Guideline Sentencing Update

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General Application Principles

Sentencing Factors

Supreme Court holds that conduct from acquitted counts may be used in guideline calculation. "In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. . . . Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence. . . . Because the panels' holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States,* . . . 115 S. Ct. 2199 . . . (1995), we grant the petition and reverse in both cases."

"We begin our analysis with 18 U.S.C. § 3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. . . . We reiterated this principle in *Williams v. New York,* 337 U.S. 241 . . . (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. . . . Neither the broad language of § 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.'"

"The Guidelines did not alter this aspect of the sentencing court's discretion." Section 1B1.4 allows sentencing courts to "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," and for "certain offenses . . . USSG § 1B1.3(a)(2) requires the sentencing court to consider 'all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.' Application Note 3 explains that '[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts.' . . . In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."

"The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. . . . In *Witte,* we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that 'consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.' . . . 115 S. Ct. at 2207. Rather, the defendant is 'punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment.'"

"The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury 'rejects' some facts when it returns a general verdict of not guilty. . . . We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.' . . . [T]he jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."

"We acknowledge 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. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."

U.S. v. Watts, 117 S. Ct. 633, 635–38 (1997) (per curiam) (Stevens and Kennedy, JJ., dissenting).

See *Outline* at I.A.3

Violation of Supervised Release

Revocation

In Eighth Circuit, after revocation court may reimpose supervised release under § 3583(h) for defendant originally sentenced before statute's effective date. Defendant was first sentenced in 1990. He began serving his term of supervised release in May 1995, had it revoked

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in October, and was sentenced to 14 months in prison with an additional supervised release term of 22 months. The district court did not specify whether it sentenced defendant under 18 U.S.C. §3583(h), which authorized the reimposition of supervised release after revocation, effective Sept. 13, 1994, or under prior Eighth Circuit case law that interpreted 18 U.S.C. §3583(e) to allow for reimposition after revocation, *see U.S. v. Schrader,* 973 F.2d 623 (8th Cir. 1992). Defendant challenged the new term of supervised release on ex post facto grounds.

The appellate court upheld the sentence. "In this circuit, under the prior law, the district court could impose, in addition to the term of imprisonment . . . , a new term of supervised release, so long as the aggregate of the two terms is less than or equal to the original term of supervised release. . . . We conclude that a defendant is not potentially subject to an increased penalty under §3583(h) because, given our [earlier] interpretation of §3583(e)(3) . . . , the maximum period of time that a defendant's freedom can be restrained upon revocation of supervised release under the new law is either the same as, or possibly less than, under the prior law. Because application of the new law does not result in an increased penalty, there is no ex post facto violation." The court distinguished *U.S. v. Beals,* 87 F.3d 854 (7th Cir. 1996), reasoning that the contrary holding was correct for the Seventh Circuit because it had previously held that reimposition after revocation was not authorized under §3583. Thus, in the Seventh Circuit, reimposition under §3583(h) was an ex post facto violation because it retroactively increased a defendant's potential penalty.

U.S. v. St. John, 92 F.3d 761, 765–67 (8th Cir. 1996).

See *Outline* at VII.B.1

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit holds that information "provided to the Government" includes information provided to a different prosecutor in another case. Defendant pled guilty to a marijuana offense that occurred in 1994. He claimed that he qualified under 18 U.S.C. §3553(f), USSG §5C1.2, for sentencing below the mandatory minimum. However, there was evidence that defendant committed a similar offense in 1993, which he had not disclosed, and the government claimed that he therefore did not meet subsection (5)'s requirement to truthfully provide to the Government all information concerning the offense and related offenses. Defendant's sentencing was postponed twice, and before he was sentenced he pled guilty to and admitted his involvement in the 1993 offense, and the prosecutor in that case recommended a reduction under §5C1.2. At the sentencing for the 1994 offense, defendant argued that, by providing information to the prosecutor in the 1993 case he satisfied subsection (5). The district court denied the reduction and defendant appealed.

The appellate court remanded, first finding that the district court erred by not providing reasons for the denial at the final sentencing hearing. "[S]ection 3553(f) states that the court shall depart from the mandatory minimum sentence if it finds '*at sentencing*' that the defendant meets all five criteria. 18 U.S.C. §3553(f) (emphasis added); *see also* U.S.S.G. §5C1.2. The district court thus must provide reasons for agreeing or refusing to apply section 5C1.2 at the time of sentencing."

The court then concluded that defendant satisfied subsection (5) when he was debriefed by the assistant U.S. attorney (AUSA) in the 1993 case. "A defendant need not disclose information to any particular government agent to be eligible for relief under section 5C1.2. 'The prosecutor's office is an entity,' and knowledge attributed to one prosecutor is attributable to others as well. . . . Thus, the fact that AUSA Torres-Reyes, the prosecutor in this case, was not present when AUSA Coughlin debriefed Real-Hernandez in the 1993 incident is not relevant to the question whether Real-Hernandez provided information to the 'government.'" The court also rejected the government's argument that the 1993 case debriefing should not trigger the safety valve because it "was a totally separate case and was only relevant to show [defendant] had not been truthful" when he told government agents in the 1994 case that he did not know anything. "The plain language of section 5C1.2(5) allows any provision of information in any context to suffice, so long as the defendant is truthful and complete."

U.S. v. Real-Hernandez, 90 F.3d 356, 361 (9th Cir. 1996).

See *Outline* at V.F.2

Fourth Circuit holds that government violated plea agreement by arguing against safety valve reduction after it failed to debrief defendant as promised. In its plea agreement with defendant, the government agreed that he would be debriefed by government agents. The debriefing never occurred, however, and defendant eventually submitted a proffer letter to the government attempting to explain his involvement in and knowledge of the offense. Defendant argued at sentencing that, in the absence of the promised debriefing, the letter entitled him to the safety valve reduction under §3553(f); §5C1.2. The government argued against the reduction, saying it could not verify the information defendant had provided. The district court, without finding whether defendant was telling the truth, determined that there was not enough information to conclude that he was and sentenced him to the statutory minimum.

The appellate court remanded. "[W]e have recognized that the burden rests on the defendant to prove that the prerequisites for application of the safety valve provision, including truthful disclosure, have been met. . . . Debriefing by the Government plays an important role in permitting a defendant to comply with the disclosure requirement of the safety valve provision and in convinc-

ing the Government of the fullness and completeness of a defendant's disclosure, thereby encouraging a favorable recommendation. . . . [W]hen the Government promises in a plea agreement to debrief a defendant, it may not thereafter simply refuse to do so and then, having deprived the defendant of his best opportunity for attempting to obtain this favorable treatment, argue that the defendant is not entitled to sentencing under the safety valve provision. . . . On remand, the Government shall comply with the plea agreement by debriefing Beltran-Ortiz prior to resentencing. The district court shall then determine whether Beltran-Ortiz has met the requirements of 18 U.S.C.A. § 3553(f)."

U.S. v. Beltran-Ortiz, 91 F.3d 665, 669 & n.4 (4th Cir. 1996).

See *Outline* at V.F.2

Supervised Release

Ninth Circuit holds that when retroactive application of guideline amendment reduces prison term to less than time already served, term of supervised release begins on date defendant should have been released. "Appellants in these consolidated cases were each convicted for growing marijuana in violation of 21 U.S.C. § 841(a) and sentenced to a term of imprisonment plus a statutory three years of supervised release. In November, 1995, each received a reduction in his custodial sentence by reason of a retroactive amendment to the sentencing guidelines which affected the manner of calculating the quantity of marijuana for sentencing purposes. Each had already spent more time in prison than required by the modified sentence."

"The government nonetheless used each prisoner's actual release date as the starting date for measuring the duration of the three years of supervised release. Appellants . . . ask[ed] the court to set the starting times for their terms of supervised release on the dates their imprisonments should have ended under the new sentences. The district court, after reviewing the stated purposes of both custody and supervised release, agreed with the government that supervised release must be measured from the actual release dates."

The appellate court reversed, concluding that, "while the statutory scheme is not crystal clear, the supervised release portion of the sentence begins on the date a prisoner's term of imprisonment expires, whether or not he is released on that date. The appellants' terms of supervised release began on the dates appellants should have been released, rather than on the dates of their actual release." The applicable statutes state that a supervised release term "commences on the day the person is released from imprisonment," 18 U.S.C. § 3624(e), and that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's term of imprisonment," § 3624(a). "Neither direct nor circumstantial evidence of legislative intent concerning the narrow question presented by this appeal is present. We know only that the revised sentencing guideline was intended to apply retroactively, and was intended to have the remedial effect of reducing sentences imposed under an earlier, more punitive sentencing formula. In a somewhat similar situation, this court contemplated a problem of clarifying when a period of supervised release was to begin. *See U.S. v. Montenegro-Rojo,* 908 F.2d 425, 431 fn. 8 (9th Cir. 1990) (stating that, in fairness, the extra time in prison should be counted towards the year of supervised release)."

"We hold that in view of the language of 18 U.S.C. § 3624(a), and because of the obvious purpose of leniency in applying the revised sentencing guidelines retroactively, we must follow the lead of this court in *Montenegro-Rojo*. We limit our holding to the unusual facts of this case, where there has been a retroactive amendment to the guidelines."

U.S. v. Blake, 88 F.3d 824, 825–26 (9th Cir. 1996). *But cf. U.S. v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996) (per curiam) (although clarifying guideline amendment reduced defendant's sentence to less than time served, rejecting claim that excess time defendant spent in prison should be credited against his term of supervised release).

See *Outline* generally at V.C

Adjustments

Vulnerable Victim

Eighth Circuit declines to apply 1995 amendment that removed "target" language. Application Note 1 of § 3A1.1 formerly stated that the adjustment applied "where an unusually vulnerable victim is made a target" of the offense. Some circuits, including the Eighth, read that language to require that a defendant intentionally targeted the victim because of a particular vulnerability. However, the commentary was revised in 1995 by the removal of the target language "to clarify application with respect to this issue." USSG App. C, Amend. 521, at 430 (Nov. 1995). The revised note now states that the enhancement applies "to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." USSG § 3A1.1(b), comment. n.2 (Nov. 1995). The court had to determine whether it could apply the amended commentary to defendants who were sentenced before Nov. 1995.

"[N]otwithstanding the Sentencing Commission's description of Amendment 521 as a 'clarification,' we hold that applying the new language set forth in U.S.S.G. § 3A1.1 comment. (n.2) (Nov. 1995), as opposed to the language set forth in U.S.S.G. § 3A1.1 comment. (n.1) (Nov. 1994), would in this case violate the Constitution's prohibition against ex post facto laws because: the application would be retrospective; it would, if anything, increase defendants' sentences; it would not merely involve a procedural change; and it would not be offset by other ameliorative provisions. "

The court then concluded that there was no evidence to support a finding that defendants, who had defrauded couples seeking to adopt children, targeted any of the couples because of their desire to adopt or because of the infertility problems of some of the victims. In any event, the court also held that the defrauded couples' "strong desire to adopt" is not "the type of particular susceptibility contemplated by §3A1.1," and defendants should not have received the enhancement.

U.S. v. Stover, 93 F.3d 1379, 1384–88 (8th Cir. 1996).

See *Outline* at III.A.1.a and d

Departures

Mitigating Circumstances

Ninth Circuit holds that sentencing entrapment may warrant reducing amount of drugs used to determine whether mandatory minimum applies. Defendant was convicted of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. "At the sentencing hearing, the court found that sentencing entrapment had occurred, and the government did not oppose a downward departure from the applicable sentencing guideline range based upon sentencing entrapment. The district court attributed one kilogram of cocaine to Castaneda and imposed the five year statutory minimum sentence pursuant to 21 U.S.C. §841(b)(1)(B)(ii). The court said that it lacked discretion to sentence Castaneda to a term below the statutory minimum. Castaneda timely appealed."

The appellate court remanded, reasoning that district courts determine the quantity of drugs attributable to a defendant, including amounts for purposes of establishing whether a mandatory minimum sentence applies. "If a defendant proves that sentencing entrapment has occurred, there is no sound reason that the government's wrongful conduct should be protected by a statutory minimum based upon an amount of drugs higher than a defendant was predisposed to buy or sell. . . . The district court here did not think that it had the discretion to reduce the amount of cocaine attributable to Castaneda by the amount tainted by sentencing entrapment. Otherwise, the court might have found, for example, that Castaneda lacked the predisposition to sell 500 grams or more of cocaine. Had the district court made such a finding, it could have excluded more than 500 grams from its finding of cocaine attributable to Castaneda. A finding that less than 500 grams of cocaine were attributable to Castaneda would result in no obligation to impose a statutory minimum sentence."

U.S. v. Castaneda, 94 F.3d 592, 594–96 (9th Cir. 1996). *See also U.S. v. Montoya,* 62 F.3d 1, 3 (1st Cir. 1995) (courts' authority to exclude drug amounts tainted by sentencing entrapment "applies to statutory minimums as well as to the guidelines").

See *Outline* at VI.C.4.c

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003

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Determining the Sentence

Consecutive or Concurrent Sentences

Supreme Court holds that § 924(c) sentence cannot be imposed to run concurrently with a state sentence. Under 18 U.S.C. § 924(c), the five-year mandatory sentence for using a firearm during a drug trafficking offense may not be imposed to "run concurrently with any other term of imprisonment." In *U.S. v. Gonzalez,* 65 F.3d 814, 819–22 (10th Cir. 1995), the Tenth Circuit held that a § 924(c) sentence "may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve*" (emphasis in original). After reviewing the legislative history and the purpose of § 924(c), the court ultimately concluded that "the phrase 'any other offense' encompasses only federal offenses" and that this interpretation was consistent with USSG § 5G1.3(b). *Cf. U.S. v. Kiefer,* 20 F.3d 874, 876–77 (8th Cir. 1994) (if called for under § 5G1.3(b), mandatory sentence under § 924(e) may be imposed to run concurrently with related state sentence; distinguishing § 924(c) because § 924(e) does not contain specific prohibition against concurrent sentencing); *U.S. v. Drake,* 49 F.3d 1438, 1440–41 (9th Cir. 1995) (following *Kiefer*).

The Supreme Court reversed, concluding that the text of the statute was clear and the Tenth Circuit should not have resorted to the legislative history. "The question we face is whether the phrase 'any other term of imprisonment' 'means what it says, or whether it should be limited to some subset' of prison sentences . . . —namely, only federal sentences. Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' . . . Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all 'term[s] of imprisonment,' including those imposed by state courts. . . . There is no basis in the text for limiting § 924(c) to federal sentences."

"Given the straightforward statutory command, there is no reason to resort to legislative history. . . . In sum, we hold that the plain language of 18 U.S.C. § 924(c) forbids a federal district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. The statute does not, however, limit the court's authority to order that other federal sentences run concurrently with or consecutively to other prison terms—state or federal—under § 3584."

U.S. v. Gonzalez, 117 S. Ct. 1032, 1035–38 (1997) (Stevens and Breyer, JJ., dissenting).

See *Outline* at V.A.3

"Safety Valve" Provision

Ninth Circuit holds that court's findings for safety valve are not controlled by jury verdict. Defendant was convicted on heroin possession and importation charges. He consistently denied that he knew the suitcase he had been paid to carry contained heroin. The district court believed him and, because defendant otherwise qualified for the safety valve provision, 18 U.S.C. § 3553(f); USSG § 5C1.2, sentenced him below the mandatory minimum. The government appealed, "arguing that the jury's guilty verdict precludes any notion that Sherpa truthfully provided 'all information' he had concerning the offense . . . [and] legally forecloses any possibility that Sherpa's consistent profession of ignorance (regarding the presence of drugs in the suitcase) was based in truth."

The appellate court affirmed. "Section 3553(f) requires a determination by the judge, *not the jury,* as to the satisfaction of the five underlying criteria. This is no accident. The judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and determine whether the defendant complies with § 3553(f)." Although a judge "cannot set aside a verdict just because he or she personally disagrees with a jury's finding," the judge "could logically find that reasonable minds might differ on a given point so as to preclude a judgment of acquittal, but conclude that *he or she* would have voted differently had he or she been a juror. While the judge's personal disagreement has no impact on the jury's finding of guilt, we hold that such disagreement is properly considered in the judge's sentencing decision."

The court also determined that *U.S. v. Brady,* 928 F.2d 844 (9th Cir. 1991), which held that a sentencing judge may not reconsider facts that were necessarily rejected by a jury's not guilty verdict, was effectively overturned by *Koon v. U.S.,* 116 S. Ct. 2035 (1996). *Koon* emphasized "the deference due the sentencing judge" and that sentencing factors should only be excluded from consideration by the Sentencing Commission, not by the courts. "We therefore acted beyond our authority . . . in *Brady* . . . . Consistent with the language of § 3553(f) and the different roles involved when determining guilt and imposing sentence, we hold that the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings."

U.S. v. Sherpa, 97 F.3d 1239, 1243–45 (9th Cir. 1996), *as amended on denial of rehearing and rehearing en banc,* — F.3d — (9th Cir. Mar. 5, 1997).

See *Outline* at V.F.2

Tenth Circuit holds that in resentencing after §3582(c)(2) motion for reduction of sentence, safety valve provision may not be applied if original sentence was imposed before effective date of §3553(f). After defendant was sentenced in 1993 to a 60-month mandatory minimum sentence for marijuana offenses, Amendment 516 (effective Nov. 1, 1995) changed the method for determining the weight of marijuana plants for purposes of sentencing under §2D1.1(c). The amendment was made retroactive, *see* §1B1.10(c), and defendant filed a motion for reduction of sentence under 18 U.S.C. §3582(c)(2). He was still subject to the mandatory minimum term, but argued that he qualified for the safety valve exception to the mandatory minimum, 18 U.S.C. §3553(f); USSG §5C1.2, and should be sentenced within the amended guideline range of 18–24 months. The district court held that §3553(f), which did not take effect until Sept. 23, 1994, could not be applied retroactively to defendant's 1993 sentence and thus the 60-month sentence would stand.

The appellate court agreed that "the safety valve exception applies to all sentences imposed on or after September 23, 1994, . . . and it is not retroactive. . . . We agree with Mr. Torres that when we remand a case to the district court with instructions to vacate the sentence and resentence the defendant, 'the district court [is] governed by the guidelines in effect at the time of resentence' . . . . But that is not the situation Mr. Torres is in. There has been no vacation of his sentence nor any order for resentencing. . . . Rather, he seeks relief pursuant to §3582(c)(2), which is a different animal."

Under that section, a defendant's "eligibility for a reduction in sentence is 'inexorably tied'" to USSG §1B1.10, which states in Application Note 2: "In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. *All other guideline application decisions remain unaffected.*" (Emphasis added by court.) "The safety valve exception is specifically excluded from retroactive application by §1B1.10, and Mr. Torres cannot evade the plain language and effect of this section by characterizing his §3582(c)(2) motion as requiring de novo resentencing."

U.S. v. Torres, 99 F.3d 360, 362–63 (10th Cir. 1996). *Cf. U.S. v. Polanco,* 53 F.3d 893, 898–99 (8th Cir. 1995) (after vacating sentence for improperly departing from mandatory minimum absent §3553(e) motion from government, directing district court to consider §3553(f) when resentencing on remand).

See *Outline* at V.F.1

Sentencing Procedure

Second Circuit uses supervisory authority to require that defendants be given opportunity to have counsel present at debriefing related to substantial assistance reduction. Defendant pled guilty to one racketeering count. He signed an agreement to cooperate with the government which, in return, agreed to file a §5K1.1 motion for downward departure if it determined that defendant provided substantial assistance. After debriefing defendant, the government did file the motion, but disparaged defendant's assistance as reluctant and less than candid. Relying on the government's characterization, the district court declined to depart more than three months from the guideline minimum of 63 months.

At the sentencing hearing, defense counsel objected to the prosecutor's comments and the sentence, complaining that the prosecutor did not notify her when the debriefing sessions were to occur and that she could have helped her client cooperate more fully. "[T]he prosecutor stated that her failure to give notice to defendant's lawyer was routine, adding that every witness or potential witness in the case was debriefed without counsel being present because that was 'standard practice' in the Eastern District prosecutor's office. The sentencing court found the practice unremarkable" and rejected defense counsel's argument. On appeal defendant contended that the Sixth Amendment entitled him to the assistance of counsel during his debriefing.

The appellate court "d[id] not reach or decide appellant's constitutional argument," instead concluding that "the government's standard practice in this district of conducting debriefing interviews outside the presence of counsel is inconsistent, in our view, with the fair administration of criminal justice. Consequently, we exercise our supervisory authority to bring it to an end, and vacate the judgment in the instant case and remand for resentencing." The court reasoned that "[t]he special nature of a §5K1.1 motion demonstrates that the government debriefing interview is crucial to a cooperating witness. To send a defendant into this perilous setting without his attorney is, we think, inconsistent with the fair administration of justice."

The court explained that "[d]efendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of counsel's failure to attend could be explained to defendant. . . . Alternatively, waiver can be set forth expressly in the cooperation agreement."

U.S. v. Ming He, 94 F.3d 782, 785–94 (2d Cir. 1996).

See *Outline* generally at IX.C

Departures

Mitigating Circumstances

Fourth Circuit rejects downward departure, sets forth five-step analysis for departure decision. Defendant was convicted on conspiracy and perjury charges. The district court departed downward five offense levels based "on the confluence of six factors": (1) defendant was "a highly decorated Vietnam War veteran [with] an unblemished record of 20 years of service . . . in the military and in the Secret Service; (2) he had a nine-year-old son with neurological problems who was in need of special supervision, and his wife's mental health was fragile; (3) he is recovering from an alcohol abuse problem and requires counseling; (4) his offense was not relatively serious because his scheme to defraud did not involve 'real fraud'; (5) his imprisonment would be 'more onerous' because law enforcement officers 'suffer disproportionate problems when they are incarcerated'; and (6) his status as a convicted felon—which prohibits him, an experienced firearms handler and instructor, from ever touching a firearm again and from voting for the rest of his life—constitutes sufficient punishment when coupled with his sentence of probation."

The appellate court, guided by *Koon v. U.S.,* 116 S. Ct. 2035 (1996), first "prescribe[d] the following analysis for sentencing courts to follow when deciding whether to depart, and we clarify the standards for review of departure decisions:

"1. The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed only for clear error.

"2. The district court must then decide whether any of the circumstances or consequences of the offense of conviction appear 'atypical,' such that they potentially take the case out of the applicable guideline's heartland. . . . Unlike the other steps in this analysis, a district court's identification of factors for potential consideration is purely analytical and, therefore, is never subject to appellate review.

"3. . . . [T]he district court must identify each [atypical factor] according to the Guidelines' classifications as a 'forbidden,' 'encouraged,' 'discouraged,' or 'unmentioned' basis for departure. Because a court's classification of potential bases for departure is a matter of guideline interpretation, we review such rulings *de novo* in the context of our ultimate review for abuse of discretion. . . . And '[a] district court by definition abuses its discretion when it makes an error of law.' . . . A factor classified as 'forbidden' . . . can never provide a basis for departure and its consideration ends at this step. . . .

"4. . . . 'Encouraged' factors . . . are usually appropriate bases for departure. But such factors may not be relied upon if already adequately taken into account by the applicable guideline, and that legal analysis involves interpreting the applicable guideline, which we review *de novo* to determine whether the district court abused its discretion. . . . Conversely, 'discouraged' factors . . . are '"not ordinarily relevant,"' but may be relied upon as bases for departure '"in exceptional cases"'. . . . When the determination of whether a factor is present to an exceptional degree amounts merely to an evaluation of a showing's adequacy, it becomes a legal question, and our review is *de novo* to determine whether the district court abused its discretion. Finally, . . . 'unmentioned' factors . . . may justify a departure where the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' indicate that they take a case out of the applicable guideline's heartland. . . . The interpretation of whether the Guidelines' structure and theory allow for a departure is, again, a legal question subject to *de novo* review to determine whether the district court abused its discretion.

"5. As the last step, the district court must consider whether circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure . . . is therefore warranted. Because this step requires the sentencing court to 'make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing' and its comparison of the case with other Guidelines cases, this part of the departure analysis 'embodies the traditional exercise of discretion by [the] sentencing court.' . . . While we review this ultimate departure decision for abuse of discretion, . . . if the district court bases its departure decision on a factual determination, our review of that underlying determination is for clear error. And if the court's departure is based on a misinterpretation of the Guidelines, our review of that underlying ruling is *de novo*."

The court then reversed, finding that none of the factors justified a departure under the foregoing analysis. Defendant's service record and his family responsibilities are "discouraged" factors under the Guidelines, *see* §§ 5H1.6 and 5H1.11, and "the record does not indicate that these factors are present to an 'exceptional' degree." Defendant's alcohol problem is a "forbidden" basis for departure, so it was "legal error and per se an abuse of discretion for the district court to have relied on this factor." The last three factors "are all 'unmentioned' factors. We conclude, however, that none of these factors warranted the district court's downward departure in this case because a departure based on the first two reasons is inconsistent with the structure and theory of the relevant guidelines . . . and the third factor is not present to an exceptional degree."

U.S. v. Rybicki, 96 F.3d 754, 757–59 (4th Cir. 1996).

See *Outline* at VI.C.1.a, h, 2.c, 3, and 5.b

Second Circuit affirms downward departure based on combination of physical impairment and "good works." Based on defendant's health problems and "good acts," the district court departed from offense level 20 to level 10 and imposed a sentence of three years' probation, six months of home confinement, and 500 hours of community service. The government appealed the departure.

Following the *Koon* standard of abuse of discretion for review of departures, the appellate court affirmed. The court recognized that physical problems, § 5H1.4, and "good works," § 5H1.11, are "not ordinarily relevant" to departure decisions. "In extraordinary cases, however, the district court may downwardly depart when a number of factors that, when considered individually, would not permit a downward departure, combine to create a situation that 'differs significantly from the "heartland" cases covered by the guidelines.' U.S.S.G. § 5K2.0 cmt."

The court agreed that defendant's case "differed significantly from the heartland of guideline cases. Rioux had a kidney transplant over 20 years ago, and his new kidney is diseased. Although his kidney function remains stable, he must receive regular blood tests and prescription medicines. As a complication of the kidney medications, Rioux contracted a bone disease requiring a double hip replacement. Although the replacement was successful, it does require monitoring. While many of Rioux's public acts of charity are not worthy of commendation, he unquestionably has participated to a large degree in legitimate fund raising efforts. . . . It was not an abuse of discretion for the district court to conclude that, in combination, Rioux's medical condition and charitable and civic good deeds warranted a downward departure."

U.S. v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996).

See *Outline* at VI.C.1.a and d

To all readers of *Guideline Sentencing Update* and *Guideline Sentencing: An Outline:*
There is an error in the February 1997 edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues,* which was distributed throughout the courts in March. Please delete the note on p. 47 at the beginning of section II.C that refers to a 1995 amendment to § 2D1.1(b)(1). That proposed change did *not* go into effect.

Also note:
Have you received a copy of the Center's report *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*? In March, copies were sent to all appeals court and district court judges, all chief probation officers, and all Sentencing Commission commissioners. If you have not received a copy, please fax a request to the Center's Information Services Office at 202-273-4025.

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Criminal History

Career Offender Provision

Supreme Court resolves circuit split, holds that "maximum term authorized" for career offender guideline calculation includes statutory enhancements. In 28 U.S.C. §994(h), the Sentencing Commission was directed to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for a career offender. Amendment 506 (Nov. 1,1994) redefined USSG §4B1.1's "Offense Statutory Maximum" as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." The appellate courts split on whether Amendment 506 conflicted with the mandate of §994(h) or was a reasonable interpretation of the statute. *See Outline* at IV.B.3.

The Supreme Court has now resolved the split by "conclud[ing] that the Commission's interpretation is inconsistent with §994(h)'s plain language, and . . . that 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements." Rejecting arguments that §994(h) was ambiguous, the Court found "that the word 'maximum' most naturally connotes the 'greatest quantity or value attainable in a given case.'" Furthermore, "the phrase 'term authorized' refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes. Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute. . . . Where Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term."

U.S. v. LaBonte, 117 S. Ct. 1673, 1675–78 (1997) (Breyer, Stevens, and Ginsburg, JJ., dissenting).

See *Outline* at IV.B.3

Departures

Extent of Departure

Seventh and Ninth Circuits differ on whether they may require use of analogies to Guidelines in setting extent of departure after *Koon*. In the Seventh Circuit case, the appellate court held that the district court chose an inappropriate analogy for an upward departure, and that therefore the extent of the departure was unreasonable. In so doing, the court also ruled that *Koon v. U.S.,* 116 S. Ct. 2035 (1996), did not remove the circuit's requirement to explain the extent of a departure by analogy to the Guidelines. "[I]n computing the degree of an upward departure, the district court is 'required to articulate the specific factors justifying the extent of [the] departure and to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the . . . sentence.'"

"We do not read *Koon* to require that we abdicate our reviewing authority over the magnitude of a departure chosen by the district court. As noted at the outset, our authority to review the district judge's departure decision in Horton's case stems from section 3742(e)–(f), which provides for appellate review of the reasonableness of the extent of any departure assigned by the district court, an issue quite separate from the court's decision whether to depart at all. Although *Koon* changed the standard of review with respect to the latter issue, . . . and adopted a unitary abuse of discretion standard for the review of departure decisions, . . . we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. . . . Because this requirement does not deprive the district judge of the deference to which he is due, we do not believe it to be inconsistent with *Koon*."

U.S. v. Horton, 98 F.3d 313, 319 (7th Cir. 1996) (Evans, J., dissenting). *See also U.S. v. Barajas-Nunez,* 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure and the extent thereof still remains.").

The Ninth Circuit, on the other hand, decided en banc that *Koon* effectively overruled its earlier holding that the extent of departure must be determined by reference to "the structure, standards and policies" of the Guidelines and "be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines," and that courts "should include a reasoned explanation of the extent of the departure" with reference to these principles. *See U.S. v. Lira-Barraza,* 941 F.2d 745, 747–51 (9th Cir. 1991) (en banc).

"In *Lira-Barraza*, we relied heavily on the Seventh Circuit's decision in *U.S. v. Ferra,* 900 F.2d 1057 (7th Cir. 1990), . . . as support for the proposition that the extent of an upward departure *requires* a comparison to analogous Guideline provisions. . . . In light of *Koon*, we now reject such a mechanistic approach to determining whether the

extent of a district court's departure was unreasonable, and hold that where, as here, a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. . . . As the Supreme Court has repeatedly noted, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.' . . . Because the extent of the district court's departure was not unreasonable, we find no abuse of discretion in the sentence imposed." The court did note that "[a]n analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential."

U.S. v. Sablan, 114 F.3d 913, 916–19 & n.10 (9th Cir. 1997) (en banc) (five judges dissenting), *rev'g* 90 F.3d 362. *See also U.S. v. Hardy,* 99 F.3d 1242, 1253 (1st Cir. 1996) (affirming upward departure: "A sentencing court is not required to 'dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic choice made.' . . . Similarly, the reasonableness *vel non* of the degree of departure need 'not [] be determined by rigid adherence to a particular mechanistic formula, but by an evaluation of "the overall aggregate of known circumstances."'").

See *Outline* at VI.D and X.A.1

Mitigating Circumstances

First Circuit holds that third-party job loss cannot be categorically excluded as potential basis for departure. Defendants, owners of a small business, were convicted of tax evasion. The district court denied their request for a downward departure on the claim that "twelve innocent employees will lose their jobs and suffer severe hardship" if defendants are imprisoned. The court agreed that the business would fail and the employees would lose their jobs, but concluded that, as a matter of law, the Sentencing Commission had considered the possible failure of a small business and its effect on employees. On defendants' appeal, the government argued that departure is precluded by §5H1.2, which states that "vocational skills are not ordinarily relevant" in a departure decision.

The appellate court, following *Koon v. U.S.,* 116 S. Ct. 2035 (1996), reversed. "It is clear that the Guidelines do not explicitly list the factor at issue here among the forbidden or the discouraged factors. The question is whether the Commission's 'vocational skills' comment implicitly discourages consideration of job loss to innocent employees. We note first that 'vocational skills' themselves are not a forbidden factor, but a discouraged factor. . . . Therefore, even if the present case merely concerned vocational skills, a per se approach would be inappropriate and the district court would still have to consider whether the case was in some way 'different from the ordinary case where the factor is present.' *Koon,* . . . 116 S. Ct. at 2045."

"We do not agree with the Government's contention that the loss of employment to innocent employees necessarily falls within the term 'vocational skills.' That a defendant may have vocational skills of great value or rarity does not necessarily tell one whether incarceration of that defendant will entail job loss to others totally uninvolved in the defendant's crimes. Vocational skills may or may not be related to job loss to others."

The court found support in *Koon* for its "belief that courts should be careful not to construe the categories covered by the Guidelines' factors too broadly." In *Koon*, "the Supreme Court recognized that while 'socio-economic status' of the defendant is an impermissible ground for departure and 'a defendant's career may relate to his or her socio-economic status, . . . the link is not so close as to justify categorical exclusion of the effect of conviction on a career. Although an impermissible factor need not be invoked by name to be rejected, socio-economic status and job loss are not the semantic or practical equivalents of each other.' . . . 116 S. Ct. at 2051."

"As *Koon* holds that job loss by the defendant resulting from his incarceration cannot be categorically excluded from consideration, we think it follows that job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration. . . . To add a judicial gloss equating job loss by innocent third parties with 'vocational skills' is to run headlong into the problem of judicial trespass on legislative prerogative against which the Supreme Court warned in *Koon*. We do not travel this path."

The court stressed that "[t]he mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland. These issues are matters of degree, involving qualitative and quantitative judgments" that must be made by the district court. "[W]e decide only that there is no categorical barrier to the district court's consideration of a departure—not that a departure would be proper on these facts."

U.S. v. Olbres, 99 F.3d 28, 32–36 & n.12 (1st Cir. 1996).

See *Outline* at VI.C.1.e and X.A.1

Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that burden is on defendants to show weapon was not possessed "in connection with the offense," §5C1.2(2); Tenth and D.C. Circuits differ on whether a defendant can be held responsible for a codefendant's possession. In the Tenth Circuit, three defendants were arrested while carrying marijuana in duffel bags from a marijuana patch to their vehicles parked 200

to 300 yards away. A rifle was found in the vehicle belonging to one defendant, who claimed the rifle was only for protection against snakes. All defendants argued that the firearm was not possessed "in connection with the offense" within the meaning of USSG §5C1.2(2), 18 U.S.C. §3553(f)(2). Section 5C1.2 does not define "possess" or "in connection with," so the district court looked to §2D1.1(b)(1) and found it was not "clearly improbable that the weapon was possessed in connection with the offense conduct of conviction." The court thus held that defendants were ineligible for sentencing below the five-year statutory minimum.

The appellate court affirmed the sentences. The district court's findings and the one defendant's admission that he had the gun for protection "establish[ed] proximity of the firearm to the offense," and the court held that "a firearm's proximity and potential to facilitate the offense is enough to prevent application of USSG §5C1.2(2)." The court also rejected the other two defendants' claim that they should not be held accountable for their codefendant's possession of the weapon. "'Offense' for purposes of §5C1.2(2) includes 'the offense of conviction and all relevant conduct.' USSG §5C1.2 comment. (n.3). The commentary in application note 4, read together with §1B1.3, simply acknowledges that individual defendants are accountable for their own conduct and that participants in joint criminal enterprises can be accountable for the foreseeable acts of others that further the joint activity. . . . Blackburn and Hilton knew of the presence of the weapon Hallum brought to the marijuana patch; that it might further their joint activity was reasonably foreseeable."

U.S. v. Hallum, 103 F.3d 87, 89–90 (10th Cir. 1996).

The defendant in the D.C. Circuit pled guilty to a drug conspiracy charge. His brother pled guilty to that charge and two other charges related to his possession of a firearm during the last of the four drug sales in the conspiracy. That sale occurred outside a restaurant and was handled by defendant's brother while he sat in his car, in which he had a gun. Defendant remained inside the restaurant during the entire transaction. Although he otherwise qualified for the safety valve, the district court ruled that, based on either coconspirator liability or constructive possession, he had possessed a firearm in connection with the offense in violation of §5C1.2(2).

The appellate court remanded, holding first that "co-conspirator liability cannot establish possession under the safety valve." The court reasoned that "application note four provides that, '[c]onsistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language parallels the wording of one of the two principal provisions defining the scope of relevant conduct . . . . Notably absent from application note four, however, is any mention of the other principal provision defining the scope of relevant conduct, which holds defendants liable for 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' *Id.* §1B1.3(a)(1)(B). Omission of this co-conspirator liability language, we think, can hardly have been inadvertent. Its omission, moreover, is consistent with the safety valve's basic purpose: to spare certain minor participants in drug trafficking enterprises from mandatory minimum sentences when imposition of the mandatory sentences would be disproportionate to the defendants' culpability. . . . Given the great likelihood that at least one member of a drug distribution conspiracy will possess a firearm, . . . incorporating co-conspirator liability into the safety valve's weapon possession element would render the safety valve virtually useless."

The court recognized "the tension" between Note 4 and "application note three's broad definition of 'offense,' which includes 'all relevant conduct.' . . . Applying the principle that the specific trumps the general, however, we read application note four, which addresses only the weapon possession element, as restricting the meaning of application note three, which applies to several elements of the safety valve. Indeed, application note four describes the weapon possession element's use of the term 'defendant' as 'limiting' defendants' liability, . . . a limitation that would have no function if application note three incorporated co-conspirator liability into the weapon possession element. We also think it significant that, by comparison to the provision enhancing drug sentences for gun possession, which uses the passive voice—requiring enhancement if a firearm 'was possessed,' *id.* §2D1.1(b)(1)—and omits any reference to the defendant, the safety valve speaks in the active voice, requiring that 'the defendant' must do the possessing . . . . And most fundamentally, we think our interpretation of the safety valve is faithful to its purpose."

The court also held that the alternative ground of constructive possession, while a possibly valid ground to deny the safety valve, did not apply under the facts of this case. "[F]inding a participant in a drug operation constructively possessed someone else's weapon requires some additional evidence linking the participant to the weapon—a link nowhere evident in the record before us."

In re Sealed Case, 105 F.3d 1460, 1461–65 (D.C. Cir. 1997).

See *Outline* generally at V.F

Sentencing of Organizations

Determining the Fine

Ninth Circuit holds that court could impose fine that might jeopardize continued viability of organization. Defendant (ELI) pled guilty to eight fraud counts. In addition to restitution of $322,442, the district court imposed a fine of $1.5 million. The fine was a departure from the sentencing guideline range of $6,425,013 to $9,178,590, and was reached after an independent auditor analyzed ELI's finances. ELI appealed, claiming that the fine would jeopardize its continued viability and, pursuant to USSG §8C3.3, a lower fine should have been imposed.

The appellate court held that the fine was properly imposed. In relevant part, §8C3.3(a) states that a court "shall reduce the fine below that otherwise required . . . , to the extent that imposition of such fine would impair its ability to make restitution to victims." Subsection (b) states that a court "may impose a fine below that otherwise required . . . if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required." An unnumbered paragraph adds that "the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."

The court held that §8C3.3 "does not prohibit a court from imposing a fine that jeopardizes an organization's continued viability. It permits, but does not require, a court in such circumstances and in its discretion, to reduce the fine. The only time a reduction is mandated under section 8C3.3 is if the fine imposed, without reduction, would impair the defendant's ability to make restitution to victims. . . . Thus, even if the district court's fine would completely bankrupt ELI, neither section 8C3.3(a) nor section 8C3.3(b) precluded the court from imposing such a fine so long as the fine did not impair ELI's ability to make restitution. It did not. . . . [Thus], the plain language of Guideline Section 8C3.3 did not require the district court to further reduce ELI's fine."

The court also looked at the guideline covering fines for individuals. "Under Guideline Section 5E1.2(a), a court must first determine if an individual defendant is financially able to pay any fine at all. If the defendant successfully demonstrates that he is unable to pay any fine, then a fine may be inappropriate. . . . Unlike Guideline Section 5E1.2, Guideline Sections 8C3.3 and 8C2.2, which apply to organizational defendants such as ELI, do not require a sentencing court to consider whether the defendant can pay a fine, so long as the ability to pay restitution is not impaired." The court added that the district court properly considered the factors listed in 18 U.S.C. §3572 in setting the fine, and that nothing in that statute precluded a fine that could jeopardize the company's viability.

U.S. v. Eureka Lab., Inc., 103 F.3d 908, 912–14 (9th Cir. 1996).

To be included in *Outline* at section VIII

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Adjustments

Multiple Counts—Grouping

Ninth Circuit holds that drug conspiracy and money laundering counts should be grouped. Defendant was convicted of conspiracy to distribute drugs and money laundering, and the evidence showed that the laundered money came from the drug business. She appealed the district court's refusal to group the conspiracy and money laundering counts for sentencing purposes. The appellate court reversed and remanded for resentencing.

"Section 3D1.2 permits grouping of closely related counts. Subsection (b) permits grouping '[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.'" The court found that defendant's "crimes satisfy the first requirement of subsection (b) of §3D1.2. Victimless crimes, such as those involved here, are treated as involving the same victim 'when the societal interests that are harmed are closely related.' U.S.S.G. §3D1.2, Application Note 2."

"The money laundering prohibition was adopted as part of the Anti-Drug Abuse Act of 1986. . . . The societal interests harmed by money laundering and drug trafficking are closely related: Narcotics trafficking enables traffickers to reap illicit financial gains and inflict the detrimental effects of narcotics use upon our society; money laundering enables criminals to obtain the benefits of income gained from illicit activities, particularly drug trafficking and organized crime. *See also Most Frequently Asked Questions About the Sentencing Guidelines* 20 (7th ed. 1994) ('[B]ecause money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as "closely intertwined" and groupable with the underlying offense.'). . . . Grouping the crimes of conspirators who engage in both trafficking and laundering merely implements the Sentencing Commission's direction to group closely related counts." The court disagreed with the Fifth and Eleventh Circuits, which "have held that the societal interests implicated by drug trafficking and money laundering are not closely related because narcotics distribution 'increas[es] lawlessness and violence' while 'money laundering disperses capital from lawfully operating economic institutions.' *U.S. v. Gallo,* 927 F.2d 815, 824 (5th Cir. 1991); *see also U.S. v. Harper,* 972 F.2d 321, 322 (11th Cir. 1992)."

The court also concluded that defendant's offenses "satisfy the second requirement of subsection (b) of §3D1.2. Lopez's acts of drug trafficking and money laundering were connected by a common criminal objective. Lopez laundered money to conceal the conspiracy's drug trafficking and thus facilitated the accomplishment of the conspiracy's ultimate objective of obtaining the financial benefits of drug trafficking."

U.S. v. Lopez, 104 F.3d 1149, 1150–51 (9th Cir. 1997) (per curiam) (Fernandez, J., dissenting).

See *Outline* at III.D.1

Departures

Mitigating Circumstances

Fourth Circuit rejects departing when §5G1.3 does not give credit for previously discharged related sentence. Defendant was convicted on a drug conspiracy charge in 1988. That conviction served as a predicate offense for a CCE charge, to which he pled guilty in July 1992 after two years of preindictment and pretrial negotiations and delays. Defendant was still serving the related 1988 sentence when he was convicted in 1992, but had finished it by the time he was sentenced on the CCE conviction in 1994. Had the 1988 term still been undischarged, credit for time served could have been given under §5G1.3(b) & comment. (n.2). Finding that the Guidelines did not adequately account for a related sentence's being already discharged, the district court departed downward to give defendant credit for the time he had served.

The appellate court vacated the departure. "The Sentencing Guidelines expressly permit district courts to give sentencing credit only for terms of imprisonment 'result[ing] from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense' if the previous term of imprisonment is 'undischarged.' U.S.S.G. §5G1.3. The Application Notes and Background Statement to §5G1.3 similarly limit its application to *undischarged* terms of imprisonment. And, despite several amendments to the Sentencing Guidelines, the Sentencing Commission has not altered §5G1.3 to include credit for discharged sentences. . . . [W]e conclude that the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority."

The court also rejected defendant's claim that departure was warranted because the 22-month delay between conviction and sentencing rendered §5G1.3 inap-

plicable. "The Sentencing Guidelines . . . direct district courts to determine credit for prior sentences at the time of sentencing and provide no exceptions for cases in which the defendant's sentencing has been delayed. Moreover, it was McHan who is principally responsible for bringing about delays in his trial and sentencing by engaging in proactive negotiation and sometimes dilatory litigation. At least where there is no indication that the government intentionally delayed the defendant's processing for the purpose of rendering §5G1.3(c) inapplicable, we decline to undermine the Sentencing Guidelines' general preference for repose and specific preference for denying sentencing credit for previously discharged sentences."

U.S. v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996) (Hall, J., dissenting). *Contra U.S. v. Blackwell,* 49 F.3d 1232, 1241–42 (7th Cir. 1995) (on remand, district court may consider departure because §5G1.3 does not cover situation where related sentence was already discharged).

See *Outline* at V.A.3

Eighth Circuit holds that §3553(e) motion has no time limit and may be made by government in conjunction with defendant's §3582(c)(2) motion. Defendant received a §5K1.1 substantial assistance reduction at his sentencing and, after another year of assistance, a further reduction under Fed. R. Civ. P. 35(b) to a sentence of 131 months, a 55% reduction from the original guideline minimum. Later, defendant moved for a sentence reduction under 18 U.S.C. §3582(c)(2), based on a retroactive guideline amendment. The government urged the court to grant the motion and reduce defendant's sentence to 106 months, which would equal a 55% reduction from the amended guideline minimum. Because this would fall below the 120-month statutory minimum, the government also made a motion under §3553(e). The court granted defendant's motion, but concluded that the government could not invoke §3553(e) in the context of a §3582(c)(2) motion and reduced the sentence to the 120-month minimum.

The appellate court remanded for reconsideration. "Section 3582(c)(2) does not itself authorize a reduction below the statutory minimum, . . . but the benefit accruing from a lowered sentencing range is independent of any substantial-assistance considerations. In order that a defendant may receive the full benefit of both a change in sentencing range and the assistance the defendant has previously rendered, we conclude that the government may seek a section 3553(e) reduction below the statutory minimum in conjunction with a section 3582(c)(2) reduction. Section 3553(e) contains no time limitation foreclosing such a conclusion."

U.S. v. Williams, 103 F.3d 57, 58 (8th Cir. 1996) (per curiam).

See *Outline* at I.E and VI.F.3

Violation of Supervised Release

Sentencing

Ninth Circuit holds that revocation sentence may be reduced under §3582(c)(2) when already-served sentence for underlying conviction could have been reduced by a later amendment. Defendant pled guilty to a marijuana offense in 1991. After completing his 51-month sentence in March 1995, he began serving his term of supervised release. Three months later, defendant violated the conditions of his release and was sentenced to seven months in prison. In November 1995, an amendment to §2D1.1 changed the method of calculating quantity for offenses involving marijuana plants. The amendment was made retroactive and, if it could have been applied to defendant, would have reduced his original guideline range from 51–63 months to 27–33 months. Defendant filed a motion pursuant to 18 U.S.C. §3582(c), requesting that his sentence on the violation of release be reduced to time served. The district court did so.

"The question presented is whether the district court had discretion under section 3582(c)(2) to reduce Etherton's sentence pursuant to the revocation of supervised release." Section 3582(c)(2) allows a court to "modify a term of imprisonment . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The appellate court determined that this section could be applied to reduce the sentence for the release violation. "The seven months imprisonment is not punishment for a new substantive offense, rather 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of . . . supervised release.' . . . [W]e interpret the statute's directive that 'the court may reduce the term of imprisonment' as extending to the entirety of the original sentence, including terms of imprisonment imposed upon revocation of supervised release."

U.S. v. Etherton, 101 F.3d 80, 81 (9th Cir. 1996) (Nelson, J., dissenting). *Cf. U.S. v. Trujeque,* 100 F.3d 869, 871 (10th Cir. 1996) (remanded: because defendant's sentence under Fed. R. Crim. P. 11(e)(1)(C) was based on a valid plea agreement and not "on a sentencing range that has subsequently been lowered by the Sentencing Commission," §3582(c)(2) cannot be applied and his motion to lower his sentence should have been dismissed).

See *Outline* at I.E and VII.B.1

Offense Conduct

Relevant Conduct

Eighth Circuit holds defendants responsible for cocaine shipment they were directly involved with despite their claim that they expected to receive marijuana. Defendants agreed to accept deliveries of pack-

ages containing marijuana for another person. After two successful deliveries, a third package was intercepted and, after a controlled delivery, defendants were arrested. The third package contained cocaine rather than marijuana. Defendants pled guilty to conspiring to distribute and possess with intent to distribute controlled substances. At sentencing, the district court held defendants accountable for the cocaine shipment despite their claims that they were expecting another marijuana shipment and could not reasonably foresee that cocaine would be in the package.

The appellate court affirmed, although it concluded "that it would have been more fitting to assess the conspirators' responsibility for the cocaine under Guideline §1B1.3(a)(1)(A). Unlike paragraph (a)(1)(B), which the district court utilized to hold [defendants] liable for the 'acts and omissions of others,' paragraph (a)(1)(A) appertains to conduct personally undertaken by the defendant being sentenced." Application Note 2 states that "the defendant is accountable for all quantities of contraband with which he was directly involved. . . . The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes . . . ; such conduct is addressed under subsection (a)(1)(A)."

"Mindful of these precepts, we have no difficulty in determining that the district court correctly attributed the 239.5 grams of cocaine to [defendants]. Through their own actions, the two men aided, abetted, and wilfully caused the conveyance . . . of at least three packages. . . . Their convictions verify that they embarked upon this behavior with the requisite criminal intent and with every expectation of receiving some type of illegal drug to distribute. Accordingly, . . . they are accountable at sentencing for the full quantity of all illegal drugs located within the parcels."

U.S. v. Strange, 102 F.3d 356, 359–61 (8th Cir. 1996).

See *Outline* at II.A.2

Second Circuit requires "specific evidence" of defendant's involvement before counting drug amounts from uncharged relevant conduct. Defendant was convicted of drug charges after being caught attempting to import heroin on a plane flight from Nigeria. His sentence was first based on the 427.4 grams of heroin contained in balloons he had swallowed. The district court then found that defendant had made seven other trips to Nigeria for the purpose of importing heroin, concluded that it was reasonable to assume that the same amount of heroin was involved in all eight trips, and used the total of 3,419.2 grams as relevant conduct to set the offense level. The appellate court remanded for resentencing, holding that there must be "specific evidence—*e.g.,* drug records, admissions or live testimony—to calculate drug quantities for sentencing purposes," and that no such evidence had been shown to support the extra amounts of heroin.

On remand, the district court conducted a sentencing hearing that produced extensive statistical evidence and other information relating to quantities carried by heroin swallowers from Nigeria who were arrested at JFK Airport during the time defendant made his trips; plus, other district judges were surveyed on their experiences with heroin swallowers. The district court also relied on defendant's statements at the time of arrest and his demeanor at trial and sentencing, concluding that the evidence supported a finding that he was responsible for carrying between 1,000 and 3,000 grams of heroin.

The appellate court vacated the sentence. Although the preponderance of evidence standard is generally used for resolving disputed facts at sentencing, "we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence. *See U.S. v. Gigante,* 94 F.3d 53, 56–57 (2d Cir. 1996). . . . The 'specific evidence' we required [in the previous opinion] to prove a relevant-conduct quantity of drugs for purposes of enhancing a sentence must be evidence that points specifically to a drug quantity for which the defendant is responsible." The court reasoned that "under the Sentencing Guidelines, evidence tending to prove 'relevant conduct' is not merely taken into consideration at sentencing, it *determines* sentencing (subject only to departure authority), and it does so at the same level of severity as if the defendant had been convicted of the relevant conduct. That circumstance prompted us to require 'specific evidence' of a 'relevant conduct' drug quantity, and we adhere to that requirement."

The "items of evidence [used by the district court] are not 'specific evidence' of drug quantities carried by Shonubi on his prior seven trips. . . . The DEA records informed [the court] of what 117 other balloon swallowers from Nigeria had done during the same time period as Shonubi's eight trips. Those records of other defendants' crimes arguably provided some basis for an estimate of the quantities that were carried by Shonubi on his seven prior trips, but they are not 'specific evidence' of the quantities he carried." Similarly, the other evidence "relates to Shonubi specifically," but does "not provide 'specific evidence' of the quantities carried on his prior seven trips." The court then ruled that, "[s]ince the Government has now had two opportunities to present the required 'specific evidence' to the sentencing court, no further opportunity is warranted, and the case must be remanded for imposition of a sentence based on the quantity of drugs Shonubi carried on the night of his arrest."

U.S. v. Shonubi, 103 F.3d 1085, 1087–92 (2d Cir. 1997).

See *Outline* at I.A.3, II.A.1 and B.4.d, and IX.B

General Application Principles

Amendments

Eighth Circuit holds that sentencing court was bound by original drug quantity finding when considering whether to apply retroactive amendment. Defendant and his son were arrested after federal agents discovered 110 marijuana plants on his property. In accordance with a plea agreement, defendant was reindicted and charged with manufacturing 73 marijuana plants; his son was charged with manufacturing 37 plants. The government and defendant stipulated that 73 plants were attributable to defendant, the presentence report stated that defendant was accountable for 73 plants, and the district court sentenced him to 30 months on that basis. After Amendment 516 to §2D1.1(c) retroactively changed the weight equivalence of marijuana plants for sentencing purposes from 1 kilogram to 100 grams, defendant filed motions to have his sentence reconsidered pursuant to 18 U.S.C. §3582(c)(2). The court denied the motions, stating in part that defendant could have been held accountable for 110 plants, which would have resulted in a statutory mandatory minimum sentence of 60 months.

The appellate court remanded, concluding that "the district court was bound by its previous determination with respect to the number of marijuana plants that was relevant to Mr. Adams's sentence. In the first place, although the finding is perhaps not technically *res judicata*, it is unusual, for efficiency reasons if no other, for trial courts to revisit factual findings. In the second place, the district court had already made a finding that the seventy-three plants for which Mr. Adams was going to be held responsible 'adequately reflect[ed] the seriousness of the actual offense behavior,' else the court could not have approved the reduction in the charges against Mr. Adams at all. *See* U.S.S.G. §6B1.2(a). In the third place, the sentencing guidelines direct a district court in situations like the present one to 'consider the sentence that it would have imposed had the amendment[] . . . been in effect' at the time of the original sentencing. *See* U.S.S.G. §1B1.10(b). We think it implicit in this directive that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively."

U.S. v. Adams, 104 F.3d 1028, 1030–31 (8th Cir. 1997). *See also U.S. v. Cothran,* 106 F.3d 1560, 1562–63 (11th Cir. 1997) (citing *Adams*, affirming district court's refusal during §3582(c)(2) hearing to reconsider number of marijuana plants that defendant had not contested at original sentencing—"§3582(c)(2) and related sentencing guidelines do not contemplate a full *de novo* resentencing").

See *Outline* at I.E

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Determining the Sentence

"Safety Valve" Provision

Third Circuit holds that defendant possessed firearm during relevant conduct and thus cannot qualify for safety valve. Defendant pled guilty to one count of possession with intent to distribute over 50 grams of cocaine base. He was arrested while selling crack on the street in September 1994. The evidence indicated that he regularly sold drugs during the preceding year and, at least in May and June of that year, purchased several guns in connection with his drug dealing. To qualify for the safety valve reduction, a defendant cannot "possess a firearm . . . in connection with the offense." 18 U.S.C. §3553(f)(2); USSG §5C1.2(2). Application Note 3 of §5C1.2 states that "offense" in subdivision (2) means "the offense of conviction and all relevant conduct." The district court held that defendant possessed a firearm in connection with the offense as defined in Note 3 and declined to apply the safety valve provision.

The appellate court affirmed. "The record shows that Wilson's drug dealing activities in the year preceding his arrest fit within the definition of 'same course of conduct.' By his own admission, he was regularly engaged in drug sales for the year prior to his September arrest, satisfying both the 'regularity' and 'temporal proximity' tests for determining 'same course of conduct.' . . . [Also], the record has demonstrated that Wilson has dealt drugs, and cocaine in particular, both when he was in possession of firearms and in connection with the offense of conviction. Wilson's admission of prior drug dealing, the reputation evidence and the circumstances surrounding his September arrest are sufficient to satisfy the similarity prong."

"We conclude from this course of conduct that Wilson's prior drug dealing was relevant conduct to the offense of conviction . . . for the purposes of the Relevant Conduct and Safety Valve Provisions." The court then found that defendant's "involvement with firearms is integrally connected to his prior drug dealing," and therefore he "failed to meet one of the requirements of the Safety Valve Provision."

U.S. v. Wilson, 106 F.3d 1140, 1144–45 (3d Cir. 1997). *See also U.S. v. Plunkett,* 125 F.3d 873, 874–75 (D.C. Cir. 1997) (affirmed: safety valve did not apply to defendant who, although he had no weapon during single drug transaction that was basis of offense of conviction, admittedly possessed firearm during relevant conduct).

See *Outline* generally at V.F

Eighth Circuit holds that defendant, not a coconspirator, must possess weapon to preclude safety valve. Defendant pled guilty to drug conspiracy charges, plus a charge of using and carrying a firearm in relation to a drug-trafficking crime. The basis for the firearm charge was that defendant knew his coconspirator carried a weapon during the conspiracy. At sentencing, the district court ruled that defendant was ineligible for the safety valve reduction because of the coconspirator's possession. The safety valve provision requires that a defendant did not "possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." 18 U.S.C. §3553(f)(2); USSG §5C1.2(2).

The appellate court remanded. Note 4 to §5C1.2(2) "provides that '[c]onsistent with [U.S.S.G.] §1B1.3 (Relevant Conduct),' the use of the term 'defendant' in §5C1.2(2) 'limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language mirrors §1B1.3(a)(1)(A). Of import is the fact that this language omits the text of §1B1.3(a)(1)(B) which provides that 'relevant conduct' encompasses acts and omissions undertaken in a 'jointly undertaken criminal activity,' *e.g.* a conspiracy." Therefore, "we conclude that in determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. As it was Wilson's co-conspirator, and not Wilson himself, who possessed the gun in the conspiracy, the district court erred in concluding that Wilson was ineligible to receive the benefit of §5C1.2."

U.S. v. Wilson, 105 F.3d 219, 222 (5th Cir. 1997) (per curiam). *Accord In re Sealed Case,* 105 F.3d 1460, 1461–65 (D.C. Cir. 1997) [9 *GSU* #3]. *But see U.S. v. Hallum,* 103 F.3d 87, 89–90 (10th Cir. 1996) (proper to deny safety valve for codefendant's possession of weapon) [9 *GSU* #3].

See *Outline* generally at V.F

Ninth Circuit holds that safety valve provision does not allow departure to probation when statute of conviction prohibits probation sentence. Defendant faced a ten-year statutory minimum sentence, but qualified for the safety valve provision. In addition to sentencing below the mandatory minimum, the district court sua sponte departed below the guideline range to impose a sentence of probation. The government appealed, and the appellate court remanded for resentencing. Apart from finding that the departure itself—for aberrant be-

havior—was not justified, the court held that the government was entitled to notice that the district court planned to depart on a ground that was not raised by either party or the presentence report. See other cases in *Outline* at VI.G and *U.S. v. Pankhurst,* 118 F.3d 345, 357 (5th Cir. 1997) (remanded: "notice must be given to the Government before a district court may depart downward").

The court also held that a sentence of probation was illegal in this case. Defendant was convicted of violating 21 U.S.C. §841(a)(1). Section 841(b), which required the ten-year minimum sentence for defendant, states that "notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph." Defendant argued that the safety valve, 18 U.S.C. §3553(f), which also contains "notwithstanding any other provision of law" language, "trumps" §841(b)'s prohibition, but the court disagreed. "To suggest that a court can disregard both the minimum sentence and the probation ban would render the ban on probation in §841 entirely meaningless, since every time a court avoided the 10-year minimum, it could also disregard the probation ban. Construing §841(b) to give effect to every provision, it appears that §841 establishes the probation ban as the ultimate floor in case the mandatory minimum sentence is somehow avoided. We therefore hold that the 'notwithstanding any other provision of law' language in §3553(f) is tied only to the ability to disregard statutory minimum terms of imprisonment; any other reading would eviscerate this ultimate floor in §841."

The court also noted that "the Guidelines *themselves* clarify that a sentence of probation is impermissible for the crime committed by Green. First, probation is prohibited under the Guidelines for any 'Class A' felony, which is defined [as carrying] a maximum term of life imprisonment. . . . U.S.S.G. §5B1.1(b)(1)." Defendant was convicted of such a felony. "Second, the Sentencing Guidelines also expressly incorporate the probation ban in statutes such as §841(b), by prohibiting probation in the event that the offense of conviction expressly precludes probation as a sentence. . . . U.S.S.G. §5B1.1(b)(2)."

U.S. v. Green, 105 F.3d 1321, 1323–24 (9th Cir. 1997).

See *Outline* at VI.G, generally at V.F

Departures

Mitigating Circumstances

Ninth Circuit affirms departure based on prejudice to defendant from government conduct during plea negotiations. Defendant was indicted on cocaine and heroin distribution charges. "The district court originally dismissed the five-count indictment, finding that the government had engaged in misconduct by entering into plea negotiations with Lopez in the absence of his attorney. This court reversed the dismissal, determining it to be an inappropriate remedy." Defendant was then convicted at a jury trial, and "the district court sentenced Lopez to 135 months in custody. In imposing this sentence, the district court departed downward three levels because of the prejudice to Lopez which resulted from the government's conduct."

The appellate court affirmed. "The government appeals what it characterizes as the district court's three-level downward departure for governmental misconduct. A reading of the sentencing transcript makes clear, however, that the district court assumed it could not depart downward for governmental misconduct. . . . Rather, it instituted a downward departure due to prejudice Lopez suffered as a result of the government's conduct. . . . Lopez's opportunity for full and fair plea negotiations was seriously affected. The district court noted that 'although it cannot be determined what the result of those negotiations might have been, it is clear that he reasonably believed he had no choice but to go to trial.' . . . The prejudice Lopez encountered as a direct result of the government's conduct was, in our view, significant enough to take this case out of the heartland of the Guidelines. . . . Therefore, the district court's three-level departure was not an abuse of discretion."

U.S. v. Lopez, 106 F.3d 309, 311 (9th Cir. 1997).

See *Outline* at VI.C.4.c

Eighth Circuit establishes analysis for aberrant behavior departure after *Koon*. Defendant pled guilty to participating in a drug manufacturing conspiracy. The district court granted a downward sentencing departure under §5K2.0 for aberrant behavior. The government appealed, arguing that defendant's conduct was not a "single act" of aberrant behavior. The appellate court, concluding that "this is no longer the most relevant inquiry," remanded and discussed departures in light of *Koon v. U.S.,* 116 S. Ct. 2035 (1996), and how it affects the analysis of whether to depart for aberrant behavior.

Under *Koon*, "a court of appeals need not defer to the district court's determination of an issue of law, such as 'whether a factor is a permissible basis for departure under any circumstances.' But the district court is entitled to deference on most departure issues, including the critical issues of '[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way.'"

"On this appeal, the parties primarily debate whether Kalb's offense was a 'single act of aberrant behavior' as that term has been defined in prior Eighth Circuit departure cases. . . . However, . . . our prior cases, and the district court in this case, have not accurately anticipated the *Koon*-mandated mode of analysis in a number of significant respects."

"First, the Sentencing Commission only mentioned 'single acts of aberrant behavior' in discussing probation and split sentences. Thus, it is an *encouraged* factor only when considering crimes in which the offender might be eligible, with a departure, for those modest forms of punishment. . . . Under *Koon*, for a serious crime like Kalb's that cannot warrant probation, a 'single act of aberrant behavior' is an unmentioned, not an encouraged departure factor."

"Second, our prior cases suggest that the only 'aberrant behavior' which may be *considered* for departure purposes is the 'single act of aberrant behavior' mentioned in the introductory comment about probation and split sentences. . . . The Commission's introductory comment about single acts of aberrant behavior does not appear in its general discussion of departures. . . . Thus, under *Koon*, 'aberrant behavior' in general is an unmentioned factor, and the task for the sentencing court is to analyze how and why specific conduct is allegedly aberrant, and whether the Guidelines adequately take into account aspects of defendant's conduct that are in fact aberrant."

"Third, when dealing with an unmentioned potential departure factor such as alleged aberrant behavior, *Koon* instructs the sentencing court to consider the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.' . . . In this case, we cannot tell from the sentencing record what aspects of Kalb's behavior the district court considered 'aberrant,' and why that particular kind of aberrant behavior falls outside the heartland *of the guidelines applicable in determining Kalb's sentencing range*. For example, the court stated that Kalb's shipping of six gallons of a precursor chemical was a single aberrant act, but it did not compare this single act to those of other peripheral drug conspirators, such as cocaine and heroin couriers."

U.S. v. Kalb, 105 F.3d 426, 428–30 (8th Cir. 1997) (Bright, J., dissenting).

See *Outline* at VI.C.1.c

Aggravating Circumstances

Sixth Circuit holds that potential dangerousness of defendant with mental disease did not warrant upward departure. Defendant was convicted of four federal firearms offenses in 1991. Before sentencing, the government moved for a hearing under 18 U.S.C. §4244 to determine his mental condition. Following §4244(d), the court found that defendant "is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment."

During defendant's treatment, doctors found a new medication that improved his condition enough to warrant a "Certificate of Recovery and Request for Court to Proceed with Final Sentencing" in 1995. The certificate also recommended that, after sentencing, defendant be returned to the institution for proceedings under §4246, "Hospitalization of a person due for release but suffering from mental disease or defect." This recommendation was made because the time defendant had spent at the institution was longer than his sentence would be and so, after sentencing, he would be released; there was no assurance that he would continue his medication without further supervision; and, without the medication, he could pose a danger to others.

Defendant's guideline range was 12–18 months, but the court "ruled that the danger Moses posed to the community warranted an upward departure to a sentence of 120 months 'primarily on the basis of Section 5K2.14, but alternatively on the ground of Section 5K 2.0 . . . .'"

The appellate court held that the departure was invalid. Under §5K2.14 ("national security, public health, or safety was significantly endangered"), the sentencing court is required "to look at the offense committed and the dangerousness of the defendant *at the time of the crime*, not the future dangerousness of the defendant." However, "it is evident . . . that the district court, legitimately concerned about the prospects that Moses would discontinue Clozaril, was focusing on Moses' future dangerousness when it applied §5K2.14. That was legal error." The court also found that §5H1.3 ("[m]ental and emotional conditions are not ordinarily relevant" in departure decisions) applied here and precluded departure. "Section 5H1.3 by its terms must encompass a variety of mental illnesses, including many that might make a defendant dangerous to himself and others. Moses' paranoid schizophrenia made him dangerous at the time of his crime, but not in an uncommon way, or in a way so out of the ordinary (in the context of mentally ill criminals) as to override application of the rule."

The court also rejected §5K2.0 as a basis for departure. A defendant's need for treatment does not warrant departure, the court held. And, as noted above, "we do not believe that Moses' dangerousness makes this is an 'extraordinary case.'" The court then disagreed with *U.S. v. Hines,* 26 F.3d 1469, 1477 (9th Cir. 1994) (defendant's "extremely dangerous mental state" and the "significant likelihood he will commit additional serious crimes" warranted upward departure under §5K2.0 and §4A1.3). Danger resulting from mental illness cannot justify departure "when there exists a statute, 18 U.S.C. §4246, directly designed to forestall such danger through continued commitment . . . . Otherwise, virtually every criminal defendant who, at the time of sentencing, met the dangerousness criteria of §4246 would also be subject to an upward departure. . . . [W]e hold that under the relevant statutes and guidelines, the appropriate mechanism of public protection is a commitment proceeding under §4246, rather than an extended criminal sentence."

U.S. v. Moses, 106 F.3d 1273, 1277–81 (6th Cir. 1997).

See *Outline* at VI.B.2.c

Offense Conduct

Calculating Weight of Drugs

Second Circuit holds that "not reasonably capable of providing" exception to using agreed-upon amount is not applicable to buyer in reverse sting. Defendant agreed to pay $11,000 for 125 grams of heroin from undercover agents. When arrested at the time the buy was to occur, defendant had only $2,039. The district court based the sentence on the agreed-upon 125 grams of heroin. On appeal, defendant conceded he had agreed to buy 125 grams but argued that, following Application Note 12 of §2D1.1, his sentence should be based on the amount that $2,039 would buy because he was financially incapable of purchasing 125 grams.

Note 12 states, in relevant part: "In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. . . . In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing."

The appellate court concluded that "[t]he plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance, that is, where the defendant '*provid[es]* the agreed-upon quantity of the controlled substance.' (emphasis added) It is hard to believe that the narrowness of this language is inadvertent, coming immediately after a discussion of what happens in a reverse sting, where the government agent 'provides' the controlled substance and the defendant provides only the money to purchase it. Moreover, in a reverse sting, as the government points out, drug traffickers making an illegal purchase frequently hold purchase money in reserve nearby for ready access while they test the quality of the drugs being purchased. We note also that drugs have been delivered on consignment, . . . or on credit with a down payment . . . . These possibilities lend support to the logic of the Sentencing Commission's distinction." Because the "not reasonably capable" exception does not apply to buyers, "[t]he district court correctly calculated Santos' sentence on the basis of 125 grams of heroin, which was the agreed-upon amount in this transaction."

U.S. v. Gomez, 103 F.3d 249, 253–54 (2d Cir. 1997).

See *Outline* at II.B.4.d

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General Application Principles

Amendments

Ninth Circuit holds that applying § 1B1.11(b)(3) to increase offense level under guideline amended after some of defendant's offenses occurred violates ex post facto clause. Defendant was convicted of five counts of mail fraud, four of which occurred before a 1989 amendment to USSG § 2F1.1. For the amount of loss involved in defendant's five counts, the amended guideline would increase his offense level by eleven, instead of by eight under the 1988 guideline. The district court used the 1994 guidelines (which included the amendment), ruling that there was no ex post facto problem because the conduct charged in the fifth count occurred after the amendment.

The appellate court remanded. "The district court implicitly followed a Guidelines policy statement when it sentenced all five counts under the 1994 Guidelines. Effective as of the November 1, 1993 Guidelines, USSG § 1B1.11(b)(3) p.s. explains that, 'If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual should be applied to both offenses.' . . . We have not previously applied policy statement § 1B1.11(b)(3). Generally speaking, Commission policy statements *are* binding on us. . . . However, we need not apply the Guidelines where they *would* violate the Constitution, regardless of the intent of the Commission. . . . Under the facts of this case, we find that the policy statement § 1B1.11(b)(3) violates the ex post facto clause of the Constitution."

"We *have* required all single-count conduct to be sentenced under a single Guidelines manual. . . . We have also required that all continuing offenses be sentenced under one Guidelines manual: the later one. . . . However, we have applied more than one Guidelines manual to multiple counts involving offenses completed at different times, and we must do so in this case."

"Application of the policy statement in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline. . . . The harm caused by the earlier offenses *can* be counted in sentencing the later one. . . . That does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be. In fact, were the later count to fall at some time after sentencing, all that would remain would be the earlier sentences, which would be too long." The court vacated and remanded for resentencing "under the 1988 Guidelines on counts one through four and under the 1994 Guidelines on count five."

U.S. v. Ortland, 109 F.3d 539, 546–47 (9th Cir. 1997).

See *Outline* at I.E

Offense Conduct

Mandatory Minimums and Other Issues

Second Circuit holds that § 2D1.1(b)(6) reduction can apply to defendant who is not subject to mandatory minimum. "This case presents the question of whether U.S.S.G. § 2D1.1(b)(4) (now § 2D1.1(b)(6)) can be applied in cases in which the defendant is not subject to a statutory mandatory minimum sentence. The district court concluded, over the objection of both the defendant and the government, that Section 2D1.1(b)(4) is not applicable in such a case. Applying the plain language of the Sentencing Guidelines, we disagree." The section states: "If the defendant meets the criteria set forth in subdivisions (1)–(5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels."

"Had the Sentencing Commission intended to limit the application of § 2D1.1 to those defendants who are subject to a mandatory minimum sentence, it could easily have done so . . . . Instead, Congress and the Commission chose to draft [§ 2D1.1(b)(6)] in such a way that, by its plain terms, it applies whenever the offense level is 26 or greater and the defendant meets all of the criteria set forth in § 5C1.2(1)–(5), regardless of whether § 5C1.2 applies independently to the case."

"Moreover, if the Commission had intended the two-level reduction to be given only to defendants who are subject to mandatory minimum sentences, it would logically have located the reduction directly within § 5C1.2, which applies only to those defendants who are subject to such mandatory sentences. Instead, it placed the reduction in § 2D1.1, which applies to *all* defendants who have been convicted of drug crimes, regardless of whether or not they are subject to mandatory minimum sentences." The court vacated and remanded, with instructions to determine whether defendant "has met the criteria listed in § 5C1.2(1)–(5). If he has, he should be given a two-point reduction pursuant to § 2D1.1(b)[(6)]."

U.S. v. Osei, 107 F.3d 101, 102–05 (2d Cir. 1997) (per curiam).

To be included in *Outline* at II.A.3; see also V.F.1

Possession of Weapon by Drug Defendant

Fifth Circuit holds that carrying weapon as part of job does not preclude §2D1.1(b)(1) enhancement. Defendant was an INS agent who was part of a drug conspiracy that transported cocaine and marijuana from Mexico to Houston in INS vehicles. He was present during at least one transport where, as part of his job, he carried a gun. However, the district court declined to enhance his sentence for possessing a firearm during a drug offense under §2D1.1(b)(1), and the government appealed.

The appellate court reversed and remanded. "Possession of a firearm will enhance a defendant's sentence under U.S.S.G. §2D1.1(b)(1) where a temporal and spatial relationship exists between the weapon, the drug-trafficking activity, and the defendant. . . . This enhancement provision will not apply where the defendant is able to show that it is 'clearly improbable' that the weapon was connected with an offense. U.S.S.G. §2D1.1 n.3. . . . Under the facts of this case, we cannot say that Marmolejo has borne his burden of proving that it is 'clearly improbable' that his gun was connected to his offense. . . . That carrying a gun was an incidence of his position does not undo the benefit that drug traffickers received from having an armed guard protect their goods. Marmolejo used his position to transport drugs and therefore any incidence of that position which further facilitated the transport should properly be taken into account at sentencing."

U.S. v. Marmolejo, 106 F.3d 1213, 1216 (5th Cir. 1997). *See also U.S. v. Sivils,* 960 F.2d 587, 596 (6th Cir. 1992) (§2D1.1(b)(1) properly applied to county sheriff who carried weapon as part of job); *U.S. v. Ruiz,* 905 F.2d 499, 508 (1st Cir. 1990) (same, for police officer).

See *Outline* at II.C.4

Sentencing Procedure

Plea Bargaining

Tenth Circuit holds that Rule 11(e)(1)(C) plea agreement that specifies sentencing range is binding and district court cannot depart downward. Defendant and the government entered into a plea agreement that stated, in part: "The United States has made an AGREEMENT pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P., that a specific offense level is the appropriate disposition of this case. The United States and defendant have agreed that the offense level is 16." The district court determined that the guideline range was 21–27 months and, after ruling that it lacked authority to consider defendant's motion for downward departure, sentenced him to 27 months. Defendant appealed, arguing that because the agreement specified a sentencing range rather than an exact term of months it was not a Rule 11(e)(1)(C) agreement that bound the court, and that, even if the agreement fell under Rule 11(e)(1)(C), the district court had jurisdiction to depart downward.

The appellate court affirmed, concluding first that "a plea agreement specifying a sentence at a particular guideline range is specific enough to fall within the language of [Rule] 11(e)(1)(C)." *See also U.S. v. Nutter,* 61 F.3d 10, 11–12 (2d Cir. 1995) (range of 155–181 months specific enough to satisfy 18 U.S.C. §3742(c)(1) and Rule 11(e)(1)(C)); *U.S. v. Mukai,* 26 F.3d 953, 954–55 (9th Cir. 1994) (plea agreement providing for five to seven years' imprisonment was Rule 11(e)(1)(C) agreement); *U.S. v. Lambey,* 974 F.2d 1389, 1396 (4th Cir. 1992) (indicating that specifying a sentencing range would satisfy Rule 11(e)(1)(C)); *U.S. v. Kemper,* 908 F.2d 33, 36 (6th Cir. 1990) (agreement that assumed sentence within range of 27–33 months was binding under Rule 11(e)(1)(C)).

Defendant's second argument "contradicts the plain language of Rule 11," which states that if a Rule 11(e)(1)(C) agreement is accepted "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." Fed. R. Crim. P. 11(e)(3). "Based on the clear language of Rule 11(e)(1)(C) and the applicable case law, Veri had no reason to believe the district court would entertain a motion for downward departure when the plea agreement specified a disposition at offense level sixteen and included no provision for downward departure." *See also Mukai,* 26 F.3d at 956–57 (where agreement allowed for downward departure only within sentencing range specified in Rule 11(e)(1)(C) agreement, district court could not depart below that range); *U.S. v. Cunavelis,* 969 F.2d 1419, 1422 (2d Cir. 1992) (district court had no authority to go beyond four-level reduction specified in Rule 11(e)(1)(C) agreement in making departure under §5K1.1). *Cf. U.S. v. Swigert,* 18 F.3d 443, 445–46 (7th Cir. 1994) (where Rule 11(e)(1)(C) agreement called for specific "term of imprisonment," district court could not impose split sentence of imprisonment and community confinement or home detention under §5C1(d)(2)).

U.S. v. Veri, 108 F.3d 1311, 1313–15 (10th Cir. 1997).

See *Outline* at VI.F.2 and IX.A.4

Departures

Mitigating Circumstances

Fourth Circuit acknowledges that, after *Koon,* post-offense rehabilitation may provide basis for departure. Defendant sought a downward departure based upon his post-offense rehabilitation efforts. Although the district court was inclined to depart, it held that it could not under *U.S. v. Van Dyke,* 895 F.3d 984, 986–87 (4th Cir. 1990) (holding that post-offense rehabilitation may be considered for acceptance of responsibility reduction but not for departure). During the pendency of defendant's appeal, the Supreme Court decided *Koon v. U.S.,* 116 S. Ct. 2035 (1996), which addressed the analysis courts should follow for departures.

The appellate court remanded, recognizing that "*Koon* rejected the reasoning that we employed in *Van Dyke* and made clear that . . . only those factors on which the Commission has forbidden reliance . . . *never* may provide an appropriate basis for departure. . . . All others potentially may provide a basis for departure under appropriate circumstances." Therefore, "it is clear that our holding in *Van Dyke* that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure. Because the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

U.S. v. Brock, 108 F.3d 31, 33–35 (4th Cir. 1997). *Accord U.S. v. Sally,* 116 F.3d 76, 79–82 (3d Cir. 1997).

See *Outline* at VI.C.2.a and X.A.1

Adjustments

Acceptance of Responsibility

Seventh Circuit outlines when attorney's statements may be attributed to defendant for § 3E1.1 purposes. On the issue of whether a particular drug deal should have been considered relevant conduct, defendant remained silent. However, his attorney made both legal and factual arguments against using that deal in setting defendant's offense level. The district court held that it was relevant conduct, and also concluded that the attorney's factual arguments, which attempted to deny or minimize defendant's involvement in that deal, were false denials of relevant conduct that, under § 3E1.1, comment. (n.1(a)), warranted denial of the acceptance of responsibility reduction. Defendant appealed, arguing that his attorney's challenges were not to the facts but to the legal conclusions drawn from facts he had admitted.

The appellate court first agreed that a defendant should be able to challenge the legal conclusion of whether admitted facts constitute relevant conduct and remain eligible for the § 3E1.1 reduction. "We think this situation is closely analogous to challenging the constitutionality of a statute while admitting the conduct which would violate the statute, or challenging the applicability of a statute to the facts. In both cases, the application notes to the Guidelines suggest that such challenges do not deprive an otherwise eligible defendant of the reduction for acceptance of responsibility."

Here, however, defendant's attorney challenged facts as well as legal conclusions, and the court recognized the district court's frustration with the way it was done. "The defendant and his attorney appear to have been attempting to manipulate the Guidelines. The attorney directed his client to remain silent about relevant conduct, apparently in order to keep his client within Application Note 1(a) . . . . The attorney then challenged facts comprising relevant conduct in the course of argument and in the written objections to the PSR. . . . Because the Guidelines provide that an otherwise eligible defendant may remain silent as to relevant conduct without losing the acceptance of responsibility reduction, the attorney presumably believed his client had everything to gain and nothing to lose from this strategy. But in this case, the district court called the attorney's bluff, and attributed the attorney's factual challenges to [defendant]."

The appellate court found such an attribution "troubling for a number of reasons," and instructed district courts on how to handle future cases. "In a case such as this one, where the defendant remains otherwise silent as to relevant conduct but his lawyer challenges certain facts alleged in the PSR, we think the court should attempt to ensure that the defendant understands and approves the argument before attributing the factual challenges in the argument to the defendant for purposes of assessing acceptance of responsibility. . . . If the defendant does understand and agree with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction."

In addition, "[w]hen an attorney challenges the facts set out in the PSR during argument, we think the court should put counsel to his or her proof. The court should ask whether the attorney intends to present evidence in support of these fact challenges. If so, the argument can go forward. If not, the argument is really baseless, and the court need not allow an attorney to waste the court's time with a baseless argument when there is no evidence supporting the factual challenges. . . . If the attorney proffers evidence, we can safely assume the defendant himself is challenging the facts, and the court can then decide whether the challenge is frivolous."

Here, it was not clear whether defendant understood and agreed with his attorney's arguments; thus, the acceptance of responsibility reduction could not be denied on this ground. However, the district court gave another, independent reason for denying the reduction—that defendant "was insincere in his apology to the court, and that he did not actually accept responsibility for his offense." Because that finding was not clearly erroneous, the appellate court affirmed.

U.S. v. Purchess, 107 F.3d 1261, 1267–69 (7th Cir, 1997).

See *Outline* at III.E.2 and 3

Determining the Sentence

Consecutive or Concurrent Sentences

Eleventh Circuit holds that government cannot omit relevant conduct to avoid concurrent sentences under §5G1.3(b). Defendant stole cars and ran "chop shops" for several years. In 1992 he was sentenced in state court to 12 years for three car thefts. Two years later he pled guilty in federal court to conspiracy to run a chop shop operation. The presentence report, based on information supplied by the government, calculated the offense level by using all the cars involved in the chop shop conspiracy except for the three involved in the state conviction. Because the state thefts were thus not "fully taken into account in the determination of the offense level for the instant offense," §5G1.3(b), the sentencing court exercised its discretion under §5G1.3(c) to make the federal sentence consecutive to the undischarged state sentence. Defendant appealed, arguing that the state thefts were relevant conduct requiring application of §5G1.3(b), and that the government omitted them because their inclusion would not have increased his sentence (his guideline range was 100–125 months, but the statutory maximum for his offense of conviction was only 60 months).

The appellate court agreed, concluding that "the Government deliberately refrained from portraying [the state thefts] as relevant conduct for one reason—to manipulate the application of the guidelines so that his federal sentence would run consecutively to the state sentences." Such manipulation is "contrary to both the letter and spirit of the guidelines. First, section 1B1.3 states that a defendant's offense level '*shall* be determined on the basis of' all relevant conduct. U.S.S.G. §1B1.3(a) (emphasis added)…. Second, the guidelines were written to prevent the Government from manipulating indictments and prosecutions to increase artificially a defendant's sentence or sentences for the same criminal conduct." Moreover, deliberately omitting relevant conduct would violate the guidelines' "real offense" sentencing approach. "We therefore conclude that when a defendant is serving an undischarged sentence resulting from conduct that is required to be considered in a subsequent sentencing proceeding as relevant conduct pursuant to section 1B1.3, section 5G1.3(b) provides that the subsequent sentence should run concurrently to the undischarged sentence."

Because defendant's state thefts were, in fact, conduct relevant to the federal offense of conviction, they should have been "fully taken into account" in setting the offense level. "[T]he district court consequently erred in concluding that section 5G1.3(b) does not require the instant sentence to run concurrently to the state sentences." However, the court noted that, even though §5G1.3(b) requires concurrent sentences, the district court retains discretion to consider an upward departure on remand.

U.S. v. Fuentes, 107 F.3d 1515, 1521–27 (11th Cir. 1997).

See *Outline* generally at V.A.3

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Offense Conduct

Mandatory Minimums and Other Issues

Seventh Circuit holds that defendant may receive §2D1.1(b)(6) reduction even if §3E1.1 reduction is denied. Under USSG §2D1.1(b)(6) (formerly §2D1.1(b)(4)), drug defendants whose offense level is 26 or above can qualify for a two-level reduction if they satisfy the requirements of subdivisions (1)–(5) of the "safety valve" provision, §5C1.2. In this case, the district court denied defendant an acceptance of responsibility reduction because he had failed to appear for his plea hearing, finally turning himself in seven months later, and did not fully admit his criminal conduct until the sentencing hearing. However, because defendant did finally admit his conduct, the court concluded that he met the requirements of §5C1.2 and thereby qualified for the two-level reduction under §2D1.1(b)(6). Defendant appealed, claiming it was inconsistent to deny the §3E1.1 reduction while granting the §2D1.1(b)(6) reduction.

The appellate court affirmed. Subdivision (5) of §5C1.2 requires that, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense." "Section 5C1.2(5) in one respect demands more of an effort from the defendant than §3E1.1(a), . . . but in other respects may demand less. Under §5C1.2(5), the defendant is required to provide the necessary information 'not later than the time of the sentencing hearing.' U.S.S.G. §5C1.2(5). In contrast, the commentary to §3E1.1 advises the district court that it may consider whether the defendant provided information in a timely manner. . . . Likewise, the commentary to §3E1.1 points to prompt and voluntary surrender and voluntary termination of criminal conduct as factors for consideration, while neither the text nor commentary for §5C1.2 highlights such factors. Assuming that the district court in Webb's case appropriately awarded a §5C1.2 reduction, it was nevertheless permitted to refuse a §3E1.1(a) reduction."

U.S. v. Webb, 110 F.3d 444, 447–48 (7th Cir. 1997). *Cf. U.S. v. Mertilus,* 111 F.3d 870, 874 (11th Cir. 1997) (per curiam) (remanded: although §2D1.1(b)(6) uses the factors listed in §5C1.2, the two sections operate independently and it was error not to consider §2D1.1(b)(6) reduction because offense of conviction is not listed in §5C1.2 as eligible for safety valve). *See also U.S. v. Osei,* 107 F.3d 101, 102–05 (2d Cir. 1997) [9 *GSU* #6].

To be included in *Outline* at II.A.3; see also V.F.2

Determining the Sentence

Safety Valve Provision

Sixth Circuit holds that safety valve may be applied to defendant whose appeal was pending on provision's date of enactment. Defendant was originally sentenced in 1991 to 121 months on an LSD charge. On appeal, the appellate court remanded for clarification of a plea withdrawal issue, and the district court imposed the same sentence on remand. After a Nov. 1993 amendment changed the guideline for calculation of LSD amounts, defendant filed a motion for sentence modification under 18 U.S.C. §3582(c). Although the district court granted her motion, it held that she was still subject to a 10-year mandatory minimum sentence and imposed a modified sentence of 120 months. One month after this sentence, on Sept. 23, 1994, the safety valve statute took effect, 18 U.S.C. §3553(f); USSG §5C1.2. Defendant appealed her sentence, claiming she should be resentenced under the safety valve provision.

"The question before us is whether §3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted. This subsection applies 'to all sentences imposed on or after' [10 days after] the date of enactment . . . . The statute's language does not address the question of its application to cases pending on appeal. The statute's purpose statement, however, suggests that it should receive broad application and should apply to cases pending on appeal when the statute was enacted."

"A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error. When a sentence is modified under 18 U.S.C. §3582(c)(2), the courts are required to consider the factors that are set out in 18 U.S.C. §3553(a). . . . The consideration of these factors is consistent with the application of the safety valve statute. Therefore, §3553(a) authorizes consideration of the safety valve statute when a defendant is otherwise properly resentenced under §3582(c)(2)."

The court also concluded that its holding is consistent with §§3553(a) and 3582(b)(2)–(3), "which indicate that a sentence is not final if it can be appealed and modified pursuant to 18 U.S.C. §3742. Similarly, §3582(b)(1) indicates that a sentence is not final if it can be modified pursuant to 18 U.S.C. §3582(c). In each of these situations resentencing is possible because of an exception to the

general rule that the initial sentence was final. Each situation raises the possibility that resentencing will lower the defendant's unrestricted guideline range below the statutory minimum, thus making consideration of the safety valve relevant. Therefore, we hold that appellate courts may take the safety valve statute into account in pending sentencing cases and that district courts may consider the safety valve statute when a case is remanded under §3742 or §3582(c), the Sentencing Guidelines or other relevant standards providing for the revision of sentences."

U.S. v. Clark, 110 F.3d 15, 17–18 (6th Cir. 1997). *See also U.S. v. Mihm,* 134 F.3d 1353, 1355 (8th Cir. 1998) ("[T]he §3553(f) safety valve is a general sentencing consideration that the district court must take into account in exercising its present discretion to resentence under §3582(c)(2). . . . [T]he grant of §3582(c)(2) relief to Mihm is a distinct sentencing exercise, one that results in a sentence 'imposed on or after' September 23, 1994. Thus, there is no retroactivity bar to applying §3553(f) in these circumstances."). *Contra U.S. v. Stockdale,* 129 F.3d 1066, 1068 (9th Cir. 1997) ("A person whose sentence is reduced pursuant to the change in the weight equivalencies is not entitled to retroactive application of the safety valve statute, whether his original sentence was pursuant to a guideline range or the statutory minimum. Both the language of the applicable provisions and their purposes require this result.") (note: order was amended on denial of rehearing and rehearing en banc, April 20, 1998); *U.S. v. Torres,* 99 F.3d 360, 362–63 (10th Cir. 1996) (do not apply to defendant originally sentenced in 1993 who was resentenced under §3582(c) after retroactive amendment changed guideline calculation of marijuana plants).

See *Outline* at V.F.1

Ninth Circuit holds that adverse jury finding does not preclude safety valve reduction. Defendant claimed to have no knowledge that a suitcase he had been asked to transport contained heroin. However, the jury found him guilty of possession of heroin with intent to distribute and of importation of heroin. At sentencing, the district court found that defendant had told the government everything he knew about the offenses and reduced his sentence under the safety valve provision, §3553(f); §5C1.2. The government argued that, because knowledge of the drugs is an element of the convicted offenses, the jury's guilty verdict precludes a finding that defendant "truthfully provided" information as required under §3553(f)(5); §5C1.2(5).

The appellate court affirmed the sentence, holding that recent Supreme Court cases make it clear that sentencing findings do not have to agree with a jury verdict. In *Koon v. U.S.,* 116 S. Ct. 2035 (1996), "the Supreme Court made it clear that courts may not define facts relevant to sentencing beyond those identified in the guidelines," and "reflect[ed] the long-standing tradition that sentencing is the province of the judge, not the jury. . . . In light of the Court's decision in *Koon*, we have no difficulty holding that a district court may reconsider facts necessary to the jury verdict in determining whether to apply the safety valve provision of the guidelines."

The court found further support in *U.S. v. Watts,* 117 S. Ct. 633 (1997), which held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge." In reversing Ninth Circuit precedent, the Court also stated that "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." The appellate court thus held that, "[c]onsistent with the language of §3553(f) and the different roles involved when determining guilt and imposing sentence, . . . the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." Because the district court's conclusion here was not clearly erroneous, the sentence was affirmed.

U.S. v. Sherpa, 110 F.3d 656, 661–62 (9th Cir. 1996) (amending 97 F.3d 1239).

See *Outline* generally at V.F.2

Supervised Release

Sixth Circuit holds that period of supervised release may be tolled while defendant is out of country after deportation. In 1992 defendant pled guilty to immigration fraud. He was sentenced to three months of imprisonment to be followed by two years of supervised release. As special conditions of supervised release, defendant was to agree to voluntary deportation, was not to reenter the United States without written permission of the Attorney General, and, if allowed to reenter, would report to the nearest probation office so that his period of supervised release "shall be resumed." Defendant served his sentence and was deported. Within a year he returned to the United States illegally and was eventually arrested in 1996. The original district court revoked defendant's supervised release and sentenced him to 24 months in prison, rejecting defendant's arguments that the court had no authority to toll his period of release and therefore that period had expired in 1995.

The appellate court affirmed the revocation and sentence, concluding that tolling a period of supervised release is allowed under the "broad discretion to fashion appropriate conditions of supervised release" granted to district courts under USSG §5D1.3 and 18 U.S.C. §3583(d). "We think that the tolling order met the specified criteria [in §5D1.3]. Mr. Isong had repeatedly violated immigration laws, and he had flagrantly violated his original sentence within months of its entry. Given his demonstrated disrespect for the law, it seems to us that the tolling order was an appropriate penological measure, designed to ensure that the defendant would be subject to supervi-

sion if and when he returned to the United States. The tolling order was also appropriate from a deterrence standpoint. It is unlikely that Mr. Isong could have been supervised after his deportation to Nigeria. Supervised release without supervision is not much of a deterrent to further criminal conduct."

The court also rejected defendant's argument that, because 18 U.S.C. § 3624(e) specifically provides for tolling a period of supervised release if a defendant is imprisoned for another crime for 30 days or more, the lack of any comparable tolling provision for a deported defendant impliedly forbids such an order. The argument "is blunted here by the rest of the statutory scheme. When deportation is part of a defendant's sentence, the deportation normally occurs upon the end of any term of imprisonment. An unserved period of supervised release does not defer deportation. 8 U.S.C. § 1252(h). In most instances, supervised release of a defendant who is outside the United States would be essentially meaningless. It seems to us that a tolling order is an appropriate way to make supervised release meaningful for defendants who are going to be deported. This circumstance, coupled with the district court's discretion to set appropriate conditions of supervised release . . . , is sufficient to counter any negative implication that might otherwise stem from 18 U.S.C. § 3624(e)."

U.S. v. Isong, 111 F.3d 428, 429–31 (7th Cir. 1997) (Moore, J., dissented). *See also U.S. v. (Mary) Isong,* 111 F.3d 41, 42 (6th Cir. 1997) (affirming condition of supervised release that defendant remain under supervision for three years, not including any time she is not in the country if she is deported).

See *Outline* generally at V.C

First Circuit holds that supervised release begins on date of actual release from prison, not date prisoner would have been released had he not been convicted of charge that was later dismissed. Defendant was sentenced in 1991 to two concurrent terms of 21 months each plus a consecutive term of 60 months for a third count of using a firearm during a drug offense, 18 U.S.C. § 924(c). He also received concurrent supervised release terms of three and five years on the first two counts. In early 1996, defendant filed a motion under 28 U.S.C. § 2255 seeking to have his § 924(c) conviction vacated on the basis of *Bailey v. U.S.,* 116 S. Ct. 501 (1995). His motion was granted and the conviction and sentence were vacated and the count was dismissed. Because the remaining valid sentences had long been completed, the court ordered defendant's immediate release and commencement of the terms of supervised release. Defendant appealed, arguing that his supervised release terms should be reduced by the time he was imprisoned (approximately 39 months) beyond the date the two valid sentences would have ended. Alternatively, he requested that the supervised release terms be eliminated altogether to compensate him for the deprivation of freedom that resulted from the vacated conviction and sentence.

The court rejected defendant's arguments, and specifically disagreed with the rationale of *U.S. v. Blake,* 88 F.3d 824, 825–26 (9th Cir. 1996) (when retroactive guideline amendment reduces prison term to less than time served, term of supervised release begins on date defendant should have been released) [9 *GSU* #1]. Defendant's arguments are "contrary to the language of 18 U.S.C. § 3624[(e)]," which states that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." Defendant can reasonably argue that, because he should have been released from prison in late 1992 and his term of release begun at that time, he should be given credit for his excess prison time by reducing his time on release. However, "[t]he fact remains that § 3624(e) ties the beginning of a term of supervised release to release from imprisonment. It forbids the running of the term of supervised release during any period in which the person is imprisoned. Joseph was in prison at the time he now seeks to identify as the beginning of his terms of supervised release and was, under the plain language of § 3624(e), ineligible for supervised release then. . . . [L]ike the Eighth Circuit in [*U.S. v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996)], we believe that the language in § 3624(e) must be given its plain and literal meaning."

The court also found defendant's arguments undermined by 18 U.S.C. § 3583(e), under which "a defendant can ask the district court to grant early termination of his supervised release terms 'in the interests of justice' after completing one full year of supervised release. . . . The availability of this mechanism, which will enable Joseph to argue whatever points of equity and fairness he thinks persuasive to the district court, further persuades us not to invent some form of automatic credit or reduction here to compensate for Joseph's increased incarceration."

U.S. v. Joseph, 109 F.3d 34, 36–39 (1st Cir. 1997).

See *Outline* generally at V.C

Adjustments

Obstruction of Justice

Second Circuit examines when § 3C1.1 enhancement may be given for perjury during a related state investigation. Defendant was convicted of environmental crimes. The district court found that, during a state investigation into the illegal waste dumping later prosecuted in federal court, defendant committed perjury. Concluding that defendant was aware of the federal investigation at that time and that it was the motivation for his perjury, the court imposed a § 3C1.1 enhancement for obstruction of

justice. Because "the connection between the two cases is quite close," the appellate court agreed that "here, perjury in the [state] action could constitute obstruction of justice in the instant federal offense."

However, the court concluded that the district court did not make adequate findings to show that defendant's perjury actually warranted enhancement. "[I]n order to base a §3C1.1 enhancement upon the giving of perjured testimony, a sentencing court must find that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter." The appellate court concluded that the district court did not sufficiently address the materiality elements. "We understand the materiality element to mean ordinarily that the intentional giving of false testimony must be material *to the proceeding in which it is given*. In other words, Herzog can be found to have committed perjury in the state proceeding only if the sentencing court finds that he intentionally gave false testimony which was material *to the state civil action*."

"This case presents an additional twist. Where, as here, the enhancement is applied based upon perjury made not in the instant judicial proceeding, but, rather, in a related but separate state action, we must assume that the element of materiality which is required by the Guidelines (as opposed to that required for a finding of perjury) must refer to a finding that the false testimony is material *to the instant action*. Just because perjured testimony is given in a related action, and simply because that testimony is found to have been material to the related proceeding, does not mean that the statements are material to the instant proceeding. We believe that, even if the court finds that Herzog's statements constituted perjury because they were material to the state proceeding, it must also find that the perjury was material to the instant federal offense before applying that state perjury as the basis for a §3C1.1 enhancement of his federal sentence. We thus hold that, when false testimony in a related but separate judicial proceeding is raised as the basis for a §3C1.1 obstruction of justice enhancement, a sentencing court may only apply the enhancement upon making specific findings that the defendant intentionally gave false testimony which was material to the proceeding in which it was given, that the testimony was made willfully, i.e., with the specific purpose of obstructing justice, and that the testimony was material to the instant offense."

"The sentencing court did not make findings with respect to either aspect of materiality. Although [it] found that the false state deposition was *motivated by* the instant federal offense, motivation alone does not equate to materiality. We therefore vacate Herzog's sentence and remand for additional findings."

U.S. v. Zagari, 111 F.3d 307, 328–29 (2d Cir. 1997).

See *Outline* at III.C.4 (State offenses)

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Offense Conduct

Drug Quantity

Supreme Court affirms that, under the Guidelines, the sentencing court determines whether offense involved cocaine or crack when jury verdict allows for either. Defendants were charged with conspiring to possess with intent to distribute mixtures containing cocaine and cocaine base (crack), 21 U.S.C. §§ 841, 846. The jury was instructed that the government must prove that the conspiracy involved cocaine *or* cocaine base, and it returned a general verdict of guilty. The district court imposed sentences based on both cocaine and cocaine base.

On appeal, defendants argued that, because the jury returned a verdict based on cocaine *or* cocaine base, their sentences could only be based on cocaine, which would result in shorter sentences. The appellate court rejected that argument, finding that the Sentencing Guidelines require the sentencing judge, not the jury, to determine the kind and amount of drugs involved in a conspiracy. *U.S. v. Edwards,* 105 F.3d 1179, 1180–81 (7th Cir. 1997).

The Supreme Court affirmed, agreeing "that in the circumstances of this case the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities. The Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon amount and kind. . . . Consequently, regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the 'controlled substances' at issue—and how much of those substances—consisted of cocaine, crack, or both."

Nonetheless, "petitioners argue that the drug statutes, as well as the Constitution, required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Petitioners misapprehend the significance of this contention, however, for even if they are correct, it would make no difference to their case. That is because the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's 'relevant conduct.' USSG § 1B1.3. And 'relevant conduct,' in a case like this, includes *both* conduct that constitutes the 'offense of conviction,' *id.*, § 1B1.3(a)(1), *and* conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction,' *id.,* § 1B1.3(a)(2). Thus, the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each—regardless of whether the judge believed that petitioners' crack-related conduct was part of the 'offense of conviction,' or the judge believed that it was 'part of the same course of conduct, or common scheme or plan.' The Guidelines sentencing range—on either belief—is identical." The Court added that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," but that was not the case here.

Edwards v. U.S., 118 S. Ct. 1475, 1477 (1998). *See also U.S. v. Lewis,* 113 F.3d 487, 490 (3d Cir. 1997) (instruction that jury had to find that defendant distributed cocaine or cocaine base to convict him of § 841(a)(1) distribution offense was not improper—district court determines weight and identity of controlled substance for sentencing under § 841(b)).

To be included in *Outline* at II.A.3

Possession of Weapon by Drug Defendant

Ninth Circuit holds that § 2D1.1(b)(1) should not be applied if defendant was entrapped into possessing weapon. Defendant pled guilty to cocaine distribution. An informant made several purchases from defendant, and one time traded a handgun for cocaine. When defendant was arrested and his home searched, officers found the gun along with cocaine and drug paraphernalia. Although a charge of using or carrying a gun during a drug-trafficking offense was dropped, the sentencing court applied the two-level enhancement under § 2D1.1(b)(1) for possessing a weapon during a drug-trafficking crime. The court rejected defendant's argument that he had been entrapped into possessing the gun and that the court should not apply § 2D1.1(b)(1) or, if it did, should offset it by a two-level reduction for sentencing entrapment.

The appellate court remanded, concluding that its precedents hold that sentencing entrapment, if proved, may warrant a downward departure or a refusal to apply an enhancement. "We hold that if Parrilla was entrapped into trading cocaine for a gun, then the doctrine of sentencing entrapment precludes application of the two-level gun enhancement under § 2D1.1(b)(1). Our holding rests upon the basic principle that a defendant's sentence should reflect 'his predisposition, his capacity to commit

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the crime on his own, and the extent of his culpability.'" Defendant bears the burden of proving sentencing entrapment by a preponderance of the evidence, and the sentencing court must make "express factual findings" as to whether defendant has met that burden. Here, the court remanded because "nothing in the record shows that the district court considered all the relevant evidence or made the required findings to reject Parrilla's sentencing entrapment claim, [and] the record is not sufficiently developed to show whether the district court properly applied the gun enhancement."

U.S. v. Parrilla, 114 F.3d 124, 127–28 (9th Cir. 1997).

To be included in *Outline* at II.C.1.

D.C. Circuit examines sentencing liability for defendant whose participation in conspiracy straddled his eighteenth birthday. Defendant was 11 years old when he first joined a large drug conspiracy. He turned 18 during the course of the conspiracy, and was 19 when he was indicted. In addition to his own conduct, the sentencing court held defendant liable for the foreseeable conduct in furtherance of the conspiracy by his fellow conspirators that occurred before he turned 18. Defendant argued, first, that as a juvenile he did not have the requisite capacity to "join" a conspiracy, and second, that because "a defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant *joining* the conspiracy," USSG § 1B1.3, comment. (n.2) (emphasis added), he should not be held liable for the conduct of others before he turned 18.

The court acknowledged that, in some instances, federal juvenile delinquency law may limit a young defendant's liability for the conduct of others. "[I]n the case of a defendant younger than twenty-one at the time of the indictment who joined a conspiracy prior to reaching eighteen, the government must either obtain a transfer of the defendant to adult status or prove that the defendant personally engaged in some affirmative act in furtherance of the conspiracy after turning eighteen before the court may attribute to him as relevant conduct drugs sold by coconspirators before he reached age eighteen."

The court affirmed the sentence because "there was overwhelming evidence of post-eighteen action in furtherance of the conspiracy. . . . The adult conduct ratifies the juvenile agreement to join the conspiracy and the juvenile participation in the conspiracy. . . . Since [defendant] was properly convicted in adult court of a conspiracy he joined as a juvenile but continued in after eighteen, the Guidelines unambiguously permit the court to consider his and his co-conspirator's foreseeable conduct 'that occurred during the commission of the [entire conspiracy] offense,' . . . starting when he joined the conspiracy at age eleven."

U.S. v. Thomas, 114 F.3d 228, 262–67 (D.C. Cir. 1997).

To be included in *Outline* at I.I and II.A.2

Criminal History

Career Offender

Fourth Circuit holds that post-offense reclassification of prior violent felony to misdemeanor level does not change its status under career offender provision. Defendant was sentenced in 1996 as a career offender, partly on the basis of a 1986 state conviction for "assault on a woman," which at the time carried a two-year maximum sentence. In 1994 the state reclassified that offense as an A1 misdemeanor with a maximum sentence of 150 days. As such, it would not have qualified as a crime of violence as defined in § 4B1.2 at the time defendant was sentenced, and he argued that he should not have been sentenced as a career offender.

The appellate court disagreed and affirmed the sentence. "The issue presented in the instant appeal appears to be one of first impression for the federal courts. Guided by the language of the guideline and the accompanying notes a rejection of Johnson's position is dictated." For the "two prior felony conviction " required for career offender status, § 4B1.2(c)(2) provides that: "The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established." The court found that defendant "sustained his conviction for assault on a female in 1986. In 1986, assault on a female was punishable by a statutory maximum of 2 years. Thus, Johnson's assault conviction is properly considered a prior felony conviction for guideline purposes."

U.S. v. Johnson, 114 F.3d 435, 445 (4th Cir. 1997).

To be included in *Outline* at IV.B.3

General Application Principles

Amendments

Eighth Circuit outlines procedure for district courts when considering whether to apply retroactive amendments following § 3582(c)(2) motion. Defendant was sentenced in 1993 for a marijuana offense. After a § 5K1.1 departure, the district court departed well below the guideline range but not below the 60-month statutory minimum, despite a motion by the government under 18 U.S.C. § 3553(e). After a Nov. 1995 amendment to the Guidelines retroactively reduced the penalty for offenses involving marijuana plants, defendant filed a motion to reduce his sentence, 18 U.S.C. § 3582(c)(2). He argued that his new sentencing range would be 57–71 months, and that the substantial assistance departure should be recalculated from this level.

The government argued against a reduction, claiming that defendant had already benefited from a substantial reduction, that it would not have moved for a reduction below the statutory minimum if the amendment had been in effect, and that defendant's later escape from prison undermined his value as a witness. The govern-

ment also claimed that, because of the longer original guideline range, it did not charge defendant with a § 924(c) firearms violation or file notice of his status as a repeat drug offender, which would have added to the statutory minimum sentence. The district court, in a one-line, handwritten ruling, denied defendant's motion "for the reasons set out in the [government's] response.

The appellate court remanded for reconsideration. Reading § 3582(c)(2) and USSG § 1B1.10(b) together, "a district court [must] make two distinct determinations. First, by substituting only the amended sentencing range for the originally determined sentencing range, and leaving all other previous factual decisions concerning particularized sentencing factors (e.g., role in the offense, obstruction of justice, victim adjustments, more than minimal planning, acceptance of responsibility, number of plants, etc.) intact, the district court must determine what sentence it would have imposed had the new sentencing range been the range at the time of the original sentencing. Second, having made the first determination, the district court must consider that determination together with the general sentencing considerations contained in section 3553(a) and, in the exercise of its thus informed discretion, decide whether or not to modify the original sentence previously imposed. . . . The denial of Wyatt's motion for a sentence reduction, absent any indication that the district court considered what would have been an appropriate sentence under the retroactive amendment, constitutes an abuse of discretion."

The court went on to consider which of the factors raised by the government could properly be considered on remand, such as "other charges the government might have been able to file had it not entered the plea agreement. While we agree that the district court should not speculate about what charges the government chose not to pursue, the district court is free to consider the complete nature of the defendant's crime pursuant to section 3553(a)." As for defendant's escape, that may not be consider in setting the amended guideline range, but "it is appropriate for the district court to consider his escape as relevant to the defendant's nature and characteristics when determining whether ultimately to grant the motion to modify his sentence."

The court rejected defendant's claim that the district court was bound to honor it's original decision to depart, and to use the amended guideline range as its starting point. "A discretionary decision to depart from the Guidelines range on the basis of substantial assistance made at the original time of sentencing is not a 'guideline application decision' that remains intact when the court considers the new Guideline range. . . . The district court's discretionary decision of whether to depart from the new amended Guidelines range based upon Wyatt's prior substantial assistance is not dictated or mandated by either its prior decision to depart or by the extent of its prior departure, because 'the benefit accruing from a lowered sentencing range is independent of any substantial-assistance considerations.' . . . The district court retains unfettered discretion to consider anew whether a departure from the new sentencing range is now warranted in light of the defendant's prior substantial assistance."

U.S. v. Wyatt, 115 F.3d 606, 608–10 (8th Cir. 1997). *Accord U.S. v. Vautier,* 140 F.3d 1361, 1364–66 (11th Cir. 1998) (in similar case, agreeing with *Wyatt* on two-step inquiry and that district court "has the discretion to decide whether to re-apply a downward departure for substantial assistance when considering what sentence the court would have imposed under the amended guideline"). *See also* USSG § 1B1.10(b), comment. (n.3) ("[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate").

See *Outline* at I.E

Departures

Mitigating Circumstances

First Circuit holds that agreeing to be deported did not warrant downward departure. Defendant pled guilty to unlawful reentry following deportation and the government "agreed to recommend a downward departure under U.S.S.G. § 5K2.0 in return for a stipulation of alienage and deportability following his release from prison, as well as waivers of any deportation hearing and any appeal from the deportation order." The offer was in line with a 1995 memorandum from the Attorney General that authorized U.S. attorneys to recommend departure under these circumstances. The district court rejected the departure, holding that it did not have authority under the Guidelines to do so.

The appellate court agreed, holding that a stipulation to deportation was neither a mitigating circumstance "of a kind" not considered by the Sentencing Commission nor mitigation "to a degree" not contemplated by the Commission. "[W]e think it is quite clear that the Commission would have considered that an alien defendant, particularly one convicted of *unlawful reentry* subsequent to deportation for an aggravated felony, almost certainly would be deported again. . . . Furthermore, we believe it would be farfetched to suppose that the Commission overlooked the central reality that in all likelihood deportation would occur by normal operation of law as a matter of course—*irrespective of the alien defendant's consent*—following a conviction for illegal reentry subsequent to deportation for an aggravated felony."

The court also cited statistics showing that, on average, over a million illegal aliens are expelled from the U.S. each year and that approximately 97% accept a voluntary departure procedure. "These analogous data indicate that

an alien criminal defendant with no plausible basis for contesting deportation—particularly one convicted of illegal reentry subsequent to deportation for an aggravated felony—does not meet the atypicality requirement for a section 5K2.0 departure simply by relying upon whatever administrative convenience presumably may result from a stipulated deportation. . . . We therefore conclude that the Sentencing Commission was fully cognizant that virtually all alien criminal defendants, convicted under 8 U.S.C. § 1326(a) and sentenced pursuant to U.S.S.G. § 2L1.2, would be subjected to deportation and that many undoubtedly would stipulate to deportation. Accordingly, we hold, at least in the absence of a colorable, nonfrivolous defense to deportation, that the proffered ground for departure under U.S.S.G. § 5K2.0 does not constitute a mitigating circumstance of a kind not adequately considered by the Commission."

On the second possible departure rationale, the court stated that "[a] mitigating circumstance is present to a degree not contemplated by the Commission only if it is portentous enough to make the case *meaningfully* atypical. . . . Absent some mitigating circumstance not suggested here, no substantial atypicality is demonstrated where an alien defendant simply stipulates to deportation and no nonfrivolous defense to deportation is discernible." And because no specific facts were alleged that this particular defendant's stipulation was atypical, "the parties essentially are left with their implicit contention that *any* stipulated deportation constitutes an extraordinary mitigating circumstance, for no other reason than that it bears the government's endorsement and dispenses with an administrative hearing. However, were downward departures permitted simply on the conclusory representations in the Memorandum, without regard to whether the alien defendant has a nonfrivolous defense to deportation, individualized guideline sentencing indeed could be undermined by what the district court aptly termed a 'shadow guideline' that would erode the prescribed [base offense level] in any alien-criminal defendant's case to which the government chose to apply the Memorandum, *simpliciter*."

U.S. v. Clase-Espinal, 115 F.3d 1054, 1056–60 (1st Cir. 1997). *Cf. U.S. v. Young,* No. 97-1455 (2d Cir. May 12, 1998) (Keenan, Dist. J.) (reversed: improper to give departure to recently naturalized U.S. citizen defendant—who could not be deported—on ground that had he not been naturalized, he might have received departure for agreeing to be deported).

See *Outline* at VI.C.5.b

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
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