Selected Post-*Booker* and Guideline Application Decisions for the D.C. Circuit

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — D.C. CIRCUIT

This document contains annotations to certain D.C. 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 D.C. 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. Blackson, 709 F.3d 36 (D.C. Cir. 2013). The defendant appealed the district court's decision to reimpose a 360-month sentence after the D.C. Circuit vacated one of the convictions upon which his original sentence was based, claiming that the district court took an overly narrow view of the scope of issues it could consider at resentencing. The D.C. Circuit began by collecting in one place the circuit's rules on the scope of a district court's resentencing authority under a remand order that contains no express instructions regarding which issues the district court may consider. First, when the circuit court vacated one count of a multi-count conviction, "the district court on remand should begin by determining whether that count affected the overall sentence and, if so, should reconsider the original sentence it imposed." Second, the district court may also consider new arguments or facts made newly relevant by the circuit court's remand. Third, the district court may consider facts that did not exist at the time of the original sentencing, such as rehabilitation efforts that the defendant had undertaken since sentencing. The D.C. Circuit stated that beyond these three categories of inquiry, the district court does not generally have authority to consider other objections at resentencing, unless the remanding court has expressly directed otherwise. "Accordingly, unlike the rule in some circuits, in this circuit the district court generally does not have authority to resentence a defendant de novo." The circuit court also concluded that the Supreme Court's decision in *Pepper* did nothing to undermine the circuit's general resentencing rules, and that the district court in the instant case understood its resentencing authority.

United States v. Bigley, 786 F.3d 11 (D.C. Cir. 2015). Following *Booker*, a sentencing court "must consider nonfrivolous arguments for mitigation, even if those arguments were previously prohibited under the mandatory guidelines regime."

B. Presumption of Reasonableness

United States v. Terrell, 696 F.3d 1257 (D.C. Cir. 2012). The D.C. Circuit vacated the defendant's within-guidelines sentence on plain error review because the district court had stated that it would sentence the defendant below the applicable guidelines range only if it found "compelling reasons" to do so. The circuit court held that the district court's "compelling reasons" rule is "functionally equivalent to a presumption that the Guidelines range is reasonable, blocking a non-Guidelines sentence in the absence of special, 'compelling' circumstances[,]" an approach that *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007), had clearly forbidden prior to the defendant's sentencing. In addition, the circuit court found that the defendant had shown a reasonable likelihood that he would have received a lower sentence but for the error, given the repeated actions of the district court throughout the proceedings to try to have the defendant's guidelines range lowered, by, for instance, delaying proceedings so he could cooperate with the government, reviewing whether the *Pickett* holding as to crack could lower his sentence, and asking the government to award the defendant the third point for acceptance of responsibility.

United States v. Pickett, 475 F.3d 1347 (D.C. Cir. 2007). The D.C. Circuit reversed a sentence on the grounds that the district court improperly refused to consider the 100:1 crack/powder ratio in its sentencing determination. The district court imposed a bottom of the guidelines sentence of 121 months for crack distribution over defendant's objection that the 100:1 crack-to-powder ratio created an unwarranted disparity. On appeal, the D.C. Circuit stated that "[a] sentencing judge cannot simply presume that a Guidelines sentence is the correct sentence." Instead, the appropriate approach to reviewing the reasonableness of a guideline sentence "is to evaluate how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a)." The circuit court identified several ways in which it concluded the guideline might fail to accomplish these purposes and concluded it was "beyond doubt that the district court erred in refusing to evaluate whether sentencing [the defendant] in accordance with Guideline §2D1.1, and its 100-to-1 ratio, would effectuate the purposes of sentencing set forth in § 3553(a)."

C. Burden of Proof

United States v. Ventura, 650 F.3d 746 (D.C. Cir. 2011). "At sentencing, the district court may make findings of fact under a preponderance-of-the-evidence standard, regardless of whether a jury has previously acquitted a defendant of the same conduct, or the conduct is previously untried." (Internal quotations and citations omitted).

D. Confrontation Rights

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). The defendant argued that he should have been allowed to confront witnesses against him at sentencing. The D.C. Circuit held that the protections of the Sixth Amendment's Confrontation Clause as explained in *Crawford v. Washington*, 541 U.S. 36 (2004), do not apply at sentencing, although any hearsay must still be reliable.

E. Resolution of Disputed Factual Issues

United States v. Blalock, 571 F.3d 1282 (D.C. Cir. 2009). The D.C. Circuit affirmed the district court's sentence for unlawful possession of a firearm by a convicted felon, specifically, its upward adjustment, under §2K2.1(b)(6), for possessing a firearm in connection with possession with intent to distribute marijuana. On the question whether the defendant, high on PCP, could form the requisite specific intent to distribute marijuana, the circuit court concluded that the proper standard of review was for clear error, but found that it was "a closer question" what standard of review applies to the issue of whether the defendant's firearm offense was "in connection with" a drug crime. The appellate court ultimately applied the due deference standard.

> On the one hand, the Eighth Circuit has treated the issue as a factual finding subject to clear error review. On the other hand, when this circuit "has focused on whether particular conduct was sufficient to warrant [an] enhancement, it has largely accorded due deference." Because whether a defendant's conduct meets the "in connection with" requirement seems best described as an application of the Guidelines to the facts, we review that determination under the due deference standard.

(Internal citations omitted.)

United States v. McCants, 434 F.3d 557 (D.C. Cir. 2006). The PSR prepared in the case had several highly contested factual issues, none of which were resolved with specific factual findings either at the sentencing hearing or in a promised, but unwritten, sentencing memorandum. At the close of sentencing, the AUSA asked the court if it adopted the PSR, to which the court replied, "[t]hat is correct." On appeal, the circuit court held that this interchange did not satisfy the requirement in Federal Rule of Criminal Procedure 32(i)(3)(B) that the court resolve any disputed portion of the PSR and remanded for resentencing.

F. Acquitted Conduct

United States v. Jones, 744 F.3d 1362 (D.C. Cir. 2014). A jury found three defendants guilty of distributing crack, but acquitted them of conspiracy to distribute drugs. At sentencing, the district court found that the three had engaged in the charged conspiracy, and sentenced them accordingly. The D.C. Circuit rejected the appellants' claim that sentences for acquitted conduct violated their Sixth Amendment rights to a trial by jury. The court, referencing its "binding precedent," held that this "practice does not violate the Sixth Amendment when the conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime." The court noted that every other circuit court to have addressed this question has reached the same conclusion. Further, the court acknowledged Justice Scalia's concurring opinion in *Rita v. United States*, 551 U.S. 338 (2007), in which he stated that *Rita* did not "rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." But the D.C. Circuit recognized that "[w]hatever the merits of Justice Scalia's argument, it is not the law." In any case, the court emphasized, the precedent of the court is that "judicial fact-finding does not implicate the Sixth Amendment."

United States v. Brown, 516 F.3d 1047 (D.C. Cir. 2008). The defendant was convicted of one count of being a felon-in-possession of a firearm and acquitted of two offenses, 18 U.S.C. § 924(c) and possession with intent to distribute PCP. He argued that the court erred in imposing an upward adjustment based on his acquitted conduct, specifically, for possessing a firearm in connection with another felony offense pursuant to §2K2.1(b)(6). Citing *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006), in which the D.C. Circuit held that "consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes," the appellate court in *Brown* concluded that the district court was authorized to rely on defendant's acquitted conduct because his sentence did not exceed the statutory maximum allowed.

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The appellate court upheld an upward enhancement based on acquitted conduct, finding that it did not violate the defendant's Fifth or Sixth Amendment rights, stating:

> To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence . . . . For those reasons, Congress or the Sentencing Commission certainly could conclude as a policy matter that sentencing courts may not rely on acquitted conduct. But under binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct. That said, even though district judges are not *required* to discount acquitted conduct, the *Booker-Rita-Kimbrough-Gall* line of cases may *allow* district judges to discount acquitted conduct in particular cases — that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate.

United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006). *Booker* does not change the rule that the district court may consider acquitted conduct in calculating the guideline range. However, restitution can be awarded only based on the amount of loss caused by the offense of conviction.

II. Reasonableness Review

A. General Principles

United States v. Hall, 610 F.3d 727 (D.C. Cir. 2010). The defendant was convicted of operating a Ponzi scheme for more than two years and the district court sentenced him to the top of the guidelines range, 188 months. The D.C. Circuit remanded for resentencing, finding that the sentence was procedurally and substantively unreasonable because, among other things, the court failed to adequately explain its loss finding and its ultimate sentence within the range. Regarding the loss calculation, the court stated: "Although the district court is required only to 'make a reasonable estimate,' U.S.S.G. §2B1.1 cmt. n. 3(c), we remand for the court either to explain how it arrived at its estimate or to recalculate the amount of the loss." The district court also failed to "explain why, in view of the factors in 18 U.S.C. § 3553(a), a sentence of 188

months was necessary, much less why the lower sentence that Hall requested would be insufficient."

In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008). *See* Section II(C) (Procedural Reasonableness).

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The court held that the district court did not impermissibly apply a presumption of reasonableness to a within-Guidelines sentence. Citing *Gall*, the D.C. Circuit explained that the district court's "statement that it 'think[s]' the range is 'reasonable' demonstrates the court's independent judgment that a within-Guidelines sentence in this case was reasonable and appropriate."

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). The D.C. Circuit affirmed as reasonable a within-guidelines sentence for conspiracy to commit bribery and fraud. The circuit court stated: "A sentencing court acts unreasonably if it commits legal error in the process of taking the Guidelines or other factors into account, or if it fails to consider them at all. A defendant may also challenge the length of a sentence as unreasonable, although we have held that 'a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness.'" (Citations omitted.) Rejecting the defendant's argument that *Booker* prohibited reliance on facts the judge found by a preponderance of the evidence, the court held that the sentencing court must still "make findings of fact when employing the Sentencing Guidelines in an advisory fashion" and that these facts need not be established beyond a reasonable doubt.

United States v. Edwards, 496 F.3d 677 (D.C. Cir. 2007). A sentence is unreasonable if it "rests on a finding of fact that is clearly erroneous."

United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007). The court remanded for resentencing based on confusion as to which guideline range was used. The court described reasonableness review as follows: "[W]e begin our review by considering whether the sentencing court started its analysis from a properly calculated Guidelines range. If it did, we then review the sentence ultimately imposed 'to ensure that it is reasonable in light of the sentencing factors that Congress specified in 18 U.S.C. § 3553(a).'" Because the court could not tell which guideline range the district court relied on as the starting point, it remanded for resentencing.

United States v. Olivares, 473 F.3d 1224 (D.C. Cir. 2006). The D.C. Circuit stated that reasonableness review "amounts to a two-step process. First, the court determines whether there was legal error," which "encompasses not only incorrect legal interpretations of the Guidelines, but also incorrect applications of the Guidelines to the facts." "Second, in the absence of legal error, the court reviews the overall reasonableness of the district court's sentence 'to ensure that it is reasonable in light of the sentencing factors that Congress specified in [] § 3553(a).'" The defendant argued that the district court erroneously denied him a guideline reduction and a departure based on the fact that he was a deportable alien and that the sentence was substantively unreasonable. The court applied its pre-*Booker* standards to review the departure decision, holding that because the district court was aware of its authority to depart but declined to do so, the matter was not reviewable. This decision, however, did not preclude review of the overall

sentence for reasonableness. On the question of reasonableness, the court indicated that the alleged departure grounds were not sufficient to overcome the presumption of reasonableness adopted in this circuit and affirmed the sentence.

B. Standard of Review

United States. v. Tann, 532 F.3d 868 (D.C. Cir. 2008). Finding that the district court erroneously enhanced the defendant's sentence for abuse of a position of trust, the D.C. Circuit discussed its post-*Booker* standard of review, stating that it continues to apply the due deference standard. It explained: "[W]hen we apply the first step of the two-step process outlined in *Gall* and *Olivares*, we do precisely what we did prior to *Booker* — determine whether the district court correctly calculated the Guidelines range and remand for resentencing if it did not. We therefore see no reason to think *Booker* displaced the congressionally mandated standard of review of a district court's application of the Guidelines to facts." The court also stated that the sentencing court "retains broad discretion to impose a sentence" based on the § 3553(a) factors and, citing *Gall*, that "[t]he advisory Guidelines range is only one such factor."

C. Procedural Reasonableness

United States v. Brinson-Scott, 714 F.3d 616 (D.C. Cir. 2013). The district court sentenced the defendant, convicted of possession of powder cocaine with intent to distribute, to a within range sentence of 140 months. On appeal, the defendant raised a procedural challenge, arguing that the district court failed to make individualized findings to support the sentence and gave no explanation at all for the sentence it imposed. Reviewing for plain error because the defendant had not objected at sentencing, the D.C. Circuit found that the defendant rested his entire argument on one sentence by the district court that, when taken out of context, supported his challenge. However, a reading of the whole record made clear that the district court addressed each of the defendant's arguments at sentencing and explained why the defendant's recalcitrance and recidivism warranted a within-range sentence. The circuit court made clear that, where a district court imposes a within-range sentence, little explanation is required. Moreover, a district court is not required to invoke the § 3553(a) factors specifically; it is enough that the explanation "sound in the terms of § 3553(a), and the court's references manifest an understanding of its statutory responsibility." (Internal quotations omitted).

United States v. Akhigbe, 642 F.3d 1078 (D.C. Cir. 2011). The D.C. Circuit held that the district court plainly committed *Gall*-type procedural error in failing to adequately explain a health care fraud sentence one year above the guidelines range. Both the government and defendant sought a sentence within the guideline range of 33 to 41 months, but the court gave the defendant a 53-month sentence, an upward variance of 12 months. After affirming Akhigbe's conviction, the panel reviewed Akhigbe's appeal for plain error because Akhigbe failed to object below. The D.C. Circuit vacated Akhigbe's sentence and remanded, holding that the lower court "plainly erred in failing to provide an adequate explanation for the unsought above-Guidelines sentence it imposed." In particular, although the bulk of the district court's sentencing discussion related to the severity of Akhigbe's offense, the D.C. Circuit faulted the court for emphasizing the negative consequences of health care fraud and its costs to the system rather than "individualized reasoning as to why the court believed a sentence 12 months above the Guidelines range was appropriate for this particular defendant." For example, the district court

had discussed specific testimony about Akhigbe's offenses but "never explained whether or why this testimony demonstrated that this defendant's fraud was more harmful or egregious than the typical case . . . [or] suggest[ed] that it believed the Guidelines range for health care fraud was too low even in the mine-run case [citing *Kimbrough*]." Moreover, the district court failed to explain how the other factors it mentioned — deterrence and protecting the public — justified the particular sentence, and its written statement of reasons "offer[ed] only vague generalities that fail to discuss meaningfully the particular defendant and his particular crime." The D.C. Circuit concluded: "[U]nder the circumstances of this case, where the district court imposed a sentence that varied significantly from both the advisory Guidelines range and from the sentences the parties sought, the brief and generalized explanation the court provided is plainly inadequate to satisfy section 3553(c)'s requirements."

United States v. Delaney, 651 F.3d 15 (D.C. Cir. 2011). The D.C. Circuit remanded a sentence for drug and weapon offenses, finding that the sentencing court misunderstood its sentencing authority to consider certain proffered facts related to the defendant's history and characteristics. The D.C. Circuit explained that "[s]ection 3553(a) requires courts to take into account relevant facts related to a defendant's history and characteristics," including the defendant's criminal history, age, efforts at rehabilitation, and any efforts to cooperate with the government. Noting 18 U.S.C. § 3661's requirement that "[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," the circuit court concluded that the record left it with doubt as to "whether the court considered [all] the . . . sentencing factors in § 3553(a)[.]"

In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008). The D.C. Circuit concluded that the sentencing court's failure to provide a statement of reasons was plain error. It stated:

> The absence of a statement of reasons is prejudicial in itself because it precludes appellate review of the substantive reasonableness of the sentence, thus "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings." A district judge "must adequately explain the chosen sentence . . . to promote the perception of fair sentencing." It is important not only for the defendant but also for "the public to learn why the defendant received a particular sentence." Arbitrary decisionmaking undermines "understanding of, trust in, and respect for the court and its proceedings." We assume Appellant's sentence of eighteen months was not randomly selected, but the absence of any explanation makes it seem so. Thus, a failure to comply with § 3553(c) causes grave institutional harm, as well as simultaneously depriving the defendant of the benefit of our review.

(Internal citations omitted).

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). In imposing sentence, "[t]he district court is not required to refer specifically 'to *each* factor listed in § 3553(a),' nor is it required 'to explain sua sponte why it did not find [a particular] factor relevant to its discretionary decision' if 'a defendant has not asserted the import of [that] factor.'" (quoting

United States v. Simpson, 430 F.3d 1177 (D.C. Cir. 2005)). *See also United States v. Staton*, 626 F.3d 584 (D.C. Cir. 2010).

United States v. Tabron, 437 F.3d 63 (D.C. Cir. 2006). The district court erroneously enhanced the defendant's sentence based on weapons possessed by codefendants without making explicit findings as to the scope of the conspiratorial agreement. A district court must "make explicit findings as to the scope of a defendant's conspiratorial agreement before holding him responsible for a co-conspirator's reasonably foreseeable acts."

D. Substantive Reasonableness

United States v. Warren, 700 F.3d 528 (D.C. Cir. 2012). The D.C. Circuit affirmed a defendant's above guidelines sentence of 65 months. The defendant claimed, *inter alia*, that his Post-Traumatic Stress Disorder (PTSD), depression, and substance abuse issues made it substantively unreasonable to sentence him to more than a brief period of incarceration, followed by treatment at a private facility. The circuit court explained that the defendant's mental health and substantive abuse problems were "of course" relevant to sentencing, and a PTSD diagnosis "may" mitigate criminal conduct that occurs spontaneously or unexpectedly, but in this case the defendant was convicted of conduct, like drugging his victims, that was "planned and deliberate." Moreover, while 18 U.S.C. § 3553(a)(2) requires the district court to consider the need for the sentence imposed to provide the defendant with needed medical care, the district court had in fact considered that factor, first recommending that he be placed in a facility recommended by his psychiatrist and then agreeing to change the recommendation to another facility at the request of his counsel.

United States v. Russell, 600 F.3d 631 (D.C. Cir. 2010). The court held that a 30-year term of supervised release imposed for one count of travel with intent to engage in illicit sexual conduct, which was within the sentencing guidelines range, was substantively reasonable. However, it found substantively unreasonable a condition of supervised release which prohibited the defendant from possessing or using a computer for any reason. Although the defendant and the government agreed that the condition was substantively unreasonable, the court conducted an independent review. The unqualified prohibition on the defendant, who had been employed as an applied systems engineer, was scheduled to last 30 years and was not subject to modification by the probation office. The court stated:

> Because the computer restriction prevents Russell from continuing in a field in which he has decades of accumulated academic and professional experience, it directly conflicts with the rehabilitative goal of sentencing. It also, of course, places a substantial burden on Russell's liberty, which under 18 U.S.C. § 3583(d)(2) must be no greater than reasonably necessary to achieve the goals of deterrence as well as rehabilitation.

The court vacated the computer restriction and remanded for modifications to it.

United States v. Gardellini, 545 F.3d 1089 (D.C. Cir. 2008). The D.C. Circuit affirmed a sentence of probation for filing a false tax return, rejecting the government's argument that the

downward variance was substantively unreasonable under *Booker* and *Gall*. The majority opinion explained: "The central teaching of *Gall* is that the Guidelines are truly *advisory.* Therefore, different district courts can and will sentence differently — differently from the Sentencing Guidelines range, differently from the sentence an appellate court might have imposed, and differently from how other district courts might have sentenced that defendant." It also stated:

> To be sure, it may be considered anomalous that the Supreme Court's chosen remedy for a Guidelines system that gave district judges too much power to find key sentencing facts was to give district judges *even more* discretion and authority. But that's water over the dam. The bottom line is this: District judges now have far more substantive discretion in sentencing than they had pre-*Booker*. Therefore, whether the defendant receives a sentence within, above, or below the Guidelines range, both the Government and defense counsel would be well-advised to understand that it will be an unusual case where an appeals court overturns a sentence as substantively unreasonable — as the post-*Rita*, post-*Gall* case law in the courts of appeals shows.

D. Plain Error/Harmless Error

United States v. Bigley, 786 F.3d 11 (D.C. Cir. 2015). A district court's failure to consider a nonfrivolous mitigation argument at sentencing constituted plain error.

United States v. Wyche, 741 F.3d 1284 (D.C. Cir. 2014). In 1989, Richard Smith was sentenced to life plus thirty years for his participation in a drug conspiracy. The district court suggested, but did not specifically find, that about four kilos of crack per month were distributed during Smith's participation in the conspiracy. The district court calculated his base offense level at 36 (500 grams were needed to trigger this highest offense level). Following Amendment 706, the district court in 2008 resentenced Smith, setting a base offense level at 34, which corresponded to a range of 500g to 1.5 kilos of distribution. Following Amendment 750, the district court in 2011 denied Smith's motion for resentencing. The D.C. Circuit affirmed, concluding that while the 2011 district court decision did not credit the 2008 district court's range of 500g to 1.5 kilos, the error was harmless because the original sentencing court suggested that Smith was responsible for distributing four kilos of crack per month. Judge Srinivasan dissented from this part of the D.C. Circuit's ruling, arguing that remand for resentencing is appropriate, as the 2011 district court did not consider the implications of the range established by the 2008 district court.

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). "The plain error test does apply to objections that should have been raised at sentencing. Reasonableness, however, is the standard of *appellate* review, not an objection that must be raised upon the pronouncement of a sentence."

United States v. Henry, 472 F.3d 910 (D.C. Cir. 2007). Defendants were sentenced at the top end of the guideline range pre-*Booker*. On appeal, the government argued that mandatory application of the guidelines was harmless because the district court had discretion to impose a

lower sentence but chose not to do so. The D.C. Circuit rejected this argument and remanded for resentencing: "[A] sentence at the top of the Guidelines range is not, in itself, enough to establish that a *Booker* error was harmless beyond a reasonable doubt."

United States v. Watson, 476 F.3d 1020 (D.C. Cir. 2007). Following a remand after *Booker*, the district court imposed a sentence of 108 months for felon in possession of a firearm — the same sentence it had originally imposed — based on its belief that the guidelines recommended a sentence between 92 and 115 months and that the statutory maximum was 240 months. On appeal, the government conceded that the statutory maximum was actually 120 months. Despite a presumption of reasonableness, the D.C. Circuit held it was plain error to conclude the statutory maximum was 240 months and remanded for resentencing, reasoning that "the district court's erroneous premise gave it the mistaken impression it was being lenient and the error thus infected [the defendant's] sentence."

United States v. Gillespie, 436 F.3d 272 (D.C. Cir. 2006). "[A]ny error in [the defendant's] mandatory Guidelines sentence was rendered harmless where . . . the district court decided that under an advisory Guidelines scheme it would have sentenced [the defendant] to an identical 'alternative sentence.'"

United States v. Ayers, 428 F.3d 312 (D.C. Cir. 2005). Mandatory application of the guidelines was not harmless simply because the district court imposed an identical alternative sentence where (1) the record left doubt as to whether the court considered the other sentencing factors in § 3553(a), and (2) the district court denied the defendant's request to supplement the record with mitigating evidence.

United States v. Gomez, 431 F.3d 818 (D.C. Cir. 2005). The D.C. Circuit discussed its approach to claims of *Booker* error that were raised for the first time on appeal. "[I]n a *Booker* plain-error case: (1) if the record establishes a reasonable likelihood that the sentence would have been lower, we remand for full resentencing; (2) if the record makes us confident that the sentence would not have been lower, we affirm; and (3) if neither of the above, we grant a limited remand." The court concluded that the appellant demonstrated plain error where the "record as a whole — particularly the district judge's imposition of minimum sentences . . . his references to the Guidelines' mandatory constraints (particularly as bars to downward departures), and his focus on the defendant's hardship to the near exclusion of her culpability — establishes a reasonable likelihood that he would have imposed a lower sentence had he known the Guidelines were not mandatory."

United States v. Simpson, 430 F.3d 1177 (D.C. Cir. 2005). Any error in imposing sentence under mandatory guidelines was rendered harmless by an identical alternative sentence based on methodology that "was consistent with the Supreme Court's subsequent decision in *Booker*." *See also United States v. Godines*, 433 F.3d 68 (D.C. Cir. 2006) (same).

E. Waiver of Right to Appeal

United States v. Laslie, 716 F.3d 612 (D.C. Cir. 2013). The defendant pleaded guilty to crossing state lines to have sex with the minor. On appeal, he argued that the district court erred

in applying a sentencing enhancement based on his use of a computer to facilitate his crime. The D.C. Circuit concluded that, because he stipulated to this enhancement in his plea agreement and raised no objections to its inclusion in the district court's calculation of his sentence, the defendant waived this challenge.

III. Crack Cases

United States v. Berry, 618 F.3d 13 (D.C. Cir. 2010). The court affirmed the denial of a sentence reduction based on Amendment 706. The defendant pled guilty to possession with intent to distribute more than 50 grams of crack. The parties and the court agreed that the defendant was a career offender, and the Probation Office determined that he was subject to an advisory guideline range of 262 to 327 months. In defendant's 11(c)(1)(c) plea agreement, however, the parties agreed to a sentence of 168 months, without explanation. In moving for a sentence reduction under Amendment 706, the defendant argued that the 168 months reflected an agreement that his sentence be at the low end of the "non-career" offender range. Relying on *Tepper*, *infra.*,the court found that "crack-cocaine offenders sentenced to a term of imprisonment within a career-offender range cannot rely on Amendment 706 to obtain a sentence reduction under § 3582(c)(2)." The court focused on the requirement in § 3582(c)(2) "that any sentence reduction must be 'consistent with applicable policy statements issued by the Sentencing Commission.'" Relying in part on the Supreme Court's decision in *Dillon*, the court found that the policy statement in §1B1.10 prohibited a sentence reduction in this case. Specifically, §1B1.10(a)(2)(B) prohibits modifications if a retroactive guideline amendment "does not have the effect of lowering the defendant's applicable guideline range." The court found that the "applicable guideline range" was the career offender range of 262-327 months, which was the range produced from a correct application of the guidelines, rather than the alternative "non-career" range, which was determined by the parties' negotiation. "Because Amendment 706 does not lower his applicable guideline range, Berry is ineligible for a sentence reduction."

United States v. Tepper, 616 F.3d 583 (D.C. Cir. 2010). The court held that the defendant was not entitled to a sentence reduction based on the amendment lowering the crack guidelines because the defendant was sentenced based on the career offender sentencing range. The defendant, who pled guilty to possession with intent to distribute 50 grams or more of crack, filed a motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2), which authorizes a court to reduce a term of imprisonment "in the case of a defendant who has been sentenced . . . based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The court stated:

> [W]e conclude that § 3582(c)(2) does not authorize a district court to reduce a career offender's term of imprisonment based on the Sentencing Commission's amendments to the crack cocaine guidelines. In so holding, we join every court of appeals that has addressed the question. [Citing decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.]

United States v. Pickett, 475 F.3d 1347 (D.C. Cir. 2007). *See* Section I(B) (Presumption of Reasonableness).

Part B General Application Principles

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

United States v. Brown, 516 F.3d 1047 (D.C. Cir. 2008). The defendant was convicted of one count of being a felon-in-possession of a firearm and acquitted of two offenses, 18 U.S.C. § 924(c) and possession with intent to distribute PCP. He argued that the court erred in imposing an upward adjustment based on his acquitted conduct, specifically, for possessing a firearm in connection with another felony offense. The court concluded that the district court was authorized to rely on defendant's acquitted conduct because his sentence did not exceed the statutory maximum allowed.

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The court upheld an upward enhancement based on acquitted conduct, finding that it did not violate the defendant's Fifth or Sixth Amendment rights.

United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007). It was no error for the district court to consider counts that had the jury deadlocked: "If it is permissible for a sentencing court to build a sentence, at least in part, on conduct for which a defendant is charged but acquitted, we find no error in relying on conduct for which [the defendant] was charged but on which the jury deadlocked, provided, as here, the court determined by a preponderance of the evidence that he engaged in the conduct."

United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006). *Booker* does not change the rule that the district court may consider acquitted conduct in calculating the guideline range. However, restitution could be awarded only based on the amount of loss caused by the offense of conviction.

United States v. Mellen, 393 F.3d 175 (D.C. Cir. 2004). The district court erred in holding the defendant accountable for the total value of the stolen property that was brought into the house by the defendant's wife. For relevant conduct purposes, the mere transitory presence of stolen property in the defendant's home is insufficient to establish that the defendant agreed to participate in the conspiracy where evidence established that defendant's wife tried to keep him from discovering the stolen goods.

United States v. Vizcaino, 202 F.3d 345 (D.C. Cir. 2000). The D.C. Circuit held that, because the defendant had failed to request a downward departure at sentencing, he did not preserve the issue for review on appeal, and the district court did not commit plain error by failing to grant the departure *sua sponte*. The defendant had been indicted for possession with intent to distribute both crack and powder cocaine. He pled guilty to the powder charge and took responsibility for some of the crack in exchange for the government dropping the crack charge. The crack was treated as relevant conduct pursuant to §1B1.3(a)(2) and increased the defendant's sentencing range from 27-33 months to 121-151 months. At sentencing, the defendant explained that he had entered into the plea agreement to avoid the mandatory minimum associated with

crack. The district court responded that it was bound by the guidelines and had no grounds on which to depart. On appeal, the defendant for the first time raised the argument that he was entitled to a downward departure under §5K2.0 because the consideration of relevant conduct drastically distorted his sentence. Because he had not raised the argument before the appeal, the D.C. Circuit held that the issue had not been preserved for appeal. Thus, the court reviewed the district court's failure to depart *sua sponte* for plain error. Although other circuits had held that drastic distortion of a sentence due to inclusion of relevant conduct was a grounds for departure under §5K2.0, the D.C. Circuit and the Supreme Court had not ruled on the issue. The D.C. Circuit affirmed the sentence, holding that the district court's failure to depart could not constitute plain error.

United States v. Williams, 216 F.3d 1099 (D.C. Cir. 2000). The defendant motor vehicle inspectors were convicted of receipt of bribes for a scheme to sell inspection stickers to cab drivers. Instead of making a particularized finding to determine when each codefendant actually joined the conspiracy, the district court assumed that each defendant joined as soon as he began working at the inspection station. Thus, the district court held each defendant responsible for all of the illegal proceeds earned the day after they began working at the inspection station despite the fact that there was no evidence that either joined until later in the conspiracy. The D.C. Circuit held that this calculation constituted clear error and recalculated the bribe amounts based on the years each codefendant had been involved. One defendant's bribe amount was reduced by an amount that would not affect his sentence, and the court held that the error as to his sentence was harmless. The other defendant would have received a reduction in his amount by at least $24,000. Because this amount could affect his sentence, the court remanded for further proceedings and resentencing.

United States v. Childress, 58 F.3d 693 (D.C. Cir. 1995). Seven defendants convicted of a drug conspiracy appealed their sentences on the ground that the district court erroneously attributed 50 kilograms of cocaine to each appellant on the basis of its general findings that the conspiracy involved more than 50 kilograms of cocaine. The D.C. Circuit held that the district court erred in failing to make individualized findings about the scope of each appellant's conspiratorial agreement and the evidence that led it to conclude in each of their cases that the 50 kilos distributed were reasonably foreseeable. The court instructed that, in applying §1B1.3 and the theory of co-conspirator liability, a district court must make particularized findings that (1) defendant's conduct was within the scope of that defendant's conspiratorial agreement, and (2) it was reasonably foreseeable. With respect to firearms, the court further explained that "findings that a defendant handled . . . extensive quantities of drugs in the course of a conspiracy are adequate to support the conclusion that the use of guns by co-conspirators was reasonably foreseeable to him."

United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995). The district court properly included conduct from two dismissed counts as relevant conduct for sentencing, and erred in including the conduct from a third dismissed count. The defendant pled guilty to one of four counts of fraud, and the government dismissed the other three counts. Two of the dismissed counts involved counterfeit checks, and were properly included by the district court as relevant conduct at sentencing. The other dismissed count involved the defendant's fraudulent use of a credit card. The circuit court noted that conduct from dismissed counts which is part of "the

same course of conduct" may be considered when determining a guideline range for the offense of conviction. In determining what constitutes "the same course of conduct," the court must consider several factors including "the degree of similarity of the offenses and the time interval between the offenses." Where the defendant's offense of conviction and the acts offered as relevant conduct can be "separately identified" and are of a different "nature," the conduct will not be considered as part of the same course of conduct. The government must demonstrate a connection between the conduct and the offense of conviction; not between the conduct and other relevant conduct. Because the D.C. Circuit found that the government failed to demonstrate a connection between the credit card fraud and the offense of conviction, the sentence was vacated and the case was remanded.

United States v. Foster, 19 F.3d 1452 (D.C. Cir. 1994). The district court properly enhanced the defendant's base offense level for possession of a dangerous weapon pursuant to §2D1.8(a)(1). The defendant challenged the inclusion of the weapon possession as relevant conduct because the district court granted his motion for judgment of acquittal on the 18 U.S.C. § 924(c)(1) count. The D.C. Circuit joined ten other circuits in concluding that acquitted conduct may be used to determine sentencing enhancements.

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

United States v. Epps, 707 F.3d 337 (D.C. Cir. 2013). The D.C. Circuit concluded that there is no controlling opinion in *Freeman v. United States*, 131 S. Ct. 2685 (2011). The D.C. Circuit applied the Supreme Court's decision in *Marks v. United* States, 430 U.S. 188 (1977), which instructs that, when there is a fragmented opinion by the Supreme Court and "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground." In *Freeman*, the plurality opinion would allow defendants sentenced following a Rule 11(c)(1)(C) agreement to apply for relief under 18 U.S.C. § 3582(c)(2), because the district court judge's decision to accept the plea and recommended sentence is likely to be based on the guidelines, whereas Justice Sotomayor's concurrence would restrict relief under § 3582(c)(2) only to cases where the guidelines were explicitly the basis of a Rule 11(c)(1)(C) plea agreement sentence. The D.C. Circuit concluded that there is no controlling opinion in *Freeman* because "the plurality and concurring opinions do not share common reasoning whereby one analysis is a logical subset of the other." (Internal quotations and citations omitted). Instead, the D.C. Circuit considered which, if any, of the rationales in *Freeman* are persuasive and chose to apply the plurality opinion, thereby allowing the defendant in this case to qualify for § 3582(c)(2) relief.

United States v. Duvall, 705 F.3d 479 (D.C. Cir. 2013). The defendant pleaded guilty pursuant to a Fed. R. Crim. P. 11(c)(1)(C) agreement, which listed the agreed-upon sentence as 15 years of imprisonment for conspiracy to distribute crack cocaine. The district court sentenced the defendant to 14 years of imprisonment based on the plea agreement. Following the Sentencing Commission's change to the crack guidelines that was then made retroactive, *see* USSG App. C, amend. 750 & 759 (2011), the defendant moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). The district court denied the motion, finding that the defendant's sentence was based on the plea agreement, not on the reduced guideline range. On appeal, the

D.C. Circuit affirmed. Because both parties agreed that Justice Sotomayor's concurring opinion in *Freeman v. United States*, 131 S. Ct. 2685 (2011), controlled the analysis, the D.C. Circuit did not further address this issue. Applying Justice Sotomayor's concurring opinion, the circuit court explained that a Rule 11(c)(1)(C) agreement may be "based on" a guidelines range in two possible scenarios: first, where the agreement explicitly provides for the defendant to be sentenced within a particular guidelines range, without providing for a specific term of imprisonment; and second, where the agreement makes clear that the basis for the specified term of imprisonment was the guidelines range. While recognizing that there may be "some close calls at the margins" when applying Justice Sotomayor's opinion, the D.C. Circuit held that this case was not a close call, because the plea agreement neither expressly specified the guidelines range nor expressly specified the offense level or criminal history category. The D.C. Circuit denied the petition for en banc review. 740 F.3d. 604 (D.C. Cir. 2013). Three judges issued separate statements concurring in the denial of the petition. Judge Kavanaugh emphasized that "Justice Sotomayor's opinion resolved the case on the narrowest grounds and is therefore the binding opinion in *Freeman.*" Judge Rogers disagreed, stating that "the only controlling holding evident from *Freeman* is that courts cannot categorically bar defendants sentenced pursuant to Rule 11(c)(1)(C) plea agreements from eligibility for a sentencing reduction under [18 U.S.C.] § 3582(c)(2)." Judge Williams similarly expressed skepticism as to whether Justice Sotomayor's concurrence may be interpreted as the most narrow and therefore controlling opinion that is binding on the D.C. Circuit.

United States v. Gatling, 687 F.3d 382 (D.C. Cir. 2012). After the defendant was sentenced, the Commission promulgated Amendment 591 to provide that the selection of a defendant's offense conduct guideline must be based only on convicted conduct. Amendment 591 was also added to the list of amendments at §1B1.10 that may be the basis for a court to reduce a defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). The defendant moved to modify his sentence, arguing that the district court based his offense conduct guideline on attempted murder, of which he was acquitted, rather than felon in possession of a firearm, of which he was convicted. The D.C. Circuit affirmed the district court's refusal to grant a hearing under § 3582(c) to see if the defendant's sentence should be reduced. The sentencing transcript and presentence report made clear that the district court started with the felon in possession guideline at §2K2.1, but then turned to §2X1.1 on the basis of the provision at §2K2.1(c)(1) that the court should apply §2X1.1 "if the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense[.]" Section 2X1.1(c)(1), in turn, instructed the court that "[w]hen an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section," the court was to apply that guideline section; the court therefore turned to the guideline for attempted murder, §2A2.1, and ultimately entered a sentence within its suggested range. "[H]owever the sentencing court may have determined [the defendant's] sentence, it started at §2K2.1."

United States v. Berry, 618 F.3d 13 (D.C. Cir. 2010) (finding defendant not eligible for a reduction because Amendment 706 did not lower his "applicable guideline range"). *See supra* Section III.

United States v. Tepper, 616 F.3d 583 (D.C. Cir. 2010) (holding that defendant was not entitled to a reduction based on Amendment 706 lowering the crack guidelines because defendant was sentenced based on career offender sentencing range). *See supra* Section III.

United States v. Jones, 567 F.3d 712 (D.C. Cir. 2009). After the defendant was sentenced, the Commission lowered the guideline ranges for certain categories of offenses involving crack and permitted district courts to apply the lower ranges retroactively. The defendant asked the court of appeals to remand his case to the district court so he could request a lower sentence. The government contended that the proper procedural mechanism would be to affirm and leave it to the defendant to file a petition with the district court pursuant to 18 U.S.C. § 3582(c)(2). The court rejected the government's argument, stating:

> Nearly all courts of appeals that have considered the issue have decided to remand to save the defendant the "additional step" of petitioning the district court for a sentencing modification. . . . We join the majority of our sister circuits and remand to give Jones an opportunity to request a reduced sentence. This course has a small advantage in terms of administrative efficiency, as it will put the issue in front of the sentencing court most directly and expeditiously. Whether to grant a reduction remains within the discretion of the district court.

(Citations and footnote omitted.)

United States v. Lafayette, 585 F.3d 435 (D.C. Cir. 2009). The court denied the defendant's motion to reduce his crack sentence based on the guidelines amendment lowering base offense levels for crack offenses. The court found that, although the district court did not address every § 3553(a) factor, it reasonably exercised its discretion and based its decision on a number of factors. Specifically, the district court considered: the severity of the crimes, the lack of acceptance of responsibility, several incidents in prison involving violence and attempted importing of narcotics, and evidence of rehabilitation in prison. The district court then concluded that those factors did not overcome the potential danger to the community if the defendant was released early.

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

United States v. Haipe, 769 F.3d 1189 (D.C. Cir. 2014). Invoking §1B1.11's language that the court "shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes," the defendant argued that a guideline amendment that came into effect after his offense was "clarifying" and therefore should have been considered by the district court. Concluding that the amendment was "substantive" and not "clarifying" in nature, the D.C. Circuit rejected the defendant's argument.

United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008). The D.C. Circuit remanded the case, finding that defendant's sentence violated the *ex post facto* clause because the amended guidelines created a substantial risk that the defendant's sentence was more severe than the sentence under the guidelines in effect when the crime was committed. The D.C. Circuit stated that the existence of discretion after *Booker* does not foreclose an *ex post facto* claim,

disagreeing with the Seventh Circuit in *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), *abrogated by Peugh v. United States*, 133 S. Ct. 2072 (2013). One judge dissented, based on how long the conspiracy continued and its end date.

United States v. Andrews, 532 F.3d 900 (D.C. Cir. 2008). The D.C. Circuit held that it was not plainly erroneous for the district court to use the *Guidelines Manual* in effect at the time of sentencing rather that the version in effect at the time of the crime. The D.C. Circuit rejected the defendant's claim than the *ex post facto* clause and relevant guideline provision were violated when the district court applied the later manual, which yielded a higher sentence. The court explained that it was not clear when the conspiracy had ended. In addition, it emphasized that neither the D.C. Circuit nor the Supreme Court has "yet determined whether, after *Booker*, application of a later. . . Manual that yields a higher sentence continues to raise an *ex post facto* problem." The court found that it did not need to decide the issue because, even if the district court erred, there was no "absolutely clear norm" that the district court failed to follow.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Yelverton, 197 F.3d 531 (D.C. Cir. 1999). The D.C. Circuit held that the district court did not err by applying an enhancement under §2A4.1(b)(3) for use of a firearm, where the use of the firearm was portrayed in a photo and accompanied by threats of further violence to kidnap the victim's mother to obtain ransom. The guideline definition of a gun being "otherwise used" under §2A4.1 did not amount to discharging but was more than brandishing. The defendant argued that for the enhancement to apply, the gun must be used on the same victim that is being coerced into acting and that showing the photo to the mother amounted only to "brandishing." The court noted that virtually all of the circuits have held that where a weapon and threats are used to engender fear and facilitate the commission of a crime, the enhancement is warranted even if the target of the threat and the person forced into compliance are not the same. In this case, the gun and the threats "were directed at two different people in two different locations at two different times." Because the defendant explicitly threatened that the gun would be used to harm her son if she did not comply, the court upheld the enhancement.

Part B Basic Economic Offenses

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

United States v. McCants, 554 F.3d 155 (D.C. Cir. 2009). The defendant acquired credit history and personal information about real victims that he used to make false identification documents that other coconspirators then used to take out loans in the victims' names. McCants pled guilty to possession of false document-making implements in violation of 18 U.S.C. § 1028(a)(5) and was sentenced under §2B1.1. On appeal, the court considered whether he

should be held accountable for the loans taken out by others and whether he used sophisticated means. On the first point, the Court held that the loss from the bank fraud was not relevant conduct as to McCants because the government had not established the temporal component of §1B1.3. While McCants had undoubtedly possessed the tools used to create the false documents that were used in the bank fraud, "he pleaded guilty to unlawful possession on only three discrete days, and the government made no attempt to show he aided the bank fraud on those days, in the course of preparing for his unlawful possession, or in an attempt to conceal his crime." On the second point, the court affirmed an enhancement for sophisticated means where McCants "committed his offense in multiple states and kept some of his false documents and device-making implements hidden in storage units rented under an alias. He also admits to using an allegedly legitimate business to conceal his offense from law enforcement."

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. Edwards, 496 F.3d 677 (D.C. Cir. 2007). Defendant was a D.C. asbestos inspector who solicited a bribe for a contract. The city ultimately authorized the contractor to implement its plan without paying the bribe, which required a $10,000 payment to save $100,000 on the contract. Under §2C1.1, the "value of . . . the benefit . . . to be received in return for the [bribe]" was the basis for an enhancement. The defendant argued that he received no benefit from the bribe but the court disagreed, reasoning that defendant would not have approved the cheaper plan without the bribe, so the value of the benefit was $100,000.

Part D Offenses Involving Drugs

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

Drug Quantity (§2D1.1(a)(5))

United States v. Carter, 449 F.3d 1287 (D.C. Cir. 2006). "[I]n determining the quantity of drugs attributable to a defendant, the sentencing judge must point to evidence sufficient to support its findings." The D.C. Circuit remanded where the district court enhanced the defendant's sentence based on drug quantities sold by other individuals without first finding that those other individuals were acting in furtherance of a conspiracy with the defendant. The district court also improperly applied an enhancement for leader/organizer without making findings as to the defendant's control or authority over his associates.

United States v. Eli, 379 F.3d 1016 (D.C. Cir. 2004). The district court properly found that the substance distributed by the defendant was crack cocaine, even though the drugs were relatively impure compared to typical crack cocaine and contained substances not usually found

in crack cocaine. The drugs were rock-like and smokable, and it was undisputed that the drugs tested positive for cocaine base.

United States v. Goodwin, 317 F.3d 293 (D.C. Cir. 2003). The defendant pled guilty to possession with intent to distribute 500 grams or more of cocaine after buying cocaine from DEA agents. At sentencing, the DEA agent testified that the price of cocaine was more than $26,000/ kilo and that the price agreed to by the defendant, $20,000/kilo, reflected a negotiated bulk discount. On appeal, the defendant argued that the district court erred because the agent set the price artificially low and triggered the court's power to depart pursuant to Application Note 14 of §2D1.1, which allows for a downward departure in a reverse sting if "the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent . . . ." The D.C. Circuit noted three ambiguities with the Note. First, it seemed "to overlook the conventional notion of price elasticity–the effect on the quantity that a buyer, even one with ample resources, would be willing to buy. . . . Second, the Note's focus on how much a buyer's 'available resources' would allow him to purchase could be read to skew the role of [a credit transaction, which] would allow a buyer to purchase more drugs than if required to pay cash. . . . [Finally], the Note sa[id] nothing explicit on how a court [wa]s to determine whether a purchase increment induced by discount pricing [wa]s 'significant.'" The court found no clear error in the district court's conclusion that the defendant failed to prove that the agents set a price that was substantially below the market value of the drugs.

United States v. Hinds, 329 F.3d 184 (D.C. Cir. 2003). The defendant was convicted of selling cocaine to an undercover police officer on three occasions. The D.C. Circuit affirmed the sentence, rejecting the defendant's argument that the district court erred because it did not exclude 60.3 grams of crack from the relevant conduct used to calculate his sentence under Application Note 12 of §2D1.1. In order to show that the defendant should have been sentenced pursuant to Application Note 12, the D.C. Circuit stated, the defendant had to establish that he "did not intend to provide" or "was not reasonably capable of providing" the agreed-upon quantity of the controlled substance. The D.C. Circuit rejected the defendant's argument that, "but for the request and assistance of the government and its informant, he would have sold powder rather than crack and hence should be subject to the less stringent [powder guidelines]." Accordingly, it affirmed the sentence.

United States v. Young, 247 F.3d 1247 (D.C. Cir. 2001). The D.C. Circuit upheld a sentence imposed in 1991 for conspiracy to manufacture and distribute PCP. In 1998, the defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), which permits a court to reduce a previously imposed sentence if the sentence has subsequently been lowered by the Sentencing Commission. The defendant argued for a reduction based on Amendment 484, which altered Application Note 1 to §2D1.1 (effective Nov. 1, 1993). The defendant's motion was denied because the defendant was not sentenced under Application Note 1 but under the then-current Application Note 12, which applied when the quantity of drugs seized does not reflect the seriousness of the offense. The court held that the defendant was sentenced correctly under Application Note 12, considering his capacity to produce pure PCP in addition to the PCP in his

possession, and that Amendment 484 would not affect the calculation because a precursor chemical would ordinarily need to be separated out prior to using the controlled substance.

Dangerous Weapons Enhancement (§2D1.1(b)(1))

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2000). The defendant was convicted of conspiracy and possession with intent to distribute drugs. On appeal, the defendant challenged a 2-level enhancement under §2D1.1(b)(1) for possession of a dangerous weapon during the commission of a drug offense. The district court found that a loaded firearm recovered from the getaway vehicle had been possessed by a co-conspirator during the drug transaction. The court held that application of the enhancement to the defendant was not clear error because it was foreseeable that the co-conspirator would be carrying a firearm during a large scale drug transaction.

Safety Valve Relief (18 U.S.C. § 3553(f))

United States v. Martinez-Cruz, 736 F.3d 999 (D.C. Cir. 2013). The defendant pled guilty to conspiracy to distribute methamphetamine and was deemed ineligible by the district court for the 18 U.S.C. § 3553(f) "safety valve" solely because the defendant's criminal history score was three points due to a prior DUI conviction, and § 3553(f) is available only if a defendant has a criminal history score of no more than one point. On appeal, the defendant collaterally attacked the prior conviction, claiming that "at the time of his plea to the DUI charge he was not properly informed of his right to counsel, and thus did not validly waive that right, so that the DUI conviction was in violation of the Constitution." The D.C. Circuit held that, in consideration of the defendant's rights under the Due Process Clause, the district court improperly placed on the defendant the burden of persuasion in challenging the validity of the prior plea. Accordingly, the court vacated the sentence and remanded the case for resentencing, instructing that the defendant must bear only the burden of production as to this validity of the prior plea. Judge Kavanaugh dissented.

United States v. Rodriguez, 676 F.3d 183 (D.C. Cir. 2012). The court remanded for resentencing because it found defendant's counsel ineffective for failing to re-request safety valve relief. Despite defendant failing to initially meet 18 U.S.C. § 3553(f)'s requirements by continually refusing to provide truthful information to the government and lying under oath at an evidentiary hearing, defendant eventually "came clean about all aspects of the [drug] transaction" at issue. The court held that "[t]he fact that [the defendant] waited 'until the last minute' to provide the information or that he was 'tardy' in doing so does not preclude him from obtaining safety-valve relief." Thus, defendant's counsel provided ineffective assistance by failing to reassert his client's right to safety valve relief just prior to sentencing. Although it was the defendant's burden to establish eligibility under § 3553(f), once he did so, the district court had no discretion to withhold application of the safety valve.

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

§2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

United States v. Long, 328 F.3d 655 (D.C. Cir. 2003). Sentencing the defendant for four counts of interstate transportation of a minor to engage in criminal sexual activity, and two counts of possession of visual depictions of minors engaged in sexually explicit conduct, the district court applied the cross reference in §2G1.1 and treated §2G2.1 as controlling.[1] On appeal, the defendant argued that the 8-level increase in offense level caused by the cross-reference required clear and convincing proof to show that his offenses included conduct that had as its purpose the production of sexually explicit depictions of the minors. The D.C. Circuit stated that the Supreme Court has noted a divergence of opinion among the circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. *See United States v. Watts*, 519 U.S. 148 (1997). The D.C. Circuit stated that it had noted the split among the circuits on this issue but had declined to require more than the preponderance standard at sentencing. *See United States v. Graham*, 317 F.3d 262 (D.C. Cir. 2003); *United States v. Jackson*, 161 F.3d 24 (D.C. Cir. 1998). Accordingly, the district court did not err by failing to treat the defendant's case as presenting "extraordinary circumstances" that required a heightened standard of proof.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release[2]

United States v. Samuel, 296 F.3d 1169 (D.C. Cir. 2002). The defendant pled guilty to attempting to sell crack and, while on release pending sentencing, was arrested on another narcotics charge. The court applied a §2J1.7 enhancement, and the defendant objected on the ground that it was barred by *Apprendi*, arguing that a court could not apply the enhancement without first finding that the defendant violated 18 U.S.C. § 3147. The D.C. Circuit found the district court merely sentenced him considering the fact that he committed an offense while on release, just as it would have considered any other specific offense characteristic. The court noted that the Sentencing Commission treated § 3147 as an enhancement provision, rather than an offense, and explained that §2J1.7 merely provided a specific offense characteristic to increase the offense level for the offense committed on release. It also stated the Sentencing Commission's interpretation of its own guideline was binding on the court, unless that interpretation violated the Constitution or a federal statute, or was inconsistent with or a plainly erroneous reading of the guideline. Finally, the court noted that, contrary to the defendant's contention, the district court's application of §2J1.7 neither increased his sentence above the statutory maximum for the drug offenses to which he pled guilty, nor exposed him to the possibility of such an increase. Consequently, the impact of §2J1.7 was limited to determining

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[1] Cross-reference deleted effective November 1, 2004. *See* USSG App. C, amend. 664 (effective Nov. 1, 2004).

[2] Redesignated as §3C1.3. *See* USSG App. C, amend. 684 (effective Nov. 1, 2006).

where, within that statutory maximum, the defendant should be sentenced. Accordingly, the D.C. Circuit concluded that there was no *Apprendi* error. Even if the enhancement were in error, it would at most be harmless error because the defendant's sentence fell below the statutory maximum, and the defendant did not and could not contest the fact that he was on release at the time he committed his second offense.

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. Blalock, 571 F.3d 1282 (D.C. Cir. 2009). The court affirmed an upward adjustment under §2K2.1(b)(6) for possessing a firearm in connection with possession with intent to distribute marijuana. First, the court affirmed the district court's finding that the defendant had the requisite specific intent to distribute marijuana, despite being under the influence of PCP. It also affirmed the district court's finding that the defendant's possession of a firearm was "in connection with" another crime. According to Application Note 14, if a firearm facilitates a drug trafficking crime, the enhancement applies if the "firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." In this case, where the gun was in the defendant's hand and the drugs were scattered on the ground nearby, the court rejected defendant's argument that the application note should be disregarded.

United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004). The defendant, convicted under 18 U.S.C. § 922(g)(1), argued on appeal that the district court erred in calculating his base offense level and that his attorney was constitutionally ineffective by failing to object to this error. The PSR indicated that the defendant was convicted in state court of "robbery" in 1994, an offense for which he received a sentence of 30 to 90 months. Finding that the defendant had sustained a prior felony conviction for a "crime of violence," the court raised his base offense level, pursuant to §2K2.1(a)(4)(A), to 20 (rather than 14 if the previous conviction did not constitute a "crime of violence"). The D.C. Circuit found that the district court erred in adopting the base offense level of 20 without confirming that the defendant's 1994 robbery conviction constituted a "crime of violence." Because the defendant did not object at sentencing, the court reviewed the sentence only for plain error. Under this standard, the defendant was not required to proffer new evidence but he did have to offer some reason to suspect that the district court's error likely resulted in an incorrect sentence. The court concluded that there was nothing before it to suggest any likelihood that the district court would have assigned a different base offense level had it first conducted the proper inquiry into the 1994 conviction. Because the only indications in the sparse record suggested that the sentence would not be reduced, the D.C. Circuit concluded that the defendant did not satisfy his burden of demonstrating a "reasonable likelihood" that the court's error affected his sentence.

United States v. Hart, 324 F.3d 740 (D.C. Cir. 2003). The defendant, sentenced on one count of unlawful possession of a firearm and ammunition, argued on appeal that §2K2.1(b)(5) (currently §2K2.1(b)(6)) was inapplicable as a matter of law because the "other felony" offense to which it referred in this case, a homicide, was not factually and temporally related to the offense of conviction. The D.C. Circuit noted that the Tenth Circuit had addressed the same argument in *United States v. Draper*, 24 F.3d 83 (10th Cir. 1994), holding that the enhancement

was permissible where the other alleged felony offense occurred weeks or months prior to the offense of conviction. The court noted that "the Tenth Circuit's interpretation has stood for nearly ten years without any effort by the Sentencing Commission – despite multiple amendments of other guidelines provisions - to amend the provision to a different effect;" this was reason enough not to break rank with sister circuits. Accordingly, the D.C. Circuit held that the homicide qualified as another felony offense under §2K2.1(b)(5)[3] even though it occurred months prior to the defendant's arrest for possession of gun. The case was reversed and remanded on other grounds.

United States v. Williams, 350 F.3d 128 (D.C. Cir. 2003). The court affirmed the district court's holding that attempted burglary is a "crime of violence" within the meaning of §2K2.1(a)(2). The defendant argued that the guideline drafters did not intend to include attempt to commit the crimes listed under §4B1.2(a)(2) as "crimes of violence." The defendant also argued that some circuits interpreting "crimes of violence" as used in the Armed Career Criminal Act, which has language identical to §4B1.2(a), had ruled that attempted burglary is not such a crime. *See United States v. Weekley*, 24 F.3d 1125 (9th Cir. 1994); *United States v. Martinez*, 954 F.2d 1050 (5th Cir. 1992); *United States v. Strahl*, 958 F.2d 980 (10th Cir. 1992). The D.C. Circuit rejected defendant's arguments and joined four other circuits in holding that attempted burglary was a "crime of violence" under §4B1.2. *See United States v. Claiborne*, 132 F.3d 253 (5th Cir. 1998); *United States v. Sandles*, 80 F.3d 1145 (7th Cir. 1996); *United States v. Carpenter*, 11 F.3d 788 (8th Cir. 1993); *United States v. Jackson*, 986 F.2d 312 (9th Cir. 1994).

United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999). The defendant was sentenced on one count of felon-in-possession of a firearm and two counts of assaulting a police officer while armed with a dangerous weapon. On appeal, the defendant challenged upward adjustments under §3A1.2, "official victim," and under §2K2.1(b)(5),[4] possession of a firearm in connection with another felony. The defendant argued that the "official victim" enhancement was unwarranted because he did not cause a "substantial risk of bodily harm" to the officers, and that the second enhancement was unjustified because he did not use his firearm during the assault. The district court found that the defendant attempted to pull his gun from his waistband during the assault thereby creating a substantial risk and indicating his intent to use his weapon to facilitate the assault. The court held that both enhancements were justified by the evidence and affirmed.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Yeh, 278 F.3d 9 (D.C. Cir. 2002). The defendant, sentenced for bringing unauthorized aliens into the U.S. for financial gain, appealed the district court's application of a

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[3] Redesignated as §2K2.1(b)(6). *See* USSG App. C, amend. 691 (effective Nov. 1, 2006).

[4] *Id.*

2-level increase pursuant to §2L1.1(b)(5)[5] for "intentionally or recklessly creating a substantial risk of death or serious bodily injury" to the aliens. Applying a plain error standard because the defendant failed to raise his objection in the district court, the D.C. Circuit rejected the defendant's contention that he had no control over the conditions aboard the vessel. The record indicated that the aliens had suffered without food or water for at least several hours before the Coast Guard arrived and that below-deck conditions were appalling. Moreover, defendant admitted that he was responsible (and received compensation for) keeping order and distributing food and water to the aliens.

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

United States v. Ventura, 565 F.3d 870 (D.C. Cir. 2009). The court vacated defendant's sentence, holding that his conviction for felonious abduction, in violation of Virginia law, was only an "aggravated felony," and not a "crime of violence" warranting a 16-level increase. First, after discussing the strict categorical approach under *Taylor*, the court found that the defendant's prior conviction did not conform to the crime of kidnapping for the purpose of applying §2L1.2. In addition, the court disagreed with the district court's conclusion that under *Shepard* the defendant was convicted of a crime of violence by virtue of his *nolo contendere* plea. Defendant's plea admitted only the truth of the crime charged in the indictment and not the facts alleged in the government's proffer. Remanding the case, the court stated: "Even under the modified categorical approach of *Shepard*, he was not convicted of kidnapping or of the use of force."

Part S Money Laundering and Monetary Transaction Reporting

§2S1.2 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity[6]

United States v. Kayode, 254 F.3d 204 (D.C. Cir. 2001). The D.C. Circuit held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of §2S1.2. The defendant was convicted on eight charges, including one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The defendant's sentence for this count was calculated under §2S1.2, but she argued on appeal that she should have been sentenced under the fraud or money structuring guidelines. The defendant asserted that §2S1.2 was intended to apply to laundering of proceeds from drug trafficking or serious organized crime, not proceeds from bank fraud, as was the case here. Because laundering funds from bank fraud would not be "atypical" under this guideline, the defendant argued that the court should have departed and used the less severe guideline. The circuit court disagreed, holding that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of §2S1.2. The application note to §2S1.2 specifies illegal activity as that covered by 18 U.S.C. § 1956(c)(7) and racketeering. "Racketeering activity" is defined in 18 U.S.C. § 1961(1) as including acts indictable under 18 U.S.C. § 1344, financial institution

[5] Redesignated as §2L1.1(b)(6). *See* USSG App. C, amend. 692 (effective Nov. 1, 2006).

[6] Guideline deleted by consolidation with §2S1.1. *See* USSG App. C, amend. 634 (effective Nov, 1, 2001).

fraud. Because the court found that the defendant's behavior fell within the heartland of §2S1.2 under the 1998 *Guidelines Manual*, the effect of Amendment 591, effective November 1, 2000, was not considered.

§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. Keleta, 552 F.3d 861 (D.C. Cir. 2009). Defendant pled guilty to operating a money-transmitting business without a license and was sentenced under §2S1.3. The D.C. Circuit found the sentence reasonable, stating: "The sentencing scheme established by §2S1.3(a)(2) does not require proof that the monies involved in the offense were themselves the product of illegal activity, were being transmitted for illegal means, or could be classified as laundered funds." It upheld the district court's calculation of the "value of the funds" despite the fact that the funds were not unlawfully obtained. The D.C. Circuit also held that the court properly refused a "safe harbor" reduction because the defendant—who had the burden of proving he was entitled to any reduction—failed to establish that he qualified for a reduction. The dissent disagreed, reasoning that the "value of the funds" in this offense was zero.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Hunt, 25 F.3d 1092 (D.C. Cir. 1994). The circuit court joined the majority of courts of appeals in rejecting the defendant's argument that tax loss, for sentencing purposes, should not include the amount the defendant "attempted to evade" from the government, but rather should only reflect the amount of money actually lost by the government in the form of fraudulently obtained funds or reduction in taxes paid.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Fareri, 712 F.3d 593 (D.C. Cir. 2013). The defendant, a stockbroker, pleaded guilty to one count of mail fraud arising out of his scheme to sell worthless shares of stock in shell companies controlled by a co-conspirator, and was sentenced to eight years and nine months (105 months) of imprisonment and ordered to pay restitution to his victims. The D.C. Circuit affirmed the district court's application of a 2-level adjustment to the defendant's base offense level based on its finding that some of his victims were vulnerable. It was reasonable for the district court to impose the adjustment on the basis that the defendant knew that three of his victims were inexperienced investors, that one suffered from health problems, and that another was grieving from the loss of a spouse.

§3A1.2 Official Victim

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

§3A1.4 Terrorism

United States v. Mohammed, 693 F.3d 192 (D.C. Cir. 2012). A jury found the defendant guilty of international drug trafficking, in violation of 21 U.S.C. § 959(a)(1), (2), and drug trafficking with intent to provide financial support to a terrorist, in violation of 21 U.S.C. § 960a. Over the defendant's objection, the district court applied the terrorism enhancement at §3A1.4(a), which increases the base offense level by 12 levels if the defendant was convicted of a crime "that involved, or was intended to promote, a federal crime of terrorism." "Federal crime of terrorism" is defined in 18 U.S.C. § 2332b(g)(5) as an offense in violation of certain enumerated statutes, including § 960a, that is "calculated to influence or affect the conduct of government by intimated or coercion, or to retaliate against government conduct[.]" On appeal, the D.C. Circuit declined to read the intent requirement from 21 U.S.C. § 960a (*i.e.*, an intent to finance terrorism) into 21 U.S.C. § 2332(g)(5), explaining that the definition of "federal crime of terrorism" in § 2332(g)(5) has "its own intent element, with an additional requirement only that the offense of conviction appear on the statutory list, as § 960a does." The circuit court also sustained the district court's finding that the defendant had the requisite intent under section 2332(g)(5) because he specifically intended to use money from drug sales to purchase a car to facilitate attacks against the United States and foreign forces in Afghanistan.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Olejiya, 754 F.3d 986 (D.C. Cir. 2014). The D.C. Circuit explained that the "manager or supervisor" enhancement is appropriate where a "hierarchical relationship" exists between the defendant and other participants in the criminal activity. Here, the court held that the enhancement was proper because the defendant recruited and supervised "underlings" who performed tasks "at his behest." A second defendant similarly claimed that he did not exercise "control" to warrant the "organizer or leader" enhancement. The court rejected this argument, pointing to the fact that this defendant relied on others to take risks in the scheme and to the fact that the defendant was "keeping tabs" on these other participants.

United States v. McCoy, 242 F.3d 399 (D.C. Cir. 2001). The defendant argued that the 2-level enhancement she received for being an "organizer, leader, or manager," pursuant to §3B1.1(c), was inappropriate because, as the PSR reported, those that she directed were "unwitting participants." The court agreed that the participants must have known of the criminal activity in order to be considered criminally responsible participants as required by §3B1.1(c). Therefore, the court remanded for further proceedings with respect to the aggravating role enhancement and affirmed the rest of the sentence.

United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001). Upholding the "organizer or leader" enhancement, the D.C. Circuit held that the court should inquire solely into the number

of people involved in determining whether criminal activity is "otherwise extensive" for the purposes of §3B1.1(a). The appellate court found that the defendant was an "organizer or leader" because of evidence that he had decision making authority, recruited others, and claimed a larger share of the proceed, but vacated the portion of the sentence based on the "otherwise extensive" finding because the unknowing participants performing ordinary and automatic duties, such as opening credit card accounts, could not be included under the factors set forth in *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), *abrogated on other grounds as noted in United States v. Berg*, 250 F.3d 139 (2d Cir. 2001).

§3B1.2 Mitigating Role

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2000). The D.C. Circuit upheld the denial of a §3B1.2(b) minor role reduction because the defendant had been involved in phone calls in which he and others "discussed, planned, and arranged" a large drug delivery.

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

> To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.

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

United States v. Ransom, 756 F.3d 770 (D.C. Cir. 2014). The D.C. Circuit rejected the defendant's argument that an upward variance based on §3B1.3 was unjustified because that provision is "generally reserved for professionals with fiduciary duties and it was not intended to apply to clerks of managers who don't exercise discretion." Referencing the district court's proper use of victim impact statements, the D.C. Circuit found no error in the district court's enhancement of the defendant's sentence because the defendant was "not a bank teller or hotel clerk" but rather "the manager of the fraudulently operating scheme" through which he "defrauded apartment owners . . . daily."

United States v. Tann, 532 F.3d 868 (D.C. Cir. 2008). The D.C. Circuit found that the district court erred in applying an enhancement for abuse of a position of trust to a fraud defendant, agreeing with the defendant that her position in the office was "ministerial." The circuit court stated: "Tann may have occupied a position of trust in the colloquial sense that she was trusted not to use her access for nefarious purposes; in that sense, so is every bank teller who

has access to the bank's money and every janitor who cleans an office where desk drawers are left unlocked. Like the bank teller or the janitor, however, Tann did not have a job that required her to exercise professional or managerial discretion, which is the standard set forth in the application note to the Guideline."

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

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

Part C Obstruction

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

United States v. Brockenborrugh, 575 F.3d 726 (D.C. Cir. 2009). The D.C. Circuit affirmed the district court's obstruction of justice enhancement, concluding that the district court did not clearly err in finding that the defendant lied on the stand. The dissent disagreed, arguing that none of the factual findings supporting the enhancement could survive clear error review. It stated: "In our legal system different roles are assigned to trial and appellate courts, and it behooves this court not to blur the lines. . . . [T]he court infers findings that the district court did not make."

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

case here where the defendant tried to keep his identity secret. The D.C. Circuit remanded the case to the district court to clarify the factual basis for the enhancement.

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

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

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Saani, 650 F.3d 761 (D.C. Cir. 2011). The D.C. Circuit vacated and remanded for resentencing because the record was unclear why the district court denied defendant credit for acceptance of responsibility and why it varied upward from the guidelines range. Specifically, the defendant argued that the court did not give him credit under §3E1.1 because he did not cooperate with the government's bribery investigation, a matter about which he had a Fifth Amendment privilege not to speak. The appellate court explained: "Courts disagree whether the 'compulsion' a defendant faces if he may be denied a reduction of his sentence unless he provides potentially incriminating information is sufficiently forceful to trigger the protection of the Fifth Amendment." (Citations omitted.) The circuit court determined, however, that it need not resolve the constitutional issue because it could not determine from the record whether the defendant's refusal to disclose the source of his funds was the reason for denying him credit. It remanded for clarification of, *inter alia*, the basis for the denial of acceptance of responsibility credit.

United States v. Kirkland, 104 F.3d 1403 (D.C. Cir. 1997). A jury convicted the defendant of distributing drugs within 1,000 feet of a school. He appealed the district court's denial of a downward adjustment under §3E1.1 because he had argued to the jury that he had been entrapped. The D.C. Circuit affirmed the district court's refusal to give a reduction for acceptance, stating: "It has been generally held that a defendant's challenge to the requisite intent is just another form of disputing culpability." The appellate court stated that it could think

of no hypothetical in which a plea of entrapment was consistent with acceptance of responsibility but, acknowledging a circuit conflict on the issue, stated that "[i]t may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we doubt it[.]"

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996). The circuit court held that the district court did not err in denying the defendant's request for a 2-level reduction under §3E1.1 because he lied about the extent of his wife's participation in his prison escape. Application Note 1 to §3E1.1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with acceptance of responsibility, but differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category. Although doubting that the guidelines create an absolute bar to the reduction, the circuit court did not, in the end, resolve the issue.

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

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

United States v. Jones, 997 F.2d 1475 (D.C. Cir. 1993) (en banc). After the defendant was convicted at trial, the district court granted a §3E1.1 reduction but did not sentence at the bottom of the guidelines range because the defendant went to trial. The D.C. Circuit affirmed, distinguishing the enhancement of a sentence for going to trial (which would be unconstitutional) from the withholding of leniency at sentencing (which would be constitutional). The dissent stated that, regardless of how the action is characterized, it was unconstitutional for the trial judge to de facto increase the defendant's sentence because he chose to go to trial rather than plead guilty.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

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

United States v. McDonald, 991 F.2d 866 (D.C. Cir. 1993). The D.C. Circuit affirmed the district court's decision to include a "set aside" juvenile conviction in the defendant's criminal history. Although §4A1.2(j) provides that sentences for "expunged convictions" are not counted in criminal history, the defendant's juvenile conviction had not been "expunged" but had been "set aside" pursuant to the D.C. Youth Rehabilitation Act. The D.C. Circuit distinguished between "set aside" and "expunged" convictions, relying on Application Note 10, which provides in pertinent part, "[a] number of jurisdictions have various procedures pursuant to which previous convictions may be set aside . . . . Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted." The D.C. Circuit acknowledged that the Ninth Circuit has reached a different conclusion on the issue, but distinguished the California statute because it expressly provides that if a court "set[s] aside" a juvenile's conviction, the youth is "released from all penalties and disabilities resulting from the offense." In contrast, the D.C. Youth Rehabilitation Act contains no such provision.

§4A1.3 Adequacy of Criminal History Category

In re Sealed Case, 199 F.3d 488 (D.C. Cir. 1999). The defendant was sentenced as a career offender and appealed, arguing that the court's comments showed it was under the mistaken belief that it lacked the authority to depart under §4A1.3. The D.C. Circuit rejected the defendant's appeal. The district court had commented at sentencing that it wished it could sentence the defendant to less than the guidelines demanded but that a long sentence was needed and there was no alternative. Evaluating the comments in the context of the transcript, the D.C. Circuit concluded that the court did not mean that it could not impose a lower sentence, but rather that it could not do so with a clear conscience.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Bailey, 622 F.3d 1 (D.C. Cir. 2010). The D.C. Circuit found that the district court erred in not considering the defendant's policy argument that application of the career offender guideline was unfair because it double-counted his convictions. The circuit court stated:

> [W]e remand the record to the district court to address appellant's policy objections to §4B1.1 of the Guidelines and to "determine whether it would have imposed a different sentence materially more favorable to the defendant had it been fully aware" of its authority, *United States v. Coles*, 403 F.3d 764, 770 (D.C. Cir. 2005).

United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001). The defendant argued that his sentence constituted plain error because he was sentenced under the career offender guideline using the maximum sentence of life from 18 U.S.C. § 841(b)(1)(A) and (B), both of which required that drug quantity be submitted to the jury under *Apprendi*. Because the evidence of drug quantity was "overwhelming and uncontroverted," however, the circuit court found that the error did not "seriously affect [] the fairness, integrity or public reputation of judicial proceedings" and did not constitute grounds for reversal under the four-prong plain error analysis. Because the underlying convictions survived plain error analysis, the application of the career offender guideline by the district court was not in error.

United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000). The D.C. Circuit held that counsel's assistance was constitutionally ineffective where, but for counsel's miscalculation of the career offender guideline, there was a reasonable probability that the defendant would not have pled guilty. Defense counsel had miscalculated the career offender guideline and told the defendant that by pleading guilty he would receive a sentence within the range of 188 to 235 months (instead of the actual range of 262 to 327 months). The circuit court explained that an error in applying the guidelines will not always amount to ineffective assistance of counsel, but added that "familiarity with the structure and basic content of the guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation" (quoting *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992)). Finding that the defendant satisfied both prongs of the *Strickland*[7] test for ineffectiveness in the plea bargain context (*i.e.*, that (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"), the D.C. Circuit remanded the case with instructions that the defendant be allowed to withdraw his plea.

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

United States v. Curtis, 481 F.3d 836 (D.C. Cir. 2007). A conviction for promoting prostitution of a minor is categorically a crime of violence under §4B1.2(a) because it "involves conduct that presents a serious potential risk of physical injury to another."

United States v. Andrews, 479 F.3d 894 (D.C. Cir. 2007). The district court did not commit plain error in concluding that a prior conviction for sexual abuse of a ward in violation of D.C. Code § 22-3013 was a crime of violence under §4B1.2(a). The circuit court noted that the general approach to such a categorical analysis was to look only at the statutory definition of the crime. However, "if the statutory definition itself does not yield an obvious answer, for example, where it covers both violent and non-violent crimes, we can then look to 'the charging paper and jury instructions' to determine whether a jury was required to find elements supporting the determination that the prior conviction was a crime of violence." Because the statute of conviction could include consensual sex between an officer and victim, the appellate court looked at the jury instructions, which required proof of oral sex. Because it was not obvious that

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

such conduct could never present a serious potential risk of physical injury, the D.C. Circuit held that it was not plain error for the district court to treat the prior conviction as a crime of violence.

United States v. Adewani, 467 F.3d 1340 (D.C. Cir. 2006). The D.C. Circuit held that escape from an institution is a crime of violence under §4B1.1. *See also United States v. Lewis*, 471 F.3d 155 (D.C. Cir. 2006) (same).

United States v. Williams, 350 F.3d 128 (D.C. Cir. 2003). The defendant pled guilty to unlawful possession of a firearm by a convicted felon and was sentenced pursuant to §2K2.1 where the district court determined the defendant's two prior felony convictions satisfied the guidelines' definition of "crime of violence." The defendant argued that one of the prior felony convictions, attempted burglary, was not a crime of violence. The appellate court rejected this argument. Section 4B1.2 specifies that a crime of violence is a crime punishable by more than one year's imprisonment and the crime has (1) "as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) the crime is "burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another." Section 4B1.2, Application Note 1 states that crimes of violence include "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

§4B1.4 Armed Career Criminal[8]

United States v. Thomas, 572 F.3d 945 (D.C. Cir. 2009). Defendant was sentenced for being a felon in possession of a firearm and the government appealed the court's failure to sentence the defendant under the Armed Career Criminal Act (ACCA). The circuit court vacated the defendant's sentence on two alternative grounds. First, because Thomas did not challenge the ACCA determination in the first appeal, under the law of the case doctrine the district court could not have revisited that determination. Alternatively, the D.C. Circuit concluded that the government adequately established that Thomas committed the requisite predicate offenses under the ACCA "on occasions different from one another," as required by 18 U.S.C. § 924(e)(1), so as to subject him to the ACCA's mandatory 15-year sentence. It found that there was sufficient evidence to establish that defendant's two predicate drug offenses were committed on different occasions because two indictments were offered, and the dates of the offenses were five months apart. Judge Ginsburg concurred except with regard to the alternative finding. Having held that the law of the case precluded reconsideration, he argued the court should not have resolved the constitutional question regarding whether "the indictments constitute sufficient evidence that Thomas's two drug offenses were committed on separate occasions." He stated: "The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment or the teaching of *Shepard* . . . is more difficult than the court lets on."

[8] In June 2015, the Supreme Court held, in *Johnson v. United States*, that the "residual clause" of the ACCA is unconstitutionally vague. The Court's opinion in *Johnson* did not consider the guideline's definition of crime of violence, 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.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Gales, 603 F.3d 49 (D.C. Cir. 2010). The D.C. Circuit affirmed the defendant's five-year sentence for crack distribution, finding that the district court did not commit clear error in denying defendant a safety valve adjustment. The circuit court found it "highly unlikely that Gales did not have any further information on the identity of his steady supplier, whom he claimed to have known for ten years, beyond the vague description given to the government." The D.C. Circuit also concluded that the district court applied the correct burden of proof and that the defendant "failed to carry his burden of establishing by a preponderance of the evidence that he was entitled to safety valve relief." Moreover, the circuit court concluded that the district court properly supported its conclusion based on the established criteria of the safety valve provision after considering proffers made at the safety valve hearing.

United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000). The defendant, who was convicted of numerous drug charges, argued on appeal that he should have received the benefit of the safety valve and a downward departure for extraordinary family circumstances. The appellate court found that there was ample evidence that the defendant had not been forthcoming or truthful in providing evidence to the government. Because the district court was aware that it had the discretion to grant a downward departure and found it unwarranted, the circuit court upheld that decision.

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2000). The D.C. Circuit upheld the denial of the safety valve for a defendant who met four of the five requirements but had not provided any information to the government. The defendant argued that he had no useful information and that the government had indicated that a debriefing would be futile. Although §5C1.2(5) does not require that the information provided be useful, there was no disclosure at all on the part of the defendant and the appellate court therefore held that the district court did not clearly err.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013). The defendant, who used the Internet to meet and have sex with a minor, pled guilty to violating D.C. Code § 22–3010.02, which prohibits arranging for sexual contact with a real or fictitious child. The defendant's sentence included a 36-month term of supervised release subject to several special conditions. As relevant here, the defendant was prohibited from (1) possessing or using a computer or having access to "any on-line service without the prior approval of the United States Probation Office," and (2) "us[ing] a computer, Internet capable device, or similar electronic device to access pornography of any kind." Citing 18 U.S.C. § 3583(d) and §5D1.3(b), the court examined whether these restrictions involved "no greater deprivation of liberty than was reasonably necessary" for sentencing purposes. With respect to the Internet restriction, the D.C.

Circuit, referring to the "ubiquity of computers in modern society and their essentialness for myriad types of employment," found that the condition constituted a "significant deprivation of liberty." The court acknowledged that "the Internet can be used to arrange sexual encounters with minors," but added that this fact alone is "inadequate to justify an internet restriction." Accordingly, the court held that the condition is "surely a greater deprivation of liberty than is reasonably necessary to achieve the goals referenced in § 3583(d)." With respect to the pornography restriction, the D.C. Circuit stated that "the record contains no evidence either that [the defendant] indulged in adult or child pornography, or that viewing adult pornography would increase the likelihood that he would again indulge in sex with nonadults[.]" As a result, the court held that the restriction "appears to be a more significant deprivation of liberty than is reasonably necessary," as forbidden by Section 3583(d). The court therefore vacated the challenged conditions and remanded the case to the district court for the imposition of "alternative conditions consistent with [Section 3583(d)]." Judge Kavanaugh dissented.

United States v. Legg, 713 F.3d 1129 (D.C. Cir. 2013). The defendant pleaded guilty to persuading a person to travel in interstate commerce to engage in criminal sexual activity and was sentenced to 30 months of incarceration and 180 months of supervised release. On appeal, the D.C. Circuit affirmed the district court's conditions of supervised release limiting the defendant's use of computers and the Internet. The circuit court rejected the defendant's claim that any restriction on his use of the computer was not related to his crime because the significant portion of his communications occurred over the telephone and not the Internet, finding that there was no dispute the defendant "used" a computer to "initiate" and "facilitate" his offense. The court also found no plain error in district court's decision to impose the computer-related conditions of supervised release, while also refusing to impose a 2-level enhancement for use of a computer under §2G1.3(b)(3); the guidelines are advisory only and therefore there is neither an abuse of discretion nor a plain error in making these two findings simultaneously. Finally, the circuit court found that the condition limiting the defendant to one Internet-capable device was not too restrictive.

United States v. Accardi, 669 F.3d 340 (D.C. Cir.), *cert. denied*, 133 S. Ct. 198 (2012). The D.C. Circuit upheld a 40-year term of supervised release as procedurally and substantively reasonable for a defendant convicted of transportation and possession of child pornography. The circuit court found the extended discussion by the district court of the defendant's particular crimes and the purposes of supervised release made it clear the release conditions were "reasonably necessary to protect the public, prevent a reoccurrence, and provide [defendant] with treatment." The circuit court also found the defendant's "unwarranted disparity" argument unavailing because the two "allegedly similar cases" offered by the defendant "constitute[d] too small a sample size" and involved much less "aggressive and troubling" images. In addition, the appellate court found no plain error in the specific conditions of supervised release imposed on the defendant. Although it acknowledged a series of circuit splits, the D.C. Circuit upheld conditions barring the defendant from patronizing any place were pornography or erotica is sold, disallowing him from using an Internet-capable computer without approval, and requiring him to complete residential alcohol abuse treatment.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

In re Sealed Case, 702 F.3d 59 (2d Cir. 2012). The defendant pleaded guilty to four counts of sex trafficking of children for prostituting four underage girls. The district court ordered the defendant to pay $3,892,055 in restitution to the four defendants, and the defendant appealed. The D.C. Circuit affirmed, explaining that under *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), the victim's losses must be proximately caused by the defendant's conduct, but that this does not mean that the defendant must be the sole cause of the harm. Moreover, the amount of restitution need not be proven with exactitude.

United States v. Fair, 699 F.3d 508 (D.C. Cir. 2012). Defendant, who sold pirated Adobe Systems software on eBay, pleaded guilty to copyright infringement. At sentencing, the district court ordered restitution pursuant to the Mandatory Victim Restitution Act in the amount of what the defendant had made from his sales, less forfeited funds turned over by the Postal Inspection Service. The circuit court reversed, explaining that a defendant's gain is not an appropriate measure of the victim's actual loss in MVRA calculations. While recognizing that there may be cases where the defendant's gain can act as a measure of (as opposed to substitute for) the victim's loss, the Second Circuit made clear that some approximation of actual lost must be made. Because the government failed to present evidence from which the district court could determine the victim's actual loss or find that the defendant's gain was a reasonable measure of that loss, the Second Circuit vacated the order of restitution.

United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006). Restitution can be based only on losses caused by the offense of conviction.

Part G Implementing The Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Cook, 594 F.3d 883 (D.C. Cir. 2010). The defendant was convicted of possession with intent to distribute crack and, because he was a repeat offender, he was sentenced to the mandatory minimum sentence of 240 months. The circuit court affirmed the denial of a motion for reduction of sentence in view of guideline amendments reducing the base level offense for offenses involving crack cocaine. It stated: "We join the other circuits in holding that section 3582(c)(2), which refers to sentences 'based on a guideline range subsequently lowered by the Sentencing Commission,' applies only to a sentence that is determined by a guideline range." The defendant's sentence was based on the mandatory minimum in 21 U.S.C. § 841(b)(1)(A)(iii), not on a guideline range.

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Heard, 359 F.3d 544 (D.C. Cir. 2004). The D.C. Circuit affirmed the district court's imposition of a consecutive sentence. The defendant first argued that §5G1.3(b) governed because his prior offenses were taken into account by their recitation in the PSR and their discussion at sentencing hearing. The court of appeals explained that the question, however, was not whether those offenses were taken into account in some colloquial sense, but whether they were fully taken into account in the determination of the offense level for the

instant offense, as required by the words of the guideline. It concluded that §5G1.3(b) did not apply because the prior offenses were not taken into account as "relevant conduct" in determining his offense level and the consecutive sentences did not otherwise cause him to suffer duplicative punishment. The defendant also argued that, even if §5G1.3(c) was the appropriate provision, the district court erred by declining to exercise its authority to impose a partially concurrent sentence under that subsection. The D.C. Circuit, noting that subsection (c) plainly leaves the decision to the discretion of the district court, held that the court did not abuse its discretion under §5G1.3(c).

United States v. Hall, 326 F.3d 1295 (D.C. Cir. 2003). Following convictions in D.C. and Maryland, and while still on probation in Maryland, the defendant was convicted in federal court for unlawful possession of a firearm and ammunition by a convicted felon. The D.C. Circuit upheld the district court's imposition of consecutive sentences. The defendant argued that the district court erroneously relied on Application Note 6[9] to §5G1.3 to run his sentence consecutively. The D.C. Circuit held that, while the district court may have erred in thinking that Application Note 6 was the relevant note (as opposed to note 1), a consecutive sentencing was nonetheless required, the defendant suffered no prejudice, and therefore the court did not plainly err.

United States v. Sobin, 56 F.3d 1423 (D.C. Cir. 1995). The D.C. Circuit affirmed the decision to impose six concurrent bankruptcy fraud sentences to run consecutively to state sentences for sexual offenses involving children. "Because the five sexual offense sentences did not result at all from conduct taken into account here, the district court properly imposed fully consecutive sentences as 'reasonable incremental punishment' for the instant offenses."

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Brooke, 308 F.3d 17 (D.C. Cir. 2002). The D.C. Circuit upheld the denial of a downward departure based on the defendant's age (82) and physical condition. The court of appeals concluded that home confinement would not be effective punishment because the defendant had a history of drug dealing in his home, and found that his impairment was not extraordinary.

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

United States v. Brooke, 308 F.3d 17 (D.C. Cir. 2002), §5H1.1. The circuit court upheld the district court's denial of a downward departure for physical impairment, based on the district court's finding that the defendant's impairments, including a swollen knee, pain, arthritis, and respiratory problems, were not "extraordinary," as required by the guidelines.

[9] Application Note 6 deleted effective November 1, 2003. *See* USSG App. C, amend. 660 (Nov. 1, 2003).

Part K Departures

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

United States v. Henry, 758 F.3d 427 (D.C. Cir. 2014). After the government declined to file a departure motion for substantial assistance under §5K1.1, the defendant argued that the government had breached the plea agreement by failing to give the U.S. Attorney's Office Departure Committee more detailed information about the prosecution of a second individual whom the defendant helped identify and investigate. Finding no difference between the proffer's statement that the second target was "being prosecuted" and the defendant's preferred phrasing of "pending trial" and "likely to plead," the D.C. Circuit concluded that the government did not breach its plea obligations and affirmed the district court.

United States v. Motley, 587 F.3d 1153 (D.C. Cir. 2009). The circuit court affirmed, finding that the government did not violate defendant's right to due process by refusing to file a motion to sentence him below the statutory mandatory minimum sentence. In the district court, the government filed a substantial assistance motion under §5K1.1 but did not file a motion for a reduction below the 10-year mandatory minimum for a crack sentence under 18 U.S.C. § 3553(e). The circuit court stated that it could grant a remedy if the government's refusal to file a section 3553(e) motion violated due process because it was not rationally related to any legitimate government end. In this case, however, the government's refusal was rationally related to the legitimate government ends of ensuring the sentence imposed reflected the seriousness of the offense and provided just punishment, and in having the defendant provide more assistance rather than less.

In re Sealed Case, 244 F.3d 961 (D.C. Cir. 2001). The D.C. Circuit held that the district court did not err in denying the defendant's motion to compel the government to file a §5K1.1 substantial assistance motion when the Departure Guideline Committee refused to authorize the filing. The defendant entered into a plea agreement with the government in which he agreed to cooperate and the government agreed to inform the Departure Committee of any assistance that might qualify him for a downward departure. The defendant provided testimony in one case and helped to secure indictments against several other defendants but he refused to testify at the last minute in a second case, allegedly out of fear for himself and his family. After the government informed the Departure Committee about the extent of the defendant's cooperation and recommended that they authorize a §5K1.1 motion for a "modest departure," the Committee refused without offering any reason for its denial. The defendant filed a motion to compel the government to file the motion on the theory that it breached the plea agreement. The district court denied the motion and imposed the sentence with no downward departure. The D.C. Circuit stated that the decision to file the §5K1.1 motion was largely within the government's discretion and, without an explanation from the Committee or an objective standard for definition of "substantial assistance," the circuit court could not presume that the Committee violated the plea agreement.

In re Sealed Case, 204 F.3d 1170 (D.C. Cir. 2000). The D.C. Circuit upheld the court's denial of a departure under §5K2.0, where the defendant argued that his assistance fell outside the "heartland" of §5K1.1.

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

United States v. Washington, 670 F.3d 1321 (D.C. Cir. 2012). The appellate court affirmed in the case of gun possession defendant who argued his sentence should be measured by local D.C. sentencing guidelines rather than the federal sentencing guidelines. The circuit court held that "although post-*Booker* nothing necessarily precludes consideration of the D.C. Guidelines in the district court's exercise of discretion in determining a particular sentence," circuit precedent did preclude the defendant from arguing for a departure or variance based on "the U.S. Attorney's lawful exercise of discretion in bringing a federal prosecution."

United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994). The district court erred in concluding that it did not have the authority to depart downward based on the likelihood that the defendant would face more severe prison conditions because of his status as a deportable alien. The case was remanded for resentencing and consideration of whether any departure is appropriate.

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

United States v. Root, 12 F.3d 1116 (D.C. Cir. 1994). The defendant, an attorney representing clients before the Federal Communications Commission, pled guilty to wire fraud in violation of 18 U.S.C. § 1343 and altering or forging public records in violation of 18 U.S.C. § 494. The circuit court affirmed the district court's 2-level upward departure based upon disruption of a government function. Although the district court also relied on improper factors, "[r]emand is not automatically required when a trial court has relied in part on improper factors in reaching a sentence under the Guidelines. Rather, we may affirm such a sentence if we determine 'on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed.'" (quoting *Williams v. United States*, 503 U.S. 193 (1992)).

§5K2.11 Lesser Harms (Policy Statement)

United States v. Riley, 376 F.3d 1160 (2004). The defendant, convicted of possession of a firearm and ammunition by a convicted felon, was a police chaplain arrested as he was returning from firearms practice at a firing range. He argued that he should receive a departure under §5K2.11 because his conduct did not threaten the harm sought to be prevented by his statutory offense. Section 922(g)(1) seeks to prevent the possession of a firearm for an "unlawful purpose," the defendant posited, while the purpose of his conduct, target practice, was lawful. The D.C. Circuit rejected this argument. Section 922(g)(1) sweeps more broadly, the court reasoned, establishing the "criminal line" at possession and not purpose. The mere absence of an unlawful purpose, the circuit court ruled, does not warrant a departure under §5K2.11.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Draffin, 286 F.3d 606 (D.C. Cir. 2002). The D.C. Circuit held that the district court's failure to depart downward *sua sponte* when not requested by the defendant did

not constitute plain error. The circuit court, however, recognized one "unlikely circumstance–and there may conceivably be others–in which plain error might be shown: namely, when, notwithstanding the defendant's silence, the sentencing court makes it plain on the record *sua sponte* that it is choosing not to depart on a particular ground because it believes (mistakenly, as it turns out) it lacks authority to do so." Nevertheless, the court held that in this case no such error occurred.

United States v. Greenfield, 244 F.3d 158 (D.C. Cir. 2001). The district court's denial of a §5K2.13 downward departure for diminished capacity based upon the defendant's depression did not constitute error. Convicted of drug conspiracy, the defendant argued at sentencing that he suffered from depression, and that his mental state contributed to his commission of the offense. After hearing the expert testimony on the defendant's mental state, the court denied the motion, stating that the testimony "mandates that the court not take into consideration diminished capacity." On appeal, the defendant argued that if drug addiction contributed only in part to the defendant's commission of the crime, then it should not preclude a departure because the defendant's mental state could also have played a role. Because the expert had not provided adequate testimony that the defendant's mental capacity had been significantly diminished, and the district court clearly understood its authority to depart, the circuit court affirmed the district court decision.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). *See* Section I(A) (Sentencing Procedure Generally).

Part B Plea Agreements

United States v. Goodall, 236 F.3d 700 (D.C. Cir. 2001). The D.C. Circuit held that a district court can, in its discretion, accept a Rule 11(e)(1)(c) plea agreement stipulating to a sentence below the range assigned by the sentencing guidelines. The plea agreement specified a sentencing range of 57 to 71 months, the government recommended a sentence at the bottom of that range, and the PSR recommended a range of 70 to 87 months. The district court, believing it was bound by both the guidelines and the plea agreement, only considered sentences at a range of 70 to 71 months. The circuit court held that, by not considering sentences between 57 and 69 months, the district court had impermissibly altered the plea agreement. While the First and Sixth Circuits held that §6B1.2 restricts a court's discretion under Rule 11(e), the D.C. Circuit joined the remaining circuits in holding that §6B1.2 does not limit the court's otherwise broad discretion under Rule 11. Vacating and remanding the sentence, the D.C. Circuit instructed the district court that, if it intended to accept the plea agreement, it should consider the range of 57 to 71 months, and if it intended to reject the plea agreement in favor of the guideline calculation, the defendant should be allowed to withdraw his plea.

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. Bruce, 285 F.3d 69 (D.C. Cir. 2002). The D.C. Circuit had previously held that Chapter Seven policy statements are not mandatory. *United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993). A year later, Congress amended 18 U.S.C. § 3553 to clarify that resentencing for probation and supervised release should be based on sentencing guidelines and policy statements issued by the Commission specifically for that purpose, rather than on the guidelines applicable to the original offense. The D.C. Circuit reaffirmed *Hooker*, notwithstanding the 1994 amendment to § 3553, reasoning that the plain language of the post-1994 law merely states that a district court must "*consider* . . . the applicable guidelines or policy statements issued by the Sentencing Commission" when imposing a sentence for a violation of supervised release.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012). The D.C. Circuit considered whether 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a mandatory 30-year sentence for any person who carries a machine gun while committing a crime of violence, requires the government to prove that the defendant knew the weapon he was carrying was capable of firing automatically. In concluding that no such requirement exists, the circuit court declined to set aside circuit precedent in *United State v. Harris*, 959 F.3d 246 (D.C. Cir. 1992), which had held that Congress intended to apply strict liability to the machine gun provisions of § 924(c). The circuit court was unpersuaded that either subsequent Supreme Court decisions or the decisions of other circuit courts had called the *Harris* decision into question, or that *Harris* was incorrectly decided, and declined to apply the rule of lenity because there was no "grievous ambiguity" in the statute.

Fair Sentencing Act of 2010

United States v. Swangin, 726 F.3d 205 (D.C. Cir. 2013). The defendant "pled guilty to possessing with intent to distribute 50 grams or more of cocaine base," where the offense specifically "involved 63.9 grams of crack cocaine." In 2009, the defendant faced a mandatory minimum of 120 months and was sentenced to 125 months. In 2010, the Fair Sentencing Act was enacted; under this statute, the defendant's conduct would have received a mandatory minimum of 60 months. The defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), seeking a sentence of 100 months, as 100 to 125 months would have been the recommended range under the amended guidelines. The district court lowered the sentence only to 120 months, as the defendant was subject to the mandatory minimum applicable at the time of his offense and sentencing, and the Fair Sentencing Act does not apply retroactively.

United States v. Fields, 699 F.3d 518 (D.C. Cir. 2012). The D.C. Circuit rejected the claim by a defendant sentenced prior to the passage of the Fair Sentencing Act that it applied retroactively to him, based on the Supreme Court's statement in dicta in *Dorsey v. United States*, that it was creating a disparity between pre-Act offenders sentenced before August 3 and those sentenced after that date. As to the defendant's claim that the district court erred in denying his motion to postpone sentencing until after the passage of the FSA, the D.C. Circuit acknowledged that the district court's decision might have been an abuse of discretion if, as the defendant claimed, the district court had denied his motion on the basis of the mistaken belief that the defendant would get the benefit of the FSA so long as his case was pending on appeal at the time the statute was enacted. However, the district court had in fact explained that it was denying a continuance because it was uncertain whether the FSA would apply to the defendant and it saw no reason to postpone every crack sentencing until Congress acted.