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

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

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

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

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Adams, 746 F.3d 734 (7th Cir. 2014). The defendants were charged with conspiracy to possess with intent to distribute and distribution of heroin. At the defendantsô sentencing, the district court applied an enhancement for maintaining a stash house. Because the conspiracy ended in August of 2010 and the enhancement was not effective until November 2010, the Seventh Circuit held that it was a violation of the *Ex Post Facto* Clause to apply the enhancement, and remanded to the district court.

United States v. Prado, 743 F.3d 248 (7th Cir. 2014). The defendant, a police officer, pleaded guilty to attempted extortion, and argued at the sentencing hearing that the district court should consider the sentence of another local police officer with similar offense conduct in imposing sentence. The district court refused to consider the arguments because it believed it could only consider sentencing disparities if they were presented on a nationwide basis. The Seventh Circuit found that the district court committed procedural error when it did not realize that it had discretion to deviate from the guidelines and consider individual sentences when deciding what sentence to impose. The court stated that one of the factors the district court may consider is the need to avoid unwarranted sentencing disparities between similarly situated defendants, and that a district court has discretion to go beyond the Sentencing Commissionôs generalized considerations.

United States v. Barnes, 660 F.3d 1000 (7th Cir. 2011). Rejecting the defendantôs assertion that *Pepper v. United States*, 562 U.S. 476 (2011), requires the district court to consider any and all arguments defendants raise upon a remand for resentencing, the Seventh Circuit held that ñwhen a case is generally remanded . . . for re-sentencing, the district court may entertain new arguments as necessary to effectuate its sentencing intent, but is not obligated to consider any new evidence or arguments beyond that relevant to the issues raised on appeal.ò *See also*

United States v. Adams, 746 F.3d 734 (7th Cir. 2014) (reiterating that *Barnes* solved a misperception that a general remand does not require a district court to ñstart from scratchò).

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

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

United States v. Gibbs, 578 F.3d 694 (7th Cir. 2009). The district court committed procedural error when it failed to calculate or acknowledge the advisory guideline range for supervised release. The court sentenced the defendant to ten yearsô imprisonment and ten years of supervised release for distributing crack. The statutory minimum term of supervised release was five years, and the statutory maximum term was life. The guideline range under §5D1.2(a)(1) was three to five years. Because the statutory minimum coincided with the top of the guideline range, the entire guideline range was simply five years. The Seventh Circuit vacated the sentence of supervised release because although the district court identified the statutory range of five years to life, it failed to calculate or even acknowledge the advisory guideline range. The procedural error entitled the defendant to a redetermination of his supervised release term.

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

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

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

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

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

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

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

United States v. Walker, 447 F.3d 999 (7th Cir. 2006). The court explained that Rule 32(h) does not apply to a post-*Booker* varianceð where the district court exercises its discretion to impose a sentence based on the advisory guidelines range after consideration of the section 3553(a) factors, the court does not unexpectedly ñdepartò from a generally binding guidelines range based on information not addressed by the PSR or the partiesô presentencing pleadings.

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

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

United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005). The court remanded a within-guideline sentence due to an ñinadequate explanation for the sentenceò; holding that ñ[a] judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversightò and that the defendant was not required to object

to ñthe judgeôs failure to explore [the defendantôs] alleged lack of cooperation . . . and to articulate his reasons for rejecting the argument for a lighter sentence on the basis of [the defendantôs] psychiatric problems and alcohol abuse.ò

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

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

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

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

B. Burden of Proof

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

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

C. Hearsay

United States v. Roche, 415 F.3d 614 (7th Cir. 2005). The court rejected the appellantôs hearsay argument and explained that the guidelines permit judges to consider information that

has ñsufficient indicia of reliability to support its probable accuracy.ò *See also United States v. Ghiassi*, 729 F.3d 690, 695 (7th Cir. 2013) (ñIn the sentencing context, the district court is not bound by the rules of evidence and, so long as it is reliable, may consider a wide range of evidence, including hearsay, that might otherwise be inadmissible at trial.ò).

D. Acquitted Conduct

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

E. Prior Convictions

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

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

> The law is very clear that a sentencing judge ñmay appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.ò . . . A corollary to this general principle is the rule that a sentencing judge ñmay consider relevant information without regard to the rules of evidence . . . provided that the information has [a] sufficient indicia of reliability to support its probable accuracy.ò . . . Indeed, the federal criminal code makes clear that: ñNo limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.ò 18 U.S.C. § 3661. Accordingly, it is well-settled law that ñhearsay is not only an acceptable basis for a sentencing determination,ò it is often an ñintegral part of the sentencing process.ò

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

F. Ex Post Facto

United States v. McMillian, 777 F.3d 444 (7th Cir. 2015). Defendant was convicted of sex trafficking involving multiple minor and adult victims. After *Peugh*, it would violate the *ex post facto* clause to apply the more recent, harsher guidelines with respect to victims for which the defendantôs conduct had ceased before those guidelines came into effect, but it did not violate the *ex post facto* clause to apply the new guidelines with respect to the victim whom the defendant continued to traffic after the effective date of the new guidelines. Although this violates the ñone book rule,ò of §1B1.11, that rule appears only as a policy statement in the guidelines, and it is thus as advisory as any other part of the guidelines.

United States v. Fletcher, 763 F.3d 711 (7th Cir. 2011). Defendant was convicted of five counts related to child pornography. Pursuant to U.S.S.G. § 3D1.2, the district court grouped four counts. The group included conduct that spanned seven years and significant guideline revisions. Defendant argued that the district court committed an *ex post facto* violation by using a later version of the guidelines incorporating harsher penalties even though much of the conduct occurred before the revisions. Although the district court relied on subsequently overturned case law, the Seventh Circuit nonetheless affirmed the sentence and held that there was no *ex post facto* issue because of the grouping rules and the so-called ñone bookò rule, USSG § 1B1.11(b)(3), which specifies that only one version of the guideline will be used. ñThe grouping guidelines together with the one book rule provide adequate notice to defendants that they will face the harsher version of the guidelines if they choose to continue a course of conduct after the guidelines are amended.ò The Seventh Circuit agreed that the district court had erred, though, in applying the later manual to a single count that had not been grouped. Nonetheless, any error was harmless because the low end of the new range for this count exceeded the statutory maximum, which was the same range the district court calculated and applied under the later manual.

Peugh v. United States, 133 S. Ct. 2072 (2013). The Supreme Court held that the Ex Post Facto clause prohibits a court from sentencing a defendant pursuant to a guideline that produces a higher range than the guideline in effect at the time the defendant committed the offense, despite the fact that the guidelines themselves are advisory. To determine whether an *ex post facto* violation occurred, the Court analyzed whether, post-*Booker*, an increased guideline range ñpresents a sufficient risk of increasing the measure of punishment attached to the covered crimes.ò The Court concluded that three features of the system together presented sufficient ñprocedural hurdlesò to imposing a sentence outside the guidelines to trigger the Ex Post Facto Clause. These features are: (1) the requirement that sentencing courts properly calculate the guidelines; (2) the possibility that appellate courts may apply a presumption of reasonableness when reviewing within guideline sentences; and (3) the fact that courts of appeal may review a sentence more closely the farther it varies from the guideline range.

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

II. Departures

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

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

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

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

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

> We are mindful of Congressô view, expressed in the PROTECT Act, regarding prosecuting and sentencing child kidnappers and sexual offenders. Although we must hold today that § 3553(b)(2) cannot constrain the discretion of a district court to impose a sentence outside the range recommended by the Sentencing Guidelines, we nevertheless believe that district courts, in the course of selecting

an appropriate sentence, ought to give respectful attention to Congressô view that crimes such as Mr. Griggôs are serious offenses deserving serious sanctions.

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

United States v. Jordan, 435 F.3d 693 (7th Cir. 2006). The Seventh Circuit held that a sentence outside the guideline range is not entitled to a presumption of reasonableness and upheld a 240-month, statutory maximum sentence over a guideline range of 110ï 137 months. This sentence, on a conviction for traveling in interstate commerce to engage in a sexual act with a juvenile and for interstate stalking, was reasonable given the: seriousness of the crimes, aggravating circumstances, heightened risk of recidivism, and need for deterrence.

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

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

United States v. Baretz, 411 F.3d 867 (7th Cir. 2005). ñWe do not have appellate jurisdiction to review a courtôs discretionary refusal to depart downward.ò

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

III. Specific Section 3553(a) Factors

A. Unwarranted Disparities

1. Fast Track

United States v. Reyes-Hernandez, 624 F.3d 405 (7th Cir. 2010). The defendants argued that they should have received downward variances based on the unwarranted disparities occasioned by fast-track programs available elsewhere. Relying on the circuitôs recent *en banc* opinion in *United States v. Corner,* 598 F.3d 411 (7th Cir. 2010) (en banc), and the Supreme Courtôs recent opinion in *Vazquez v. United States*, 558 U.S. 1144 (2010), the court concluded that sentencing courts may consider the existence of such fast-track programs under a section 3553(a) analysis. It stated:

> As in *Corner*, we are compelled now to reconsider our prior interpretation of the fast-track guideline § 5K3.1. We now hold, consistent with the First, Third, and Sixth Circuits, that a district court may consider a fast-track argument when evaluating the applicable § 3553(a) factors. Although we previously held that Congress ñexpressly approvedò fast-track sentencing disparities through the PROTECT Actð thus effectively constraining sentencing judgesô discretion to consider the absence of a fast-track program in their districts under § 5K3.1ð the Supreme Courtôs disposition in *Vazquez* reflects the understanding that Congressional ñdirectivesò to the Sentencing Commission are unlike statutes in that they are not equally binding on sentencing courts.
>
> This follows the new paradigm established by *Kimbrough* and *Spears* that permits district court judges to disagree categorically with those directives in providing an individual sentence. To the extent that our prior decisions might be read to treat §5K3.1 as if it had the effect or force of a statute, we were proceeding without the benefit of *Kimbrough*, *Gall*, *Spears*, *Vazquez*, and *Corner*. These new developments in the law now refocus our understanding of § 5K3.1 [Early Disposition Programs [Policy Statement]] and cause us to view it through a different lens.

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

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

2. Co-defendants

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

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

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

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

> That comparison of co-defendants, however, is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences. First, the lower sentence for [a co-defendant] was attributable to his decision to plead guilty to the offense and his cooperation with the government, which is a legally appropriate consideration. The corresponding reduction in his sentence as compared to a non-cooperating defendant is not an ñunwarrantedò disparity. Moreover, the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts.[1] In fact, the focus on the differences among defendants in an individual case in which one defendant cooperates could actually increase sentence disparity, because the resulting lower sentence for the offense to redress that disparity will be out of sync with sentences in similar cases nationwide in which there were not multiple defendants or in which one did not cooperate.

B. Other Factors

United States v. Morris, 775 F.3d 882 (7th Cir. 2015). Defendant pleaded guilty to crack distribution. He challenged his below-range sentence because the district court did not specifically address his claims for mitigation. The Seventh Circuit vacated and remanded for resentencing. Although a district court is not required to comment on every argument, in this

[1] Here and throughout, internal citations and punctuation in quotations are omitted unless otherwise noted.

case, the unusual facts and the absence of discussion of defendantôs principal argument made it impossible to determine whether the court had considered them. In particular, defendantôs recommended sentence was 57 to 71 months. Defendant, however, contended that this was unreasonably high given that (1) he sold counterfeit drugs, (2) because the counterfeit drug was ñcrackò rather than ñpowder,ò he was subject to the 18:1 disparity between these two types of drugs; and (3) he had originally offered to sell the informer a very small amount and provided the counterfeit drug only after the informed asked for additional quantities far in excess of what defendant had previously provided.

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

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

IV. Forfeiture

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

V. Restitution

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

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

VI. Reasonableness Review

A. General Principles

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

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

United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009). The court stated that the Supreme Courtôs decisions in *Kimbrough* and *Spears* held that ña judge need not accept the Sentencing Commissionôs penological framework. The court may adopt its own.ò According to the court, this means that ñ§ 3553 permits a judge to reduce one defendantôs sentence because of anotherôs lenient sentenceð not *because* of § 3553(a)(6), but *despite* it.ò

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

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

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

United States v. McIlrath, 512 F.3d 421 (7th Cir. 2008). The Seventh Circuit has stated that its pre-*Gall* precedent was generally consistent with the Supreme Courtôs opinion in *Gall*. It described the holding in *Gall* as follows: ñ[A] sentence outside the guidelines range must not be

presumed unreasonable by the appellate court, which also may not hogtie sentencing judges with a rigid formula for determining whether the justification for an out-of-range sentence is ópropertionalô to the extent of the sentenceôs deviation from the range.ò

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

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

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

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

United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005). The court held that a sentence of more than double the high end of the guideline range was unreasonable where the district court acknowledged the need to consider the section 3553(a) factors but failed to single out any factor except the defendantôs criminal history. It noted that a useful starting point for determining reasonableness is to analogize to pre-*Booker* case law and ask how the sentence would have fared under decisions that analyze the reasonableness of departures. ñAll that is necessary now to sustain a sentence above the guideline range is óan adequate statement of the judgeôs reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant.ôò

B. Procedural Reasonableness

United States v. Estrada-Mederos, 784 F.3d 1086 (7th Cir. 2015). It was procedurally unreasonable for the sentencing court to offer no response to a defendantôs argument for a downward variance based on the length of time he had spent in administrative immigration detention due to delays in criminally charging him. Although a court need not always address every mitigating argument, the facts here showed that defendant had spent a significant amount of time in administrative detention, and would not otherwise receive credit for that time. Numerous other courts have considered that same factor to be relevant and addressed it in written opinions, indicating that the factor at least deserves consideration.

United States v. Lockwood, 789 F.3d 773 (7th Cir. 2015). The district court did not provide an adequate record for appellate review of its sentence of more than three times the top end of the guidelines range. When imposing an extraordinary punishment, a sentencing court must provide a compelling justification as to why the defendant should be punished more harshly than others who have committed the same offense and received the same criminal history score. Here, a single page of transcript, which focused entirely on criminal history and did not address any of defendantôs arguments in mitigation, was insufficient to meet this standard.

United States v. Poulin, 745 F.3d 796 (7th Cir. 2014). The defendant pleaded guilty to possession and receipt of child pornography. On appeal he claimed his below-guideline sentence was not procedurally reasonable. He claimed that the district court did not adequately take into account his argument that the 2010 survey by the Sentencing Commission demonstrated that 70 percent of federal judges find the child pornography guidelines in similar cases extreme and unwarranted. Although the district court stated at sentencing that defense counsel made ñsome comment aboutò I donôt know the exact context,ò and that the court did not ñsee the degree of discontent that [defense counsel] does in the survey,ò the Seventh Circuit found that the comment was not sufficient to demonstrate it had implicitly considered the argument, even though the defendant received a below-guidelines sentence. The court stated that it was not confident the sentencing court had implicitly considered the argument in calculating the sentence. It further stated that the defendantôs argument was valid and that the sentencing court must address it on remand. In addition, the court found that because the district court explicitly stated it was unaware of the context of the defense counselôs ñsome comment,ò the court was unable to discern whether proper consideration of it would have affected the defendantôs sentence. Because this error was not harmless, the court remanded for resentencing.

United States v. Washington, 739 F.3d 1080 (7th Cir. 2014). The defendant pleaded guilty to attempting to possess cocaine with intent to distribute and the district court sentenced him within the guideline range to 97 monthsô imprisonment. When it imposed the sentence, the court simply stated that it had considered ñall the factors of 18 U.S.C. §3553(a)ò and that the crime was ñserious.ò The Seventh Circuit found that the explanation was not sufficient and that ñeven when faced with only stock arguments, the district court may not presume that a within-guidelines sentence is reasonable . . . and must provide an óindependent justificationô in accordance with the §3553(a) factors for the term of imprisonment imposed.ò Therefore, the circuit court vacated the sentence for resentencing.

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

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

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

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

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

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

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

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

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

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

> When a district court does not make a finding of fact regarding a position advanced by a party during a post-*Booker* sentencing, this Court will assume, for

the purposes of the reasonableness analysis, that it considered the submission in a light favorable to the offering party. If it can be effectively argued that the sentence was unreasonable, given favorable implicit factual determinations, the case will be remanded for the trial court to make explicit factual findings.

C. Substantive Reasonableness

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

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

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

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

> All these points would hardly be worth repeating in an opinion were it not for our concern lest criminal defendants confuse a debatable sentence with an unreasonable one and as a result waste their time and ours by filing frivolous appeals. A sentence of 276 months is long, and since it is not a statutory minimum and the sentencing criteria in 18 U.S.C. § 3553(a) are vague, the judge would not have been acting unreasonably had he given Gonzalez a shorter sentence, though this would depend on how much shorter and on the judgeôs explanation for the sentence. But because the criteria *are* vague, a sentence that is within the guidelines range and thus coincides with the judgment of the Sentencing Commission not only is presumptively reasonable, as the cases say, . . . but, as this formula implies, will very rarely be upset on appeal.

By the same token, a sentencing judge who, as he is required to do, deals conscientiously with the defendantôs principal arguments for a sentence, below the guidelines range, that is based on the statutory criteria, . . . will be reversed only in a very exceptional case. . . . The present case, rather than being exceptional, is routine.

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

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

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

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

Additionally, the court noted that Mr. Owens had accepted responsibility for his actions and exhibited remorse. It also assured him that the court considered his medical condition. Nevertheless, it found that, when one weighs these facts

> against the serious nature of the offenses and the short time frame in which they were committed, a lengthy term of imprisonment was desirable.

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

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

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

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

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

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

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

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

D. Plain Error / Harmless Error

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

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

E. Waiver of Right to Appeal

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

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

VII. Revocation of Supervised Release

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

VIII. Retroactivity

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

IX. Crack Cases

United States v. Wren, 706 F.3d 861 (7th Cir. 2013). The court held that, where the defendantôs original guideline range, before a substantial assistance departure, was above the presumptive floor of the mandatory minimum penalty, but the defendant received an original sentence below the mandatory minimum as a result of substantial assistance, §1B1.10ôs admonition that the court at resentencing must ñleave all other guideline application decisions

unaffectedò does not prevent a district judge from resentencing the defendant below the mandatory minimum penalty. ñ[W]hen a district court is authorized (by the prosecutor's substantial-assistance motion or a safety-valve reduction) to give a sentence below the presumptive statutory floor, that authority is equally applicable to a sentence-reduction motion after a change in the Guideline range.ò

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

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

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

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

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

> Before *Kimbrough* was decided, our position was that a district court may not reduce the 100:1 ratio when initially calculating the appropriate sentencing range for a crack-related offense . . . . In *Kimbrough*, however, the Supreme Court rejected the argument that Congress had mandated that sentencing courts apply the 100:1 ratio to all crack offenses . . . and noted that the Sentencing Commission itself disfavors the ratio. . . . The Supreme Court reaffirmed that the district court must continue to calculate and consult the guidelines, but it may sentence a crack offender below the guidelines range in a routine case if it believes the 100:1 ratio alone punishes the defendant in excess of what is justified under the § 3553(a) factors.

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008). The sentence was improper where ñ[t]he district judgeôs comments suggest that he thought the [congressionally enacted crack/powder] disparity was mandatory.ò

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

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

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

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

Part B General Application Principles

§1B1.1 Application Instruction

United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012). The Seventh Circuit held that double counting is generally permissible unless the text of a sentencing guideline expressly prohibits it. Noting its case law was inconsistent about whether double counting is generally

permissible or impermissible, the panel explicitly overruled *United States v. Bell*, 598 F.3d 366 (7th Cir. 2011), which held double counting impermissible where the applicable guideline did not expressly prohibit it.

United States v. Tockes, 530 F.3d 628 (7th Cir. 2008). ñBy statute, ó[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.ô 18 U.S.C. § 3661. Under section 3553(a), the court is required to consider, among other things, the history and characteristics of the defendant.ò

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

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

United States v. Davison, 761 F.3d 683 (7th Cir. 2014). Defendant was convicted of distribution of at least 50 grams of crack but was acquitted of conspiracy. The district court nonetheless sentenced defendant based on his involvement in the conspiracy and, in so doing, attributed to him 8.4 kilograms of crack sold by other members of the putative conspiracy. Defendant subsequently moved for a sentence reduction under 18 U.S.C. § 3582 based on amendment 750 and the decreased base offense level for crack offenses. The district court denied the motion, finding that, because defendant was responsible for all crack sales by the conspiracy members, the base offense level did not change. The Seventh Circuit remanded for further findings, concluding that the district court had erroneously conflated ñrelevant conductò as defined by USSG §1B1.3(1)(1)(B) and conspiracy. Relevant conduct within the guidelines focuses on ñacts, reasonably foreseeable to the defendant even though committed by others, that furthered a criminal activity that he had agreed to undertake jointly with those others.ò Conspiracy, in contrast, is ñgenerally much broader than jointly undertaken criminal activity under §1B1.3.ò The record did not contain evidence sufficient to establish jointly undertaken criminal acts within the meaning of §1B1.3 that would justify attributing defendant with quantities of drugs far in excess of the 4.5 kilograms that he admitted.

United States v. Walker, 721 F.3d 828 (7th Cir. 2013). In a matter of first impression, the court agreed with the Sixth Circuit that, at sentencing for drug distribution conspiracy, the district court must make specific factual findings to determine whether each defendant's relevant conduct encompassed the distribution chain that caused a user's death, before applying the 20-year statutory mandatory minimum sentence based on death or serious bodily injury resulting from use of drug distributed by a defendant under 21 U.S.C. § 841(b)(1)(A). The drug distribution that ultimately led to the death must have been reasonably foreseeable and in furtherance of jointly undertaken activity. The Seventh Circuit rejected the district courtôs determination that the penalty provision of § 841(b)(1)(A) requires an identical twenty-year mandatory floor for all members of the conspiracy because the drug network, as a whole, had caused the deaths of several customers. Each individual defendant should be evaluated and sentenced separate from his co-conspirators, and the sentencing court must make particularized

findings for each defendantð simply being part of the same conspiracy that led to the death is not sufficient to warrant the mandatory minimum sentence.

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

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

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

United States v. McGowan, 478 F.3d 800 (7th Cir. 2007). The Seventh Circuit reversed a 132-month sentence for a cocaine trafficking conspiracy. The defendant was convicted of two counts of distributing cocaine (and acquitted on a conspiracy count), which involved 7.2 grams and 4.9 grams, respectively. These convictions yielded a guideline range of 27-33 months. The district court then attributed at least 489 grams of cocaine to the defendant as relevant conduct, which increased the defendantôs guideline range to 110-137 months. The court held that the district courtôs findings with respect to relevant conduct unreasonably held the defendant responsible for a large quantity of drugs that the government had not demonstrated were part of the same course of conduct or common scheme or plan.

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

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

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

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

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

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

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

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

United States v. Guerrero-Martinez, 240 F.3d 637 (7th Cir. 2001). The district court did not err in its determination of relevant conduct attributed to the defendant. The defendant pled guilty to possession with intent to distribute in excess of 100 kilograms of marijuana and aiding and abetting the possession of that marijuana. The district court held that the entire shipment

could be attributed to the defendant as relevant conduct because he oversaw the delivery, even though he only purchased a portion of the shipment himself. On appeal, the defendant claimed because he only purchased a small amount and did not aid in the sales to anyone else nor had any idea how much marijuana was in the shipment, it was not reasonably foreseeable to him that the shipment contained 1,500 pounds of marijuana. The Seventh Circuit found the defendantôs argument to be without merit because he met with other co-conspirators prior to the shipment and was aware that the drugs he agreed to buy were just a part of the shipment. Further, he watched over the unloading of not only the boxes with the drugs for his payment but also those boxes which were being unloaded into a van belonging to another buyer. Therefore, the circuit court found the defendant liable under the aiding and abetting provision of §1B1.3 and held that the district court properly determined the quantity of drugs attributable to the defendant.

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

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

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000). The district court did not err in its calculation of the amount of drugs attributable to the defendant for sentencing purposes. After a jury trial, the defendant was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. At his sentencing, the district court attributed an amount of drugs found in a stash house to the defendant as relevant conduct. The defendantôs arrest resulted in the search of an apartment to which he had a key. Two kilograms

of methamphetamine and five kilograms of cocaine were found in the stash house, along with a number of the defendant's personal articles. On appeal, the defendant argued that even if he was involved in the drug delivery which led up to his arrest, the drugs found in the apartment were not within the scope of an alleged agreement to distribute the drugs. The circuit court found that the fact that the defendant had a key, had clothing and other items in the apartment, and admitted on the witness stand that he had seen a microwave on the bed in which the police had also found a wooden press used to form cocaine into bricks were all circumstantial evidence that he was not an unwitting participant, but was instead an active participant. Therefore, the Seventh Circuit held the district court did not commit clear error in including the quantity of drugs in the calculation of the defendant's sentence.

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

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

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in holding that uncharged bulk purchases of methamphetamine were properly considered as relevant conduct in determining the defendant's sentence. Upon the defendant's guilty plea to distributing methamphetamine, charges relating to an earlier bulk purchase of the drug were dropped. The defendant was heavily involved in the purchase of methamphetamine from numerous suppliers, but only pled guilty to distribution of 4.25 grams. However, the sentencing court included as relevant conduct an estimated 90 ounces of methamphetamine from his bulk purchases. The circuit court found both a commonality of purpose; maintenance of a high-volume drug distributorship, and similarity of modus operandi; driving to his suppliers on a

frequent, predictable schedule and paying in cash for small, fixed amounts. Therefore, his bulk purchases were properly considered as relevant conduct in determining his sentence.

§1B1.8 Use of Certain Information

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

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Taylor, 778 F.3d 667 (7th Cir. 2015). Although a 18 U.S.C. § 3582(c)(2) motion may lack merit, a district court has subject matter jurisdiction to adjudicate the motion. Congress granted district courtôs jurisdiction to decide such motions on the merits, regardless of whether a particular defendant was ultimately entitled to relief.

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

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

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

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

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

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

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

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

simply falls outside the limited exception providing a district court with jurisdiction to modify a sentence.ò

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

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

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

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

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

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

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

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

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

See United States v. Fletcher, 763 F.3d 711 (7th Cir. 2011), *Ex Post Facto*.

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

F.3d 702 (7th Cir. 2012) (rejecting defendantôs argument to use the *Guideline Manual* in effect on the date of the offense, rather than on the date of sentencing).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

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

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

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

United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003). The district court erred in applying a 2-level enhancement under §2A3.2(b)(2)(B); an enhancement under §2A3.2 could not apply in the case of an attempt where the victim was an undercover police officer.[2] The defendant pled guilty, admitting that he traveled in interstate commerce with the intent to engage in a prohibited sexual act with an undercover agent whom he believed to be a 14-year-old girl. During sentencing, the district court increased the defendantôs offense level by two based on §2A3.2(b)(2)(B) which provided for a 2-level enhancement where the defendant unduly influenced a minor under the age of 16 to engage in prohibited sexual conduct. On appeal, the defendant argued that this enhancement could not apply when the victim was an imaginary teenager and where no sexual conduct had occurred. The Seventh Circuit stated that the guideline and its commentary indicated that the offender must have succeeded in influencing or compromising a minor. In other words, an enhancement could not apply where the offender and victim had not engaged in illicit sexual conduct. The court then noted that the defendantôs second argument, that the guideline could not apply in the case of a sting operation, merged with defendantôs first argument, because in a case where there was no real victim but only an undercover police officer, there would never be completed action on the part of the victim. The court noted that the commentary to §2A3.2 created a rebuttable presumption that the defendant unduly influenced the victim if he was at least ten years older than the victim. If the Sentencing Commission intended to allow a defendant to rebut the presumption of undue influence, it could not have meant to apply the presumption in the case of a sting operation where the government could manipulate the characteristics and actions of the victim to create undue influence in every single case. The court noted that if it were to follow this reasoning, there would never be a case involving a sting operation in which the enhancement did not apply. The court specifically declined to follow the Eleventh Circuit which had considered the same issue in a similar case and held that an enhancement could be applied in the case of a sting operation. *See United States v. Root,* 296 F.3d 1222 (11th Cir. 2002). Finally, the court noted that even if it were to decide that the enhancement for ñundue influenceò could apply to sting operations, the district court had failed to make the necessary factual findings. The district court never made any findings that defendantôs words or actions were so influential as to unduly influence any victimï regardless of her individual characteristics. Accordingly, the case was remanded for resentencing.

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

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[3]

Loss Issues (§2B1.1(b)(1))

United States v. Clark, 787 F.3d 451 (7th Cir. 2015). Application note 3(F)(iii), applicable to certain labor law violations, prescribes that ñthe value of the benefits shall be considered to be not less than the difference between the legally required wages and the actual wages paid.ò But the note also provides that it is to be used ñto assist in determining loss,ò so the sentencing court may not simply assume that the specified value represents a loss amount when there is no evidence that any actual loss occurred due to a defendantôs false statements. However, when there is evidence of actual loss in the context of the case, the court may rely on the application note to determine that the ñbenefitsò received by a defendant represent the loss amount to the government.

United States v. Moore, 788 F.3d 693 (7th Cir. 2015). Application note 3(F)(i)ôs direction to calculate a loss amount of at least $500 ñper access deviceò is not limited to access devices that are actually presented to a merchant to obtain goods or services. Rather, its plain language applies to all the unauthorized access devices seized in a case and attributable to the defendant.

United States v. Durham, 766 F.3d 672 (7th Cir. 2014). Defendants were convicted of various fraud counts associated with their transformation of a legitimate financial business into one that operated as a Ponzi scheme. The Seventh Circuit affirmed the sentence. In doing so, it affirmed calculations of both actual and intended loss, which resulted in the same range. The district court calculated actual loss pursuant to §2B1.1 using a report from the companyôs bankruptcy trustee. This report was ñeasily sufficientò to support the actual loss calculation, particularly in combination with evidence at trial regarding defendantsô misappropriation. The district court appropriately rejected defendantsô arguments that the loss was caused by the 2008 financial crisis and subsequent recession because they did not substantiate their analysis with ñreliable evidence.ò The district court based intended loss on the amount ñplaced at risk by the schemeò and, more specifically, determined that this included the entire amount of the companyôs most recent certificate offering. Defendants argued that this failed to account for their subjective intent, but the Seventh Circuit held that the trial judge correctly analyzed intended loss, particularly in the context of a Ponzi scheme that generated no legitimate gains and would inevitably collapse. The Court also noted that the ñplaced at riskò standard was not

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

ñnecessarily inconsistentò with the jurisdictionôs ñgeneral positionò that courts should consider subjective intent because ñthe evidence established that the defendants intended to place the full value of their certificate authorization at risk.ò

United States v. Dachman, 743 F.3d 254 (7th Cir. 2014). After the defendant pleaded guilty to wire fraud in a scheme to defraud investors, the district court determined the amount of loss to be 4 million dollars, the amount of money the investors lost. The defendant argued at sentencing that the amount of loss should instead be $700,000, which was based on the amount by which he personally benefitted. On appeal, the defendant changed his argument and instead claimed that in calculating a 4 million dollar loss, the district court failed to credit him with over 2 million in operational expenses. The Seventh Circuit found that actual loss, which includes reasonably foreseeable pecuniary harm that resulted from the offense, also includes ñthe amount put at riskò by the defendant who misappropriated the funds. The court held the district court did not commit error when it determined the amount of loss to the investors was 4 million dollars.

United States v. Giovenco, 773 F.3d 866 (7th Cir. 2014). Defendant was convicted of mail fraud based on a scheme in which he and others falsely claimed to be a minority business enterprise in order to obtain Chicago subcontracts. The district court attributed to defendant a loss amount that included all the money received by the enterprise pursuant to its false status as a minority business enterprise. Defendant argued that this amount was not a ñlossò because the primary contractor had received the services for which it paid. The Seventh Circuit agreed that application note 3(F)(v) of USSG §2B1.1 governed this determination. This note provides that where, regulatory approval by a government agency is obtained by fraud, loss is the full amount paid with ñno credit provided for the value of those items or services.ò Accordingly, the district court properly attributed defendant with the entire loss amount.

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

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

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

United States v. Allen, 529 F.3d 390 (7th Cir. 2008). Under §2B1.1, the determination of loss for a defendantôs sentencing range is different than that for his restitution obligations: ñ[w]hile for sentencing purposes ólossô is defined as the greater of either the óactualô or the óintendedô amount lost due to the fraud, for restitution purposes the statute implicitly requires that the restitution award be based on the amount of loss actually caused by the defendantôs offense.ò It stated: ñA court may find that a defendant intended a large amount of loss for

sentencing purposes, but then order a much reduced amount in restitution in light of the actual losses suffered by the victims.ò

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

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

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

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

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

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

Victims Issues (§2B1.1(b)(2))

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

Mass Marketing (§2B1.1(b)(2)(A)(ii))

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

Access Device (§2B1.1(b)(11)(b))

United States v. Doss, 741 F.3d 763 (7th Cir. 2013). The imposition of a 2-level sentencing enhancement for trafficking of any unauthorized access device under §2B1.1(b)(11)(B) was improper where the district court also imposed a two-year consecutive sentence for aggravated identity theft offense, because such an enhancement is specifically made inapplicable by the sentencing guidelines in Application Note 2 of §2B1.6.

Relocation and Sophisticated Means (§2B1.1(b)(10)(A), (C))

United States v. DeMarco, 784 F.3d 388 (7th Cir. 2015). The sophisticated means enhancement was properly applied when defendant, a bank manager, manipulated account and customer information in order to apply for loans in the names of customers and then conceal the activity. There was not an isolated incidence of fraud, but a scheme involving a myriad of steps.

United States v. Hines-Flagg, 789 F.3d 751 (7th Cir. 2015). The two-level enhancement for relocation of a fraudulent scheme to another jurisdiction ((b)(10)(A)) does not apply when the only supporting evidence is that the defendant herself sometimes travelled to other jurisdictions, rather than relocating the ñschemeò as a whole. Under the ñhub and spokeò model (which the court did not explicitly adopt), a scheme that is primarily located in one city is not ñrelocatedò if it has always relied on periodic trips to outlying locations to obtain merchandise, credit card information, or the like, so long as the ñhubò of the scheme remained in one location.

United States v. Wayland, 549 F.3d 526 (7th Cir. 2008). The enhancement for using sophisticated means, §2B1.1(b)(9)(c) (since relocated to (b)(10)(C)), was properly applied to a scheme, though poorly executed, that ñlasted nine years and involved a series of coordinated fraudulent transactionsò and ñdisplayed a greater level of planning and concealment than the typical health care fraud . . . .ò

Jeopardizing Financial Institution (§2B1.1(b)(16))

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

§2B1.6 Aggravated Identity Theft

United States v. Ziao Yong Zheng, 762 F.3d 605 (7th Cir. 2014). Defendant pleaded guilty to aggravated identify theft and conspiracy to misuse Social Security numbers and commit passport fraud. Pursuant to 18 U.S.C. §1028A, he received a mandatory two-year sentence for aggravated identity theft that ran consecutive to the sentence imposed for the predicate offense. Defendant challenged the district courtôs application of a two-level enhancement for fraudulent use of a foreign passport pursuant to U.S.S.G. § 2L2.1(B)(5)(b). The Seventh Circuit reversed, holding that applying the two-level enhancement was prohibited by U.S.S.G. § 2B1.6(a) application note 2, which is a ñspecial guidelines rule against double counting.ò This application note states that, if a defendant is sentenced to the statutory mandatory two-year sentence for aggravated identity theft pursuant to 18 U.S.C. § 1028A, the court should not apply ñany specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence of the underlying offense.ò The Court held that ñmeans of identification,ò which is defined by 18 U.S.C. § 1028(d)(7), id., encompassed passports. It rejected the governmentôs contention that passports did not fall within this definition but instead were addressed by a different statutory provision, 18 U.S.C. § 1028(d)(3), addressing ñidentification documents.ò There was ñno reason why a passport cannot be both an ñidentification documentôand a ómeans of identification.ô The terms overlap, and nothing in the statutory scheme suggests that an identification document cannot also qualify as a means of identification.ò

See United States v. Doss, 741 F.3d 763 (7th Cir. 2013), §2B1.1.

United States v. Dooley, 688 F.3d 318 (7th Cir. 2012). The Seventh Circuit vacated and remanded for resentencing a case involving convictions on three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, and six additional counts of other fraud offenses. The circuit court noted that section 1028 has an unusual penalty provision: every conviction is punishable by exactly two years, and every sentence must run consecutively to every sentence

for a different crime, but multiple section 1028A convictions may run concurrently to each other. Thus, the district court here had three sentencing options of adding 24, 48, or 72 months for the three aggravated identity theft counts on top of the sentences for the six additional counts of other fraud offenses. In this case, the defendant was sentenced to 96 months, which consisted of 72 months for the aggravated identity theft convictions (*i.e.*, three 24-month consecutive terms) and a 24-month term for the other fraud convictions to be served consecutive to the aggravated identity theft terms. In cases of multiple section 1028A convictions, the commentary at §2B1.6 references §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance. *See* USSG §2B1.6, comment. (n.1(B)). USSG §5G1.2 comment. (n.2(B)) provides factors the sentencing court should consider when sentencing a defendant with multiple counts under section 1028A. However, in this case, the sentencing judge arrived at the 96-month term by primarily focusing on the 18 U.S.C. § 3553(a) factor of avoiding unwarranted sentencing disparity and never mentioned the considerations set out in §5G1.2 comment. (n.2(B)). The Seventh Circuit noted that while the 72-month term for the identity theft convictions may be appropriate, the sentencing court nevertheless failed to adhere to the sentencing process required by *Gall* and *Rita* by focusing on the section 3553(a) factors in lieu of the sentencing guidelines.

§2B3.1 Robbery

United States v. Rogers, 777 F.3d 934 (7th Cir. 2015). The two-level enhancement for robberies involving carjacking, §2B3.1(b)(5), may be applied even when ñkeys were obtained merely by rummaging throughò a victimôs purse in her presence, rather than by violence or seizure of a vehicle in the victimôs presence. So long as they keys are seized by force or threat or force from the victimôs person, the guidelineôs requirement that a motor vehicle be taken ñfrom the person or presence of anotherò is met.

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Hawkins, 777 F.3d 880 (7th Cir. 2015). It was not error for the sentencing court to find that ñanalysts,ò who worked for members of a county tax assessment review board, held ñhigh-level decision-making or sensitive position[s],ò and therefore qualified for the four-level enhancement at §2C1.1(b)(3). Although the analysts were subordinate to the board members, the evidence was that a single analyst was responsible for a given assessment appeal, and that an analyst could exercise unlimited discretion in influencing the outcome of an appeal by his or her choice of comparable properties.

United States v. Whiteagle, 759 F.3d 734 (7th Cir. 2014). Defendant, a ñconsultant,ò was convicted of various charges related to a scheme by which companies provided money and other things of value to a Ho-chunk tribal legislator to obtain tribal contracts. Defendant first challenged the district courtôs use of the bribery guidelines, §2C1.1, rather than the gratuity guidelines, §2C1.2. The Seventh Circuit rejected this argument. A bribe is meant to influence future actions, and a gratuity is a reward for past actions. Here, although the legislator sometimes received payment after legislative actions were taken, the payments were part of a continuing course of conduct in which defendant solicited money and other things of value on the legislatorôs behalf with the ñexpress understandingò that the legislator would ñtake future actions favorable to the companies from which the payments were sought.ò Defendant also argued that the trial court calculated the amounts of the bribes incorrectly because it used the full value of the contracts received in exchange for the payments. Defendant contended that these amounts were excessive because (1) all but one of the relevant votes awarding the contracts were unanimous, meaning that the corrupt conduct of the legislator was not the ñbut-for cause of the decisions to award the contracts to these companies,ò and (2) the Ho-Chunk nation received value from the contracts. He also sought to have his own fees excluded from the calculation because the companies ñwillingly paid those sums to him as a consultant as a cost of doing business with the Nation.ò The Seventh Circuit did not resolve whether the amounts should be calculated based on the total contract or the bribes themselves because the amounts paid to the defendant directly were a reasonable sum for the court to use. The district court properly concluded that the ñexorbitantò compensation that defendant receivedð more than $2.5

millionò was because of his ability to convey bribes to the legislator. Because this approach led to the same enhancement as did either alternative approach, the sentence was affirmed.

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

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

Part D Offenses Involving Drugs and Narco-Terrorism

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[4]

United States v. Walker, 721 F.3d 828 (7th Cir. 2013), *cert. granted, judgment vacated* by Lawler v. United States, 134 S. Ct. 2287 (2014). The Seventh Circuit held that while a district court generally need not find death reasonably foreseeable for the mandatory minimum sentence to apply in cases where a defendant directly distributes drugs or uses intermediaries to distribute drugs that result in death, the district court must find the distribution chain that ultimately led to an individual's death to be relevant conduct under §1B1.3(a)(1)(B) before a defendant can receive the twenty-year penalty at 18 U.S.C. § 841(b)(1)(A).

United States v. Are, 590 F.3d 499 (7th Cir. 2009). The court affirmed the drug conspiracy sentence, including the enhancement for being in possession of a dangerous weapon in connection with a drug trafficking offense. The circuit court explained the ñshifting of burdensò involved with application of the enhancement:

> Application of §2D1.1 involves a shifting of burdens. *United States v. Idowu,* 520 F.3d 790, 793 (7th Cir. 2008). The government bears the burden of first proving by a preponderance of the evidence that the defendant possessed the weapon. *Id.*

[4] In 2014, the Commission amended the Drug Quantity Table in §2D1.1 and the precursor chemicals quantity tables in §2D1.11 to reduce by two the base offense levels assigned to all drug types, while ensuring the guidelines penalties remain consistent with existing mandatory minimum penalties. *See* USSG App. C, amend. 782 (eff. Nov. 1, 2014). The Commission made these revisions to the drug guideline available for retroactive application to previously sentenced defendants, subject to a special instruction requiring that any order granting sentence reductions based on Amendment 782 shall not take effect until November 1, 2015, or later. *See* USSG App. C, amend. 788 (eff. Nov. 1, 2014).

(citing *United States v. Bothun,* 424 F.3d 582, 586 (7th Cir. 2005)). The defendant need not have actual possession of the weapon; constructive possession is sufficient. *Id.* If the government carries its burden, then the defendant must show that it was ñclearly improbableò that the weapon was connected to the drug offense. *Id.*

We have noted that when a gun is found in ñclose proximityò to illegal drugs the gun is presumed ñto have been used in connection with the drug trafficking offense.ò *United States v. Souffront,* 338 F.3d 809, 833 (7th Cir. 2003). However, close proximity to drugs is not a requirement for application of the §2D1.1(b)(1) enhancement. We have upheld application of §2D1.1 where the weapon was not found in the same place as illegal drugs. *See, e.g., United States v. Parra,* 402 F.3d 752, 767 (7th Cir. 2005) (upholding the finding that it was not ñclearly improbableò that gun was connected to drug offense where gun was found under the mattress in defendant's bedroom and defendant was selling drugs out of her house); *United States v. Grimm,* 170 F.3d 760, 767-68 (7th Cir. 1999) (concluding that §2D1.1(b)(1) could apply where defendant had a gun in the trunk of his car but no drugs were present where he had used the car to deliver drugs six weeks earlier).

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

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

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

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

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

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

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in enhancing the defendantôs sentence two levels based on his possession of a firearm, pursuant to §2D1.1(b). The defendant pled guilty to two counts of distributing methamphetamine after police executed a search warrant on his car, finding cocaine, methamphetamine, and a loaded

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

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

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

United States v. McMillian, 777 F.3d 444 (7th Cir. 2015). The enhancement for use of a computer to entice a person to engage in prohibited sexual contact with a minor, §2G1.3(b)(3)(B), was proper despite the language of application note 4 purporting to restrict application of the enhancement to direct communications with a minor, or a person exercising control over the minor. The court joined the Fifth Circuit in holding that the application note conflicted with the plain language of the guideline, and was therefore void to the extent of the conflict. Thus, the defendantôs posting of online advertisements for the sexual services of his minor victims was sufficient to apply the enhancement.

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

harmless because there was no indication from the district court that it would impose the same sentence absent the enhancement.[5]

United States v. Veazey, 491 F.3d 700 (7th Cir. 2007). Section 2G1.3 provides for a cross reference to §2G2.1 when the offense ñinvolved caus[es] . . . a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.ò *See* §2G1.3(c)(1). The Seventh Circuit stated:

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

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

United States v. Johnson, 784 F.3d 1070 (7th Cir. 2015). The four-level enhancement for producing material containing sadistic, masochistic, or violent conduct was properly applied when photographs showed the 12-year old victim penetrating herself with a screwdriver. In the absence of actual violence or injury, the appropriate inquiry is whether the material objectively portrays sadistic or masochistic conduct. Here, the material carried a sufficient objective connotation of violence and cruelty that the enhancement was properly applied, despite defendantôs argument that the victim could have been voluntarily performing the actions for her own purposes.

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

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

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

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

United States v. Garthus, 652 F.3d 715 (7th Cir. 2011). The court affirmed a within-guideline sentence of 360 months for transporting, receiving, and possessing child pornography, holding that the district court was entitled to rely more heavily on its concern with the risk of recidivism than his arguments for lenience. First, in arguing for a lower sentence under §5K2.13, the defendant argued that he had ñdiminished capacityò to avoid committing the crimes and that the district court ignored that argument. The Seventh Circuit disagreed, stating that ñdiminished capacityò was not argued at sentencing and, further, such argument was ñunsubstantiated.ò The Seventh Circuit next discussed the scientific literature regarding recidivism and child pornography and, noting that the defendant also committed a hands-on sex offense, found that ñ[t]his defendant's characteristics suggest that he is more dangerous than the average consumer of child pornography.ò The Seventh Circuit acknowledged that the sentencing judgeôs remarks were ñcrypticò but explained that the reasons for the sentence were obvious. It stated:

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

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

> A sentencing judge is not required to ñdelve into the history of a guidelineò in order to satisfy himself that ñthe process that produced it was adequateò;

> ñsentencing hearings [would] become unmanageable, as the focus shifted from the defendant's conduct to the ólegislativeô history of the guidelines.ò

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

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

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

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

United States v. Myers, 355 F.3d 1040 (7th Cir. 2004). The appellate court affirmed the district courtôs base offense level calculation under §2G2.2 and its application of a 4-level enhancement under §2G2.2(b)(3). On appeal, the defendant argued that the district court erred in calculating his base level as 17 pursuant to §2G2.2, receipt of child pornography, rather than a

base level of 15 pursuant to §2G2.4, possession of child pornography. He also argued that the 4-level enhancement was improper because it constituted double-counting. The Seventh Circuit noted that the defendant pled guilty to both receipt and possession of child pornography. The defendant argued that the distinction between receipt and possession of child pornography was meaningless, because anyone in possession of child pornography must have received it at some point in time, and therefore he argued that it was irrational to impose a higher sentence for the receipt than for mere possession. Because possession and receipt were not the same conduct and threaten distinct harms, the court stated, the imposition of different base offense levels was not irrational and therefore the defendantôs challenge failed. The court also found defendantôs double counting argument without merit. The conduct for which the 4-level enhancement was applied was distinct from that which formed the base offense and which supported the 2-level enhancement.

United States v. Brown, 333 F.3d 850 (7th Cir. 2003). The defendant pled guilty to knowingly possessing child pornography. At sentencing, the defendant admitted he had exchanged pornographic images, but not for commercial purposes. The district court enhanced the defendantôs sentence after determining that the defendantôs trading qualified as ñdistributionò under §2G2.2(b)(2). The defendant appealed, arguing that his conduct did not qualify as ñdistributionò because in order to qualify as distribution, an exchange must be made for pecuniary gain. The Seventh Circuit found that distribution required the expectation of something valuable in return. The court noted that, although Application Note 1 referred to ñpecuniary gain,ò it also recognized that pecuniary gain is a broad concept, and that it does not exclude the concepts of ñswaps, barter, in-kind transactions, or other valuable consideration.ò Therefore, any activity taking place through trades, barter and other transactions was covered by the term ñdistribution,ò even though this activity may not involve an exchange of money. *See also United States v. Carani*, 492 F.3d 867 (7th Cir. 2007); *United States v. Wainwright*, 509 F.3d 812 (7th Cir. 2007).

United States v. Griffith, 344 F.3d 714 (7th Cir. 2003). The appellate court affirmed the district courtôs upward departure pursuant to §2G2.2, Application Note 2 for distribution of child pornography. Defendantôs sentencing range was 168 to 210 months; the court imposed a sentence of 262 months. The PSR noted that §2G2.2 of the guidelines allowed for a departure if the defendant received a 5-level upward adjustment for engaging in a pattern of sexual abuse of minors where that adjustment did not adequately reflect the seriousness of the sexual abuse or exploitation involved. *See* §2G2.2, Application Note 2. ñAlthough the government did not seek a departure, the court nevertheless concluded that an upward departure was appropriate for several reasons. First, the court characterized the nature of the activity depicted in [defendantôs] photographs ómas more aggravated that any [it had ever] been exposed to.ôò The court was particularly troubled that defendant had created a web site to get more photographs. ñMost importantly, the judge focused on [defendantôs] criminal history and the unsuccessful attempts at rehabilitation.ò The court stated, ñ[i]f a judge determines that a defendantôs conduct ósignificantly differed from the norm,ôthe judge may depart from the applicable guideline rangeò and a ñcourt may depart from the range even if the Sentencing Commission already incorporated the reason for departure in a sentencing adjustment so long as óthe court determined that, in light of the unusual circumstances, the weight attached to that factor under the guidelines was inadequate or excessive.ôò *See* §5K2.0. Moreover, ña court is authorized to depart from [the]

guideline range if the defendantôs criminal history category ódoes not adequately reflect the seriousness of the defendantôs past criminal conduct or the likelihood that the defendant will commit other crimes.ôò *See* §4A1.3. In the instant case, the Seventh Circuit found that the district court fully explained why it believed this case was unusual and outside the ñheartlandò of typical child pornography cases. The district court also departed upward because of defendantôs future danger to society in light of his two prior offenses of sexually abusing minors and his three failed attempts at completing a treatment program for sexual offenders.

United States v. Gunderson, 345 F.3d 471 (7th Cir. 2003). The court affirmed the district courtôs sentence of 120 months for possession of child pornography, which included enhancements pursuant to §2G2.2(b)(4) and §2G2.2(b)(2).[6] The court found that the district court did not err in applying a §2G2.2(b)(4) upward adjustment because defendant was previously convicted for having sex with his 17-year-old girlfriend. The defendant then argued that the district court should not have assessed a 5-level increase for distribution under §2G2.2(b)(2) because he received no money from the people who downloaded his child pornography and because he set up his computer to automatically trade files even when he was not using the computer at the time. The court found that these types of swaps, barters and in-kind transactions were covered under §2G2.2(b)(2). The court also affirmed the finding that the defendant should not get an acceptance of responsibility adjustment.

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

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. Schmitt, 770 F.3d 524 (7th Cir. 2014). Defendant was convicted of possessing a firearm while being a felon. He challenged application of a four-level enhancement under § 2K2.1(b)(6) for using or possessing the gun in connection with another felony. The

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

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

Seventh Circuit held that this enhancement was proper, because the evidence demonstrated that defendant purchased the firearm with a combination of cash and methamphetamine. This would not constitute ñuseò of the firearm, but it did constitute ñpossessionò ñin connectionò with a felony offense. When he ñexchanged the gun for drugs, he took control of it in a way that was intentionally related to the drug trafficking offense.ò

United States v. Jackson, 741 F.3d 861 (7th Cir. 2014). The defendant was convicted of unlawful possession of a firearm after he possessed it and sold it to someone else whose possession was also illegal. The district court applied an enhancement at §2K2.1 because the defendant transferred the firearm with knowledge or reason to believe it would be possessed ñin connection with another felony offense.ò On appeal, the defendant argued that the enhancement was improper because it penalized him a second time for conduct that was otherwise encompassed within his conviction. He claimed that his offense of conviction included the transfer of the firearm to the other person. The Seventh Circuit held that because section 922(g) requires proof of possession only, therefore the act of transferring the firearm was a separate act that was not necessary to his offense of conviction. The court therefore affirmed application of the enhancement.

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

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

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

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

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

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

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

United States v. Charles, 238 F.3d 916 (7th Cir. 2001). The district court did not err in increasing the defendantôs sentence four levels for possession of a firearm in connection with another felony. The defendant was convicted of inducing a false and fictitious statement in connection with the purchase of a firearm and of being a felon in possession of a firearm, after he and a friend fired upon the residences of the mother and brother of his ex-girlfriend. The defendant testified at his sentencing hearing that after he received the gun, he sold it to the friend involved with him in the offense of conviction. The circuit court stated that pursuant to §2K2.1(b)(5)[8], a 4-level increase is appropriate for possessing a firearm in connection with another felony or transferring a firearm with knowledge, intent, or reason to believe that it would be used in connection with another felony. The circuit court found that although there was limited evidence presented by the government in support of the 4-level enhancement, the gun was found in a car occupied by the defendant and his friend, there was bad blood between the defendant and his former girlfriendôs family, and the defendant had testified that he purchased the gun that was used to shoot at the residences. Therefore, the court found the enhancement was appropriate. *See also United States v. Markovitch*, 442 F.3d 1029 (7th Cir. 2006); *United States v. Wagner*, 467 F.3d 1085 (7th Cir. 2006).

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996). The district court properly enhanced the defendantôs base offense level by four levels, pursuant to §2K2.1, based on its determination that the defendant possessed firearms in connection with a drug offense. The defendant maintained that the district court erred by enhancing his base offense level because the government failed to establish that the firearms found in his home were possessed ñin connection withò his marijuana dealing. The appellate court rejected this argument, holding that the phrase ñin connection withò should be given its logical and common meaning. The court further noted that the phrase, at a minimum, should be interpreted broadly to mean that firearms involved must

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

have some purpose or effect with respect to the drug trafficking crime, and its presence or involvement cannot be the result of an accident or coincidence. Instead, the gun must facilitate, or have the potential of facilitating the drug trafficking offense. In the instant case, the defendantôs firearms were concealed under the bed and in the closet, but there is no indication that the weapons were not readily accessible. Additionally, the court held that the seizure of the firearms in close proximity to illegal drugs was a powerful inference that the firearms were used in connection with the drug trafficking operation.

Other Issues

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

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

United States v. Simmons, 485 F.3d 951 (7th Cir. 2007). The defendant was convicted of dealing in firearms without a license in violation of 18 U.S.C. §§ 922(a)(1)(A) and (2). He was sentenced pursuant to 18 U.S.C. § 921(a)(30), and §2K2.1(a)(5), because the weapon involved in the offense was considered a ñsemiautomatic assault weaponò under the definition given in the statute. The defendant appealed, noting first that ñ18 U.S.C. § 921(a)(30), which defined the term ósemiautomatic assault weapon,ô was repealed . . . on September 13, 2004ò and because ñ§2K2.1(a)(5) incorporated and depended on 18 U.S.C. § 921(a)(30), then § 2K2.1(a)(5) expired when § 921(a)(30) expired and it could not be used to calculate his sentence.ò The court rejected this argument, holding:

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

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

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

Part L Offenses Involving Immigration, Naturalization, and Passports

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

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

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

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

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

United States v. Aviles-Solarzano, 623 F.3d 470 (7th Cir. 2010). The court held that the district court did not err in finding that defendantôs aggravated battery conviction under Illinois law was a crime of violence even though the court relied on the PSIôs unsubstantiated summary of the indictment charging the defendant with aggravated battery. The court stated that an unsubstantiated summary of an indictment in a PSI ñdoes not satisfy the Supreme Court's requirement of a judicial record and thus is not (unless its accuracy is unquestioned - an

important qualification to which we'll return) a proper basis for classifying a defendant's prior crimes for purposes of federal sentencing.ò It went on, however, to point out that the defendant's lawyer did not question the accuracy of the summary in the PSI, ñeven though she had access to the indictment,ò a public document.

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

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

United States v. Garcia-Lopez, 375 F.3d 586 (7th Cir. 2004). Defendant was indicted and pled guilty to a violation of 8 U.S.C. § 1326(a) and (b) for illegal reentry into the United States following his previous deportation and removal. The district court erred when it found that a crime of violence enhancement under §2L1.2(b)(1)(A)(ii) did not apply because the defendantôs conviction had been vacated prior to his sentencing. The plain language of §2L1.2(b)(1)(A)(ii) indicates that the appropriate inquiry is whether the defendant had been convicted of a crime of violence at the time of his prior deportation. The court held that ñ[n]othing in the guideline suggests that the analysis should consider whether the conviction has been vacated subsequent to the deportation but prior to the sentencing for the reentry offense.ò *See also United States v. Gonzalez-Lara*, 702 F.3d 928 (7th Cir. 2012) (finding that ñ[n]othing in the plain text of [§2L1.2(b)(1)(A)] supports [the] argument that the 16-level enhancement should only apply when a defendantôs original pre-revocation sentence results in a term of imprisonment exceeding thirteen monthsò).

United States v. Vasquez-Abarca, 334 F.3d 587 (7th Cir. 2003). The appellate court affirmed the district courtôs 16-level increase of the defendantôs offense level under §2L1.2 considering the defendantôs prior conviction for aggravated criminal sexual abuse of a minor as a ñcrime of violence.ò The defendant had been convicted of aggravated criminal sexual abuse of a minor after he had touched the breast of a 12-year-old girl. The district court considered the

defendantôs prior conviction as a ñcrime of violenceò and the defendant argued that his offense level should only have been increased by eight levels because the crime he committed qualified only as an ñaggravated felonyò under §2L1.2(b)(1)(c). More specifically, the defendant argued that a prior conviction is a ñcrime of violenceò only if it involved force under §2L1.2 Application Note 1(B)(ii) subparagraph I and is one of the offenses enumerated in subparagraph II. The court held that under the plain language of Application Note 1(B)(ii) of §2L1.2, a ñcrime of violenceò means those crimes described in subparagraph I and includes those crimes set forth in subparagraph II. Furthermore, the offenses enumerated in subparagraph II do not have to involve force to warrant an upward adjustment. Because defendantôs prior conviction was specifically listed in subparagraph II, the district court did not err.

United States v. Chavez-Chavez, 213 F.3d 420 (7th Cir. 2000). The district court did not err when it made a discretionary decision not to depart downward further than it had already in sentencing the defendant on the ground that the criminal history category overstated the seriousness of his prior felony conviction. The defendant had pled guilty to unlawful re-entry after having been removed for aggravated criminal sexual abuse of an 11-year-old girl. The district court departed downward after concluding that the defendantôs criminal history category overstated the seriousness of his prior offense. On appeal, the defendant contended that the district court should have departed even further, and requested an additional departure based on Application Note 5.[9] The Seventh Circuit stated that had the district court found the defendant ineligible under the application note, the decision would be reviewable for error. However, the court held that the district court found the defendant eligible, but undeserving. Therefore, the decision was unreviewable, and the appeal was dismissed.

§2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

See United States v. Ziao Yong Zheng, 762 F.3d 605 (7th Cir. 2014), §2B1.6.

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

United States v. Earls, 704 F.3d 466 (7th Cir. 2012). The Seventh Circuit joined the Fifth, Eighth, Tenth, and D.C. Circuits by holding that Application Note 2 at §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)) does not apply when §2X1.1 is reached by cross reference from §2L2.2(c)(1)(A). The cross reference at §2L2.2(c)(1)(A) applies when the defendant uses a passport or visa in the commission or attempted commission of a felony offense. Application Note 2 defines ñsubstantive offenseò (*i.e.*, the ñfelony offenseò at §2L2.2(c)(1)(A)) to mean ñthe offense that the defendant was *convicted* of soliciting, attempting, or conspiring to commit.ò (Emphasis added). However, when §2X1.1 is reached by cross reference, the panel observed, it is rare that a defendant will

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

have already been *convicted* of ñsoliciting, attempt, or conspiring to commitò the substantive/felony offense at the time of sentencing. Therefore, the Seventh Circuit concluded, the commentary in Application Note 2 is logically intended to be applied when §2X1.1 is applied directly, not when it is reached through cross reference from §2L2.2(c)(1)(A).

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

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

Part R Antitrust Offenses

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

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

Part S Money Laundering and Monetary Transaction Reporting

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

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

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

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

Part T Offenses Involving Taxation

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

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

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

Part X Other Offenses

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

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

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

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

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

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

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

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

§3A1.4 Terrorism

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

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Dade, 787 F.3d 1165 (7th Cir. 2015). There is no requirement that a defendant have been able to ñcoerceò other members of a conspiracy for the aggravating role enhancement to apply. Coercion is only one factor for a sentencing court to consider in making a ñcommonsense judgment about the defendantôs relative culpability given his status in the criminal hierarchy.ò *See United States v. Weaver*, 716 F.3d 439, 443-44 (7th Cir. 2013).

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

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

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

United States v. D'Ambrosia, 313 F.3d 987 (7th Cir. 2002). The defendants used a scheme to operate an illegal sports book-making operation and concealed income from the Internal Revenue Service. The defendants challenged the district courtôs application of a four-level enhancement to each defendantôs sentence for being a leader or organizer of a tax conspiracy. The appellate court affirmed the district courtôs application of the enhancement, holding that the defendants were subject to the four-level ñorganizer-leaderò enhancement regardless of whether the wagering offense and tax conspiracy offenses were analyzed separately or grouped together under §3D1.2. The defendants contended that their participation in the tax conspiracy was limited to their role as clients of a third party. The court concluded that the defendantsô argument failed to recognize that the determination of whether a defendant is an ñorganizer or leaderò under §3B1.1 ñis to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct). . . .[T]here is no question that the defendantsô operation of a multi-jurisdictional offshore sports bookmaking empire is clearly relevant in assessing their role in the tax conspiracy.ò

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

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

§3B1.2 Mitigating Role

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

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

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

United States v. DeMarco, 784 F.3d 388 (7th Cir. 2015). A defendant need not hold a formal position of trust for this enhancement to be applicable. Rather, courts should look beyond labels and categories and focus on the nature of the defendantôs relationship to the victim and the level of responsibility he was given. Here, the enhancement was justified by the defendantôs use of his role as an investment manager and bank employee to recruit victims.

United States v. Rushton, 738 F.3d 854 (7th Cir. 2013). The district courtôs application of the enhancement for abuse of position of trust was impermissible double counting in a community pool money laundering case, where the abuse of trust related to the underlying offense and the defendant received a 4-level enhancement under §2B1.1(b)(19)(B)(iii) that already considered the defendantôs abuse of trust as part of the fraud scheme. The court relied on Application Note 15(c) in making its determination.

United States v. Anderson, 259 F.3d 853 (7th Cir. 2001). The district court did not err when it enhanced the defendantôs sentence for abuse of a position of trust. The defendant pled guilty to embezzling and willfully misapplying money which belonged to customers of the bank for which he worked, and he was sentenced to 41 months. The district court found that as an assistant branch manager, the defendant had access to and control over all customersô accounts and found that he withdrew money from customersô accounts. The district court further found he hid the money by opening an account in the name of his brother and by depositing a portion of

the money into a CD account established in a friendôs name. On appeal, the defendant argued that he did not occupy a position of trust because his illegal conduct involved his actions as merely a bank teller. The circuit court held that the district court properly applied the enhancement because the defendant was not employed as a bank teller, but as an assistant manager. In that position, he had the authority to withdraw funds from bank accounts over $1,000.00 without obtaining a supervisorôs permission. The circuit court found that the transactions at issue were all over that amount. Further, as a supervisor, the defendant had knowledge of the codes to access the customersô accounts, information bank tellers did not have. Therefore, his position was correctly considered a position of trust for application of the enhancement.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendantôs sentence based on abuse of a position of trust. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy Middle Eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over a 21-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. The district court enhanced the defendantôs sentence two levels for his abuse of trust, pursuant to §3B1.3. The circuit court found that the defendant had represented himself as a licensed money manager and had offered to invest money for one of the women he dated, stating he was knowledgeable about investments and that he regularly invested money for other people. The circuit court found these representations were sufficient to convince the woman to entrust the defendant with her money, thereby placing him in a position of trust. Because the defendantôs abuse of this position of trust facilitated his commission of the fraud, the district court properly increased the defendantôs sentence.

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

ordinarily given considerable deference)ò and those subject to significant supervision. In this case, unlike the other two, the defendant was found to possess both extensive managerial control and discretionary executive powers, making the actual abuse not a necessary element of the offense.

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

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

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

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

teller did not remember making these specific withdrawals for the defendant, she testified she often made such withdrawals for him in her role as a teller. Because there was sufficient evidence suggesting that the defendant was responsible for directing tellers to make these unauthorized withdrawals, the district court did not err in finding that the teller made these withdrawals for the defendant.

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

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

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Wilbourn, 778 F.3d 682 (7th Cir. 2015). Application of the obstruction of justice enhancement was justified when the defendant pretended to be mentally ill, delaying proceedings in his case for a period of four to five months. The fact that defendantôs lawyer, rather than defendant himself, had requested a delay for a competency evaluation did not prevent application of the enhancement, when the evidence was that the defendant himself had intentionally exaggerated his symptoms.

United States v. Sandoval, 747 F.3d 464 (7th Cir. 2014). The defendant pleaded guilty to the attempted possession of 20 kilograms of cocaine. At the time of his arrest, he gave law enforcement a false name which hid his legal status, and he continued to use that false name through pretrial services, his initial appearance, and during other court proceedings. The district court applied the obstruction adjustment. On appeal the defendant argued that the adjustment was not applied properly because the application notes provide that the enhancement should not be applied where a defendant provides a false name or identification at arrest. The Seventh Circuit affirmed, stating that the application note does not preclude application in this case because the defendantôs use of a false identity was ñmaterialò within the meaning of the application notes. The court stated that the defendant ñlied about his identity and thereby concealed his illegal presence within the United States.ò In addition, the Seventh Circuit said that once the court learned of the defendantôs true identity, it revoked his bond and had him taken into custody, which indicated to the circuit court that the lie ñtended to influence or affectò the district courtôs decision.

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

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

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

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

United States v. Willis, 523 F.3d 762 (7th Cir. 2008). ñ[A] sentencing court should not apply [§3C1.1] more than once for multiple acts of obstruction . . . [W]e hold that multiple acts of perjury produce a single two-level enhancement under §3C1.1 and possibly a higher or above-Guidelines sentence based on the discretion conferred by 18 U.S.C. § 3553(a), not the imposition of multiple obstruction-of-justice enhancements.ò

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

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

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

United States v. Jefferson, 252 F.3d 937 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for his obstruction of justice. The defendant was convicted following a jury trial of five counts relating to the distribution of crack cocaine. On appeal, the defendant contended the district court erred in increasing his base offense level pursuant to §3C1.1, based on a finding that he had committed perjury when he testified at trial, without first making specific findings of perjury. The circuit court found that the district court cited to several portions of the record in which the defendant denied selling crack cocaine and further found that denial was a falsehood which amounted to perjury. Thus, the circuit court

stated that the defendantôs contention that the district court did not find he willfully intended to provide false testimony failed, and it held that the enhancement properly applied. *See also United States v. Noble*, 246 F.3d 946 (7th Cir. 2001) (district court did not err in enhancing defendantôs sentence where defendant committed perjury during his testimony by lying and by coaching and orchestrating anotherôs false confession); *United States v. Carrera*, 259 F.3d 818 (7th Cir. 2001) (district court did not err when it failed to identify the perjurious statements and finding that the statements did not preclude an obstruction of justice enhancement where the court specifically pointed to testimony that conflicted with the agentôs account of the defendantôs post arrest statements); *United States v. Anderson*, 259 F.3d 853 (7th Cir. 2001) (district court did not err in finding uncharged relevant conduct established enhancement for obstruction of justice based on perjurious statements where the defendant lied and claimed he never intended to keep the funds he was charged with embezzling).

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

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

United States v. Cotts, 14 F.3d 300 (7th Cir. 1994). The district court did not wrongly enhance defendant Fernandezôs sentence for obstruction of justice. A government agent, posing as a large scale drug trafficker, negotiated several reverse buys with the defendants. During the course of his dealings with the conspirators, the agent told a codefendant of a fictitious person

whom he believed was an informant. Subsequent to this conversation, the defendant plotted to kill the fictitious informant. He challenged the obstruction of justice enhancement on the grounds that conspiring to kill a person who does not exist does not obstruct anything. He further stated that he did not intend to obstruct the investigation or prosecution but only to take revenge for the informantôs betrayal. The appellate court rejected this argument and relied on the language of §3C1.1, which explicitly provides for an enhancement for ñattempts to obstruct or impede.ò The district court based its enhancement on the defendantôs attempt to obstruct justice ñand by definition, attempt requires that one act with the purpose of effectuating the proscribed result.ò Further, although the district court was somewhat ambiguous in discussing the defendantôs intent, the district court did expressly mention his retaliatory motive. Because Application Note 3(i) specifically refers to statutes encompassing retaliation against an informant, the court of appeals upheld the obstruction of justice enhancement.

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

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

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

See United States v. Fletcher, 763 F.3d 711 (7th Cir. 2011)*, Ex Post Facto*.

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

processing and deporting him. In addition, the court of appeals found that the community was subjected to separate instances of risk of harm from his continued criminal activities. The defendant, the court held, had not demonstrated anything more than conduct that ñconstitutes single episodes of criminal behavior, each satisfying an individualï albeit identicalï goal.ò

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

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

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Miller, 782 F.3d 793 (7th Cir. 2015). Although a sentencing court may not base denial of the reduction for acceptance of responsibility solely on the nature of a defendantôs plea (here, *nolo contendere*), the sentencing court in this case had appropriately based its decision on specific observations about the defendantôs refusal to acknowledge any association with a criminal association, and not on the plea itself.

United States v. Sandidge, 784 F.3d 1055 (7th Cir. 2015). It was proper to deny the reduction for acceptance of responsibility when the defendant refused to take responsibility for relevant conduct that led to a sentencing enhancement. Although the defendant pleaded guilty to being a felon in possession of a firearm, he denied having pointed the gun at a victim, despite the sentencing courtôs finding (upheld on appeal) that he had done so. Given this factual finding,

and given that the defendant did not dispute that this fact, if true, was relevant conduct, the court was justified in refusing the reduction for acceptance of responsibility.

United States v. Mount, 675 F.3d 1052 (7th Cir. 2012). The Seventh Circuit held that the district court erred by denying the 1-level reduction at §3E1.1(b) after the government's motion certifying the defendant's assistance through a timely plea. The defendant escaped from a community center, but once apprehended entered into a plea agreement in which the government agreed to make motions for both the 2-level reduction at §3E1.1(a) and the one-level reduction at subpart (b) if the defendant accepted the proffered agreement, thus avoiding a trial. The defendant accepted the agreement. However, at sentencing the district court denied the 1-level reduction based upon the defendant's escape. The Seventh Circuit held that although the sentencing guidelines are now advisory, the one-level reduction must be applied if the defendant meets the three requirements at §3E1.1(b): (1) a decision that the defendant qualifies for the first two levels under subpart (a); (2) an offense level of 16 or greater before subpart (a) is applied; and (3) a government motion certifying assistance through a timely plea. The Seventh Circuit emphasized that while "the court retains discretion to apply the factors outlined in 18 U.S.C. § 3553(a) to choose a proper sentence," it still "must begin . . . with the right reference point from the guidelines." Because these three requirements were met in this case, the court should have granted the 1-level reduction under §3E1.1(b).

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

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

United States v. Nielsen, 232 F.3d 581 (7th Cir. 2000). The district court did not err in denying the defendant's request for an additional downward adjustment based on an acceptance of responsibility. On the day before his scheduled trial date, the defendant pled guilty to

conspiracy to collect extensions of credit by extortionate means, and the district court sentenced him to 96 months. Nine days before his trial was scheduled to begin, the defendantôs counsel notified the government that the defendant intended to plead guilty, but he did not actually execute a plea agreement or plead guilty until the day before trial. The Seventh Circuit stated that by the time the defendant gave notice of his intention to plead guilty, the government had already invested substantial resources in trial preparation, brought in witnesses, issued subpoenas and made travel arrangements, and found the government could not stop preparing for trial even after the defendant gave notice of his intention to plead because of the possibility that his plea would not go through. The circuit court held that the district court did not err in its determination that the defendant did not plead guilty in a sufficiently timely manner to warrant an additional reduction under §3E1.1(b)(2).[10]

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

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

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

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

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

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

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

United States v. Jenkins, 772 F.3d 1092 (7th Cir. 2014). Defendant pleaded guilty to aiding and abetting a kidnapping. On appeal, he challenged the district courtôs consideration of a state court conviction to assess criminal history points. Applying plain error review, the Seventh Circuit agreed that the state court conviction should not have added criminal history points because the statute under which defendant was charged and convicted was held facially unconstitutional. The conviction was *void ab initio*. Accordingly, the conviction fell into the exception set forth in application note 6 to U.S.S.G. § 4A1.2. The sentence was vacated and remanded.

Buchmeier v. United States, 581 F.3d 561 (7th Cir. 2009). The defendant was sentenced as an armed career criminal following four firearms convictions. In a collateral proceeding, he contended that his eight prior state convictions for burglary do not meet the definition of a ñcrime punishable by imprisonmentò under 18 U.S.C. § 921(a)(20) because a notice he received from the Illinois Department of Corrections upon the expiration of his state term and his release from all supervision constitutes a ñrestoration of civil rightsò within the definition of section 920(a)(20). That section provides that ñ[a]ny conviction which has been expunged, or set aside

or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.ò The Seventh Circuit held that ñ[b]ecause the state sent Buchmeier a document stating that his principal civil rights have been restored, while neglecting to mention the continuing firearms disability . . . his burglary convictions do not count for federal purposes.ò

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

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

United States v. Mitchell, 18 F.3d 1355 (7th Cir. 1994). The district court properly refused to entertain the defendantôs collateral attack of a prior sentence used to determine his criminal history category. The defendant claimed that his prior state conviction was invalid because his plea was not entered knowingly and voluntarily and lacked sufficient factual basis. The Seventh Circuit followed the First, Fourth, Sixth, Eighth, and Eleventh Circuits in holding that ña defendant may not collaterally attack his prior state conviction at [his federal] sentencing unless the conviction is presumptively void.ò The court of appeals reasoned that a sentencing hearing is not the proper forum in which to challenge the validity of a prior conviction because such a challenge requires a fact-intensive inquiry. Because inquiries are more appropriately handled in a state collateral proceeding or by federal habeas corpus. Since a review of the record from the defendantôs state court conviction did not reveal a presumptively void plea, the defendantôs collateral challenge must fail.

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

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

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

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

United States v. Turchen, 187 F.3d 735 (7th Cir. 1999). The district court permissibly departed upward on the basis of the defendantôs previous acquittal ñby reason of mental defect.ò The district court appropriately concluded that the defendantôs mental instability constituted a higher likelihood of recidivism, thus justifying longer commitment to protect the public.

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

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

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

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Coleman, 763 F.3d 706 (7th Cir. 2014). Defendant pleaded guilty to possession with intent to distribute crack. The district court erroneously categorized him as a career offender and calculated a range of 188-235 months, sentencing defendant to 225 months imprisonment. Defendant filed a motion pursuant to 28 U.S.C. § 2255 seeking resentencing. A different district court agreed and resentenced defendant to 120 months imprisonment based on removal of the career offender designation and subsequent revisions to the drug guidelines. The Seventh Circuit reversed and remanded. Although agreeing that the original guidelines calculation was in error, the Seventh Circuit relied on *United States v. Hawkins*, 706 F.3d 820 (7th Cir. 2013), holding that an ñerroneous determination that the petitioner was a career offender in calculating his sentence was not a cognizable error under §2255 post-*Booker*.ò Given the advisory nature of the guidelines and the fact that a district court may not presume that an in-range sentence is reasonable, an error of this nature did not constitute a miscarriage of justice. The Seventh Circuit declined the invitation to revisit that decision and rejected possible bases for distinguishing that holding. The Court specifically noted that, in contrast to *Hawkins*, where the erroneous calculation led to a range five to ten times higher than the correct range, the difference between the erroneous and correct ranges was ñmuch less significant here.ò Thus, ñthe likelihood of a different sentence in light of the sentencing error is not an adequate basis to distinguish *Hawkins*.ò

United States v. Smith, 721 F.3d 904 (7th Cir. 2013). In a case of first impression, the Seventh Circuit rejected the defendantôs argument that because §4B1.1 is not empirically based,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Mueller, 112 F.3d 277 (7th Cir. 1997). In an issue of first impression, the Seventh Circuit held that using a telephone to facilitate a drug offense, 21 U.S.C. § 843(b), constitutes a ñcontrolled substance offenseò under §4B1.1. The defendant appealed the sentencing judgeôs determination that the defendant be treated as a career offender based on a prior conviction under 18 U.S.C. § 843(b). The defendant asserted that because the Sentencing Commission deleted from §4B1.2 the specific list of statutory ñcontrolled substance offensesò (which did not include § 843(b)) and deleted language indicating that the definition included ñsubstantially similarò offenses, the Commission did not intend § 843(b) violations to be treated as controlled substance offenses. The circuit court found this argument conclusory and examined the language of §4B1.2(2)[11], which presents a two-part inquiry: First, the sentencing court must determine if the statute prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession with intent to do so. If it does, it is a controlled substance offense. If not, the offense will be deemed a controlled substance offense if the statute involves ñaiding and abetting, conspiring, [or] attempting to commit such an offense.ò ñUnlawful use of a telephoneò offenses fall into the latter category because one cannot be

[11] Section 4B1.2(2) was amended by deleting ñ(2)ò and inserting in lieu thereof ñ(b)ò effective November 1, 1997 pursuant to amendment 568.

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

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

§4B1.4 Armed Career Criminal[12]

Price v. United States, No. 15-2427, 2015 WL 4621024 (7th Cir. Aug. 4, 2015). The court held that the rule announced by the Supreme Court in *Johnson v. United States* was a new substantive rule of constitutional law, and was thus retroactively applicable on collateral attack under 28 U.S.C. § 2255. *See* n.12. Thus, a case in which the defendant was originally sentenced under ACCA based on a finding that his prior offenses constituted violent felonies under the now-invalidated residual clause may be the subject of a second or successive § 2255 motion.

United States v. Wright, 48 F.3d 254 (7th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to the Armed Career Criminal Act , 18 U.S.C. § 924(e)(1), based on prior felony convictions which were more than 15 years old. The defendant claimed that convictions more than 15 years old were stale and should not be considered for ACCA purposes, much like the 15-year limit on the use of felonies for sentencing purposes under §4A1.2(e). In considering an issue of first impression, the Seventh Circuit joined

[12] In June 2015, the Supreme Court held, in *Johnson v. United States*, that the ñresidual clauseò of the ACCA is unconstitutionally vague. *See* 135 S. Ct. 2551 (2015). The Courtôs opinion in Johnson did not consider the guidelinesô definitions of ñcrime of violence,ò including the residual clause in the career offender guideline. As such, *Johnson* has not resulted in a change in guideline application at the time of this update.

with the Third, Fourth, Fifth, Eighth, and Eleventh Circuits in finding that no time limit exists on prior felony convictions for purposes of the ACCA. The appellate court examined the statute and concluded that if Congress intended a time restriction on the use of felonies under the ACCA it would have attached a time restriction.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. May, 748 F.3d 758 (7th Cir. 2014). The defendant appealed his sentence for conspiracy with one other codefendant to distribute crack, challenging the district courtôs refusal to award him the safety-valve and its application of the aggravating role at §3B1.1 for his supervisory role in the offense. At sentencing, the parties did not agree whether the defendant was ñan organizer, leader, manager or supervisor of othersò as required by the section 3553(f). On appeal, the defendant argued that regardless of the adjustment at §3B1.1, the court erred in denying him safety-valve relief. The Seventh Circuit found that section 3553(f) specifically disqualifies a defendant if he was a ñsupervisor of others in the offense, as determined under the sentencing guidelines.ò Because §3B1.1 authorizes an adjustment as long as a defendant supervised ñone or moreò participants and he supervised one other person as required by the guideline, denial of the safety-valve was appropriate.

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

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

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

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

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Kappes, 782 F.3d 828 (7th Cir. 2015). As in *Thompson* and *Siegel*, the court rejected the application of ñstandardò supervised release conditions without individualized findings as to their appropriateness. In the absence of such findings, the court remanded for the district court to specify appropriate limitations on the conditions or make further findings justifying them. Given the defendantôs conviction for a child pornography offense, certain special conditions related to sex offender status were appropriate, but the district court on remand should more appropriately tailor some ï such as a ban on all pornography ñlegal or illegal,ò and an absolute bar on contact with all minors under 18 ï to the defendantôs offense and characteristics.

United States v. Phillips, No. 14-1354, 2015 WL 3937527 (7th Cir. June 26, 2015). The list of factors a supervised release revocation court must consider at 18 U.S.C. § 3583(e) is not exclusive. The court may also consider the general sentencing factors listed in § 3553(a), so long as it relies primarily on the § 3583(e) factors. When imposing a term above the guidelines range, the sentencing court is not required to specifically explain why a within-range sentence would be insufficient, as long as the sentence is otherwise justified by the statutory factors.

United States v. Thompson, 777 F.3d 368 (7th Cir. 2015). This is a consolidated appeal of several cases addressing the Seventh Circuitôs ñconcernsò with the imposition of supervised release. (It follows up to the Courtôs earlier decision, *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014).) ñMany district judges appear to have overlookedò that conditions of supervised release are subject to the factors set forth in 18 U.S.C. § 3553. The court vacated some conditions of supervised release where the district court had failed to include specific reasons explaining why particular requirements were necessary. (For example, the Court vacated a condition imposing ñlifetimeò supervised release because of the lack of such findings.) The court vacated other conditions that were inappropriately vague or appeared to have been simply ñboxes checked on a form.ò (For example, the Court vacated a condition requiring a defendant to ñnotify third parties of risks that may be occasioned by the defendantôs criminal record or

personal history or characteristics.ò) The Court also rejected conditions that appeared not to have been tailored to the defendantsô specific circumstances, particularly when defendants received to very long sentences. (For example, in a case in which the defendant received a 25-year sentence, the Court criticized a requirement that, if the defendant was unemployed after 60 days, he shall ñperform at least 20 hours of community service work per week,ò noting that the likely age of the defendant upon release made this a questionable condition.). The Court specifically rejected the idea that vague or questionable conditions could be adapted by probation officers, emphasizing that supervised release conditions are a part of sentencing that must be determined by the judge.

United States v. Adkins, 743 F.3d 176 (7th Cir. 2014). Agreeing with its sister circuits, the Seventh Circuit vacated and remanded a special condition of supervised release that it found was unconstitutionally vague and overbroad. The defendant pleaded guilty to receipt and possession of child pornography and the district court imposed a condition that the defendant ñshall not view or listen to any pornography or sexually stimulating material or sexually oriented material or patronize locations where such material is available.ò The Seventh Circuit reasoned that the provision could preclude the defendant from using a computer or entering a library because both are ñlocationsò where sexually stimulating material is available. Nor could the defendant ride the bus, enter a grocery store, watch television, or read a magazine or newspaper.

United States v. Clay, 752 F.3d 1106 (7th Cir. 2014). The Seventh Circuit joined a majority of circuits in concluding that consideration of section 3553(a)(2)(A) while revoking supervised release is not a procedural error. On appeal after revocation, the defendant argued that the court abused its discretion by relying on section 3553(a)(2)(A) which is not included on the list of factors courts may consider when revoking a term of supervision under 18 U.S.C. §3583(e). The circuit court held that section 3553(a)(2)(A) may be considered ñso long as the district court relies primarily on the factors listed in section 3583(e)ò because there is significant overlap between those factors and section 3553(a)(2)(A).

United States v. Shannon, 743 F.3d 396 (7th Cir. 2014). The defendant violated a condition of his lifetime supervised release for the possession of child pornography by attaching a web camera to his computer without permission and visiting websites involving sexually explicit images of teenage girls. On appeal he contested the imposition of a special condition that required a ban on the possession of ñany sexually explicit material,ò arguing that it was not reasonably related to his offense of conviction. The Seventh Circuit vacated the condition and remanded the case because of a lack of findings or any explanation by the district court for the imposition of this condition. The court found that the district court imposed the condition without discussion or justification during the hearing, and ruled it problematic because it could include even legal adult pornography. Because the condition included a lifetime ban on otherwise legal material, the circuit court vacated and remanded for further proceedings.

United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013). The Seventh Circuit held that §5D1.2ôs definition of ñsex offenseò did not include a simple failure to register as a sex offender

as required by the Sex Offender Registration and Notification Act because the offense was not ñperpetrated against a minor.ò[13]

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

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

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

§5E1.2 Fines for Individual Defendants

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

United States v. Monem, 104 F.3d 905 (7th Cir. 1997). In reviewing the imposition of a fine for plain error, the appellate court remanded the case for the district court to make factual findings in support of the fine assessed against the defendant with respect to his conviction for using interstate facilities to carry on a prostitution business and laundering the proceeds.

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[13] Pursuant to amendment 786, effective November 1, 2014, the application note defining ñsex offenseò for purposes of §5D1.2 was revised to state, ñSuch term does not include an offense under 18 U.S.C. §2250 (Failure to register).ò USSG § 5D1.2 cmt. n.1.

Sentencing judges have an affirmative duty to make specific findings with respect to seven factors before imposing fines. Among these factors, the court must consider evidence presented concerning the defendantôs ability to pay and the burden a fine would place on the defendantôs dependents. §5E1.2(d)(1)-(7). The sentencing court may ñdischarge its duty to make factual findingsò by accepting the findings set forth in the presentence report. However, in this particular case, the presentence report indicated that the defendant was unable to pay a fine due to his lack of assets or monthly cash flow, but might be able to pay a fine in installments upon release from prison. Despite the probation officerôs skepticism about the defendantôs ability to pay, the sentencing court stated that it was adopting the findings of the presentence report and imposing a fine of $15,000. The circuit court rejected the lower courtôs blanket statement of adoption of the PSR because there was an unexplained contradiction between the findings of the PSR and the fine assessed. The circuit court remanded the case to the district court to allow the court to ñclarify its reasons for imposing the fine in the amount of $15,000.ò

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

Part G Implementing the Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

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

United States v. Tockes, 530 F.3d 628 (7th Cir. 2008). ñ[T]he guidelines are . . . advisory, and as a statutory matter, the court [is] free to impose the sentences concurrently or consecutively after considering the section 3553(a) factors. *See* 18 U.S.C. § 3584(b) (ó[T]he court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).ô).ò

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

United States v. Moore, 784 F.3d 398 (7th Cir. 2015). Defendant was convicted in federal court of Hobbs Act robbery, and in state court for murder stemming from the same events. Although the parties disputed whether §5G1.3(b) or (c) applied, the sentencing court acted within its statutory discretion in providing that the defendantôs federal sentence run consecutively with his state sentence. The court offered extensive justification for its decision that was more than sufficient to comply with 18 U.S.C. §§ 3553, 3584(a), and precedent.

United States v. Nania, 724 F.3d 824 (7th Cir. 2013). Defendant was convicted in federal court of producing child pornography, after being convicted of the sexual abuse itself in state court. At sentencing, the defendant argued that the federal sentence should run concurrently with his state sentence, because the offenses overlapped sufficiently for the purposes of §5G1.3. The Seventh Circuit disagreed. Although the defendantôs case meets the first requirement under §5G1.3(b), that all of the conduct involved in the state offense must be relevant conduct for purposes of the federal offense, his case did not meet the second requirement, that all of the state conduct also increased his federal offense level under the guidelines calculation. Moreover, Application Note 3(D) to §5G1.3 gives a sentencing judge broad discretion in complex cases to ñfashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve reasonable punishment.ò

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

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

United States v. Plantan, 102 F.3d 953 (7th Cir. 1996). The district court properly imposed a 24-month consecutive sentence based on the defendantôs criminal history. The

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

United States v. Yahne, 64 F.3d 1091 (7th Cir. 1995). The district court did not err in refusing to group or consolidate the defendantôs cases for sentencing purposes. The defendant pled guilty to charges of theft of interstate property in Illinois and Indiana, and his Rule 11(e)(1)(c) plea agreement included a downward departure for substantial assistance for the Illinois charges. The district court sentenced the defendant to 18½ months of incarceration. The defendant had already served his sentence for the Indiana theft and claimed on appeal that there was a sufficient nexus between the two cases to be consolidated under the guidelines. The circuit court ruled that §5G1.3(b) does not apply to a defendant who has completely served his sentence prior to his second sentencing.

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

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

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

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

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

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

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

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

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

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

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

Part K Departures

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

United States v. Lezine, 166 F.3d 895 (7th Cir. 1999). The district court erred in refusing to review the defendantôs claim that he had provided substantial assistance, finding that the governmentôs refusal to move for a downward departure was within its discretion. The Seventh Circuit ruled that because the government entered into a plea agreement that stated ñif the defendant provided full and truthful cooperation,ò a downward departure would be madeï the government had limited its discretion. The government cannot unilaterally decide that a defendant has breached a plea agreement without an evidentiary hearing on the matter.

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

United States v. Eppinger, 49 F.3d 1244 (7th Cir. 1995). The district court did not abuse its discretion by denying the defendantôs request to present evidence *in camera* in support of her motion for a downward departure under §5K1.1. The defendant pleaded guilty to one count of conspiracy to distribute cocaine and was granted a downward departure of ten percent from the

mandatory minimum sentence of ten years. The defendant claimed to be afraid to speak in open court about the circumstances surrounding her involvement in the drug trade because she had received a number of threats prior to the sentencing, and contended that the court may have granted a greater downward departure if it had allowed her to testify *in camera*. The circuit court ruled that the defendant failed to demonstrate compelling reasons requiring *in camera* testimony, and that the district courtôs decision did not constitute plain error.

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

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

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

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

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

§5K2.1 Death (Policy Statement)

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

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

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

§5K2.8 Extreme Conduct (Policy Statement)

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

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

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

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

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

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

Part A Sentencing Procedures

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

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

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

Part B Plea Agreements

§6B1.4 Stipulations (Policy Statement)

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

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Perry, 743 F.3d 238 (7th Cir. 2014). The defendant violated the terms of his supervised release for the second time and the district court sentenced him to a five-year term of imprisonment. He had been sentenced to three monthsô imprisonment upon his first revocation. On appeal, the defendant argued that the district court erred in imposing the sentence because the version of section 3583(k) that was in effect at the time of his initial offense authorized a maximum sentence of only two years. The Seventh Circuit agreed, holding that the Supreme Court has stated that defendants are to be sentenced at their revocation hearings pursuant to the version of the statute that was in effect on the date the offense was committed. The defendant also argued on appeal that he should be credited for the time served on his initial revocation. In a matter of first impression for the Seventh Circuit, the court found that every other court of appeals to consider the issue determined that the amendment to section 3583 in the

PROTECT Act in 2003 ñeliminates the credit for terms of imprisonment resulting from prior revocations.ò However, the court vacated and remanded the sentence for the district court to correct the term of imprisonment.

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

United States v. Fischer, 34 F.3d 566 (7th Cir. 1994). The district court did not err in determining that the defendantôs failure to avoid contact with his ex-girlfriend was a violation of his terms of supervised release. The defendantôs probation officer had instructed the defendant to avoid contact with his ex-girlfriend. The defendant argued that failure to follow these instructions could not be a legitimate violation because the instruction was a nonministerial command properly the subject of a court-approved condition of release and not a condition that could be left to the discretion of a probation officer. The circuit court, while agreeing that the sentencing court and not the probation officer is responsible for setting the terms of supervised release, concluded that the district courtôs revocation of supervised release was not actually based on the defendantôs failure to follow his probation officerôs instructions, but rather on the independent grounds of the dangerous and anti-social nature of the defendantôs contact with his ex-girlfriend.

§7B1.4 Term of Imprisonment

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

OTHER STATUTORY CONSIDERATIONS

Fair Sentencing Act

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

18 U.S.C. § 924(e)(1)

United States v. Smith, 544 F.3d 781 (7th Cir. 2008). ñ[A]fter *Begay*, the residual clause of the ACCA [Armed Career Criminal Act] should be interpreted to encompass only ópurposefulô crimes. . . . [C]rimes requiring only a *mens rea* of recklessness [or negligence] cannot be considered violent felonies under the residual clause of the ACCA.ò Thus, a prior Indiana conviction for criminal recklessness was not a ñviolent felonyò under the ACCA.

21 U.S.C. § 851(a)(1)

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Jordan, 742 F.3d 276 (7th Cir. 2014). The defendant was sentenced to 24 months for violating the conditions of his supervised release and appealed, arguing that the district court committed error by considering hearsay evidence without making an ñinterest of justiceò finding that is required by Rule 32(b)(2)(C). The government relied on a police report to prove possession of 30 pounds of marijuana and when the defense counsel asked the probation officer whether the officer was available to testify, the government objected, stating that the officer ñwould have been available if [it] had contacted him. [It] didnôt contact him because the

rules of evidence donôt require that he be here.ò Because the court did not make any finding whether the police report was reliable or that good cause existed for its admission, and it did not discuss Rule 32, the Seventh Circuit found it committed error and the error was not harmless. Therefore, it reversed and remanded.

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

Rule 35(b)(2)

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