United States v. Brown, 579 F.3d 672 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1106 (2010). In determining whether the sentencing court correctly applied the special instruction at §2G2.1(d)(1) if the offense involved the exploitation of more than one minor, the court determined the legal standard for whether an image is “lascivious” permits “consideration of the context in which the images were taken, but limits the consideration of contextual evidence to the circumstances directly related to the taking of the images.” Therefore, although the defendant took only one clearly lascivious photograph depicting one of his twin step-granddaughters lying nude on a bed touching her genitalia with her legs spread, the district court could properly look to more than the four corners of that photograph and consider the other numerous images showing both twins nude and focusing on their genitals in sequence and within minutes of the clearly lascivious image to determine that those images were also lascivious. The court found

application of the enhancement at (d)(1) was appropriate because even though the sentencing court erred by taking into account other criminal acts committed by the defendant, including his possession of other pornographic images of minors, the error was harmless where the sentencing court explicitly stated it found all the images of the twins to be lascivious.

United States v. Shafer, 573 F.3d 267 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1542 (2010). The defendant argued that the court erred in imposing a two-level enhancement that applies when “the offense involved . . . the commission of a sexual act or sexual contact.” The defendant claimed that the terms “sexual act” and “sexual contact” both require one individual to touch another and do not encompass self-masturbation. In an issue of first impression, the court concluded that self-masturbation constitutes “sexual contact” sufficient to support the district court’s application of the enhancement. The court stated that “because Congress chose to use different language when defining ‘sexual contact,’ [than it used when defining ‘sexual act’] it seems clear that Congress intended not to limit ‘sexual contact’ in the same way it limited ‘sexual act.’”

United States v. Martin, 291 F. App’x 765 (6th Cir. 2008), *cert. denied*, 131 S. Ct. 274 (2010). The defendant, who held himself out to be a modeling instructor and photographer, pleaded guilty to production and possession of child pornography. The defendant appealed the application of the specific offense characteristic for the minor victims being in his care, custody, or supervisory control because his relationship to them was unlike the other caretakers listed in Application Note 3 as examples of those subject to the enhancement. The Sixth Circuit held the increase was properly applied because the specific offense characteristic is intended to have broad application and is to apply whether the minor was entrusted to the defendant temporarily or permanently.

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

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

United States v. Lewis, 605 F.3d 395 (6th Cir. 2010). The defendant argued on appeal that application of the two-level enhancement for use of a computer constituted impermissible double counting because the use of a computer was a substantive element of the crime of

conviction. The Sixth Circuit held that the fact that the statute allows computer use as one means of transporting the material does not mean that the use of a computer is a required element of the offense, and his use of a computer could appropriately be used as an offense characteristic to affect his sentence.

United States v. Stall, 581 F.3d 276 (6th Cir. 2009). The court found the sentencing court’s explanation of the extent of a downward departure in a possession case to one day imprisonment and 10 years supervised release was sufficient, where the sentence including the supervised release was 27 months longer than the total period imprisonment and supervised release recommended by the government. The sentencing court noted that the lengthy period of supervised release would protect the public, restrict the defendant’s freedom, deter the defendant and other similar offenders, and “otherwise vindicate the sentencing factors outlined by the Guidelines.” Additionally, the court found that the sentencing court enumerated all of the 18 U.S.C. § 3553(a) factors and discussed the application at length to the facts in the case.

United States v. Gawthrop, 310 F.3d 405 (6th Cir. 2002). “Nothing in §2G2.2(b)(4) or its current commentary requires a temporal nexus between any instances of sexual abuse or exploitation.” In this case, the defendant was convicted of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2). On appeal, the defendant argued that the district court erred in applying a five-level enhancement under §2G2.2(b)(4) because his 1988 conviction for sexually abusing his daughter was too attenuated from the 1999 sexual abuse of his granddaughter to form a “pattern of activity” under §2G2.2(b)(4). The defendant claimed that there must be a sufficient temporal nexus between instances of abuse or exploitation to establish a pattern of such activity. The issue on appeal was whether the eleven-year span between these two events precluded each from being considered as a part of a pattern of such activity. The Sixth Circuit explained that the fact that the defendant’s 1988 conviction could not be considered as part of his criminal history under §4A1.2 was of no consequence because §2G2.2(b)(4) does not require a temporal nexus between any instances of sexual abuse or exploitation. The abuse of his daughter and granddaughter—even though the events occurred eleven years apart—clearly constituted a “pattern of activity involving the sexual exploitation of a minor” sufficient to justify the district court’s adjustment to his offense level.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

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

disagreed because it determined that §2J1.2(c) encompasses both the investigation and prosecution of a case. The court of appeals explained that the sentencing stage of defendant's bank robbery conviction continued to entail the prosecution of the offense. Accordingly, the court upheld the application of the enhancement under §2J1.2(c).

United States v. Kimble, 305 F.3d 480 (6th Cir. 2002). "When sentencing a defendant under §2J1.2, the district court is 'required to calculate the base offense level for the offense of conviction under *both* the 'Obstruction of Justice' guideline, U.S.S.G. §2J1.2, and the 'Accessory After the Fact' guideline, §2X3.1, and apply the greater of the two sentences.' It is not necessary for the government to prove facts sufficient to establish a defendant's guilt as an 'Accessory After the Fact' in order to impose a sentence under §2X3.1; the section merely serves as a tool to calculate the base offense level 'for particularly serious obstruction offenses.' In fact, proof of the underlying offense is immaterial, since the point of the cross-reference is to 'punish more severely . . . obstruction of . . . prosecutions with respect to more serious crimes.'" (Internal citations omitted). In this case, the defendant argued that the district court should have applied §2J1.2 without also applying the §2X3.1 cross-reference provision. The court of appeals explained that application of the §2X3.1 cross-reference provision is mandatory and the defendant's claim that he was not an accessory after the fact to the offense was irrelevant because he did not have to be guilty of the crime referenced in §2X3.1 for the higher sentence to apply.

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

§2J1.7 Commission of Offense While on Release³

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

Part K Offenses Involving Public Safety

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

United States v. Coleman, 627 F.3d 205 (6th Cir. 2010). The district court properly applied the four-level enhancement in §2K2.1 for the defendant's possession of ammunition in connection with another felony. Stating that there was no binding case law directly on point, the

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

court stated that §2K2.1 provides for an increased sentence “if the defendant used or possessed any firearm **or** ammunition.” (Emphasis in original). The court found that the defendant’s possession of ammunition alone facilitated or had the potential to facilitate the felony drug trafficking offense because it increased the risk of violence by putting “the owner of the ammunition one step closer to having a loaded firearm.”

United States v. Sawyers, 360 F. App’x 621 (6th Cir.), *cert. denied*, 130 S. Ct. 3305 (2010). The government appealed, arguing that the sentence was unreasonable because the sentencing court failed properly to consider the cross-reference at §2K2.1(c). The court held that the sentencing court erred in finding that it could not apply the cross-reference because there was not an underlying conviction for the offense it was asked to cross-reference, and stated that it has long held that the court may consider acquitted conduct.

United States v. Mosley, 575 F.3d 603 (6th Cir. 2009). The court held that the defendant’s prior Michigan conviction for resisting and obstructing a police officer is not a crime of violence under §2K2.1. The court stated that the offense does not contain a use-of-physical-force element, it is not in the guidelines’ list of covered crimes, and it does not “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” The court found that the Michigan statute included an individual who “assaults, batters, [or] wounds” an officer, but also an individual who “obstructs” an officer, which includes “a knowing failure to comply with lawful command.” The court remanded for the district court to determine which of these two ways the defendant committed the crime. *See also United States v. Emery*, 340 F. App’x 289 (6th Cir. 2009).

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

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

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

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

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

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

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

of other firearms—the court of appeals determined that the district court erred in enhancing the defendant’s sentence under §2K2.1(b)(5).

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

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

United States v. Wheeler, 330 F.3d 407 (6th Cir. 2003). “While violations of § 922(g)(1) are sentenced under U.S.S.G. §2K2.1, an enhancement under subsection 2K2.1(a)(2) focuses on Defendant’s history of drug offenses, a different aspect of Defendant’s conduct than gun possession. Similarly, U.S.S.G. §4A1.1(d) focuses not on gun possession alone, but on the fact that Defendant violated § 922(g)(1) while under another criminal justice sentence. Finally, the

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

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

prior drug convictions for which Defendant received criminal history points under U.S.S.G. §4A1.1 obviously included conduct other than gun possession. Although some of these points are based on the same drug convictions as Defendant’s enhancement under §2K2.1(a)(2), the guidelines expressly provide that ‘[p]rior felony conviction(s) resulting in an increased base offense level under subsections . . . (a)(2) . . . are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).’” (internal citations omitted). In this case, the defendant contended that the district court double-counted because it used the same conduct—his possession of firearms—as the basis for sentencing him under §2K2.1, for enhancing his base offense level under §2K2.1(a)(2), for adding two criminal history points under §4A.1.1(d), and for adding three additional criminal history points under §4A1.1(a). The court of appeals explained that each of the applicable guidelines emphasizes different aspects of the defendant’s conduct other than gun possession or involved expressly-authorized double counting. As a result, the court of appeals did not find impermissible double counting.

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

United States v. Cobb, 250 F.3d 346 (6th Cir. 2001). “Sentencing guidelines should be read as they are written. As written, §2K2.1(c)(1)(B) focuses on a defendant’s state of mind with respect to some other offense generally rather than on his or her state of mind with respect to some specific offense. If the defendant has the requisite state of mind with respect to that general offense and death results, then §2K2.1(c)(1)(B) is applicable.” In this case, the defendant argued that this “section requires knowledge of some specific offense, [but the Sixth Circuit explained that] the use of the word ‘another’ as the sole modifier of ‘felony offense’ does not command such a narrow reading. [The Sixth Circuit stated that] [a]s used in this context, ‘another’ merely means ‘additional, one more.’ While appellant would like the section to read ‘another specific felony offense,’ it does not.” (internal citations omitted).

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

evidence, it demonstrates [the defendant's] knowledge or intent to produce the pipe bomb with intent to harm another." (internal citations omitted).

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

Part L Offenses Involving Immigration, Naturalization, And Passports

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

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

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

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

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

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

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

United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001). Defendant was previously convicted of second degree sexual abuse, a misdemeanor. Based on the undisputed description of that crime in the PSR, the Sixth Circuit held that this conviction constituted sexual abuse of a minor and, therefore, an aggravated felony under 8 U.S.C. § 1101(a)(43). The fact that the prior conviction was only a misdemeanor did not matter where the crime fell within the statutory definition of aggravated felony.

Part P Offenses Involving Prisons and Corrections Facilities

§2P1.1 Escape, Instigating or Assisting Escape

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

§2P1.2 Providing or Possessing Contraband in Prison

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

Part Q Offenses Involving the Environment

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

United States v. Rutana, 18 F.3d 363 (6th Cir. 1994). Section 2Q1.2 requires a 4-level increase if the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure. The court of appeals distinguished a “disruption” from an “impact,” explaining that a disruption is something more than a simple interference or interruption. The court of appeals determined that the evidence in this case indicated that the defendant’s actions resulted in a disruption of a public utility. The defendant discharged hazardous pollutants into a city sewer line that led directly to a waste water treatment plant, causing several bacteria kills at the plant and burning two plant employees. The defendant’s

discharges caused the plant to violate its clean water permit. As a result of the defendant's actions, the plant could not perform its essential function. The court of appeals stated that the expenditure of substantial sums of money is not required in order to prove that a disruption of a public utility occurred.

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

United States v. Kuhn, 345 F.3d 431 (6th Cir. 2003). “The application notes to each enhancement [under §2Q1.3] authorize downward or upward departures based on several factors. For §2Q1.3(b)(1)(B), applicable if the offense involved a discharge of a pollutant, application note 4 contemplates an upward or downward departure based on ‘the harm resulting from the . . . discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation. . . .’ For §2Q1.3(b)(4), applicable if the offense involved a discharge without a permit or in violation of a permit, application note 7 contemplates an upward or downward departure based on ‘the nature and quantity of the substance involved and the risk associated with the offense. . . .’” “Section 2Q1.3(b)(1)(B) contemplates its application in the event of ‘a discharge,’ meaning a single discharge as does section 2Q1.3(b)(4).” “Section 2Q1.3(b)(1)(B) and section 2Q1.3(b)(4) are two distinct offense level adjustments within an offense guideline and are intended to be applied cumulatively. The guidelines instruct that ‘[t]he offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used.’”

Part S Money Laundering and Monetary Transaction Reporting

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

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

Part T Offenses Involving Taxation

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

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

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

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

Part X Other Offenses

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

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

CHAPTER THREE: Adjustments

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

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

The [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 cases on this issue "uniformly count as participants persons who were (i) aware of the criminal objective, and (ii) knowingly offered their assistance." With respect to

the guideline’s language “otherwise extensive,” the Sixth Circuit explained that this was an alternative to the involvement of five or more participants, and held that in determining whether the language applies, “. . .the phrase authorizes a four-level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants.” Additionally, the court addressed the method of determining the contributions of participants and non-participants, discussing Application Note 3 to the guideline and concluding that “the test for functional equivalence requires that a sentencing court consider how significant the role and performance of an unwitting participant was to the ultimate criminal objective.”

§3B1.2 Mitigating Role

United States v. Groenendal, 557 F.3d 419 (6th Cir. 2009). The Sixth Circuit held that the district court erred in refusing to apply a downward adjustment for the defendant’s minor role in the offense of possession of child pornography. The court held that the adjustment can apply to convictions involving only one participant charged with criminal conduct because the guideline does not require that more than one participant be charged with a crime. “Even a sole defendant charged with criminal conduct is entitled to a reduction under §3B1.2 if his conduct 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 [the defendant’s] request for a downward adjustment pursuant to U.S.S.G. §3B1.2. Moreover, [the Sixth Circuit has] held that downward departures under §3B1.2 are available only to a party who is ‘less culpable than most other participants’ and ‘substantially less culpable than the average participant.’”

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

United States v. May, 568 F.3d 597 (6th Cir. 2009). The court held that the district court erred by enhancing the defendant’s sentence based on §3B1.3. The court reiterated that the abuse-of-trust enhancement can only apply where the defendant abused a position of trust with 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 of why the defendant’s computer skills were not special for the purpose of §3B1.3 follows:

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

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

Part C Obstruction

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

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

counts under §3D1.2(a) even though the production count and the possession count involved the same victim and the same transaction.

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

§3D1.4 Determining the Combined Offense Level

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

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996). In this opinion, the Sixth Circuit determined that seven units are not “significantly more than 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.’” (internal citations omitted). In this case, the court of appeals determined that the defendant’s situation was not one of the rare situations contemplated by the commentary to §3E1.1 where the defendant clearly demonstrated an acceptance of responsibility through 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. *See also United States v. Lapsins*, 570 F.3d 758 (6th Cir. 2009) (holding that the government was not required to move for the third level where the government did not believe that the defendant had fully accepted responsibility for his actions).

United States v. Castillo-Garcia, 205 F.3d 887 (6th Cir. 2000). “Application Note 3 to the [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.’” (internal citations omitted).

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

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). “The defendant bears the burden of showing by a preponderance of the evidence that the reduction is justified. A defendant who pleads guilty is not entitled to a reduction as a matter of right. However, the ‘[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) . . . , will constitute significant evidence of acceptance of responsibility. . . .’” (internal citations omitted). In this appeal, the appellate court reversed the district court’s decision awarding the defendant a 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.”

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

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

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

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

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

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

United States v. Irons, 196 F.3d 634 (6th Cir. 1999). “In deciding whether prior offenses are part of a ‘single common scheme or plan,’ as would render them ‘related’ under U.S.S.G. §4A1.2(a)(2) for assigning criminal history points and for treating separate convictions as a single crime, we find that ‘scheme’ and ‘plan’ are words of intention, implying that [offenses] have been jointly planned, or at least that . . . the commission of one would entail the commission of the other as well.” “[A] defendant has the burden of establishing that his crimes were jointly

planned or that the commission of one entailed the other.” In this case, the defendant argued that two prior offenses—violation of a protection order and breaking and entering a former girlfriend’s home—were related because the offenses were part of a crime spree intended to harass the former girlfriend. The Sixth Circuit stated that “prior convictions are not ‘related’ merely because they are part of a crime spree.” The Sixth Circuit explained that “[a]lthough [the] defendant’s purpose to harass his former girlfriend may have been similar, . . . crimes are not ‘related’ merely because each was committed with the same purpose or common goal.” The Sixth Circuit further explained that in order to show that two offenses are related, the defendant must show that “he either intended from the outset to commit both crimes or that he intended to commit one crime which, by necessity, involved the commission of a second crime.” The defendant presented no evidence that at the time he violated the protection order, that he decided to break into his former girlfriend’s’s house, so the offenses were not related.

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

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

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

United States v. Mayle, 334 F.3d 552 (6th Cir. 2003). In this case, the defendant complained that the district court should not have considered evidence of his responsibility for two previous deaths that were unrelated to his offenses of conviction (fraud, forgery, and false statement) because that evidence did not fall under any of five examples listed in the guidelines. The Sixth Circuit explained that the examples were illustrative and not exhaustive of the

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

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

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

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

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

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

United States v. Ford, 560 F.3d 420 (6th Cir. 2009). Modifying prior decisions in the circuit, the Sixth Circuit held that a “walkaway” escape is not a crime of violence under §4B1.1, relying on the Supreme Court’s recent decision in *United States v. Chambers*, 129 S. Ct. 687 (2009). In *Chambers*, the Supreme Court held that a failure to report is not a crime of violence, requiring the court to modify prior decisions suggesting that all types of escape convictions under Kentucky law constitute crimes of violence. The court found that a walkaway escape does not present the risk of physical injury to others and do not involve the same type of purposeful, violent and aggressive conduct that the listed crimes of violence in §4B1.1 do.

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

United States v. Michael, 576 F.3d 323 (6th Cir.), *cert. denied*, 130 S. Ct. 819 (2009). The defendant was convicted of seven drug (both crack and powder cocaine) and firearms offenses. Because he had two prior felony drug-trafficking convictions, the district court sentenced the defendant as a career offender under §4B1.1. The defendant received a total of 420 months in prison: 360 months’ for the drug counts and a consecutive 60-month sentence for possession of a firearm in furtherance of a drug-trafficking offense. The defendant appealed his sentence, arguing that “the district court failed to recognize its discretion to disagree with the . . . 100:1 ratio . . . as implicitly incorporated into the Sentencing Guidelines’ career-offender provisions.” The court agreed. The Sixth Circuit held that “[a] district court may lawfully conclude . . . that the policies underlying the career-offender provisions—including their implicit incorporation of the 100:1 ratio—yield a sentence ‘greater than necessary’ to serve the objectives of sentencing.” (quotation omitted). The court stated that 28 U.S.C. § 994(h), “which provides that ‘[t]he Commission shall assure that the guidelines specify a sentence to a term of

imprisonment at or near the [statutory] maximum term authorized' for a career offender" only tells the Sentencing Commission what to do, not the courts. According to the court, "had Congress wanted to mandate certain sentences (as opposed to Guidelines ranges) for career offenders, it knew very well how to do so. And, as the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005) and its progeny make clear enough, a directive that the Commission specify a particular Guidelines range is not a mandate that sentencing courts stay within it." Despite this, the court found that the district court did not plainly err, and affirmed the defendant's sentence.

United States v. Wynn, 579 F.3d 567 (6th Cir. 2009). The sentencing court erred in relying on the factual recitation in the PSR to conclude that the defendant's guilty plea to sexual battery under Ohio law was a "crime of violence" for purposes of determining whether he was a career offender. The Supreme Court stated in *Begay* that when determining if a prior conviction constitutes a "violent felony" under the ACCA, "we consider the offense generically [and] examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion," and found that the court can examine "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant . . . or to some other comparable judicial record of this information" when the statutory definition of the crime is ambiguous. The court stated that the Supreme Court had rejected consideration of police reports and criminal complaint applications in *Shepard* to support a finding of a "crime of violence" and found that factual descriptions in the PSR are "the sort of information that one might expect to find in a police report." (quoting *United States v. Barteo*, 529 F.3d 357 (6th Cir. 2008)).

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

United States v. Horn, 355 F.3d 610 (6th Cir. 2004). "[C]rimes are part of the same scheme or plan only if the offenses are jointly planned, or, at a minimum, the commission of one offense necessarily requires the commission of the other. . . . '[T]he simple sharing of a modus operandi cannot alone convert [separate offenses] into one offense by virtue of their being a single common scheme or plan.' . . . [M]erely because crimes are part of a crime spree does not mean that they are related. Nor are such offenses related because they were committed to achieve a similar objective, such as the support of a drug habit. Finally, offenses are not necessarily related merely because they were committed within a short period of time." In this case, the Sixth Circuit determined that the district court properly determined that two robberies were not part of a common scheme or plan. The Sixth Circuit explained that the robberies were

committed weeks apart at different locations; the offenses involved different victims; and the defendant had an accomplice in the first offense but not the second. The Sixth Circuit stated that no evidence indicated that the two armed robberies were jointly planned or that the commission of the first robbery entailed the commission of the second.

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

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

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

§4B1.4 Armed Career Criminal

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

United States v. LaCasse, 567 F.3d 763 (6th Cir. 2009) *cert. denied*, 130 S. Ct. 1311 (2010). The court held that the defendant’s conviction in Michigan for “fleeing and eluding” qualifies as a violent felony under the ACCA. The court distinguished fleeing and eluding from driving under the influence. While both crimes require the offender to be driving a car, the court stated that fleeing and eluding “is distinguishable with respect to intent: the offender makes a conscious decision to flee rather than to stop his vehicle as requested by a police officer.” Further, “fleeing and eluding involves aggressive conduct; the offender is attempting to outrun a police cruiser either in a low speed-limit area or in a manner that results in a collision or an accident.”

United States v. Oaks, 554 F.3d 1087 (6th Cir. 2009). The court remanded the case to the district court in light of *United States v. Chambers*, 129 S. Ct. 687 (2009), where the Supreme Court held that failure to report in an Illinois case was a separate crime and did not amount to a violent felony under the Armed Career Criminal Act. Because the definition of escape in the Tennessee statute placed together in a single numbered statutory section several different kinds of behavior, similar to the Illinois statute, the court was unable to determine the status of the defendant’s custody at the time of the escape or whether the escape qualified as “violent.”

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

United States v. Hargrove, 416 F.3d 486 (6th Cir. 2005). In this opinion, the Sixth Circuit determined that the defendant’s prior felony convictions—three Ohio sexual battery convictions under Ohio Rev. Code § 2907.03(A)(5) (1994)—were not violent felonies under the Armed Career Criminal Act. To reach this determination, the Sixth Circuit used the exception to the rule from *Taylor v. United States* that permits the district court to look only to the fact of conviction and the statutory definition of the prior offense. The exception applies to cases where “the prior offense is defined broadly enough for it to encompass some offenses that meet the ACCA’s definition of a ‘violent felony’ and some that do not. . . .” In that case, the district court may also consider the charging document and jury instructions.

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

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

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

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

United States v. Bolka, 355 F.3d 909 (6th Cir. 2004). "The application of a §2D1.1(b)(1) sentence enhancement does not necessarily preclude the application of a §5C1.2(a) 'safety valve' reduction. A defendant may be unable to prove that it is clearly probable that the firearm was not connected to the offense—the logical equivalent of showing that it is clearly improbable that the firearm was connected to the offense—so as to defeat a §2D1.1(b)(1) enhancement. However, that same defendant may, nevertheless, be able to prove by a preponderance of the evidence that the firearm was not connected to the offense so as to satisfy §5C1.2(a)(2). The 'clearly improbable' standard is a higher quantum of proof than that of the 'preponderance of the evidence' standard. It does not deductively follow from a defendant's failure to satisfy a higher quantum of proof on a particular issue that he cannot satisfy a lower quantum of proof on that same issue. It also does not necessarily follow from the existence of a preponderance of evidence demonstrating that a defendant possessed a firearm during the time of the offense—the government's prima facie burden of proof for purposes of a §2D1.1(b)(1) enhancement that there exists a preponderance of evidence demonstrating such possession in connection with the offense—contrary to the defendant's burden of proof so as to defeat a §5C1.2(a) reduction. While they are quantitatively the same, these evidentiary standards are qualitatively distinct. Similarly, it does not deductively follow from the presumption that a defendant's possession of a firearm was connected to the offense—arising from a preponderance of evidence demonstrating such possession during the time of the offense—for purposes of a §2D1.1(b)(1) enhancement that a preponderance of evidence demonstrating such a connection, in fact, exists for purposes of a §5C1.2(a) reduction. Consequently, a defendant's conduct warranting a §2D1.1(b)(1) enhancement does not per se preclude that defendant from proving by a preponderance of the evidence that his possession of the firearm was not connected with his offense for purposes of a §5C1.2 (a) 'safety valve' reduction."

United States v. Penn, 282 F.3d 879 (6th Cir. 2002). "The 'safety valve' provision of 18 U.S.C. § 3553(f) provides that in cases involving certain drug offenses, including violations of 21 U.S.C. § 841, the sentencing court may impose a sentence 'without regard to any statutory

minimum sentence,’ if the court determines that the five criteria listed in § 3553(f) are satisfied. The first criterion requires that ‘the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.’ Section 5C1.2 of the Sentencing Guidelines interprets the ‘safety valve’ exception.” In this appeal, the government complained that the defendant was not eligible for a reduced sentence under the “safety valve” provision because he had more than one criminal history point as calculated under §4A1.1. Specifically, the government argued that the district court erred in concluding that by granting a downward departure pursuant to §4A1.3, it was authorized to reduce the defendant’s criminal history points and thereby make him eligible for sentencing under the “safety valve.” The Sixth Circuit noted that the commentary to §5C1.2 is unambiguous and clearly limits a district court’s authority to apply the “safety valve” provision to cases where a defendant has not more than one criminal history point as calculated under §4A1.1, regardless of whether the district court determined that a downward departure in the defendant’s sentence is warranted under by §4A1.3. In the instant case, the district court’s determination that the defendant was entitled to a downward departure under §4A1.3 had no effect on the defendant’s criminal history score as calculated under §4A1.1. Section 4A1.3 did not authorize the district court to add or subtract individual criminal history points from a defendant’s record; instead, it merely allowed the district court to impose a sentence outside the range prescribed by the guidelines for a defendant’s particular offense level and criminal history category. That is, §4A1.3 allows a district court to sentence a defendant with reference to the guideline range applicable to a defendant with another criminal history category, not to change the defendant’s actual criminal history category.

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

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

United States v. Bazel, 80 F.3d 1140 (6th Cir. 1996). “Section 3553(f) [of title 18] and §5C1.2 . . . require the [sentencing] court to make a finding both that the defendant was not an “organizer, leader, manager, or supervisor” and that the defendant was not engaged in a [continuing criminal enterprise] in order to open the ‘safety valve.’” In this appeal, the defendant maintained that he was eligible for the safety valve because he was not engaged in a continuing

criminal enterprise although the government demonstrated that he was an “organizer, leader, manager, or supervisor” of a criminal operation. The court of appeals explained that once the district court found that the defendant was an “organizer, leader, manager, or supervisor,” it could not make one of the findings necessary to opening the “safety valve.” Thus, the court of appeals stated that the district court properly denied the safety valve.

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

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

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

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

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

Part G Implementing the Total Sentence of Imprisonment

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

United States v. Jones, 569 F.3d 569 (6th Cir. 2009). The court acknowledged that there are two conflicting interpretations of the term “guideline range.” Section 5G1.1 could be interpreted to refer to two distinct concepts: “the ‘applicable guideline range’ and the ‘guideline sentence.’ The applicable ‘guideline range’ is determined by the sentencing court based on the defendant’s offense level and criminal history.” If the mandatory minimum term is higher than

the top of that range, it trumps the guideline range and becomes the guideline sentence. Under the other interpretation, “when there is a mandatory minimum that is above the guideline range calculated by the sentencing court, that mandatory minimum, though a single point, becomes the ‘guideline range.’” The court held that, in light of these two interpretations, the provision in the plea agreement was ambiguous. The court construed the term against the government, and held that “the phrase ‘above the guideline range’ in the plea agreement means above the guideline range of 70 to 87 months of imprisonment calculated by the district court before it applied the mandatory minimums.”

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

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

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

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

Part K Departures

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

United States v. Gabbard, 586 F.3d 1046 (6th Cir. 2009). The defendant argued that the district court wrongfully confused application of 18 U.S.C. § 3553(e) and §5K1.1 when his guideline range was determined by a statutory mandatory minimum, and failed adequately to explain its determination of the downward departure as between the statute and the guideline. The court found that the district court did not need to grant a motion under both section 3553(e)

and §5K1.1 to sentence the defendant below the guideline range because “[w]here the statutory minimum sentence becomes the Guidelines sentence, . . . a government motion to depart below the Guidelines pursuant to §5K1.1 is, as a practical matter, superfluous.” (quoting *United States v. Richardson*, 521 F.3d 149 (2d Cir. 2008)). In the instant case, however, the court found any error was harmless because the court granted the §5K1.1 motion and sentenced the defendant well below the statutory minimum.

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

United States v. Rosenbaum, 585 F.3d 259 (6th Cir. 2009) *cert. denied*, 130 S. Ct. 1115 (2010). The court held that the decision whether and to what extent to grant a §5K1.1 motions rests within the discretion of the district court, and that an impermissible factor for the sentencing court to consider is the potential of a Rule 35(b) motion in the future. The court found that the sentencing court considered the defendant’s cooperation and found that he had not begun cooperating until after co-defendants had agreed to cooperate and that his cooperation was incomplete at the time of sentencing. Therefore, although the court stated that its appraisal might change in the future if the defendant’s information produced results, it properly determined his assistance was not yet sufficiently substantial to warrant a reduction under §5K1.1.

United States v. Truman, 304 F.3d 586 (6th Cir. 2002). In the instant case, the district court held that §5K1.1 applied and that absent a motion from the government to depart, the district court lacked the discretion to do so. On appeal, the defendant argued that §5K1.1 was not the exclusive provision for dealing with all cooperation, but rather the court may consider a defendant’s cooperation not contemplated by §5K1.1 under the grant of discretion to sentencing judges embodied in §5K2.0. Relying on *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), the defendant argued that his cooperation was directed to state and local authorities and thus was outside the scope and limitation of §5K1.1. The Sixth Circuit noted that there was a split among the circuits as to whether the substantial assistance mentioned in §5K1.1 was limited to federal authorities. *Compare United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998) *with United States v. Love*, 985 F.2d 732 (3d Cir. 1993). However the court noted that it did not need to decide this issue nor weigh in on the circuit division in order to resolve this appeal. The court stated that, by its terms, §5K1.1 applied only to substantial assistance in connection with the investigation and prosecution of another individual who has committed a crime. Where the substantial assistance was directed other than toward the prosecution of another person, the limitation of §5K1.1—the requirement of a government motion as a triggering mechanism did not apply. The court noted that other courts had recognized this distinction and had observed that when the defendant’s cooperation did not involve investigation or prosecuting another person, the government’s power

to limit the court's exercise of discretion to depart downward did not apply. *See, e.g., United States v. Khan*, 920 F.2d 1100 (2d Cir. 1990). Accordingly the court held that when a defendant moved for a downward departure on the basis of cooperation or assistance to government authorities which did not involve the investigation or prosecution of another person, §5K1.1 did not apply and the sentencing court was not precluded from considering the defendant's arguments solely because the government had not made a motion to depart. Consequently the district court erroneously concluded that it lacked discretion to consider the defendant's asserted grounds for a downward departure absent a motion from the government; the sentence was vacated and the case was remanded.

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

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

§5K2.1 Death (Policy Statement)

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

§5K2.2 Physical Injury (Policy Statement)

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

was this universe of cases that the sentencing commission contemplated and determined to merit a six-level enhancement, not an eleven-level enhancement.”

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

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

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

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

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

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

§5K2.8 Extreme Conduct (Policy Statement)

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

appropriate. The Sixth Circuit’s explanation for why the offense conduct was “unusually heinous, cruel, brutal, or degrading” follows:

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

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

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

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

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

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

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

Part B Probation and Supervised Release Violations

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

United States v. Kontrol, 554 F.3d 1089 (6th Cir. 2009). The sentence imposed upon revocation of supervised release was procedurally and substantively reasonable when the court sentenced the defendant to 15 months, above the guideline range of 4 to 10 months because the defendant made threatening statements to his probation officer. Although those statements did not relate to his underlying offense for violations of his supervised release, the court correctly considered the section 3553(a) factors and properly found that they “bear on the circumstances of his underlying offense,” his “recalcitrance, the need to protect [the probation officer] and other probation staff,” and on “the prospect of deterring other defendants from going down a similar path.”

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

United States v. Kirby, 418 F.3d 621 (6th Cir. 2005). “[A] court may consider evidence at a revocation hearing that would be inadmissible in a criminal prosecution.” In this case, the Sixth Circuit determined that the rule from *Crawford v. Washington*, 541 U.S. 36 (2004)—that out-of-court statements can only be used in court if the declarant was unavailable and the accused was given a prior opportunity to cross-examine the declarant—did not apply to revocation of supervised release hearings.

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

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

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

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

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

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

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

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

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

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

United States v. Franklin, 622 F.3d 650 (6th Cir. 2010). On his third sentencing appeal after a conviction for armed bank robbery and brandishing a firearm during a crime of violence, the defendant argued that the court's prior decision was overruled by *Kimbrough v. United States*, 552 U.S. 85 (2007). He asserted that the discretion to impose a sentence that differs from the advisory guidelines extends to policy disagreements with mandatory minimum sentences. Therefore, the sentencing court had authority to consider the mandatory minimum sentence when determining his sentence for the underlying offense. The court held that in *Kimbrough*, the Supreme Court recognized that courts are constrained by mandatory minimums established by Congress, and the sentence was presumptively reasonable because it was within the guideline range.

United States v. Ham, — F.3d —, 2011 WL 43429 (6th Cir. Jan. 7, 2011). In keeping with the Supreme Court's decision in *Abbott v. United States*, 131 S. Ct. 18 (2010), the Sixth Circuit affirmed a five-year mandatory sentence pursuant to 18 U.S.C. § 924(c) even though the defendant also had a ten-year mandatory sentence pursuant to 21 U.S.C. § 841. In *Abbott*, the Supreme Court held that the language in 18 U.S.C. § 924(c) that "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law" refers only to other provisions that impose mandatory minimum sentences for conduct proscribed under section 924(c). *i.e.*, the possession of a firearm in connection with a predicate crime. "Under *Abbott*, a mandatory minimum sentence under §924(c) must run consecutively with any mandatory sentences for predicate crimes, as well as for other unrelated crimes. The 'except' clause in §924(c) prohibits only the imposition of multiple consecutive mandatory sentences under §924 for using a firearm in the commission of a violent or drug trafficking crime."

18 U.S.C. § 3582(c)(2)

United States v. Turnley, — F.3d —, 2010 WL 5140624 (6th Cir. Dec. 20, 2010). The defendant, convicted for possession of crack cocaine with the intent to distribute, filed a motion pursuant to 18 U.S.C. § 3582(c)(2), for a lower sentence in accordance with the subsequently lowered guideline range. The district court held that *Booker* renders the guidelines advisory in section 3582(c)(2) resentencings, and resentenced the defendant below the mandatory amended guideline range. The government appealed. After the parties filed their briefs, the Supreme Court directly addressed the issue in *Dillon v. United States*, 130 S. Ct. 2683 (June 17, 2010), and held that *Booker* does not require that the guidelines be considered advisory in section 3582(c)(2) resentencings because "proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." The court held, therefore, that the district court erred, and vacated and remanded the case for resentencing.

United States v. Jimenez, 605 F.3d 415 (6th Cir. 2010). The defendant argued her sentence was unreasonable because the court’s decision to base her sentence in part on her need for medical and mental health treatment was at odds with section 3582(a), which states that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” Recognizing the tension between the statutory admonition and the duty at section 3553(a)(2)(D) for the court to consider the need for medical care or other correctional treatment, the Sixth Circuit ruled that although section 3582(a) bars consideration of rehabilitation concerns in the decision whether and how long to imprison the defendant, where permissible factors justify the imprisonment and the length of imprisonment, the sentencing court is free to recommend rehabilitation services.

United States v. Johnson, 564 F.3d 419 (6th Cir.) *cert. denied*, 130 S. Ct. 318 (2009). *See Issues Related to United States v. Booker*, 543 U.S. 220 (2005), IX.

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

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