CHAPTER ONE: ***Introduction and General Application Principles***

Part B -- General Application Principles

§ 1B1.1 Application Instructions

United States v. Thomas, __ F.3d __ (3d Cir. Nov. 26, 2004) No. 03-4447. Defendant pled guilty to participating in a racketeering enterprise in violation of 18 U.S.C. § 1962(c). The predicate racketeering acts committed by the defendant were a felony murder and a bank robbery. Due to defendant's admitted murder, the district court applied § 2A1.1, the first-degree murder guideline. Defendant argued that *Blakely v. Washington*, 124 S.Ct. 2531 (2004) precluded the application of § 2A1.1 to his case. The Third Circuit found *Blakely* inapplicable because it excepts from its scope sentences imposed "on the basis of the facts...admitted by the defendant." While there were at least four possible interpretations of the language "facts...admitted by the defendant," all four interpretations were present here. First, the information to which defendant pled guilty listed the murder. Second, defendant's plea agreement incorporated the allegation of the killing. Third, the death was one of the two predicate acts for the RICO violation charged in the information. Finally, defendant admitted all of the facts relevant to that charge in his plea colloquy. Even if defendant did not admit to an intentional killing, Note 1 to § 2A1.1 makes patent that the guideline may be applicable in cases where death results during the commission of certain felonies, including robbery.

Double Counting

United States v. Fisher, ___ F. 3d ___ (3d Cir. Sept. 10, 2007) No. 06-1795. After a pedestrian complained to patrol officers that defendant and another man had attempted to rob him at gunpoint, the officers pursued and apprehended defendant. Defendant pled guilty to being a felon in possession of a firearm. At an evidentiary hearing, one of the officers testified that during the chase, defendant pointed the gun at him and began to pull the trigger during the chase. The district court applied a § 2K2.1(b)(5) for possession of a firearm in relation to another felony (attempted robbery) and a six-level increase under § 3A1.2(c)(1) for creating a substantial risk of serious bodily injury by assaulting a law enforcement officer during the flight from the offense. The Third Circuit affirmed, finding no double counting problem. Each of the enhancements involved conduct which the other did not. Section 2K2.1 involves the use of a firearm, whereas § 3A1.2 involves a law enforcement officer victim. Thus, § 2K2.1 is a conduct-related enhancement, while § 3A1.2 is a victim-related enhancement.

United States v. Guzman, 2006 WL 3479059 (3rd Cir.(N.J.))). The defendant pled guilty to conspiracy to deal firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) and Conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1341. The offense involved approximately 135 firearms, some of which had been used in violent crimes. The defendant's guideline range was 24 to 30 months. The district court elected to depart downward three levels due to the defendant's cooperation, resulting in a new advisory guidelines range of 15 to 21 months. The district court then considered each of the § 3553(a) factors and sentenced him to 42 months imprisonment and three years supervised release.

The defendant argued on appeal that the district court engaged in impermissible "double counting" in fashioning his sentence. He asserted that his base offense level was increased by six levels pursuant to U.S.S.G. § 2K2.1(b)(F) because the offense involved more than 50 firearms. Then, at sentencing, when the judge evaluated the "seriousness of the offense" under 18 U.S.C. § 3553(a)(2), he noted that only approximately 40 of the guns had been recovered, that there was evidence in the presentence report that some of those 40 guns had been used in very serious crimes, and that a substantial number of these weapons were still unaccounted for. The defendant claims that because the large number of guns involved was already taken into consideration in U.S.S.G. § 2K2.1(b)(F), it was error for the district court to use that issue a second time, as justification to impose a non-guideline sentence.

The Court of Appeals found this argument unpersuasive. First, even the commentary to the version § 2K2.1 used by the district court at sentencing expressly authorized an "upward departure" if the "number of firearms significantly exceeded fifty." U.S.S.G. § 2K2.1 cmt. N. 16. Certainly 135 firearms significantly exceeds 50. Moreover, the Court of Appeals held that the extent to which a defendant, after *Booker* can rely on the principle of avoiding double counting is minimal. Although sentences can still be reviewed for unreasonableness, after *Booker* sentencing judges are given a huge measure of freedom in deciding which factors should carry more weight in determining the appropriate sentence for any particular defendant. Here, per § 3553(a), the district court was required to consider the "seriousness of the offense," and in so doing, found that the fact the defendant facilitated the release of approximately 135 firearms into an area where they would likely be used in dangerous crimes, made the conduct particularly serious. Thus, even if the Sentencing Commission had not explicitly authorized an upward departure here, in a post-*Booker* regime, there was no plain error in the sentencing court attributing additional weight to this factor.

United States v. Martinez, 2004 WL 432491 (3rd Cir.(N.J.))). Defendant pled guilty to one count of armed robbery and one count of discharging a firearm during a different robbery. He argued on appeal that the bar against double counting precludes any firearm enhancement for any of the robberies, since count two already punishes him for use of a firearm. Similarly, the defendant argued that an enhancement for inflicting serious bodily injury on a victim must be overturned because the injury in this case was inflicted by a firearm and an enhancement on that basis would constitute double counting. The Court of Appeals held that there was no double counting. The sentence on count two precluded a firearm use enhancement for only the

underlying robbery offense. The district court observed this prohibition, and then correctly applied the firearm use enhancement to the other count, which was not the underlying offense for count two. Martinez is similarly mistaken in his assertion that his enhancements for firearm use and inflicting serious bodily injury are impermissibly duplicative. Inflicting injury and using a firearm are completely independent features of a criminal act: one could inflict injury upon somebody without using a firearm (or any weapon at all), and one could use a firearm without inflicting bodily injury. The fact that Martinez used his firearm to inflict the bodily injury in this case does not render the separate enhancements a collective act of "double counting."

United States v. Maurello, 76 F. 3d 1304 (3d Cir. 1996). Defendant, a disbarred lawyer, was convicted of mail fraud in connection with his unauthorized practice of law. Enhancing sentence under §3B1.3 for use of a special skill and under §2F1.1(b)(3)(B) for violating a judicial or administrative order did not result in impermissible double counting. In the absence of a guideline prohibition against the two enhancements, there was no double counting problem.

United States v. Pardo, 25 F. 3d 1187 (3d Cir. 1994). Defendant was convicted of bank and wire fraud, and failure to appear. The Third Circuit held that the district court's method of calculating defendant's sentence did not constitute "double counting." It was proper to enhance defendant's offense level by two levels under §3C1.1 for obstruction of justice, even though defendant was also separately convicted of failure to appear in violation of 18 U.S.C. §3146(a).

United States v. Green, 25 F. 3d 206 (3d Cir. 1994). Defendant was convicted, among other offenses, of threatening a federal law enforcement officer in violation of 18 U.S.C. §115(a)(1)(B). He argued that the district court erred in enhancing his offense level under §3A1.2 based on the intended victim's status as a law enforcement officer. It was defendant's contention that because the statute under which he was charged contemplates a law enforcement officer victim or other federal official, an enhancement under §3A1.2 constitutes double counting. The Third Circuit upheld the enhancement, stating that because the victim's "official status was not incorporated into the guidelines section (2A6.1) which determined defendant's base offense level, the §3A1.2 adjustment was necessary in order to reflect all the elements of defendant's offense."

United States v. Wong, 3 F. 3d 667 (3d Cir. 1993). Defendant embezzled approximately $2.4 million. He used his position as supervisor and his understanding of the bank's accounting system to perpetrate the offense. Enhancements under §2B1.1(b)(5) for more than minimal planning and under §3B1.1(c) for being an organizer or leader may be applied in tandem without constituting impermissible double counting or cumulative punishment for same offense. These adjustments address different concerns. The adjustment for more than minimal planning was intended to distinguish relatively simple crimes from more sophisticated ones. The adjustment for role in the offense addresses concerns about the relative responsibilities of those involved in the offense, punishing those more harshly who assume a leadership role.

United States v. Georgiadis, 933 F. 2d 1219 (3d Cir. 1991). Defendant, who was an assistant vice president of a bank, pled guilty to embezzling bank funds by diverting money from mortgage settlements into his own accounts. Adjustments under §§2B1.1(b)(1) for amount of loss, 2B1.1(b)(5) for more than minimal planning, and 3B1.3 for abuse of position of trust are independent sentencing considerations. Upward adjustments for bank embezzlement on the basis of abuse of trust as well as adjustments based on the magnitude of the loss and more than minimal planning did not constitute double counting. Further, abuse of trust is not an element of embezzlement under 18 U.S.C. §656 since it is not necessary to prove abuse of trust (within the meaning of the guidelines) in order to convict under 18 U.S.C. §656.

Bodily Injury/Dangerous Weapon

United States v. Johnson, 199 F.3d 123 (3d Cir. 2000). Defendant was convicted of two counts of conspiracy to interfere with interstate commerce by robbery, 18 U.S.C. § 1951, and one count of use of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1). During the first robbery, a co-defendant was armed with a baseball bat. The defendant and another accomplice wielded sledgehammers to break open jewelry display cases. A co-defendant threatened to hit an employee with the baseball bat unless she put the phone down. The Court of Appeals held that the baseball bat and sledgehammers were dangerous weapons. Under the circumstances, both were capable of inflicting death or serious bodily injury.

United States v. Harris, 44 F. 3d 1206 (3d Cir. 1995). Defendant pled guilty to bank robbery. The district court added four points to defendant's offense level under §2B3.1(b)(2)(D) because it viewed the mace which defendant used to spray tellers as a "dangerous weapon" and two points under §2B3.1(b)(3)(A) based on its conclusion that the victims sustained "bodily injury." The Third Circuit rejected the enhancements, indicating that the government failed to establish that the mace was a dangerous weapon and that the district court failed to determine the character and duration of the symptoms experienced by the tellers, as well as the character of the medical attention they received. Not all contact between a victim and a health care professional will justify a conclusion that bodily injury occurred.

More than Minimal Planning

United States v. Saxton, 2002 WL 31882238 (3rd Cir.(Pa.))). The defendant's wife was the Prothonotary and Clerk of Court for Mifflin County. An investigation revealed that throughout her twenty year career, she embezzled funds collected in the normal course of business and converted these funds for the personal use of her and the defendant. The defendant appealed his sentence. He argued that the district court erred in imposing a two level enhancement for more than minimal planning. He asserted that his conduct of repeatedly accepting the monies from his wife, over time, was typical for the commission of the crime for which he pled guilty and was purely opportune.

The Court of Appeals found the defendant's argument without merit. "Purely opportune" has been defined as "spur of the moment conduct, intended to take advantage of a sudden opportunity." *United States v. Monaco*, 23 F. 3d 793, 797 (3d Cir. 1994). The defendant's participation in multiple deposit transactions of embezzled funds into his and his wife's account, in addition to his frequent thousands-of-dollars gambling sprees with his wife in Atlantic City, fails to qualify as "spur of the moment conduct," or the taking advantage of a "sudden opportunity."

United States v. Barbati, 2002 WL 121828 (3rd Cir.(Pa.))). The defendant was convicted of sale or receipt of stolen vehicle in violation of 18 U.S.C. § 2313 and aiding and abetting in violation of 18 U.S.C. § 2. The evidence established that the defendant either purchased or received a total of three stolen motor vehicles from individuals who were participating in a multi-state car theft ring. The defendant purchased two vehicles and set up the purchase of a third, for prices which were substantially below fair market value. On appeal, he argued that the sentencing court erred in enhancing the defendant's sentence by two points for more than minimal planning. The Court of Appeals affirmed the sentence. The defendant received three stolen cars and engaged in repeated acts over a period of time.

United States v. Cianscewski, 894 F. 2d 74 (3d Cir. 1990). The Third Circuit upheld a two-level enhancement under §2F1.1(b)(2) for more than minimal planning. Defendant received seven stolen checks from a government informant or from his wife and sold them to undercover agents on three separate occasions. On each occasion, defendant went to the same prearranged location, entered the vehicle of his buyer, and completed the transaction. On at least one occasion, he himself, and not his wife, arranged the rendezvous.

§ 1B1.2 Applicable Guidelines

United States v.Barnes, 324 F.3d 135 (3rd Cir. 2003). Walter Barnes was convicted of filing false claims for refunds with the Internal Revenue Service and with aiding and abetting the presentation of the claims, in violation of 18 U.S.C. §§ 287 and 2. The indictment arose out of a scheme in which the defendant and Joseph Johnson prepared and filed false income tax returns for a fee, thereby obtaining for the taxpayers refunds to which they were not entitled. The scheme included making unjustified claims for deductions for dependents on the taxpayers' returns and improperly claiming "head of Household" instead of "Single" filing status on certain returns. The probation officer calculated the base offense under the tax guidelines found at U.S.S.G. § 2T1.4. This calculation was adopted by the district court.

On appeal, the defendant argued that the fraud guideline, U.S.S.G. § 2F1.1, was applicable to this case. His argument was predicated on Appendix A - - Statutory to the Sentencing Guidelines, which indicates that "this index specifies the offense guideline section(s) in Chapter Two (Offense Conduct) applicable to the statute of conviction." The appendix at the time of Barnes' sentencing made section 2F1.1 applicable for a section 287 offense. There is some force to this argument. The problem with it, however, is that it only gives part of the

guidelines picture. Application Note 14 to section 2F1.1, as applicable here, makes clear that a different guideline should be used if an offense is more aptly covered by another guideline. The Court of Appeals agreed with the district court by holding that U.S.S.G. § 2T1.4 covers "Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud" and thus is more apt for use in sentencing here than section 2F1.1.

United States v. DeLaurentis, 2002 WL 31160104 (3rd Cir.(N.J.))). The defendant was convicted and sentenced for extortion under color of official right in violation of 18 U.S.C. § 1951(a), (b)(2), and (b)(3) and corrupt acceptance of money in violation of 18 U.S.C. § 666(a)(1)(B). On appeal, he contends it was error to consider conduct underlying acquitted Counts 1 through 4 in enhancing his sentence under U.S.S.G. § 2C1.1(b)(1)(requiring an increase of two levels if the offense involved more than one extortion). This assertion is contrary to U.S.S.G. § 1B1.3(a)(2) and *United States v. Watts*, 519 U.S. 148, 157 (1997)(holding 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). Here, the government presented letters and tape recordings demonstrating the defendant orchestrated other similar extortion schemes. The Court of Appeals affirmed the judgment of conviction and sentence.

United States v. Enright, 2002 WL 826442 (3rd Cir.(N.J.))). The defendant was president of Petro Plus Oil, a company that bought and sold fuel at the bottom of the chain. He pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); money laundering (18 U.S.C. § 1957); and tax evasion (26 U.S.C. § 7201). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

The defendant appealed, arguing that the district court erred in using the money laundering guidelines to determine his sentence because the conduct at issue was atypical, and fell outside the "heartland" of usual money laundering activity. The Court of Appeals determined that there was nothing "atypical" about the case that would have justified the district court in not using the money laundering guidelines. The record demonstrated that the defendant was a leading figure in an elaborate, carefully orchestrated, systematic scheme to defraud. Money derived from the success of the scheme was used to keep the daisy chain going and the links in the chain were set up to avoid detection by authorities. This amounted to a crime of significant duration and marked severity. The total loss to the State of New Jersey on account of the daisy chain scheme was approximately 11 million dollars. The conduct at issue constitutes serious criminal activity and is the type Congress sought to prevent and punish when it proscribed money laundering.

United States v. Erlikh, 2002 WL 626226 (3rd Cir.(N.J.))). The defendant was president of Kings Motor Oil, a wholesale distributor of home heating oil and motor oil. He pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); money laundering (18 U.S.C. § 1957); and tax evasion (26 U.S.C. § 7201). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

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United States v. Diaz, 245 F.3d 294 (3rd Cir. 2001). The defendant pled guilty to a four count information that included charges of fraud in violation of 18 U.S.C. §§ 1341 and 1342, and money laundering, in the form of engaging in a monetary transaction in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957(a). On appeal, the defendant challenged two aspects of her sentence. First, she argued that the district court erred in computing her prison term based on the sentencing guideline applicable to the money laundering charge, U.S.S.G. § 2S1.2, rather than the guideline applicable to the fraud charge, U.S.S.G. § 2F1.1. The latter guideline would have resulted in 6-12 fewer months in prison. This issue required the Court of Appeals to consider whether Amendment 591 to the Sentencing Guidelines, effective on November 1, 2000, should apply retroactively to the defendant's sentence and whether the decision in *United States v. Smith*, 186 F.3d 297 (3d Cir. 1999) remains good law, at least for sentences imposed prior to the effective date of the amended guidelines. Second, the defendant challenged the amount of restitution she was ordered to pay.

In concluding that Amendment 591 substantively changed the guidelines as interpreted in *Smith*, the Court of Appeals held, "The Sentencing Commission's characterization of an amendment as 'clarifying' is not, however, binding on us, nor even entitled to substantial weight....Rather, it is our own interpretation of the pre-amendment guidelines that determines whether the Amendment clarified that interpretation or substantively changed it. See *Marmolejos*, 140 F.3d at 493; *Bertoli*, 40 F. 3d at 1407 n. 21. The amended guidelines cannot constitutionally be applied to the defendant's sentence. The pre-amendment guidelines are applicable, meaning the analysis established in *Smith* and its progeny will apply to the instant case."

The Court of Appeals concluded that the defendant did not make a serious, concerted effort to conceal or to legitimize the funds or to reinvest them in additional criminal activity. It was therefore not appropriate to sentence the defendant under the money laundering guideline. The defendant should have been sentenced under the fraud guideline. The instant case is a simple receipt-and-deposit case to which § 2S1.2 should not apply. The defendant made no efforts to disguise the source of the student assistance funds that the Franklin School received and deposited or to conceal the fact that the deposits were federal student assistance funds. *Mustafa, Bockius, Cefaratti,* and *Smith* all are in accord that the heartland of the money laundering guidelines includes, in addition to drugs and organized crime, cases involving typical money laundering, financial transactions that are separate from the underlying crime and that are designed either to make illegally obtained funds appear legitimate, to conceal the source of some funds, or to promote additional criminal conduct by reinvesting the funds in additional criminal conduct. See *Mustafa*, 238 F. 3d at 495; *Bockius*, 228 F. 3d at 312; *Cefarati*, 221 F. 3d at 514; *Smith*, 186 F. 3d at 298.

United States v. Smith, 186 F.3d 290 (3d Cir.1999). The defendants were convicted of conspiracy to defraud, interstate transportation of stolen property, causing unlawful interstate travel with intent to distribute stolen property, and money laundering. The district court used the more severe money laundering guideline instead of that for the fraud as the basis for sentencing. The money laundering counts carried an offense level of twenty, U.S.S.G. § 2S1.1(a)(2), while the fraud charge carried a level of six, U.S.S.G. § 2F1.1(a). In this case, the money laundering convictions were based on 15 checks sent to Smith's creditors. The money laundering activity, when evaluated against the entire course of conduct, was an "incidental by-product" of the kickback scheme. The Court of Appeals concluded that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime. That is not the type of conduct implicated here. The Court of Appeals reversed and directed the use of the fraud guidelines rather than that for money laundering. In making its selection, the sentencing court must determine if the conduct being punished falls within the particular guideline's heartland, a set of typical case embodying the conduct described in each guideline.

The Court of Appeals relied on a 1997 report to Congress by the Sentencing Commission, in which the Commission stated that the high base offense levels for money laundering reflected an effort to punish the activities which aroused Congressional concern: "1) situations in which the 'laundered' funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime; and, 2) situations in which the financial transaction was separate from the underlying crime and was undertaken to either: a) make it appear that the funds were legitimate, or b) promote additional criminal conduct by reinvesting the funds in additional criminal conduct." In the instant case, the Court of Appeals decided that the money laundering guideline was inappropriate because the defendants left a paper trail, conduct inconsistent with concealment, because any efforts at concealment were disingenuous, and because, when evaluated against the entire course of conduct, the money laundering was an incidental by-product of routine fraud.

United States v. Conley, 92 F.3d 157 (3d Cir. 1996). A jury found defendant guilty of conspiracy and conducting an illegal gambling business. Defendant argued that permitting the court to determine the objectives of the conspiracy violated his Sixth Amendment right to a jury trial and the Due Process Clause of the Fifth Amendment. The Third Circuit rejected defendant's claims, finding §1B1.2(d) constitutional. This provision, with its accompanying application note, note 5, requires the sentencing court to determine beyond a reasonable doubt the objects of a multi-object conspiracy after a jury returns a general guilty verdict on a conspiracy charge which does not specify the objectives of the conspiracy. In conclusion, the court noted that by determining the objects of the conspiracy beyond a reasonable doubt, the sentencing court met whatever procedural standard might have been required.

Braxton v. United States, 111 S. Ct. 1854 (1991). Under §1B1.2(a), the court should apply the offense guideline most applicable to the offense of conviction. However, in the case of a conviction by a plea of guilty containing a stipulation which specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline most applicable to the stipulated offense. For the proviso in §1B1.2(a) to apply, there must not be simply a stipulation, there must be a stipulation that "specifically establishes" a more serious offense.

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

United States v. Abrogar, 2006 WL 2382328 (3rd Cir. (N.J.))). The Court of Appeals held that improper discharges of oily bilge waters and oily sludges from foreign vessel that occurred outside U.S. waters were not "relevant conduct" for offense of conviction of failure to maintain an accurate oil record book inside U.S. waters.

In *United States v. Neal*, 2006 WL 1080693 (3rd Cir. (Pa.))), the defendant was acquitted by a jury of possession of a stolen firearm but convicted of possession of a firearm by a convicted felon. He was sentenced to 55 months imprisonment. He appealed his conviction and sentence, arguing that the District Court erred by (1) applying a two-level upward adjustment after finding that the firearm was stolen and (2) by refusing to apply a downward adjustment for acceptance of responsibility.

As for his first argument, the defendant asserted that once a defendant is found not guilty of certain conduct under the beyond a reasonable doubt standard by a jury, the prosecution should not be permitted to use this same conduct, considered now using the lower preponderance of the evidence standard, to enhance the defendant's sentence. In rejecting Neal's argument that his sentence could not be adjusted under 2K2.1(b)(4) for possession of a stolen firearm, the Court of Appeals stated that the Supreme Court has expressly held that an acquittal on a charge does not prevent the District Court from considering at sentencing the underlying conduct so long as it has been proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed. 2d 554 (1997)(per curiam)(holding that defendant's acquittal of using a firearm in relation to a drug trafficking crime by a jury did not preclude sentencing court from determining that firearm was possessed in furtherance of possession of cocaine base with intent to distribute).

With respect to Neal's contention that his sentence should have been adjusted under 3E1.1 for acceptance of responsibility, the Court of Appeals held there was no error. As made clear in *United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996), application not 1(b) to 3E1.1 states that sentencing courts should consider, in addition to other factors, the defendant's "voluntary termination or withdrawal from criminal conduct or associations" in determing whether a defendant has accepted responsibility. Here, despite warnings from probation officers and the District Court, Neal repeatedly returned to drug use, flouting federal and state laws, and the terms of the Court's orders of pretrial and presentence release. His continued abuse of cocaine subsequent to conviction but prior to sentencing countermands any inclination to determine that he is eligible for an acceptance of responsibility adjustment.

United States v. Vasquez, 2006 WL 1026493 (3rd Cir. (N.J.))). The defendant was convicted of four counts of filing a false claim with the IRS in violation of 18 U.S.C. § 287 (Counts 1-4) and eight counts of aiding in filing a false income tax return in violation of 26 U.S.C. § 7206(2) (Counts 5-12). His sentencing took place after the Supreme Court decided United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005).

Prior to sentencing, the Government presented the Probation Office with evidence of many more fraudulent returns as "relevant conduct." With regard to Counts 1-4, the Government presented evidence of 52 additional false claims filed on behalf of Puerto Rican residents as proof of a tax loss of approximately $260,000; with regard to Counts 5-12, it presented evidence of over 800 additional inflated tax returns as proof of a tax loss over $2.7 million. Taking into account the loss amounts and other sentencing factors, the offense level was 26 and the guidelines custody range was 63 to 78 months. The offense level for the loss amount proven at trial was only 12 and the guidelines custody range was 10 to 16 months. The sentencing judge refused to consider any evidence of tax loss beyond that alleged in the indictment and sentenced the defendant to 16 months imprisonment.

The Government appealed the sentence. Issue: Whether the sentencing judge erred in refusing to consider the Government's evidence of tax loss; and whether the resulting sentence was reasonable. The Court of Appeals held that the sentencing judge erred in failing to consider the Government's evidence of relevant conduct. It directed that, on remand, the district judge should consider evidence proffered by the Government, correctly calculate the applicable guidelines range, and impose a sentence upon consideration of all the § 3553(a) factors.

After Booker, the sentencing procedure includes two steps. The first step is to calculate the correct guideline range just as before. See *Cooper*, 437 F.3d at 330 ("as before *Booker*, the standard of proof under the guidelines for sentencing facts continues to be preponderance of the evidence"); *United States v. Miller*, 417 F. 3d 358, 363 (3d Cir. 2005)("the District Court is free to engage in precisely the same exercise in judicial fact finding as id did [before *Booker*], so long as such fact finding is consistent with Booker").

In the second step, a judge must consider the statutory factors listed in 18 U.S.C. § 3553(a) to determine whether to sentence within the advisory guideline range. *Booker* did not change the manner in which the correct guidelines range is calculated; only the weight of the correctly calculated range in the final determination of the appropriate sentence.

Meaningful consideration of the § 3553(a) factors necessarily includes the correct calculation of the applicable guideline range, 18 U.S.C. § 3553(a)(4). The district judge, in the case at issue, did not give meaningful consideration to the § 3553(a) factors because he refused to consider tax loss evidence that, if found probative, would have resulted in a significantly higher offense level and guideline sentencing range.

United States v. Worley, 2004 WL 602748 (3rd Cir.(Del.))). The defendant was acquitted of one count of mail fraud and one count of transportation of stolen property - - both relating to the acquisition of a Chevrolet Suburban - - but she was convicted of the conspiracy to commit mail fraud. The indictment expressly included the events concerning the acquisition of the Suburban in this conspiracy count. As the district court noted, "The fact that the jury acquitted Ms. Worley of a substantive mail fraud charge does not undermine its conclusion that she conspired to commit mail fraud with her co-defendant as the elements of those two charges are different." It was therefore proper under U.S.S.G. § 2B1.1 to attribute the value of the Suburban to Worley.

The district court also correctly found that the value of the Suburban could be attributed to Worley under the relevant conduct guideline, U.S.S.G. § 1B1.2. The Supreme Court has made clear that an acquittal on a charge does not prevent a court from considering the underlying conduct as relevant conduct so long as it has been proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 154, 117 S.Ct. 633, 136 L.Ed. 2d 554 (1997).

United States v. Sosanya, 2003 WL 214463 (3rd Cir.(Pa.))). The defendant pled guilty to bank fraud in violation of 18 U.S.C. § 1344 and possession of a counterfeit passport in violation of 18 U.S.C. § 1546. He appealed his sentence of 27 months imprisonment. Pursuant to § 2F1.1(b)(5)(B), the district court applied a two level enhancement to his sentence because the offense involved the production of an unauthorized counterfeit access device. The defendant claimed that the district court committed clear error in applying this enhancement, as his relevant conduct did not include involvement in the production of the counterfeit credit cards.

The defendant and co-defendants Lloyd Mbamali, Suzanne Moses and another unnamed individual, went from London to the United States. The day before the trip, Mbamali gave them counterfeit credit cards. Once in the United States, they drew cash advances from several banks, using the counterfeit credit cards, and wired the money back to London. On October 19, 2000, two weeks before the trip to the United States, the "Doctor," the leader of the scheme, had also sent the defendant and Moses to Paris, France, where they used counterfeit credit cards, which may or may not have been the same cards used in the United States, to rent two automobiles.

The defendant was involved in the scheme to commit bank fraud at least as early as the trip to Paris. Accordingly, all activity on or after October 19, 2000, involving that scheme, may be attributed to the defendant for purposes of sentence enhancement.

The Court of Appeals concluded that the district court appropriately considered the production of counterfeit credit cards, regardless of whether the defendant actually took part in their production. The bank fraud scheme that the defendant agreed to jointly undertake could not be accomplished without the production of the counterfeit credit cards. It was, therefore, reasonably foreseeable to the defendant that the counterfeit credit cards needed to be produced in order to accomplish this scheme.

United States v. Davis, Jr., 2002 WL 957373 (3rd Cir.(Pa.))). The defendant was found guilty of filing a false corporate tax return in violation of 26 U.S.C. § 7206(1). He was a minority stockholder in, and ran the day-to-day operations of, Royal Travel Service, a wholesale travel agency. His father was the majority stockholder. William Fitzmorris was the Director of Charter Sales for U.S. Airways and Richard Meyer was the U.S. Airways charter sales representative who ran Royal's account. The four reached an agreement whereby Fitzmorris and Meyer would receive cash payments from Royal in return for providing Royal with discounted airfares on charter flights. Fitzmorris and Meyer were each to receive 25% of the discounts, with Royal retaining 50%. Davis, Jr., Fitzmorris and Meyer each opened bank accounts in the Cayman Islands. Davis, Jr. would periodically transfer funds from Royal to his offshore account, and then would transfer the funds from the offshore account to Fitzmorris's and Meyer's accounts. In his requests to draw these funds from the Royal account, Davis, Jr. gave his bookkeeper false explanations for the transactions, the result of which was to inflate expenditures, which were then transferred to Royal's corporate tax returns, lowering its tax burden.

The defendant appealed, contending that the district court erred by adjusting his offense level upwardly for the tax loss associated with the under-reporting of bribery income of Fitzmorris and Meyer. The Court of Appeals agreed with the district court's findings and conclusion. The tax losses caused by Fitzmorris and Meyer arose out of the same course of conduct or common scheme or plan as that committed by Davis, Jr. By making payments to Fitzmorris and Meyer via sham corporations and Cayman Island bank accounts, by making certain payments in cash, and by disguising the nature of the payments in the books and records of Royal, Davis, Jr. clearly aided and abetted the tax evasion of Fitzmorris and Meyers.

United States v. Glover, 2002 WL 745595 (3rd Cir.(Del.))). In May of 1999, the defendant made two trips by commercial airline as a courier transporting marijuana from Arizona to Delaware. At the time, he had been living with William Carter, who had organized and directed the drug conspiracy. The defendant concedes that he transported a total of approximately 70 pound of marijuana from Arizona.

On May 26, 1999, the day defendant embarked on his second trip to Arizona, he and another courier, Tamara Brown, were driven to the airport by Carter. They departed on separate flights but met in Arizona with a co-conspirator who delivered suitcases of marijuana to them. On May 28, 1999, the defendant and Brown returned with the marijuana, again on separate flights.

Prior to sentencing, the defendant objected to the inclusion of the drugs transported to Delaware on May 28, 1999. The court, however, deemed the 35 pounds of marijuana transported by Brown as relevant conduct. The defendant appealed, arguing that there was an insufficient factual basis to support the court's decision to assess responsibility to him for the 35 pounds of marijuana transported by Brown. The Court of Appeals concluded that the drugs transported by Brown were properly attributable to the defendant for sentencing purposes. Not only is there ample support in the record to establish that defendant aided and abetted Brown under § 1B1.3(a)(1)(A), but it is also evident that Brown's acts were reasonably foreseeable by defendant and in furtherance of a jointly undertaken criminal activity under § 1B1.3(a)(1)(B).

United States v. Watterson, 219 F.3d 232 (3rd Cir.2000). Beginning in 1995, Toshia Watterson was involved in an organization which distributed drugs within 1000 feet of various schools. She pled guilty to conspiracy to distribute cocaine and marijuana in violation of 21 U.S.C. § 846 and criminal forfeiture. At sentencing, Watterson challenged the computation of what was to become her guideline imprisonment range, specifically the use of § 2D1.2, which deals with drug offenses committed near "protected locations" such as schools and which, if applied, would result in a base offense level two levels higher than that called for under § 2D1.1. He argued that § 2D1.2 was inapplicable because Appendix A of the guidelines compels the use of § 2D1.1 rather than § 2D1.2 as the guideline by which to set the base offense level when, as here, there was a 21 U.S.C. § 846 conspiracy to violate only 21 U.S.C. § 841(a)(1) and not 21 U.S.C. § 860. The issue presented on appeal, i.e. whether § 2D1.2, rather than § 2D1.1, is the applicable offense guideline section for a defendant who has not stipulated or pled guilty to, or been convicted at trial of, a violation of § 860. Subsumed within the question of which offense guideline section is applicable is a broader guideline dispute: at what point is "relevant conduct" factored in? Should relevant conduct be considered at the outset in determining the applicable offense guideline section or may it only be considered once that guideline section has been determined? The Court of Appeals concluded that the applicable offense guideline section for a defendant who has not been convicted of 21 U.S.C. § 860 or stipulated to having committed a drug offense in or near a school zone is §2D1.1. The Court of Appeals further concluded that relevant conduct is factored in, if at all, only after the appropriate offense guideline section is selected. According to § 1B1.1(a), the district court first selects the offense guideline section applicable to the offense of conviction.

United States v. Stephens, 198 F.3d 389 (3rd Cir. 1999). Defendant pleaded guilty to Social Security fraud in violation of 18 U.S.C. § 510(a)(2). As relevant conduct, the district court considered conduct that could not be charged because the applicable statute of limitations period had expired. Defendant contests the upward adjustment in her base offense level that resulted from the inclusion of this conduct. The Court of Appeals held that conduct that is not chargeable because the statute of limitations has expired may be considered in determining the appropriate sentence under the guidelines.

United States v. Watts, 117 S. Ct. 633 (1997). The Supreme Court held that conduct underlying charges on which the defendant has been acquitted may be relied on in sentencing. A sentencing court may consider conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence. The court noted that 18 U.S.C. §3661 codifies the long-standing principle that sentencing courts have broad discretion to consider various kinds of information, and the jury cannot be said to have "necessarily rejected" any facts when it returns a general not guilty verdict.

United States v. Wilson, 106 F. 3d 1140 (3d Cir. 1997). The commentary to §1B1.3 provides a three-prong test to determine whether offenses are part of the same course of conduct. The sentencing court must look to "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between offenses." Even if one factor is absent, "a stronger presence of at least one of the other factors may be sufficient to find the same course of conduct."

United States v. Brothers, 75 F. 3d 845 (3d Cir. 1996). Defendant's cousin negotiated the purchase of 10 kilograms of cocaine for $190,000. The defendant lent his cousin less than $6,500 toward the purchase price and drove him to the site of the transaction where they were arrested. After the arrest, the cousin told agents that defendant was fully aware of the quantity of drugs involved. However, at the sentencing hearing, the cousin testified that the defendant was not aware of the amount involved. The district court relied on the hearsay statement provided by the cousin at the time of arrest. The Third Circuit reversed, holding that the hearsay evidence upon which the district court relied, which was in direct conflict with the sworn testimony, did not meet the "sufficient indicia of reliability" standard. Defendant's past drug transactions with his cousin involved relatively small amounts of drugs. This was not sufficient to corroborate cousin's unsworn statement that defendant knew the transaction would involve more than five kilograms of cocaine. Particular scrutiny should be exercised of factual findings relating to amounts of drugs involved, since quantity of drugs attributed to defendant usually will be single most important determinant of his or her sentence under the guidelines. A searching and individualized inquiry into circumstances surrounding each defendant's involvement is critical.

Witte v. United States, 115 S. Ct. 2199 (1995). Defendant pled guilty to attempted possession of 1,000 pounds of marijuana. At sentencing, the district court found that 1,091 kilograms of cocaine were "relevant conduct" under USSG. §1B1.3 and sentenced the defendant for the cocaine as well as the marijuana. Several months later, defendant was indicted for the cocaine offenses, and he moved to dismiss on double jeopardy grounds. The Supreme Court found no double jeopardy, ruling that the fact that conduct is considered as relevant conduct does not constitute "punishment" for that conduct. The court noted that §5G1.3(b) lessens the impact of its ruling by requiring a concurrent sentence if the defendant is serving an undischarged term of imprisonment resulting from offenses that have been fully taken into account as relevant conduct. This reduces the possibility that two separate prosecutions will grossly increase a defendant's sentence.

United States v. Price, 13 F. 3d 711 (3d Cir. 1994). In sentencing defendant for conspiracy to distribute drugs, the district court properly attributed to defendant 530 kilograms of cocaine supplied by one source and 470 kilograms supplied later by a source in Florida. In reaching this conclusion, the district court noted that the defendant had a special rapport with the source of the 530 kilograms and acted as his intermediary. The defendant acted as a bodyguard in connection with the Florida source and assisted in the distribution of cocaine by using violence to ensure that drug dealers work through the organization. The Third Circuit found that the district court did not simply attribute all of the conspiracy's drug transactions to defendant, but made an individualized inquiry as required by *U.S. v. Collado*, 975 F. 2d 985 (3d Cir. 1992).

United States v. Miele, 989 F. 2d 659 (3d Cir. 1993). Defendant pled guilty to conspiracy to distribute cocaine. In sentencing defendant, the district court held him responsible for more than five kilograms of cocaine. The informant's estimate in the PSR (6.8 kilograms) was significantly higher than the estimate he gave at the trial of co-conspirators (2.2 to 2.7 kilograms). The Third Circuit held that the district court's determination of drug quantity did not have "sufficient indicia of reliability," given numerous inconsistencies, the fact that the source of most of the critical evidence was an addict-informant with an impaired memory, and the lack of any findings by the district court other than a single conclusory finding as to drug quantity.

United States v. Pollard, 986 F. 2d 44 (3d Cir. 1993). The Third Circuit held that there is no statutory or constitutional requirement that a defendant be convicted of conduct before the conduct may be considered in sentencing. Indeed, the guidelines provide that relevant conduct includes uncharged conduct outside the offense of conviction. The district court may consider uncharged conduct in determining whether and how to apply upward or downward adjustments.

United States v. Dixon, 982 F. 2d 116 (3d Cir. 1992). Defendant and two co-conspirators robbed a bank. While in the bank, one co-conspirator pretended she had a gun in her hand beneath a towel. The Third Circuit affirmed an enhancement under §2B3.1(b)(2)(C) based on the co-conspirator's brandishing a dangerous weapon, even though the co-conspirator did not actually possess a weapon. Defendant was accountable for his co-conspirator's brandishing of

the "gun" since it was in furtherance of the jointly undertaken robbery and was reasonably foreseeable.

United States v. Collado, 975 F. 2d 985 (3d Cir. 1992). Defendants were convicted of a drug conspiracy and several related counts. The district court attributed to defendants amounts distributed by the conspiracy as early as April 1988, even though there was no evidence of their involvement until September 21, 1988. The Third Circuit remanded, because the court made no finding as to when defendants' membership in the conspiracy began. It would be improper to attribute to defendants amounts distributed by their co-conspirators before they entered the conspiracy. The Third Circuit held that a defendant can be held responsible for the quantity of drugs distributed by his or her co-conspirators only if the drugs distributed (1) were in furtherance of the jointly-undertaken activity, (2) were within the scope of the defendant's agreement, and (3) were reasonably foreseeable in connection with the criminal activity the defendant agreed to undertake.

United States v. Mobley, 956 F. 2d 450 (3d Cir. 1992). At the sentencing stage, a convicted criminal is entitled to less process than a presumptively innocent accused. In considering relevant conduct under §1B1.3 to increase a defendant's offense level, the court may consider uncharged conduct. Moreover, courts may use conduct underlying an offense in which the defendant was acquitted to enhance a sentence. These practices are constitutional, and do not require application of the reasonable doubt standard.

United States v. Frierson, 945 F. 2d 650 (3d Cir. 1991). The Third Circuit ruled that facts underlying counts which are dismissed pursuant to a plea agreement may be considered as relevant conduct in computing defendant's guidelines. Defendant pled guilty to unarmed bank robbery. As part of a plea bargain, the armed robbery count was dismissed. It was proper for the district court to consider the defendant's possession of a gun.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). Defendant was convicted of a drug conspiracy which ran from August 9, 1989 through September 6, 1989. He was acquitted of aiding and abetting a transaction which took place on August 10, 1989. The Third Circuit found no error in including the cocaine involved in the August 10, 1989 transaction in computing defendant's offense level. A conspirator is responsible for the acts of his co-conspirators during the period of the conspiracy.

United States v. Murillo, 933 F. 2d 195 (3d Cir. 1991). The Third Circuit held that in making role in the offense determinations for defendants whose crimes were committed before November 1, 1990, a court should consider both conduct comprising the offense of conviction and conduct in furtherance of the offense of conviction. For defendants whose crimes were committed on or after November 1, 1990, a court should consider all relevant conduct under §1B1.3 of the guidelines.

United States v. Torres, 926 F. 2d 321 (3d Cir. 1991). The district court properly considered in determining the applicable sentence a quantity of cocaine seized in violation of the Fourth Amendment and suppressed for that reason. Illegally seized evidence, although inadmissible at trial, may nevertheless be considered in determining a defendant's offense level under the guidelines. The case was remanded, however, because the plea agreement was based on a stipulation that a lesser quantity of drugs would be used in computing the sentence. A court must accept a stipulation contained in a plea agreement or offer the defendant an opportunity to withdraw his plea.

United States v. Williams, 917 F. 2d 112 (3d Cir. 1990). The Third Circuit joined other circuits in holding that a sentencing court may consider drug quantities outside the offense of conviction. This includes drug quantities in counts that have been dismissed. A sentencing court may consider criminal conduct in counts that were dismissed in connection with a plea agreement.

United States v. Cianscewski, 894 F. 2d 74 (3d Cir. 1990). It was proper to include the value of stolen government checks sold by the wife of defendant who was convicted of selling other government checks even though the wife was acquitted by the jury after successfully asserting the entrapment defense.

United States v. Ryan, 866 F. 2d 604 (3d Cir. 1989). Defendant charged with possession of controlled substance with intent to distribute was convicted on lesser included offense of simple possession. His guideline range was 0-6 months. The district court departed upward and imposed a sentence of 10 months imprisonment. The departure was based on the amount, purity, and packaging of the drugs. The Third Circuit affirmed the departure, holding that a court is permitted to consider evidence on counts on which a defendant is acquitted.

§ 1B1.4 Information to be Used in Imposing Sentence

United States v. Baird, 109 F.3d 856 (3d Cir. 1997). The district court did not err in departing upward based on conduct underlying counts dismissed as part of a plea agreement. The Third Circuit held that even in the plea bargain context, conduct underlying dismissed counts may support an upward departure.

United States v. Inigo, 925 F. 2d 641 (3d Cir. 1991). In determining an appropriate sentence, the district court may rely on hearsay as well as information not in the record at trial. The only constraint is that it must be reliable.

United States v. Bruno, 897 F. 2d 691 (3d Cir. 1990). Sentencing court was without power to depart below guideline range based on defendant's cooperation absent a government motion. However, the district court erroneously concluded that it lacked power to consider defendant's cooperation in imposing a sentence within the applicable guideline range. There is no conflict between 18 U.S.C. §3661 and 18 U.S.C. §3553(b), which directs courts to sentence

within the guidelines. While the court recognized some tension, it stated that "we are satisfied that the use of information of the type encompassed in §3661 must be subject to the limitations of §3553(b).

§ 1B1.7 Significance of Commentary

United States v. Boggi, 74 F.3d 470 (3d Cir. 1996). The Third Circuit held that commentary that interprets or explains a guideline is authoritative unless it violates the Constitution or federal statute, or is inconsistent with or is plainly erroneous reading of that guideline. The district court's failure to follow such commentary may constitute incorrect application of the guideline, subjecting sentence to reversal on appeal.

Stinson v. United States, 113 S. Ct. 1913 (1993). The Supreme Court held that commentary that interprets or explains a guideline is authoritative and binding on the courts unless it violates the Constitution or a federal statute, or is inconsistent with or a plainly erroneous reading of, that guideline.

United States v. Craddock, 993 F. 2d 338 (3d Cir. 1993). The guidelines provide that the commentary is to be treated as the legal equivalent of a policy statement; both may be helpful in interpreting a section and determining how it was intended to be applied. Of course, it is the text that is binding, and we would follow the text over the commentary in the event of conflict.

Williams v. United States, 112 S. Ct. 1112 (1992). In a footnote, the Supreme Court noted that the dissent stated that an error in interpreting a policy statement governing departures "is not, in itself, subject to appellate review." Nevertheless, the majority noted that the dissent quoted 18 U.S.C. §3553 (b) which requires the court to consider "the sentencing guidelines, policy statements, and official commentary of the sentencing commission." Thus, the majority noted that "the dissent would appear to agree that an appellate court can review the validity of a district court's reasons for departure for consistency with the commission's policy statements; it simply considers that inquiry to go to the 'reasonableness' of the decision to depart rather than to the correct application of the guidelines."

United States v. Joshua, 976 F. 2d 844 (3d Cir. 1992). Defendant was found to be a career offender based in part on his conviction for being a felon in possession of a firearm. While his appeal was pending, the Sentencing Commission promulgated a clarifying amendment to the commentary to §4B1.1. The amendment clarified that felon in possession of a firearm is not a crime of violence. Moreover, the amendment also demonstrated the Commission's intent that sentencing courts make the determination whether a crime "otherwise involves conduct that presents a serious potential risk of physical injury" by looking only at the conduct expressly charged in the indictment. Defendant argued that since this amendment was not a substantive change to the guidelines and merely a clarification of the Commission's intent, it should apply to him despite the fact that the effective date of the amendment is after the date of his sentence. The Third Circuit held that it was free to consider a new commentary regarding an ambiguous

guideline in determining how that guideline should be applied, even where a prior panel had resolved the ambiguity to the contrary. However, the court found that the text of career offender guideline would not support the amended commentary's position that possession of a firearm by a felon is never a crime of violence. Nevertheless, the court found that the commentary properly directed the court to consider only the conduct alleged in the indictment. Defendant's sentence under career offender guideline could not stand. Since the indictment did not allege that defendant's conduct, posed a serious potential risk of physical injury, his conviction was not a crime of violence. Further, the court of appeals held that the maximum authorized sentence under §924(e) is life.

§ 1B1.8 Use of Certain Information

United States v. De Los Santos, 2002 WL 737122 (3rd Cir.(N.J.))). The defendant argued on appeal that the government violated his plea agreement when it provided information to the district court and the probation office concerning additional quantities of cocaine he admitted to dealing in the course of his cooperation. These quantities were beyond the amount he expressly assumed responsibility for in his plea. He also argued that his sentence should be vacated and his case remanded for resentencing because the district court impermissibly utilized facts obtained from him through his cooperation agreement as "aggravating factors" weighed in the course of his sentencing. The Court of Appeals found these arguments without merit. The plea agreement clearly stipulated that "all other information relevant to sentencing, favorable or unfavorable, including information provided . . . before and after signing this agreement" would be furnished to both the sentencing judge and the U.S. Probation Office. Further, the defendant expressly acknowledged to the district court that the agreement had been read to him in its entirety and that he understood its terms. His attorney expressly acknowledged that the information concerning the additional quantities of cocaine would be utilized to inform the court's determination as to the extent of the § 5K1.1 departure. Moreover, the quantities of cocaine in question were neither mentioned nor considered until after the district court had already set the defendant's offense level and granted the government's motion for a downward departure. Finally, at sentencing the government requested that the district court use the parties' stipulated quantity of cocaine only, and not the additional quantities that the Probation Office had included in the presentence report. Indeed, at sentencing, the district court explicitly made mention of the fact that the additional quantities of cocaine would not be considered an aggravating factor.

United States v. Baird, 218 F.3d 221 (3d Cir. 2000). In December 1994, having learned that he was about to be indicted for conspiracy to violate civil rights, defendant offered to cooperate with the government. Unrepresented by counsel, he signed a brief note prepared by an assistant U.S. attorney indicating that "no statements made by you, or other information provided by you during the 'off-the-record' proffer, will be used directly against you in any criminal case." Two days later, on December 9, 1994, and still unrepresented, he signed a more formal letter drafted by the United States Attorney's Office. The letter acknowledged the defendant's desire to cooperate and stated that defendant's desire to cooperate and stated that the earlier "off-the-

record" note no longer applied and "[f]rom now on," information furnished was "on the record, and could be admitted against you in the future if you failed to plead guilty" to a Hobbs Act robbery and a conspiracy to violate civil rights. The letter also noted that cooperation could result in a governmental motion for a downward departure. In the month following, defendant fabricated evidence to exculpate a co-conspirator. On January 28, 1995, defendant admitted this deception and later aided the government in obtaining incriminating information on the co-conspirator. At sentencing, the district court characterized the plea agreement as "null" based on the defendant's attempts to shield a co-conspirator and departed upward.

The defendant filed a 2255 motion. In its response, the government conceded that the defendant's "sentencing guideline calculation and the district court's determination to depart upward were based upon matters which included in large part information obtained directly from defendant.

The Court of Appeals held that, "In the defendant's direct appeal, we held that evidence underlying dismissed counts was properly considered in the sentencing process. *Baird*, 109 F.3d at 863. The question here is quite different and is based on U.S.S.G. § 1B1.8, a guideline provision that excludes certain information from a court's consideration of the sentence to be imposed. The Court of Appeals concluded that the government had promised that such information would not be used to increase the defendant's punishment. Consequently, that material should not have been factored into the sentence. The Court of Appeals further stated that the district court erred in ruling that the cooperation agreement was a nullity.

§ 1B1.9 Class B or C Misdemeanors and Infractions

United States v. R.L.C., 112 S. Ct. 1329 (1992). The sentencing guidelines do not apply to a defendant sentenced under §§5031-5042, the Federal Juvenile Delinquency Act. However, the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult offender unless the district court finds an aggravating factor sufficient to warrant an upward departure.

Government of Virgin Islands v. Dowling, 866 F. 2d 610 (3d Cir. 1989). The Third Circuit held that the sentencing guidelines do not apply to offenses under the Virgin Islands code.

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

United States v. Turner, 2005 WL 995512 (3rd Cir.(Del.))). The defendant pled guilty to conspiracy to distribute cocaine. His plea stipulated to a base offense level of 34. He received a three-level reduction for acceptance of responsibility and a two-level reduction for minor participant. With a criminal history category of VI, his guideline imprisonment range was 151 to 188 months. He was sentenced on July 9, 1999, to 188 months imprisonment.

On appeal, the defendant argued that Amendment 640 to the Sentencing Guidelines, which took effect on November 1, 2002, and capped the base offense level of minor participant drug offenders at 30, should apply to him. He argued that the amendment is a clarifying, as opposed to a substantive amendment, and thus should be applied retroactively. The Court of Appeals concluded that Amendment 640 was substantive and not to be given retroactive effect.

United States v. Edwards, 309 F.3d 110 (3d Cir. 2002). The defendant pled guilty to conspiracy to counterfeit and forge securities and launder money, bank fraud and criminal forfeiture, and money laundering. He filed a motion under 18 U.S.C. § 3582(c)(2) seeking to modify his term of imprisonment on the basis of Amendment 634 to the United States Sentencing Guidelines § 2S1.1. This amendment, which became effective after Edwards was sentenced, alters the guideline range in connection with the offense of laundering of monetary instruments. Because Amendment 634 is not listed in subsection (c) of § 1B1.10, which sets forth the policy statement regarding when a reduction in a term if imprisonment is warranted based upon an amendment to a guideline range, the district court concluded that there was no legal basis for a modification of Edwards' sentence and, thus, denied the motion. In a subsequent motion, Edwards argued that Amendment 634 was a clarifying, rather than substantive, amendment which may be given retroactive effect despite the fact that it is not listed in subsection (c) of § 1B1.10 as an amendment that would authorize a modification or reduction in his term of imprisonment. The district court again denied Edwards' motion. He appealed. The Court of Appeals concluded that Amendment 634 is a substantive amendment and that the district court properly denied Edwards' § 3582(c)(2) motion seeking to modify his term of imprisonment.

United States v. Briceno-Rodriguez, 2002 WL 31160102 (3rd Cir.(Pa.))). On appeal, the defendant argued that counsel was ineffective for failing to request a continuance of the sentencing date until November 1, 2001, the date on which an amendment to U.S.S.G. § 2L1.2 was to become effective. The proposed amendment to 2L1.2 demonstrated an intent to grade prior offenses and, thus, his enhancement would have been less than it was. Relatedly, he argued that, the issue of a continuance aside, counsel should have asked for a downward departure of four levels using the pending amendment to 2L1.2 as the basis. The Court of Appeals ruled that his latter argument was foreclosed - - "We have explicitly held that proposed amendments to the Sentencing Guidelines do not provide independent legal authority for downward departure. *United States v. Morelli*, 169 F.3d 798, 809 n. 13 (3d Cir. 1999). Thus, counsel could not have been acting unreasonably in not "using the pending amendment to 2L1.2 as the basis for a downward departure motion under § 5K2.0. The defendant's first argument is similarly unavailing. The proposed amendment was just that a proposed amendment. There was no guarantee that Congress would approve the amendment.

United States v. McBride, 283 F. 3d 612 (3d Cir. 2002). At sentencing, McBride's base offense level was set at 42, U.S.S.G. § 2D1.1(c) (1993). The defendant subsequently moved for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2). . The motion was based on Amendment 505 to the Sentencing Guidelines, an amendment which became effective on November 1, 1994 and which deleted offense levels 38, 40, and 42 of the Drug Quantity Table in U.S.S.G. § 2D1.1(c) and inserted a revised level 38 as the upper limit of the Table.

In a Memorandum Opinion dated October 26, 2000, the district court agreed that retroactive application of Amendment 505 would be available to McBride and that the guideline imprisonment range would be recomputed after giving him the benefit of the level 38 cap. The Court scheduled a limited sentencing hearing, ordered an updated presentence report, and appointed counsel to represent McBride.

On January 5, 2001, the sentencing hearing commenced. McBride asked that, aside from any benefit he might receive as a result if the retroactive amendment, he be resentenced in accordance with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It was his position that because the jury had not found a specific drug quantity beyond a reasonable doubt, he should be resentenced within the statutory maximum for 21 U.S.C. § 846, "the object of said conspiracy being 21 U.S.C. § 841(a)(1), without regard to quantity." Applying *Apprendi*, he argued, would result in a maximum sentence of twenty years under 21 U.S.C. § 841(b)(1)(C) rather than a sentence within the expected guideline imprisonment range, as recomputed, of 360 months to life imprisonment. The district court determined that even if *Apprendi* could be applied retroactively, it would not be applied at McBride's resentencing because that resentencing was circumscribed by the nature of the motion before the Court, which was simply a motion under 18 U.S.C. § 3582(c)(2) for a reduction of sentence based on a change in the Guidelines. Accordingly, the Court only gave McBride the benefit of that change, pegging the base offense level at 38, and resentenced him to 400 months imprisonment.

McBride appealed, arguing that the district court erred in restricting the scope of that hearing to the benefit, if any, he would receive by virtue of the retroactive amendment to § 2D1.1 with its new upper limit on the base offense level. Rather, he argued the scope of the hearing should have encompassed *Apprendi* and the substantial benefit the application of *Apprendi* would assuredly have afforded him. The Court of Appeals affirmed the district court's ruling. Only the retroactive amendment is to be considered at a resentencing under § 3582 and the applicability of that retroactive amendment must be determined in light of the circumstances existent at the time sentence was originally imposed. In other words, the retroactive amendment merely replaces the provision it amended and, thereafter, the Guidelines in effect at the time of the original sentence are applied. Wholly aside from the fact that there was no *Apprendi* at the time of the original sentencing, constraining a court's consideration to the retroactive amendment at issue is consistent with the focused nature of a proceeding under § 3582.

United States v. Spinello, 265 F.3d 150 (3rd Cir.2001). On appeal, the defendant argued that the district court's reliance on the legal standard enunciated in *United States v. Marcello*, 13 F. 3d 752, 761 (3d Cir. 1994), in its denial of his motion for a downward departure based on "aberrant behavior," was erroneous. Under *Marcello*, aberrant behavior "must involve a lack of planning, it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first time offender." At sentencing, Spinello recognized that *Marcello* was circuit precedent which the district court was obliged to apply. However, effective November 1, 2000, subsequent to his sentencing, the Sentencing Commission amended the Guidelines via Amendment 603 to add § 5K2.20, which defines "aberrant behavior" in a manner different from *Marcello*, to wit: "'Aberrant behavior' means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." Spinello seeks a remand to give the district court the opportunity to consider § 5K2.20 and, hopefully, to resentence him to a lower term.

The remand which Spinello seeks as a result of the conflict between *Marcello* and § 5K2.20 is only possible if that guideline section can be applied retroactively. Because § 5K2.20 is not listed in § 1B1.10(c) for automatic retroactive application, the question is whether § 5K2.20 is a mere "clarification" of the law that merits retroactive application to a defendant on direct appeal or a "substantive change" to the Guidelines that does not. See *United States v. Marmolejos*, 140 F. 3d 488, 491 (3d Cir. 1998); see also U.S.S.G. § 1B1.11(b)(2) (The court shall consider subsequent amendments to the extent that such amendments are clarifyinf rather than substantive changes.). The Third Circuit concluded that Amendment 603, which added § 5K2.20, was a substantive change to the Guidelines rather than a mere clarification of the Guidelines, and cannot be applied retroactively to Spinello.

United States v. Thompson, 70 F. 3d 279 (3d Cir. 1995). Subsequent to defendant's sentencing, the Sentencing Commission amended §3E1.1 to provide for an additional one level reduction for acceptance of responsibility. The Third Circuit refused to apply the amendment retroactively. The statute that permits the Commission to make reductions retroactive, 18 U.S.C. §3582(c)(2), states that a reduction is proper if consistent with the applicable policy statements of the Sentencing Commission. Guideline §1B1.10 states that an amendment not listed in subsection (c) may not be applied retroactively. The amendment to §3E1.1 was not listed in §1B1.10(c).

United States v. Marcello, 13 F. 3d 752 (3d Cir. 1994). The guideline for structuring currency transactions, §2S1.3, was amended effective November 1, 1993, to reduce the base offense level. The Third Circuit remanded to consider whether, under the amended guideline, a reduction was warranted pursuant to 18 U.S.C. §3582(c)(2) and §1B1.10(d). Defendant would be entitled to a modification only if the amendment was listed in the "retroactivity" section of the guidelines, §1B1.10(d), and the district court exercised its discretion to apply the more lenient guideline. Here, the amendment to §2S1.3 was listed in §1B1.10(d) and therefore the court had discretion to apply it retroactively.

§ 1B1.11 Use of Guideline Manual in Effect at Sentencing

The One Book Rule

United States v. Griswold, 57 F.3d 291 (3d Cir. 1995). The district court was correct in using the "one book rule" of §1B1.11(b)(2). The Third Circuit held that §1B1.11(b)(2) was binding, and prohibits the mixing and matching of provisions from different versions of the guidelines. Quite recently, the Third Circuit, addressed this very issue in *U.S. v. Corrado*, 53 F.3d 620 (3d Cir. 1995).

United States v. Corrado, 53 F.3d 620 (3d Cir. 1995). Defendant contended that the 1987 version of the guidelines should have been used when calculating his adjusted offense level and the 1993 version when determining the maximum available reduction for acceptance of responsibility. The Third Circuit held that the adoption of the so-called "one book rule" under §1B1.11(b)(2) is binding. By adopting §1B1.11(b)(2), the Commission "effectively overruled" *U.S. v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992), and *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), insofar as they conflict with the codification of the one-book rule.

United States v. Bertoli, 40 F. 3d 1384 (3d Cir. 1994). Disapproved of "one book rule" in calculating guidelines for counts grouped together. *See Seligsohn*, 981 F. 2d at 424. The fact that various counts of an indictment are grouped cannot override ex post facto concerns.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). The Third Circuit expressly disapproved of the so-called "one book rule" -- that only one set of the guidelines should be used in calculating the applicable sentence "as a cohesive and integrated whole."

Ex Post Facto

United States v. Wood, 486 F. 3d 781 (3d Cir. 2007). Defendant was convicted of charges based on a robbery that took place January 6, 2004. He received a six-level official victim enhancement for assault on a police officer under § 3A1.2(c). He argued for the first time on appeal that the application of the enhancement violated the ex post facto clause, and the Third Circuit agreed that the error was plain. The official victim enhancement relied on by the court during defendant's January 2006 sentencing was amended, effective November 1, 2004, ten months after defendant engaged in the charged conduct. Prior to the amendment, defendant would have been subject to a three rather than six-level increase under § 3A1.2(b). The government conceded that all three prongs of the plain error review have been met: (1) the court erred in applying the 2004, rather than the 2002, official victim enhancement, (2) the error was clear and obvious, and (3) the error affected defendant's substantial rights.

United States v. Stanford, 2006 WL 3090143 (3rd Cir. (Pa.))). The defendant pled guilty to using a scheme and artifice to defraud a bank from in or around June of 2001, and continuing thereafter until May of 2002. On appeal, he argued that the presentence report erroneously used the 2001 edition of the sentencing guidelines instead of the 2000 edition, thereby committing an ex post facto violation.

According to the defendant, all of the fraudulent activity occurred in June 2001. He therefore contends that the district court erred by using the 2001 version which did not become effective until November 1, 2001. Application of the 2001 edition yielded an advisory guidelines range of 18 to 24 months. Using the 2000 edition of the guidelines, however, would have resulted in a guideline range of 10 to 16 months.

In affirming the judgement, the Court of Appeals noted that the district court relied upon Application Note to U.S.S.G. § 1B1.11, which provides that under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. As the Supreme Court instructed in *United States v. Broce*, 4888 U.S. 563 (1989), a guilty plea is more than a confession which admits that the accused did various acts. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). It is an admission that he committed the crime charged against him. *North Carolina v. Alford*, 400 U.S. 25, 32 (1970). *Broce*, 488 U.S. at 570. Here, the information charged that the scheme and artifice to defraud continued thereafter until May of 2002. Thus, the defendant's admission that he engaged in fraudulent activity after November 1, 2001 provided a sufficient basis for the district court to apply the 2001 edition of the guidelines. See *United States v. Moscony*, 927 F. 2d 742, 754 (3d Cir. 1991).

United States v. Dozier, 119 F. 3d 239 (3d Cir. 1997). The Court of Appeals held that two conditions must be met for a law to be ex post facto. "First, the law must be retrospective, that is, it must apply to events occurring before its enactment. Second, the change in the law must alter the definition of criminal conduct or increase the penalty by which a crime is punishable."

United States v. Menon, 24 F. 3d 550 (3d Cir. 1994). The Third Circuit held that the district court violated the ex post facto clause by applying the sentencing enhancement under §2Q2.1(b)(3)(A) which provided for an enhancement according to the table in §2F1.1, "if the market value of the fish, wildlife, or plants exceeds $2,000." Even though the enhancement was in effect when defendant was sentenced, it was not part of the guidelines at the time of defendant's conduct. The conduct at issue occurred in July of 1991 when the guidelines provided for an upward adjustment only "if the market value of the specially protected fish, wildlife, or plants exceeded $2,000. The general rule is that a sentencing court must apply the guidelines in effect at the time of sentencing. *See U.S. v. Cherry*, 10 F. 3d 1003, 1014 (3d Cir. 1993) and *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991). But changes in sentencing guidelines that enhance the penalty offend the Ex Post Facto Clause of Article I of the U.S. Constitution. *See Miller v. Florida*, 482 U.S. 423, 431-435 (1987) and *U.S. v. Kopp,* 951 F. 2d at 526.

United States v. Cherry, 10 F. 3d 1003 (3d Cir. 1993). In sentencing defendant for unlawful flight to avoid prosecution, the district court improperly used the 1989 guidelines, rather than the 1991 guidelines which were in effect at the time of sentencing. Under the 1989 version of §2J1.6, the court was permitted to consider defendant's underlying murder conviction in calculating his criminal history category. The 1991 version did not permit this. The Third Circuit reversed, noting that a sentencing court must apply the guidelines in effect at the time of sentencing; it is only when this would result in a more severe penalty that ex post facto concerns arise and courts must apply the guidelines in effect at the time of the offense.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). In *Hughey v. U.S.*, 495 U.S. 411 (1990), the Supreme Court held that a restitution order under the VWPA must be based only on the loss caused by the conduct that formed the basis of the conviction. After *Hughey*, Congress amended the VWPA to provide that (a) when an offense involves a pattern of criminal activity, "victim" means a person who is directly harmed by that pattern, and (b) the court is authorized to order restitution to the extent that the parties have agreed to it in a plea agreement. These amendments became effective after defendants committed their offense but before they entered plea agreements. The Third Circuit held that because these amendments worked to the detriment of defendants by enlarging a court's power to order restitution, application of the amendments to defendants was prohibited by the ex post facto clause.

United States v. Pollen, 978 F. 2d 78 (3d Cir. 1992). Defendant argued that the district court erred in considering relevant conduct in making a four level leadership enhancement under §3B1.1(a). He was sentenced in July of 1991. The Third Circuit, relying on its decision in *U.S. v. Murillo*, 933 F. 2d 195 (3d Cir. 1991), agreed with defendant. Consideration of relevant conduct was plain error. The court noted that the guidelines were amended effective November 1, 1990, to specify that relevant conduct should be considered in making role adjustments. However, if the guideline in effect at the time of the offense is more favorable to a defendant, it must be applied.

United States v. Chasmer, 952 F. 2d 50 (3d Cir. 1991). Although sentencing guidelines in effect at time of sentencing ordinarily will govern sentencing, defendant may not be prejudiced by change in guidelines after he commits offense and thus, when guidelines in effect at time of offense are more favorable to defendant, they must be applied.

United States v. Sussman, 900 F.2d 22 (3d Cir. 1990). Defendant who committed offense prior to November 1, 1987 but was sentenced after that date was properly sentenced under law applicable to offenses committed prior to November 1, 1987, the effective date of the Sentencing Reform Act. Defendant would have received a lighter sentence under the guidelines absent departure. However, such a construction of the applicability of the Sentencing Reform Act would be inconsistent with the clear intent of Congress as expressed in legislative history and would result in conflicts with the ex post facto clause of the Constitution. The Sentencing Reform Act applies only to offenses committed after November 1, 1987. See *United States v. Stewart*, 865 F.2d 115 (7th Cir. 1988); *United States v. Haines*, 855 F.2d 199 (5th Cir. 1988).

United States v. Bucaro, 898 F.2d 368 (3d Cir. 1990). The counting of points for prior juvenile delinquency adjudications under §4A1.2(d)(2) does not violate the ex post facto clause. An ex post facto law is one that punishes for conduct that was not criminal at the time it occurred or that increases punishment for an act after the act is done. When defendant committed the federal offenses for which he was sentenced, the sentencing guidelines had already clearly provided that prior adjudications of juvenile delinquency were a relevant factor during sentencing.

Ex Post Facto--Continuing Offenses and Conspiracies

United States v. Moscony, 927 F. 2d 742 (3d Cir. 1991). Defendant argued that it was improper to apply the guidelines to his RICO offense which began prior to and continued after the effective date of the guidelines. The Third Circuit agreed with the district court that RICO is a continuing offense "directly analogous to the crime of conspiracy," and that therefore the guidelines were applicable to defendant's RICO conviction. Application of the guidelines to defendant's offense did not violate the ex post facto clause. Defendant elected to continue his illegal pattern of conduct after the effective date of the guidelines, and the guidelines do not prescribe a higher sentence for his RICO offense than that provided by pre-guidelines law.

United States v. Audinot, 901 F.2d 1201 (3d Cir. 1990). The Third Circuit held that application of the sentencing guidelines to defendant who escaped from custody before enactment of guidelines but was not recaptured until after guidelines' effective date did not violate the ex post facto clause.

United States v. Rosa, 891 F. 2d 1063 (3d Cir. 1989). In the absence of any evidence that defendant affirmatively renounced conspiracy prior to November 1, 1987, the effective date of the sentencing guidelines, defendant convicted of conspiracy could be sentenced on the basis of the guidelines.

§ 1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

United States v. R.L.C., 112 S. Ct. 1329 (1992). The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§5031-5042). The Supreme Court held that a juvenile cannot be sentenced to a greater sentence than an adult under the guidelines. This is because 18 U.S.C. §5037(c)(1)(D) requires the length of official detention in certain circumstances to be limited to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The Supreme Court held that "this limitation refers to the maximum sentence that could be imposed if the juvenile were being sentenced after application of the United States Sentencing Guidelines."

CHAPTER TWO: *Offense Conduct*

Part A -- Offenses Against the Person

§ 2A1.1 First Degree Murder

United States v. Bell, 113 F. 3d 1345 (3rd Cir. 1997). Defendant was convicted of murdering a witness in violation of 18 U.S.C. §1512(a)(1)(A) and (C). In sentencing defendant to life imprisonment, the district court applied §2A1.1(a), the guideline for first-degree murder. Defendant contended this was error because the jury did not find that her killing of the witness was first degree murder. The Third Circuit found it unnecessary to resolve this issue because §1512(a)(2)(A) provides the punishment shall be death or life imprisonment, regardless of whether it is first-degree or second-degree murder. Defendant did not argue that the killing here was manslaughter.

Braxton v. United States, 111 S. Ct. 1854 (1991). Defendant pleaded guilty to assault and firearms counts but not guilty to attempting to kill a U.S. Marshal. At the plea hearing, the government presented the facts of the crime to provide a factual basis for the pleas. Defendant agreed with the facts as presented by the government. Relying on §1B1.2(a), over the defendant's objections, the court sentenced defendant as though he had been convicted of attempted killing. The Supreme Court reversed, ruling that the facts as stated by the prosecutor were not sufficient to establish an attempt to kill under 18 U.S.C. §1114. At the plea hearing, defendant merely agreed that he shot "through the door opening and that the gunshot lodged in the front door just above the door knob." There was no stipulation that defendant shot at the Marshal. Accordingly, defendant's sentence based upon the guideline for that offense could not stand.

United States v. Donley, 878 F. 2d 735 (3d Cir. 1989). Defendant was convicted of first-degree murder and sentenced to life imprisonment. He argued that 18 U.S.C. § 3581(b)(1) confers discretion to impose a sentence of less than life imprisonment for any Class A felony, including first degree murder, which was given a letter grade classification for the first time in 18 U.S.C. § 3559. Defendant's argument implies that Congress, in passing §3581(b)(1), meant to set a new minimum penalty for first degree murder of "any period of time," superceding the old minimum of life imprisonment under 18 U.S.C. §1111. The Third Circuit held that 18 U.S.C. § 3581 deals only with maximum penalties, not with minimums; that Congress did not mean to replace a fixed minimum sentence for first degree murder with an indeterminate sentence; and that the terms of imprisonment set in §3581(b) were not intended to apply to the offenses that were assigned letter grades for the first time in § 3559. Rather, they were meant to apply only to those offenses that were assigned letter classifications in the statutes describing the offenses. Section 3559 carries its own sub-section specifying maximum penalties, and some of those penalties are incompatible with limits set in §3581(b).

§ 2A1.2 Second Degree Murder

United States v. McNeil, 887 F. 2d 448 (3d Cir. 1989). Defendant was convicted of soliciting a person to murder his U.S. Probation Officer. He argued that he was subjected to cumulative punishment for the same offense when the sentencing court added three points to his base offense level pursuant to §3A1.2 because of the intended victim's status as a federal officer. The Third Circuit disagreed, holding that merely because 18 U.S.C. §1114 makes it a crime to assault, or attempt to kill, certain federal officers, a defendant convicted of this crime is not subject to cumulative punishment by virtue of having his sentence enhanced under §3A1.2. Defendant also argued that the Commentary to §2A1.2 provides that no enhancements should be applied in the case of mere solicitation. The Third Circuit held that this language only prohibited the application of specific offense characteristics, but not victim, role and obstruction of justice enhancements. The court relied on §1B1.1, which governs the manner of sentence determination, to affirm the use of a victim related enhancement in a solicitation to murder case.

§ 2A2.2 Aggravated Assault

United States v. Martin, 2002 WL 31479075 (3rd Cir.(N.J.))). The defendant was found guilty by jury of assaulting FBI Special Agent Raymond Lovett in violation of 18 U.S.C. § 111(a) and (b). He argued on appeal that he should have been sentenced under § 2A2.4 rather than § 2A2.2. Violations of 18 U.S.C. § 111 may be sentenced pursuant to § 2A2.2 or § 2A2.4. Section 2A2.2 applies to aggravated assault convictions. Section 2A2.4 applies to convictions of obstructing or impeding officers. The Court of Appeals held that it was not plain error to sentence Martin under § 2A2.2 because the evidence presented at trial showed that he used a dangerous weapon (an automobile) when he intentionally struck down a federal agent with his vehicle with the intent to do bodily harm. The Court of Appeals affirmed.

United States v. Jacobs 167 F.3d 729 (3d. Cir. 1999). The defendant pled "guilty" to aggravated assault on his former girlfriend on federal property in violation of 18 U.S.C. § 113(a)(3). In his appeal, the defendant made three arguments. First, he contends that the district court erred in imposing a six level enhancement pursuant to U.S.S.G. § 2A2.2(b)(3)(C), infliction of permanent or life-threatening injury. Second, he asserts that the court erred in upwardly departing five levels and that the court also erred on the degree of the departure due to insufficient findings that Jacobs had inflicted "extreme psychological injury" upon the victim. Third, he argues that the court should not have ordered him to pay full restitution pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. The Court of Appeals affirmed the district court's conclusion that Jacobs is to pay full restitution under the Mandatory Victims Restitution Act and the district court's application of a six level enhancement pursuant to U.S.S.G. § 2A2.2(b)(3)(C), Infliction of Permanent or Life-Threatening Bodily Injury. The Court of Appeals remanded for a more detailed explanation in accordance with Third Circuit precedent as to the basis of the sentencing court's five level upward departure pursuant to § 5K2.3, Extreme Psychological Injury. Jacobs' offense clearly falls within subsection (c)(1)(B), an identifiable victim suffered a physical injury or pecuniary loss and § 3664 clearly mandates full restitution in

subsection (f)(1)(A). The victim's lost "annual leave" and "restored leave"was a proper component of the restitution award. The elevated and prominent scar on the victim's face was an obvious disfigurement that is likely to be permanent; Jacobs had inflicted injuries that left permanent scars all over the victim's body; and the stabbing to the victim's face, mouth, chest, back and abdomen involved a substantial risk of death.

United States v. Johnstone, 107 F. 3d 200 (3d Cir. 1997). Defendant, a former police officer, was convicted of six counts of use of excessive force in violation of 18 U.S.C. §242. The district court added four points to defendant's offense level under §2A2.2(b)(2)(B) to reflect that a a dangerous weapon-- a flashlight-- was "otherwise used" in connection with the assault. Defendant claimed that the district court engaged in impermissible double counting since the flashlight had been considered in classifying his conduct as aggravated assault. The aggravated assault provision and the specific enhancements for the relative level of involvement of a dangerous weapon account for different aspects of an assault. In *U.S. v. Wong*, 3 F. 3d 667 (3d Cir. 1993) and *U.S. v. Maurello*, 76 F. 3d 1304, 1315-16 (3d Cir. 1996), the Court of Appeals noted that the Sentencing Commission was aware of the potential for double counting inherent in some of the provisions, and that, accordingly, the Guidelines specifically forbid double counting in certain, enumerated circumstances. Thus, because the Sentencing Commission has not expressly forbidden double counting in applying the aggravated assault guideline, the Third Circuit held that the district court correctly granted the four point enhancement even if doing so might in some sense constitute double counting.

United States v. Johnson, 931 F. 2d 238 (3d Cir. 1991). Defendant and a co-defendant assaulted three Assistant U.S. Attorneys but pled guilty to assaulting only one of them. The district court properly increased defendant's base offense level by four levels under §2A2.2(b)(2)(B) based on the fact that the gun was "otherwise used," rather than "brandished." In making the distinction, the appellate court agreed with the trial judge "that when a defendant did not simply point or wave about a firearm, but actually leveled the gun at the head of a victim at close range and verbalized a threat to discharge the weapon, the conduct is properly classified as 'otherwise using' a firearm." Defendant approached his victim with a gun, pointed it at her head from a distance of one to two feet, ordered her not to start her car or he would "blow her head off," and demanded money.

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

United States v. Hayward,359 F. 3d 631 (3d Cir. 2004). The defendant and his wife owned a cheerleading school which was invited to take part in the World Cheerleading Association's "World Tour of Champions" which involved a tour in Europe. The defendant and six female teenagers went on the tour. At a hotel in London, the defendant began to rub the back of one of the girls, slipping his hand inside her pants. He fondled the breasts of another girl and kissed another girl. The defendant pushed this girl's head toward his penis. Some time later, he removed his pants and had the two girls fondle his penis.

Hayward was convicted of violating 18 U.S.C. § 2423(a) (transportation of a minor with intent to engage in criminal sexual activity). The corresponding guideline for a violation of § 2423(a) is U.S.S.G. § 2G1.1. Under that guideline, the sentencing judge may select among U.S.S.G. § 2A3.1 (Criminal Sexual Abuse), § 2A3.2 (Statutory Rape), or § 2A3.4 (Abusive Sexual Contact), as appropriate. The sentencing judge sentenced the defendant under § 2A3.1 (Criminal Sexual Abuse). The Court of Appeals reversed the sentence, finding that the appropriate guideline was § 2A3.4 (Abusive Sexual Contact) since the evidence showed that the victim's mouth could not have touched the defendant's penis because the defendant's trousers were between her mouth and his penis - - he could only have been sentenced to sexual contact and not sexual abuse. It was not skin-to-skin contact. Statutory definition of "sexual act" which includes contact between the penis and the mouth, requires skin-to-skin contact.

United States v. Queensborough, 277 F.3d 149 (3d Cir. 2000). The district court did not err in finding that the presentence report provided the defendant with the required notice of an upward departure pursuant to § 5K2.8 and Application Note 5 of § 2A3.1 [now Application Note 6]. The defendant and codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the presentence report, located underneath the heading "Factors that May Warrant Departure which stated, "According to U.S.S.G. § 2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure my be warranted, *see* § 5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice.

United States v. Ward, 131 F.3d 335 (3d Cir. 1997). Defendant abducted a 24 year old woman and brutally sexually assaulted her over a period of three days. He was convicted of kidnaping in violation of 18 U.S.C. §1201. At sentencing, the district court imposed a two-level upward departure, pursuant to USSG §2A3.1, application note 7, which provides: "if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted." Defendant previously had been convicted of sexually assaulting a jogger at knife point. The Court of Appeals affirmed, commenting, "his prior commission of a similar offense involving sexual abuse, therefore, qualified as an 'encouraged factor' for departure pursuant to *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996). Although the prior conviction was used in calculating defendant's criminal history category, it was for a similar prior sexual assault and could be considered again, consistent with 18 U.S.C. §3553, in justifying an upward departure.

United States v. Castro, 2003 WL 1919355 (3rd Cir.(N.J.))). This appeal challenged the sentence of a defendant who pled guilty to kidnaping. As part of the defendant's plea agreement, he stipulated that a two level enhancement was applicable under § 2A4.1(b)(3) because a dangerous weapon was used during the course of the kidnaping. This enhancement was included in the defendant's sentence. The defendant appealed, challenging the enhancement.

On July 18, 200, the defendant and two co-conspirators drove from Queens, New York to Elizabeth, New Jersey to kidnap a drug dealer named Nelson Rondon. During the ride, the defendant told his co-conspirators about two weapons they were going to use to intimidate Rondon. The defendant and one of the co-conspirators forcibly abducted Rondon in front of his house. Rondon stated that he was hit twice with a gun during the abduction. The defendant and his co-conspirators held Rondon captive for several days.

On July 21, 2000, the conspirators returned to Elizabeth in a vehicle with Rondon in the back seat. A brown bag containing a large frame automatic weapon and a .38 caliber rifle were in the vehicle. The conspirators were arrested as they waited for the ransom money to be delivered.

The defendant now contends that he was not aware of any weapons that were used to abduct Rondon until July 21. The Court of Appeals held that the defendant may not now renege on the stipulation that was part of his plea agreement. He further argued that the enhancement is improper because he never personally possessed, used, or displayed a gun against Rondon. Even without the stipulation, the district court's conclusion that a gun was used was not clearly erroneous. The government could prove that his co-conspirators possessed a gun in connection with the offense and the defendant was aware of it. All that is required for a sentence enhancement is that a dangerous weapon be used and that its use be reasonably foreseeable. See U.S.S.G. §§ 1B1.3(a)(1)(B), 2A4.1(b)(3). The defendant's arguments were without merit.

United States v. Pollard, 986 F. 2d 44 (3d Cir. 1993). Defendant was convicted of kidnaping and related counts for abducting young boys or luring them back to his apartment to commit sexual acts. The kidnapping guideline, §2A4.1, directs the court to use the guideline for the underlying offense if it results in a greater offense level. The Third Circuit affirmed, holding it was proper to sentence defendant under the guideline for criminal sexual abuse, §2A1.3, even though he was never charged with that offense, and the federal court lacked jurisdiction to try him for it.

§ 2A6.1 Threatening or Harassing Communication

United States v. Cothran, 286 F.3d 173 (3d 2002). A jury convicted the defendant of conveying false information and threats about carrying an explosive device on an airplane, in violation of 49 U.S.C. § 46507. The defendant was scheduled to fly from Philadelphia to Atlanta. He telephoned the U.S. Air Ticket Reservation Office and stated something to the effect that he was upset with U.S. Air for not letting him bring explosives on the plane, and that he wanted to blow a plane out at 35,000 feet. Later, the defendant was observed talking on a telephone at the airport and was overheard saying "don't tell me how to blow up a bomb." The defendant was arrested.

The presentence investigation report recommended applying U.S.S.G. § 2K1.5 as the most analogous guideline. Section 2K1.5 is the guideline applicable to "Possessing Dangerous Weapons or Materials While Boarding or Aboard and Aircraft." The district court demurred, finding § 2A6.1 the "appropriate section to apply to Cothran's conduct." Section 2A6.1 is the guideline applicable to "Threatening or Harassing Communications."

The Court of Appeals agreed that § 2A6.1 is the more analogous guideline. In contrast to § 2K1.5, it accurately embodies Cothran's conduct.

The defendant then argued that if § 2A6.1 is applicable, he is entitled to a four-level reduction because his "offense involved a single instance evidencing little or no deliberation." The district court disagreed, stating that, "I do not find that it was one single episode and I find the conduct existed over the two different episodes and over a period of hours and that there was some serious deliberation and thought . . . in reference to both of these conversations and both of these activities." The Court of Appeals agreed.

United States v. Green, 25 F. 3d 206 (3d Cir. 1994). Defendant requested his friend, a police officer, to run a records check on a postal inspector's license plate. The sentencing court ruled that this was evidence of defendant's intent to carry out threats against the inspector. According to the Third Circuit, this justified a six-level enhancement under §2A6.1(b) for intent to carry out a threat.

Part B -- Offenses Involving Property

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

United States v. O'Keefe, 2006 WL 370784 (3rd Cir.(Pa.))). The defendant pleaded guilty to violating 18 U.S.C. § 371 and 1343 as a collections agent for a fraudulent telemarketing scheme run from Canada. One of the issues raised by the defendant on appeal was the two level enhancement under U.S.S.G. § 2B1.1(b)(9)(B) for committing a substantial part of the fraudulent scheme outside the United States. He argued that the enhancement was inapplicable because he

was a resident of Canada at the time of the offense and did not know he was involved in extracting money from persons in the United States. In affirming the sentence, the Court of Appeals noted that O'Keefe's Canadian residence does not except him from § 2B1.1(b)(9)(B), and that he stipulated he "understood that others acting with him expected to receive money sent by wire transfer from Americans.

United States v. Newsome, 439 F. 3d 181 (3rd Cir. 2006). The issue in this appeal was whether the creation of forged driver's licenses and employer Ids for the purpose of making fraudulent bank withdrawals qualified for the two level sentencing enhancement under U.S.S.G. § 2B1.1(b)(9)(C)(i) for "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification."

The defendant conspired with others to make fraudulent withdrawals from customer accounts at Fleet Bank. One of the co-conspirators, Annur Hamilton, had obtained personal contact and account information of Fleet customers from an unidentified Fleet employee. Using this information, the conspirators produced fake driver's licenses, employee identification cards, and completed pre-printed withdrawal slips, which were then used by two of the co-conspirators, Evelyn Rivera and Elaine Daniels, to make withdrawals from Fleet branches. Although it is unclear who actually manufactured the fake identification cards, the defendant and Hamilton contributed to the effort by taking digital photographs of Rivera and Daniels. These photographs were then placed on forged identification cards, which contained the name and personal information of the fraud victims, but displayed the photograph of Rivera or Daniels. The defendant supplied the fake cards to Rivera and Daniels and served as their driver on the fraudulent forays to various Fleet branches. Before the defendant and his co-conspirators were apprehended, they managed to withdraw $135,340.

At sentencing, the district court determined that a two level upward adjustment was warranted under U.S.S.G. § 2B1.1(b)(9)(C)(i) for "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification." The Court of Appeals affirmed the enhancement. By taking a means of identification - - the information from the fraud victim's driver's license and employer ID - - and combining that information with a photograph of Daniels or Rivera, the defendant produced another means of identification - - a means of identification of the victim, which because it bore Daniels' or Rivera's photograph, would give Daniels or Rivera access to the victim's assets. This is precisely the type of behavior for which the sentencing enhancement was intended.

United States v. Andeliz, 2002 WL 1284214 (3rd Cir.(N.J.))). The defendant was convicted by a jury of two counts of receiving and possessing stolen property in violation of 18 U.S.C. § 659, and two counts of receiving and possessing stolen merchandise having a value in excess of $5,000 and which crossed a state boundary in violation of 18 U.S.C. § 2315. At sentencing, the district court applied a four level enhancement because Andeliz was in the business of receiving and selling stolen property. The Court of Appeals concluded that the district court properly applied the enhancement in U.S.S.G. § 2B1.1(b)(4)(B). It was clear from

the record that Andeliz was engaged in the business of receiving and selling stolen property. He was caught with a substantial amount of stolen goods. His fencing operation was also conducted with sufficient regularity to support a finding that he was in the business of receiving stolen property.

United States v. Cottman, 142 F. 3d 160 (3rd Cir. 1998). Defendant pled guilty to conspiracy to possess, sell, and dispose of stolen property. He contended that the district court erroneously applied a four point upward adjustment under § 2B1.1(b)(4)(B) on the basis that he was "in the business of receiving and selling stolen cable equipment." The district court concluded that the defendant had a steady source of stolen cable boxes that was generated from more than one robbery or theft...his source of cable boxes appear to have been persons employed by cable companies...he regularly received up to 300 cable boxes per week. The appellate court upheld the enhancement. Nothing in language, commentary, or amendment history of § 2B1.1(b)(4)(B) suggests that to earn the enhancement the defendant must be the criminal "mastermind" behind the scheme. Also, the fact that a defendant continues to hold down a legitimate job does not foreclose the enhancement.

Determining Loss Amount

United States v. Anderson, 2007 WL 490985 (3rd Cir.(N.J.))). The defendant pleaded guilty to charges of conspiracy to commit wire fraud and wire fraud, under 18 U.S.C. §§ 371 and 1343. He and several co-conspirators fabricated credit documents and property appraisals to obtain, and quickly default on, mortgage loans far in excess of the underlying properties' true value. In total, the defendant and his accomplices secured nearly 60 mortgages totaling nearly $9,000,000 from the sole lender they targeted.

One of the issues presented on appeal by the defendant was that the district court erred in calculating loss because it "failed to adequately consider the fair market value of the properties secured by the loans." The district court arrived at its loss determination by adopting the methodology and financial data outlined in the psr, which was developed by a special agent of the FBI. The agent testified to his methodology, which was to start with the principal of each loan; subtract any amount the lender was able to recover through foreclosure sales or refinancing; subtract any origination fees earned by the lender; add any costs associated with foreclosure; and add any loss bargained-for-interest. By applying this methodology, the agent determined that the loss was $2,599,409.

In arguing that the district court failed to adequately take into account the fair market value of the properties on which the lender foreclosed, the defendant did not attack the methodology used by the district court, but rather the accuracy of the underlying data. He argued that the district court should not have relied on the amounts the lender recovered from foreclosure sales because the lender, in its haste to minimize its losses, sold the relevant properties for less than market value. However, the defendant offered no evidence as to the purported actual market value of the properties or otherwise offered proof that the lender sold

even one of the properties for less than it otherwise could or should have. Finally, the Court of Appeals indicated that it defies logic to suggest that the lender would do anything less than its utmost to recoup its losses, especially when it had not other means of doing so. The Court of Appeals was satisfied that the district court did not commit plain error in determining that the defendant was responsible for $2,599,409 in loss.

United States v. Tupone, 442 F. 3d 145 (3d Cir. 2006). The defendant was convicted of fraudulently receiving workers' compensation benefits in violation of 18 U.S.C. § 1920. Tupone, an injured postal service employee, was awarded full disability payments, then failed to report a cottage business of buying and selling automobiles to the Department of Labor (DOL). The sentencing issue raised on appeal was the attributable loss under § 2B1.1. At trial, the investigating DOL agent testified that had Tupone reported his profit from the cottage industry, his disability payments would have reduced by $7,320.50 (actually received $54,432); moreover, as a partial disability recipient, his claim would have been reviewed differently. The sentencing judge ruled attributable loss as the total amount of disability payments received, presuming Tupone's false statements to the DOL would have negated eligibility for any disability payments.

The Court of Appeals ruled that U.S.S.G. § 2B1.1, Application Notes 3(A) & (F)(ii), establishes a particular standard for loss determination of improperly received government benefits, i.e., the loss is the difference of the value of the benefits actually received and the value of the benefits legitimately intended. That rule should have applied in this case, particularly in light of the aforementioned trial testimony of the agent.

United States v. Aronowitz, 2005 WL 2760948 (3rd Cir. 2005). From 1997 to 2002, the defendant, a licensed dentist, charged an insurance company as if he had performed certain root canal procedures even though he had in fact unlawfully allowed dental assistants to do the work. In 2004, he pled guilty to health care fraud under 18 U.S.C. § 1347 and was sentenced to 48 months of imprisonment.

The defendant was sentenced after the Supreme Court had decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004), but before *United States v. Booker*, 125 S.Ct. 739 (2005). The district court found the sentencing guidelines to be unconstitutional, but nevertheless considered the suggested guidelines range for the offense as informing the decision rather than mandating it, an approach later prescribed by the Supreme Court. See *Booker*, 125 S.Ct. At 756-57. At sentencing, the district court found the amount of loss to be between $199,000 and $344,000.

While the defendant's sentence was enhanced based on facts neither admitted to nor found by a jury, the defendant did not complain that his Sixth Amendment rights were violated by raising a *Booker* challenge on appeal. In addition, the Court of Appeals noted that remanding to allow the district court to resentence in light of *Booker* would be redundant in this case since the district court essentially applied the analysis called for by that case. Instead, the Court of Appeals reviewed the district court's application of the guidelines de novo, as under prior case

law, see, e.g., *United States v. Brennan*, 326 F. 3d 176, 200 (2003), and the defendant's sentencing for "unreasonableness." See *Booker*, 125 S.Ct. At 765-66.

The defendant argued on appeal that the district court erred by finding that he caused any monetary loss in determining his sentence. He argued that there was no loss because there was no proof that any of his patients were harmed by the root canals that he had his employees perform unlawfully. The defendant relied on *United States v. Maurello*, 76 F.3d 1304 (3d. Cir. 1996) and *United States v. Hays*, 242 F.3d 113 (3d Cir. 2001), as establishing the proposition that, for the purposes of sentencing those who fraudulently offer professional services to the public, "loss" may not include the services that were "satisfactory" and "have not harmed" the public. *Maurello*, 76 F.3d at 1311-12. According to the defendant, because the government did not make any showing that patients were harmed by the root canal procedures, the district court was wrong to consider that his conduct caused any loss.

The Court of Appeals held that the defendant's reliance on *Maurello* and *Hayes* was misplaced because those cases were disavowed by the Sentencing Commission. In November 2001 (10 months after *Hayes* was decided), an Application Note was added that read: "In a case involving a scheme in which...services were fraudulently rendered to the victim by persons falsely posing as licensed professionals...loss shall include the amount paid for the property, services, or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services. *U.S. Sentencing Guidelines Manual*, § 2B1.1, cmt. N. 3(F)(v). The Sentencing Commission specified *United States v. Maurello* as one of the two cases prompting the addition of this Application Note....While *Booker* instructs that the sentencing guidelines are no longer mandatory, it also finds that the guidelines are advisory and requires that sentencing courts consider the advice they give.

Reviewing the district court's determination under the sentencing guidelines de novo, the sentencing range considered by the district court did not rest on an improper calculation of loss under the guidelines based upon the amended commentary. The defendant's sentence was not "unreasonable" and the judgment of the district court was affirmed.

United States v. Feldman, 338 F.3d 212 (3rd Cir. 2003). Loss computation affirmed for defendant who concealed $138,000 in assets in bankruptcy fraud case despite the fact that it was impossible for the loss to have actually occurred. However, the restitution order was vacated and the case was remanded so the district court could determine loss based on the difference between the credit the defendant would have received if he had disclosed his assets and the amount he actually received.

United States v. McKelvey, 2003 WL 193948 (3rd Cir.(Pa.))). Appellant argued that the district court erroneously failed to consider $53,000 of a 2002 annuity payment as collateral "otherwise provided by the defendant" which was divided among the victims in a civil action. This would have reduced the loss from $57,828 to $4,828. The Court of Appeals held that unlike *Kopp*, where an estimate of actual loss at the time of detection would have been unfair because it

would undervalue the security pledged for the loan, the 2002 annuity was divided up as restitution and was not security for the underlying transactions. Incorporating the restitution amount would improperly minimize the appellant's culpability. As the Court of Appeals has recognized, "a defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught." *United States v. Mummert*, 34 F. 3d 201, 204 (3d Cir. 1994) (where defendant falsified and forged bank loan application, actual loss is the loss to the bank minus current value of pledged collateral and a gratuitous offer to transfer property cannot be considered). Moreover, even if the appellant were correct that the actual loss should be reduced by the $53,000 divided up in the civil action, such a reduction would not be applicable in determining the intended loss - - which would remain at $57,828.

United States v. Albright, et.al, 2002 WL 538749 (3rd Cir.(Pa.))). The defendants pled guilty to criminal charges arising from participation in a conspiracy to steal cash, stock certificates, bond certificates, certificates of deposit, jewelry, and other property from a safe in a Mercersburg, Pennsylvania apartment. The court determined the guideline level for Mark Ortega by valuing the victim's loss at $1.5 million, but the victim reported a loss of only $212,100. Ortega appealed, arguing that in calculating the value of the victim's loss under U.S.S.G. § 2B1.1(b)(1)(N), the district court improperly included the face value of the stock certificates, bond certificates, and certificates of deposit stolen from the safe, even though the certificates alone are worthless and do not confer ownership.

In affirming the district court's loss computation, the Court of Appeals has held that the amount of loss under § 2B1.1 should be determined by the face value of a check or bond, not by its "market" or "street" value. *United States v. Stuart*, 22 F.3d 76, 82 (3d Cir. 1994) (citing *United States v. Cianscewski*, 894 F.2d 74, 80 (3d Cir. 1990).

United States v. Medford, 94 F. 3d 419 (3d Cir.1999). The defendant contends that the district court erred in enhancing his base offense level because it arbitrarily selected the midpoint between the high and low estimates of the stolen items' fair market value as the amount of loss and stated, without further explanation, that doing so is entirely appropriate. The Court of Appeals has held that in cases in which the fair market value ranges between two estimates and either end of the range is equally plausible, courts generally should adopt the lower end of the estimated range. See *Miele*, 989 F.2d at 665-66. The Court of Appeals held that "In determining that the fair market value of the stolen items exceeded $2.5 million, the district court selected the middle value of the high and low estimates without assessing the reliability of the higher estimate. In addition, the district court did not articulate an adequate evidentiary basis for selecting the middle value of the two estimates, as opposed to selecting the low end of the range.

United States v. Hallman, 23 F. 3d 821 (3d Cir. 1994). Defendant, using various aliases, deposited stolen and forged checks into an account and then withdrew the funds. He forged one of the stolen checks to buy a car in the State of Alabama for about $14,000. When he was arrested, a search of his vehicle revealed 61 pieces of stolen mail, including stolen checks having a face value of $25,152. Defendant argued that some of the checks had no value as a result of the passage of time or because payment on the checks would have been stopped. The Third Circuit affirmed. Note 2 to §2B1.1 specifically states that "loss" is the "loss that would have occurred if the check or money order had been cashed." Defendant's theft of the checks was complete, although his criminal conduct was only partially completed.

United States v. Stuart, 22 F. 3d 76 (3d Cir. 1994). Defendant assisted a co-defendant in selling stolen government bonds with a face value of $129,000 and received a nine level enhancement under §2B1.1(b)(1)(J). Amount of loss is to be determined by face value of bonds, not by its market or street value where, in order for defendant to be paid his $2,000 for participating in scheme, $10,000 of stolen bonds would have to have been liquidated at $.20 on dollar. However, downward departure warranted because loss overstates defendant's role.

United States v. Wong, 3 F. 3d 667 (3d Cir. 1993). Defendant illegally wired about $476,000 from a bank to accounts controlled by others. However, the parent corporation of this company later gave defendant a $300,000 promissory note which provided that the principal would be repaid directly to defendant in quarterly installments. The Third Circuit held that the $300,000 promissory note constituted property obtained as a result of the offense, and thus constituted "gross receipts from participation in the offense" for purposes of a §2B1.1(b)(7)(B) enhancement. Gross receipts from the offense includes all property which is obtained either directly or indirectly as a result of the offense.

United States v. Colletti, 984 F. 2d 1339 (3d Cir. 1992). Defendants stole a shipment of diamonds from a courier for a jewelry store. They argued that the actual loss under §2B1.1 was not the $626,000 retail value of the stolen gems, but the 25 percent discounted price which the jewelry store would have been willing to sell them for, or the even-lower wholesale replacement cost of the gems. The insurance company covering the loss settled the jewelry store's claim for $289,749.50. The Third Circuit upheld the use of the retail value of the diamonds, since there was adequate evidence in the record to support the finding that the stolen gems had an actual market value of $626,000.

United States v. Cianscewski, 894 F. 2d 74 (3d Cir. 1990). In sentencing defendant for offenses involving stolen treasury checks, the district court properly based loss on "face value" of the checks, rather than the amount defendant received for them on resale.

United States v. Parker, 874 F. 2d 174 (3d Cir. 1989). Defendant pled guilty to stealing 122 pieces of mail worth approximately $22,500. At sentencing, he claimed the value of the stolen mail was less, seeking to benefit from a lower offense level. The trial court rejected his attempt to raise a factual issue, ruling that the facts were established by the guilty plea, and the Third Circuit agreed. When the plea agreement itself provides for a plea to the facts relevant to sentencing, a separate stipulation of facts is not necessary. Thus, it is proper for the sentencing court to rely on admissions of material facts made during pleas in sentencing defendants.

Departures

United States v. Stuart, 22 F. 3d 76 (3d Cir. 1994). Defendant assisted a co-defendant in selling stolen government bonds with a face value of $129,000 and received a nine level enhancement under §2B1.1(b)(1)(J). He argued that the most he could have received from his participation was $2,000, which would result in a two-level enhancement. The Third Circuit affirmed, since under application note 2 to §2B1.1, "loss is the fair market value of the particular property at issue." Nevertheless, the court suggested that, notwithstanding the proper application of the guidelines, a nine level enhancement overstated both the degree of defendant's criminality and his need to be corrected. Where application of the guidelines' monetary tables bears little or no relationship to a defendant's role in the offense, and greatly magnifies the sentence, the district court should have the discretion to depart downward.

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

United States v. Andeliz, 2002 WL 1284214 (3rd Cir.(N.J.))). The defendant was convicted by a jury of two counts of receiving and possessing stolen property in violation of 18 U.S.C. § 659, and two counts of receiving and possessing stolen merchandise having a value in excess of $5,000 and which crossed a state boundary in violation of 18 U.S.C. § 2315. At sentencing, the district court applied a four level enhancement because Andeliz was in the business of receiving and selling stolen property. The Court of Appeals concluded that the district court properly applied the enhancement in U.S.S.G. § 2B1.1(b)(4)(B). It also held that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it was not necessary that the jury have found the facts that established the loss amount, and that Andeliz was in the business of receiving stolen property. His sentence was well below the ten year statutory maximum sentence.

United States v. King, 21 F. 3d 1302 (3d Cir. 1994). Defendant possessed 220 government bonds that were stolen from a home during a burglary. He sold 129 to a government agent in two separate transactions, and turned the remaining bonds over to the FBI on the day of sentencing. The Third Circuit reversed an enhancement under §2B1.2(b)(4)(A) for being in the business of selling and receiving stolen property. The transactions involved a single purchaser. His sales did not involve the same level of sophistication, and were not even remotely repetitive.

United States v. Chiarelli, 898 F. 2d 373 (3d Cir. 1990). Defendant was convicted of possession of stolen property and conspiracy to receive stolen property. The Third Circuit held that a high speed chase through a downtown area is a sufficient ground for upward departure for passenger as well as driver. The district court also departed upward, relying in part on the great value of the property stolen and the "association" between defendants and the sophisticated burglars who stole the property. The Third Circuit reversed, holding these were not permissible bases for departure because they are already taken into account by the stolen property guideline. District court properly applied the guidelines by refusing to consider the value of the recovered property as a mitigating factor.

§ 2B3.1 Robbery

United States v. Williams, 2007 WL 24128447 (3rd Cir.(N.J.))). This case involved a conspiracy to rob armored trucks that were transporting cash to and from various retail stores and banks. The first one occurred in March 2002. The defendant and a co-defendant posed as construction workers and successfully held up the armored truck driver. The presentence report indicated the either the defendant or a co-defendant, or possibly both of them, was armed. The second robbery occurred five months later, in August 2002. The defendant was supposed to function as the "get-away" driver, but the plan was foiled and a shootout between an armed security guard and the defendant's co-conspirators ensued, resulting in the arrest of all four conspirators.

With respect to the August 2002 robbery, the defendant claimed that the District Court erred in imposing a four-level sentence enhancement for the intended but unrealized loss and by enhancing his sentence for brandishing a firearm.

The Court of Appeals affirmed the judgment of sentence, noting that under U.S.S.G. § 2X1.1, when a robbery is unsuccessful, the amount of money intended to be stolen can be considered. Further, a guard testified at trial that he believed on of the attackers had a gun, pointed it at him, and may have even fired the weapon. This testimony supported the Distrcit Court's finding that a gun was brandished by the defendant's co-conspirator. Because brandishing a gun was a reasonably foreseeable act in furtherance of a jointly undertaken criminal activity, the District Court properly enhanced the defendant's sentence.

United States v. Griggs, 2006 WL 1976032 (3d Cir.(Pa.))). The defendant pled guilty to four counts of robbery, all in violation of 18 U.S.C. § 2113(a). His presentence report included a six-level upward adjustment under U.S.S.G. § 2B3.1(b)(2)(B) for having "otherwise used" a firearm during the fourth robbery. The defendant objected to the enhancement, claiming he used a crossbow during the fourth robbery, not a firearm. He was sentenced on September 8, 2004 - - after *Blakely v. Washington*, 542 U.S. 296 (2004), but before *United States v. Booker*, 543 U.S. 220 (2005). The District Court expressly declined to consider the sentencing guidelines in making its sentencing decision, finding the guidelines unconstitutional in their entirety under *Blakely*. Nevertheless, the court heard evidence at the sentencing hearing on the gun-use

enhancement recommended in the presentence report. The bank teller involved in the fourth robbery testified unequivocally that the defendant pointed a gun at her during the robbery. The District Court found by a preponderance of the evidence that the defendant used a gun during the fourth robbery.

The Court of Appeals ruled that the District Court correctly applied a preponderance of evidence standard to determine whether the defendant used a gun, rather than a crossbow, and that the District Court''s gun-use finding was not clear error. The defendant also argued on appeal that, even if he used a gun, his sentence should only have been enhanced five levels for having "brandished" the gun under U.S.S.G. § 2B3.1(b)(2)(C), not six levels for having "otherwise used" the gun under U.S.S.G. § 2B3.1(b)(2)(B). The Court of Appeals again ruled there was no error. The bank teller testified the defendant took out a gun, pointed it at her, told her to fill a bag with money, and warned her not to "push his buttons." In affirming the District Court's finding, the Court of Appeals noted that it had previously held that "leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one's direction, is a cessation of 'brandishing' and the commencement of 'otherwise used.'" *United States v. Orr*, 312 F.3d 141, 145 (3d Cir. 2002). The defendant's conduct during the fourth robbery falls squarely within this definition of "otherwise used."

The Court of Appeals did, however, remand the case for resentencing, finding that the District Court expressly declined to consider the guidelines. Furthermore, the record did not reveal that the court considered the remaining § 3553(a) factors. This was error under *Booker*.

United States v. Knighton, 2006 WL 467967 (3rd Cir.(Pa.))). The defendant pled guilty to bank robbery , punishable under 18 U.S.C. § 2113(a). His sentencing was held on March 18, 2005, approximately two months after the Supreme Court issued its landmark decision in *Booker*. The Court imposed a prison term of 70 months, which included a two-level enhancement for carjacking. In enhancing Knighton's sentence, the Court adopted the findings of the presentence investigation report, which concluded that "the defendant took a motor vehicle from the presence of another by force, violence, or intimidation" in the course of the bank robbery. This constitutes a carjacking under U.S.S.G. § 2B3.1, Application Note 1. Knighton objected to the Court's enhancement of his sentence for carjacking and the Court's alleged use of the preponderance of the evidence standard in finding the facts meriting the carjacking enhancement. The district court overruled those objections.

On appeal, the defendant renewed his objection to the two-level enhancement for carjacking, as prescribed by U.S.S.G. § 2B3.1(b)(5). He argued that the Court failed to find that he had the intent to "cause death or serious bodily harm" during the course of the theft. The Court of Appeals rejected the defendant's arguments, noting that the guidelines' definition of carjacking is a wholly separate definition of carjacking, applicable independent of 18 U.S.C. § 2119. The Application Notes do not state their definition of carjacking tracks the elements of the carjacking statute and there is no indication that the Sentencing Commission intended for the terms of the statute to control the definition.

United States v. Wilson, 369 F.3d 329 (3rd Cir. 2004). In this case, the defendant entered a bank. He was carrying a backpack and a duffle bag, and had what he later claimed was a toy gun stuffed in the waistband of his trousers. The backpack contained a fake bomb made out of a two liter bottle, PVC pipe, duct tape, and a toy cellular phone as a fake triggering device. He approached a teller, saying "This is not a joke, give me your money." He moved his jacket aside to display the handle of the toy gun. He further stated, "I also have a bomb that can be detonated by a cell phone, you have 40 seconds. If anybody tries to stop me or follow me, I push redial and bank blows up!" The defendant put the backpack on the counter, approximately 18 inches in front of the teller. Although the teller could not recall whether the backpack was open or shut, she believed that the backpack contained a real bomb.

On appeal, the defendant argued that the district court erred in holding that he "otherwise used" the fake bomb during the robbery rather than merely "brandishing" it. The Court of Appeals held that by placing a fake bomb close to the bank teller who believed it to be real, and by making explicit verbal and written threats to imminently detonate the bomb if the teller did not comply with his demands, the defendant went beyond mere "brandishing." His conduct is analogous to pointing a gun at a teller's head, making demands, and threatening to shoot unless the teller complies. The Court of Appeals therefore concluded that the defendant "otherwise used" the fake bomb for sentencing purposes.

United States v. Manna, 2004 WL 491873 (3rd Cir.(Pa.))). Appellant-defendant pled guilty to armed bank robbery in violation of 18 U.S.C. § 2113(d) and using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). He suggested that the Double Jeopardy Clause precluded the district court from enhancing his sentence for armed bank robbery under U.S.S.G. § 2B3.1's enhancement for taking the property of a financial institution. Manna contends that a § 2B3.1(b)(1) enhancement to a sentence for armed bank robbery is impermissible because the fact that property was taken from a financial institution is already an element of armed bank robbery, and therefore cannot be used as a sentencing enhancement factor. It is clear in the Third Circuit, however, that a "court must make all applicable, mandatory adjustments unless the guidelines specifically exempt the particular conduct at issue." *United States v. Johnstone*, 107 F.3d 200, 212 (3d Cir. 1997). Because neither § 2B3.1, nor the guidelines generally, expressly forbids enhancing an armed bank robbery sentence where property was taken from a financial institution, the district court's § 2B3.1(b)(1) enhancement of Manna's armed bank robbery sentence was entirely appropriate.

Manna next argued that the district court erroneously imposed § 924(c)(1)(A)(ii)'s enhancement for brandishing a firearm instead of the brandishing enhancement set forth in U.S.S.G. § 2B3.1(b)(2)(C). But once the district court found that Manna had brandished a firearm, it was compelled by the mandatory language of W4,6
924(c)(1)(A)(ii) to impose the statutory enhancement for brandishing, and had no discretion to opt instead for the brandishing enhancement under the guidelines.

Manna's third challenge is that the district court improperly failed to apply the acceptance of responsibility reduction under U.S.S.G. § 3E1.1 to the § 924(c) offense. However, the guidelines unambiguously provide that Chapter Three, including § 3E1.1 shall not apply to a § 924(c) conviction.

Finally, Manna argued that the district court erred by finding a loss of greater than $10,000 but less than $50,000. He suggests that although he stole more than $10,000 from the bank, the fact that the bank ultimately recovered all but $300 of the stolen funds should preclude the application of the one level "loss" enhancement under § 2B3.1(b)(7). Manna's armed bank robbery was discovered by the victim bank simultaneous with its commission - - the bank and its employees were held up by the armed Manna, and the employees were therefore eyewitnesses to the crime. Because, by definition, the recovered stolen funds were not returned to the bank until after the robbery was committed and discovered, those funds cannot operate to reduce the amount of "loss" within the meaning of U.S.S.G. § 2B3.1(b)(1).

United States v. Thomas, 327 F.3d 253 (3rd Cir. 2003). The defendant pleaded guilty to two counts of bank robbery, in violation of 18 U.S.C. § 2113(a). During one of the robberies, the defendant handed a bank teller a note reading: "Do exactly what this says, fill the bag with $100s, $50s and $20s, a dye pack will bring me back for your ass, do it quick now. Truely yours." In determining the original offense level, the district court applied a two level enhancement under U.S.S.G. § 2B3.1(b)(2)(f), which applies "if a threat of death was made" in connection with the robbery.

The defendant appealed his sentence, arguing that the district court erred in applying this enhancement. The Court of Appeals held that the defendant's note to the bank teller was a threat of death warranting the enhancement. In determining whether a threat made during a robbery is a "threat of death" warranting a sentencing enhancement, the focus is on the reasonable response of the victim of the threat. Because there may be a difference between a threat of violence and a threat of death, a district court applying an enhancement for making a threat of death in connection with a robbery should identify the features of the threat, or of the situation or context in which the threat is made, that supports the conclusion that a reasonable victim would understand that his life had been threatened.

United States v. Orr, 312 F.3d 141 (3d Cir. 2002). The defendant committed a robbery at a credit union. He carried what appeared to be a black handgun. After entering the credit union, Orr told the manager to kneel, face the wall, and put her hands on her head. He then held his gun to the head of the assistant manager and directed her to empty a metal cash box into a garbage bag. He left with $65,468.

With the cooperation of a friend of Orr's, the government obtained a recorded confession. The cooperating witness also reported that Orr owned a pellet gun that resembled a handgun, and witnesses to the robbery reported that he had carried a black handgun.

The defendant raised two objections: (1) the pellet gun he used in the robbery was not a "dangerous weapon," and (2) he had not "otherwise used" but had merely "brandished" the gun and, therefore, he should not have received the four-level enhancement. The district court rejected both objections and the defendant appealed.

Orr argued that the guidelines preclude application of a four-level enhancement for "otherwise used" under § 2B3.1(b)(2)(D) when the object employed in the robbery appears to be but is not a dangerous weapon. Orr used what appeared to be a functioning handgun but was, in fact, a dismantled pellet gun. His argument rested on the purported contradiction between the definition of objects that appear to be but are not "dangerous weapons" in § 1B1.1 and in § 2B3.1. A pellet gun, while not a firearm, is by definition a "dangerous weapon." § 1B1.1, Commentary Application Note 1(e) (2001). Orr concedes that the dismantled pellet gun appeared to be a "dangerous weapon," but contends that because it was dismantled, it was not so in fact. The Court of Appeals held that a dismantled pellet gun, which could be used as a bludgeon, is a "dangerous weapon" within the meaning of § 1B1.1. Application Note 1(d) of § 1B1.1 clearly instructs that objects that appear to be dangerous weapons shall be considered dangerous weapons for purposed of § 2B3.1.

Orr's second argument was that his weapon was merely "brandished" in the course of the robbery, rather than "otherwise used." The Court of Appeals concluded that the district court correctly found that pointing a gun at the head of the assistant manager and ordering her to empty money into a garbage bag was a "specific threat" directed at her and was precisely the type of conduct which satisfies the "otherwise used" requirement. Neither the guidelines nor the caselaw requires infliction of the violent physical contact Orr suggests or a verbalized threat to harm the victim in order to constitute "otherwise used."

United States v. Lahr, 2002 WL 31447574 (3rd Cir.(Pa.))). The defendant argued that the district court, when applying U.S.S.G. §§ 2B3.1(b)(2)(C) and 1B1.3, errred in determining that a firearm was used in the offense. Lahr argued that there is not sufficient evidence, established by a preponderance, to show that a weapon was used in the commission of the crime. However, the district court found that sufficient evidence did exist to show that Lahr was aware that an operable handgun was in the possession of her co-defendant. This factual determination by the district court was not clearly erroneous.

United States v. Hampton, 2002 WL 1589892 (3rd Cir.(Pa.))).The defendant pled guilty to conspiracy to commit armed bank robbery, two counts of armed bank robbery, and using, carrying and brandishing a firearm during and in relation to a crime of violence. He was charged under 18 U.S.C. § 924(c) with one of the bank robberies. He appealed and argued that the district court erred in applying a five level increase pursuant to U.S.S.G. § 2B3.1(b)(2)(C) in connection with the other robbery. The Court of Appeals concluded that the defendant's argument lacked merit. Application Note 2 of U.S.S.G. § 2K2.4 specifically provides that "if a defendant is convicted on two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with one of the robberies, a weapon enhancement would apply to the bank robbery

which was not the basis for the 18 U.S.C. § 924(c) conviction." These are precisely the circumstances in this case. Hampton was charged under 924(c) for only the May 13, 1999, robbery. Therefore, 2B3.1(b)(2)(C) is applicable to the sentence imposed for the December 30, 1998, robbery. The district court did not double count Hampton's sentence.

United States v. Day, 272 F.3d 216 (3d Cir. 2001). At sentencing, the district court enhanced the defendant's offense level by two levels because he made a "threat of death" while committing two bank robberies. This threat consisted of the defendant's passing notes to tellers that read, "Put some money on the counter. No dye packs. I have a gun." The district court heard arguments on the appropriateness of this enhancement and concluded that the enhancement was warranted under the ruling in *United States v. Figueroa*, 105 F.3d 874 (3d Cir. 1997). In *Figueroa*, the defendant used a note that read in relevant part, "I have a gun. Give me all the money." *Id*. at 876.

On appeal, the defendant argued that *Figueroa* does not apply because the Sentencing Guidelines in effect at that time required an "express threat of death" while the Guideline has since been amended to require only a "threat of death." He contends that the removal of the word "express" somehow narrowed the scope of this provision and that the Commentary supports this interpretation. The Court of Appeals disagreed and affirmed the sentence. "The 1997 amendment to the Sentencing Guidelines on which Day relies did not alter our holding in *Figueroa*. If anything, the amendment only reaffirmed the outcome in that case. In this context, *Figueroa* applies almost exactly to the facts before use, and thus the judgment of the district court is affirmed. . . . There is thus no merit to Day's argument that a threat of death requires both words and actions together."

United States v. Stevens, 223 F.3d 239 (3d Cir. 2000). The defendant pleaded guilty to an indictment charging him with one count of carjacking, in violation of 18 U.S.C. § 2119, and one count of carrying a firearm during the commission of a violent crime, in violation of 18 U.S.C. § 924(c). Subsequently, he pleaded guilty to an information charging another, separate carjacking offense. On appeal, the defendant argued that when calculating his sentence for the February 11, 1997 carjacking offense, the district court improperly imposed a five-level enhancement based on the offense characteristic of "brandishing" a firearm, pursuant to U.S.S.G. § 2B3.1(b)(2)(C). While this enhancement would normally have applied to this carjacking offense, because the defendant also received a mandatory minimum ten-year concurrent sentence for carrying a firearm under 18 U.S.C. § 924(c), the enhancement did not apply to the February 11 carjacking. See U.S.S.G. § 2K2.4, App. Note 2. However, as reflected in the PSR, the defendant's sentence fully complied with the guidelines: pursuant to § 2K2.4, the "brandishing" enhancement was specifically not applied to the defendant's sentence for the February 11, 1997 offense. The enhancement was applied, however, to the defendant's sentence for his February 6, 1997 carjacking offense, respecting when he was not charged with a firearms violation. The Court of Appeals concluded, "Applying the five-level enhancement to his sentence for the February 6, 1997, carjacking was entirely proper."

United States v. Johnson, 199 F.3d 123 (3d Cir. 2000). Defendant was convicted of two counts of conspiracy to interfere with interstate commerce by robbery, 18 U.S.C. § 1951, and one count of use of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1). During the first robbery, a co-defendant was armed with a baseball bat. The defendant and another accomplice wielded sledgehammers to break open jewelry display cases. A co-defendant threatened to hit an employee with the baseball bat unless she put the phone down. The Court of Appeals held that the baseball bat and sledgehammers were dangerous weapons. Under the circumstances, both were capable of inflicting death or serious bodily injury. The Court of Appeals also held that the defendant "otherwise used" the sledgehammer and that a four level enhancement under U.S.S.G. § 2B3.1(b)(2)(D) was appropriate.

United States v. Copenhaver, 185 F.3d 178 (3d Cir. 1999). The defendant and a co-defendant robbed the Strasburg Inn. The defendant pointed a bb pistol at the night auditor, jumped over the counter, struck the night auditor on the head with the pistol and forced him to open the cash register. The robbers forced the auditor into another office, put him in a fireplace and placed the fire screen across it. In sentencing the defendant, the district court applied a two level enhancement under U.S.S.G. § 2B3.1(b)(4)(B) for physical restraint. On appeal, the defendant argued that the enhancement was not applicable because the guidelines' definition of "physically restrained" requires an exertion of physical force upon the victim. The Court of Appeals held that the defendant did more than merely order the auditor to stand still, kneel or lie down. He not only forced him into another office but put him into the fireplace and placed the fire screen across it, thereby confining his victim. No actual touching is required to effect physical restraint. The use of the unchallenged word "forced" in the presentence report connotes physical restraint. Although it is of record that the screen was easily removable, the fact that a barrier was not impenetrable does not negate physical restraint. The judgment of sentence, which includes the two level enhancement for "physical restraint" of the victim was affirmed.

United States v. Weadon, 145 F. 3d 158 (3rd Cir. 1998). Defendant pled guilty to a four count Indictment charging bank robbery in violation of 18 U.S.C. § 2113(a). Over defense counsel's objection that defendant's concealed weapon played no part in any of the three bank robberies in which he had it in his pocket, the district court added five points to the base offense level on the ground that defendant's having the firearm on his person during the robberies meant that he "possessed" the firearm within the meaning of U.S.S.G. § 2B3.1(b)(2)(C). On appeal, defendant argued that carrying a gun in one's pocket is not possession of that gun. He asserted that "possessed" should be construed similarly to "brandished" or "displayed," and that the guideline should not be applied to enhance a sentence where the firearm was not utilized during the robbery. The Court of Appeals affirmed the judgment of the district court, noting that Black's Law Dictionary defines "possess" as "to have in one's actual and physical control; to have the exclusive detention and control of."

United States v. Figueroa, 105 F.3d 874 (3d Cir. 1997). The Third Circuit held that defendant's sentence may be enhanced by two levels under USSG. §2B3.1(b)(2)(F) for making an express threat of death, "without explicitly threatening to kill the victim." During a bank robbery, the defendant presented a written statement to a teller informing that he possessed a gun. In reaching its conclusion, the circuit court deemed the crucial determination to be whether a reasonable victim would fear for his or her life due to the defendant's statements or actions. It is the effect of the threat, not its actual wording, which triggers the two-level enhancement under section 2B3.1(b)(2)(F). A two level enhancement applies to a defendant who announces in the course of a robbery, either by word or action, that he has a gun.

United States v. Harris, 44 F. 3d 1206 (3d Cir. 1995). Defendant pled guilty to bank robbery. The district court added four points to defendant' offense level under §2B3.1(b)(2)(D) because it viewed the mace which defendant used to spray tellers as a "dangerous weapon" and two points under §2B3.1(b)(3)(A) based on its conclusion that the victims sustained "bodily injury." The Third Circuit rejected the enhancements, indicating that the government failed to establish that the mace was a dangerous weapon and that the district court failed to determine the character and duration of the symptoms experienced by the tellers, as well as the character of the medical attention they received. Not all contact between a victim and a health care professional will justify a conclusion that bodily injury occurred.

United States v. Dixon, 982 F.2d 116 (3d Cir. 1992). Defendant and two co-conspirators robbed a bank. While in the bank, one co-conspirator pretended she had a gun in her hand beneath a towel. The Third Circuit affirmed a three level enhancement under §2B3.1(b)(2)(C) based on the co-conspirator's brandishing a dangerous weapon, even though the co-conspirator did not actually possess a weapon. Note 2 to §2B3.1 states that the enhancement applies when an object that appeared to be a dangerous weapon was brandished.

United States v. Frierson, 945 F. 2d 650 (3d Cir. 1991). In accordance with the provisions of a plea agreement, defendant pled guilty to unarmed robbery, while armed robbery and car theft counts were dismissed. Nonetheless, the defendant admitted to handing the teller a note which said, "Give me your money, I have a gun." At the hearing, the teller testified that defendant held a gun throughout the robbery. Defendant denied having a gun. The district court increased defendant's base offense level by three levels under §2B3.1 for possession of a gun. The Third Circuit upheld the enhancement, finding the guidelines require relevant conduct to be considered in determining specific offense characteristics, even though such conduct underlies a count dismissed in a plea bargain.

§ 2B3.2 Extortion by Force or Threat of Injury or Serious Damage

U.S. v. Mussayek, 2003 WL 21805625 (3rd Cir. (NJ)). In 1979, the defendant, an Israeli immigrant, settled in Brooklyn. He reportedly was defrauded by Ike Fogel and Phillip Ben Jacob in separate scams. In order to recoup his losses, the defendant and Joseph Aharanoff enlisted two undercover agents to extort money from Fogel and Jacob. Trial testimony indicated that the defendant directed the agents to break the legs of Fogel and Jacob or kill them. Further, the defendant was prepared to kidnap Fogel's daughter to obtain $1 million from him. On one occasion, Aharanoff traveled to Israel where he was met by Mussayek in an effort to locate Fogel. Aharanoff and an agent were en route to Israel to "complete Mussayek's mission" when they were stopped at JFK Airport.

The defendant was convicted after a jury trial of Conspiracy to Commit Extortion and Interstate Travel in Aid of Racketeering. He subsequently appealed three aspects of the guideline computations. He first argued that an enhancement for "an express or implied threat of death, bodily injury, or kidnapping" was not applicable because the threat had not been communicated to the victim. The Court of Appeals found no reason to limit the meaning of the term "threat" as used in § 2B3.2(b)(1) to contemplate only statements communicated to an intended victim and affirmed the enhancement.

Mussayek's also asserted that the District Court erred by finding that the conspiracy involved the "preparation to carry out a threat of ...serious bodily injury," or otherwise demonstrated the ability to carry out such a threat." He argued that the "preparation" would not have resulted in any actual extortion because it was part of a sting operation. The Court of Appeals concluded that the ultimate success of a scheme has no bearing on whether the enhancement is applicable.

The defendant's final sentencing argument was that a downward departure was warranted pursuant to § 5K2.10 because the victims provoked the offense. The Court of Appeals concluded that there was not sufficient evidence of provocation and that the defendant's behavior was "grossly disproportionate to any provocation" on the part of the victims.

United States v. Tobin, 155 F. 3d 636 (3rd Cir. 1998). Tobin sought to be hired as a booking agent for a New Jersey-based rock band named Monroe. When Tobin was not hired, she commenced a protracted campaign of telephone harassment against the leader of the band. Of particular relevance, the defendant claimed that she had listed herself as the band's representative and that when clubs called to book "gigs," she was going to tell them that the band was "over" and "non-existent." On appeal, Tobin argued that the district court erred in applying U.S.S.G. § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) instead of § 2B3.3 (Blackmail and Similar Forms of Extortion). She cited *United States v. Inigo*, 925 F. 2d 641 (3d Cir. 1991), for the proposition that in order for § 2B3.2 to apply, the threat to the viability of the entity must be of tremendous economic magnitude in absolute terms. Tobin contends that § 2B3.2 does not apply since the band was not an economically viable entity, in that it played only six to ten gigs a

year and barely broke even on those gigs it did play. The court of appeals held that in determining whether § 2B3.2 applies, the focus is on the economic effect on the particular victim, not the absolute magnitude of the threat. Here, Tobin's actions threatened the viability of the band. If she had carried out the destructive course of action that she threatened (and indeed, implemented to a certain extent), the band would have faced the reasonable probability of its demise. The district court thus properly applied U.S.S.G. § 2B3.2 to Tobin's conduct.

United States v. Fiorelli, 133 F.3d 218 (3d Cir. 1998). Defendant, a union official, was found guilty of extorting money and services from contractors. He contended that the district court made no findings to support its enhancement under §2B3.2(b)(1) for threatening bodily injury. The appellate court upheld the enhancement, finding that the district court adopted express findings that "Sampsel threatened to go to the FBI and Siesser, under Fiorelli's direction, threatened bodily injury and death if Sampsel went to the FBI."

United States v. Boggi, 74 F.3d 470 (3d Cir. 1996). The district court erred in applying §2C1.1 to determine the base offense level for union official convicted of racketeering, extortion and conspiracy to commit extortion. In reversing the district court's reliance on §2C1.1, the Third Circuit held that either §2B3.2 or §2B3.3 were applicable depending on whether there was a threat of violence or economic ruin. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. In remanding for resentencing, the appellate court instructed the district court to "make necessary factual findings to determine" the type of harm involved in this case. Application of §2B3.2 requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. If the district court finds that the threat in this case did not rise to the level required under §2B3.2, then application of §2B3.3 is appropriate.

United States v. Inigo, 925 F. 2d 641 (3d Cir. 1991). Defendant attempted to extort $10 million from DuPont by threatening to use stolen proprietary information to compete with them. The Third Circuit found that the district court erroneously applied the extortion guideline, §2B3.2, rather than the blackmail guideline, §2B3.3. The extortion guideline requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. No such threat was made in this case.

United States v. Rosen, 896 F. 2d 789 (3d Cir. 1990). Defendant pled guilty to sending a threatening letter with intent to extort money. The district court sentenced defendant under §2B3.2. Defendant appealed, claiming that §2B3.2 was inapplicable because he had no intention of carrying out the threat. Although the district court had found that the defendant did not intend to carry out the threat, application note 2 to §2B3.2 states the guideline is applicable "if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person." As the lower court observed, the intent to carry out the threat was irrelevant to the offense, and therefore §2B3.2 was applicable.

§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Cohen, 171 F. 3d 796 (3d Cir. 1999). Gerson Cohen, a meat salesman for Butler Foods, paid kickbacks totaling $111,548.21 to five meat managers for Thriftway Food Stores. A jury convicted him on 25 counts of mail fraud and he pleaded guilty to three counts of income tax fraud. In computing Cohen's offense level, the district court used the actual dollar amount of the kickbacks and granted him a two level reduction for acceptance of responsibility. The Government appealed, claiming that the district court erred by using the dollar amount of the bribes rather than the benefit conferred by the bribe, and by granting a reduction for accepting responsibility. Subsection (b)(1) provides an enhancement based on the greater of two dollar amounts: "The value of the bribe or the improper benefit to be conferred." The Court of Appeals concluded that the district court should have used the "improper benefit" conferred. "Improper benefit" is the "value of the action to be taken or effected in return for the bribe." Thus, "improper benefit" refers to the net value accruing to the entity on whose behalf the individual paid the bribe. At sentencing, the Government adduced evidence of the "improper benefit" that accrued to Butler Foods. Cohen's kickbacks induced Thriftway to purchase $10,000,000 worth of meat from Butler Foods, whose seven percent margin yielded a profit of $700,000. A $700,000 "improper benefit," if sufficiently proved, mandates an enhancement of 10 levels.

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

U.S. v. Baskerville, 2004 WL 1203032 (3rd Cir.(Pa.))). The defendant pled guilty to uttering and possessing counterfeit currency, and to possessing a firearm following a felony conviction. The presentence report recommended a four-level enhancement for possession of a firearm in connection with another felony offense - - i.e., the counterfeiting offense. Baskerville objected to this enhancement and testified at the sentencing hearing that he always carried a gun for personal protection and that, while he knew he was carrying a loaded firearm when he went to pick up the counterfeit notes, he was not upset with anyone and did not carry it to threaten anyone or to protect the notes. After the sentencing hearing, the district court concluded that the four level enhancement was appropriate. There was enough circumstantial information in this case, particularly in light of the defendant's statements that he knew he had a gun in his possession, and in light of the amount of the counterfeiting money involved in the offense to support the finding that the firearm was possessed in relation to another felony offense, namely counterfeiting. Baskerville appealed. The Court of Appeals concluded that the four level enhancement was appropriate.

U.S. v. Gregory**,** 345 F.3d 225 (3rd 2003). Case remanded to determine if defendant who was passing counterfeit currency at an Atlantic City casino while in possession of a firearm possessed the gun "in connection with" the counterfeiting offense pursuant to § 2B5.1(b)(4).

United States v. Stiver, 2002 WL 1331755 (3rd Cir.(Pa.))). Ronald Stiver was convicted of passing and uttering counterfeit currency. The district court enhanced his sentence by six offense levels because the defendant "manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting." The defendant appealed, arguing that Application Note 4 to U.S.S.G. § 2B5.1 makes the enhancement inapplicable. This note states: "Subsection (b)(2) does not apply to persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." He argued that he merely photocopied bills. The Court of Appeals affirmed the judgment of sentence, holding that the focus of Application Note 4 is not on the manner of production, but on the quality of the counterfeit item. The district court conducted a visual examination of the notes. Second, the district court observed that the counterfeit notes were accepted by various merchants as legitimate currency before they were eventually detected as counterfeit by either the store manager, banks, or an armored car service.

United States v. Taftsiou, 144 F. 3d 287 (3rd Cir. 1998). Defendant was convicted of possessing, delivering, passing and conspiring to pass approximately $1 million in counterfeit Federal Reserve Notes. At the same trial, defendant's son was convicted of dealing and conspiring to pass approximately $1 million in counterfeit Federal Reserve Notes. On appeal, the defendants argued that the district court erred in enhancing their sentences by 11 levels pursuant to U.S.S.G. § 2B5.1(b) on the ground that the "amount of loss" was allegedly unsubstantiated by the evidence. Second, they contend that the 11-level enhancement was improper in light of the poor quality of the notes. The Court of Appeals affirmed the 11-level enhancement, concluding that the evidence was sufficient to support a finding that the face value of the notes at issue was between $800,000 and $1.5 million.

Part C -- Offenses Involving Public Officials

§ 2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

United States v. DeLaurentis, 2002 WL 31160104 (3rd Cir.(N.J.))). The defendant appealed the district court's eight level enhancement under § 2C1.1(b)(2)(B)(increase by eight levels if the offense involved a payment for the purpose of influencing an elected official or a supervisory law enforcement officer). The Court of Appeals affirmed. The defendant was a supervisory law enforcement officer because he supervised the detective bureau and held himself out as a supervisory officer. There was uncontradicted testimony that the Mayor and Town Council relied on his recommendations when deciding on sanctions for non-compliant liquor license holders.

United States v. Pena, 268 F.3d 215 (3rd Cir.2001). Arthur Pena was a veteran police officer of the West New York, New Jersey, Police Department, who, along with other officers, accepted bribes in return for permitting illegal poker video gambling machines to operate without interference in certain areas of New Jersey. He was convicted by jury of conspiracy to commit extortion in violation of 18 U.S.C. § 1951(a) for "protection" payments made between 1989 and 1996 by one of the distributors of the gambling machines.

At issue on appeal, was the proper application of § 2C1.1 and, specifically, the propriety of the District Court's 13-level increase in Pena's offense level on the benefit received by the payer of the bribes from Pena's illegal conduct between 1989 and 1992. He argued that, because the government failed to prove the "net benefit" to the gambling machine distributors who paid the bribes at issue, he should have been sentenced based on the aggregate amount of the bribes. As part of his argument, Pena urged that the "net benefit" calculation requires a showing of the net profit to the distributor.

The evidence at trial revealed routine payments had benn made to Pena in the amount of $2,000 each month from 1989 through April 1993. At sentencing, the government introduced the affidavit of FBI Special Agent Kenneth O'Connor. The affidavit contained the following evidentiary averments: "Riviero stated that in 1988 they earned $323,000, in 1989 the amount was $986,300, in 1990 the amount was $1,021,700, in 1991 they earned $726,800, in 1992 they earned $452,110, in 1993 they earned $302,630, and in 1994 they earned about $41,380. He further told me that about 10 to 15 percent of these figures were derived from legal activity such as children's games and juke boxes and that about 95 percent of these earnings were from machines in West New York, New Jersey.

"In December 1989, I spoke to George Riviero, the owner of CMOG. He told me in substance and in part, that CMOG earned an average of $5,000 to $6,000 in profit per week during the most profitable years."

Pena argued at sentencing that the government had failed to prove the specific "net profit" or "net benefit" and that the court must sentence him based on the aggregate bribe amount proven - - $96,000. The government argues that it had in fact proven the benefit received by CMOG, namely, the revenues CMOG realized from the illegal operation.

The District Court ruled that, consistent with the opinion in *United States v. Schweitzer*, "net benefit" in this situation was the monies realized from the illegal operation. "Net benefit" has nothing to do with expense incurred by the wrongdoer in obtaining the net value received where the transaction was wholly illegal. The District Court relied on the revenues shown to have been received by CMOG for the 50:50 split from illegal operations. Then, based on the information Luis Riveira provided to O'Connor, the Court netted out 20 percent to account for business outside of West New York and the proceeds from the few legitimate machines, and therefore made a fact finding of $2,573,000 as "CMOG's net benefit received for the years 1989 through 1997."

The Court of Appeals agreed the with the decision of the District Court. "Net value" of the "benefit" received does not mean "net proceeds." Rather, it means benefit received after netting out the value ow what - - if anything - - of legitimate value, was provided. Costs related to the illegal activity are not to be deducted. The operations here were wholly illegal and therefore there is no other value to "net out."

United States v. Rudolph, 137 F.3d 173 (3d Cir. 1998). The defendant, an INS Special Agent, accepted a total of $1,500 for an INS metal template, a device that imprints a marking when fingerprints and signatures are affixed to alien registration "green" cards to demonstrate authenticity, and delivered a federal presentence report prepared by the U.S. Probation Office in the Southern District of New York to a cooperating witness in exchange for $1,000. Defendant asserted that it was improper for the district court to increase his offense level by two levels under § 2C1.1(b)(1) based on his admissions to the probation department that he had accepted two additional bribes that were not the subject of a charge. Section 2C1.1 provides for a base offense level of 10 for "offering, giving, soliciting, or receiving a bribe" and mandates a two-level increase if the offense "involved more than one bribe or extortion." Defendant acknowledged during the sentencing hearing that he had admitted to the probation officer that he accepted bribes for three templates, and the district court properly considered that admission in making its finding that defendant had accepted three bribes. The Court of Appeals affirmed, stating that it has consistently rejected the argument that only charged conduct may be grounds for a sentencing enhancement. See *U.S. v. Baird*, 109 F. 3d 856, 863 (3d Cir.)("conduct not formally charged...can be considered at sentencing") cert. denied,_ _ U.S. _ _, 118 S. Ct. 243 (1997); *U.S. v. Sokolow*, 91 F. 3d 396, 411 (3rd Cir. 1996)(affirming district court's use of uncharged conduct for purposes of sentencing determination pursuant to § 1B1.3(a)(2)); *U.S. v. Pollard*, 986 F. 3d 44, 47 (3d Cir. 1993)("the court may consider uncharged conduct in determining whether and how to apply upward or downward adjustments").

United States v. Boggi, 74 F.3d 470 (3d Cir. 1996). The district court erred in applying §2C1.1 to determine the base offense level for union official convicted of racketeering, extortion and conspiracy to commit extortion. In reversing the district court's reliance on §2C1.1, the Third Circuit held that either §2B3.2 or §2B3.3 were applicable depending on whether there was a threat of violence or economic ruin. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. In remanding for resentencing, the appellate court instructed the district court to "make necessary factual findings to determine" the type of harm involved in this case. Application of §2B3.2 requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. If the district court finds that the threat in this case did not rise to the level required under §2B3.2, then application of §2B3.3 is appropriate.

United States v. Felton, 55 F. 3d 861 (3d Cir. 1995). Defendant, a tax examining assistant with the Automated Collection Service of the IRS, was convicted of demanding and accepting a bribe and demanding illegal gratuities to "fix" taxpayers problems with the IRS. The district court departed upward, finding defendant had accepted one bribe and five gratuities. In affirming the lower court's decision, the court of appeals noted that §2C1.1(b)(1) requires a two-

level increase "if the offense involved more than one bribe." Section 2C1.2(b)(1), which would have applied had there been no bribes, requires a two-level increase "if the offense involves more than one gratuity." There is no provision increasing the offense level for one bribe and multiple gratuities. Nothing in the guidelines suggest that this type of repeated unlawful conduct involving a bribe and gratuities should be treated less harshly than repeated unlawful conduct involving only bribes or only gratuities. The departure was appropriate.

United States v. Schweitzer, 5 F. 3d 44 (3d Cir. 1993). The defendant pleaded guilty to conspiring to bribe a public official in order to obtain confidential information maintained by the Social Security Administration. He paid $3,640 to a government employee for certain confidential information, and then resold the information for at least $8,000. The Third Circuit rejected defendant's claim that the amount of the bribe should be subtracted from the $8,000 to determine "the benefit received" under §2C1.1(b)(2)(A). Application note 2 to §2C1.1 allows for a deduction of the value that would be derived in a legitimate transaction not induced by a bribe. Here, there was no value that could be received in a legitimate transaction. The net benefit received was the market value of the information sold.

§ 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

United States v. Milan, 304 F.3d 273 (3rd Cir.2002). The defendant contends that the district court erred when it applied a 3-level upward departure to his combined offense level rather than to the public corruption counts only, which had the effect of increasing his sentence by 16 months. Application Note 5 states: Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. Milan maintains that the district court should have applied the departure only to the Group Two adjusted offense level, the group encompassing Milan's acts of public corruption to which the departure was applicable, before applying the multiple-grouping adjustments found in U.S.S.G. § 3D1.4. The Court of Appeals held that the district court was correct to apply the Note 5 departure at step (i) after the grouping of the counts, and affirmed the sentence.

Part D -- Offenses Involving Drugs

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

Mandatory Minimum Sentences

United States v. Huggins, 467 F.3d 359 (3rd Cir. 2006) - The defendant was charged with possession with intent to distribute five grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Pursuant to 21 U.S.C. § 851(a), the Government filed an information notifying the defendant of its intention to seek an enhanced penalty under § 841(b)(1)(B), which calls for a mandatory minimum 10 year sentence for anyone who has committed a violation of that provision "after a prior conviction for a felony drug offense has become final." The information relied solely on the defendant's juvenile adjudication in Monroe County Juvenile Court. The defendant subsequently pleaded guilty to possession with intent to distribute five or more grams of cocaine base and was sentenced to the mandatory minimum term of 120 months imprisonment.

On appeal, the Court of Appeals held that a "prior conviction" as used in 21 U.S.C. § 841(b)(1)(B) does not include adjudications of delinquency under the Pennsylvania Juvenile Act, and remanded the case for resentencing. NOTE: Unlike § 841(b)(1)(B), the Armed Career Criminal Act explicitly provides that the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony. See 18 U.S.C. § 924(e)(2)(C).

United States v. Bullard, 2005 WL 3409603 (3rd Cir.(Pa.))). In this case, the Court of Appeals held that no remand was necessary under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005), and *United States v. Davis*, 407 F. 3d 162 (3d Cir. 2005). The defendant was sentenced to the statutory minimum sentence of 240 months - - the lowest possible sentence he could receive as a convicted drug offender with a prior felony conviction. The statutory mandatory minimum was above the sentencing guidelines range, which was 188-235 months. Guidelines or no guidelines, the judge simply could not go any lower pursuant to the statute under which the defendant was convicted.

United States v. Rodriguez, 2002 WL 1337688 (3rd Cir.(Pa.))). The defendant appealed, arguing that 21 U.S.C. § 841(b), the statutory provision that establishes the penalties for violations of 21 U.S.C. § 841(a) is unconstitutional under the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court of Appeals previously held that under Apprendi, drug identity and quantity are treated as statutory elements only when they implicate a sentence beyond the applicable statutory maximum. *United States v. Barbosa*, 271 F. 3d 438, 457 (3d Cir. 2001). Thus, Apprendi does not invariably preclude a sentencing judge from deciding the drug identity and quantity involved in a 841 offense as sentence enhancement factors using a preponderance of the evidence standard. As long as the enhanced sentence is below the statutory maximum authorized by the jury's factual findings, there is no Apprendi issue. The Court of Appeals further ruled that an error in the judgment caused the defendant no harm because the sentence

imposed was within that allowed by the plea agreement. It is a firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict. *United States v. Chasmer*, 952 F. 2d 50, 52 (3d Cir. 1991).

United States v. Pressler, 256 F. 3d 144 (3rd Cir. 2001). The defendant contends that his sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it was arrived at in part as a result of sentencing findings made by the district court. The jury convicted the defendant of conspiracy to distribute heroin, specifically finding that he was over 18 years old and that he had conspired to distribute heroin to persons under the age of 21. Absent a quantity finding, distribution of heroin generally carries a maximum sentence of 20 years in prison. But 21 U.S.C. § 859(a) doubles all applicable penalties for persons over the age of 18 who distribute narcotics to persons under the age of 21. Based solely on the jury's verdict, therefore, the defendant's maximum sentence was 40 years - - 12 years more than his ultimate sentence of 336 months. A defendant has no valid *Apprendi* claim where, as here, his ultimate sentence is less than that which would have been authorized by the jury's verdict.

United States v. Butch, 256 F. 3d 171 (3rd Cir. 2001). The defendant argued that the district court erred by failing to submit the weight of the controlled substance to the jury for a factual determination beyond a reasonable doubt in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court of Appeals, like it did in *United States v. Williams*, 235 F. 3d 858 (3d Cir. 2000), held that because the sentence actually imposed...was well under the prescribed statutory maximum, *Apprendi* is not applicable.

United States v. Williams, 235 F. 3d 858 (3d Cir. 2000). In connection with the plea agreement, the parties stipulated that the amount of heroin involved in his violation of 21 U.S.C. § 841(a)(1) was approximately 67.2 grams. The presentence report recommended that 361 grams of heroin and 311.2 grams of cocaine be applicable to the defendant for sentencing purposes. This higher drug quantity was apparently based in sales of heroin in which the defendant was involved totaling 67.2 grams, plus the 293.4 grams of heroin and 311.2 grams of cocaine found in the Hawthorne Place apartment. On appeal, the Court of Appeals had to determine whether the Supreme Court's decision in *Apprendi v. New Jersey* had an effect on the district court's sentencing of the defendant, to the extent that the drugs found in the Hawthorne Place apartment should be attributed to the defendant for sentencing purposes. The Court of Appeals held that *Apprendi* was not applicable. First and foremost, though the district court's finding regarding the amount of drugs substantially increased the possible statutory maximum sentence under 21 U.S.C. § 841(b)(1), *Apprendi* is not applicable to the defendant's sentence because the sentence actually imposed was well under the original statutory maximum of 20 years. The district court's findings in this case increased the defendant's sentence under the Sentencing Guidelines, but the sentence did not exceed the statutory maximum. Accordingly, "we hold that the district court's finding was a permissible exercise of discretion, to the extent that the finding altered the defendant's sentence under the Sentencing Guidelines. The 20-year maximum sentence was confirmed several times in the course of the defendant's plea and sentence. The district court's finding that the drugs attributable to the defendant for sentencing purposes could be characterized as a finding of relevant conduct under the sentencing guidelines.

United States v. Holman, 168 F. 3d 655 (3d Cir. 1999). Defendant was subject to a mandatory minimum sentence of 120 months under 21 U.S.C. § 841(a)(1). The district court determined that defendant's applicable guideline range was 108 to 135 months, and sentenced defendant to 135 months. Since the record showed that this sentence was made with consideration of the entire applicable guideline range and without regard to the statutory mandatory minimum, the Court of Appeals refused to review whether defendant was entitled to safety valve protection under § 5C1.2. Even if defendant had been able to show that he met the requirements of the safety valve provision, § 5C1.2 would have been of no help to him.

United States v. Robinson, 167 F. 3d 824 (3d Cir. 1999). The defendant was sentenced to the 20 year mandatory minimum sentence required by 21 U.S.C. § 841(b)(1)(C) when "death or serious bodily injury results from the use of" the substance the defendant was convicted of distributing. On appeal, the defendant acknowledges that a user of the heroin he supplied died from its use, but challenges the sentence because the district court did not make a finding that his conduct was a proximate cause of the user's death. In this case, the defendant conspired to distribute the heroin and a person to whom it almost immediately was distributed consumed it and died as a result. The Court of Appeals concluded that Congress did not intend the phrase "if death or serious bodily harm results from the use of such substance" in § 841(b)(1)(C) to require a showing that the defendant's distribution of the substance in a common law sense proximately caused the death. The district court's well-supported findings showed that there was a sufficient nexus between the substance and the death to require the imposition of the mandatory minimum sentence.

United States v. Kole, 164 F. 3d 164 (3d Cir. 1998). Defendant pled guilty to conspiring to import heroin into the U.S. The district court imposed an enhanced sentence based upon defendant's prior felony drug conviction in the Philippines. Section 851(c)(2) expressly bars the consideration of any prior conviction that was obtained in violation of the U.S. Constitution. Defendant argued that the enhancement was improper because she was denied effective assistance of counsel in the Philippines and the Philippine legal system does not recognize the right to a jury. The Third Circuit held that §851 only excludes those convictions obtained in a manner inconsistent with the concepts of fundamental fairness and liberty in the due process clause. The Philippine conviction was obtained consistently with the concept of fundamental fairness. Section 851 does not exclude criminal convictions obtained under a foreign system merely because that sovereign does not give the defendant the right to a jury trial.

United States v. Lynch, No. 98-1029 (3d Cir. Oct. 15, 1998). Jerry Lynch pleaded guilty to conspiracy to distribute cocaine base, 21 U.S.C. § 846, distribution of cocaine base and aiding and abetting the distribution of cocaine base, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and distribution of cocaine base and aiding and abetting the distribution of cocaine base within 1,000 feet of a playground, 21 U.S.C. § 860 and 18 U.S.C. § 2. Prior to Lynch's plea, the government had filed an information that charged Lynch with having been convicted of two state felony charges in the Court of Common Pleas of Bucks County, Pennsylvania. This information was filed pursuant to 21 U.S.C. §§ 841(b), 851(a)(1). Lynch neither waived nor was afforded

prosecution by indictment for either of these two prior convictions. The district court enhanced Lynch's statutory sentences in light of the two prior convictions resulting in an increased sentencing range under the United States Sentencing Guidelines.

On appeal, Lynch argued that 21 U.S.C. § 851(a) allows enhancements for prior convictions only if those prior convictions proceeded by indictment or if the defendant waived indictment. The government argued the statute allows enhancements for prior convictions no matter how charged, providing the present offense for which the defendant is to be sentenced has been charged by indictment or if the right to indictment had been waived. The Court of Appeals concluded that the government's interpretation is the correct one.

United States v. DeJulius, 121 F. 3d 891 (3d Cir. 1997). Defendant pleaded guilty to conspiracy to distribute 19 pounds of methamphetamine. He argued that the ten-year mandatory minimum for over 100 grams of methamphetamine was not applicable unless the government could prove that the methamphetamine in question was actually D-methamphetamine as opposed to L-methamphetamine. The district court concluded that because only D-methamphetamine could be considered "methamphetamine" under 21 U.S.C. §841(b)(1)(A)(viii), and only 55.8 grams of D-methamphetamine could be attributed to the defendant, the ten-year mandatory minimum did not apply. The Third Circuit reversed, holding that for mandatory minimum purposes all forms of methamphetamine are treated alike. In reaching its decision, the district court erroneously relied on *U.S. v. Bogusz*, 43 F. 3d 82 (3d Cir. 1994). The analysis in *Bogusz* was clearly limited to the guidelines, not statute. Moreover, *Bogusz* has been rendered virtually obsolete since the Sentencing Commission has eliminated the distinction between D- and L-methamphetamine effective November 1995.

Santana v United States, 98 F. 3d 752 (3d Cir. 1996). Defendant argued that his counsel failed to object to a miscalculation of his sentence under the guidelines. He contended that he was eligible for a minimum sentence of 87 months under the guidelines. The Third Circuit rejected the ineffective assistance claim because the mandatory minimum sentence for his offense was 120 months. Under §5G1.1(c)(2), where the statutory minimum sentence exceeds the defendant's guideline range, the court is required to impose the statutory minimum sentence. A court is powerless to impose a sentence below the statutory minimum without a government motion.

Deal v. United States, 113 S. Ct. 1993 (1993). A defendant must be sentenced to five year consecutive term of imprisonment for his first conviction under §924(c) and 20 years consecutive "in the case of his second or subsequent conviction." The Supreme Court held that the 20-year penalty for "second or subsequent" convictions applies even if defendant suffers both convictions at the same trial.

United States v. McGlory, 968 F. 2d 309 (3d Cir. 1992). Under 21 U.S.C. §841(b)(1)(A), a defendant with two or more prior felony drug convictions is subject to a mandatory life sentence. Defendant's 1971 conviction for possession of cocaine was a felony under Pennsylvania law. Effective June 14, 1972, that statute was repealed. Possession of cocaine was reduced to a misdemeanor. Defendant's state conviction was final prior to the effective date of this change. Defendant contended that his 1971 state conviction could not be considered a felony for purposes of 21 U.S.C. §841(b)(1)(A) because if he were convicted of the same conduct today, it would only be a misdemeanor under Pennsylvania law. The Third Circuit rejected this interpretation, despite defendant's analogy to guideline §4B1.2, which defines a prior felony conviction in terms of the penalty for the offense. Tremendous confusion in sentencing would result if the sentencing court had to analyze the current status of every prior state law under which a defendant was previously convicted.

United States v. Tannis, 942 F. 2d 196 (3d Cir. 1991). Defendant pled guilty to possession with intent to distribute 374 grams of a mixture containing cocaine base. The Third Circuit affirmed the 10-year mandatory minimum sentence, noting that the district court correctly determined that it lacked authority to depart below this mandatory minimum.

Continuing Criminal Enterprise

United States v. Riddick, 156 F. 3d 505 (3rd Cir. 1998). The defendant was indicted on one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a), one count of conspiring to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846, thirteen counts of distributing cocaine in or near a school in violation of 21 U.S.C. § 860(a), and one count of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). A jury convicted the defendant on all counts. At sentencing, the government argued that the defendant should sentenced under the sentencing guideline section resulting in the highest offense level within the group of counts. The government reasoned that here, the conviction for distribution of cocaine near a school, rather than the conviction for operating a CCE, provided the higher offense level and life imprisonment. Moreover, the government argued that the court was not precluded from sentencing the defendant on the distribution near a school counts because that offense is not a lesser included offense of the CCE count. The district court rejected this argument and held that "if you charge ... continuing criminal enterprise ... that offense is so odious and so severe that if the government secures a conviction on that offense, then the sentence should be imposed on that offense, even if it is not technically a lesser included offense." The government appealed. The court of appeals vacated the sentence and remanded for resentencing. It held that the district court was not precluded from sentencing the defendant on the counts for distribution of cocaine near a school. Substantive predicate offenses do not merge with the CCE count.

Drug Quantity

United States v. Gavin, 2006 WL 3079013 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court's determination of the quantity of the cocaine base distributed by him (at least 20 grams) was not supported by a preponderance of the evidence. The Court of Appeals held that there was sufficient evidence for the district court to find that the government proved by a preponderance of the evidence that the defendant sold at least 20 grams of crack cocaine to a co-defendant. The co-defendant testified that she received an eighth of an ounce of crack cocaine from the defendant at least ten times over a period of at least two to three weeks. In order for the quantity of drugs to be at least 20 grams, there only had to be about seven purchases of an eighth of an ounce of crack cocaine. The district court found the co-defendant's testimony credible. In *United States v. Gibbs*, 190 F. 3d 188, 204 (3d Cir. 1999), the Third Circuit recognized that district courts may estimate drug quantities based on a co-defendant's testimony "about average amounts sold per day multiplied by the length of time sold." Additionally, the absence of direct evidence does not prevent a district court from estimating drug quantities. See id. However, the evidence must possess "sufficient indicia of reliability to support its probable accuracy." *Gibbs*, 190 F. 3d at 203.

United States v. Mercer, 2006 WL 2690003 (3rd Cir.(Pa.))). At sentencing, the district court judge enhanced the defendant's role based on drug quantity and his aggravated role in the offense. The defendant appealed, arguing that the question of his role in the offense should have been submitted to a jury and that the evidence did not support the district court's determination of drug quantity. The Court of Appeals affirmed the district court's sentence, stating that after *Booker*, a judge may determine sentencing facts supported by a preponderance of the evidence so long as those facts are applied to an advisory, rather than mandatory, sentencing scheme. See *United States v. Miller*, 417 F. 3d 358, 362-63 (3d Cir. 2005).

With respect to the issue of drug quantity, the district court relied on trial testimony and ample testing. The Court of Appeals noted that it had previously held that sample testing and testimony may be sufficient evidence to determine drug quantity. *See United States v. Dent*, 149 F. 3d 180, 187-88, 190-91 (3d Cir. 1998).

In United States v. Scott, 2006 WL 1113513 (3rd Cir.(Pa.))), the defendant pled guilty to distribution of cocaine and crack cocaine. The defendant appealed the sentence, arguing that the District Court erred by failing to apply the beyond a reasonable doubt standard at the sentencing hearing and by relying on the Government's hearsay evidence in its calculation of the quantity of drugs.

As for the first argument, Scott maintained that, because his is a "transition case" (i.e., a case in which the guilty plea was entered before - - but sentencing occurred after - - the Supreme Court's decision in *Booker*, the *Booker* remedy of an advisory Guidelines scheme was unforeseeable when he pled guilty and, therefore, it cannot be applied to him without violating his due process rights or the Ex Post Facto Clause of the Constitution. The Court of Appeals concluded that Scott's contention, however, was foreclosed by a recent decision, also involving a "transition case," in which the Court of Appeals held that "as before *Booker*, the standard of proof under the guidelines for sentencing facts continues to be a preponderance of the evidence." *United States v. Cooper*, 437 F. 3d 324 (2006). Moreover, *Booker* itself expressly states that its holdings, including its remedial holding, apply to all cases on direct review. It was not an infringement of Scott's due process rights or a violation of the Ex Post Facto Clause for the District Court to impose a sentence based on facts found by a preponderance of the evidence.

The Court of Appeals also rejected Scott's contention that the District Court erred by relying on the Government's hearsay evidence in its calculation of the quantity of drugs, stating that any basis there may have been in *Blakely* for holding hearsay inadmissible at sentencing was negated by *Booker's* remedial holding. In fact, Justice Scalia's dissent in *Booker* indicates that the majority's holding did not alter a sentencing court's ability to rely on hearsay to make sentencing determinations.

The defendant also argued that the Guidelines' crack cocaine/powder cocaine disparity is so disproportionate, it "cannot be justified," and therefore, his 108-month sentence is unreasonable under *Booker*. He pointed to the "1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees," in which several federal judges, each of whom was a former United States Attorney, argue that the "disparity between powder cocaine and crack cocaine...results in sentences that are unjust and do not serve society's interests." The question before the Court of Appeals, however, is not whether a sentencing court may use the disparity as a reason to impose a shorter sentence than the one recommended by the Guidelines after *Booker*, but rather whether it is error for the District Court not to have taken the disparity into account. Because the Court of Appeals has routinely upheld the disparity against constitutional attack, including equal protection claims, it ruled that it would be "inconsistent to require the District Court to give a nonguideline sentence based on the disparity."

Finally, the defendant argued that his sentence was unreasonable. The Court of Appeals, after examining the District Court's findings, concluded that "there is little question the sentence it imposed was reasonable."

United States v. Boyd, 2006 WL 714486 (3rd Cir.(Pa.))). Jesse Boyd was sentenced post-*Booker*. The Court of Appeals rejected his contention that the court erred when evaluating the admissibility of hearsay statements with respect to drug quantity because the court relied in part on unreliable hearsay evidence. The use of hearsay in making findings for purposes of Guidelines sentencing violates neither the Sentencing Reform Act of 1984 nor the Due Process Clause. The Court of Appeals further noted that the preponderance of the evidence standard is applicable when a court makes findings of fact for purposes of sentencing. See *Cooper*, 437 F. 3d at 330; *United States v. Miller*, 417 F. 3d 358, 363 (3d Cir. 2005).

United States v. Ordaz, 2005 WL 82212 (3rd Cir.(Pa.)). In this case, the Court of Appeals affirmed the district court's drug quantity estimation, noting that courts may estimate a drug quantity based on testimony by co-defendants about the weight of drugs transported by couriers, and on other testimony about the average amounts sold per day multiplied by a particular length of time. See *Gibbs* 190 F.3d at 204 (citing *United States v. Maggard*, 156 F.3d 843, 848 (8th Cir. 1998)).

United States v. Romero, 2004 WL 1462702 (3rd Cir.(Pa.))). At the sentencing hearing, the defendant conceded that he had distributed or possessed with intent to distribute 4.5 kilograms of cocaine. He argued on appeal that "drugs possessed for distribution should not be counted for guideline purposes if they are returned to the original supplier for credit after the possessor is arrested." The Court of Appeals did not agree, stating that when a person possesses illegal drugs with the intent to distribute them, that person's culpability is no less however he finally disposes of the drugs.

United States v. Jansen, 369 F. 3d 237 (3rd Cir. 2004). In this appeal, the Third Circuit ruled that any drugs possessed for personal used should not be considered in computing the base offense level for a defendant convicted of possession with intent to distribute controlled substances. The crime of simple possession is qualitatively different from crime of possession with intent to distribute, so that one who possesses drugs for his own personal use is not engaged in a common scheme or plan with or in the same course of conduct as the perpetrators of a drug distribution scheme. Other Courts of Appeals have reached the same conclusion.

United States v. German, 2004 WL 835820 (3rd Cir.(N.J.))). The defendant argued that the district court erred in sentencing him for between five and fifteen kilograms of cocaine. However, in his plea agreement, the defendant stipulated that the base level was 32 because the offense involved at least five kilograms but less than fifteen kilograms of cocaine. The Court of Appeals held that the district court's ruling was not clearly erroneous. Even if the defendant was permitted to challenge the quantity, there was sufficient evidence to establish a finding of five to fifteen kilograms. The defendant and his co-conspirators agreed to sell seven kilograms of cocaine to an undercover officer, and the two kilograms that were actually delivered represented the first of three installments in the drug deal. As noted in the presentence report, all the other defendants agreed that the object of the conspiracy was for the distribution of seven kilograms of cocaine.

United States v. Spencer, 2004 WL 432495 (3rd Cir.(Pa.))). Spencer, a former Philadelphia police officer, argued on appeal that the district court erred in finding that he was responsible for the distribution of 75 grams of crack at sentencing. A defendant's sentence "depends to a great extent upon the quantity of drugs deemed relevant" to the offense he/she is convicted of. A sentencing court is allowed to estimate the drug quantity attributable to the defendant based on his/her role in the conspiracy and reasonable foreseeability with respect to the conduct of coconspirators. Here, the district court estimated the amount attributable to Spencer

by starting with the 25 grams seized from a coconspirator's car. The court then examined the record and found that the testimony established that Spencer had warned the coconspirator about raids. The testimony regarding the number of occasions on which he had previously warned her about police raids was not precise; the estimates ranged from as few as three to as many as ten. The court took the lowest number (three) and multiplied that by 25, the number of grams seized, and reasoned that at least 25 grams were foreseeable. Given Spencer's background as an experienced narcotics officer, the court's conclusion is unassailable. Accordingly, the Court of Appeals held that the 75 grams attributed to Spencer was an exceedingly conservative estimate.

United States v. Phillips, 349 F.3d 138 (3d Cir. 2003). Defendants were convicted of drug conspiracy charges. The district court denied defendants' request for a jury determination of the quantity of crack attributable to each of them individually. Instead, the court instructed the jury to decide only the amount of crack involved in the conspiracy itself. The jury found beyond a reasonable doubt that the crack attributable to the conspiracy was 50 or more grams, an amount which triggered the statutory maximum of life imprisonment under 21 U.S.C. § 841(b)(1)(A). The Third Circuit held that in a multi-defendant drug conspiracy, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires the jury to decide only the drug-type and quantity elements to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator. The finding of drug quantity for purposes of determining the statutory maximum us an offense-specific, not a defendant-specific, determination. The jury must find, beyond a reasonable doubt, the existence of a conspiracy, the defendant's involvement in it, and the requisite drug type and quantity involved in the conspiracy as a whole. Once the jury makes these findings, it is for the sentencing judge to determine by a preponderance of the evidence the drug quantity attributable to each defendant and sentence him accordingly, provided that the sentence does not exceed the applicable statutory maximum.

United States v. Chorin, 322 F.3d 274 (3d Cir. 2003). The defendant was convicted of possession of a precursor and attempt to manufacture a controlled substance. At a sentencing hearing, a DEA chemist testified that, based upon the amount of methylamine found, the laboratories were capable of producing about 73.2 kilograms of pure methamphetamine. On cross-examination, the chemist admitted that it was possible that, during the cooling process required to convert methylamine gas into methylamine liquid, some methylamine could evaporate, reducing the final amount of methylamine liquid. The district court found that the amount of methamphetamine that could be produced from the methylamine was 73.2 kilograms.

On appeal, the defendant argued that the actual amount involved was lower than 73.2 kilograms because he could have sold some of the methylamine and the chemist admitted that some methylamine gas could have evaporated during the cooling process. He also argued that the chemist improperly based his conclusions on the amount of methylamine found because there was an insufficient amount of P2P, another precursor, to produce 73.2 kilograms of methamphetamine. However, as other Courts of Appeals have held, a district court is not limited to the precursor in the smallest amount. Rather, a district court may estimate the amount of controlled substance that a defendant could manufacture from the precursor he possessed if he combined that precursor with the proportionate amount of missing ingredients.

United States v. Givan, 320 F.3d 452 (3d Cir. 2003). On appeal, the defendant argued that the district court clearly erred in finding that he was involved in the distribution of between one and three kilograms of heroin and that he possessed a firearm in relation to drug trafficking. A co-conspirator testified that during 1995, 1996, and 1997, he and Torrence traveled to Chicago approximately every three months to purchase $15,000 to $30,000 worth of heroin and cocaine and that in 1998 and 1999 he and Torrence traveled to New York approximately every three months to obtain $30,000 worth of heroin and/or cocaine. The co-conspirator testified that $30,000 would buy eight or nine ounces of heroin in New York. According to the co-conspirator, Torrence made at least five trips for heroin, each time for eight ounces, for a total of 40 ounces, or one and three tenths kilograms. This testimony was consistent with the quantity of drugs found in the car. The heart of Torrence's argument is that the district court erred in relying on the co-conspirator's testimony because of his unreliability. While the co-conspirator is a drug addict, his testimony, in contrast to that considered in *United States v. Miele*, 989 F.2d at 667, was not internally inconsistent and, also in contrast to that in Miele, was corroborated by the testimony of another witness. The Court of Appeals concluded that the drug quantity calculation was not clearly erroneous.

United States v. Chambers, 2003 WL 193704 (3rd Cir.(Pa.))). The defendant pled guilty to conspiracy to travel in interstate and foreign commerce in aid of the distribution and possession with intent to distribute cocaine base (crack) and to interstate travel in aid of racketeering activity. At a sentencing hearing, the defendant argued, among other things, that the base offense level should be 30 rather than 32 because some of the cocaine base was intended for personal use.

With respect to the quantity of cocaine base, the defendant argued that in the case of a drug sale, whether or not part of a conspiracy, the portion of the drugs that the seller held for personal use should not be counted in computing relevant conduct. Thus, of the 55.1 and 0.14 grams seized in this case, the portion that the defendant intended for personal use should not be counted, and the government had the burden of proving what was not intended for personal use. Judge Vanaskie rejected this argument, holding that in the case of a drug conspiracy charged, the entire quantity of drugs handled, including that intended for personal use, is relevant conduct for the purpose of calculating the base offense level. The defendant appealed. The Court of Appeals affirmed...Every circuit to address the question has held that where a member of a conspiracy to distribute drugs handles drugs both for personal consumption and distribution in the course of the conspiracy, the entire quantity of drugs handled is relevant conduct for purposes of calculating the base offense level.

United States v. Knight, 2002 WL 31429873 (3rd Cir.(Pa.))). The defendant was convicted of violating 21 U.S.C. § 846. The indictment charged only that the defendant conspired to distribute and possess with the intent to distribute a mixture and substance containing a detectable amount of cocaine base, commonly known as crack, a schedule II controlled substance; contrary to the provisions of 21 U.S.C. § 841(a)(1), in violation fo 21 U.S.C. § 846. Following the defendant's conviction, the probation department prepared a

presentence investigation report recommending that the defendant be sentenced to life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) even though no quantity of crack was specified in the indictment or found by the jury. Section 841(b)(1)(A) provides for life imprisonment where a defendant is convicted of distributing more than 50 grams of cocaine base.

On appeal, the defendant argued that, in light of the court's ruling in *Apprendi*, he should not receive a sentence greater than the "default" period of 20 years imprisonment provided for distribution of any detectable quantity of cocaine base under 21 U.S.C. § 841(b)(1)(C). However, the defendant's argument is clearly foreclosed by *United States v. Vasquez*, 271 F.3d 93 (3d Cir. 2001) and *United States v. Cotton*, 122 S.Ct. 1781 (2002).

The jury's verdict in the Knight case clearly established beyond a reasonable doubt that Knight did conspire to possess with intent to distribute, and did distribute, cocaine base. Accordingly, the jury credited testimony from coconspirators including evidence that Knight bought approximately two kilograms of cocaine base for between $21,000 to $25,000 per kilogram every ten days. There is no doubt whatsoever that the jury concluded beyond a reasonable doubt that Knight's conspiracy involved the distribution of more than 50 grams of cocaine base. That is all that is necessary to trigger the maximum statutory penalty of life imprisonment. Therefore, here, as in *Cotton*, "even assuming defendant's substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." 122 S.Ct. at 1786. Accordingly, the judgment of sentence is affirmed.

United States v. Vanasse, 2002 WL 31151325 (3rd Cir.(Pa.))). The defendant pleaded guilty to one count of conspiracy to distribute and to possess with intent to distribute more than five kilograms of cocaine, contrary to 21 U.S.C. § 841(a)(1), in violation of 21 U.S.C. § 846. On appeal, the defendant argued that the district court erred in sentencing him to more than 20 years imprisonment. The Court of Appeals affirmed the judgment of conviction and sentence. The defendant pleaded guilty to a conspiracy to distribute more than five kilograms of cocaine, which carries a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A). A guilty plea is the functional equivalent of a jury conviction. *See United States v. Broce*, 488 U.S. 563, 569 (1989). His sentence of 300 months is not in excess of the maximum applicable sentence of life imprisonment.

The defendant also argued on appeal that the district court erred in determining the amount of cocaine that should be attributable to him in relationship to the conspiracy under U.S.S.G. § 2D1.1 and 1B1.3. As part of his plea agreement, the defendant stipulated that he was responsible for 1,300 kilograms of cocaine, and a guilty plea is the functional equivalent of a jury conviction. *Broce*, 488 U.S. at 569. The district court did not err.

United States v. Berroa-Medrano, 303 F.3d 277 (3d Cir. 2002). This case required the Court of Appeals to consider what constitutes a "mixture or substance containing a detectable amount" of a controlled substance for purposes of sentencing. At sentencing, although one of the two packages Berroa admitted to distributing contained mostly drug cutting agents and only trace amounts of heroin, the court used the total weight of the two packages as the basis to sentence Berroa to a 100-month prison term. On appeal, Berroa challenged the sentence on the grounds that the court improperly considered the gross weight of the two packages, about one kilogram, rather than the net weight of the heroin itself. The Court of Appeals held that the traces of heroin disclosed during lab testing in this case, although in amounts too small to determine its purity within a mixture, constitute a detectable amount, and that the district court did not err when it included the entire weight of the larger package in calculating Berroa's sentence. The Court of Appeals noted that it recently determined that, even when a controlled substance contains a very slight amount of a controlled substance, the entire package must count toward a defendant's sentence. See *United States v. Butch*, 256 F.3d 171, 177-80 (3d Cir. 2001) (instructing that the district court must include the gross weight of Endocet pills in calculating a defendant's mandatory minimum sentence under § 841(b) even though the controlled substance (oxycodone) in the pills was merely 0.8% of the total weight of the pills); see also *United States v. Touby*, 909 F.2d 759, 772-73 (3d Cir. 1990)(holding that the entire weight of 100 gram slab of Euphoria must be considered by sentencing court, even though the controlled substance only comprised 2.7% of the total weight).

United States v. Campbell, 295 F.3d 398 (3d Cir. 2002). Defendant contended that, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), his sentence was unconstitutional because the issue of drug quantity, which resulted in a sentence beyond the statutory maximum authorized by the jury's verdict, had not been submitted to the jury and proven beyond a reasonable doubt. Because the evidence supported a conviction under 21 U.S.C. § 841(b)(1)(B)(iii), which provides for a five to 40 year sentence for distribution of at least five grams of cocaine, the Court of Appeals held that defendant's 22-year sentence, although in violation of *Apprendi*, did not constitute plain error. The evidence at trial established indisputably, and beyond a reasonable doubt, that defendant distributed in excess of five grams of cocaine base.

United States v. Smiley, 2002 WL 1723815 (3rd Cir.(N.J.))). In this appeal, the defendant argued that the district court erred in sentencing him based upon a drug weight of 15 to 50 kilograms of cocaine when that amount was not proven beyond a reasonable doubt. He contends that the district court relied on untrustworthy evidence, and was overly liberal in its assessment of drug quantity. In concluding that the district court did not err, the Court of Appeals noted the testimony of a confidential informant and intercepted telephone conversations.

United States v. Jackson, 2002 1478495 (3rd Cir.(N.J.))). The defendant was convicted by jury of conspiring to distribute and to possess with intent to distribute more than 100 grams of heroin. On appeal, he argued that the court erred in determining the quantity of heroin attributable to him, 824.7 grams. He asserted that only 24.7 grams of cocaine should be attributable to him because that was the quantity involved in the delivery on July 22, 1998. The Court of Appeals affirmed the judgment of conviction and sentence. The agreement was for the sale of 800 to 2000 grams. The calculation was not limited to the amount delivered. Furthermore, Jackson's contention, if accepted, would require the court to sentence him on the basis of a drug quantity less than that attributed to him by the jury as it convicted him of a conspiracy involving more than 100 grams of heroin.

United States v. Montano-Betancourt, 2002 WL 1305581 (3rd Cir.(N.J.))). Motano-Betancourt pled guilty to conspiring to import heroin. He argued that the district court erred in holding him accountable for the full 1.78 kilograms of heroin seized in Ecuador. Two DEA reports stated that the weight of the heroin seized was 1.78 kilograms and that the couriers intercepted carrying this heroin intended to deliver all the contraband to one contact (an undercover agent) in the United States. Montano-Betancourt was actively engaged in the transportation of this 1.78 kilograms of heroin from Ecuador. He managed the drug couriers involved and provided them with funds for travel expenses. Thus, the district court did not err in sentencing the defendant for more than one kilogram of heroin.

United States v. Sammut, 2002 WL 1289877 (3rd Cir.(N.J.))). The defendant appealed, arguing that the district court wrongly attributed 40.8 kilograms (90 pounds) of drugs to him. Under the guidelines, a sentencing court uses the "agreed-upon" quantity of drugs to calculate the base offense level of a defendant convicted of a controlled substance offense in a reverse sting. This quantity and the corresponding offense level may be reduced if "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 district court reasonably concluded that Sammut and Bresler agreed to produce 90 pounds of Ecstasy. In telephone conversations between the defendants and the undercover agent, the defendants repeatedly affirmed that they are willing and able to produce 90 pounds of Ecstasy with the 15 gallons of MDP2P that the agent was to supply. These statements and others amply supported the district court's finding that the defendants agreed to produce 90 pounds of Ecstasy.

United States v. Henry, 282 F. 3d 242 (3d Cir. 2002). The defendant was charged in a one-count indictment with possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii). He subsequently pleaded guilty to possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). Under the law at the time of his plea, the identity and quantity of the controlled substance was a sentencing factor to be judicially determined by a preponderance of the evidence at a sentencing hearing. See *United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed. 2d 554 (1997). Thus, the defendant did not plead to any specific drug or quantity. He did offer to plead to one ounce of marijuana, but the government would not agree to this plea.

Subsequent to acceptance of the plea, the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." As a result of this decision, Henry requested the district court to empanel a jury to determine the identity and weight of the controlled substance beyond a reasonable doubt. The court denied the request, holding that Apprendi did not apply because a conviction for either distribution of marijuana or cocaine base would result in a guidelines sentence less than the 40 year "statutory maximum penalty" that the court concluded would apply to a drug distribution crime. Thus, the court held a sentencing hearing, resolving the identity and quantity issues under a preponderance of the evidence standard. The court found that the substance distributed by Henry was 22 grams of cocaine base. Accordingly, Henry was sentenced to the "mandatory minimum" sentence applicable to distribution of 22 grams of cocaine base - - five years.

The Court of Appeals concluded that an Apprendi violation had occurred. "We cannot say beyond a reasonable doubt that Henry would have received a 60-month sentence if the quantity and identity of the substance had been determined by a jury beyond a reasonable doubt. No evidence was presented to a jury for a determination of the identity and quantity issues. Rather, the evidence of drug identity and quantity was presented to the judge during the sentencing hearing and the determination was made by a preponderance of the evidence....We find it consistent with the mandate of Apprendi to remand for a jury to determine these facts beyond a reasonable doubt....We see no reason why a jury cannot be convened for the sole purpose of deciding the facts that will determine the sentence. After all, that is the job of the jury as fact-finder. In view of the foregoing, the judgment of the district court will be vacated and the case remanded to that court for a determination by a jury, beyond a reasonable doubt, as to the identity and quantity of the drug possessed by Henry with intent to distribute, and then for re-sentencing.

United States v. Perez, 280 F. 3d 318 (3rd Cir. 2002). The defendant argued on appeal that the government failed to prove the he was responsible for any of the drugs, let alone the one to three kilograms seized from an apartment. Here, from the defendant's conduct (specifically his remaining in Del Rosario's apartment for a significant amount of time while several others came and went), the district court found an implied agreement between Del Rosario and the defendant to provide security. The defendant's conduct was in furtherance of the jointly undertaken criminal activity because, as already noted and among other things, evidence exists that he provided security for Del Rosario while distributing the drugs. The full amount was reasonably foreseeable to the defendant because he was in the apartment for an extended period of time while the drugs were being distributed, and there was information circulating that a large shipment had arrived from the Philippines.

United States v. Boone, 279 F. 3d 163 (3rd Cir. 2002). Defendant purchased three to five kilograms of cocaine powder from a wholesale distributor in New York City, delivered cocaine to street level dealers, and personally "cooked" at least 200 grams of cocaine powder into crack cocaine. The court found that defendant was responsible for the powder cocaine and for "some amount" of crack, but found that the crack was "encompassed in level 30," the base offense level it assigned to defendant. The Court of Appeals held that the district court erred in refusing to determine the amount of crack for which defendant was responsible. Since the court found that defendant was responsible for "some amount" of crack cocaine as well as powder, it was required to convert each controlled substance into a volume of marijuana, pursuant to the guidelines' Drug Equivalency Tables, and then select the offense level that applied to the aggregate quantities. The district court's conclusion that the crack was encompassed in the base offense level of 30 was erroneous because it was tantamount to holding that defendant was not responsible for any crack whatsoever. Even if defendant was responsible for only the lowest amount of cocaine powder covered by level 30, three kilograms, that amount converts to a marijuana equivalent of 700 kilograms. Thus, any amount of crack above 15 grams, the equivalent of 300 grams of marijuana, would place defendant above the ceiling for level 30. The evidence established that defendant was responsible for more than 15 grams of crack.

United States v. Weston, 279 F. 3d 163 (3rd Cir. 2002). The defendant was convicted of conspiring to distribute and possess with intent to distribute cocaine and cocaine base (crack). Thomas Weston manufactured crack cocaine and enlisted numerous persons to distribute large quantities of crack and powder cocaine in Asbury Park, New Jersey, between 1995 and 1998. The evidence at trial established that Weston purchased 3 to 5 kilograms of cocaine powder from a wholesale distributor in New York City. He converted cocaine powder into crack cocaine, delivered cocaine to a coterie of street level dealers for distribution in Asbury Park, and personally "cooked" at least 200 grams of cocaine powder into crack cocaine.

In his pro se brief challenging his sentence, Weston argued that the district court erred at sentencing by attributing 5 kilograms of cocaine powder to him that he purchased in New York City. In Weston's view, only the 220 grams of cocaine powder that he caused to be delivered to an undercover agent during two controlled drug buys identified in the indictment can be attributed to him under the Sentencing Guidelines. However, a sentence in a criminal conspiracy is based upon all relevant conduct and not merely offense conduct. See *United States v. Rivera-Maldonado*, 194 F. 3d 224, 228 (7th Cir.). The evidence here easily established that Weston's relevant conduct included the purchase and sale of approximately 5 kilograms of cocaine powder.

Weston's multiple drug-trafficking offenses, including the offense of conviction, and his purchases from Poppy, were part of a "common scheme or plan," because they were "substantially connected to each other by at least one common factor, such as ... common accomplices, ... [or a] common purpose." Weston and Farris were clearly accomplices in the offense of conviction and in their joint purchases of cocaine powder from Poppy. Farris introduced Weston to Poppy, identified Weston as a reliable bulk purchaser of cocaine, purchased cocaine from Poppy for Weston, and gave Weston money to purchase cocaine from

Poppy. The purchases from Poppy and the offense of conviction also "qualifi[ed] as part of the same course of conduct [because] they [were] sufficiently related or connected to each other as to warrant the conclusion that they were part of [an] ... ongoing series of offenses." The conduct all occurred within the small geographic area in or near Asbury Park, involved cocaine that Weston sold through intermediaries, and it involved the same co-conspirators. The district court properly held Weston accountable for all the cocaine that he purchased from Poppy; either alone or jointly with Farris.

In his pro se brief, Weston also relied upon *United States v. Miele*, 989 F. 2d 659 (3d Cir. 1993), in arguing that the district court committed clear error by crediting Farris' testimony regarding the volume of cocaine that he and Weston purchased from Poppy. The Court of Appeals here, however, found that the district court based the volume of cocaine on Farris' sworn trial testimony, and the court concluded that the testimony was reliable. The testimony remained unshaken after vigorous cross-examination. Moreover, the "vast disparity" in estimates of drug quantity that the Court of Appeals found so troubling in *Miele* is absent here. Farris' testimony was neither speculative nor contradictory. Although Farris did initially testify that the first trip was in 1995, he immediately corrected himself and explained that it was in 1996. Moreover, even if he had not done so, the resulting discrepancy would not have been analogous to the discrepancies in *Miele*. Slight memory lapses hardly compel a sentencing court to completely reject testimony about drug quantity. Given Farris' familiarity with drug transactions, his estimate of volume was appropriately considered by the district court.

United States v. Barbosa, 271 F.3d 438 (3d Cir. 2001). In July 1998, the Drug Enforcement Agency arrested the defendant for importing 882 grams of cellophane wrapped pellets of heroin, which he had swallowed while in Aruba and subsequently expelled in a hotel room in Philadelphia, Pennsylvania. Following the arrest, the defendant was charged in a complaint with possession with intent to distribute heroin. Upon further investigation, the DEA laboratory determined that the pellets defendant had swallowed contained cocaine base with a purity of 85%, not heroin.

After a jury trial, the defendant was convicted of possession with intent to distribute more than 50 grams (i.e., 882 grams) of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii). He was later sentenced to a 20-year term of imprisonment. The defendant appealed his conviction and sentence, contending that: (1) the district court should have sentenced him based upon the drug he intended to bring into the country (heroin), rather than the drug he unwittingly, but actually, transported (cocaine base); (2) in accordance with the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), the issue of which substance he intended to transport should have been submitted to the jury for a factual determination beyond a reasonable doubt; and (3) if it was proper to sentence him for cocaine base, the court erred in sentencing him to a 20-year mandatory minimum.

The Court of Appeals held that (1) *Apprendi* applied retroactively because defendant's direct appeal was pending at the time the Court decided *Apprendi*; (2) *Apprendi* violation, which occurred when identity of the controlled substance, a fact that increased defendant's penalty beyond the prescribed statutory maximum, was not submitted to the jury and proven beyond a reasonable doubt was plain error; (3) as a matter of first impression in the Third Circuit, defendant, who was in actual possession of cocaine, while believing the substance to be heroin and intending to distribute it, was subject to sentencing for possession with intent to distribute cocaine; (4) *Apprendi* violation did not affect defendant's substantial rights, or the fairness, integrity, or public reputation of judicial proceedings, and thus did not warrant correction on appeal; and (5) as a matter of first impression in the Third Circuit, a controlled substance which was 85 % pure cocaine base but not crack, subjected defendant to the statutory mandatory minimum for cocaine base. The Court of Appeals further held that the statutory maximum penalty that can be imposed on a defendant when drug identity is not known or found by the jury is one year, the lowest statutory maximum under the "catch-all" provisions of § 841.

United States v. Vasquez, 271 F.3d (3rd Cir. 2001). The defendant was indicted on charges of conspiracy to possess and distribute "more than five kilograms of cocaine" in violation of 21 U.S.C. §§ 846 and 841, several related counts of obstruction of justice, and two counts of witness tampering. The indictment specifically charged a drug conspiracy involving "cocaine." Although it did not reference cocaine base or crack cocaine, it listed the following overt act: "storing approximately 859 grams of crack cocaine (cocaine base) and approximately 992 grams of cocaine powder in Room #2, 647 Union Street, Columbia, PA.

The trial evidence, which included testimony based on a forensic analysis, established that police seized 991 grams of powder cocaine and 859 grams of crack cocaine from the rooming house. The defendant raised no objection to the testimony regarding drug quantity, and he presented no affirmative evidence at any time challenging the government's evidence of drug quantity. Additionally, neither the government nor the defendant requested an instruction requiring the jury to find the quantity of drugs involved in his conspiracy offense, and the court gave no such instruction. The District Court's instructions concerning the drug conspiracy only required the jury to find the defendant conspired "to possess and distribute cocaine." Following deliberations, the jury convicted the defendant of conspiracy to possess and distribute cocaine, as well as obstruction of justice.

At sentencing, the District Court adopted the factual findings and sentencing recommendations in the presentence report. The court determined, without objection and under a preponderance of the evidence standard, that, based on the trial evidence and the presentence report, the defendant had been involved with 996 grams of powder cocaine and 859 grams of crack cocaine. A total offense level of 40 and a criminal history category of I resulted in a sentencing range of 292 to 365 months. The defendant was sentenced to 292 months.

The defendant challenged his sentence on appeal, contending that because the court did not submit the issue of drug quantity for determination, he must be re-sentenced in accordance with the default 20-year statutory maximum sentence that applies to cocaine offense of unspecified drug quantity.

The Court of Appeals opined, "In this case, the District Court increased the defendant's penalty based on its finding, by a preponderance of the evidence, that he had been involved with 992 grams of powder cocaine and 859 grams of crack cocaine. The *Apprendi* violation occurred when the judge, rather than the jury, determined drug quantity and then sentenced Vasquez to a more than 24-year sentence, a term in excess of his prescribed 20-year statutory maximum."

The Court of Appeals ruled that the plain error standard governed the defendant's request for relief. Each *Apprendi* violation is both a trial and a sentencing error.

In turning to the consequences of the *Apprendi* violation, the Court of Appeals held, "Under the circumstances, the evidence concerning drug quantity was 'overwhelming,' and because the defendant's sentence would not have changed absent the trial error, there is no reasonable basis upon which to conclude that the fairness, integrity, or public reputation of the judicial proceedings were seriously affected....We therefore conclude that, in light of the undisputed evidence of drug quantity attributable to Vasquez and our determination that his sentence did not exceed the statutory maximum for the cocaine amount introduced at trial, the fairness, integrity, or public reputation of judicial proceedings were not seriously affected even though an *Apprendi* violation occurred in his case."

United States v. Butch, 256 F. 3d 171 (3rd Cir. 2001). The defendant challenged his sentence on the ground that the district court erred when it attributed to him the gross weight of the Endocet pills rather than the net weight of the controlled substance oxycodone in the pills. This error, he contends, resulted in an incorrect range under the sentencing guidelines. The district court determined the sentence as follows: The 26,400 Endocet pills had a combined weight of 14.49 kilograms. Because oxycodone, the controlled substance in Endocet, is not one for which the sentencing guidelines' drug quantity table provides a base offense level by unit of weight, the probation office looked to the drug equivalency tables found in Application Note 10 of § 2D1.1. According to those tables, one gram of oxycodone is equivalent to 500 grams of marijuana.

In support of his argument, the defendant cites Amendment 517 to the sentencing guidelines applicable to Schedule I or II depressants which equates one unit or one pill to one gram of marijuana (as opposed to the 500 grams of marijuana figure used by the district court). He argues that because, under the language of 28 C.F.R.S. 1308.12(e), oxycodone acts like a depressant and is not specifically excepted or listed in another schedule, oxycodone qualifies as a Schedule II depressant.

The Court of Appeals held that the defendant's argument failed for two reasons. His assertion that the net controlled substance should be used in determining the base offense level is directly contrary to Application Note A to the drug quantity table, which provides that "[u]nless otherwise specified, the weight if a controlled substance set forth in the table refers to the entire weight of a mixture or substance containing a detectable amount of the controlled substance." Moreover, the defendant's argument was expressly rejected by the Court of Appeals in the case of *United States v. Gurgiolo*, 894 F.2d 56 (3d Cir. 1990), wherein the appellate court reversed the district court's calculation of the applicable drug quantity based on the net weight of the oxycodone in Percocet pills. Second, oxycodone is not a Schedule II depressant. It is a Schedule II Opiate, a clarification distinguishable from Schedule II depressants.

United States v. Yeung, 241 F.3d 321 (3d Cir. 2001). San Yeung was convicted by a jury of conspiring to distribute heroin in violation of 21 U.S.C. § 846, distribution of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and distribution of heroin within 1000 feet of a school in violation of 21 U.S.C. § 860. An informant had met with the defendant and told him that he was interested in buying an ounce. Yeung said that an ounce would not do and that he would sell the informant half a unit or a unit. A unit would cost $70,000. The informant had other meetings with Yeung who reiterated his desire to sell half a unit or a unit. Again, the informant said he wanted to buy only one ounce. Finally, the defendant and a co-conspirator sold one ounce to the informant. The question on appeal was whether Application Note 12 to U.S.S.G. § 2D1.1-6 counsels that the defendant be sentenced to the one ounce completed transaction, the one unit (or one-half unit or two units) that he and Zheng would have liked to have sold to Nguyen, or the aggregated amount of one unit (or one-half unit or two units) plus one ounce. Defense counsel argued that the base offense level should have been based on the one ounce actually sold rather that the one unit which weighs one and one-half pounds. The Court of Appeals ruled "Had there been evidence of an agreement beyond that one ounce, it would have been eminently appropriate for Yeung to receive the sentence he received. Because, however, it is only the one ounce which is supported by the evidence, it is on that amount that Yeung must be re-sentenced."

United States v. Gibbs, 190 F. 3d 188 (3d Cir. 1999). Sydnor objected to both the district court's quantity determination and its determination that some of the drugs were crack. In this case, the Court of Appeals had to determine whether a district court may make an estimate of drug quantity based on a simple price quote, without more. There appear to be no instances in which drugs were credited to a defendant based solely on a pricing conversation without further negotiations confirming the sale. The Court of Appeals concluded: "We think it too speculative to conclude that the January 25 pricing call meant that Sydnor had one kilogram in his possession and was ready to resell it at the price designated by Gibbs; it is as viable--if not more viable--to assume that Sydnor was simply obtaining price information in general or checking to see how much he would have to pay Gibbs to buy his next kilogram. The district court clearly erred in attributing a kilogram of cocaine to Sydnor based on this conversation. The question, then, is whether the district court clearly erred in concluding that the 1.7 kilograms of cocaine that Gibbs told Saunders he had given Sydnor was in crack form. Although a close question, the Court of

Appeals held that the district court did not clearly err, based on Gibbs's consistent use of the expression "doing up" or "doing something," which Agent Coleman interpreted to mean cooking cocaine into crack, and on Agent Coleman's testimony that "doing something for Antjuan" meant turning cocaine into crack and selling the resulting crack to Sydnor.

Defendant Brown argued that the district court erred in attributing to him all of the drugs that were distributed by the conspiracy in the one-month period during which Brown acted as an enforcer. The Court of Appeals held "in light of conversations between Brown and Gibbs and the district court's specific finding that Brown was an enforcer for "a major drug dealer," we do not think it was clearly erroneous for the district court to conclude that Brown was sufficiently involved with the conspiracy, as a protector of the leader of a large trafficking organization, so as to be charged with the 27 kilograms of powder cocaine and nine ounces of crack that passed through the conspiracy during the time he served as enforcer.

Mitchell v. U.S., 119 S.Ct. 1307, 1311-16 (1999). Defendant pled guilty to four drug counts, but reserved the right to contest the amount of drugs at sentencing. At the plea hearing, the district court warned her that by pleading guilty she would waive various rights, including "the right to remain silent under the Fifth Amendment." At sentencing, the government presented evidence on the amount of drugs defendant sold. Defendant challenged the adequacy of that evidence, but did not testify or present any evidence of her own. The district court found the government's evidence on quantity credible, partly by drawing an adverse inference from defendant's silence, and sentenced her to a ten-year mandatory minimum term. The court held that defendant, after pleading guilty, had no right to remain silent on the details of the offense.

The Third Circuit affirmed, concluding that "although Mitchell faced the possibility of a harsher sentence ... because of her failure to testify at the sentencing hearing, ... in light of the fact that she does not claim that she exposed herself to future federal or state prosecution, the Fifth Amendment privilege no longer was available to her. *U.S. v. Mitchell,* 122 F. 3d 185, 189-91 (3d Cir. 1997).

The Supreme Court reversed and remanded, rejecting the government's argument that defendant's guilty plea waived her privilege against compelled self-incrimination and ruling "that petitioner retained the privilege at her sentencing hearing." The Court also rejected the idea that the district court could draw an adverse inference from defendant's silence. The Court added that "whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 is a separate question. It is not before us, and we express no view on it."

United States v. Marmolejos, 140 F. 3d 486 (3d Cir. 1998). Defendant was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. The evidence showed that he had negotiated to sell of 5 kilograms of cocaine but had delivered only 4.96 kilograms. Using the 5 kilogram figure, the district court sentenced the defendant in October 1991 to 126 months in prison, based upon the version of Application Note 12 to U.S.S.G. § 2D1.1 that was in effect at that time. In April 1996, the defendant filed a § 2255 motion. He contended that his sentencing offense level should have been based on the 4.96 kilograms of cocaine he actually distributed, rather than the 5.00 kilograms he intended to distribute. Defendant's sentence could have been reduced by five to twenty-nine months if he was correct. In support of his claim, defendant relied on Amendment 518, effective November 1, 1995, which changed Application Note 12 to § 2D1.1 to provide that the negotiated drug quantity should be used to determine offense level "unless the sale is completed and the amount delivered more accurately reflects the scale of the offense." The district court rejected his contention and he appealed. The sole question is whether Amendment 518 has, by its terms, clarified the existing commentary in the Guidelines or substantively changed its meaning. The Court of Appeals, in reversing the district court's decision, held that Amendment 518 does not change the method for calculating amounts involved in uncompleted sales, but merely clarifies the proviso for completed ones. Amendment 518 represents a clarification of the previous application note, because it "fills a void and resolves an ambiguity in § 2D1.1 regarding the proper weight of drugs for a court to consider in sentencing a defendant involved in a completed narcotics transaction.

United States v. Russell, 134 F. 3d 171 (3d Cir. 1998). The defendant was convicted of drug conspiracy and conducting a continuing criminal enterprise. He was the organizer of a complex and lucrative scheme to distribute drugs. The Court of Appeals concluded that the district court properly relied on the co-conspirators' drug quantity stipulations. The quantity of drugs that his co-conspirators took responsibility for was a reliable basis for estimating the quantity of drugs attributable to him.

United States v. Mitchell, 122 F. 3d 185 (3d Cir. 1997). Although the sentencing court must carefully scrutinize the government's evidence in "calculating the amount of drugs involved in a particular operation, a degree of estimation is sometimes necessary." *U.S. v. Paulino,* 996 F. 2d 1541, 1545 (3d Cir. 1993). Evidence at sentencing was that defendant sold one and one-half to two ounces of cocaine two to five times weekly for a two year period. This, coupled with defendant's refusal to offer any evidence to the contrary, was sufficient to support the district court's finding that defendant sold at least 13 kilograms of cocaine for purposes of determining the offense level under §2D1.1.

United States v. Melendez, 55 F. 3d 130 (3d Cir. 1995), *aff'd on other grounds, Melendez v. U.S.*, 116 S. Ct. 2057 (1996). Defendant argued that a downward departure was required under application note 17 to §2D1.1 because the government's confidential informant offered to sell him cocaine at prices substantially below market price, thereby leading him to purchase a significantly greater quantity than he would have been able to purchase given his available funds. He further maintained that the $12,500 he had available would have enabled him to purchase, on

the open market, only between one-half and three-quarters of a kilogram of cocaine, instead of the more than 50 kilograms attributed to him by the district court. The Third Circuit found no error since defendant specifically stipulated in his plea agreement that he was responsible for 50 to 150 kilograms of cocaine.

United States v. Edmond, 52 F. 3d 1236 (3d. Cir. 1995). The district court attributed to defendant 175 kilograms of cocaine from four shipments. The parties agreed that the first shipment weighed 25 kilograms. The district court found that the other three shipments weighed 50 kilograms each, based in part on testimony that the four shipments weighed between 35 and 50 kilograms each. The Third Circuit held that the record did not support the district court's drug quantity determination. A range of weights does not justify assigning the highest weight in that range. The judge also could not assign the average weight, 42.5 kilograms, to each of the four shipments. The witness appeared to be saying that the smallest shipment was 35 kilograms, and the largest was 50 kilograms, and the other two shipments were no smaller or larger. Thus, the court could rationally conclude that the total weight of the four shipments was at least 155 kilograms (i.e. one shipment of 35 kilos, one of 50 kilos, and two of at least 35 kilos). However, the court did not make these factual findings.

United States v. Benish, 5 F. 3d 20 (3d Cir. 1993). Defendant argued that the district court erroneously believed that it lacked discretion to depart downward based upon the age and sex of the marijuana plants. The Third Circuit affirmed, finding the guidelines focus exclusively on number of plants. Thus, a sentencing court could not conclude that the age or sex of particular marijuana plants were factors not adequately considered by the Commission.

United States v. Deaner, 1 F. 3d 192 (3d Cir. 1993). Defendant contended that the district court should have sentenced him for his marijuana offense without considering its weight, since the government denied him an opportunity to inspect or weigh the plants by destroying them despite his discovery request. The Third Circuit held that evidence concerning the marijuana's weight was reliable. Certificate from Bureau of Standards, Weights and Measures stated that scale used to weigh marijuana plants was accurate, and the director of the Bureau certified that the marijuana weighed 23.9 kilograms. Although the government did not retain a representative sample, DEA complied substantially with procedure set forth in 28 C.F.R. §50.21 for destruction of contraband evidence.

United States v. Paulino, 996 F. 2d 1541 (3d Cir. 1993). Although only a small quantity of cocaine was actually seized, there was evidence that defendant's organization sold large quantities. A co-conspirator stated that $12,000 worth of cocaine was sold on a good day. There was also testimony that cocaine sold in the area at $1,000 per ounce, and that the conspiracy extended for a 30-month period and ran seven days per week from 10:00 a.m. to midnight. In order to account for "off " days and days when no cocaine was sold, the district court reduced the estimate by 50 percent. The Third Circuit upheld the estimate.

United States v. McCutchen, 992 F. 2d 22 (3d Cir. 1993). Defendant was arrested with 119 vials of a chunky white powder. Fifteen vials were analyzed by a police chemist, who determined that they contained 1,381 milligrams of a substance containing cocaine base. From the weight of the substance in these 15 vials, the chemist projected that the total weight of the substance in all 119 vials was 9.866 grams, and defendant was sentenced accordingly. The Third Circuit upheld the use of the chemist's extrapolation.

United States v. Miele, 989 F. 2d 659 (3d Cir. 1993). Defendant pled guilty to conspiracy to distribute cocaine. In determining the amount of cocaine attributable to defendant, the district court relied on an addict-informant who gave inconsistent statements regarding the quantity involved. No other witnesses testified as to specific drug quantities and there was no other corroborative evidence to support the drug estimate. The Third Circuit held that the district court's determination of drug quantity did not have "sufficient indicia of reliability," given numerous inconsistencies, the fact that the source of most of the critical evidence was an addict-informant with an impaired memory, and the lack of any findings by the district court other than a single conclusory finding as to drug quantity. Under *U.S. v. Collado*, 975 F. 2d 985 (3d Cir. 1992), accomplice attribution is permissible only where facts found by the district court indicate that "drug transactions conducted by the defendant's co-conspirators were within the scope and in furtherance of the activity the defendant agreed to undertake." In order to reach this conclusion, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to ensure that the defendant's sentence accurately reflects his or her role.

United States v. Delviscovo, 978 F. 2d 124 (3d Cir. 1992). The government conceded that the district court erred in concluding that the offense of conviction was possession of more than 500 grams of cocaine, since the offense to which defendant pled guilty was possession of less than 500 grams of cocaine. The Third Circuit remanded for resentencing, since the sentence was erroneous as a matter of law.

United States v. Rodriguez, 975 F. 2d 999 (3d Cir. 1992). Defendants attempted to sell three one-kilogram packages purporting to be cocaine. The packages actually contained 65.1 grams of cocaine and 2,976 grams of boric acid. They were packaged in this manner in an attempt to dupe unsuspecting buyer into believing he was buying more cocaine. The Third Circuit held that the boric acid and cocaine blocks were not a "mixture" for purposes of sentencing under §2D1.1. The boric acid was not used as a "cutting agent," was not intended to be consumed and although they were in close proximity, they remained separate layers in the package. The appellate court held that the boric acid, which made up over 97 percent of the total weight, was packaging material and should have been excluded from calculation.

United States v. Collado, 975 F. 2d 985 (3d Cir. 1992). The Third Circuit ruled that the district court's estimation that one drug transaction involved 62.5 grams of heroin amounted to speculation. The evidence regarding this transaction consisted of transcripts of two taped telephone calls in which defendants agreed to supply heroin to a co-conspirator. Neither call contained any reference to a specific amount of heroin. The presentence investigation report observed that based on "other telephone calls" the government stated that this conversation referred to 62.5 grams of heroin. However, the report did not explain what those other calls were. The government's only argument is that the calls must have referred to a sale of at least 62.5 grams because defendants always dealt in quantities of at least that amount. Whether an individual defendant may be held accountable, under relevant conduct, for amounts of drugs involved in transactions conducted by co-conspirators depends upon degree of defendant's involvement in conspiracy. The Third Circuit held that a defendant can be responsible for the quantity of drugs distributed by his or her co-conspirators only if the drugs distributed (1) were in furtherance of the jointly-undertaken activity, (2) were within the scope of the defendant's agreement, and (3) were reasonably foreseeable in connection with the criminal activity the defendant agreed to undertake. In order to reach this conclusion, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to ensure that the defendant's sentence accurately reflects his or her role.

United States v. Torres, 926 F. 2d 321 (3d Cir. 1991). The Third Circuit held that cocaine which had been suppressed because it was illegally seized could be considered in determining the amount of cocaine involved in the offense for sentencing purposes. However, because defendant's plea agreement stipulated to a lesser amount of cocaine, the court remanded the case to give defendant the opportunity to withdraw his plea. Although the plea agreement stated that the judge was not bound by any stipulations, the defendant may not have understood this to apply to the stipulated drug amount.

United States v. Touby, 909 F. 2d 759 (3d. Cir. 1990). The court of appeals rejected the appellant's argument that the 100 grams of Euphoria found in his bedroom was only 2.7 percent pure and that only pure Euphoria, rather than the total weight of the product, could be used in determining his base offense level. The court stated that the guidelines provide that the base offense level is determined by the quantity of drugs that appellant manufactured or conspired to manufacture; the purity of the substance was not a factor. The court also rejected the appellant's argument not to consider the weight of the 100 grams of Euphoria because the product was poisonous and therefore inconsumable. Although defendant argued that 97.3 percent of the 100 gram slab contained other "poisonous" ingredients which rendered the substance inconsumable, there was no attempt to prove that these ingredients were manufacturing by-products rather than a "cut." In fact, a government witness testified at trial that additional ingredients are often added to "cut" drugs and defendant offered no evidence to discredit or rebut this testimony.

United States v. Gurgiolo, 894 F. 2d 56 (3d Cir. 1990). The defendant pled guilty to charges involving a variety of Schedule II, III and IV controlled substances. The district court calculated defendant's offense level merely by converting drugs to heroin equivalent. As to Schedule III and IV substances, the court held the sentence should be based on total weight, whereas for Scheduled II substances, the calculation must be based on "pure" weight. The Third Circuit concluded that whole weight rather than "pure" weight of Schedule II, III, and IV drugs should have been converted to heroin equivalency for purpose of arriving at the base offense level. The appellate court also agreed with the defendant that because the guidelines establish a cap of 20 on the offense level attributable to crimes involving Schedule III substances, the district court ought to have held that the maximum heroin equivalent for those substances was 59 grams.

United States v. Sciarrino, 884 F. 2d 95 (3d Cir. 1989). Defendant contended that the district court erred in relying on hearsay evidence in determining the appropriate offense conduct under §2D1.1 of the sentencing guidelines. The Third Circuit ruled that the sentencing court could rely on hearsay evidence to determine the amount of marijuana involved in the offense so long as the hearsay statement had sufficient indicia of reliability.

Drug Quantity is a Sentencing Factor, Not an Element of the Offense

United States v. Haywood, 155 F. 3d 674 (3d Cir. 1998). Defendant argued that the government failed to prove by a preponderance of the evidence that 980 grams of heroin were attributable to him. The Third Circuit upheld the drug quantity finding because it was based on an uncontroverted statement in the PSR. Under Rule 32(b)(6)(D), a sentencing court may accept the PSR's facts as its own. At sentencing, the court asked defendant and his attorney whether they had any objection or comments on the PSR. Counsel responded that they had both reviewed the PSR and it appeared to be correct. The court then adopted the PSR's factual findings and guideline applications. The information in the PSR contained the requisite indicia of reliability, and the court was justified in relying upon it as well as counsel's representations as to its accuracy.

United States v. Lewis, 113 F. 3d 487 (3d Cir. 1997). A jury convicted the defendant of distributing a controlled substance in violation of 21 U.S.C. §841(a)(1). The district court sentenced him for distributing cocaine base rather than cocaine powder. The Third Circuit held that the sentencing court, rather than the jury, determines the nature and quantity of the controlled substance involved in a §841(a) offense. The amount and type of drugs involved are sentencing factors for the judge rather than elements of the offense for the jury. The government need only prove by a preponderance of the evidence that defendant distributed cocaine base.

United States v. Chapple, 985 F. 2d 729 (3d Cir. 1993). The Third Circuit ruled that the weight of the drugs involved is a sentencing issue that must be decided by the sentencing judge rather than the jury. In imposing sentence, the district court was not bound by the jury's verdict as to the quantity of drugs involved in the scheme.

Uncompleted Transactions

United States v. Raven, 39 F. 3d 428 (3d Cir. 1994). Appellant pleaded guilty to conspiracy to import heroin into the United States from Thailand. Defendant argued that the district court erred by: (1) failing to properly apply Application Note 12 to §2D1.1 in determining his offense level, (2) refusing to depart downward for "sentencing entrapment," and (3) finding that defendant was predisposed to import three to four kilograms of heroin. Note 12 to §2D1.1 provides, in pertinent part, that in an uncompleted distribution, a "court shall exclude from the guideline calculation the amount of drugs the defendant did not intend to produce and was not reasonably capable of producing." The Third Circuit outlined the burden of proof and persuasion in establishing the quantity of drugs for which a defendant is responsible in an unconsummated drug transaction. Once the government makes its prima facie showing that a particular amount of drugs was negotiated, defendant must come forward with evidence that he or she lacked both the intent and capability to produce the drugs. The ultimate burden of persuasion does not shift to the defendant, but remains at all times with the government. Thus, if a defendant introduces new evidence or casts the government's evidence in a different light, the government then must prove either that the defendant intended to produce the negotiated amount or that he or she was reasonably capable of doing so. For a defendant to be sentenced on a lesser amount, the sentencing court must find both lack of intent to produce and lack of reasonable capability to produce negotiated amount. The word "produce" must vary according to context. Where defendant is a drug "seller," it means to deliver or manufacture; drug "buyer," it addresses quantity defendant intended to purchase; and drug "courier," it focuses on quantity defendant intended to transport. Thus, defendant's contention that he had neither money nor drugs is irrelevant in a "courier" case. The Third Circuit remanded, directing the district court to determine if defendant had intent and capability to produce negotiated amount. However, the appellate court concluded that district court did not err, even if doctrine of sentencing entrapment was applicable, in refusing to depart downward. Though government agents suggested that conspirators import three to four kilograms of heroin, defendant had no problem with bringing back larger amount and was ready to do whatever was required to make venture feasible.

Crack versus Cocaine

United States v. Ricks, 494 F. 3d 394 (3rd Cir. 2007). On remand, following *Booker*, the district court resentenced the defendant and his brother by applying a crack/powder cocaine drug quantity ratio of 20-to-1 instead of the guidelines ratio of 100-to-1 and then imposing sentences within those ranges. The government argued that (1) district courts are not permitted to categorically reject the 100-to-1 ratio established by Congress and incorporated into the guidelines; and (2) allowing courts to create their own ratios will lead to unwarranted sentencing disparities.

The Court of Appeals held that district courts may not categorically reject the 100-to-1 ratio. In rendering its decision, the Court of Appeals stated that when a district court categorically rejects the 100-to-1 ratio, it fails to properly consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct" under § 3553(a)(6). Allowing district courts to choose a non-guidelines ratio as a matter of policy would unquestionably lead to such disparities; some judges would presumably continue using the 100-to-1 ratio while others might employ a 20-to-1 or 5-to-1 ratio, or even eliminate the disparity in drug quantities.

The Court of Appeals explained that although district courts may not categorically reject the 100-to-1 ratio, they may as *Gunter* put it, consider the crack/powder cocaine differential in the guidelines as a factor when sentencing defendants. 462 F. 3d at 249. How are trial courts, if they choose to exercise their discretion, to go about "factoring" the differential without creating a new ratio? They should first calculate the correct guidelines range and rule on any departure motions, according to steps one and two of the procedure set out in *Gunter*. Then, considering the individual circumstances of a defendant and the specific crime, district courts should consider the relevant § 3553(a) factors. It is at this stage (step 3) that courts may consider the crack/cocaine differential as it applies to the particular case before them.

In conclusion, when a district court imposes a below-guidelines sentence for a crime involving crack, the record must demonstrate that the court focused on individual, case-specific factors. Prohibiting the categorical rejection of the 100-to-1 ratio while permitting case-specific consideration of the differential is consistent with § 3553(a) as well as the reasoning in *Booker* and *Gunter*.

Kimbrough v. U.S., 551 U.S. ____ , 127 S.Ct. ____ (June 11, 2007)(granting certiorari). The sentencing guidelines set the offense level for sentences involving crack and powder cocaine using a 100 to 1 ratio; the offense level for an offense involving, for example, 5 grams of crack cocaine is the same as the offense level for an offense involving 500 grams of powder cocaine. The Supreme Court has granted certiorari to determine whether a below-Guidelines sentence is "per se unreasonable" because it was based in part on the district court's disagreement with the sentencing disparity for crack and powder cocaine offenses. The Court will consider whether in post-*Booker* sentencing a court may consider the impact of the 100 to 1 ratio and the weight that a sentencing court should assign to 18 U.S.C. 3553(a)(6), which instructs a sentencing court to consider "the need to avoid unwarranted disparity among defendants with similar conduct."

United States v. Jaime, 2007 WL 1599023 (3rd Cir.(Pa.))). The defendant's argument on appeal was that the District Court erred by concluding that it did not have the legal authority to consider the Sentencing Commission's view that the 100:1 crack to powder cocaine ratio overstates the seriousness of crack offenses and creates unwarranted disparity. In view of the holding in *United States v. Gunter*, 462 F. 3d 237 (3d Cir. 2006), the Court of Appeals agreed.

United States v. Williams, 2006 WL 2927348 (3rd Cir. (Del.)). The defendant appealed his sentence for possession with intent to distribute crack cocaine, arguing that the district court did not adequately consider the sentencing factors set forth in 18 U.S.C. § 3553(a), and that it was unreasonable for the district court to sentence him to the range prescribed by the Sentencing Guidelines using the formula for crack cocaine. At sentencing, the district court judge asserted that considering the merits of the 100:1 guidelines ratio was a policy consideration that lay outside the province of the judiciary.

The Court of Appeals held that in light of its decision in *Gunter*, 462 F. 3d 237 (3rd Cir. 2006), it was reversible error. Citing *Gunter*, the Court of Appeals reiterated, "Post-*Booker* a sentencing court errs when it believes that it has no discretion to consider the crack-to-powder disparity incorporated in the Guidelines - - but not demanded by 21 U.S.C. § 841(b) - - as simply advisory at step three of the post-Booker sentencing process (imposing the actual sentence after considering the relevant § 3553(a) factors)." While reiterating that a district court may not "categorically reject the 100:1 ratio and substitute its own," *Gunter* holds that once a district court has properly calculated a defendant's sentence under the guidelines (using the 100:1 ratio adopted by Congress), it may consider the possible inequity of that 100:1 ratio in the third step of sentencing.

United States v. Gunter, 462 F. 3d 237 (3rd Cir. 2006). The defendant was indicted for conspiracy to distribute in excess of 50 grams of crack, in violation of 21 U.S.C. § 846; possession with intent to distribute in excess of 50 grams of crack, in violation of 21 U.S.C. § 841(a)(1); possession of crack with the intent to distribute within 1000 feet of a school, in violation of 21 U.S.C. § 860(a); carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Following a jury trial, he was convicted on all charges.

When combined with a criminal history category of V, the defendant's total offense level of 34 yielded a sentencing range of 235 to 293 months. He was also exposed to a consecutive 60-month term because he used or carried a firearm in furtherance of a drug trafficking crime. His aggregate guidelines range was 295 to 353 months.

At sentencing, the defendant asked the District Court to sentence him below his guidelines range on several grounds, including what he claimed was the unjustifiable "disparity" created by the longer sentences recommended for offenses involving crack cocaine compared to those recommended for offenses involving powder cocaine. Had his offense conduct involved powder rather than crack cocaine, his sentencing range would have been 111 to 123 months, instead of 295 to 353 months. The defendant grounded his contention that the court had discretion to sentence at less than the guidelines range for his crack offenses because of the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). He never argued that the court had incorrectly calculated his guidelines range. Rather, he asked it to sentence him below his correctly calculated range because of the form of the drug involved in these offenses. The District Court rejected that argument, ruling that the 100:1 crack/powder

cocaine differential in the guidelines was a determination left to Congress, not to sentencing judges, and thus he was bound to follow it in setting the sentence. The defendant was sentenced to 295 months imprisonment.

In *United States v. King*, 454 F.3d 187 (3d Cir. 2006), the Court of Appeals ruled that when imposing a sentence post-*Booker*, District Courts must follow a three-step sentencing process: (1) courts must continue to calculate a defendant's guidelines sentence precisely as they would have before *Booker*. *See id*. At 196; *see also Cooper*, 437 F.3d at 330; (2) in doing so, they must formally rule on motions of both parties and state on the record whether they are granting a departure and how that departure affects the guidelines calculation, and take into account our circuit's pre-*Booker* case law, which continues to have advisory force. *King*, 454 F. 3d at 196; (3) they are required to exercise their discretion by considering the relevant statutory sentencing factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the guidelines.

The Court of Appeals noted that while the District Court complied with steps one and two in the instant case, it eschewed following through fully with exercising its discretion at step three, notwithstanding the defendant's express request that it do so. In effect, the District Court treated the sentencing guidelines as mandatory and not advisory. The Court of Appeals ruled that once between the minimum and maximum statutory ranges of 21 U.S.C. § 841(b), there is nothing special about the crack cocaine sentencing guidelines that makes them different, or less advisory, than any other guideline provision. It held that the District Court erred under *Booker* in treating the crack/powder cocaine sentencing differential incorporated in the guidelines as mandatory in imposing a final sentence. The 100:1 crack/powder cocaine differential in the guidelines does not take away a court's discretion to sentence at anything less than the minimum range calculated under the guidelines.

The Court of Appeals stated that a sentencing court errs, post-*Booker*, when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the guidelines, but not demanded by statute governing sentencing for drug offenses, as simply advisory at step three of the post-*Booker* sentencing process (imposing the actual sentence after considering the relevant § 3553(a) factors). The Court of Appeals emphasized that a District Court is under no obligation to impose a sentence below the applicable sentencing guidelines range solely on the basis of the crack/powder cocaine differential in the guidelines. Furthermore, the Court of Appeals did not suggest (or even hint) that the District Court categorically reject the 100:1 ratio and substitute its own, as this is *verboten*. The limited holding here is that District Courts may consider the crack/powder cocaine differential in the guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process.

United States v. Hickson, 1626575 (3rd Cir.(Del.))). In this case, the Court of Appeals held that there was sufficient evidence to support a finding that the substance found in the defendant's possession was crack cocaine. A DEA chemist testified that her expert analysis had confirmed that the substance at issue was cocaine base. Moreover, a detective who had extensive experience in cases involving crack cocaine, testified that the "white, chunky rock-like substance" was crack, and finally, a detective, a veteran of "hundreds" of investigations involving crack, testified, based on the visual appearance of the drug and his investigatory experience, that the substance was crack.

United States v. Miles, 2006 WL 1625996 (3rd Cir.(Pa.))). In this appeal, the defendant argued that the District Court's sentence was "far greater than would be necessary to achieve the purpose of 18 U.S.C. § 3553(a)," and thus that it was unreasonable. According to the defendant, the law unfairly distinguishes between criminal offenses relating to cocaine powder and cocaine base (crack). The Court of Appeals agreed with the government that the District Court's sentence was not unreasonable. Notably, the defendant did not argue that the District Court erred in its consideration of any particular factor under § 3553(a) or that it failed to correctly apply the guidelines. Nor could the Court of Appeals discern from their review of the record that the Court committed any such error. The defendant's policy argument, viz., the disparate punishment for cocaine powder and cocaine base (crack) offenses, is not an adequate basis for the Court of Appeals to conclude that the Court imposed an unreasonable prison sentence. The Court of Appeals noted, "Congress has enacted the guidelines, which requires disparate punishment for the two types of offenses, and the District Court was bound to consider them. The defendant's argument on appeal is best directed to the legislative branch of our government, not to the courts."

United States v. Marshall, 2006 WL 1648606 (3rd Cir.(N.J.))). The defendant appealed his sentence, arguing, among other things, that his sentence of 168 months was unreasonable because the District Court did not consider the factor set forth in 18 U.S.C. § 3553(a)(6) - "sentencing disparity." The gist of the defendant's argument was that a comparatively stiff sentence for distributing cocaine base is unreasonable when compared to less severe penalties for distributing cocaine powder. The Third Circuit has "upheld the constitutionality of both the federal drug statutes (21 U.S.C. §§ 841(b)(1) and 846) and the guideline provisions (U.S.S.G. § 2D1.1) that treat crack cocaine offenses more severely than offenses involving an equal quantity of cocaine powder." *United States v. Alton*, 60 F.3d 1065, 1069 (3d Cir. 1995)(citing *United States v. Frazier*, 981 F. 2d 92 (3d Cir. 1992). It held that *Booker* did not compel a different result in the instant case.

In United States v. Scott, 2006 WL 1113513 (3rd Cir.(Pa.))), the defendant pled guilty to distribution of cocaine and crack cocaine. The defendant appealed the sentence, arguing that the District Court erred by failing to apply the beyond a reasonable doubt standard at the sentencing hearing and by relying on the Government's hearsay evidence in its calculation of the quantity of drugs.

As for the first argument, Scott maintained that, because his is a "transition case" (i.e., a case in which the guilty plea was entered before - - but sentencing occurred after - - the Supreme Court's decision in *Booker*, the *Booker* remedy of an advisory Guidelines scheme was unforeseeable when he pled guilty and, therefore, it cannot be applied to him without violating his due process rights or the Ex Post Facto Clause of the Constitution. The Court of Appeals concluded that Scott's contention, however, was foreclosed by a recent decision, also involving a "transition case," in which the Court of Appeals held that "as before *Booker*, the standard of proof under the guidelines for sentencing facts continues to be a preponderance of the evidence." *United States v. Cooper*, 437 F. 3d 324 (2006). Moreover, *Booker* itself expressly states that its holdings, including its remedial holding, apply to all cases on direct review. It was not an infringement of Scott's due process rights or a violation of the Ex Post Facto Clause for the District Court to impose a sentence based on facts found by a preponderance of the evidence.

The Court of Appeals also rejected Scott's contention that the District Court erred by relying on the Government's hearsay evidence in its calculation of the quantity of drugs, stating that any basis there may have been in *Blakely* for holding hearsay inadmissible at sentencing was negated by *Booker's* remedial holding. In fact, Justice Scalia's dissent in *Booker* indicates that the majority's holding did not alter a sentencing court's ability to rely on hearsay to make sentencing determinations.

The defendant also argued that the Guidelines' crack cocaine/powder cocaine disparity is so disproportionate, it "cannot be justified," and therefore, his 108-month sentence is unreasonable under *Booker*. He pointed to the "1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees," in which several federal judges, each of whom was a former United States Attorney, argue that the "disparity between powder cocaine and crack cocaine...results in sentences that are unjust and do not serve society's interests." The question before the Court of Appeals, however, is not whether a sentencing court may use the disparity as a reason to impose a shorter sentence than the one recommended by the Guidelines after *Booker*, but rather whether it is error for the District Court not to have taken the disparity into account. Because the Court of Appeals has routinely upheld the disparity against constitutional attack, including equal protection claims, it ruled that it would be "inconsistent to require the District Court to give a nonguideline sentence based on the disparity."

United States v. Brigman, 350 F.3d 310(3d Cir. 2003). Defendant and Jennings were arrested after police found a quantity of drugs in a vehicle they were driving. The Third Circuit held that the government proved by a preponderance of the evidence that the drugs were “crack” or cocaine base. A DEA chemist testified that the drugs were cocaine base. She further testified that while “crack” is not a scientific term, the shape of it suggested that it was crack cocaine. A DEA agent testified that the cocaine seized was crack cocaine, noting that it had a round beveled edge, which suggested that the cocaine had been “cooked” in a manner that crack is “cooked” The agent also testified that Jennings had told him that defendant had sold him “crack” on a regular basis. Finally, the court’s finding that the drugs were crack cocaine was supported by the drugs’ physical appearance: a lumpy, rocklike appearance characteristic of crack, and a round, beveled edge.

United States v. Hodge, 2003 WL 955599 (3rd Cir.(Virgin Islands))). In this case, the Court of Appeals held that a wax-and-flour mixture sold to undercover federal agent as "crack cocaine" did not constitute a "controlled substance analogue" within the meaning of the Controlled Substance Analogue Enforcement Act. This precluded prosecution for narcotics trafficking conspiracy and for using firearm during drug trafficking crime. The mixture did not satisfy Act's definition requring "substantially similar" chemical structure. 21 U.S.C.A. §§ 802(32)(A), 841, 846.

United States v. Davenport, 2003 WL 149895 (3rd Cir.(Del.))). Davenport argued that the district court erred in concluding that the cocaine base attributed to him was "crack" cocaine under the sentencing guidelines. The laboratory report established that sodium bicarbonate was not present in the cocaine base attributed to Davenport. However, Davenport freely entered into a plea agreement which stipulated that 394 grams of "crack" cocaine base, and 125 grams of powder cocaine would be attributed to him. The Court of Appeals rejected Davenport's eleventh hour attempt to rescind the stipulation he freely entered into in his plea agreement.

United States v. Hinton, 2003 WL 40479 (3rd Cir.(Pa.))). On appeal, Hinton contends that the district court erred in finding that the substance was crack cocaine. Here, the indictment explicitly charged Hinton with possession of "cocaine base (crack cocaine)." The plea agreement stipulated that the amount of cocaine base (crack cocaine) involved was more than 50 grams but less than 150 grams. During the plea colloquy, Hinton acknowledged that the prosecution's recitation of the evidence, which specifically referred to "crack cocaine" five times, was correct. In response to inquiries by the sentencing judge, Hinton acknowledged that he was carrying crack cocaine. Under these circumstances, the Court of Appeals found ample evidentiary support to conclude that the drug was crack cocaine.

United States v. Waters, 313 F.3d 151 (3d Cir. 2002). The sentencing guidelines define "crack" cocaine as "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate and usually appearing in a lumpy rocklike form." U.S.S.G. § 2D1.1(c), Note (D). This appeal presented the recurring question whether the government must show that the drugs seized from a defendant contained sodium bicarbonate in order to demonstrate by a preponderance of the evidence that they are crack for sentencing purposes. The Court of Appeals held that a substance need not contain sodium bicarbonate in order to qualify as "crack cocaine" under the sentencing guidelines. An experienced law enforcement officer testified that niacinamide was commonly used in area of drug conspiracy defendant's arrest as a substitute for sodium bicarbonate. The officer examined the substance in question and concluded from its appearance that it was in rock form. It was intended to be smoked. A DEA chemist testified that the niacinamide that was found in the substance at question served the same purpose as sodium bicarbonate, namely as a cutting agent. This testimony was sufficient to support the sentencing court's finding that the government had shown by a preponderance of the evidence that the substance was "crack cocaine."

United States v. Alexander, 2002 WL 1466470 (3rd Cir.(Pa.))). This appeal challenged the adequacy of the plea colloquy in terms of the identity of the drug in question as crack cocaine. The Court of Appeals held that the factual basis for the government's assertion that the drug involved was cocaine base (crack) was amply established. Alexander admitted, in both the plea agreement and the Statement of Defendant, that the drug he had possessed was cocaine base (crack). Moreover, the prosecutor's summary of the factual basis for the plea included the fact that the evidence would show that the drug involved was cocaine base or crack, as opposed to powder cocaine, and after hearing that summary, Alexander agreed with it.

United States v. Morrison, 2002 WL 1284109 (3rd Cir. (Pa.))). The defendant pled guilty to possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1). The district court found Morrison accountable for 217.7 grams of crack cocaine and 117.7 grams of powdered cocaine. Morrison appealed, contesting the district court's finding of 217.7 grams of cocaine to be crack cocaine.

During sentencing, "the character of the drug substance need not be shown beyond a reasonable doubt, but only by a preponderance of the evidence....The government must present reliable and specific evidence that the substance in question is crack, but the government need not provide chemical analysis nor is 100% certainly required in order to satisfy the evidentiary burden." At sentencing, the government called a forensic chemist with DEA and a BNI agent. The chemist testified that all five samples he analyzed were cocaine base, but he could not conclude whether the cocaine base was crack as is required for the enhanced penalties. The agent testified that the CI negotiated purchases only for crack cocaine. He also testified that the purchase price was consistent with crack cocaine. Morrison argues that the district court erred because the chemist could not testify that the cocaine base conformed to the Note D definition of crack. He argues that the agent's testimony that the substance looked like crack cocaine, and was sold as crack cocaine does not cure the deficiency in the chemist's testimony.

The Court of Appeals affirmed the judgment, stating "Notwithstanding the chemist's inability to conclude from his laboratory analysis that the substance he analyzed was the form of cocaine base referred to as crack, we see no error by the district court in its crack finding, especially in light of the deferential standard of review and the preponderance of the evidence standard applicable during sentencing. Despite a lack of testimony by the chemist on the form of the cocaine base, we held in *Dent* that when the chemist's testimony was combined with the officer's testimony in that case, there was sufficient evidence to satisfy the government's burden and to affirm the district court's factual finding that the substance was crack cocaine.

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The government called three witnesses to establish that the substance found in defendant's apartment was crack. The first witness, the supervisor of the police department's chemical lab, produced the lab's chemical analysis of defendant's drugs. The report stated that one of the drugs was cocaine base and the other was cocaine. The supervisor explained that the report referred to cocaine base rather than "crack" since the latter term was not generally used in the lab. The second witness, an

experienced narcotics detective, testified that he seized from defendant's apartment four bags containing an off-white beige substance, and an additional three bags containing a white powder. He further testified that the off-white beige substance, which was harder and off-color compared to the powder, appeared to be crack. The third witness, an experienced narcotics detective who had been present during the previous testimony, testified that, based on his experience, the item referred to as cocaine base would qualify as "crack" on the street. The defendant argued that the government failed to prove at the sentencing hearing that a substantial portion of the defendant's drugs was crack. The Court of Appeals upheld the district court's determination that the substance was crack. There was little doubt considering the color, texture, and circumstances that the cocaine base was crack. One hundred percent certainty is not required, nor is a precise chemical analysis.

United States v. Dent, 149 F. 3d 180 (3d Cir. 1998). Dent appealed his conviction and sentence for conspiracy to distribute crack cocaine alleging that the government failed to prove that the substance recovered during his arrest was crack cocaine. Although a chemist identified the contraband as cocaine base, she did not perform a test to determine whether it contained sodium bicarbonate. The sole evidence that Dent conspired to distribute crack rather than another form of cocaine base was a police officer's statement that the vials in Item 5 contained crack and a forensic scientist's testimony that crack generally is sold in vials or plastic bags. The court of appeals held that the district court did not abuse its discretion by finding that the testimony of the officer and forensic scientist satisfied the burden of proof. It also held that the weight calculation was reasonably reliable. The vials and their contents were substantially similar in appearance, police seized all the drugs at the same time and place, and the forensic scientist randomly selected the vials weighed.

Edwards v. United States, 118 S. Ct. 1475 (1998). Petitioners were charged with conspiring to sell mixtures containing cocaine and cocaine base. The jury was instructed that the government had to prove that the conspiracy involved measurable amounts of "cocaine or cocaine base," and it returned a general guilty verdict. The judge found that each petitioner's conduct involved both cocaine and crack and sentenced based on the crack guidelines. On appeal, for the first time, petitioners argued that the word "or" in the jury instruction required the judge to assume that the conspiracy involved only cocaine. In a unanimous opinion, the Supreme Court affirmed the crack sentence, holding that under the guidelines, the judge, not the jury determines the kind and quantity of controlled substances. Moreover, even if the jury had found the substance was cocaine, the "relevant conduct" section of the guidelines, 1B1.3, requires the judge to consider all drugs that are "part of the same course of conduct or common scheme or plan as the offense of conviction." Petitioners' argument might have made a difference if the guideline sentence for crack had exceeded the statutory maximum for powder cocaine, but the sentences here were within the statutory limits for powder cocaine.

United States v. Faulks, 143 F. 3d 133 (3rd Cir. 1998). Defendant pled guilty to cocaine distribution, money laundering and criminal forfeiture of real property. On appeal, he argued that the district court erred in finding that the controlled substance he distributed was crack cocaine. The Court of Appeals affirmed the district court's finding. The indictment charged distribution of crack. Defendant's plea was knowing and voluntary, and constituted an admission of all material facts alleged in the indictment, even where those facts are not essential elements of the offense charged. See *U.S. v. Dickler*, 64 F. 3d 818, 823 (3d Cir. 1995) and *U.S. v. Parker*, 874 F. 2d 174 (3d Cir. 1989). There was a further admission that the substance was crack when defendant agreed with the government's account of the factual basis for the plea.

United States v. Roman, 121 F. 3d 136 (3d Cir. 1997). The Third Circuit ruled that the government "just barely" met its burden of proving drug was crack. Police officer's conclusion was based on the way the substance was packaged--in vials with color caps. The officer testified that this is the way crack is typically packaged for sale in Philadelphia.

United States v. Powell, 113 F. 3d 464 (3d Cir. 1997). At sentencing, the district court found that the offense involved crack cocaine. Defendant claimed the lab report stated that the substance was "cocaine base" and "a powder." He observed that cocaine base is a crystalline substance, not a powder, and that the report may be inaccurate. The Third Circuit affirmed defendant's sentence, stating the district court properly relied on defendant's admissions during the plea colloquy to determine that the substance was crack cocaine. At the plea hearing, the government represented and the defendant repeatedly admitted the substance in question was crack cocaine. Admissions to the court by a defendant during a guilty plea colloquy can be relied upon by the court at the sentencing stage. *See U.S. v. James*, 78 F. 3d 851, 856 (3d Cir. 1996).

United States v. James, 78 F. 3d 851 (3d Cir. 1996). Defendant pleaded guilty to possession and distribution of cocaine base. In view of a 1993 amendment to §2D1.1, which states that cocaine base means "crack," defendant argued that crack is the only form of cocaine base subject to the 100 to one sentencing ratio, and that the government has the burden of showing by a preponderance of the evidence that the particular form of cocaine base was crack. Although defendant admitted in the plea colloquy that he sold crack, the Third Circuit held that the government must prove that the form of cocaine base is crack. Defendant's mere affirmance of government's casual reference to crack cocaine during the plea colloquy was not an admission that he possessed and sold crack.

United States v. Alton, 60 F.3d 1065 (3d Cir. 1995). Defendant was found guilty at trial of conspiracy and possession with intent to distribute cocaine base. The district court departed downward, concluding that the Sentencing Commission did not adequately consider the disparate impact that its policies would have on African-American males when it developed guideline ranges for crack cocaine. In reversing the departure, the appellate court held that: (1) the Sentencing Commission did not act arbitrarily or capriciously by using 100:1 ratio between powder and crack forms of cocaine in formulating drug equivalency tables for sentencing purposes, and (2) disparate impact of severe penalties for crack cocaine offenses on African-Americans was not valid ground for downward departure.

United States v. Frazier, 981 F. 2d 92 (3d Cir. 1992). Defendants argued that the sentencing scheme's 100:1 ratio between cocaine and cocaine base is racially discriminatory. The Third Circuit held that Congress and the Sentencing Commission did not step beyond the bounds of the Constitution in selecting the 100:1 ratio. There is no evidence to suggest that distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on part of either Congress or Sentencing Commission.

United States v. Jones, 979 F. 2d 317 (3d Cir. 1992). Defendant raised two issues on appeal. First, he argued that the district court abused its discretion by denying his motion to withdraw his guilty plea. Second, he contended that the sentencing enhancement for distributing cocaine base is constitutionally vague in that it fails to differentiate cocaine base from cocaine. The district court denied defendant's motion to withdraw his guilty plea upon finding that the reason he sought to withdraw the plea was his "fear of a substantial sentence," and that the reasons proffered by defendant were merely a "post hoc" attempt to justify his motion. The Third Circuit affirmed the lower court's ruling. In *U.S. v. Huff*, 873 F. 2d 709 (3d Cir. 1989), the court held that three factors must be considered when a district court evaluates a defendant's motion to withdraw a guilty plea: (1) whether the defendant asserts his innocence; (2) whether the government would be prejudiced by his withdrawal; and (3) the strength of the defendant's reasons to withdraw the plea. The Third Circuit further held that the sentencing guideline imposing higher offense levels for offenses involving cocaine base was not unconstitutionally vague for failing to define the term "cocaine base." Crack is chemically different from cocaine and used differently. Crack is a "cocaine base" and a chemical compound created from alkaloid cocaine, with a definable molecular structure different from cocaine salt. Guidelines have a reasonable basis to differentiate between cocaine base and cocaine salt, and in addition are not vague under common usage definitions. According to the circuit court, crack is "far more addictive than cocaine in its salt form, and is more accessible due to its relatively low cost."

LSD

Neal v. United States, 116 S. Ct. 763 (1996). Defendant argued that the presumptive weight in the sentencing guidelines should also be used to calculate the weight for mandatory minimum sentencing purposes under the statute, 21 U.S.C. §841(b). The Supreme Court concluded that the guidelines did not control the statute, and pursuant to *Chapman,* the actual weight of the blotter paper or other carrier medium must be included when calculating the statutory minimum sentence. Accordingly, the weight of LSD for mandatory minimum purposes will almost always be greater than the weight for guideline purposes.

United States v. Hanlin, 48 F. 3d 212 (3d Cir. 1995). *Chapman v. U.S.*, 500 U.S. 453 (1991) requires an LSD sentence to be based on the combined weight of the LSD and the blotter paper carrier medium. Defendant moved to reduce his sentence under the November 1993 amendment to guideline §2D1.1(c) which assigns a weight of .4 mg to a dose of LSD. The Third Circuit refused to reduce defendant's sentence, holding that even after amendment to sentencing guideline dealing with determining weight of LSD for purposes of drug quantity table, carrier

medium is to be included in determining weight of LSD for purposes of determining applicable statutory mandatory minimum sentence. Thus, even if defendant's guideline range were reduced by applying the amendment, his 10-year mandatory minimum sentence under 21 U.S.C. §841(b)(1) would not be affected.

Chapman v. United States, 500 U.S. 453 (1991). The Supreme Court ruled that 21 U.S.C. §841(b) requires the weight of the carrier medium, typically blotter paper, to be included in determining the weight of the LSD for mandatory minimum sentencing purposes. Effective November 1, 1993, the Sentencing Commission revised the method of calculating the weight of LSD, instructing courts to give each dose of LSD on carrier medium a constructive or presumed weight of 0.4 milligrams. This Amendment, 488, was made retroactive by Amendment 502.

Methamphetamine

United States v. Gori, 324 F.3d 234 (3rd Cir. 2003). The defendant pleaded guilty to once count of conspiracy to distribute more than 500 grams of methamphetamine in violation of 21 U.S.C. § 846. On appeal, Gori maintained that he did not sell more than 500 grams of a mixture containing methamphetamine. He reasoned that, because the drugs he sold were so diluted they were effectively unmarketable, they were not a "mixture." He therefore contends that his sentence should reflect not the total weight (i.e. methamphetamine plus cutting agent) of the drugs he sold, but only the weight of the pure methamphetamine contained therein - 27 grams.

The Court of Appeals rejected Gori's argument. While § 841 does not explicitly define "mixture," the Supreme Court has said that a drug combined with a carrier medium "used to facilitate the distribution of the drug" is a mixture. *Chapman v. United States*, 500 U.S. 453, 466, 468, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (holding that § 841 requires that LSD blotter paper be included in weight of a "mixture" containing a detectable amount of LSD).

Gori also challenged the district court's failure to depart downward due to the low purity - 2.7 percent on average- of the methamphetamine mixture he sold. The Court of Appeals held that the district court was correct in refusing to depart downward, because to do so based on the low quality of a drug is an improper exercise of discretion. The Sentencing Commission explicitly decided to make a defendant's sentence turn on a drug's weight, not its purity.

United States v. DeJulius, 121 F. 3d 891 (3d Cir. 1997). Defendant pleaded guilty to conspiracy to distribute 19 pounds of methamphetamine. He argued that the ten-year mandatory minimum for over 100 grams of methamphetamine was not applicable unless the government could prove that the methamphetamine in question was actually D-methamphetamine as opposed to L-methamphetamine. The district court concluded that because only D-methamphetamine could be considered "methamphetamine" under 21 U.S.C. §841(b)(1)(A)(viii), and only 55.8 grams of D-methamphetamine could be attributed to the defendant, the ten-year mandatory minimum did not apply. The Third Circuit reversed, holding that for mandatory minimum

purposes the type of methamphetamine is irrelevant. The statute does not distinguish btween D- and L-meth. The district court erred in dividing the DL-methamphetamine into D-meth and L-meth, finding that only D-meth should be counted toward the 100 grams required by the mandatory minimum statute and failing to apply the mandatory minimum. In reaching its decision, the district court erroneously relied on *U.S. v. Bogusz*, 43 F. 3d 82 (3d Cir. 1994). The analysis in *Bogusz* was clearly limited to the guidelines, not statute. Moreover, *Bogusz* has been rendered virtually obsolete since the Sentencing Commission has eliminated the distinction between D- and L- methamphetamine effective November 1995.

United States v. Bogusz, 43 F. 3d 82 (3d Cir. 1994). Defendant pled guilty to conspiring to distribute phenylacetic acid, a listed chemical, knowing it would be used to manufacture methamphetamine in violation of 21 U.S.C. §841(d)(2). Section 2D1.11(c)(1) (Distributing a Listed Chemical) directs a court to apply §2D1.1 if the offense involved manufacturing a controlled substance. The Third Circuit held that (1) the district court properly applied the cross-reference to sentence defendant under §2D1.1; (2) methamphetamine (actual) is net amount after impurities, cutting agents, and waste by-products are removed; (3) methamphetamine (actual) referenced in drug quantity tables is D-meth only -- in order to calculate a base offense level under §2D1.1(c) for L-meth, the substance must first be converted into marijuana equivalents; and (4) incorrect determination of methamphetamine type can be plain error.

§ 924(c) Using or Carrying A Firearm In Relation to a Drug Offense

United States v. Reeves, 2003 WL 1950046 (3rd Cir.(Pa.))). The defendant appealed the sentence imposed against him for "brandishing" a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A). He argued that he was entitled to a fact finding hearing on whether he brandished a gun, contending brandishing is an element of the offense that must be alleged in the indictment and proved beyond a reasonable doubt. Although he admittedly drove the getaway car, the defendant maintains he did not brandish a gun during two armed robberies committed by his co-defendants. In concluding that the defendant misconceived the nature of his violation, the Court of Appeals cited *United States v. Price*, 76 F.3d 526, 529 (3d Cir. 1996)(holding that person who aids and abets use of a firearm in a crime of violence is punishable as a principal actor under 18 U.S.C. § 924(c)). Furthermore, the government specifically alleged brandishing as an element of the charges against him. Since the defendant's guilty plea, the Supreme Court has addressed whether brandishing is an element of 18 U.S.C. § 924(c)(1)(A) that the prosecution must prove beyond a reasonable doubt. In *Harris v. United States*, 122 S.Ct. 2406, 2420 (2002), the Supreme Court held that brandishing a firearm is an aggravating factor to be considered at sentencing, not an element of the crime of carrying a firearm under 18 U.S.C. § 924(c)(1)(A).

United States v. Ast, 2002 WL 31477314 (3rd Cir.(Pa.))). The defendant pled guilty to charges of conspiracy and armed robbery, and two counts of brandishing a firearm during commission of a crime. The district court sentenced Ast to an aggregate term of 40 years. Included in this sentence was a seven-year term for the first count of brandishing a firearm and a 25 year sentence for the second firearm count pursuant to 18 U.S.C. § 924(c), which governs certain firearm offenses. Ast appealed, contending that the these subsequent convictions should be interpreted to include only those convictions imposed later in time, and should not include multiple findings of guilt contained within a single judgment and sentence. Ast acknowledged that his argument that is directly contrary to the Supreme Court's holding in *Deal v. United States*, which held that a "subsequent conviction" within the meaning of the Sentencing Guidelines was intended to include any subsequent "finding of guilt by a judge ir a jury," including those occurring in the context of a single adjudicative proceeding resulting in a single multi-count judgment of conviction. 508 U.S. 129, 131 (1993). The judgment of the district court was affirmed.

United States v. Sumler, 294 F.3d 579 (3rd Cir.2002). In this appeal the Third Circuit concluded that bartering illegal drugs for a gun constitutes use of a firearm in connection with drug trafficking and invokes the mandatory sentence provisions of 18 U.S.C. § 924. The defendant and others sold crack cocaine from a house for several months in 1999. Joe Wells was one of the customers who frequented the place. On one occasion, Wells traded a gun for cocaine from a co-defendant who also used the house for drug trafficking. Defendant offered to buy the gun from the co-defendant, but was refused. A few days later, defendant obtained a gun from Wells in exchange for drugs.

United States v. Couch, 291 F. 3d (3rd Cir. 2002). The defendant raised one issue on appeal. He argued that because he entered one guilty plea to six counts of the indictment at the same time, no one conviction is a "second or subsequent" conviction subject to the enhanced sentencing provisions of 18 U.S.C. § 924(c)(1)(C). Thus, he argued that the district court erred in imposing enhanced sentences of 25 years each for two of the three firearms convictions. The Court of Appeals affirmed, stating that the phrase "second or subsequent" in 18 U.S.C. § 924(c)(1)(C) refers to each conviction in excess of one. In the case of multiple § 924(c)(1) convictions, whether entered simultaneously or serially, the standard penalty provided in § 924(c)(1)(A)(iii) should be assigned to one and the enhanced penalty set forth in § 924(c)(1)(C)(i) applies to every other."

United States v. Stewart, 283 F.3d 579 (3d Cir. 2002). On appeal, the defendant challenged the district court's imposition of two mandatory consecutive sentences under 18 U.S.C. § 924(c)(1). He argued that when multiple convictions are entered simultaneously, none of the convictions may be considered to be "second or subsequent" convictions for enhanced sentencing purposes under 18 U.S.C. § 924(c)(1)(C). The Third Circuit held that enhanced sentencing for a "second or subsequent" conviction under 18 U.S.C. § 924(c) applies where the convictions for the first and subsequent § 924(c) offenses are entered simultaneously. See *Deal v. United States*, 508 U.S. 129 (1993); *United States v. Coates*, 178 F. 3d 681, 683 n. 2 (3d Cir. 1999); and *United States v. Casiano*, 113 F. 3d 420, 424-26 (3d Cir. 1997).

United States v. Matthews, 2002 WL 205678 (3rd Cir.(Pa.))).The defendant argued on appeal that the district court erred in imposing the mandated enhanced sentence under 18 U.S.C. § 924(c)(1)(C) for a second or subsequent conviction and the district court erred in failing to examine the factors set forth in U.S.S.G. § 5K1.1 before determining the extent of the downward departure based on the defendant's cooperation. The defendant asserts that he simply did not have two convictions, only one, because he pled guilty to all offenses at the same time in one plea. Second, he argued that even if he did have more than one conviction of violating § 924(c), neither was "second" or "subsequent" again because he pled simultaneously to both offenses. The Court of Appeals affirmed the sentence, stating "...timing does not matter. It does not matter whether a defendant is tried by a jury or pleads guilty and it does not matter whether he pleads simultaneously or separately to multiple offenses, he is convicted of all of the offenses. Each guilty plea is a separate conviction, one following after the other, no matter how may times the word 'guilty' is uttered."

Muscarello v. U.S., 118 S. Ct. 1911 (1998). Under 18 U.S.C. § 924(c)(1), a person who uses or carries a firearm during and in relation to a drug trafficking crime is subject to a five year mandatory minimum prison term. In a 5 - 4 written opinion by Justice Breyer, the Supreme Court held that the phrase carries a firearm is not limited to the carrying of firearms on the person. Rather it also applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the trunk of a car, which the person accompanies.

United States v. Gonzalez, 117 S. Ct. 1032 (1997). The Supreme Court held that the plain language of 18 U.S.C. §924(c) forbids a district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. 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."

United States v. Martin, 116 F. 3d 702 (3d Cir. 1997). After defendant's conviction for use of a firearm had been reversed under *Bailey v. U.S.*, 116 S. Ct. 501 (1995), the district court was permitted to impose a two-level enhancement under §2D1.1(b)(1) for possession of a firearm in connection with a drug offense. The court of appeals relied on *U.S. v. Davis*, 112 F. 3d 118 (3d Cir. 1997).

United States v. Eyer, 113 F. 3d 470 (3d Cir. 1997). The Supreme Court in *Bailey*, 116 S. Ct. at 509 recognized that its opinion did not affect the "carry" prong of §924(c)(1) and that a "number of courts of appeals have held that possessing a firearm in an automobile during and in relation to a drug trafficking crime constitutes 'carrying' under §924(c)(1). The facts here concluded that Eyer was carrying the firearm. It was loaded and in the console between the two front seats, and was conveyed with the cocaine to the purchaser's apartment.

United States v. Davis, 112 F. 3d 118 (3d Cir. 1997). Defendant filed a motion under 28 U.S.C. §2255 seeking to vacate, set aside, or correct his sentence. He claimed that his conviction under §924(c) for use of a firearm during a drug trafficking crime was inconsistent with *Bailey v. U.S.*, 116 S. Ct. 501 (1995). The district court agreed, vacated the §924(c) conviction and ordered resentencing on the remaining counts. In resentencing defendant, the district court vacated the 60 month sentence imposed for the §924(c) conviction and as required under §2D1.1(b)(1), imposed a two-level enhancement for possession of a firearm during a drug crime. Defendant appealed, arguing the district court lacked jurisdiction to resentence him on the unchallenged drug counts. The Third Circuit held that after vacating the §924(c) conviction, the district court had jurisdiction under §2255 to resentence on the remaining drug counts. The language "correct the sentence" in §2255 is not limited to the portion of the sentence directly associated with the vacated conviction.

United States v. Goggins, 99 F. 3d 116 (3d Cir. 1996). Defendant was convicted of possession with intent to distribute cocaine base and using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§924(c). In view of *Bailey v. U.S.*, 116 S. Ct. 501 (1995), the district vacated the §924(c) conviction but then imposed a two-level enhancement under §2D1.1(b)(1) for possession of a firearm on the drug conviction, concluding that the weapon clearly was present in the bedroom when police arrested the defendant. The Third Circuit ruled that a weapons enhancement under §2D1.1(b)(1) is permissible following acquittal on §924(c) charge. Section 2D1.1(b)(1) is broader than 18 U.S.C. §924(c)(1).

Smith v. United States, 113 S. Ct. 2050 (1993). The Supreme Court held that offering to trade a firearm in exchange for drugs constitutes "use" of the firearm under §924(c).

§ 2D1.1(b)(1) Two-Level Enhancement for Possession of Dangerous Weapon

United States v. Cole, 2007 WL 2461776 (3rd Cir.(Pa.))). The District Court found the defendant possessed a firearm in relation to the drug offense. The evidence came solely from on of the defendant's co-conspirators who testified that the defendant threatened his sister with a gun because he suspected she stole a stash of drugs.

The defendant appealed this finding, arguing that testimony from co-conspirators is unreliable because it is motivated by a desire for leniency in exchange for cooperation. The Court of Appeals, citing 18 U.S.C. § 3661, affirmed the Judgment and Commitment Order of the District Court, stating "The credibility of a co-conspirator may be suspect but the credibility of a witness if for the factfinder. A reviewing court is deferential to the trial court's factual determinations. There is no basis for finding the District Court was in error. It further noted that even post-*Booker*, a sentencing court may consider relevant conduct the court finds by a preponderance of the evidence. *United States v. Grier*, 475 F. 3d 556, 561 (3d Cir. 2006).

United States v. Brito, 2007 WL 2343765 (3rd Cir. (Pa.)). The defendant appealed his sentence, asserting that the district court erred in imposing a two-level sentencing enhancement for possession of a dangerous weapon during a violation of the Controlled Substances Act pursuant to U.S.S.G. § 2D1.1(b)(1). Because the defendant was not in actual possession of the firearm, he argued that the government must prove that he had constructive possession of it. He further argued that while the government may have shown access to the weapon, it failed to prove any intent to exercise control over it. The defendant also argued that the government failed to demonstrate any nexus between the weapon and the underlying criminal activity that it was alleged to further. The government responded that the defendant overstated its burden. The government argued that temporal and spatial proximity between firearms and drugs makes their connection and a possessor's intent to use the firearms highly probable.

The Court of Appeals agreed with the government that there was no clear error in the district court's conclusion to apply a two level increase pursuant to the guidelines. In *United States v. Drozdowski*, 313 F. 3d 819 (3d Cir. 2002), the Court of Appeals noted that courts have relied on a number of variables in making the "clearly improbable" determination, including: (1) the type of gun involved (handguns less improbable than hunting rifles); (2) whether the gun was loaded; (3) whether the gun was stored near the drugs or drug paraphernalia; and (4) whether the gun was accessible. Here, the firearm was an unloaded handgun stored next to some of the drugs in the apartment couch - - a readily accessible location. Other drug paraphernalia, including a cooking pot with a latent fingerprint matching that of the defendant and ammunition for the gun were also found in the apartment. The defendant was seen entering and exiting the apartment and was in possession of a key to the apartment. Therefore, it was not clearly improbable that the defendant used the Lorcin .380 caliber semiautomatic pistol in connection with his drug trafficking activity.

United States v. Manigault, 2007 WL 1109243 (3rd Cir. (Pa.))). The facts of this case are as follows: A tow truck operator towing an illegally parked car spotted a gun on the front seat of the car. When the police arrived, the tow truck operator opened the door of the car and the police recovered the gun, some marijuana, and 32 grams of crack cocaine. The registered owner, Richena Stanley, called the police to report that her car had been stolen. When the police contacted her, she told them that the defendant bought and used the car, but registered it in her name. She also told them that she had falsely reported the car as stolen on the defendant's instructions. She cooperated with the police, who recorded a phone call in which the defendant again instructed her to report the car as stolen. The defendant was subsequently sentenced to 235 months imprisonment following his plea of guilty to two counts of violating 21 U.S.C. § 841(a)(1)(distribution and possession with intent to distribute crack cocaine).

On appeal, he objected to enhancements for obstruction of justice (U.S.S.G. § 3C1.1) and possession of a deadly weapon (U.S.S.G. § 2D1.1) as well as to his classification as a career offender (U.S.S.G. § 4B1.1). The defendant's first objection was that the application of § 3C1.1, allowing a sentencing enhancement for obstruction of justice, was not warranted for his instructions to Stanley to falsely report the car as stolen. He argued that Application Note 4(g)

of U.S.S.G. § 3C1.1, one example in a non-exhaustive list of conduct warranting the enhancement, requires that a false statement have "significantly obstructed or impeded" the investigation. He also directed the court's attention to Application Note 5(b), which states that "making false statements, not under oath, to law enforcement officers" does not warrant the enhancement unless Application Note 4(g) applies.

The Court of Appeals held that the conduct addressed in Application Note 5 references ordinary, and less culpable, evasive conduct than that attributed to the defendant. He twice requested that Stanley lie in an effort to interfere with the police investigation. A false record was produced (the stolen car report made by Stanley at the defendant's behest) during the investigation, and Stanley was directed to conceal evidence material to an investigation. U.S.S.G. § 3C1.1 Application Note 4(c) and (d). The Court of Appeals held that the enhancement was properly applied.

The defendant's next objection was to the application of § 32D1.1(b)(1) for possession of a deadly weapon during a drug trafficking offense. He argued that the district court relied upon "hearsay" and not an admission by him or a finding by the jury that he possessed the gun found on the front seat of the car, in violation of *United States v. Booker*, 543 U.S. 220 (2005). Moreover, because the gun possession count was dropped as a result of the plea agreement, he argued that his sentence was enhanced for "acquitted conduct" in violation of the Sixth Amendment, again citing *Booker*. The Court of Appeals disagreed.

Booker's teachings regarding the requirements of jury factfinding or admissions by a defendant were only applicable when the sentencing guidelines were mandatory. Judges have broad discretion to impose a sentence within a statutory range. Indeed, unindicted conduct rising to the level of a crime can be found, by a preponderance of the evidence, to be a factor for enhancement so long as the sentence lies within the statutory maximum. See *Grier*, 475 F. 3d at 561. It was undisputed, moreover, that a gun was recovered from the car along with the drugs the defendant admitted to possessing. Given the proximity of the gun to the recovered drugs - - both in the front seat of the car - - it is not "clearly improbable that the weapon was connected with the offense. U.S.S.G. § 2D1.1, Application Note 3. And even assuming the defendant was "acquitted" of the gun possession charge when it was dismissed as part of the plea agreement, no relief is in order after *Booker*. See *United States v. Watts*, 519 U.S. 148, 156-57 (1997)(allowing sentencing enhancements for acquitted conduct. Based on the foregoing, the Court of Appeals held that the enhancement for possession of a deadly weapon (U.S.S.G. § 2D1.1) was properly applied.

Finally, the defendant disputed the district court's finding that he was a "career offender" under U.S.S.G. § 4B1.1. He argued that one of his predicate convictions, Recklessly Endangering Another Person in violation of 18 Pa.C.S.A. 2705, was not a crime of violence as defined in U.S.S.G. § 4B1.2(a). The Court of Appeals looked only to the elements of the crime. The two elements of the crime are recklessness and placing another in danger of death or serious bodily injury. The Court of Appeals concluded that recklessly placing another in danger of death

or serious bodily injury is clearly conduct presentencing a "serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 Application Note 1. Therefore, the Court of Appeals held that a violation of 18 Pa.C.S.A. § 2705 is a crime of violence and the defendant is a career offender under § 4B1.2.

United States v. Pope, 2004 WL 830902 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred because he did not own or use the three weapons found at his residence. The Court of Appeals rejected this argument. Because one of the three guns was found (loaded) next to a bag of crack cocaine, and with the defendant not having produced any evidence in his favor, it cannot be said that it was "clearly improbable" that the weapon was connected to the underlying offense. And the defendant's contention that the guns weren't his is simply irrelevant, for ownership of the weapons is not what is at issue.

United States v. Givan, 320 F.3d 452 (3d Cir. 2003). On appeal, the defendant argued that the district court clearly erred in finding that he was involved in the distribution of between one and three kilograms of heroin and that he possessed a firearm in relation to drug trafficking. A co-conspirator testified that Torrence gave him a gun to protect them on every trip they took to pick up drugs. While Torrence makes much of the fact that the troopers did not recover a firearm from the vehicle or at the scene of the arrest, there is no support for his argument that such recovery is a prerequisite to the application of the firearms enhancement. Similarly, there is no support for his argument that he should not have received the firearms enhancement because his co-conspirator did not receive it. The Court of Appeals upheld the firearms enhancement.

United States v. Sanders, III, 2003 WL 257527 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred in imposing a two level enhancement for possession of a dangerous weapon. The Court of Appeals affirmed. There is evidence that the appellant knew that one of his co-conspirators carried a pistol during their joint drug trafficking activities. Moreover, appellant had firearms at his residence and in close proximity to other drug trafficking paraphernalia.

United States v. Davenport, 2003 WL 149895 (3rd Cir.(Del.))). Davenport argued that the district court erred in applying a two level enhancement for possession of a firearm pursuant to U.S.S.G. § 2D1.1(b)(1). While searching Davenport's home, police found a .9mm handgun at the very time Davenport had arranged to sell more drugs to the informant. That gun was found in a bedroom on a different floor that the drugs and drug paraphernalia. However, a 15 year police veteran testified that drug dealers typically use firearms to protect their product, cash and personal well being. Moreover, even though the gun was not found in close proximity to the drugs or drug paraphernalia, a loaded magazine that fit the gun was nearby as was other evidence that the firearm was used in connection with the drug business. The Court of Appeals held that the district court's finding was not erroneous.

United States v. Drozdowski, 313 F.3d 819 (3d Cir. 2002). The defendant was a distributor of cocaine. He operated with the assistance of his wife and other family members. His mother-in-law stored cocaine at her house and, unbeknownst to his father, the defendant kept the proceeds from his business at his father's house. Agents subsequently searched the father's home. Two unloaded revolvers were found underneath a desk in a bedroom. Agents seized more than $31,000 from a dresser in a hallway. A cutting agent and zip-lock bags were seized.. The defendant appealed, asserting that it was clearly improbable that the weapons found in his father's house were connected with the conspiracy to distribute cocaine. He bases his argument on the idea that because the guns were unloaded and buried under boxes and assorted bric-a-brac, they were inaccessible, and therefore it is clearly improbable that they were being used in connection with the conspiracy. The Court of Appeals upheld the enhancement. Both guns were handguns. Though the guns were unloaded, the .44 was stored in a case with its ammunition and they were stored in close proximity to currency and drug paraphernalia. The room where agents discovered the guns contained a cutting agent.

United States v. Thornton, 306 F.3d 1355 (3d Cir. 2002). The defendant appealed, arguing that the district court erred by applying a two level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a weapon. He raised two arguments against the imposition of this enhancement. First, he contends that the district court violated his plea agreement by considering his post-cooperation statements in applying the enhancement. Second, the defendant argued that, absent his post-cooperation statements, there is insufficient evidence supporting the enhancement's application.

In enhancing Thornton's sentence under § 2D1.1(b)(1), the district court relied in part on the fact that "the defendant's own admissions at one time confirmed the fact that the guns were in the house." Thornton offered this information while cooperating with the Government, and therefore the district court's consideration of it violated his plea agreement as well as U.S.S.G. § 1B1.8. However, the Court of Appeals concluded that the Government presented sufficient evidence, independent of Thornton's post-cooperation statements, in support of this enhancement. According to the presentence investigation report, one of Thornton's co-conspirators admitted that "when he, Mr. Thornton and others were dealing drugs in Carlisle, they were in possession of two handguns. This admission of gun possession constituted sufficient evidence supporting Thornton's § 2D1.1(b)(1) enhancement. Thornton is culpable for the co-conspirator's gun possession since, due to Thornton's presence during the described drug transactions, his co-conspirator's actions were reasonably foreseeable.

United States v. Johnson, 302 F.3d 139 (3d Cir. 2002)). The defendant was convicted of possessing drugs with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). He appealed his conviction and sentence, arguing that the district court improperly imposed a two level sentencing enhancement for obstruction of justice after finding that he committed perjury during several portions of his trial testimony, and mistakenly imposed a two level sentencing enhancement for possession of a firearm because he had a loaded revolver in the same bag as his drugs.

The evidence shows that the defendant possessed a loaded firearm in the bag containing the drugs and drug paraphernalia. For the foregoing reason, the Court of Appeals upheld the enhancement for possession of a firearm.

United States v. Bellitti, 2002 WL 1058093 (3rd Cir.(Del.))). The defendant and Ignazio Lena were managers of a heroin distribution ring. The investigation culminated when four of the defendant's associates delivered heroin and were arrested. Two associates were in possession of firearms. On appeal, Bellitti contends that the district court erred in adding two levels to his base offense level under U.S.S.G. § 2D1.1(b)(1) because it was not reasonably foreseeable that his co-conspirators would be in possession of firearms during drug trafficking activity. The Court of Appeals disagreed. Bellitti had a managerial role in the drug conspiracy. He and Ignazio Lena set up and engineered a transaction in which their associates were to deliver over $300,000 worth of heroin to buyers in Delaware. During the planned delivery, Bellitti's associates were arrested and FBI agents found some of them in possession of firearms. Firearms are the "tools of the trade" for drug dealers, especially in large-scale transactions. The Court of Appeals held that it was not clear error to conclude that the coconspirators' possession of firearms at the scene of the drug exchange was reasonably foreseeable to Bellitti.

United States v. Mota, 2002 WL 575607 (3rd Cir.(Pa.))). Mota pled guilty to conspiring to distribute, distributing, and possessing with intent to distribute 231.06 grams of crack cocaine. He appealed, challenging the district court's two level enhancement for possession of a firearm under U.S.S.G. § 2D1.1(b)(1). Given the presence of a loaded .38 caliber handgun in Mota's residence where and when drugs and drug paraphernalia were seized, the district court did not err in imposing that enhancement.

United States v. Luna, 2002 WL 480959 (3rd Cir.(Pa.))). The defendant's sole contention on appeal is that the district court erred in applying a two point enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a weapon during the drug offense. In order for the enhancement to apply, the government must prove, by a preponderance of the evidence, that the defendant possessed the weapon and that the connection between the weapon and the drug offense was not clearly improbable. See *United States v. Price*, 13 F.3d 711, 733 (3d Cir. 1994). The Court of Appeals reviewed the record and found that there was sufficient evidence before the district court to support the finding.

United States v. Candalario, 2002 WL 405748 (3rd Cir. (Pa.))). On appeal, the defendant contends that the district court erred in adding two points to his base offense level based on a determination that dangerous weapons were used by the defendant. According to the pre-sentence report, the defendant and his brother operated an extensive heroin trafficking business in Lancaster and York counties. Investigators were informed that the defendant and his brother were known to carry knives and handguns. The defendant argued that the government did not prove that he possessed dangerous weapons in connection with his drug activities. However, in addition to the information regarding the defendant's use of guns that was furnished to investigators, the defendant implicitly admitted in his phone conversation with the probation

officer prior to his sentencing that he did use guns. The probation officer inquired of the defendant about his use of guns, to which he responded: "that goes with the territory." There was also credible evidence that the defendant had stabbed a customer over a drug debt. The Court of Appeals held that the defendant's admissions and other evidence adequately supported the two level enhancement.

United States v. Pitt, 193 F. 3d 751(3d Cir. 1999). On appeal, defendant Strube argued that the two level enhancement of possession of a firearm was not warranted. The presentence report, describing the offense conduct, stated that Wallace Pitt drove a quantity of cocaine from Utah to Strube's home in Pennsylvania, where he met up with Richard Pitt, who had flown another quantity of cocaine from Utah to Pennsylvania. Wallace Pitt told investigators that Strube took the bags of cocaine from his car and later took him on a tour of his house. Pitt said Strube showed him several firearms including a .357 caliber revolver. The Court of Appeals upheld the two level enhancement, stating that "it takes no imagination whatsoever to conclude that Strube displayed his weapons to Pitt, not so Pitt, the gun collector could admire them, but so Pitt, the drug courier, would clearly understand that Strube was never to be crossed.

United States v. Gibbs, 190 F. 3d 188 (3d Cir. 1999). In July 1996, while the investigation of the conspiracy was ongoing, an informant told the government that Brown had participated in an armed robbery during which a security guard was shot. The government searched Brown's apartment, discovered a shotgun, and prosecuted Brown under 18 U.S.C. § 922(g) which criminalizes possession of a weapon by a convicted felon. At sentencing in the instant case, the government introduced as evidence the sawed-off shotgun, which was at the heart of his earlier conviction, on the ground that Brown had possessed this shotgun during the relevant time periods for which he was an enforcer for the instant conspiracy. The district court added two points to his offense level in accordance with U.S.S.G. § 2D1.1(b)(1). Brown alleges that this constituted double counting and violated double jeopardy, since he had already been punished for possessing the shotgun. The Court of Appeals held that "because Brown's possession of a weapon was the basis for an earlier conviction but a mandatory ground for enhancement in a separate offense with different requirements, the district court did not violate Brown's double jeopardy rights and did not double count in reaching Brown's final offense level.

United States v. Russell, 134 F. 3d 171 (3d Cir. 1998). The defendant was convicted of drug conspiracy and conducting a continuing criminal enterprise. He was the organizer of a complex and lucrative scheme to distribute drugs. The district court applied a two level enhancement under § 2D1.1(b)(1) based on defendant's possession of a knife he used to assault a man who had stolen his drug proceeds. Defendant asserted that he used the knife in self-defense and that this was not the type of possession contemplated by § 2D1.1(b)(1). The appellate court affirmed, stating that the confrontation between the defendant and his victim was over drug proceeds. Under such circumstances, it was not improbable that the knife was connected with the drug offense.

United States v. Knobloch, 131 F. 3d 366 (3d Cir. 1997). Defendant was convicted of conspiracy to distribute marijuana, distribution of anabolic steroids, and using or carrying a firearm during and in relation to a drug trafficking crime. At one point, defendant sold a bag of steroids to a cooperating individual and was immediately arrested. He was found in possession of a loaded 9mm pistol. A subsequent search of defendant's residence revealed two other handguns. The district court erred when, after it had sentenced defendant under 18 U.S.C. §924(c) for carrying a firearm during and in relation to a drug crime, it enhanced his sentence under §2D1.1 based on his possession of other firearms. The court of appeals noted that application note 2 to §2K2.4 prohibits a two-level enhancement under these circumstances for possession of a firearm--whether it be the one directly involved in the underlying offense or another firearm, even one in a different location. If the court imposes a sentence for a drug offense along with a consecutive sentence under 18 U.S.C. §924(c) based on that drug offense, it simply cannot enhance the sentence for the drug offense for possession of any firearm.

United States v. Martin, 116 F. 3d 702 (3d Cir. 1997). After defendant's conviction for use of a firearm had been reversed under *Bailey v. U.S.*, 116 S. Ct. 501 (1995), the district court was permitted to impose a two-level enhancement under §2D1.1(b)(1) for possession of a firearm in connection with a drug offense. The court of appeals relied on *U.S. v. Davis*, 112 F. 3d 118 (3d Cir. 1997).

United States v. Davis, 112 F. 3d 118 (3d Cir. 1997). Defendant filed a motion under 28 U.S.C. §2255 seeking to vacate, set aside, or correct his sentence. He claimed that his conviction under §924(c) for use of a firearm during a drug trafficking crime was inconsistent with *Bailey v. U.S.*, 116 S. Ct. 501 (1995). The district court agreed, vacated the §924(c) conviction and ordered resentencing on the remaining counts. In resentencing defendant, the district court vacated the 60 month sentence imposed for the §924(c) conviction and as required under §2D1.1(b)(1), imposed a two-level enhancement for possession of a firearm during a drug crime. Defendant appealed, arguing the district court lacked jurisdiction to resentence him on the unchallenged drug counts. The Third Circuit held that after vacating the §924(c) conviction, the district court had jurisdiction under §2255 to resentence on the remaining drug counts. The language "correct the sentence" in §2255 is not limited to the portion of the sentence directly associated with the vacated conviction.

United States v. Price, 13 F. 3d 711 (3d Cir. 1994). Defendant argued there was no evidence that the gun was possessed to further the conspiracy and, therefore, he challenged enhancement under §2D1.1(b)(1) for possession of a dangerous weapon. The Third Circuit noted that although there was no evidence at trial linking defendant to specific acts of violence, there was ample evidence that the organization ruled through violence and intimidation. Under these circumstances, the government met its burden that it was not "clearly improbable" that defendant's gun was possessed in furtherance of the aims of that conspiracy.

United States v. Demes, 941 F. 2d 220 (3d Cir. 1991). Defendant sold cocaine from his residence and was convicted by a jury of drug charges. A search of his residence disclosed numerous firearms. The Third Circuit upheld an enhancement under guideline §2D1.1(b)(1) based upon defendant's possession of a dangerous weapon during the commission of a drug crime. Although the weapons were not used during the crime, they were clearly present. The district court could properly determined that the size and composition of defendant's "arsenal" created a strong inference that he possessed the weapons in order to further the drug transaction.

Use of Aircraft to Import or Export a Controlled Substance

United States v. Bethancourt, 65 F. 3d 1074 (3d Cir. 1995). Defendant conspired to import cocaine into the U.S. He received a §2D1.1(b)(2) enhancement for importing a drug using an aircraft other than a regularly scheduled commercial air carrier. The Third Circuit affirmed stating, co-conspirator's use of a military aircraft to import the drugs was reasonably foreseeable. Defendant knew his co-conspirator was going to Panama on a military aircraft; it was certainly foreseeable that co-conspirator would return on one as well. The use of the military aircraft was clearly in furtherance of the cocaine conspiracy because it was an integral part of the plan to import cocaine into the U.S.

§ 2D1.12 Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

United States v. Landmesser, 378 F.3d 308 (3d. Cir. 308 2004). The defendant and two others stole anhydrous ammonia from an agricultural supply business. During the theft, anhydrous ammonia vapor was released from the tanks, burning Landmesser's eyes. He was arrested the following day. The defendant eventually pled guilty to theft of anhydrous ammonia.

At the sentencing hearing, the defendant objected to the two-level enhancement pursuant to § 2D1.12(b)(2), maintaining that, although there may have been a release of a hazardous or toxic substance, it was not an "unlawful" one as defined by Application Note 3 to U.S.S.G. § 2D1.12. The district court concluded that the release of the anhydrous ammonia was "unlawful" because Landmesser, having stolen the anhydrous ammonia, had no "authority to be releasing it." The district court imposed the enhancement and the defendant appealed.

The Court of Appeals vacated the sentence. Under the district court's rationale, § 2D1.12(b)(2) would appear to apply in every instance in which a "discharge, emission, or release" occurs in the course of a theft - an interpretation that would render Application Note 3 essentially meaningless.

§ 2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. McQuilkin, 78 F. 3d 105 (3d Cir. 1996). The Third Circuit held that the safety valve provision does not apply to defendants convicted under 21 U.S.C. §860 of selling drugs within 1,000 feet of a school.

United States v. Rodriguez, 961 F. 2d 1089 (3d Cir. 1992). The so-called "schoolyard provision" of the federal drug laws (21 U.S.C. §860) provides enhanced penalties for certain drug crimes that occur within 1,000 feet of a school. Defendant argued that the provision requires an intent to distribute drugs within 1,000 feet of a school. The Third Circuit rejected this argument, ruling that the schoolyard statute applies to defendant who possesses drugs within 1,000 feet of school even if he or she intends to distribute them elsewhere.

§ 2D2.1 Unlawful Possession; Attempt or Conspiracy

United States v. Warren, 186 F.3d 358 (3d Cir. 1999). This case involved a courier who brought a large quantity of drugs into the country but who, from the very inception of the transaction, was cooperating with the authorities, to whom he revealed his plans. The defendant telephoned DEA and stated that he had been propositioned to act as a drug courier. After debriefing the defendant, a DEA agent called a federal customs agent to arrange for a controlled delivery. The defendant declined to follow the agents' recommended course of action. He arrived in New York City and was approached by immigration officials. The defendant told them that he had drugs in his possession and surrendered them. He pled guilty to possession of a controlled substance.

In this case the district court departed upward four offense levels, taking it from two to six to impose five years probation. The stated basis for the court's ruling was twofold: first, that the drugs were not for personal consumption, and second, that the defendant had a history of criminal conduct. In departing upward, the district court relied in part upon Application Note 1 to § 2D2.1, which states: The typical case addressed by this guideline involves possession of a controlled substance for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted. In other words, the departure would be appropriate if it is shown, or can be inferred, that the defendant intends to do something more than merely possess the drugs. This case involved 21, 269.2 tablets of ecstasy. In this case, the Court of Appeals held that the "record evidence is unequivocal that not only did the defendant not intend that anyone consume the drugs he carried, but also that he intended to turn those drugs over to the government agents and did so. During the meeting with a DEA agent, the defendant claimed he was to receive $15,000 for acting as a drug courier, and that he needed the money because he was several thousand dollars in debt as the result of bank frauds and dealings with Israelis involved in vehicle thefts. The Court of Appeals concluded that "this statement, however, whatever its import, is too ambiguous and attenuated a basis for this particular ground for an upward departure. Because the bases for

the upward departure did no have sufficient evidentiary support, the Court of Appeals vacated the district court's order and remanded for sentencing.

United States v. Ryan, 866 F. 2d 604 (3d Cir. 1989). Defendant charged with possession of controlled substance with intent to distribute was convicted on lesser included offense of simple possession. His guideline range was 0-6 months. The district court departed upward and imposed a sentence of 10 months imprisonment. The departure was based on the amount, purity, and packaging of the drugs. The Third Circuit affirmed , holding that a district court is permitted to consider evidence on counts on which a defendant is acquitted.

Part E -- Offenses Involving Criminal Enterprises and Racketeering

§ 2E1.1 Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

United States v. Marrone, 48 F. 3d 735 (3d Cir. 1995). Defendant was convicted of RICO and gambling offenses. He had previously been convicted in state court for a predicate act charged in count two. The district court did not factor the predicate act, attempted bribery, into defendant's base offense level. Instead, following application note 4 to §2E1.1, the court assessed three criminal history points for the bribery sentence under §4A1.2(a)(1). Defendant argued that because the bribery was included as a predicate act, it was part of the "instant offense," and should not have been assigned criminal history points. The Third Circuit held that the district court properly followed application note 4, stating the Sentencing Commission's "treatment of the prior conviction for a RICO predicate act avoids the anomaly of treating a RICO defendant with such a conviction as a first offender with a criminal history category of I." Additionally, the district court did not factor the predicate act, an arson, into co-conspirator's base offense level. Instead, the court relied on the arson conviction, as well as an unrelated extortion conviction, to classify co-conspirator as a career offender under §4B1.1. The Third Circuit held that this was consistent with application note 4 to §2E1.1, which directs a court to include a prior conviction for a predicate act in a RICO defendant's criminal history score. The two prior felony convictions referred to in §4B1.1 need only be separate from each other, they need not be separate from the instant offense.

United States v. Carrozza, 4 F. 3d 70 (3d Cir. 1993). The Third Circuit held that relevant conduct for sentencing in a RICO case includes all conduct reasonably foreseeable to particular defendant in furtherance of racketeering enterprise to which defendant belongs. The term "underlying criminal activity" in §2E1.1(a)(2) means simply any act, whether or not charged against defendant personally, that qualifies as RICO predicate act under 18 U.S.C. §1961(a) and is otherwise relevant conduct under §1B1.3. The district court erred when it limited relevant conduct to conduct in furtherance of the predicate acts charged against defendant. However, such relevant conduct could not be used to increase the statutory maximum from 20 years to a term of life imprisonment. The statutory maximum sentence must be determined by the conduct alleged in the indictment.

United States v. Moscony, 927 F. 2d 742 (3d Cir. 1991). Defendant argued that it was improper to apply the guidelines to his RICO offense which began prior to and continued after the effective date of the guidelines. The Third Circuit agreed with the district court that RICO is a continuing offense "directly analogous to the crime of conspiracy," and that therefore the guidelines were applicable to defendant's RICO conviction. The application of the guidelines to defendant's offense did not violate the ex post facto clause. Defendant elected to continue his illegal pattern of conduct after the effective date of the guidelines, and the guidelines do not prescribe a higher sentence for his RICO offense than that provided by pre-guidelines law.

Part F -- Offenses Involving Fraud or Deceit

§ 2F1.1 Fraud and Deceit

United States v. Redding, Sr., 2007 WL 627412 (3rd Cir.(Pa.))). The background of this case is as follows: The defendant was employed as a collection agent by a health care services agency. His job included collecting delinquent accounts and negotiating settlements with various businesses that owed the agency money. He was not authorized to receive, divert or deposit any checks payable to the health services agency. Nevertheless, the defendant opened an account at PNC Bank, and deposited approximately 100 checks payable to the agency. The checks totaled $780,823, but the defendant remitted to the agency only $366,912. He kept $413,911 for himself, using it primarily to support his and his wife's drug addiction. To execute the scheme, the defendant caused PNC bank statements reflecting the fund deposits to be mailed from PNC to a post office box. The defendant subsequently pled guilty to mail fraud in violation of 18 U.S.C. § 1341.

On appeal, the defendant argued that the district court erred in granting a two-level increase in his offense gravity score for more than minimal planning, U.S.S.G. § 2F1.1, and abuse of position of trust, U.S.S.G. § 3B1.3.

With respect to the enhancement for more than minimal planning, the defendant argued that each instance of theft should have been considered "purely opportune." He asserted he could not have planned ahead for each act, contending lack of knowledge and control over which accounts were to be assigned to him on a daily basis, and emphasizing the willingness of his employer to accept or refuse the amount he negotiated.

In concluding that the district court's determination that the offense involved more than minimal planning the Court of Appeals cited the substantial time period of the scheme (April 13, 2000, through January 23, 2002), and the repeated criminal pattern.

With regard to the enhancement for abuse of position of trust, the Court of Appeals noted that the offense was only discovered after almost two years and the defendant had considerable discretion. Notwithstanding some degree of supervision, there was reliance on his integrity.

United States v. Kossak, 2006 WL 1172183 (3rd Cir.(Del.))). The defendant appealed his sentence, arguing that the sentence imposed by the district court was unreasonable because the guideline range was incorrectly calculated to include a two-level enhancement for "mass marketing" under U.S.S.G. § 2F1.1(b)(3) and a two-level enhancement for preying on "vulnerable victims" under U.S.S.G. § 3A1.1(b). He asserted that only 13 of the borrowers implicated in the scheme had been solicited through telemarketing. This, he argues, is not "a large number."

The Court of Appeals found that the district court did not err in viewing Kossak's scheme as mass-marketing. As the district court observed, this was a situation in which telemarketing was a significant part of the scheme. Kossak had employed 12 or 13 telemarketers to solicit loans as part of his business practice. Further, 13 of 49 victims came into contact with Infinity through mass-marketing. The fact that the other 36 victims were solicited by other means does not make the enhancement inapplicable. The comments accompanying § 2F1.1 indicate that the enhancement applies where a large number of people are "solicited," not only where a large number of people are, in fact, induced and defrauded. In other words, the enhancement targets conduct and not result. Therefore, the Court of Appeals held that the mass-marketing enhancement was properly applied.

Kossak also objected to the two-level enhancement for targeting vulnerable victims. His victims included a 62 year old man in an oxygen tent, a 90 year old man, an 80 year old woman, a 59 year old blind woman, a 59 year old woman who was entirely unaware of the loan, a man who was 64 at the time of a first loan and 65 at the time of a second, a 68 year old man, a 73 year old woman, an 81 year old man living in a nursing home, a bankrupt man, who had lost his savings and whose wife had just lost her job at the time of the transaction, and a man who did not speak English.

The Court of Appeals found no error. Kossak stole significantly more from his elderly and disabled victims than he did from his younger and non-disabled victims. He exploited the vulnerable victims to a greater degree of success in accomplishing his crime.

U.S. v. Wallace, 2004 WL 1208883 (3rd Cir.(Pa.))). The defendant pled guilty to bank fraud and mail fraud. The district court found that the defendant violated a cease and desist order filed by the Pennsylvania Securities Commission and imposed a two level enhancement. At the sentencing hearing, the defendant took the position that the § 2F1.1(b)(4)(C) enhancement was not applicable because a violation of the order must be a knowing one and he was not aware of the existence of the cease and desist order until long after it was entered. However, his testimony demonstrated that he was aware of the order. He appealed and the Court of Appeals affirmed the district court's judgment.

United States v. Khorozian, 333 F.3d 498 (3d Cir. 2003). Defendant was convicted of bank fraud for negotiating counterfeit checks, despite her claim that she did not know that the checks were counterfeit. Because the bank suffered no actual loss (the bank discovered the checks were counterfeit), the district court sentenced defendant on the loss she intended, i.e., the face value of the counterfeit checks. See Note 8 to § 2F1.1. Defendant argued that because she did not know the checks were counterfeit, she intended no loss, and thus the court erred in finding that $20 million was the amount of loss. The Third Circuit found no error. Because the bank fraud statute reached defendant's conduct, and the jury found her guilty under the statute, defendant intended to cause the bank loss. The government set out a prima facie case of intended loss by showing that the two checks defendant attempted to negotiate had a face value of about $20 million. Defendant did not offer any evidence to disprove this amount of loss.

United States v. Feldman, 2003 WL 21751935 (3rd Cir.(Pa.))). The defendant filed a bankruptcy petition in which he vastly understated the amount of property he owned. Indicted for concealing assets and making false declarations in the bankruptcy, he pled guilty to four counts of bankruptcy fraud and was sentenced to 15 months imprisonment and ordered to pay restitution to his creditors. On appeal, the defendant argued that the government failed to meet its burden of proving by a preponderance of the evidence that he intended to cause a loss to his creditors.

The Court of Appeals found that the government had met its burden that Feldman intended to cause a loss of the full amount of debt owed, even the Court of Appeals concluded that the district court erred in determining actual loss. The district court impliedly found that Feldman intended to inflict a loss in the amount of the entire debt from which he sought to be discharged and that finding is supported by assumptions about the nature of Feldman's crime and the fact that he concealed other assets that were not even arguably exempt from bankruptcy.

United States v. Brennan, 326 F.3d 176 (3d Cir. 2003).The defendant was convicted for, *inter alia*, concealing bearer bonds with a face value of $3,795,000 from a bankruptcy estate; however, the district court imposed its sentence based on an estimated loss to the bankruptcy estate of $22 million. As a debtor in possession, the defendant was obligated to file monthly operating reports with the Bankruptcy Court from the time he declared bankruptcy in August 1995 until June of 1997, when the Bankruptcy Court appointed a trustee to take possession of the bankruptcy estate. However, in October of 1995, the defendant had ordered the bearer bonds cashed and the bonds' proceeds otherwise invested. By June of 1997, when the defendant ceased to be a debtor in possession, those investments had netted an additional $18 million in profits, none of which the defendant reported. The district court added those profits to the base $4 million value of the bonds to determine the loss under the guidelines.

Brennan appealed, arguing that the profits from the bonds should not be included in the amount of loss, and alternatively, that the $18 million loss figure was not properly found by the district court. The Coutr of Appeals held that the profits were a part of the bankruptcy estate and concealed from the Bankruptcy Court each time Brennan filed a monthly report to the

Bankruptcy Court from August 1995 until June of 1997, when the total amount concealed from the bankruptcy trustee stood at $22 million. Because the concealment for which Brennan was formally indicted was still ongoing in 1997, and the original concealment of the bearer bonds had not yet been detected at that date, the further concealment of the $18 million in profits was either direct actual loss from the continuing offense or relevant uncharged conduct committed during the original offense. Therefore, those profits were properly considered in establishing the total loss. Bankruptcy fraud is a continuing offense which lasts until it is detected or its consequences are purged.

United States v. Hinton, 2003 WL 1706046 (3rd Cir.(N.J.))). Haywood Hinton engaged in a bank scheme in which he instructed confederates to deposit checks and to receive back a fraction of the proceeds from the bank and to split those proceeds. The district court concluded that the intended loss was the full face value of the deposited checks. The Court of Appeals held that the district court's determination of the intended loss was without persuasive foundation. The district court incorrectly reasoned that because the deposited checks were bogus, and the accounts ultimately had a zero balance, the face value of the bogus checks was necessarily the amount of loss intended by Hinton. This contradicted the district court's express finding that Hinton's method of operation was to defraud banks by means of a split deposit, where only a portion of the deposited checks was actually withdrawn from the bank, and the zero balance resulted not from a taking of all the funds but, rather, from the bank's discovery that the checks were bogus. The correct analysis should focus on the amounts that Hinton intended to steal, not the value of the worthless checks deposited at the bank.

It may well be, as the prosecution insists, that Hinton intended to abscond with the entire amount of the deposited checks, or as close to the entire amount as he could. However, the district court did not adequately explore the issue of intended loss and explain its finding. Contrary to the government's suggestion, the record contains no finding by the court that Hinton intended for there to be any withdrawals from the accounts other than the initial withdrawals. Accordingly, the court's finding regarding the loss cannot stand and the case is remanded for further analysis.

United States v. Sonowo, 2003 WL 1269316 (3rd Cir.(Del.))). The defendant was one of several persons indicted for involvement in a fraudulent scheme, known as the "black money" scheme. He and his cohorts tricked a number of persons in the United States into sending them funds that were to be used to purchase a special cleaning chemical that would be used to clean U.S. currency previously stamped with the letters "CBN" (Central Bank of Nigeria) in black ink. In turn, the cleaned money allegedly was to be used to set up churches. The defendant pled "guilty" to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371.

The defendant appealed, arguing that the district court erred in enhancing his sentence pursuant to U.S.S.G. § 2F1.1(b)(4)(A), which provides a two level increase if the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency." Sonowo contends that

it was his co-conspirator, and not he, who made misrepresentations. The district court concluded that "given the close working relationship the two shared, it should have been completely foreseeable to Sonowo that his co-conspirator would use any means necessary to persuade potential victims, including telling them that he represented a religious organization." The Court of Appeals held that the district court did not err in enhancing the sentence accordingly.

United States v. Lloyd, 2003 WL 245734 (3rd Cir.(N.J.))). At the sentencing hearing, the district court concluded that there was more than minimal planning involved in Lloyd's offense and imposed a two level enhancement for more than minimal planning. The defendant appealed. The crux of his arguments was that his actions involved no more than that is necessary to complete a classic bank fraud. The Court of Appeals held that Lloyd's conduct involved a multitude of steps and acts repeated over a period of time. Moreover, he took steps to conceal the offense. He told investigators that an old acquaintance sent the supposed wire transfer and at first, would not share this person's name with the investigators. Later, he identified the individual as Carl or Gordon Smith, but before investigators could question Smith they were told that he had, rather conveniently died. There is no requirement that his efforts to conceal be successful. All that must be established is that the efforts taken by the defendant merely have been intended to deceive.

United States v. Williams, 2003 WL 42471 (3rd Cir.(Pa.))). The defendant founded and incorporated MICOM, Inc., a telemarketing firm which offered and sold licensed application preparation services for paging and mobile radio Federal Communication Commission licenses. He later recruited Joseph Viggiano to run the day-to-day operations of the firm. In November 1994, MICOM began to advertise to potential investors that the firm would assist them in acquiring the FCC licenses, aleging that the licenses would lead to huge profits through either lease or resale to large telecommunication firms. In fact, the licenses had no resale value and telecommunications companies do not lease such licenses from individuals. Nonetheless, approximately 175 investors gave MICOM about $1,650,000 based on these false representations.

After initially founding MICOM and developing its fraudulent licensing concept, in 1995, Mr. Williams entered into negotiations with Mr. Viggiano to sell his interest in MICOM. Once a deal was reached, Williams transferred his interest in the on-going conspiracy to Viggiano for $60,000, an amount that represented one-half the value of the business. Between August 10 and November 17, 1995, Viggiano proceeded to wire transfer a total of $62,000 to Williams, who had taken up residence in Brazil. A few months later, the Federal Trade Commission closed MICOM following an investigation by that agency.

On appeal, Williams argued that the district court erred in sentencing him based on the total fraud of $1,650,000 committed by MICOM because Williams voluntarily withdrew from the conspiracy before most of the damages occurred. The Court of Appeals held, "As there was not a severance of all ties to the business, it was appropriate for the district court to find that Williams had not abandoned the conspiracy. *See United States v. Lowell*, 649 F.2d 950, 955-56

(3d Cir. 1981). The sentence was therefore based on a reasonable estimate of the loss Williams caused. The evidence considered by the district court indicates that Williams never abandoned the enterprise and its goals. *United States v. Steele*, 685 F.2d 793, 803-804 (3d Cir. 1982)....He continued to receive payments from Viggiano and MICOM as late as November 17, 1995. That was a mere two months before the FTC shut down MICOM and instituted proceedings....There was not a severance of all ties to the business."

United States v. Titchell, 2002 WL 31477309 (3rd Cir.(Pa.))). In *United States v. Titchell*, 261 F.3d 348 (3d Cir. 2001) (*Titchell I*), the Court of Appeals upheld Titchell's convictions under 18 U.S.C. § 371 (one count) and 1341 (two counts), but vacated his sentence and remanded his case for resentencing. The Court of Appeals did so upon concluding that, in contravention of *United States v. Geevers*, 226 F.3d 186 (3d Cir. 2000), the district court had miscalculated Titchell's sentence. More specifically, the district court equated the loss Titchell potentially could have caused as the loss he intended to cause without performing the "deeper analysis" required to compare the two. On remand, the defendant was re-sentenced. He appealed, arguing that the district court again improperly determined the loss he intended to inflict through his criminal scheme.

Two co-defendants enlisted Titchell's help in mailing fictitious invoices to renew "Yellow Pages" telephone book advertising. The one bulk mailing in which Titchell personally participated involved sending 119,575 fraudulent renewal notices, each for a $147 fee, or $17,577,525 in total. The government seized approximately $647,000 in checks, which means about 3% of the recipients returned payment. Only a single $147 check was actually cashed. Thus, the Court of Appeals stated that "the record demonstrates a potential loss from Titchell's scam of $17,577,525; Titchell argues that his intended loss was only $647,000 (or something closely approximating that amount, because he only expected a 3% return on his mailing); and the actual loss that the government has identified is a mere $147."

At Titchell's re-sentencing hearing, the district court again determined that the $17.5 million potential loss constituted the intended loss. The district court stated it "had not simply equated potential loss with intended loss, but had found that Titchell intended to bilk every single person that he sent these invoices to." The Court of Appeals affirmed the judgment.

United States v. Kushner, 305 F. 3d 194 (3rd Cir. 2002). Raymond Kushner pled guilty to bank fraud, in violation of 18 U.S.C. § 1344, and to conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371. Between March 28, 1998, and roughly July 20, 1998, the defendant conspired with others to produce and cash counterfeit checks. In total, the members of the conspiracy negotiated $38,452.95 worth of counterfeit checks. Late in the course of the conspiracy, Kushner learned that federal agents were investigating the scheme, and that they had arrested one or more of his co-conspirators. Before a warrant was issued for his own arrest, Kushner surrendered to the Secret Service and admitted his wrongdoing. He also handed over 219 preprinted checks, with a face value of $455,102.29, which had not yet been presented for payment. The district court ruled that the proper loss figure was the one suggested in the presentence investigation report and endorsed by the government - - $498,300.64.

On appeal, Kushner challenged the district court's calculation of the amount of loss caused by his activities. He argued that his withdrawal from the conspiracy made it improper to include, in the loss calculation, the face value of the unused counterfeit checks that he surrendered to authorities. In other words, he argued that when he surrendered he did not intend to cause any loss greater than the $38,452.95 he had already caused. The Court of Appeals held that under the law of conspiracy, a defendant is liable for his own and his co-conspirators' acts as long as the conspiracy continues unless he withdraws prior to the conspiracy's termination. But even upon withdrawal, a defendant remains liable for his previous agreement and for his own and his co-conspirators' previous acts in furtherance of the conspiracy - - the crime is in the agreement, not in the achievement of its criminal end. Even when a defendant's intent changes as he withdraws from the conspiracy, the loss that should be considered for sentencing purposes remains the loss that the defendant intended during his active participation in the conspiracy. The Court of Appeals therefore affirmed the district court's loss calculations under § 2F1.1(b)(1).

Kushner's second contention on appeal was that the district court erred in ruling that it had no discretion to depart downward pursuant to Application Note 11 of § 2F1.1. At sentencing, Kushner argued that because he had surrendered the unnegotiated checks that were being used by the government to support an enhanced sentence, the "intended loss" they represented overstated the seriousness of his offense. Th district court's position was that allowing a downward departure under Application Note 11 because Application Note 8 produced an unwarrantedly harsh sentence "is in effect to say I disagree with Application Note 8, which I can't do." The Court of Appeals held the fact that Application Note 8 clarifies that the "loss" referred to in subsection (b)(1) is the "intended loss," where that figure can be ascertained, does not limit the reach of Note 11; "intended loss" can understate or overstate the seriousness of an offense just as much as "actual loss." Application Note 11 stands on equal footing with Application Note 8; neither one restricts the meaning of the other. When Note 8 informs a district court's calculation under § 2F1.1(b)(1), Note 11 allows the court to depart from that calculation if it finds that the calculation overstates or understates the seriousness of the offense. The Court of Appeals vacated Kushner's sentence and remanded for resentencing.

United States v. Tiller, 302 F. 3d 98 (3d Cir. 2002). The defendant was employed as a managed care caseworker by Villanova Rehabilitation Consultants ("VRC"), a medical managed-care consulting firm. VRC employed caseworkers such as the defendant to monitor the medical care provided under insurance policies. The Philadelphia Housing Authority ("PHA") contracted with VRC to monitor the medical treatments covered by PHA's workers' compensation insurance policies. The service for which PHA bargained was in-person, on-site monitoring of the medical care administered by health care professionals to PHA employees ("claimants") who received treatment for on-the-job injuries. Individual PHA claimants were assigned to VRC caseworkers, who were responsible for meeting with claimants at the doctors' or physical therapists' offices and then preparing detailed written reports. When a caseworker first met with a claimant, the caseworker prepared a report entitled "PHA Initial Assessment," and subsequent contacts with a claimant resulted in the preparation of "Follow Up" reports. In addition to preparing these reports, caseworkers were required to document their activities on VRC records

known as "Weekly Activity Summaries and Expense Reports," which tracked the number of visits the caseworker made for each two-week pay period.

VRC billed PHA for its services on a per-visit basis. Caseworkers submitted their reports to VRC, which in turn prepared an invoice. The invoice broke down the activity for which PHA was being charged, including travel time, time spent on the visit, and any incidental expenses. VRC then sent the invoice to Crawford and Company ("Crawford"), the third-party administrator for the PHA workers' compensation program. Based on the invoices and reports received from VRC, Crawford prepared checks payable to VRC. These checks were mailed from Crawford's office in Broomall, Pennsylvania, to VRC in Wayne, Pennsylvania.

VRC paid Tiller a base salary, as well as a $40 bonus for every visit made and reported in excess of six visits per week. Caseworkers received bi-weekly pay checks from VRC that included any bonuses.

Tiller devised and executed a scheme to obtain additional bonuses by stating that she had visited PHA claimants when in fact she had not. Unaware of this fraud, VRC then billed PHA for these visits in invoices thaat it submitted to Crawford, and Crawford mailed VRC checks as payment for visits that had never taken place.

Tiller argued on appeal that the district court erred in calculating the amount of the loss used in determining the base offense level. Based on the amount that PHA paid for the fraudulent Tiller visits, the district court found the loss for guideline purposes was between $70,000 and $120,000. This total reflects the amount PHA paid for invoices tied to fraudulent Tiller reports in connection with the witnesses who testified at trial plus the probable loss sustained in connection with other claimants interviewed in the investigation and identified in discovery.

On appeal, Tiller did not argue that the district court incorrectly determined the amount of money that PHA paid for invoices that billed for visits that she did not make. Rather, Tiller asserts that PHA suffered no actual loss because, she claims, her reports accurately set forth medical information about the claimants. The fact that this information was gleaned from medical reports, rather than from personal visits with claimants and doctors, did not, in her submission, cause PHA any loss. Tiller argues that because PHA did not suffer any actual loss, the loss for purposes of sentencing should be based on the amount of incentive pay (i.e., bonuses) that she received for the fraudulent reports submitted.

The Court of Appeals held that Tiller's argument ignored the critical fact that PHA bargained and paid for in-person, on-site monitoring of claimants, but was fraudulently deprived of this service. The scheme for which Tiller was convicted was not the preparation and submission of reports that misstated the substance of the medical care being provided to claimants. Rather, Tiller was convicted of reporting that she had met with claimants when in fact she had not. The district court correctly found that "there is no question that PHA sustained a financial loss when it paid for visits that defendant never actually made. The loss is properly calculated based on the amount paid by PHA for visits with claimants that the defendant never made.

PHA's situation here is analogous to that of a person who contracts and pays for any other service that is intended to prevent some sort of damage before it occurs. If a person contracts and pays for such services and the services are not furnished, the loss to the person who contracted for the services is the amount that the person paid.

United States v. Eisenhart, 2002 WL 1925914 (3rd Cir.(Pa.))). The defendant pleaded guilty to bank fraud in violation of 18 U.S.C. § 1344. He argued on appeal that the district court erred in calculating the amount of loss under the guidelines. The district court determined that the amount of loss was the loss at the time of the discovery of Eisenhart's fraud in September 1996. Eisenhart argues that the district court should have credited the $125,000 that his mother repaid as she was a guarantor on one of the fraudulently obtained loans. The Court of Appeals ruled, "Here, Eisenhart seeks to benefit from his mother's repayment of some of the funds he fraudulently obtained. The payment was made after he entered a plea agreement, but prior to sentencing. In essence, he is attempting to allow his mother to purchase a lower sentence by relying on her conduct as guarantor. However, the money Eisenhart's mother paid was not collateral securing the loan. Moreover, the money was not repaid until several years after the loss was discovered. Accordingly, the district court correctly held that the payment did not diminish the bank's loss for sentencing purposes because it did not effect the amount of the loss at the time Eisenhart's crime was discovered. See U.S.S.G. § 2F1.1 App. Note 8(b).

"Moreover, we have held that a defendant should not be permitted to barter for a lower sentence by offering to make restitution after being caught. See *United States v. Shaffer*, 35 F.3d 110, 115 (3d Cir. 1994). Consequently, restitution payments that are tendered after a fraud is detected ordinarily do not reduce the applicable offense level. Id. Similarly, a defendant cannot rely on post-detection restitution efforts by a culpable third party to reduce the loss for sentencing purposes. See *United States v. Mummert*, 34 F.2d 201, 204 (3d Cir. 1994)....The district court properly relied upon the actual amount of the loans outstanding at the time the fraud was discovered, September 1996, to determine the amount of loss under the sentencing guidelines."

The defendant also argued on appeal that the district court erred in determining that his conduct substantially jeopardized the safety and soundness of a financial institution. However, the Court of Appeals agreed with the district court.

United States v. Lessane, 2002 WL 1859746 (3rd Cir.(Pa.))). Lessane was charged with the illegal distribution of prescription drugs without a license. He received the drugs from "a guy" who worked for McKinnon Distributors, in Maryland, who was supplying them to Lessane from "overstock." Lessane sold about $70,000 worth of drugs and made a profit of around $35,000. He failed to deliver certain drugs to Apple Hill that were worth approximately $1,200. Otherwise, customers who purchased from him did receive the drugs that they had requested from him. The presentence investigation report recommended a base offense level of six, based upon a loss calculation for less than $2,000, namely, Apple Hill's loss of $1,200. Every purchaser from Lessane, other than Apple Hill, received what they had bargained for, so that $1,200 was the amount of loss for purposes of sentencing.

At sentencing, the government argued that since Lessane procured the drugs illicitly, the full value of the drugs was the amount of the loss. Lessane's counsel argued that the loss was $1,200. The district court heard arguments and held that the amount of loss was $35,000, or the gain to the defendant. Lessane appealed. The Court of Appeals vacated the judgment and remanded with instructions that Lessane be sentenced based on a loss of $1,200. There was no allegation that the drugs sold were worth less than was paid for them.

United States v. Hughes-Irabor, 2002 WL 1517931 (3rd Cir.(Del.))). In reaching the total offense level, the district court included a two level enhancement under U.S.S.G. § 2F1.1(b)(4) (now U.S.S.G. § 2B1.1(b)(7)) which provides for an increase in the level if the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization." Hughes-Irabor appealed, raising the sole contention that the district court erred in determining that he was subject to the two level enhancement under section 2F1.1(b)(4). The Court of Appeals was satisfied that the enhancement was proper. While Hughes-Irabor acknowledges making reference to his religious faith during the dealings in which the extraordinary scheme culminating in the fraud were played out here, his conduct went beyond such a mere reference and plainly came within the guideline.

United States v. Brown, 2002 WL 1354690 (3rd Cir.(N.J.))). The defendant pled guilty to conspiracy to defraud and obtain money and property by false and fraudulent pretenses by means of wire communications in violation of 18 U.S.C. § 1343. Brown, a licensed real estate appraiser, provided fraudulent appraisals on properties that were the subject of mortgage loan applications. He was involved in falsifying ten real estate appraisals spanning from April to August of 1996. After each property was purchased, there was a substantial wire transfer from the lending institutions to the buyers' attorneys covering the amount of the money financed. Each foreclosure resulted in a considerable loss to the lending institution involved.

In determining the aggregate loss attributable to Brown's fraudulent appraisals, the district court took into account only four of the ten properties that had gone into foreclosure when the presentence report was prepared. The first appraisal used in the loss calculation involved an estimated loss to First Union National Bank of $105,000. The other three fraudulent appraisals involved estimated losses to Walsh Securities totaling $332,424. Brown objects to the calculation of the sentencing enhancement, arguing that the amount of loss calculated for Walsh Securities should be excluded because, he contends, Walsh Securities participated in the overall

conspiracy to defraud. He argues the government failed to meet its burden to establish the amount of loss because the government admitted that Walsh Securities played a role in the conspiracy. The Court of Appeals held, "We need not decide whether it would be clear error to have included the loss of a victim who was neither indicted nor named as an unindicted co-conspirator because Brown stipulated in his plea agreement that the properties at issue would be included in the calculation of losses....Brown attempted to contradict his own sentencing stipulation." The Third Circuit has repeatedly held that a defendant cannot negotiate a plea agreement based on stipulations and then attempt to evade those stipulations on appeal. See *United States v. Cianci*, 154 F. 3d 106, 110 (3d Cir. 1998) (holding defendant who made stipulation in plea agreement cannot later renege that agreement); *United States v. Melendez*, 55 F. 3d 130, 136 (3d Cir. 1995) (rejecting defendant's attempt to dispute stipulation regarding appropriate sentencing range); *United States v. Parker*, 874 F. 2d 174, 175-78 (3d Cir. 1989) (refusing to allow defendant to argue facts which contradicted those agreed to in plea agreement). Brown's argument is foreclosed by his own stipulation in the plea agreement.

United States v. Dass, 2002 WL 549103 (3rd Cir.(Pa.))). The defendant pleaded guilty to one count of wire fraud in violation of 18 U.S.C. § 1341. He worked for a number of different motels. He used customers' credit card numbers to purchase personal merchandise and "double billed" customers. When a customer reserved a room with a credit card but subsequently paid in cash, the defendant would pocket the cash and charge the room to the credit card, then manipulate hotel records to cover his activity. The district court attributed a loss amount of $17,576.69 to the defendant. That amount represented the total of the merchandise purchased and the alleged double billing. The defendant accepted responsibility for a portion of this loss, but denied responsibility for, and objected to, $10,767.07 of the loss attributable to double billing customers at the Days Inn in Mechanicsburg, Pennsylvania. He argued at sentencing and argues on appeal that he should not be charged with that loss, as the government had not proved that amount of double billing by a preponderance of the evidence. His specific objection is to the reliability of the evidence showing the $10,767.07 double billing loss.

At sentencing, a postal inspector testified that upon executing a search warrant for the defendant's house and car, he recovered a number of credit card receipts, billing statements, deposit envelopes, and other material. These documents reflected the double billing scheme. He then showed the documents to the Days Inn general manager, Jim Baisch, who, according to the inspector, agreed that they indicated double billing. The inspector then asked Baisch to calculate the loss the motel suffered as a result of the defendant's conduct.

The defendant argued that the government failed to produce any evidence by means of live testimony or documents reflecting the calculations leading to Baisch's conclusion that Days Inn loss was $10,767.07. But hearsay may be admitted during sentencing proceedings, and may be relied upon by a sentencing court, so long as it is reliable. The reliability of Baisch's hearsay statements was a decision for the district court, and factual determinations based on such statements are deferred to unless clearly erroneous. At the sentencing hearing, the postal inspector testified as to various statements that Baisch had made, including estimates as to the amount of loss the defendant caused by the double billing scheme. The district court apparently relied on those statements, and it was entitled to do so.

United States v. Youla, 2002 WL 29704 (3rd Cir.(Del.))). The defendant pleaded guilty to social security number fraud in violation of 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 2. In February of 1998, the defendant attempted to purchase credit cards through an FBI informant. The informant purported to have a relative who worked for a bank and could acquire the cards, but would only engage in a transaction for a minimum of twenty cards. Although the defendant never actually purchased the credit cards, apparently because he suspected that the informant was connected with law enforcement, the defendant did organize the requisite number of buyers, agreed to the transaction, and provided the informant with sufficient names and social security numbers of prospective card purchasers (8 false and 12 authentic) to meet the twenty card order minimum. Each of the buyers was willing to pay at least $1,000 per card. The defendant and Mara, one of his confederates, met with the informant and an undercover FBI agent, who showed them twenty credit cards which the informant had procured using the information provided by the defendant and his group. The defendant and Mara sampled one of the credit cards, and agreed to meet with the informant the following day to consummate the transaction. Neither the defendant nor Mara appeared.

The district court calculated the loss by summing the credit limits of those cards acquired using false social security numbers. Each of the cards had a credit limit of $50,000. Multiplying $50,000 by eight, the number of cards which depended on false social security numbers, the district court set the amount of loss at $400,000.

On appeal, the defendant argued that the district court erred by calculating the loss value as the aggregate credit limit on the credit cards he and his coconspirators attempted to acquire. He argued that he should not be held responsible for the false social security card numbers provided by others. The district court found that it was foreseeable to the defendant that those involved in the scheme would use false social security numbers to obtain credit cards. The Court of Appeals held that the district court's finding was not erroneous.

The defendant also argued that the district court erred in determining that he and his confederates intended to exhaust the credit limits on the cards they acquired. The defendant claims he intended to repay the credit card debt he incurred, but before he was caught the defendant characterized the purchase of the credit cards as a potentially lucrative business. He described the scheme to a potential participant in terms of the credit limit, demonstrating his expectation that his cohorts would exhaust their cards. The fact that the social security numbers were false belies any intent by the defendant and his confederates to repay the debts incurred. In fact, in the defendant's presence, one of his confederates explicitly expressed an intent to exhaust the credit limits of the cards he would acquire. The Court of Appeals ruled that the district court did not err.

United States v. Napier, 273 F. 3d 276 (3rd Cir. 2001). The defendant pleaded guilty to four counts of bank fraud in violation of 18 U.S.C. § 1344. In June of 1990, the defendant borrowed approximately $384,000 from GWB to fund his purchase of property located in Bucks County, Pennsylvania. As part of the loan application, GWB had a licensed real estate appraiser prepare an appraisal valuation of the property the defendant intended to purchase. The lender's appraisal valued the property at $480,000. After making only five payments, the defendant defaulted on the loan and in January of 1991, GWB began foreclosure proceedings. The property was purchased at a sheriff's sale in April of 1995 by GWB, the sole bidder, for $305,000. "Loss" is defined as the "amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." At the defendant's original sentencing hearing, the district court based its determination of GWB's "loss" on the forced sale price, $305,000. The defendant appealed his sentence. The Court of Appeals remanded the case to allow the district court to recalculate the "loss" sustained by GWB in light of the decision in *United States v. Sharma*, 190 F.3d 220 (3d Cir. 1999).

In recalculating the fraud loss amount on remand, the district court found no reason to rely on the appraisal value, given that an appraisal is simply an estimate. Instead, the district court determined that GWB's subsequent sale of the property one month following its purchase to EMC Mortgage Company ("EMC") for $307,500 was a more reliable indication of the property's fair market value.

On appeal, the defendant now argues that the appraisal value of the property at $480,000 is the most reliable valuation of the property. He does not dispute that GWB purchased the property in 1995 at a sheriff's sale for $305,000 and sold the property to EMC one month later for $307,500, although he questions whether the subsequent sale to a commercial seller of real estate was an arm's length transaction. The district court was satisfied that the market had declined in the period following the appraisal, as the purchaser to whom the bank had sold the property then resold it a few years later for approximately the same price. The Court of Appeals affirmed the district court's determination.

United States v. Antico, 275 F. 3d 245 (3d Cir. 2001). The defendant was convicted on one count of racketeering in violation of 18 U.S.C. § 1962(c)-part of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), nine substantive counts of extortion in violation of 18 U.S.C. § 1951 (known as the Hobbs Act), and eight substantive counts of wire fraud in violation of 18 U.S.C. § 1343.

Between 1983 and January 1996, the defendant held various positions at the Department of Licenses and Inspections ("L&I") for the City of Philadelphia (the "City"). L&I's function is to administer and enforce the City's code requirements, including building, electrical, fire, health, housing, business, and zoning regulations. Officials of L&I are empowered to issue zoning and use permits and licenses according to a first-come-first-served policy, conduct inspections, and enforce applicable codes and regulations through citations and cease and desist orders. Persons aggrieved by these decisions may appeal to the Zoning Board of Adjustment. The defendant worked at L&I at various times as a Zoning Examiner, a Code Administrator, and the Business

Regulatory Enforcement Director. In these positions, he had the discretionary authority to approve zoning and use permits and licenses, and to cite and close businesses for violations of the City's ordinances and the laws of Pennsylvania, particularly those governing adult cabarets and topless bars.

In the late 1980s, Elizabeth Ricciardi had two children by the defendant. In lieu of child support payments, the defendant offered to establish Ricciardi as an expediter. Expediters are independent contractors who, in exchange for a fee, represent individuals and businesses before L&I and the ZBA. Expediters typically prepare the paperwork required to obtain permits, licenses, or variances by L&I or the ZBA. Expediters may interact with employees of L&I during the process, and appear at public hearings before the ZBA. She was reluctant to accept, knowing nothing about the expediting business, but the defendant told her that he would take care of everything. He referred clients to her who needed licenses and permits from L&I. She would call the defendant when a client hired her. The defendant would then tell her how to fill out the applications or would complete them himself. Ricciardi was known to use the defendant's office at L&I to do her work, and he would have city employees pick up and deliver her paperwork and watch her children. The defendant personally worked on 564 of the 748 building permit, and 288 of the 322 zoning permit, applications filed by Ricciardi and submitted them under her name. Moreover, the defendant was the one who approved the permits and applications submitted by her business. The defendant neither publicly disclosed a conflict of interest nor disqualified himself from taking official action in these matters. As a result of this arrangement, Ricciardi admitted to earning over $700,000 during the course of the arrangement.

The district court used the amount of $770,284 to adjust the offense level from ten to twenty in accordance with the table in § 2F1.1. The question presented on appeal is whether the district court's loss calculation, based on the entire gain to another "acting with the public official" in honest services fraud, is clearly erroneous. The victim in this case, the citizenry of Philadelphia, lost something intangible: the honest services of one of its public officers. How should the loss be valued? The defendant objects to calculating the loss from the gross receipts to Ricciardi in her expediting business. Instead, he argues that the loss should be at most the estimated $31,200 child support obligation that was the motivation behind his scheme to defraud. Inasmuch as none of Ricciardi's clients were harmed, the defendant insists the loss should be zero. The Court of Appeals held that the amount Ricciardi received - by "acting with the public official" - is the correct measure of loss under § 2F1.1. The sentencing guidelines mandate, "If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1. Therefore, the district court's calculation of the loss at $770,284 was not clearly erroneous.

United States v. Titchell, 261 F.3d 348 (3d Cir. 2001)). The defendant appealed his sentence for two counts of mail fraud, in violation of 18 U.S.C. § 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. He and his co-defendants participated in a scheme to fraudulently procure funds from thousands of businesses by mailing out fictitious invoices for renewal of telephone "Yellow Pages" advertising. On appeal, he argued that his conviction and sentence violated the principles announced in *Apprendi v. New Jersey*, 430 U.S. 266 (2000), and that the district court erred when calculating loss under U.S.S.G. § 2F1.1.

In concluding that the defendant's *Apprendi*-based argument was without merit, the Court of Appeals stated, "It is well-settled, in both this Circuit and others, that *Apprendi* is not implicated unless the defendant's actual sentence exceeds the statutory maximum sentence for the crime of conviction....Titchell received a sentence of 37 months, while the statutory maximum for mail fraud is five years. Accordingly, there is simply no *Apprendi* error in this case, plain or otherwise."

As part of the mail fraud scheme, the defendant mailed out 119,575 fraudulent invoices for Yellow Pages advertising at $147 each, for an invoice total of $17,577,525. The government intercepted the defendant's mail and seized approximately $647,000 worth of checks that were intended to pay for the fraudulent advertisement. This figure represented a three percent return on his mailing, which is what the defendant maintains is the norm for this sort of scam and what he expected and intended to receive. The government identified only one victim who actually lost his $147. The record demonstrates a potential loss of $17,577,525; Titchell argues that his intended loss was only $647,000. The Court of Appeals held that resolution of the loss issue is controlled by *Geevers*. According to *Geevers*, "it is clear that a district court errs when it simply equates potential loss with intended loss without deeper analysis. This is because the fraud guideline has never endorsed sentencing based on the worst-case scenario potential loss, and equating possible loss with intended loss is a linguistic stretch that we have previously rejected.. Moreover, intended loss refers to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims. In the instant case, the district court erred by equating potential loss with intended loss without the requisite "deeper analysis." In determining intended loss, the district court merely referenced the potential loss calculation, and did not attempt to explain or justify why the potential loss should be considered the same as intended loss. The government argued that the district court implicitly drew the reasonable inference that the defendant intended to cause the full potential loss from his mail fraud. This argument "does not satisfy *Geevers*: if district courts could silently draw such inferences, there would be little left of Geevers' admonition that district courts must perform a 'deeper anaylsis' than simply calculating potential loss."

United States v. Jarvis, 258 F. 3d 235 (3d Cir. 2001). The defendant pled "guilty" to one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342. He admitted to participating in two separate fraudulent schemes that bilked investors of more than $800,000. The presentence investigation report set the defendant's guideline sentencing range at 24 to 30 months. However, after determining that the defendant caused psychological injury to his victims [U.S.S.G. § 2F1.1, comment. n. 11(c); see also U.S.S.G. § 5K2.3] and knowingly endangered their solvency [U.S.S.G. § 2F1.1, comment. n. 11(f)] , the district judge imposed a five-level upward departure. This increased the defendant's offense level from 20 to 25, which, combined with a criminal history category of II, resulted in a guideline range of 63 to 78 months. The defendant was sentenced to the statutory maximum of 60 months. On appeal, the defendant claims that his conduct did not go beyond the heartland of typical fraud cases, and that the court misapplied the guidelines. The defendant's fraudulent scheme caused several victims to suffer severe emotional trauma. Two victims were prescribed depression medication and had to see a mental health professional in order to deal with their losses. In addition, the defendant divested one victim of her liquid assets, amounting to $45,444, and endangered the insolvency of another. The Court of Appeals noted that actual insolvency is not required and affirmed the district court's decision.

United States v. Hayes, 242 F.3d 114 (3d Cir.2001). The defendant, who lacked the necessary college degree to be a social worker, but who forged her qualifications and worked for several years for three New Jersey social service agencies, was convicted of wire fraud, 18 U.S.C. § 1343, for causing one of the agencies to deposit her salary into her bank account. The sole issue on appeal was whether the total salary paid to the defendant in all of her fraudulently obtained employment should have been assessed as the amount of loss (the salary from the other two agencies being drawn in as relevant conduct under U.S.S.G. § 1B1.3) or whether, under the rule of *United States v. Maurello*, 76 F. 3d 1304 (3d Cir. 1996), the court should have attempted to determine whether any of the services performed by the defendant had value. If the latter, the loss calculation should have been made by determining which portions of the defendant's services had value to the clients (or to the agency) and which did not. The Court of Appeals vacated the judgment and remanded for re-sentencing, holding that, under the present circumstances, the district court should have attempted the calculation set forth in *Maurello*, perhaps with the aid of an expert in social work who would evaluate the defendant's files. "It has been amply demonstrated that the defendant provided some value to the agencies and that her full salary cannot therefore be termed 'loss'."

United States v. Youla, 241 F.3d 296 (2001). The defendant pleaded guilty to falsely representing a social security number to be his own for the purpose of defrauding MBNA in violation of 42 U.S.C. § 408(a)(7)(B). He argued on appeal that the district court erred in its calculation of the intended loss as $400,000 and in its four level increase for his leadership role. After examining the record, the Court of Appeals found that the defendant had raised a non-frivolous issue with respect to his sentencing, particularly loss. When applying § 2F1.1, courts are bound by the commentary thereto. Application note 8 of the corresponding commentary provides in relevant part: Consistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater that the actual loss. In § 2X1.1, judges are instructed to calculate the offense level for attempt by taking the number for the completed offense and

subtracting three. The district court failed to do so in this case. If the district court determined that the defendant intended to use the fraudulently obtained credit cards to their maximum limits but did not do so, the sum of those credit limits is plugged in § 2F1.1(b)(1) to determine the level that would apply if the crime had been completed, and then three is subtracted from this number per § 2X1.1.

United States v. Geevers, 226 F.3d 186 (3rd Cir. 2000). The defendant pleaded guilty to one count of bank fraud arising out of a check kiting scheme. On appeal, the defendant argued that because a passer of worthless checks could not possibly abscond with the full face amount of his worthless checks, the district court erred in calculating his intended loss under a "worst case" scenario. He contends that the face amount of the deposited checks cannot be the figure employed in sentencing because no reasonable check kiter would think that he or she could get away with withdrawing the full face amount of the checks. He also contends that if the district court correctly calculated the intended loss figure from his check passing activities, he still should have received a three-level reduction in his guidelines calculation because he had not completed his attempt. This latter argument raised questions about the interpretation of U.S.S.G. § 2X1.1. Though the Court of Appeals stated, "It is clear that a district court errs when it simply equates potential loss with intended loss without a deeper analysis, the Third Circuit affirmed the sentence...While intended loss may not be automatically determinable based on what the potential loss is, intended loss may still equal potential loss... We therefore must resolve the question whether a reasonable inference may be drawn that a defendant in Geevers's position intends to cause the full loss of the face value of his false checks." The Third Circuit concluded, "A district court does not commit ...error when, in the absence of sufficient evidence to the contrary, ... fixes the guidelines range based upon a presumption that the defendant intended to defraud the banks of the full face amount of the worthless checks....Further, the guideline clearly precludes granting a downward departure in situations in which the attempted conduct was prevented solely through the intervention of the victim or law enforcement."

United States v. Greene, 212 F.3d 758 (3rd Cir. 2000). The defendant ran a large-scale criminal ring that passed stolen and counterfeit checks in several states. He was responsible for defrauding 14 banks and other financial institutions out of more than $6 million. On appeal, he argued that the district court erred by imposing a four point enhancement under U.S.S.G. § 2F1.1(b)(7)(B). This provision applies when the offense affected a financial institution, and the defendant received more than $1 million in gross receipts from the offense. The defendant claims that he did not defraud any single financial institution of more than $1 million, even though cumulatively he was responsible for losses to several financial institutions exceeding this amount. The Court of Appeals held that U.S.S.G. § 2F1.1(b)(7)(B) does not require that a defendant derive more than $1 million from a single financial institution. The plain language of the guidelines indicates that the defendant must derive a million dollars from the offense, not the financial institution.

United States v. Torres, 209 F. 3d 308 (3d Cir. 2000). The defendant was sentenced on his plea of guilty to one count of bank fraud. The district court found that the loss was $66,262.59, i.e. the amount of the stolen check deposited into the Kelly Services account - - $66,021.94 - - plus the amount of the bad check used to open the account - - $240.65. Torres contends that the loss was $24,900, i.e. the amount of the attempted withdrawal. In upholding this determination, the Court of Appeals stated, "As this court has stated on numerous occasions, and as the Commentary to U.S.S.G. § 2F1.1 at note 8 provides, the Guidelines sweep in not only actual loss but intended loss, if that amount can be determined and is higher than actual loss. Torres' activities in connection with the accounts leave little or no doubt that the 'intended, probable, or otherwise expected loss' here was for the full amount fraudulently deposited."

United States v. Duliga, 204 F.3d 97 (3rd Cir. 2000). The defendant was convicted on a multi-count indictment charging conspiracy to commit mail and wire frauds. On appeal, he contends that the district court incorrectly determined his base offense level by attributing to him the entire amount of loss generated by the conspiracy rather than the amount of loss he generated through his own telemarketing efforts. In calculating the amount of loss generated by the fraud, a sentencing court obviously may include amounts directly attributable to the fraudulent conduct of the defendant. In addition, where, as here, the crime of fraud for which the defendant has been convicted involves jointly undertaken criminal activity, the sentencing court may also attribute to the defendant amounts of loss resulting from the "reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." However, to do so, the loss resulting from the acts or omissions of others must be: (1) in furtherance of the jointly undertaken activity; (2) within the scope of the defendant's agreement; and (3) reasonably foreseeable in connection with the criminal activity the defendant agreed to undertake. See *United States v. Evans,* 155 F.3d 245, 254 (3d Cir. 1998); *United States v. Price*, 13 F.3d 711, 732 (3d Cir. 1994); *United States v. Collado,* 975 F.2d 985, 995 (3d Cir. 1992). Applying this test, the Court of Appeals concluded that the district court correctly included the entire amount of the loss generated by the telemarketing scam when determining Duliga's offense level.

United States v. Thayer, 201 F. 3d 214 (3rd Cir. 2000). Defendant was convicted on twenty counts of criminal liability for willful failure to pay over federal withholding and F.I.C.A. taxes in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2; willful filing of false claims against the government in violation of 18 U.S.C. §§ 2, 152; and willful concealment of bankruptcy-estate assets in violation of 18 U.S.C. §§ 2, 152. The district court enhanced defendant's sentence by two levels for "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines...." U.S.S.G. § 2F1.1(b)(4)(B) (1998). The district court relied on the probation office's finding, asserted by the government, that such an enhancement is appropriate whenever a defendant is convicted of concealing assets in a bankruptcy case. The Court of Appeals, agreeing with the Court of Appeals for the First Circuit, held that the Rules and Forms of the Bankruptcy Court in the sentencing context are not judicial orders, injunctions, decrees, or processes. This conclusion is supported by the commentary. Nothing in the guidelines suggests the drafters intended as a general matter to sentence bankruptcy fraud more strictly than other types of fraud.

United States v. Yeaman, 194 F. 3d 442 (3d Cir.1999). The defendant, along with four other defendants, was convicted of various counts of conspiracy, wire fraud, and securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of three public companies to the Teale Network, a fraudulent network of offshore and domestic companies. Teale represented these leased stocks as assets available to pay claims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Company. When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless. In combination, the parties raised four sentencing issues. The government finds three flaws in the district court's application of the sentencing guidelines: (1) the finding of no loss under U.S.S.G. § 2F1.1; (2) the failure to impose a four level increase under U.S.S.G. § 2F1.1(b)(6) for a substantial effect on a financial institution; and (3) the rejection of a special skills enhancement under U.S.S.G. § 3B1.3. The defendant challenges the district court's upward departure based on its finding that the defendant's fraudulent acts resulted in loss of confidence in an important institution.

The district court found no actual loss because it concluded that World Life had issued the policies, and was thus committed to pay the $6.4 million in claims, prior to the defendant's misrepresentations. The Court of Appeals found the district court's analysis flawed for several reasons. The victims of the scheme were World Life and the beneficiaries of the group medical policies. Without the assets of the defendants and the resulting appearance of solvency, the most reasonable inference is that World Life would have ceased paying premiums to Teale long before it eventually did. The district court failed to make any finding, however, as to the likelihood of a causal connection between the misrepresentations of the defendants and Teale's collection of premiums after the defendants committed themselves to support the scheme. The defendant understood the extent of Teale's scheme, including the roles of other parties to the scheme and the need to place a diversity of stocks on Teale's financial record in order to pass muster with World Life and insurance regulators. The Court of Appeals concluded that the defendant is responsible for the acts of all others involved in the scheme that occurred after he entered the conspiracy, and thus all of the premiums ceded by World Life as a result of their combined acts.

The Court of Appeals held that the district court erred in holding that the defendant did not substantially jeopardize the safety and soundness of World Life by (1) substantially reducing benefits to World Life's insureds and (2) placing World Life in a position such that it was unable to refund premiums that were paid in exchange for non-existent coverage. The defendant and others received several million dollars of premiums from World Life that should have gone towards paying insureds' claims or refunding their premiums. Accordingly, the Court of Appeals remanded for application of U.S.S.G. § 2F1.1(b)(6)(A).

The defendant appealed the district court's decision to impose a one-level upward departure based on the loss of confidence in an important institution that resulted from his fraudulent acts. In this case, the district court concluded that a resulting loss of confidence in an important institution took this case out of the "heartland" of fraud cases. The Commission has explicitly encouraged departures based on this factor. Application Note 10 to U.S.S.G. § 2F1.1 provides a nonexclusive list of circumstances in which the loss calculated pursuant to § 2F1.1 "does not fully capture the harmfulness and seriousness of the conduct." Causing a loss of

confidence in an important institution is identified as one such circumstance. See Application Note 10(e). The government's evidence is sufficient to support a finding of loss of confidence in the stock market.

United States v. Sharma, 190 F.3d 220 (3d Cir. 1999). In determining loss, the district court included both the principal amount of the loan and interest in its calculation. On appeal, the defendants argued that the district court erroneously included the unpaid interest on SBI's loans in the loss calculation. The defendants emphasized that Application Note 8 to U.S.S.G. § 2F1.1 excludes interest from the calculation of loss. The pertinent portion of Application Note 8 provides that "loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred." In *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), the Court of Appeals stated that "the fraud guideline defines 'loss' primarily as the amount of money the victim has actually ended up losing at the time of sentencing." Id. at 531. Explaining that Application Note 8(b) "plainly states that where, as here, the defendant fraudulently misstates his assets, the 'loss' is the victim's actual loss--unpaid principal and interest less the amount the lender has recovered (or can expect to recover) from the loan collateral." However, the Sentencing Commission subsequently amended Application Note 8 to state that the loss "does not...include interest the victim could have earned on such funds had the offense not occurred." In *Sharma*, the Court of Appeals held that "the plain language of the application note suggests that the Sentencing Commission intended to distinguish "bargained-for interest" from "opportunity-cost interest." "Opportunity-cost interest" is interest the victim could have earned. In contrast, "bargained-for interest" is an integral part of the borrower's obligation to the lender. Therefore, the Court of Appeals in affirming the district court's computation of loss, held that "in determining the amount of actual loss sustained by a victim in a criminally fraudulent loan the sentencing court may include the contractually "bargained-for interest." Thus, the district court did not err when it perceptively included the unpaid interest owed in its calculation of loss.

United States v. Nathan, 188 F.3d 190 (3d Cir. 1999). Electrodyne Systems Corporation, a defense contracting company, specialized in providing military components to the United States government. Nathan was Electrodyne's president and vice-president. Between November 1989 and March 1994, Electrodyne entered into six contracts to provide U.S. government agencies and the U.S. military including NASA and the Air Force with electronic components to be used in research, communications, radar, and weapons systems. Each contract required Electrodyne to comply with the Buy American Act, 41 U.S.C. § 10a-10d (1988), and in each contract Nathan (on Electrodyne's behalf) represented that Electrodyne (a) intended to manufacture the components in the United States; (b) would not use foreign components; and (c) would not use offshore manufacturing sites. Despite their contractual and statutory obligations, Nathan and Electrodyne entered into agreements with foreign companies in Russia and the Ukraine to build the components specified in the contracts. In so agreeing, Nathan disclosed to the foreign manufacturers the drawings, specifications, and technology of the contracted for components. Nathan failed to disclose these foreign contracts to the government and failed to register with the State Department as a manufacturer or exporter of defense articles. Nathan pled guilty to illegally importing goods into the U.S. because he failed to mark the items with the country of origin in violation of 18 U.S.C. § 545.

The Court of Appeals held that, in determining loss, the face value of the contract does not reflect a reliable loss figure because Electrodyne was prepared to provide the components to the Air Force, and the value of those components must be offset against the amount the Air Force agreed to pay. This is true whether we speak of actual or intended loss. The government's argument ignores the value that the Air Force would have received for its money if the settlement had proceeded. That is, if the parties had carried out the agreement, the Air Force would have received pin diode switches that, for all this record shows, were worth $139,200.

United States v. Bennett, 161 F. 3d 171 (3d Cir. 1998). The defendant was sentenced to 144 months imprisonment for perpetrating the largest charity fraud in history. On appeal, the defendant argued that the district court erred in imposing a two-level increase in the offense level for the defendant's misrepresentation of acting on behalf of a charity and imposing a four-level increase in the offense level for deriving more than $1 million from a fraud offense that affected a financial institution. In upholding the district court's sentence, the court of appeals concluded that the defendant actively solicited contributions from individuals and organizations, exploiting their charitable impulses to extract donations that were eventually funneled to his for-profit businesses and personal use. Surely these donors would not have contributed the funds had they known the true nature of New Era: namely, that it was an organization premised on falsehoods and serving as a vehicle for the defendant's personal gain. The court of appeals also found that the defendant personally derived more than $1 million from his criminal conduct and that the offense affected several financial institutions, most directly Prudential Securities.

United States v. Evans, 155 F.3d 245 (3d Cir. 1998). Defendant was convicted of fraud based on a scheme that staged car accidents and then submitted insurance claims for non-existent medical treatment. He argued that in calculating loss, the court improperly considered funds obtained from legitimate insurance claims submitted on behalf of legitimate accident victims. The Third Circuit agreed, holding that the district court did not make adequate findings to support its conclusory statement that the loss exceeded $2.5 million. Although the determination need not be exact and can be based on the trial record as well as the sentencing record, an appellate court should not be asked to rummage through the entire record without guidance from the district court as to the legal and factual basis for its determination.

United States v. Sain, 141 F. 3d 463 (3rd Cir. 1998). A federal grand jury indicted the defendant and his company, Advanced Environmental Consultants, Inc., on 46 counts of fraud. Sain claims that the district court erred in computing the loss. The Court of Appeals concluded there was no error.

United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996). Actual loss suffered by clients of defendant, a disbarred lawyer, rather than defendant's gross gain, was appropriate basis for loss measurement in sentencing defendant for mail fraud in connection with his unauthorized practice of law. Actual loss included only fees paid by dissatisfied clients rather than money paid by clients for satisfactory legal services.

United States v. Neadle, 72 F. 3d 1104 (3d Cir. 1995), *amended*, 79 F. 3d 14 (3d Cir. 1996). Defendant misrepresented the amount of his company's initial capital in order to obtain license to form Virgin Islands insurance company. Hurricane Hugo hit the Virgin Islands and the company was unable to meet the resulting claims of its policyholders. The Third Circuit used the claims of the policyholders, $24,438,748, minus the company's $4 million in reinsurance, to reach a loss of $20,438,748. It was proper to use the actual loss, rather than the amount of loss defendant intended to inflict even though defendant allegedly intended to run company in proper way and allegedly did not intend to inflict any loss. Defendant engaged in fraudulent conduct to perpetuate his business, regulators could not locate basic accounting records and there was a commingling of funds with another insurer.

United States v. Dickler, 64 F. 3d 818 (3d Cir. 1995). Defendants ran a business that repossessed cars on behalf of banks. Rather than obtaining bids for the cars "as is," defendants submitted false bids to the banks, sometimes based on falsified condition reports. If the false bid was accepted, defendants would acquire the vehicle instead of the fictitious bidder, repair and detail the car, and resell it for a profit. The district court calculated loss by taking the gain received by defendants from the sale of the cars and deducting expenses. The Third Circuit rejected using defendant's gain as a surrogate for loss under §2F1.1, because it appeared feasible to estimate actual loss. The actual loss to the banks was the fair market value of the vehicles less what defendants paid for them. Although defendant's conduct impaired the court's ability to estimate the vehicle's value in the "as is" market, the court could reasonably have used 85% of the "blue book" value of the cars as an estimate. If, on remand, the court finds a loss estimate is still not feasible, then in determining defendant's gain, the court must deduct additional expenses such as salespersons' commission and auction and transportation expenses.

United States v. Coyle, 63 F.3d 1239 (3d Cir. 1995). The defendant, who was the chief financial officer of a company that administered health care benefits, was convicted of three counts of mail fraud. He challenged the calculation of loss. He prepared false financial reports that concealed the company's true disbursements and administrative costs, thereby allowing the company to retain a higher amount than reported. The Third Circuit held it was appropriate to adopt the "amount taken" or "gross gain" as the measure of fraud loss, i.e., the difference between the amount reported and the amount retained. Under §2F1.1, fraud loss is the "amount of money the victim has actually lost revised upward to the intended or probable loss if either amount is higher and determinable." *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991). However, under the guidelines and case law precedent, "the offender's gain from committing the fraud is an alternative estimate to use in cases of embezzlement." *U.S. v. Badaracco*, 954 F.2d 928 (3d Cir. 1992). The district court did not err in determining the amount of loss by adopting the "amount taken" or "gross gain" as the measure of fraud loss. The circuit court rejected the defendant's contention that the amount of fraud loss should be reduced by the amount of administrative retention attributable to the amount company reported to be contract. This was a case comparable to embezzlement.

United States v. Shaffer, 35 F. 3d 110 (3d Cir. 1994). Defendant was convicted of bank fraud as a result of his check kiting scheme. By the time of sentencing, defendant had settlement agreements with three of the four victim banks. The district court found that the actual loss was the total loss of $462,309, less the amounts under the settlement agreements. There was no intended loss. The Third Circuit reversed, holding that the victims' loss in a check kiting scheme should be calculated when the offense is detected, rather than as it exists at the time of sentencing. By its very nature, check kiting ordinarily involves the borrowing of funds from the bank and without the offender providing any security to protect the bank against loss. It is more akin to theft than a secured loan fraud.

United States v. Mummert, 34 F. 3d 201 (3d Cir. 1994). Defendant, a former bank executive, fraudulently caused the bank to loan $95,000 to finance construction of a house for a partnership. Defendant argued that the bank suffered no loss under §2F1.1, because after the fraud was discovered, one of the partners offered to sign the property over to the bank if the property was not sold. The Third Circuit held that the court properly refused to reduce the loss by the amount of restitution offered after the crime was discovered. Under application note 7(b) the loss is the actual loss to the bank at the time of sentencing ($95,000) reduced by the amount the bank has recovered or can expect to recover from any assets pledged to secure the loan ($0). The fact that a third party gratuitously offered, after defendant's crime was detected, to reimburse victim for its losses cannot reduce the amount of loss for sentencing purposes.

United States v. Daddona, 34 F. 3d 163 (3d Cir. 1994). Defendants were convicted of various counts of fraud stemming from their attempts to disclaim performance and payment bonds issued in connection with a construction project. The trial court based the loss under §2F1.1 to be in excess of $1.5 million, most of which represented the mortgagee's cost to complete the project after taking it over from the mortgagor/developer. The Third Circuit reversed, holding that the costs incurred by the mortgagee in completing real estate development were not attributable, for sentencing purposes, to fraudulent conduct committed in connection with performance bonds under which mortgagee was not obligee. Accordingly, completion costs were not includable in amount of loss for purposes of sentencing mortgagor and contractor for fraud.

United States v. Monaco, 23 F. 3d 793 (3d Cir. 1994). Defendant directed his son to prepare labor sheets falsely showing that he had worked 1,000 hours. He then submitted a false progress payment request to the Department of Defense. This procedure was repeated on four occasions. As a result of the false hours, the company received about $140,000 in accelerated payments. The Third Circuit found the district court erred by finding the offense did not involve more than minimal planning. Defendant committed the fraud in such a way that it would have been difficult to discover, even if the government had conducted an audit. In addition, more than minimal planning is present in any case where repeated acts occur over a period of time.

United States v. Katora, 981 F. 2d 1398 (3d Cir. 1992). Defendants telephoned their own 900-telephone service thousands of times to create the illusion that the service had large, bona fide accounts receivable. They then negotiated a contract to sell up to $250,000 worth of these bogus accounts receivable. In addition, they ran up a $126,000 service charge bill from their

telephone company, MCI. The Third Circuit affirmed the district court's determination that the loss was $373,600; slightly less than the sum of the $250,000 factoring limit plus MCI's unpaid service charges. There was sufficient evidence that defendants inflicted a loss of at least $126,000 on MCI and intended to inflict a loss of at least $250,000 on the factor.

United States v. Holloman, 981 F. 2d 690 (3d Cir. 1992). Defendant obtained canceled corporate checks and used them to order blank checks, which he deposited in accounts under fictitious names. At the time of his arrest, the defendant had two canceled checks with a combined face value in excess of $1.5 million. The Third Circuit affirmed a 12-level enhancement based upon a loss of more than $1.5 million. The court rejected defendant's claim that there was no "loss." The purpose of the canceled checks was not to draw on them but to use them in a counterfeiting scheme which could easily have led to a loss in the neighborhood of the amount of the canceled checks themselves. The guidelines cover not only actual loss but also intended loss, if that loss is higher than actual loss.

United States v. Badaracco, 954 F. 2d 928 (3d Cir. 1992). In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The district court calculated the loss caused by defendant's fraud by adding together the amounts of the three electrical contracts awarded by the developers to the family companies. The Third Circuit affirmed, holding that under the circumstances of this case, it was appropriate to look to the gain that defendant received, rather than the amount of the bank's loss.

United States v. Kopp, 951 F. 2d 521 (3d Cir. 1991). Defendant induced a bank to make a $13.75 million loan for a shopping center by falsely inflating the rental income from the center. After defendant defaulted, the bank received a deed in lieu of foreclosure and eventually sold the shopping center for $14.5 million, $750,000 more than the loan. The Third Circuit vacated the district court's determination that $13.75 million was the appropriate measure of loss under §2F1.1, the fraud guideline. Loss under the fraud guideline is different than loss under §2B1.1, the theft guideline. All theft involves an intent to deprive the victim of the full value of the property taken, while fraud may not. In this case, defendant fraudulently obtained $13.75 million, but he gave something in return: a mortgage of the property. Loss under the fraud guideline should be calculated as actual loss (measured at the time of sentencing), unless the intended or probable loss is greater and is determinable.

United States v. Astorri, 923 F. 2d 1052 (3d Cir. 1991). The district court erred in making a four-level enhancement under USSG. §2F1.1(b)(2) for "more than minimal planning" and "a scheme to defraud more than one victim." According to the circuit court "if either characteristic is present, the commentary tells us to apply a two-level increase. The commentary does not indicate a four-level enhancement where both signs of harm are present."

United States v. Cianscewski, 894 F. 2d 74 (3d Cir. 1990). Sentencing court properly determined loss based on the face value of stolen U.S. government checks rather than on amount defendant received when the stolen checks were sold. More than minimal planning was involved. Defendant received seven stolen checks from government informant or from his wife and sold them to undercover agents on three separate occasions. On each occasion, defendant went to the same prearranged location.

Part G -- Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

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

United States v. Jimenez-Calderon, 2006 WL 1582040 (3rd Cir.(N.J.))). The defendant pled guilty to Conspiracy to Promote Sex Trafficking, in violation of 18 U.S.C. § 371, and Promoting Sex Trafficking by Force, in violation of 18 U.S.C. § 1591(a)(1). She argued on appeal that the District Court engaged in double counting when it applied § 2G1.1(b)(4)(B) because "the evils addressed by § 2G1.1(b)(4)(B) respond to the same evils of inducement or coercion already found in subsection 2G1.1(b)(1)(A) and (B). The relevant version of § 2G1.1(b)(1) applicable at the time of sentencing provided for a 4-level increase if "the offense involved (A) a commercial sex act; and (B) the use of physical force, fraud, or coercion." Section 2G1.1(b)(4)(B) provides an additional 2-level increase if "a participant otherwise unduly influenced a minor to engage in a commercial sex act." The gravamen of the defendant's argument is that she should not have been sentenced for unduly influencing a minor to engage in a commercial sex act pursuant to subsection (b)(4)(B) because "the use of physical force, fraud, or coercion" takes any undue influence into account.

The Court of Appeals held that the District Court did not engage in impermissible double counting when it applied an enhancement to the base level offense calculation pursuant to W4,6 2G1.1(b)(4)(B). The defendant was convicted of sex trafficking of children or by force, fraud, or coercion. 18 U.S.C. § 1591. Section 1591 does not solely address the trafficking of minors. It prohibits the trafficking of any person, adult or minor, if force, fraud, or coercion is used to cause that person to engage in a commercial sex act. A base offense level of 19 applies "if the offense involved a minor." U.S.S.G. § 2G1.1(a)(1). If the victims in the instant case had been adults, the base offense level would have been 14. U.S.S.G. § 2G1.1(a)(2). The District Court applied a two-level enhancement pursuant to § 2G1.1(b)(4)(B) for unduly influencing a minor to engage in a commercial sex act. There was no double counting because there is no explicit prohibition in the sentencing guidelines preventing the cumulative application of the provisions listed under § 2G1.1.

United States v. Campbell, III, 2006 WL 3079061 (3rd Cir. (Pa.))). The relevant facts of this case are as follows: The defendant made a videotape containing a series of sexually graphic depictions of two minor children. Only the depictions of one child are at issue on this appeal. This child, R.L., is the grandson of the defendant's mother's then boyfriend; the defendant had no familial relationship with R.L. The videotape depicts R.L. bathing and sleeping and reflect that the defendant was the only adult present during the taping (though not necessarily the only adult in the home). The bedroom scene involve the defendant undressing R.L. while he sleeps and include R.L.'s reaction upon awakening the following morning. Although the exact dates of filming are not known, they are placed between January 1999 and December 2000. During this period, both the defendant and R.L. stayed in R.L.'s grandfather's house, and the defendant was asked to babysit R.L. on multiple occasions. Also, during this time period, R.L. bathed in the defendant's presence and slept overnight in the defendant's bed on several occasions.

In view of the above facts, the district court found by a preponderance of the evidence that the defendant qualified for a two level enhancement under U.S.S.G. § 2G2.1(b)(2). Under this guideline, the offense level is increased by two levels "if the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant...." Application Note 3 to § 2G2.1 states that this subsection "is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently." The district court found that the defendant was exercising temporary supervisory control over R.L. when the incidents occurred.

On appeal, the defendant challenged the district court's finding of temporary supervisory control. He correctly pointed out that to satisfy the guideline, a defendant must exercise control not merely at some point in time, but at the time when the criminal conduct occurred. According to the defendant, because the government did not prove that he had been asked to supervise R.L. at the time each of the incidents occurred, the evidence was legally insufficient to establish supervisory control. The defendant relied heavily on *United States v. Blue*, 255 F.3d 609 (8th Cir. 2001). In that case, the Eighth Circuit held that an enhancement under § 2G2.1(b)(3)(A) was inappropriate where the underlying conduct was a brief sexual encounter in the bathroom that occurred while the child's mother slept, with the bathroom door in sight, even though the defendant and the child lived in the same house. Id. at 613-15.

Th Third Circuit was not persuaded by the analysis in *Blue* because the case is distinguishable for two reasons. First, the incident in *Blue* was a brief, one-time encounter under circumstances in which it was plainly evident that the defendant had not been entrusted with supervision of the child. Here, the incidents in question involved bathing and overnight stays in which the defendant and R.L. were alone and undisturbed for lengthy periods. Moreover, the record demonstrates that the defendant was repeatedly entrusted to supervise R.L. in settings similar - if not identical - to those which he filmed. Second, the record in *Blue* lacked any

evidence that the defendant maintained a relationship of trust of the child. Here, the record is replete with evidence. Because § 2G2.1(b)(2) is aimed in large part at punishing abuse of a child's trust, see *United States v. Balfany*, 965 F. 2d 575, 585 (8th Cir. 1992), the defendant's relationship of custodial trust with R.L. is an important factor.

In proving temporary supervisory control, the government need not establish that the defendant specifically was asked to supervise the child. In *Blafany*, supervisory control was established, where the defendant lived with the child, cared for the child "at times," enjoyed a relationship of trust with the child, and accosted the child in settings in which supervisory control could be reasonably inferred 965 F. 2d at 585. Those factors are present here, and the judgment of the district court was affirmed.

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

United States v. Goff, ___ F.3d ___ (3d Cir. Aug. 30, 2007) No. 05-5524. Defendant was convicted of possessing hundreds of electronic images of child pornography on his computer. Although the PSR recommended a guideline range of 37 - 46 months, the district court imposed a four-month sentence. As support, it noted that it had considered the Guidelines (but made no mention of the range that was applicable to defendant), considered a letter from a doctor that stated that defendant "had never acted out in any sexual way with children," and noted the number of letters of support from friends and family. The court relied heavily on the fact that defendant had no criminal history and had lived an "exemplary" life for 54 years.

The Third Circuit reversed, finding the four-month sentence both procedurally and substantively unreasonable. First, the district court did not follow the three-step process laid out in *U.S. v. Gunter*, 462 F. 3d 237 (3d Cir. 2006) for imposing sentences after *Booker*. The court's decision failed to reflect the required analysis of the § 3553(a) factors and gave short shrift to the Guidelines, one of the listed factors. The four-month sentence was unreasonably lenient. The court viewed this as a victimless crime, and ignored the real injuries suffered by the children depicted in the pornography. The fact that defendant never "acted out in any sexual way with children" was irrelevant - defendant was not charged with molestation.

United States v. Kosteniuk, 2007 WL 2980801 (3rd Cir.(Pa.))). After pleading guilty to two counts of receiving and possessing child pornography, the defendant was sentenced to five years in prison and seven years of supervised release. He appealed, raising several challenges to the length of his supervised release and to special conditions requiring participation in polygraph testing, submission of DNA, and refrain from possessing any materials depicting and/or describing "sexually explicit conduct."

The defendant worked as a mechanical engineer. At least four coworkers reported seeing inappropriate pictures on his computer screen. The FBI was notified, and a subsequent forensic examination revealed several illicit pictures saved on the defendant's work computer. He was interviewed by investigators and admitted to downloading images of child pornography at work and estimated that "hundreds" of such images could be found on his work computer.

The Court of Appeals rejected the defendant's challenges to his seven year term of supervised release, and the conditions requiring him to submit to DNA and polygraph testing. Under 18 U.S.C. § 3583(k) in effect at the time of the offense, the District Court had discretion to impose any term of supervised release up to and including life. Several factors convinced the Court of Appeals that the seven year term of supervised release was not unreasonable. The defendant's practice of viewing child pornography at work - - as witnessed by at least four coworkers - - indicates a lack of control over his compulsion. Some of the images found on his work computer, moreover, were of prepubescent children under the age of 12. He also sought and received mental health treatment for his addiction, but the treatment failed to prevent his addiction from escalating in the months prior to his arrest.

For reasons set forth in *United States v. Sczubelek*, 402 F. 3d 175, 181-87 (3d Cir. 2005), the Court of Appeals rejected the defendant's challenge requiring him to submit a DNA sample at the discretion of the probation officer.

In *United States v. Lee*, 315 F. 3d 206, 217 (3d Cir. 2003), the Court of Appeals found that polygraph testing could be beneficial in the Probation Office's supervision and treatment of the defendant and did not involve any greater deprivation of liberty than was necessary to protect the public and rehabilitate the offender. Since the defendant is already directed to report periodically to the probation officer and provide truthful answers after he is released from imprisonment, the Court of Appeals reasoned "the additional requirement that appellant undergo polygraph testing does not place a significantly greater demand on him." For largely the same reasons in *Lee*, the Court of Appeals concluded the District Court did not abuse its discretion in imposing a polygraph condition.

Finally, the Court of Appeals addressed the defendant's challenge to the condition that he "not possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games depicting and/or describing sexually explicit conduct as defined at 18 U.S.C. § 2256(2). In *United States v. Voelker*, 489 F. 3d 139, 150-53 (3d Cir. 2007), the Court of Appeals found that an identical condition had the effect of prohibiting appellant from possessing, not only illegal child pornography, but also legal adult pornography or possibly even non-pornographic materials, such as medical texts. Because the District Court in *Voelker* had failed to provide any explanation for the restriction, a restriction that raises serious First Amendment concerns, the Court of Appeals vacated the condition and remanded for resentencing.

As in *Voelker*, the Court of Appeals concluded that the District Court here provided no explanation for prohibiting the defendant from possessing any materials depicting and/or describing "sexually explicit conduct." Nor was the Court of Appeals satisfied from its own independent examination of the record that the defendant's admitted addiction to pornography warrants such a broad restriction. The Court of Appeals, therefore, vacated the special condition and remanded for resentencing consistent with the opinion in *Voelker*.

United States v. Olfano, 2007 WL 2728665 (3rd Cir.(Pa.))). The defendant pled guilty to an information charging him with receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). He objected to the five-level enhancement for "a pattern of activity involving the sexual abuse or exploitation of a minor," pursuant to § 2G2.2(b)(4). This guideline has since been re-designated as § 2G2.2(b)(5). The enhancement stemmed from the defendant's two juvenile adjudications for indecent assault; the adjudications involved improper sexual contact with a female juvenile in 1986, and with his nine-year-old half-sister in 1989. The defendant did not contest that he was adjudicated delinquent in those cases, but instead argued that they did not constitute a "pattern" under the guidelines.

On appeal, the defendant raised the same issue. The commentary to § 2G2.2 defines "pattern of activity involving the sexual abuse or exploitation of a minor" as "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct." U.S.S.G. § 2G2.2 cmt. N. 1 (2002). The Third Circuit has held that, as used in the guidelines, "sexual abuse" refers to conduct covered by 18 U.S.C. §§ 2241, 2242, 2243, and 2224, while "sexual exploitation of a minor" refers to conduct described in 18 U.S.C. §§ 2251(a), (b), and (c)(1)(b). *United States v. Ketcham*, 80 F. 3d 789, 794 (3d Cir. 1996). The Third Circuit did state in *Ketcham*, that any activity covered by § 2G2.2 - - which involved trafficking in child pornography - - did not itself constitute sexual abuse or exploitation of a minor.

In concluding that the District Court properly applied the five-level enhancement in this case, the Court of Appeals noted that the guidelines do not place an explicit time limit on the previous activities that a court may consider in finding a "pattern of activity," and there is no temporal nexus necessary to establish a pattern of activity of sexual abuse or exploitation of a minor. The Court of Appeals also rejected the defendant's argument that his prior conduct is too factually dissimilar from his present conviction to create a pattern of activity. The Commentary to the applicable guidelines explicitly states that the incidents upon which the enhancements were based need not be related to the present offense or involve the same victim. U.S.S.G. § 2G2.2 cmt. N. 1 (2002). Although trafficking in child pornography does not constitute sexual abuse or exploitation of a minor, such trafficking is precisely the kind of conduct that is subject to a sentence enhancement based on sexual abuse or exploitation. It appears that the guidelines contemplate a difference in kind between the conduct that leads to conviction and the conduct that leads to enhancement; trafficking is the offense, but previous sexual abuse or exploitation creates the enhancement.

The Court of Appeals recognized the defendant's argument that his current conviction if for the receipt of child pornography through a computer, while the prior incidents that constitute his pattern of activity "do not involve receipt of child pornography, and do not involve use of a computer." Nonetheless, the prior incidents involve inappropriate touching of juvenile females, which amounts to sexual abuse or exploitation of a minor. The Court of Appeals, based on the plain language of the guidelines, that because there is no similarity requirement and the previous incidents of sexual misconduct are not so different in kind, they can be used to enhance the defendant's sentence for receiving child pornography via the Internet.

United States v. Fitzgerald, 2007 WL 57139 (3rd Cir. (N.J.)). This defendant pled guilty to distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). On appeal, he argued that the district court erred in applying a five level sentencing enhancement under U.S.S.G. § 2G2.2(b)(4) for a pattern of activity involving the sexual abuse or exploitation of a minor because there was insufficient temporal proximity between the prior offense and the current conduct to constitute a patter. The district court relied upon the defendant's conviction for sexual assault in 1984 consisting of two acts involving the same four year old boy, to support the "pattern of activity" sentencing enhancement. The defendant argued that a 20 year old conviction for sexual assault was too remote and different in kind from the current offense of distributing child pornography to qualify as a "pattern."

In agreeing with several other circuits that "remote" or "unrelated" instances of sexual misconduct can support a sentencing enhancement, the Court of Appeals found that the district court did not err in applying the five level enhancement pursuant to U.S.S.G. § 2G2.2(b)(4).

United States v. Williams, 2006 WL 1547844 (3rd Cir.(Pa.))). The defendant pleaded guilty to possessing pornography depicting minors engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B). The sole issue on appeal was the District Court's application of a five-level sentence enhancement for "engaging in a pattern of activity involving the sexual abuse or exploitation of a minor" pursuant to § 2G2.2(b)(4). The defendant argued that the government failed to show by a preponderance of the evidence that he engaged in a "pattern of sexual abuse or exploitation" and that the five-level enhancement was therefore in error. He claimed that he never engaged in any actual or verifiable contact with any minor that would trigger the enhancement. Rather, he asserted that his conduct was limited to sexually explicit conversations in online chat rooms about sexual encounters with minors that were nothing more than fantasies. Moreover, he argued that mere possession of child pornography does not constitute "sexual abuse or exploitation of a minor" within the meaning of § 2G2.2. See United States v. Ketcham, 80 F.3d 789, 794 (3d Cir. 1996).

In upholding the District Court's decision to apply the five-level enhancement, the Court of Appeals noted that the guidelines define "sexual abuse or exploitation" as "conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses." Thus, even an unsuccessful attempt to sexually abuse or exploit a minor is considered "sexual abuse or exploitation" for guidelines purposes. A "pattern of activity

involving the sexual abuse or exploitation of a minor" is defined as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

Relying on hundreds of pages of the defendant's conversations in online chat rooms, the District Court found that the defendant (1) offered to pay a man for a sexual encounter with his four year old daughter, (2) went to a Dairy Queen to meet a sixteen year old girl for the purpose of a sexual encounter with her, (3) attempted to set up meeting times with minors, and (4) conspired with several adults to have sexual contact with their minor children. There is more than enough evidence in the record to support the District Court's conclusion that these incidents were attempts on the part of the defendant to have sexual encounters with minors. Taken together, such repeated attempts constitute a "pattern of sexual abuse or exploitation," for purposes of § 2G2.2.

United States v. Harrison, 357 F.3d 314 (3d Cir. 2004). The defendant pleaded guilty to transporting through the mail visual depictions of minors engaging in sexually explicit conduct, "such visual depictions having been obtained through the use of a computer." The defendant told a federal agent that he had downloaded some of the specific pictures which he later sent to the undercover federal investigator. During the sentencing hearing, defense counsel admitted that the defendant downloaded pornographic images onto his computer, copied them onto disks, and later mailed them to the federal agent.

The single issue on appeal is whether the sentencing enhancement under § 2G2.2(b)(5), for when "a computer was used for the transmission of the material or a notice or advertisement of the material," was properly applied. The Court of Appeals held that the enhancement applies whether the defendant uses a computer to transmit the material to someone else, or someone else uses a computer to transmit the material to the defendant. In other words, in the language of § 2G2.2(b)(5), "transmission" covers both the sending and the receiving of pornographic material, so if the defendant received child pornography by means of a computer, the enhancement is applicable.

The defendant attempted to sidestep the direct application of the guidelines by defining "the material" as the computer disks sent to the undercover agent, rather than the pornographic material contained on those computer disks. By this reasoning, a computer had not been used to transmit "the material," because "the material" encompasses only the computer disks themselves, which were unquestionably sent through the mail and not via a computer. The Court of Appeals held this interpretation of the guidelines to be absurd and concluded that the enhancement was properly applied.

United States v. Parmelee, 319 F.3d 583 (3d Cir. 2003). A jury convicted the defendant of four counts of possession of child pornography using media that traveled in interstate commerce in violation of 18 U.S.C. § 2252A(a)(5)(B). The guidelines manual section that applies to violations of 18 U.S.C. § 2252A(a)(5)(B) is found in U.S.S.G. § 2G2.4. Within the text of § 2G2.4(c)(2) is a cross-reference to § 2G2.2. At sentencing, the district court refused to apply the cross-reference on the ground that it would violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The government appealed.

In this case, the Court of Appeals confronted the issue of whether a sentencing court can apply the trafficking cross-reference of U.S.S.G. § 2G2.4(c)(2) to enhance a defendant's sentence for possession of child pornography, when the court finds by a preponderance of the evidence that the requisites for the trafficking cross-reference have been established, even though the defendant was convicted only of possession of materials depicting a minor engaged in sexually explicit conduct. It concluded that because Apprendi does not prohibit application of the § 2G2.4(c)(2) cross-reference, the district court erred by declining to apply it. The sentence was reversed and the case remanded for resentencing.

United States v. Galo, 239 F.3d 572 (3d Cir.2001). The defendant pled "guilty" to a two count indictment. Count one charged him with production of material depicting the sexual exploitation of children in violation of 18 U.S.C. § 2251(a), and Count two charged him with possession of material depicting the sexual exploitation of a minor in violation of a minor in violation of 18 U.S.C. § 2252(a)(4)(B). On appeal, the defendant challenged the district court's use of his prior state convictions to enhance his sentence pursuant to 18 U.S.C. § 2251(d) and impose a mandatory minimum sentence of 15 years imprisonment. This section provides in relevant part: "Any individual who violates...this section shall be fined under this title or imprisoned not less than ten (10) years nor more than twenty (20) years, but if such person has one prior conviction under this chapter [18 U.S.C. § 2251 et seq.],...or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than fifteen (15) years nor more than thirty (30) years." The district court's enhancement is based upon two guilty pleas he entered in state court. In reversing the district court, the Court of Appeals stated, "Rather, the sentencing court need only determine if the statute (not the conduct) the defendant was previously convicted if relates to the sexual exploitation of children. Section 2251(d) incorporates the categorical approach because it focuses the sentencing court's attention on the statutory definition of a prior conviction. It is the elements of a given statute, not the conduct that violates it that determines if the statute relates to sexual exploitation of children. We conclude, therefore, that the district court erred when it considered Galo's prior conduct in determining whether he was subject to the § 2251(d) enhancement. The court should have focused only on the statutory definitions of those prior convictions."

United States v. Crandon, 173 F.3D 122 (3d Cir. 1999). The defendant pled guilty to one count of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). At sentencing, the district court noted that § 2G2.2 of the Sentencing Guidelines provides a base offense level of 17 for a conviction of receiving child pornography. However, the district court applied the cross-reference, thereby invoking § 2G2.1, which raised the base offense level to 25. On appeal, the defendant argued that the district court erred in assigning him a base offense level of 25 as outlined in § 2G2.1. The Court of Appeals held that the district court erred in determining that the defendant acted "for the purpose of producing a visual depiction of sexually explicit conduct" without permitting any actual examination or consideration of his purpose. It is simply not enough to say "the photo speaks for itself and for the defendant, and that is the end of the matter." It is critically important to be certain that the defendant's purpose was, in fact, to create pornographic pictures. The defendant contends that his purpose in taking the pictures was the memorialization of his love for the girl, which had progressed to sexual intimacy, rather than the photographing of sexually explicit conduct.. It at least deserves to be heard. The Court of Appeals concluded that it may be possible for an individual to willfully take a sexually explicit photograph, but not for the purpose of producing sexually explicit material warranting a § 2G2.1 base level. In addressing this question, the court should consider the defendant's purpose or intent in taking the photographs before applying the cross-reference.

United States v. Ketcham, 80 F. 3d 789 (3d Cir. 1996). Defendant pled guilty to transporting, distributing and reproducing child pornography. He denied any involvement in the production of child pornography. Contrary to the plea agreement, the district court applied a five-level enhancement under §2G2.2(b)(4), concluding that defendant's possession, transportation, reproduction and distribution constituted "a pattern of activity involving the sexual abuse or exploitation of a minor." The Third Circuit reversed, ruling that the district court incorrectly interpreted §2G2.2(b)(4). "Sexual abuse" refers to conduct covered by offenses making it criminal for anyone to engage in sexual activity with another under stipulated circumstances, and "sexual exploitation of a minor" refers to conduct covered by sentencing guideline setting out offense level for various forms of "sexually exploiting a minor." The latter includes employing, inducing, coercing or transporting a minor with intent that such minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Transportation, reproduction and distribution of child pornography is not "sexual abuse" or "exploitation of a minor," even if the materials "involve" such sexual exploitation by a producer.

United States v. Bierley, 922 F. 2d 1061 (3d Cir. 1990). Defendant received magazines depicting child pornography from an undercover postal inspector. He pled guilty to receipt of child pornography in violation of 18 U.S.C. §2252(a)(2). The district court concluded that an adjustment for mitigating role under §3B1.2 was not available inasmuch as defendant was the sole "criminally responsible" participant in the offense. The district court adduced a number of factors which it thought pointed to a downward departure but which it said were, in totality, not sufficient to support a departure. The Third Circuit held that the district court did not err in concluding that §3B1.2 was, in itself, not the basis for a downward adjustment since defendant

was only "criminally responsible" participant. However, a departure by analogy to §3B1.2 is available if defendant's conduct would qualify as "minor" or "minimal" had the supplier, a postal inspector, been a criminally culpable participant.

§ 2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

United States v. Romualdi, 101 F. 3d 971 (3d Cir. 1996). Defendant pleaded guilty to possessing three or more videotapes containing child pornography in violation of 18 U.S.C. §2252(a)(4). The district court departed downward, citing the opinion in *U.S. v. Bierley*, 922 F. 2d 1061 (3d Cir. 1990). In *Bierley*, the undercover postal inspector acted as the distributor and after the magazines were delivered, inspectors searched Bierley's residence. Unlike the search of Romualdi's, the inspectors found no other articles of child pornography except for the magazines that Bierley had received through the sting operation. The government appealed, arguing that Romualdi was not analogous to *Bierley.* The crime to which Romualdi pled, possession, not receipt, of child pornography, is a crime that on its face requires no concerted activity. In reversing the departure, the Third Circuit held that possession of child pornography was a single person offense which does not involve concerted activity. Here, defendant pled guilty to possession of child pornography and obtained the benefit of a lower offense level than had the crime been receipt of child pornography.

United States v. Harvey, 2 F. 3d 1318 (3d Cir. 1993). Following a two-year investigation, agents executed a search warrant at defendant's residence and seized 75 photos of naked children engaged in sexually explicit conduct. Defendant took the photos in the Philippines. Section 2G2.4(c)(1) applies to a defendant who sexually exploits children abroad, photographs the conduct, and possesses the photos in the United States.

Part J -- Offenses Involving the Administration of Justice

§ 2J1.2 Obstruction of Justice

United States v. Abdus-Shakur, 2005 WL 23365 (3rd Cir. (N.J.)). The defendant pled guilty to forging a district court order compelling the Bureau of Prisons to recognize his name change, in violation of 18 U.S.C. § 505 and 2. The district court sentenced him to 21 months in prison in accordance with U.S.S.G. § 2J1.2. The defendant appealed his sentence, arguing that this guideline was not appropriate and that the district court should have sentenced him under U.S.S.G. § 2B1.1, Fraud.

In affirming the sentence, the Court of Appeals explained that the introductory commentary to § 2B1.1states that the guideline addresses basic forms of property offenses. Offense level increases under the guideline are determined, in large part, by the amount of pecuniary loss or harm that results. In contrast, the defendant's offense did not involve property or money of any kind. Because the defendant's forgery did not involve property or financial

harm, the Court of Appeals agreed that his conduct did not fall under § 2B1.1. Furthermore, the background commentary to § 2J1.2 notes that one of the offenses covered is altering court records. The defendant clearly attemoted to alter an "Order" of the district court by forging a judge's name in order to have the BOP acknowledge his legal name change.

United States v. Bertoli, 40 F. 3d 1384 (3d Cir. 1994). Defendant was convicted of obstruction of justice and conspiracy to obstruct justice. The district court, using the 1993 guidelines, applied §2J1.2, the guideline covering obstruction of justice. That guideline, however, contains a cross-reference, §2J1.2(c)(1), to be applied when a defendant's activity involved "obstructing the investigation or prosecution of a criminal offense." In such a case, the court is to sentence defendant as an accessory after the fact, §2X3.1, to the underlying offense. The district court found that the underlying crimes involved fraud, and applied §2F1.1, the fraud guideline. Defendant argued that application of the 1993 guidelines violated the Ex Post Facto Clause. The Third Circuit agreed with defendant, stating that the guidelines in effect when the crime was committed, directed a court to use the cross-reference only when the obstructionist behavior was directed at assisting another escape punishment. Applying the 1993 version violated the ex post facto clause. The amendment, effective November 1, 1991, was a substantive change. On remand, the district court is to apply the 1989 guidelines.

§ 2J1.3 Perjury or Subornation of Perjury; Bribery of Witness

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). After ascertaining that the base offense level for perjury before a grand jury was 12, the district court applied a three level enhancement for "substantial interference with the administration of justice." The district court had found that the defendant's perjury had caused the unnecessary expenditure of substantial governmental resources, including the re-interview of four witnesses, re-calling two witnesses before the grand jury, and issuing subpoeanas.. The Court of Appeals concluded that the enhancement was appropriate.

§ 2J1.6 Failure to Appear by Defendant

United States v.Muhammad, 146 F. 3d 161 (3rd Cir. 1998). The defendant was charged with two firearms offenses including possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). At his arraignment, he pled not guilty and was released on bond. He fled and was arrested two weeks later. A superseding indictment was returned charging the defendant with the two original firearms count plus an additional count for failure to appear (bail jumping). A jury convicted him on the bail jumping charge, but was unable to reach a verdict on the firearms charges which were ultimately dismissed. The district court sentenced the defendant pursuant to U.S.S.G. § 2J1.6. The defendant's base offense level was elevated by nine points pursuant to § 2J1.6(b)(2)(A) since the district court determined that the indictment's reference to 18 U.S.C. § 924(e) constituted notice to the defendant at the time he jumped bail of the government's intention to seek a punishment of at least 15 years. On appeal, the defendant contends that the district should not have been permitted to look to § 924(e) in determining his

sentence. The sentence was affirmed. The text of § 2J1.6 makes it clear that a defendant's bail jumping sentence should be increased in relation to the potential punishment that he faced at the time he jumped bail rather than the actual punishment that he received. *See U.S. v. Sanchez*, 995 F.2d 468, 470 (3d Cir. 1993). In order to trigger a penalty for purposes of the phrase "punishable by" as used in § 2J1.6(b)(2), the government must notify the defendant that it will seek that penalty provision prior to the time the defendant jumps bail, whether by indictment or otherwise. Applying this "notice" approach, the Court of Appeals found that the defendant was informed by the government in his indictment that it intended to seek the 18 U.S.C. § 924(e) sentencing enhancement. The district court was therefore entitled to enhance the offense level for bail jumping by nine levels.

United States v. Pardo, 25 F. 3d 1187 (3d Cir. 1994). Defendant pled guilty to bank and wire fraud and failure to appear. The Third Circuit held that district court's method of calculating defendant's total offense level did not result in "double counting" of defendant's failure to appear. The district court followed application note 3 to §2J1.6 when it added two levels for obstruction of justice to the total offense level for the two fraud counts. Because 18 U.S.C. §3146(b)(2) requires that any sentence imposed for obstruction to be consecutive to any other sentence, the district court must separate out the portion of the total sentence corresponding to the obstruction. Here, the court determined the appropriate sentence for defendant was 37 months, and then sentenced defendant to 31 months on the fraud counts, and six months for the failure to appear.

United States v. Cherry, 10 F. 3d 1003 (3d Cir. 1993). In sentencing defendant for unlawful flight to avoid prosecution, the district court improperly used the 1989 guidelines, rather than the 1991 guidelines which were in effect at the time of sentencing. Under the 1989 version of §2J1.6, the court was permitted to consider defendant's underlying murder conviction in calculating his criminal history category. The 1991 version did not permit this. The Third Circuit reversed, noting that a sentencing court must apply the guidelines in effect at the time of sentencing; it is only when this would result in a more severe penalty that ex post facto concerns arise and courts must apply the guidelines in effect at the time of the offense.

United States v. Sanchez, 995 F. 2d 468 (3d Cir. 1993). The appellate court held that §2J1.6(b)(2)(A), which requires a nine-level enhancement for the offense of bail jumping where the underlying charge carries a maximum prison term of 15 years or more, was entirely rational when applied to defendant. The guideline rationally provides higher penalties for those who evade trial on offenses carrying higher penalties.

§ 2J1.7 Commission of Offense While on Release

United States v. Hecht, 212 F. 3d 847 (3d Cir. 2000). The defendant appealed his sentence, contending that the district court erred in enhancing his sentence on the ground that his crime was committed while on release from another federal offense. He argued that the enhancement was improper because he was not notified of the possibility of the enhancement at the time of his release on the first offense. The Court of Appeals held that pre-release notice of the possibility of the enhancement is not required.

Rodriguez v. United States, 480 U.S. 522 (1987). According to 18 U.S.C. §3147, anyone who commits a felony while on bail must be sentenced to at least two years imprisonment in addition to the sentence imposed for the underlying felony. The Supreme Court held that neither the language nor the legislative history of §3147 provides any basis for concluding that it was intended to affect the power of trial judges to suspend sentence under 18 U.S.C. §3651 and impose probation instead.

Part K -- Offenses Involving Public Safety

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

United States v. Schwartz, 2007 WL 1643186 (3rd Cir.(Pa.))). The defendant pleaded guilty to possession of a firearm. On appeal, he argued that the District Court erred by using U.S.S.G. § 2K2.1(a)(2) to calculate his sentence and by double counting his prior felony convictions. Additionally, he claimed that the District Court's requirement that he submit a DNA sample as a condition of his supervised release violates the Fourth Amendment.

U.S.S.G. § 2K2.1(a)(2) provides for a base offense level of 24 when the defendant has two prior convictions for crimes of violence. The defendant argued that his arson conviction is not a crime of violence. He admitted that his escape conviction constitutes a crime of violence. His arson conviction was under 18 Pa. Cons. Stat. § 3301(f): A person commits a felony of the third degree if he possess, manufactures, or transports any incendiary or explosive material with the intent to use or to provide such device or material to commit any offense described in subsection (a), (c) or (d). The subsections referenced are arson endangering persons, arson endangering property, and reckless burning or exploding.

In order to determine whether the defendant's conviction constitutes a crime of violence, the Court of Appeals employed a categorical approach, considering the elements of the crime and not the underlying conduct or facts. See *United States v. Galo*, 239 F. 3d 572, 581 (3d Cir. 2001). The Court of Appeals affirmed the sentence, concluding that possession of an incendiary or explosive device with the intent to use it to commit arson or reckless burning or exploding is "inherently conduct that presents a serious risk of physical injury to another."

With respect to the defendant's double-counting argument, the Court of Appeals referred to Application note 10 to § 2K2.1 provides that when a defendant has prior felony convictions that increase his or her base offense level under subsection (a)(2), the convictions are also counted when calculating criminal history. The Court of Appeals held that the District Court's consideration of the prior felonies in its determination of the base offense level and criminal history score was proper.

Finally, as held in *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005), the taking of a DNA sample from an individual on supervised release is not an unreasonable search.

United States v. Rouse, 2007 WL 1654171 (3rd Cir.(Pa.))). The defendant appealed his sentence, claiming that the District Court erred when it increased his base offense level U.S.S.G. § 2K2.1(b)(4) by two levels for possessing a stolen firearm. He argued that the government must prove that he knew the firearm he possessed was stolen. The Court of Appeals affirmed the sentence, noting that this issued had been addressed in *United States v. Mobley*, 956 F. 2d 450 (3d Cir. 1992). It further indicated that there was nothing in *Apprendi* or *Booker* which would undermine the decision in *Mobley*....Enhancements pursuant to § 2K2.1(b)(4) do not have a scienter requirement....The District Court properly found by a preponderance of the evidence that the firearm the defendant possessed was stolen.

United States v. Hicks, 2007 WL 708985 (3rd Cir.(N.J.))). The facts of this case are as follows: Police officers observed the defendant standing outside a parked vehicle, face-to-face with an unidentified female. Alerted to the officers' approach, the female quickly fled and the defendant was observed placing a loaded .38 caliber revolver into the back seat of the vehicle. He was further observed discarding a clear plastic bag containing 9.28 grams of cocaine. Confronted by the officers, the defendant resisted arrest and a physical altercation ensued during which the defendant discarded another plastic bag containing .84 gram of marijuana along with a single edge razor blade. A search of his person revealed a small amount of suspected crack cocaine found in his pocket. The defendant eventually pled guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The presentence report assessed a four-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(5) because the defendant possessed the firearm in connection with another felony offense, namely the distribution of illegal drugs.

The defendant appealed his sentence, claiming that the district court's application of the preponderance of the evidence standard in assessing the four-level enhancement was a violation of his Fifth Amendment right to due process. In that regard, he asserted that the Due Process Clause requires facts relevant to enhancements, particularly those that constitute a separate offense under governing law, to be proven beyond a reasonable doubt. Citing its recent decision in *United States v. Grier*, No. 05-1698, 2007 WL 315102 (3d Cir. Feb. 5, 2007), the Court of Appeals concluded that the "right to proof beyond a reasonable doubt does not apply to facts relevant to enhancements under an advisory guidelines regime." Therefore, the district court's finding by a preponderance of the evidence that the defendant possessed a firearm in connection with drug distribution activity did not violate his Fifth Amendment right to due process.

Next, the defendant argued that the district court erred in assessing the enhancement because there was insufficient evidence under the preponderance of the evidence standard to conclude that the defendant was engaged in drug distribution activity. In support of his contention, the defendant maintained that the drugs recovered on the night of his arrest were for personal use and he was not attempting to distribute them to the unidentified female with whom he was conversing. Furthermore, he maintained that neither the vehicle nor the firearm belonged to him and that he never used or displayed the firearm during his conversation with the female.

The Court of Appeals concluded that it was reasonable for the district court to infer from the circumstances surrounding the defendant's arrest that he was engaged in drug distribution activity. Furthermore, there existed a sufficient relationship between the firearm and the drug activity to justify a four-level enhancement under U.S.S.G. § 2K2.1(b)(5).

United States v. Grier, 475 F. 3d 556 (3rd Cir. 2007). The facts of this case are as follows: Juan Navarro confronted the defendant over a bicycle. Navarro swung at the defendant. The punch did not connect, and the two men fell wrestling to the ground. Several witnesses warned Navarro that the defendant had a gun. A shot was fired. When the two men separated, the defendant was holding a gun. Neither had been struck by the bullet or sustained serious injury. The defendant then pointed the gun at Navarro. Navarro attempted to rush the defendant but was held back by other individuals. The defendant pointed the gun upward and fired a single shot. Both men left the scene. The defendant discarded the firearm in a nearby trash can. Officers found the discarded gun, and a background investigation revealed that it had been stolen. The defendant eventually pled guilty to a federal charge of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

A presentence report assessed a four-level enhancement pursuant to § 2K2.1(b)(5) for use of a firearm in connection with another felony offense, namely aggravated assault under Pennsylvania law. See 18 Pa. Cons. Stat. § 2702. This finding raised the defendant's total offense level from 23 to 27, and the imprisonment range from 84 to 105 months to 120 to 150 months. The final guidelines range, in light of the statutory maximum, was 120 months.

At sentencing, defense counsel argued that the four-level enhancement should not apply because the defendant had acted in self-defense. She also asserted that, under Pennsylvania law, the defendant was guilty not of aggravated assault but of "simple assault by mutual consent," a lesser-graded version of simple assault punishable by imprisonment of one year or less. See 18 Pa. Cons. Stat. §§ 1104, 2701. This crime is not considered a "felony" under the guidelines.

The only witness to testify at the hearing was Navarro. He described the altercation and stated that he had not possessed a firearm or any other weapon. He admitted, however, that he had not seen the defendant "pull" the gun from his clothing. He stated that people were telling him that the defendant was taking the gun out.

The district court adopted the presentence report, but granted a downward departure of two levels under § 5K2.10 in light of Navarro's conduct, which was partly responsible for the four-level enhancement. This reduced the guidelines imprisonment range to 100 to 120 months. The district court recognized that the guidelines were advisory but nevertheless imposed a sentence of 100 months.

The defendant appealed, arguing that the district court erred in (1) applying a preponderance standard to facts relevant to the four-level enhancement, (2) finding that he had committed aggravated assault under Pennsylvania law, and (3) imposing sentence without fully articulating its consideration of the factors under 18 U.S.C. § 3553(a).

Writing for the majority, Judge Fisher commented that, "Under an advisory guidelines scheme, district courts should continue to make factual findings by a preponderance of the evidence and Courts of Appeals should continue to review those findings for clear error. The only change in the equation is that, at the end of the day, the district court is not bound by the recommended guidelines range, but must impose a sentence based on all the factors articulated in § 3553(a). The Court of Appeals must then decide whether that final sentence is 'reasonable.'"

The primary issue in this appeal was whether the Due Process Clause of the Fifth Amendment requires facts relevant to enhancements under the guidelines, particularly those that constitute a "separate offense" under governing law, to be proved beyond a reasonable doubt.

In affirming the district court's decision to apply the preponderance standard to all facts relevant to the guidelines, including the finding that the defendant committed the offense of conviction in connection with an aggravated assault under Pennsylvania law, the majority opinion concluded that, "There can be no question, in light of the holding of Booker and the reasoning of Apprendi, that the right of proof beyond a reasonable doubt does not apply to facts relevant to enhancements under an advisory guidelines regime. Like the right to a jury trial, the right to proof beyond a reasonable doubt attaches only when the facts at issue have the effect of increasing the maximum punishment to which the defendant is exposed. Apprendi, 530 U.S. at 489-94 (The relevant inquiry is one not of form, but of effect - - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?). Facts relevant to application of the guidelines - - whether or not they constitute a 'separate offense' - - do not have this effect. E.g., Tanise, 942 F. 2d at 198; see also U.S. Sentencing Guidelines Manual § 5G1.1.

As previously noted, the defendant also challenged the district court's finding that he committed aggravated assault. With respect to this issue, the majority concluded that since "the presentence investigation report does not contain any specific reasons to support its finding of aggravated assault and the district court heard testimony from the victim and did not make any further findings on the question, we will refrain from reviewing its determination regarding the aggravated assault until it has stated more explicitly how it reached Grier's sentence." It further

held that the record was insufficient to review the sentence for "reasonableness." The touchstone of "reasonableness" is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a). The only explanation of the sentence provided by the district court was: "The Court believes that 100 months is reasonable in view of the considerations of § 3553(a).

In remanding the case for resentencing, Judge Fisher, writing for the majority, stated, "We do not suggest that the original sentence reflects anything less than the sound judgment of the District Judge, or that the final sentence should necessarily differ from the one previously imposed. The nature of the final sentence is, as always, a matter within the discretion of the District Court. We do ask, however, that the District Court explain its decision on the record, specifically by reference to the factors of 18 U.S.C. § 3553(a) and further elaboration on its findings regarding the factual underpinning of the assault enhancement.

Judge Sloviter, with whom Judge McKee joined, dissented with the majority opinion, stating that, "The majority's statement that facts relevant to application of the guidelines - - whether or not they constitute a 'separate offense,' do not constitute 'elements of a crime,' and do not implicate the right to 'proof beyond a reasonable doubt,' simply wipes away the entire holding of Apprendi...With no precedent and no persuasive rationale for its discard of the beyond-a-reasonable-doubt standard, the majority's decision represents a regrettable erosion of a criminal defendant's constitutional right of due process, an erosion that I can only hope will be of short duration." Even if the majority were convincing that the appropriate standard of proof is preponderance of the evidence, Judge Sloviter opined that the district court clearly erred in finding that the defendant committed an aggravated assault which was the basis for the four-level enhancement. At most, Judge Sloviter believed the facts on the record support a charge of simple assault by mutual consent, which, under Pennsylvania law, is only punishable by up to one year in prison, and does not support the four-level enhancement.

United States v. Navarro, 476 F. 3d 188 (3rd Cir. 2007). The facts of this case are as follows: A police officer noticed the defendant driving a vehicle. At the time, the defendant was wanted on state charges of aggravated assault. A car chase ended with the defendant losing control of his vehicle and flipping it on its roof. The defendant fled on foot and managed to escape. Officers discovered a loaded, semiautomatic handgun on the roof of the vehicle. The following day, a local resident provided the police with a jacket that was found near the scene of the crash. The jacket contained a quantity of marijuana (weighing 3.9 grams) and several packets of cocaine (weighing .31 gram).

The defendant was subsequently arrested and, after waiving his Miranda rights, gave a statement to officers. He admitted that he had been driving the vehicle during the pursuit and that the handgun and drugs found belonged to him. He also confessed to another crime, previously unknown to officers. The defendant revealed that he had obtained the gun in 2002 through a drug exchange. He had given an unknown person "three rocks" of crack and had received the gun in return.

The defendant pleaded guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g), and two counts of simple possession of controlled substances, in violation of 21 U.S.C. § 844(a). A presentence report recommended that the defendant's sentencing range be enhanced by four levels under U.S.S.G. § 2K2.1(b)(5) because the firearm had been possessed "in connection with another felony offense." The predicate offense for the enhancement, according to the report, was simple possession of cocaine and marijuana. Defense counsel objected, arguing that the enhancement could not apply because the predicate offense, simple possession of a controlled substance, see 21 U.S.C. § 844(a), is not a felony. The Government conceded this point. However, the Government asserted that the enhancement should nevertheless apply based on the felony offense of drug distribution, see 21 U.S.C. § 841, to which the defendant had confessed in his statement to the police.

A sentencing hearing was held. The officer who had taken the defendant's statement testified that the defendant had admitted that the handgun was obtained through a drug transaction. A recording and transcript of the statement introduced into the record confirmed the officer's recollection. Defense counsel argued that the evidence was insufficient to prove that the drug transaction had occurred. Additionally, defense counsel argued, notwithstanding the evidentiary deficiency, the offense could not support the enhancement under § 2K2.1(b)(5) because the firearm had been obtained as a direct result of the drug transaction. Essentially, the argument was that the offense was not sufficiently distinct from the firearms possession crime to qualify as "another felony offense" for purposes of § 2K2.1(b)(5).

The district court overruled the objection, concluding that the defendant's statement was sufficient to prove that the drug transaction had in fact occurred. The sole question raised on appeal was the propriety of the four-level enhancement under § 2K2.1(b)(5).

The Court of Appeals employed a two-part standard for determining whether an offense committed in connection with possession of a firearm may support an enhancement under § 2K2.1(b)(5). The first part of the test, from *Blockburger v. United States*, 284 U.S. 299 (1932) and *United States v. Lloyd*, 361 F.3d 197 (3d Cir. 2004), is legal in nature and asks whether the predicate offense and the firearms possession crime each have an element that is not shared by the other. The second part of the test, from *United States v. Fenton*, 309 F. 3d 825 (3d Cir. 2002), is essentially factual in nature and asks whether more than mere possession of the firearm - - brandishment or other use - - was an integral aspect of the predicate offense. If these two questions are answered in the affirmative, then, according to the Court of Appeals, the four-level enhancement under § 2K2.1(b)(5) should apply.

Using this two-part standard, the Court of Appeals held that the four level enhancement under § 2K2.1(b)(5) was properly applied when a defendant obtains a prohibited firearm through a drug trade. In such cases, possession of the firearm facilitates the offense of drug distribution but does not constitute an integral aspect of that offense. The district court properly found that, by exchanging drugs for the firearm, the defendant had possessed the firearm "in connection with another felony offense," warranting application of the enhancement under § 2K2.1(b)(5).

United States v. Butler, 2006 WL 3707845 (3rd Cir. (Pa.))). On appeal, the defendant argued that the district court erred by finding that his prior manslaughter conviction constituted a crime of violence under U.S.S.G. § 4B1.2(a), thereby warranting a base offense level of 20 points in accordance with U.S.S.G. § 2K2.1(a)(4). Consistent with application note 1 to U.S.S.G. § 4B1.2the Court of Appeals held that the district court correctly concluded that the defendant's prior conviction for manslaughter constituted a crime of violence.

United States v. Greene, 2006 WL 1976034 (3rd Cir.(N.J.))). The defendant pled guilty to a one-count indictment charging a violation of 18 U.S.C. § 922(g)(1) - - knowing possession of a firearm by a convicted felon. Both parties stipulated that (1) the applicable sentencing guideline was U.S.S.G. § 2K2.1(a)(4)(A), under which the base offense level was at least 20 due to his prior conviction for a controlled substance offense; (2) a two-level enhancement was applicable because the gun's serial number had been obliterated; and (3) a three-level reduction for acceptance of responsibility was appropriate. The presentence report also included a four-level enhancement for possession of a firearm "in connection with another felony offense" pursuant to U.S.S.G. § 2K2.1(b)(5). The defendant objected to this enhancement and moved for a downward departure based upon claimed post-offense rehabilitation.

The District Court conducted a sentencing hearing on June 3, 2004, and found that the Government had satisfied its burden of proving by a preponderance of the evidence that the defendant was engaged in the felony of drug distribution when he was arrested in possession of the .45 caliber pistol.

On appeal, it was undisputed that the District Court, when sentencing the defendant, treated the sentencing guidelines as mandatory rather than advisory. The Court of Appeals determined, therefore, that the defendant was entitled to resentencing. It noted that on remand, the District Court will have the opportunity to address the defendant's challenge to the finding of the connection between the firearm and drug distribution, a connection the Court of Appeals has previously recognized. See, e.g., *United States v. Russell*, 134 F. 3d 171, 183 (3d Cir. 1998)("Guns are a tool of the drug trade."); *United States v. Adams*, 759 F. 2d 1099, 1108 (3d Cir. 1985)(equating the gun with "the most commonly recognized narcotics paraphernalia"); see also, e.g., *United States v. Perez*, 280 F. 3d 318, 342 (3d Cir. 2002)(concluding that expert testimony discussing drug traffickers' use of cell phones and pagers to evade location by police investigators was properly admitted by the district court); *United States v. Ten Thousand Seven Hundred Dollars & No Cents in United States Currency*, 258 F.3d 215, 232 (3d Cir. 2001)(observing "that the amount of money in claimants' possession ... constitutes probative circumstantial evidence that the currency itself is connected to illicit narcotics transactions").

The Court of Appeals noted that the evidence in the instant case, the nine bags containing drugs in the glove compartment and $3,000 in cash alongside several cellular telephones in the center console, appears to fall within these parameters.

United States v. Reichard, 2005 WL 2811793 (3rd Cir.(Pa.))). In the spring of 2003, the defendant was involved in a brief romantic relationship with Teresa Lovin. After the affair, Lovin resumed a relationship with Raymond Kotomski. The defendant began sending threatening letters anonymously to Lovin and Kotomski. In October 2002, he entered Kotomski's house and took several items, including personal papers belonging to Lovin. He also spray painted the words "Get out Bitch" on the side of Lovin's car. The defendant eventually made and mailed a suspicious package to Kotomski. Kotomski did not open the package and took it to the state police barracks where a bomb squad concluded it contained a dangerous device, and disarmed it using a water cannon. The defendant was arrested and pled guilty to one count of manufacturing a "firearm" in violation of 26 U.S.C. § 5861.

The presentence report provided for a total offense level of 21, a criminal history category of I, and a guideline imprisonment range of 37 to 46 months. These calculations were not in dispute at sentencing. The government moved for an upward departure. It argued that the case was outside the heartland of cases contemplated in § 2K2.1 for three reasons: 1) the defendant actually used the device; 2) the defendant intended to use the device to carry out his threat to the victim; 3) by placement in the mail, the device posed a significant risk of serious bodily injury to others. The district court granted the government's motion and looked to analogous guideline provisions to determine the appropriate extent of the departure, concluding that an increase of four offense levels was appropriate. The defendant was left with a total offense level of 25, which along with a criminal history category of I, resulted in a guideline range of 57 to 71 months. The district court imposed a sentence of 60 months imprisonment.

The defendant appealed, arguing that the district court erred when it departed upwards because the factors supporting the departure were already accounted for in the guidelines calculation. § 2K2.1 applies only to criminal activities involving the making, importing, possessing, selling, transferring, and theft, etc., of firearms under specified circumstances. The base offense level of 24 thus took into account the fact that the defendant made a firearm, the fact that the firearm was a destructive device (i.e., a bomb), and the fact that he made and possessed that device in connection with a felony; namely, the harassment, threatening and stalking of Lovin and Kotomski. The Court of Appeals concluded that § 2K2.1 "did not take into account what the defendant did once he had manufactured the bomb; namely, place the bomb in the mail in a manner that (a) was designed to place it directly into the hands of the intended victim, and (b) would, during its mail transit, create a high risk of serious injury to many innocent people....While the defendant is correct in stressing that a 'destructive device' by definition is capable of causing bodily injury, there is a material difference between creating such a device and, after creating it, actually employing it in a manner that will create a substantial risk of serious bodily injury not only to the intended victim but to countless others as well."

In short, the fact that the device was dangerous, in and of itself, does not justify departure because the dangerousness of the device was already accounted for by the two-level enhancement for use of a "destructive device." The creation of a substantial risk of serious bodily injury to the general public was not adequately accounted for in the guidelines and justifies an upwards

departure. The Court of Appeals noted that the guidelines encourage departure in situations of this kind. See § 5K2.14, § 1B1.3, Application Note 5, and § 2K2.1, Application Note 8.

Further, the Court of Appeals concluded that the district court did not abuse its discretion when it departed upwards four levels. The district court looked to three provisions it viewed as analogous - - §§ 3C1.2, 2A6.2, and 2B3.1(b)(2). The two-level enhancement under § 3C1.2 for creation of a risk to others in the course of fleeing a law enforcement officer is more clearly analogous because it squarely addresses the defendant's creation of a risk to others.

United States v. Campbell, 2004 WL 3019535 (3rd Cir.(Pa.))). On appeal, the defendant challenged his sentence, claiming that the application of a four level enhancement under U.S.S.S.G. § 2K2.1(b)(5) contravened the requirements of due process because he received insufficient notice of the other "felony offense" justifying the imposition of the enhancement. The presentence report recommended the four-level enhancement. The defendant filed objections, and following a sentencing hearing, the district court found the evidence insufficient to support the assertion that the crack cocaine was possessed with the intent to distribute. However, the district court still applied the four-level enhancement. Although the district court had found that the government had failed to establish that Campbell's acknowledged possession of crack was for distribution rather than for personal use, possession for the defendant's own use was itself a crime. Possession for Campbell's own use, standing alone, would have been, for federal purposes a misdemeanor rather than a felony. But the fact that Campbell had, at an earlier time, pled guilty in a state court to possessing marijuana served, under the doubling provisions of 21 U.S.C. § 844(a), to convert possession of crack cocaine for personal use into a felony, and hence "another felony offense" within the meaning of § 2K2.1(b)(5).

Campbell argued that the district court erred when it imposed the four-level enhancement without giving him proper notice. He relied heavily on the filing requirement of 21 U.S.C. § 851. The Court of Appeals, however, held that notice under § 851 is not required in order for a court to find an enhancement under § 2K2.1(b)(5). The facts and circumstances of this case indicated that the notice afforded Campbell was adequate to satisfy Rule 32 and § 6A1.3. His prior convictions were identified in the presentence report and U.S.S.G. § 2K2.1(b)(5) was identified as a basis for adjustment.

United States v. Irvin, 369 F. 3d 284 (3rd Cir. 2004). This case arose out of the tragic accidental shooting of the defendant's three year old son, Daequan, at the home of the defendant's mother where the defendant and his son were living. While playing, the child found a .40 caliber pistol that the defendant kept in their room, and accidentally shot himself. He died four days later. The defendant was prosecuted by the Commonwealth of Pennsylvania for involuntary manslaughter, and by the federal government for felon-in-possession of a firearm. The issues on appeal pertain to sentencing determinations made by the district court regarding the number of weapons the defendant possessed; whether he accepted responsibility; and whether inclusion of the state offenses in his criminal history calculation was proper.

On the day of the shooting, the defendant advised the first officer on the scene that his son found the gun and accidentally fired it, that he did not have a license for the gun, and that he had thrown the gun out the back bedroom window. He was arrested and taken into custody. Later that same day at the police station, the defendant told officers that, in fact, the gun could be found in the back bedroom underneath the mattress with some other guns. When a search of the defendant's mother's home was conducted, six guns were recovered from her house in addition to the .40 caliber pistol. Just as he had told the police, the defendant's pistol was found in the upstairs back bedroom underneath the mattress. Two other guns were also under the mattress, and two more were under the bed. A sixth gun was found in the closet of that same bedroom. A seventh gun was found in the living room of the home.

There was in fact no direct evidence (e.g., fingerprints, purchase receipts) that the defendant had dominion and control over the other guns - five of which were found in the back bedroom, which was where the defendant's cousin, Lucius Joe, resided, and one of which was found in the common area. The defendant testified that he kept the gun his son used in the middle bedroom where they slept; that after the tragedy he "instinctively" hid the gun used by his son under the mattress in the back bedroom; that he did not know the other two guns were under the mattress until he saw them while hiding the gun; that he was unaware of the presence of any of the other four weapons found in the house (one of which was found in the open in the living room); that Lucius Joe had previously showed him three of the guns that were found in the back bedroom; and that the six other guns found were not his.

The district court discredited the defendant's testimony concerning his knowledge, possession, and ownership of the other six firearms and set forth the reasons for its findings. The court concentrated on (1) the defendant's initial lie to the police (he told them that he had thrown the gun out the window); (2) the fact that rather than get medical help for his son, the defendant first hid the gun and spent shell, because he knew he could not legally have possession of a gun; and (3) its conclusion that the defendant's testimony that it was his "instinct" to put the gun in the back bedroom and that "I don't know why I had a gun" was unworthy of belief. The court ultimately determined that the defendant possessed a total of eight firearms. It then concluded that the defendant was not entitled to a reduction in his offense level for acceptance of responsibility because he had offered false testimony.

The Court of Appeals held that all eight guns found in defendant's mother's home, where he was living, could be considered in determining the base offense level, and that defendant was not entitled to a downward adjustment for acceptance of responsibility. The Court of Appeals further held that the defendant's state conviction for involuntary manslaughter was part of the course of conduct underlying the instant federal conviction, and thus the state conviction could not be considered in calculating the defendant's criminal history. The defendant could not have exercised criminally negligent control over firearm with which his three year old son accidentally shot himself unless the defendant was already in possession of it.

United States v. Lloyd, 361 F. 3d 197 (3rd Cir. 2004). The defendant placed a bomb under the fuel tank of another individual's truck, lit the fuse (which consisted of a cigarette), and fled the scene. As the intended victim was about to enter the truck, his dog alerted him to the presence of the undetonated device under the vehicle. Authorities disassembled and examined the bomb. They concluded that the bomb was capable of exploding and would have exploded had it not been for the "malfunction of the cigarette." The defendant was indicted by a grand jury sitting in the Western District of Pennsylvania. He subsequently pled "guilty" to possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d), and conspiracy to violate that provision, in violation of 18 U.S.C. § 371.

In the process of calculating Lloyd's sentence, the presentence report recommended that the district court add four points to Lloyd's base offense level pursuant to U.S.S.G. § 2K2.1(b)(5), which provides for such an adjustment when it is found that a defendant "used or possessed any firearm . . . in connection with another felony offense; or possessed or transferred any firearm . . . with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense . . . ."

Lloyd objected to the proposed adjustment, contending that the allegedly felonious conduct on which the proposed adjustment was based was essentially the same conduct that formed the basis for the underlying counts to which he had pled guilty. The district court, however, found that the act of placing the bomb and igniting it was sufficiently different from the acts of conspiracy and possession so as to distinguish this case from *Fenton*. The district court accordingly applied the four point adjustment prescribed under § 2K2.1(b)(5). Lloyd disputed this holding on appeal.

The Court of Appeals found that the case clearly presented "another felony offense" as that term from the guidelines is to be properly understood. The felony offense alleged here is that of criminal mischief under Pennsylvania state law. The government alleges that Lloyd possessed the homemade bomb with "knowledge, intent, or reason to believe that it would be used . . . in connection with" an explosion causing at least $1,000 damage to property beloning to another. *See* U.S.S.G. § 2K2.1(b)(5); 18 Pa. C.S.A. § 3304. Criminal mischief is a second degree misdemeanor punishable by up to two years incarceration when it involves over $1,000 of damage. The Court of Appeals held that is sufficient to constitute a "felony" under Application Note 7 to § 2K2.1. There is no question that criminal mischief is a crime distinct from the crime of possession of unregistered explosives. Moreover, criminal mischief is clearly not a "firearm possession offense" under Note 18. Accordingly, the Court of Appeals held that the Pennsylvania second degree misdemeanor of criminal mischief constituted "another felony offense" distinct from the felony of possession of an unregistered destructive device.

Lloyd presented one final argument on appeal. He argued that the district court never made any explicit finding that the possible or expected damage to the intended victim's truck would have exceeded the $1,000 threshold had the bomb detonated. The Court of Appeals disagreed. It defies reason that the detonation of the bomb beneath the fuel tank of a recent model truck would result in something less than $1,000 damage. Even assuming, *arguendo*, that the bomb would not have caused $1,000 of damage had it exploded, what matters for the purposes of this case is how much damage Lloyd intended to cause or believed would be caused by the bomb.

The district court's findings were affirmed.

United States v. Rivera, 2003 WL 21246541 (3rd Cir.(Pa.))). Police officers searched the defendant's residence and found seven packets of heroin and a loaded 9 mm semi-automatic pistol in his basement. He pled guilty in federal court to possession of a firearm by a convicted felon. At sentencing, the district court enhanced the defendant's offense level by four levels pursuant to U.S.S.G. § 2K2.1(b)(5) because it found that he possessed the firearm in connection with another offense. On appeal, he challenged the four level enhancement under U.S.S.G. § 2K2.1(b)(5). He argued that there was no connection or relationship between the firearm and his possession of heroin with intent to distribute. The defendant further argued that he was only "passively in possession of a gun and drugs in the basement of his residence." The Court of Appeals affirmed the judgment of conviction and sentence. The defendant's associate was a drug trafficker, the defendant was a distributor of heroin and the defendant admitted he needed the firearm for protection. Furthermore, the heroin and loaded gun were found in proximity in Rivera's basement. These factors demonstrate the requisite relationship or association between the gun and the felony, in this case, possession of heroin with intent to distribute. *United States v. Loney*, 219 F.3d 281 (3d Cir. 2000).

United States v. Stepp, 2003 WL 21152962 (3rd Cir.(Pa.))). The defendant, Lamar Thomas and Robert Tarver were standing in the vicinity of East 22nd Street in Erie, Pennsylvania. The defendant gave Tarver a quarter ounce of crack cocaine to break down for further distribution. Suddenly, a man known as Twin Beason came by, grabbed the cocaine from Tarver and fled. Thomas gave a handgun to the defendant, who then went in search of Beason who he wished to scare in retaliation for stealing the cocaine. Officers apprehended the defendant, Thomas and Tarver before they found Beason. At the time of the arrest, the handgun was back in the possession of Thomas.

The defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court imposed a four-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(5) because the gun was possessed in connection with a drug transaction. This appeal followed. The defendant argued that it was not possible for him to possess the handgun in connection with the drug transaction because he had not obtained the weapon from Thomas until after he handed the cocaine to Tarver. The Court of Appeals affirmed the sentence. Although the defendant did not have the gun during his drug transaction, the Court of Appeals

has implicitly rejected the argument that a gun must be possessed during a felony to be possessed in connection with that felony. The fact that Congress chose not to use the "in connection with the commission or attempted commission of another offense" language from U.S.S.G. § 2K2.1(c), suggests that § 2K2.1(b)(5) does not require that the gun be possessed during the commission of the felony.

United States v. Rucker, 2002 WL 31898235 (3rd Cir.(Pa.))). The defendant, a previously convicted felon, was arrested on December 26, 2000, after a traffic stop. A handgun was found. He subsequently pleaded guilty to possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the government offered a police report showing that the handgun had been stolen on April 13, 1992, from a gun shop. The district court imposed a two level enhancement under U.S.S.G. § 2K2.1(b)(4) because the handgun had been stolen. The defendant appealed and argued that a § 2K2.1(b)(4) enhancement was not supported by a preponderance of the evidence because the government failed to establish that the gun was not returned to the gun shop after the 1992 theft. The Court of Appeals affirmed. The adjustment is based on strict liability. The defendant need not have stolen the weapon or even know or have reason to know that it was stolen. Because the defendant produced no evidence to the contrary, the Court of Appeals could not say that the district court committed clear error in finding that the government had established, by a preponderance of the evidence, that the dun in the defendant's possession was stolen.

United States v. Johnson, 2002 WL 31831564 (3rd Cir.(Pa.))). The defendant was convicted of conspiracy and 43 counts of making false statements. He was responsible for obtaining 83 firearms over a period of six months. The district court enhanced his offense level by one level pursuant to the government's motion for an upward departure pursuant to U.S.S.G. § 2K2.1(b) Application Note 16, based on the type and number of firearms. The district court reasoned that 80 firearms significantly exceeded 50. On appeal, Johnson argued that the number of firearms additional to 50 was already accounted for under the guideline itself and therefore the departure was not warranted. Because it was evident that the district court exercised its discretion in granting an upward departure of one level, that the departure was within its authority under the explicit language of the sentencing guideline, and that the decision was reasonable in light of the dangerousness of the defendant's conduct, the Court of Appeals affirmed.

United States v. Fenton, 309 F.3d 825 (3d Cir. 2002). The defendant and three accomplices broke into a sporting goods store and stole a number of handguns. A few hours later, the defendant and one of his accomplices returned to the store. They stole rifles and shotguns, which they later sold. Fenton had a number of felony convictions and was therefore prohibited from possessing any firearm. The defendant pleaded guilty to the theft of firearms from the sporting goods store, which theft made him a felon in possession of a firearm, in contravention of 18 U.S.C. § 922(g). In sentencing the defendant, the district court imposed a two-level upward adjustment pursuant to § 2K2.1(b)(4) because the firearms were stolen and added four additional levels pursuant to § 2K2.1(b)(5). This latter provision states: "If the

defendant used or possessed any firearms or ammunition in connection with another felony offense . . . increase by four levels."

The defendant appealed, arguing that the district court erred in imposing the four level enhancement pursuant to § 2K2.1(b)(5). He asserted that because his only conduct was stealing firearms from the sporting goods store, the district court's interpretation of "another felony offense" would punish hime twice for the same conduct. The first issue then is: when felonious conduct violates a state law and a federal weapons law, does the state law crime qualify as "another felony offense" for purposed of the enhancement under § 2K2.1(b)(5)? In other words, may the court used the same conduct to support the base offense level for the substantive offense, and thereafter, as "another felony offense" to enhance the sentence? The Court of Appeals held that "another felony offense" means a felony or act other than the one the sentencing court used to calculate the base offense level. A plain reading of the guideline clearly suggests that there must be a second crime committed by the defendant before imposing the enhancement. In this case, there was no other offense: there was no allegation that Fenton possessed any firearms when he entered the sporting goods store, nor was there any allegation that Fenton used the stolen firearms to commit any crimes after the theft. A state law crime, identical and coterminous with the federal crime, cannot be considered as "another felony offense" within the meaning of the guidelines. Accordingly, the Court of Appeals concluded that the district court erred by applying § 2K2.1(b)(5) to enhance Fenton's offense level by four levels. The case was remanded for re-sentencing.

United States v. Luster, 305 F.3d 199 (3rd Cir. 2002). The defendant pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). On appeal, he argued that the district court erroneously calculated his offense level by counting a prior felony conviction for escape from prison as a crime of violence. The district court concluded that escape is neither an enumerated offense nor a crime that has the use of force as a necessary element under Pennsylvania law. It held, however, that the crime of escape, "by its nature, presents a serious potential risk of physical injury to another." The state criminal information relating to the defendant's escape charged: "The actor unlawfully removed himself or herself from official detention, namely The Renewal Center, in violation fo 18 Pa. C.S.S. 5121(a).

The Court of Appeals held that escape presents a serious potential risk of physical injury. Escape is a continuing crime; it does not end when the escapee completes the act of leaving a correctional facility. Rather, the escapee must continue to evade police and avoid capture. Thus, "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. The conduct set forth in the defendant's count of conviction by its nature presents a serious potential risk of physical injury to another.

United States v. Cicirello, 301 F.3d 135 (3d Cir. 2002). The defendant pleaded guilty to unlawfully disposing of stolen firearms in violation of 18 U.S.C. § 922(j). On January 9, 2001, Mark Smith, James Williams, and Christopher Williams burglarized a sporting goods store and stole 22 firearms, all but one of which were handguns. They had discussed the plan with Michael Cicirello, but he declined to participate. However, after the burglary, Cicirello agreed to dispose of the firearms and did so the next day, then turning over the proceeds to the burglars. The district court applied a four level adjustment under § 2K2.1(b)(5) for the transfer of a firearm "with knowledge, intent or reason to believe that it would be used or possessed in connection with another felony offense." The sentencing judge was swayed by the fact that the guns were concealable weapons, thus weapons of choice in street crimes, as well as the fact that "he sold the guns on the streets." In concluding that the district court erred in imposing the four level enhancement, the Court of Appeals stated, "the factors relied upon by the district court - - the sale 'on the streets' and the type of guns - - do not save its ruling. The sale 'on the streets' is simply unfounded, as the record only indicates that Cicirello 'disposed of' the guns, not where, how, or to whom. With respect to the type of guns, while 21 of the 22 guns stolen were handguns, this fact alone certainly does not establish that Cicirello had the required mental state. The facts present here are not enough from which to infer knowledge, intent, or reason to believe....The district court's factual determination that defendant had reason to believe that the stolen firearms would be used in another felony crime was clearly erroneous."

At sentencing, the district court departed upward based on Application Note 16 to § 2K2.1, again relying on the "sale on the streets" of 22 guns and holding that selling "a score of lethal concealable firearms on the streets is an extreme aggravating factor not taken into account by the Guidelines." The Court of Appeals held that the upward departure was in error. Application Note 16 speaks in very strong terms - - "a substantial risk of death or bodily injury to multiple individuals" - - and the atypicality statutorily required for departure heightens the standard even more. Here, the number of weapons has been specifically considered in the guideline, as has the fact that the weapons governed by it are for the most part concealable firearms. Cicirello's offense is within the "heartland" of § 2K2.1.

United States v. Early, 2002 WL 1041121 (3rd Cir.(Pa.))). The defendant, Kenneth Johnson and five others were charged in a conspiracy to obtain firearms through straw-man purchases. Early and Johnson recruited people who had valid forms of Pennsylvania identification, and who had clean criminal records to purchase firearms for them. They would escort the straw purchasers to the gun stores, tell them which guns to buy, supply the money for the firearms purchases, and take possession of the firearms immediately after the purchases. In furtherance of the conspiracy, Early and Johnson made at least nine straw purchases. Of the nine straw purchasers who testified, six of them directly implicated Early as one of the people for whom they purchased firearms. As a group, the straw purchasers testified that a total of thirty firearms were involved in the straw purchases. The evidence adduced at trial was that Early and his co-conspirator, Kenneth Johnson, were the leaders and organizers of a scheme to obtain at least thirty firearms by using at least nine straw purchases. Early argued that the court's reliance on this evidence was in violation of Apprendi. The Court of Appeals held that Apprendi has no

application to a sentence determined by the guidelines which is within the statutory maximum sentence. Here, appellant's statutory maximum was 50 years and he was sentenced to only 16 years.

United States v. Pritchett, 2002 WL 393029 (3rd Cir.(Pa.))). The defendant pled guilty to being a fugitive in possession of a gun, in contravention of 18 U.S.C. § 922(g)(2). He was sentenced to 71 months imprisonment, based, in part, on a four level sentencing enhancement under U.S.S.G. § 2K2.1(b)(5). That section provides, in pertinent part, that "if the defendant used or possessed any firearm...in connection with another felony offense" the sentencing judge should increase the offense level by four. The district court concluded that the "other felony offense" in this case was appellant's fugitive status, which violated other state and federal fugitive statutes. On appeal, the defendant contends that the district court's interpretation of § 2K2.1(b)(5) "double counts" his fugitive status in computing his sentence because that status was an essential element of his offense of conviction. In addition, appellant claims that this interpretation contravenes the structure of § 2K2.1 and 18 U.S.C. § 922(g), as well as an application note to the guidelines. U.S.S.G. § 2K2.1, cmt. n. 18.

The Court of Appeals agreed with appellant, stating, "As appellant notes, his status as a fugitive was, as it had to be, considered in calculating the base offense level for his sentence. Section 2K2.1(b)(5) then permits a four level enhancement for using or possessing a firearm in connection with 'another felony offense'" Within this framework, 'another felony offense' means a felony other than the one the sentencing court considered in calculating the base offense level. Simply put, enhancing appellant's sentence for being a fugitive with a gun because he is a fugitive double counts his fugitive status when the guidelines require 'another,' i.e., a different felony in order to enhance....The fact that appellant violated other state and federal fugitive statutes by being a fugitive does not change this result."

United States v. Ushery, No. 00-2042 (3d Cir. February 26, 2001), Unreported. On July 4, 1999, the defendant's sister telephoned him saying that she needed a handgun, explaining that her boyfriend, Yayah Ibn Talib, had recently been discharged from jail and planned to commit a robbery. Talib got on the phone during this conversation and told the defendant that he knew someone who was coming to Harrisburg and that he was going to rob him. Talib offered to pay the defendant $100 for the firearm. The defendant gave his sister the handgun and then drove her and Talib uptown where Talib was supposedly to meet his friend. At one point, Talib told the defendant to pull over, saying, "I want to talk to my man." The defendant stopped the car and Talib got out. Talib approached a Lexus, fired a gunshot, went through the victim's pockets and drove away in the victim's car.

Following a three count indictment charging the defendant, his sister and Talib with several crimes, a one count superseding information was filed charging the defendant with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). The defendant pled guilty. On appeal, the defendant argued that the district court erred in enhancing his sentence. He challenged the enhancement on three grounds: (1) the court should have not

referred to the cross reference at U.S.S.G. § 2K2.1(c)(1)(A), but instead should have sentenced him only under § 2K2.1(a) and (b); (2) the enhancement he received based on the use of his weapon in a carjacking violates the teachings of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), because he was neither charged with nor convicted of the carjacking; and (3) even if the court's use of the cross reference was permissible, he should not have been subjected to a two level increase based on the carjacking because he had no knowledge or intent that a carjacking, as distinguished from a garden variety robbery, would take place. At oral argument, defense counsel withdrew the Apprendi argument. The judgment of the district court was affirmed.

United States v. Miller, 224 F.3d 247 (3rd Cir.2000). The defendant pled guilty to selling firearms without a license. On appeal, he argued that he was entitled to a reduction to level six pursuant to § 2K2.1(b)(2) because each of the weapons involved in his offense were possessed "solely for sporting purposes or collection." He argued that the Commission intended the word "possessed" in § 2K2.1(b)(2) to refer to a defendant's use of the firearms in question only up until the date of the conduct giving rise to his conviction - - in this case, the sale of the firearms. In other words, he asserts that he is entitled to a reduction if he had possessed the firearms in question for lawful sporting purposes up until the date he illegally sold the same. The Court of Appeals held that "where a defendant sold the firearms in question, he did not possess them solely for a lawful sporting purpose or collection even if defendant has possessed the firearms in question for lawful sporing purposes up until the date he illegally sold them....Guidelines subsection for recution of offense level to six for certain firearms offenses when defendant possesses ammunition and firearms solely for lawful sporting purposes or collection excludes trafficking offenses from the offense level reduction."

United States v. Loney, 219 F.3d 281 (3rd Cir.2000). When the police arrived to investigate a reported burglary, they discovered the defendant standing nearby on his aunt's porch. Frisking him, the officers found hidden in his clothes 29 packets of heroin and a .380 caliber semi-automatic pistol loaded with one round of ammunition. The question on appeal was whether the district court erred when it applied U.S.S.G. § 2K2.1(b)(5) and increased the defendant's offense level by four points for possessing a firearm "in connection with" his drug offense. The defendant emphasized that the government has no further evidence tying the gun to his drug trafficking, and he claims the reason he carried the gun was that, after witnessing a friend's murder, he did not trust anyone and felt he needed protection. The defendant did not question that he possessed a firearm, nor does he question that his possession of the drugs constitutes "another felony offense" under the guideline provision. The dispute was over the meaning of the phrase "in connection with." Did the defendant possess his gun "in connection with" his drug offense? In affirming the district court's decision, the Court of Appeals stated, "First, our interpretation of § 2K2.1(b)(5) must take into account that the sentence adjustment is not limited to 'use' of a firearm but also applies to 'possession,' so we should not give 'in connection with' a meaning so strict that it reads the possession standard out of § 2K2.1(b)(5). 'In connection with' is not a synonym for 'use.' A second reason for believing that the possession need not have any actual effect on the other felony offense is that the guideline applies to a defendant who merely possesses ammunition. If the guideline's drafters wanted to

introduce some requirement of a causal effect through the phrase 'in connection with,' it is strange that they expressly provided that the guideline applies to someone who had ammunition but not a firearm....More generally, we conclude that when a defendant has a loaded gun on his person while caught in the midst of a crime that involves in-person transactions, whether involving drugs or not, a district judge can reasonably infer that there is a relationship between the gun and the offense and hence § 2K2.1(b)(5) is satisfied."

Royce v. Hahn, 151 F. 3d 116 (3d Cir. 1998). The issue in this case is whether mere possession of a firearm by a previously convicted felon is a "crime of violence" that triggers an obligation of federal prison authorities to notify local authorities upon an inmate's release. The Court of Appeals held that possession of a firearm under 18 U.S.C. §§ 922(g) and (o) is not a crime of violence within the terms of 18 U.S.C. § 4042(b) and that Program Statement No. 5162.02(7) is an impermissible interpretation of 18 U.S.C. § 924(c)(3). Accordingly, the Bureau of Prisons may not subject petitioner to the notification requirements set forth in 18 U.S.C. § 4042(b).

United States v. Brannan, 74 F. 3d 448 (3d Cir. 1996). Defendant and a friend traveled to a nearby town to sell a gun. As it was being removed from the trunk, it accidentally discharged, killing a third party. Defendant pled guilty to a state charge of involuntary manslaughter. Nearly two years later, he pled guilty in federal court to felon in possession of a firearm. At the time of his federal sentencing, defendant was serving the sentence for involuntary manslaughter. The district court applied a four-level enhancement under §2K2.1(b)(5) for using or possessing the firearm in connection with the involuntary manslaughter. Defendant argued that §2K2.1(b)(5) requires an intent to commit the other felony. The Third Circuit held that §2K2.1(b)(5) does not require that use or possession be intentional for enhancement to apply.

United States v. Dersham, 16 F. 3d 406 (3d Cir. 1993). State police troopers found defendant passed out behind the wheel of his automobile in a parking lot. The engine was running and a .45 caliber semi-automatic handgun was on the front seat. Although the gun was in a holster and the safety mechanisms were engaged, the weapon was cocked and loaded with a bullet in the chamber and with five bullets in the inserted clip. An unplugged police scanner programmed to local law enforcement frequencies was in the car. Dersham argued that his base offense level should be six because he possessed the weapon only for the lawful purposes of collecting and target shooting. The district court declined to reduce the offense level to six, stating that the location and circumstances of Dersham's possession of the weapon are inconsistent with any lawful sporting or collection purpose. With respect to his criminal history, the defendant has a conviction for carrying a firearm without a license. The Court of Appeals affirmed.

United States v. Bossinger, 12 F. 3d 28 (3d Cir. 1993). The Third Circuit held that "plinking," defined as shooting at cans, bottles, and the like in trash dumps or as they are floating by in a river, is a lawful sport under §2K2.1(b)(2).

United States v. Joshua, 976 F. 2d 844 (3d Cir. 1992). The maximum term of imprisonment authorized under 18 U.S.C. §924(e) is life imprisonment.

United States v. Mobley, 956 F. 2d 450 (3d Cir. 1992). Defendant was convicted of being a felon in possession of a firearm, and received a two level enhancement under §2K2.1(b)(2) because the gun was stolen. The Third Circuit concluded enhancement was appropriate even though defendant did not know gun was stolen.

United States v. Kikumura, 918 F. 2d 1084 (3d Cir. 1990). Defendant's intention in this case was to detonate a bomb in a crowded area. The appellate court ruled that §§2K2.1 (possession of firearms by prohibited person), 2K2.2 (possession of firearms in violation of regulatory provisions), and 2K1.6 (transporting explosives with knowledge that others will use the explosives to harm people or property) do not take into consideration defendant's intent to kill, and therefore was a proper ground for upward departure.

United States v. Uca, 867 F. 2d 783 (3d Cir. 1988). Two defendants pled guilty to conspiracy to purchase 56 untraceable handguns for shipment overseas. The district court departed upward, based in part, upon the threat to public welfare caused by untraceable handguns. The Third Circuit held that the trial court's upward departure was impermissible and remanded for resentencing. The guidelines adequately consider 1) number of guns involved, 2) traceability of the weapons, 3) unlawful purpose for which the guns were to be used, and 4) threat to public welfare posed by the handguns.

§ 2K2.2 Unlawful Trafficking and Other Prohibited Transactions Involving Firearms

In *United States v. Neal*, 2006 WL 1080693 (3rd Cir. (Pa.))), the defendant was acquitted by a jury of possession of a stolen firearm but convicted of possession of a firearm by a convicted felon. He was sentenced to 55 months imprisonment. He appealed his conviction and sentence, arguing that the District Court erred by (1) applying a two-level upward adjustment after finding that the firearm was stolen and (2) by refusing to apply a downward adjustment for acceptance of responsibility.

As for his first argument, the defendant asserted that once a defendant is found not guilty of certain conduct under the beyond a reasonable doubt standard by a jury, the prosecution should not be permitted to use this same conduct, considered now using the lower preponderance of the evidence standard, to enhance the defendant's sentence. In rejecting Neal's argument that his sentence could not be adjusted under 2K2.1(b)(4) for possession of a stolen firearm, the Court of Appeals stated that the Supreme Court has expressly held that an acquittal on a charge does not prevent the District Court from considering at sentencing the underlying conduct so long as it has been proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed. 2d 554 (1997)(per curiam)(holding that defendant's acquittal of using a firearm in relation to a drug trafficking crime by a jury did not preclude sentencing court from determining that firearm was possessed in furtherance of possession of cocaine base with intent to distribute).

With respect to Neal's contention that his sentence should have been adjusted under 3E1.1 for acceptance of responsibility, the Court of Appeals held there was no error. As made clear in *United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996), application not 1(b) to 3E1.1 states that sentencing courts should consider, in addition to other factors, the defendant's "voluntary termination or withdrawal from criminal conduct or associations" in determing

whether a defendant has accepted responsibility. Here, despite warnings from probation officers and the District Court, Neal repeatedly returned to drug use, flouting federal and state laws, and the terms of the Court's orders of pretrial and presentence release. His continued abuse of cocaine subsequent to conviction but prior to sentencing countermands any inclination to determine that he is eligible for an acceptance of responsibility adjustment.

United States v. Wickstrom, 893 F. 2d 30 (3d Cir. 1989). A silencer is a firearm for purposes of establishing base offense level under §2K2.2. Appellate court rejected definition of firearm limited to use as a weapon in favor of definition in 26 U.S.C. §5845(f).

§ 2K2.4 Use of Firearm, Armor Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v.Jennings, 2003 WL 21205883 (3rd Cir.(N.J.))). Javon Jennings, who pled guilty to one count of armed robbery and one count of use of a firearm during a crime of violence, appealed alleging that the district court misapplied the sentencing guidelines by enhancing his sentence for brandishing a firearm. He was involved in a series of armed robberies. He pled guilty to the December 9, 2000, armed robbery of a Gulf Gas Station in Collingswood, New Jersey, and to using and carrying a short barreled shot gun during and in relation to a crime of violence (the armed robbery of a Gas Mart in Haddon Township on December 20, 2000. In his plea agreement, Jennings stipulated that in addition to the December 9 armed robbery, he committed or aided and abetted the commission of three other armed robberies on November 20, 2000, December 16, 2000 and December 20, 2000, and one attempted armed robbery on December 2, 2000. Because Jennings pled guilty to use and carrying a firearm in connection with the December 20, 2000, armed robbery and received a consecutive sentence for that offense under 18 U.S.C. § 924(c), the Court of Appeals held that the district court did not enhance the base offense level for the December 20, 2000, armed robbery. Rather, the district court, in adopting the presentence investigation report, only applied weapon enhancements to the armed robberies with no related conviction for a § 924 (c) offense. *See* U.S.S.G. § 2K2.4, Application Note 2 ("If a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction).

United States v. Casiano, 113 F. 3d 420 (3d Cir. 1997). Defendant pled guilty to conspiracy to commit carjacking and kidnapping, aiding and abetting carjacking, two counts of use of firearm in relation to crime of violence, and kidnapping. Defendants argued that because the criminal course of conduct from the carjacking (the first predicate offense) to the kidnapping (the second predicate offense) was continuous and involved only one victim, the district court erred as a matter of law in applying 18 U.S.C. §924(c)(1) to use of a handgun in connection with the kidnapping as "a second or subsequent conviction." The appellate court affirmed, holding "enhancement mandated by §924(c)(1) is appropriate where predicate acts occur simultaneously during same criminal episode and involve only one victim."

Bailey v. United States, 116 S. Ct. 501 (1995). Under 18 U.S.C. §924(c)(1) a defendant who "uses" or carries a firearm during and in relation to any crime of violence or drug trafficking crime is subject to a five year mandatory minimum sentence. The Supreme Court held that the term "use" in §924(c)(1) requires "evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. "Use" includes brandishing, displaying, bartering, striking with, and firing or attempting to fire, a firearm, as well as the making of a reference to a firearm in a defendant's possession. However, it does not include mere placement of a firearm for protection at or near the site of a drug crime or its proceeds or paraphernalia, or the nearby concealment of a gun "to be at the ready for an imminent confrontation." The "inert presence" of a firearm is not sufficient to constitute use even if it emboldens or protects its owner. "If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used.'" The court distinguished §924(d)(1) which reaches firearms that are intended to be used, and sentencing guideline §2D1.1(b)(1) which provides an enhancement for a firearm possessed during a drug offense. The court also noted that the "carry" prong of §924(c)(1) may reach other offenders. Neither of the cases before the court satisfied the "use" definition. In one case, the firearm was in a locked footlocker in a closet. The cases were remanded to determine liability under the "carry" prong of §924(c).

Smith v. United States, 113 S. Ct. 2050 (1993). Under 18 U.S.C. §924(c)(1), a defendant who uses a firearm during a drug trafficking crime must be sentenced to five years imprisonment. Where as here, the firearm is a "machine gun" or is fitted with a silencer, the mandatory sentence is 30 years. In this case, the defendant offered to trade his MAC-10 machine gun for two ounces of cocaine. The Supreme Court held that defendant's offer to trade the gun for drugs constituted "use" within the meaning of §924©).

Deal v. United States, 113 S. Ct. 1993 (1993). Defendant was convicted in a single trial of six separate bank robberies and six counts of using a firearm during a crime of violence under 18 U.S.C. §924(c). That section provides for a consecutive five-year term for the use of a firearm, and a 20-year term "in the case of a second or subsequent conviction under this subsection." Thus, for the second through sixth gun count convictions, the district court imposed 20-year consecutive sentences for a total of 105 years. Defendant argued that there should have been six consecutive five-year terms rather than a five-year term and five consecutive 20-year terms. The Supreme Court affirmed, finding the second through sixth convictions in the single proceeding arose "in the case of a second or subsequent conviction" within the meaning of §924(c). The statute is not ambiguous and the term "conviction" refers to the "finding of guilt by a judge or jury that precedes entry of a final judgment of conviction."

United States v. Torres, 862 F. 2d 1025 (3d Cir. 1988). Defendant sought to protect his confederates who were being arrested for distribution of cocaine on the street by brandishing a firearm at the arresting officer. He was convicted of the predicate offenses of conspiracy to distribute cocaine and assaulting a federal officer, as well as to §924(c)(1) offenses, i.e., use of a firearm during a drug trafficking crime and use of a firearm in connection with an assault on a federal officer. The court of appeals affirmed, even though the two §924(c)(1) convictions arose out of the same criminal episode and the same act.

Part L -- Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Otero, 2007 WL 2610412 (3rd Cir.(Pa.))). The defendant pleaded guilty to illegal re-entry by an alien previously deported following a conviction for an aggravated felony. At sentencing, the District Court increased the defendant's offense level by 16 levels under U.S.S.G. § 2L1.2(b)(1)(A)(ii), because the court concluded that simple assault qualified as a crime of violence under that provision. The defendant filed a pro se motion pursuant to 28 U.S.C. § 2255, alleging that his sentence was excessive because the District Court improperly used the simple assault conviction to increase his offense level by 16 levels. The District Court denied the § 2255 motion, and the defendant appealed.

The Court of Appeals held that simple assault in Pennsylvania does not qualify as a crime of violence under U.S.S.G. § 2L1.2.

United States v. Hernandez-Gonzalez, 495 F. 3d 55 (3d Cir. 2007) The defendant was convicted under 8 U.S.C. § 1326(a) of being an alien found in the U.S. following deportation. Guideline § 4A1.2 provides, in part, that any prior sentence that was imposed within 10 years of the instant offense is counted in a defendant's criminal history score. Although defendant was "found" in the U.S. when he was arrested in March 2005, he admitted that he had returned to the U.S. immediately after his 1998 deportation, and that he had lived in Pennsylvania for about six years before his arrest. The PSR found that the criminal conduct began at least as early as January 1, 2000, and thus it was proper to include convictions that dated from 1990 in the calculation of defendant's criminal history. The Third Circuit affirmed, holding that the "found in" offense began on the date defendant entered the U.S. rather than on the date he was found in the U.S. by authorities. The defendant's offense of being an alien found in the United States following deportation commenced on the date he entered the United States, rather than on the date he was discovered in the United States by immigration authorities, for purposes of computing the defendant's criminal history score.

United States v. Garcia Rivas, 2007 WL 1893242 (3rd Cir.(Pa.))). In this case, the advisory guidelines range was 46 to 57 months. The government appealed the district court's decision to sentence the defendant to twelve months and one day in prison for illegal re-entry into the United States following deportation for an aggravated felony in violation of 8 U.S.C. § 1326(a) and (b)(2). At sentencing, the district court took into account that the defendant would have had a lower sentence had he been arrested in a district with a fast-track program, and considered his history of alcohol abuse.

The Court of Appeals vacated the sentence and remanded to the district court for re-sentencing. It held that it was unreasonable to consider the disparity between fast-track and non-fast-track districts in issuing the sentence, and that the guidelines provide that drug or alcohol dependence or abuse is not a reason for a downward departure. It is noted that this case was decided subsequent to the opinion in *United States v. Vargas*, 477 F. 3d 94 (3d Cir. 2007).

United States v. Vargas, 477 F.3d 94 (3rd Cir. 2007). The defendant appealed his sentence of 41 months imprisonment following his plea of guilty to illegally reentering the United States after he was deported following conviction of an aggravated felony in violation of 8 U.S.C. § 1326(a), (b)(2). He claims the district court erred in sentencing him when it rejected his argument that his sentence created an "unwarranted disparity" in light of the "fast-track" programs available to defendants in some other districts.

The Court of Appeals held the disparity between sentences in fast-track and non-fast-track districts is authorized by Congress and, hence, warranted. The district court's refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable. Any sentencing disparity authorized through an act of Congress cannot be considered "unwarranted" under § 3553(a)(6).

United States v. Midgley, 2007 WL 625630 (3rd Cir.(Pa.))). The background of this case is as follows: In 1994, the defendant was arrested in connection with the shooting of his girlfriend. He pleaded guilty to two misdemeanors: possession of an instrument of crime in violation of 18 Pa.C.S. § 907, and simple assault in violation of 18 Pa.C.S. § 2701. In Pennsylvania, simple assault carries a two-year statutory maximum sentence and possession of an instrument of crime carries a five-year statutory maximum. The defendant was deported to Jamaica in 1999, but was arrested again on January 5, 2005, this time by federal immigration and customs enforcement agents in Philadelphia. He pleaded guilty to one count of illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(1). The presentence investigation report recommended a 16-level increase because the defendant had been deported after a prior conviction for a felony (simple assault) that was a crime of violence.

In determining whether the simple assault was a crime of violence, the Court of Appeals looked to the plea colloquy in the Pennsylvania Court of Common Pleas to gain more information about whether the defendant's act that led to his prior conviction qualified as a crime of violence. This review showed that at the reception of the guilty plea on the simple assault charge, the prosecution introduced a detailed description of facts recounting how the defendant decided to shoot his girlfriend and then shot her. Though the defendant may not have stated explicitly that the prosecution's characterization of facts was accurate, he did not take issue with it. The judgment of the district court was affirmed.

United States v. Velasquez, 2006 WL 1506858 (3rd Cir.(Pa.))). The defendant pleaded guilty to unlawful reentry by an alien previously deported after a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326. During sentencing, the District Court ruled that the defendant's previous conviction for attempted burglary constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(G), which increased his statutory-maximum sentence from two years under § 1326(a) to twenty years under § 1326(b)(2). Additionally, in calculating a sentence under the advisory guidelines, the District Court concluded that the defendant's attempted burglary offense was a crime of violence under U.S.S.G. § 2L1.2, which triggered a sixteen-level increase in his base offense level.

On appeal, the defendant argued that the District Court erred in applying the aggravated-felony enhancement under § 1326(b)(2) and the crime-of-violence enhancement under § 2L1.2.

With respect to the defendant's first challenge, the Court of Appeals employed the formal categorical approach of Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed. 2d 607 (1990), to evaluate whether the defendant's conviction constitutes a burglary offense under § 1101(a)(43)(G). Under this approach, the Court of Appeals looked only to the statutory definition of the predicate offense. The defendant was convicted of second-degree attempted burglary under N.Y. Penal Law §§ 140.25, 110.00. Under section 140.25, "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when ... the building is a dwelling." Based on these considerations, the Court of Appeals concluded that § 1101(a)(43)(G)'s burglary offense encompasses a conviction under section 140.25. Further, the defendant received a one-year sentence; thus, the term of imprisonment imposed was at least one year. Accordingly, the Court of Appeals found the District Court's application of this enhancement was correct.

With respect to the defendant's second challenge, the Court of Appeals used the formal categorical approach as described above, in finding that the District Court properly applied the sixteen-level increase pursuant to § 2L1.2(b)(1)(A).

United States v. Efigenio, 2006 WL 1438720 (3rd Cir.(Pa.))). The defendant pled guilty to unlawful entry of an alien previously deported after conviction for an aggravated felony, a violation of 8 U.S.C. §§ 1326(a) and (b)(2). The presentence report designated an adjusted offense level of 21 and a criminal history category of II - - applying a 16-level enhancement for Efigenio's previous deportation following conviction for a crime of violence, but recommending a three-level reduction for acceptance of responsibility. The District Court adopted the presentence report and sentenced the defendant to 41 months in imprisonment. On appeal, the defendant argued that the 16-level enhancement was improper because his conviction for lewd and lascivious acts with a minor under fourteen under California Penal Code § 288(a) is not a crime of violence under the sentencing guidelines. The Court of Appeals disagreed, ruling that Efigenio's conviction for lewd and lascivious acts against a child under fourteen constitutes sexual abuse of a minor. In holding that the crime was also a crime violence, the Court of Appeals noted that the 2003 guidelines explicitly include "sexual abuse of a minor" in the definition of a "crime of violence." U.S.S.G. § 2L1.2 app. N. 1(B)(iii)(2003). As the Court of Appeals noted in *United States v. Remoi*, the 2003 amendment to the definition makes it clear that the enumerated offenses are always classified as "crimes of violence," regardless of whether the prior offense has as an element the use, attempted use, or threatened use of physical force against the person of another. 404 F. 3d 789, 796 (3d Cir. 2005).

United States v. Gomez-Fonseca, 2006 WL 760274 (3rd Cir.(Pa.))). At sentencing, the defendant argued that the 16-level increase in his offense level was not warranted because he had never been convicted of a crime of violence. He also objected to the denial of acceptance of responsibility, and he argued that he should be awarded a downward departure because his criminal history level over-represented the seriousness of his crimes. The district court found that the 16-level increase was warranted because his previous conviction had been for a crime of violence. After hearing argument, the district court awarded a three-level reduction for

acceptance of responsibility. However, the court found that the defendant's criminal history category did not over-represent the seriousness of his crimes.

The defendant appealed. He argued that his 1995 conviction for false imprisonment with the use of a knife was not a "crime of violence" because no one was injured during the commission of the crime.

In evaluating a prior conviction when imposing a sentence, the district court may look to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some other comparable judicial record of this information." United States v. Shepard, 544 U.S. 13, 125 S.Ct. 1254, 1263, 161 L.Ed. 2d 205 (2005). The defendant's conviction encompassed two statutes - - Cal. Penal Code § 236, False Imprisonment, and Cal. Penal Code § 12022(b), Use of Deadly or Dangerous Weapon. The Court of Appeals held that using a deadly weapon to falsely imprison someone obviously fits into the category of a "crime of violence" because it involves a substantial risk of physical force.

The defendant also argued that the district court erred by not granting him a downward departure because his criminal history over-represented the seriousness of his past crimes. The Court of Appeals found no error. It was clear that the district court was well aware that it had the authority to depart downward, and chose not to do so. The Court of Appeals has no jurisdiction to review a district court's discretionary refusal to depart downward.

Gomez-Fonseca further argued that the additional sentence of six months for the supervised release violation punished him twice for the same offense. The Court of Appeals stated, "That argument ignored that his illegal reentry was a new criminal conviction and also violated the previously imposed term of supervised release. It would be a novel principle of law that precluded a court from sentencing a recidivist for a new crime as well as for the violation of any probation, parole, or supervised release that the criminal conduct may have violated."

United States v. Remoi, 404 F. 3d 789 (3d Cir. 2005). The defendant was convicted of knowingly preventing and hampering his deportation under a final order of removal in violation of 8 U.S.C. § 1253(a)(1)(C). One of the issues on appeal was whether or not the defendant's prior state convictions for criminal sexual contact with a helpless victim were incorrectly treated as a "crimes of violence" for sentencing purposes under § 2L1.2. The government conceded that the determination whether the prior convictions fit within the definition of crime of violence must be undertaken on a categorical basis, looking only to the elements of the offense of conviction and not the underlying facts. This analysis requires three steps. First, it must be established for which specific crime the defendant is convicted. Second, the necessary elements of the crime must be interpreted. Third, it must be determined whether those elements necessarily bring the state crime within the definition of § 2L1.2. The Court of Appeals concluded that a sexual crime perpetrated against a minor- forcible or not- is a crime of violence and thus, affirmed the judgment of the district court.

United States v. Lennon, 372 F.3d 535 (3d Cir. 2004). The defendant was deported to her native Jamaica on September 24, 1993. Eleven months later, she re-entered the United States under the pseudonym Diedra Barlow. Soon after her illegal re-entry, the defendant resumed her violations of the law and was arrested on several occasions by state authorities. She eventually came to the attention of INS officials as a result of an anonymous tip and was apprehended on July 7, 2001. The defendant was indicted for, and pled guilty to, being "found in the United States, having knowingly and unlawfully re-entered the United States" in violation of 8 U.S.C. §§ 1326(a) and (b)(2). She argued that the 1993 Sentencing Guidelines were applicable because her crime was completed upon her illegal re-entry in 1994. In imposing sentence, the district court concluded that the defendant's crime was committed on the date she was "found" in the United States and used the 2001 version of the Sentencing Guidelines. The district court also assessed criminal history points for the crimes committed from 1991 up until her apprehension by INS on July 7, 2001.

The defendant appealed and the Court of Appeals held that where the defendant unlawfully entered the United States with a fictitious name, she was, for sentencing purposes, "found in" the United States when actually discovered. The offense of being "found in" the United States illegally is "committed" when the alien comes to the affirmative attention of INS officials.

United States v. Billy, 2004 WL 758571 (3rd Cir.(Virgin Islands). Appellant Wangue Billy was convicted in Florida state court in 1999 of performing lewd and lascivious acts in the presence of a minor after pleading nolo contendere. Billy was deported to his native Haiti following this conviction, but was arrested in St. Thomas, U.S. Virgin Islands in 2002 while trying to reenter the continental United States. In sentencing Billy for illegal reentry, the district court applied an eight level increase set forth in U.S.S.G. § 2L1.2(b)(1)(C), which allows for such an increase when a defendant has been "previously deported, or unlawfully remained in the United States, after a conviction for an aggravated felony."

Billy appealed and argued that the underlying Florida conviction was not an "aggravated felony" under the United States Sentencing Guidelines or 8 U.S.C. § 1101, a statute classifying certain crimes as aggravated felonies for the purposes of immigration and deportation. The Court of Appeals held that "because a violation of Florida Statute § 800.04 qualifies as "sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A), the district court did not err in applying the eight level increase.

United States v. Frias, 338 F.3d 206 (3rd Cir. 2003). The defendant pleaded guilty to unlawful reentry after deportation in violation of 8 U.S.C. § 1326. At sentencing, the district court imposed a sentence enhancement of 16 levels because it concluded that the defendant had reentered the United States after a felony drug conviction for which the sentence imposed exceeded 13 months. The defendant argued that the term "sentence imposed" in § 2L1.2(b)(1) should mean the sentence actually served. Because he served a sentence of less than 13 months, he argued that he should be subject to the lesser 12 level enhancement. The district court rejected this argument. The defendant appealed. In affirming the judgment of the district court, the Court of Appeals held that the term "sentence imposed" as used in the guideline referred to the maximum term of imprisonment on an indeterminate sentence rather than the sentence

actually served. The defendant had been sentenced to 11 to 23 months on his state felony drug conviction.

United States v. Bamfield, 328 F.3d 115 (3d Cir. 2003). The defendant was convicted of 8 U.S.C. § 1253(a)(1)(C), preventing or hampering departure of an alien subject to an order of removal. He appealed his sentence, arguing that because his offense of conviction was not listed in the Statutory Index (Appendix A) of the United States Sentencing Guidelines Manual, the district court was required by § 2X5.1 to apply the most analogous guideline for the offense, and that the district court erred in concluding that § 2L1.2 was the most analogous guideline. The Court of Appeals held that § 2L1.2 was in fact directly applicable to convictions for violation of 8 U.S.C. § 1253(a)(1)(C), and that the failure to list this offense in the Statutory Index constituted an inadvertent error on the part of the United States Sentencing Commission. The Statutory Index refers to 8 U.S.C. § 1252(e), the old "failure to depart" statute, rather than 8 U.S.C. § 1253(a), the new "failure to depart" statute, represents an inadvertent omission by the Sentencing Commission.

United States v. Dyer, 323 F.3d 464 (3d Cir. 2003). The defendant appealed his judgment of conviction for unlawful reentry into the United States after a previous deportation in violation of 8 U.S.C. § 1326. He argued that his case was not within the heartland of the sentencing guidelines because he had reentered the United States to obtain legal employment and he thought he could reenter legally after four or five years from his deportation. The Court of Appeals held that the case did not fall outside the heartland. A legal purpose for an illegal reentry has been held to be insufficient to warrant a downward departure. *See United States v. Abreu-Cabrera*, 64 F.3d 67, 76 (2d Cir. 1995). Few illegal immigrants would admit that they reentered for any purpose other than a legal one.

United States v. Munoz-Valencia, 2003 WL 873983 (3rd Cir.(Virgin Islands))). The defendant was a Columbian citizen who was arrested on December 14, 2000, while attempting to board an airplane. He was carrying $90,000 of undeclared currency and using a false resident alien identification card. A presentence report revealed the defendant was previously deported on October 25, 1998. The immigration court issued a superseding order of voluntary departure, and the defendant complied by returning to Columbia on November 17, 1998. On this basis, the presentence report recommended a two level enhancement under U.S.S.G. § 2L2.2(b)(1) because the defendant was an unlawful alien who had been deported voluntarily or involuntarily) on one or more occasions prior to the instant offense. The district court adopted the recommendation of the presentence report.

On appeal, the principle issue was whether the enhancement under U.S.S.G. § 2L2.2(b)(1) applies to an alien who left the United States under voluntary departure. The Court of Appeals held that here, as in *Mrvica v. Esperdy*, 376 U.S. 560, 84 S.Ct. 833 (1964), an order of deportation had previously been entered against the defendant, and there was no error in applying the enhancement under U.S.S.G. § 2L2.2(b)(1).

United States v. Palmer, 2003 WL 214466 (3rd Cir.(Pa.))). The defendant was indicted on one count of unlawful reentry into the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). The indictment stated that Palmer had been deported previously following an earlier conviction for illegal reentry after deportation. He subsequently pled guilty. He appealed his sentence of 57 months, claiming that the district court erred by increasing his guidelines offense level in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because a jury did not determine that Palmer previously was deported after conviction for a drug trafficking felony with a sentence of more than thirteen months. His base offense level was enhanced 16 levels under U.S.S.G. § 2L1.2(b)(1)(A)(i), which mandates such an increase if the defendant previously was deported after a drug trafficking conviction with a sentence of more than thirteen months.

The Court of Appeals found Palmer's claim to be meritless. He pled guilty to illegal reentry following removal subsequent to the commission of an aggravated felony in violation of 8 U.S.C. § 1326. Under 8 U.S.C. § 1326(b)(2), the statutory maximum is twenty years imprisonment. Therefore, *Apprendi* is inapplicable because Palmer's sentence does not exceed the statutory maximum. *See United States v. Williams*, 235 F.3d 858, 862-64 (3d Cir. 2000). Further, even if the indictment to which Palmer pled guilty did not include the fact that he was deported after conviction of an aggravated felony, *Apprendi* would not be implicated because *Apprendi* does not apply to the use of prior convictions to increase a statutory maximum sentence. *See United States v. Weaver*, 267 F.3d 231, 250-51 (3d Cir. 2001). The Supreme Court has held, while addressing 8 U.S.C. § 1326, that the government is not required to allege in an indictment or establish as an element of the offense the existence of an aggravated felony. *See generally Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

United States v. Campbell, 2002 WL 31732226 (3rd Cir. (Del.))). At sentencing, the defendant sought a downward departure, asserting that one was merited because of his status as a deportable alien, because his criminal conduct was aberrant, and because he had many relatives in the United States. The district court made a discretionary decision not to depart. Inasmuch as the court recognized that it had the power to depart, and chose not to, the Court of Appeals had no jurisdiction over the defendant's appeal.

United States v. Colon, 2002 WL 2007189 (3rd Cir.(Pa.))). The defendant appealed, contending that the district court erred when it denied his request for a downward departure based on his status as a convicted deportable alien. The defendant requested the departure pursuant to U.S.S.G. § 5K2.0 on the ground that as a convicted deportable alien he was subject to potential consequences not visited upon others convicted of the same offenses. Because the district court believed it had the authority to depart, but exercised its discretion not to do so, the Court of Appeals dismissed the appeal for lack of jurisdiction.

United States v. Sanchez-Reyna, 2002 WL 1517919 (3rd Cir.(N.J.))). Sanchez-Reyna pleaded guilty to unlawful reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). The Court of Appeals held that a defendant who pleaded guilty in the District of New Jersey to unlawful reentry after being deported following an aggravated felony conviction was not entitled to a downward departure based on sentencing disparity between sentences imposed upon plea of guilty for illegal reentry in the Southern District of California and the rest of the country arising

from inordinately high volume of illegal reentry cases prosecuted in the Southern District of California. To dispose of this inordinate volume of cases, the United States Attorney in the Southern District of California usually permits the defendant to plead guilty to simple illegal reentry under 8 U.S.C. § 1325(a), pursuant to a fast track program, and thus be eligible for a lower guidelines sentence than that imposed for identical conduct in cases prosecuted under section 1326(a).

United States v. Valencia-Chacon, 2002 WL 984229 (3rd Cir.(Pa.))). The defendant pleaded guilty to illegal reentry of a deported alien in violation of 8 U.S.C. §§ 1326(a) and (b). He appealed, arguing that his prior conviction for transportation of methamphetamine is not an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(B) and therefore does not warrant a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A). The Court of Appeals held that this crime was an aggravated felony under 8 U.S.C. § 1101(a)(43)(B), warranting the 16-level increase.

United States v. Alba, 2002 WL 522819 (3rd Cir.(N.J.))). The defendant, a convicted heroin and cocaine dealer, was deported to the Dominican Republic on January 16, 1990. At the time of his deportation, the INS provide Alba with Form I-294, which provided in pertinent part, that: Should you wish to return to the United States, you must first write this office...as to how to obtain permission to return after deportation. By law (8 U.S.C. § 1326), any deported person who within five years returns without permission is guilty of a felony.

On August 17, 2000, Alba entered the United States at Newark International Airport and was arrested when a customs check revealed his prior deportation. He was convicted, following a bench trial, of illegally entering the country in violation of 8 U.S.C. §§ 1326(a) and (b)(2). The district court granted him a five level downward departure, finding that the circumstances surrounding Alba's crime removed his case from the heartland of similar cases. In granting the departure, the district court stated that it was not aware of a "single case where the defendant takes an airplane into the United States, walks through Customs, hands them his green card and says here I am. In every single one of these cases, the person is found in the United States. He has slipped back into the country. In other words, Alba reentered the country forthrightly versus surreptitiously." In reaching this conclusion, the district court observed that Alba only had a sixth grade education, was given Form I-294, was left with his green card, and had been working in the Dominican Republic without further legal troubles. The purported purpose of Alba's trip to the United States was to visit with his 16 year old son and that Alba had made "full disclosure at every step in this case of what he was doing."

The government appealed. The Court of Appeals affirmed the downward departure.

United States v. Soto, 2002 WL 464580 (3rd Cir.(Pa.))). The defendant was deported because of an aggravated felony conviction. He was subsequently discovered in the United States, arrested and pled guilty to unlawful re-entry after deportation in violation of 8 U.S.C. § 1326. On appeal, the defendant argued that the district court erred in increasing the statutory maximum penalty based upon a prior conviction for an aggravated felony. The Court of Appeals, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), affirmed the judgment and sentence of the district court.

Gerbier v. Holmes, 280 F. 3d 297 (3rd Cir. 2002). Gerbier is a citizen of Haiti who was a lawful permanent resident of the United States from 1984 until 1999 when he was removed to Haiti in the wake of proceedings triggered by a Delaware felony drug possession conviction that came to the attention of the Immigration and Naturalization Service. The appeal turns on the meaning of "aggravated felony" under the Immigration and Naturalization Act (INA). See 8 U.S.C. § 1 et seq. (1999). Whether an alien has been convicted of an "aggravated felony" determines whether he ie eligible for cancellation of removal. See 8 U.S.C. § 1229b(a)(3) (1999). The primary question, one of first impression for us, is whether a state felony drug conviction constitutes a "drug trafficking crime" and, therefore, an aggravated felony under the INA when that crime would only be punishable as a misdemeanor under federal law. This issue turns on the proper interpretation of 18 U.S.C. § 924(c)(2), which is the criminal penalties section of the federal criminal code and is incorporated by reference into the INA. See 8 U.S.C. § 110(a)(43)(B) (1999). The Court of Appeals concluded that Gerbier's prior marijuana conviction cannot be used to satisfy the "hypothetical federal felony" route. Gerbier's conviction would only be punishable as a misdemeanor under federal law. See U.S.C. § 844(a). Thus, his conviction does not constitute a "drug trafficking crime" as defined in § 924(c)(2), and he has, thereby, not been convicted of an "aggravated felony" for purposes of § 1101(a)(43) of the INA.

United States v. McKenzie, 193 F. 3d 740 (3d Cir.1999). The defendant pleaded guilty to knowingly and willfully re-entering the United States after being deported subsequent to his conviction for commission of an aggravated felony. The defendant requested a 2-level downward departure pursuant to Application Note 5 to U.S.S.G. § 2L1.2, which provides that: Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted on the seriousness of the aggravated felony. The district court held that the application note was inapplicable because, notwithstanding the partial suspension of sentence, the circuit court imposed a term of imprisonment exceeding one year for the crack cocaine offense. On appeal, the defendant pointed to U.S.S.G. §§ 4A1.2(b)(1) and (2) which provide that "the term 'sentence of imprisonment' means a sentence of incarceration and refers to the maximum sentence imposed" but that "if part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." The Court of Appeals held that "the difficulty with the defendant's position is that U.S.S.G. § 4A1.2(b) defines "sentence of imprisonment" for purposes of computing a defendant's criminal history category, a subject not at issue in this case. Thus, U.S.S.G. § 4A1.2(b) refers to "sentence of imprisonment" rather than "term of imprisonment" as used in Application note 5.

United States v. Graham, 169 F. 3d 787 (3d Cir. 1999). The defendant pled guilty to reentry into the U.S. following deportation, a violation of 8 U.S.C. § 1326. Section 1101(a)(43)(G) defines as an aggravated felony "a theft offense...for which the term of imprisonment at least one year." This case required the Court of Appeals to determine whether a misdemeanor can be an "aggravated felony" under a provision of federal law even if it is not, technically speaking, a felony at all. The particular question is whether petit larceny, a class A misdemeanor under New York law that carries a maximum sentence of one year, can subject a federal defendant to the extreme sanctions imposed by the "aggravated felon" classification. The

Court of Appeals concluded that Congress was sufficiently clear in its intent to include certain crimes within one-year sentences in the definition of "aggravated felony." In this case Congress's definition requires a finding that this defendant was an aggravated felon, though not a felon in the conventional sense.

Almendarez-Torres v. U.S.,118 S. Ct. 1219 (1998). Subsection (a) of 8 U.S.C. § 1326 provides a maximum two year sentence if a deported alien returns to the United States without special permission. Subsection (b)(2) provides for a sentence of up to twenty years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." In a 5-4 opinion written by Justice Breyer, the Supreme Court held that subsection (b)(2) does not describe a separate offense, but merely authorizes an enhanced sentence when an offender also has an earlier conviction for an aggravated felony. Thus, a defendant who was deported after conviction of an aggravated felony is subject to the twenty year maximum sentence even if the prior is not alleged or proved at trial. No due process violation occurs when prior convictions are used to increase a statutory maximum without being charged in an indictment and proved to a jury beyond a reasonable doubt. Recently, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, the Court upheld the validity of *Almendarez-Torres*, singling out "the fact of a prior conviction" as the exception to the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

United States v. DeLeon-Rodriguez, 70 F. 3d 764 (3d Cir. 1995). Defendant was convicted of illegal reentry after deportation in violation of 8 U.S.C. §1326(b)(2). Under §1326(b)(2), if the deportation followed conviction for an aggravated felony, the defendant is subject to 20 years imprisonment. The Third Circuit held that §1326(b)(2) is a sentencing enhancement provision rather than an offense distinct from §1326(a).

United States v. Eversley, 55 F. 3d 870 (3d Cir. 1995). Defendant was deported in 1988 after being convicted of drug trafficking. He illegally re-entered and subsequently pled guilty to violating 8 U.S.C. §1326(b)(1), illegally re-entry following commission of a felony "other than aggravated felony," rather than §1326(b)(2), re-entry after deportation following commission of an "aggravated felony." Defendant conceded that he was in fact deported for the commission of an aggravated felony. The trial court increased his offense level by 16 levels under §2L1.2(b)(2). The Third Circuit held that the district court was required to apply §2L1.2(b)(2), even though defendant pled guilty to a violation of §1326(b)(1).

United States v. McCalla, 38 F. 3d 675 (3d Cir. 1994). A jury convicted defendant for unlawful re-entry after deportation for an aggravated felony in violation of 8 U.S.C. §1326(b)(2). At the time of deportation, he was given a standard form that incorrectly warned that unlawful reentry would expose him to a maximum sentence of two years imprisonment. The actual statutory maximum penalty was 15 years. The Third Circuit held that because defendant illegally re-entered the country subsequent to effective date of statutory amendment that provided for the enhanced punishment, there was no ex post facto problem. The offense is not the prior aggravated felony, but rather the re-entry or being "found" in the United States after deportation.

Departures–Voluntary Deportation

United States v. Croussett, 2002 WL 99808 (3rd Cir.(Pa.))). On appeal, counsel argued that the district court abused its discretion by refusing to depart downward from the sentencing guidelines range based on the defendant's willingness to be deported. The district court explained that it was "aware of its power to depart, but in exercising its discretion the court would choose not to depart." If this were indeed the case, the Court of Appeals would lack jurisdiction. The Court of Appeals has no jurisdiction to review the district court's exercise of discretion. *United States v. Torres*, 251 F. 3d 138, 145 (3d Cir. 2001). However, the district court erred because it did not have discretion to depart. The Court of Appeals has explained that "in light of the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the United States Attorney." *United States v. Marin-Castaneda*, 134 F. 3d 551, 555 (3d Cir. 1998). In the present case, the United State Attorney did not request a departure from the sentencing guidelines, therefore the district court had no discretion, and, accordingly, although the Court of Appeals disagreed with the reasoning of the district court, it held that the district court was correct not to depart.

United States v. Marin-Castaneda, 134 F.3d 551 (3d Cir. 1998). Defendant, a Colombian national, pleaded guilty to importing 1,227 grams of heroin into the United States. He argued that the district court had authority to depart downward based on his willingness to consent to deportation, his age and the ordeal caused by ingestion of the heroin pellets. The district court did not depart. The court of appeals found no error, concluding that the three proposed bases for downward departure–consent to deportation, age and physical trauma–did not warrant a departure, either individually or collectively. Defendant did not assert any extraordinary condition other than the fact that he was 67 years old at the time of sentencing. He did not seem to suffer from any unusual impairments for a man his age. He was aware of the health risks involved in ingesting heroin prior to his trip, and his willingness to be deported and reliance on 8 U.S.C. §1231(a)(4)(B) is misplaced.

Part M -- Offenses Involving National Defense

§ 2M5.2 Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

United States v. Tsai, 954 F. 2d 155 (3d Cir. 1992). Defendant was convicted by a jury of three counts of violating and one count of conspiring to violate the Arms Export Control Act. He participated in a conspiracy to export certain components of military equipment to Taiwan without the required export license. The Third Circuit held that: (1) DSU-15 optical receivers and infra-red domes exported by defendant were critical components of the Sidewinder missile and constituted "sophisticated weaponry" under §2M5.2; (2) upward departure for concern about national security not available where applicable guideline itself explicitly assumed some threat to national security; (3) volume of commerce involved in defendant's exportation of infra-red domes and optical receivers to Taiwan was not extreme so as to justify upward departure; and (4) upward adjustment under §3B1.1(c) for defendant's managerial role did not preclude downward adjustment under §3B1.2(b) .

Part P -- Offenses Involving Prisons and Correctional Facilities

§ 2P1.1 Escape, Instigating or Assisting Escape

United States v. Hillstrom, 988 F. 2d 448 (3d Cir. 1993). Defendant was convicted of escaping from Allenwood Federal Prison Camp. The district court erred in not determining whether the prison camp was a facility similar to a community corrections center, community treatment center, or halfway house. Under §2P1.1(b)(3), a defendant is entitled to a four-point reduction, if he or she "escaped from the non-secure custody of a community corrections center, community treatment center, halfway house, or similar facility." The Third Circuit remanded, concluding that sentencing courts must determine on a case-by-case basis whether the conditions at a specific camp are sufficiently similar to warrant a reduction under §2P1.1(b)(3). A two part inquiry is required: (1) whether the facility was non-secure and (2) whether the facility was similar to a community corrections center, community treatment center, or halfway house.

United States v. Audinot, 901 F.2d 1201 (3d Cir. 1990). The Third Circuit held that application of the sentencing guidelines to defendant who escaped from custody before enactment of guidelines but was not recaptured until after guidelines' effective date did not violate the ex post facto clause.

United States v. Medieros, 884 F. 2d 75 (3d Cir. 1989). Defendant, while serving an 18 month sentence for unauthorized use of a bank card, walked away from the Lewisburg Farm Camp. The court of appeals agreed with the district court in holding that walking away from non-secure facility rather than from secure prison was not permissible reason for downward departure. Section 2P1.1(b)(2) adequately distinguishes escape from secure versus non-secure facilities. The interactive effect of §§2P1.1(a) and 4A1.1(d) and (e) does not constitute a permissible ground for downward departure. Increase in criminal history points for escape is not impermissible double counting.

United States v. Ofchinick, 877 F. 2d 251 (3d Cir. 1989). The Third Circuit held that the district court did not err in adding two points under §4A1.1(d) for defendant who escaped even though element of offense was that defendant be in custody and one point under §4A1.1(e) for committing the offense less than two years after release from prison. The two point increase was permissible under these circumstances because a defendant's criminal history must be calculated independently of the offense level. As to the second point, application note 5 to §4A1.1 provides that the section applies if the defendant is still in confinement. An escape does not constitute an end to confinement.

Part Q -- Offenses Involving the Environment

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

United States v. Chau, 293 F. 3d 96 (3d Cir. 2002). The defendant was indicted for violations of the Clean Air Act. He was charged with polluting the air when he cleaned up a building containing asbestos. On appeal, the defendant argued that the district court erred in imposing 1) a six level enhancement pursuant to U.S.S.G. § 2Q1.2(b)(1)(a) for a continuous or repetitive discharge of the substance, 2) a four level enhancement pursuant to U.S.S.G. § 2Q1.2(b)(3) for disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, and 3) a four level enhancement pursuant to U.S.S.G. § 2Q1.2(b)(4) for transportation, treatment, storage, or disposal without a permit or in violation of a permit. The Court of Appeals upheld the enhancements pursuant to U.S.S.G. §§ 2Q1.2(b)(1)(a) and 2Q1.2(b)(3), and ruled that the district court erred in applying the enhancement pursuant to § 2Q1.2(b)(4).

There is substantial evidence that the defendant disturbed the asbestos in the building. There is also evidence that some asbestos became exposed to the air. A city inspector found that some opened garbage bags containing asbestos were left outside on the sidewalk. The district court correctly found that there had been a continuous discharge. Chau's actions resulted in a cleanup that required substantial expenditure. The fact that Superfund relief was authorized prior to the institution of criminal charges is irrelevant because it was the defendant's criminal acts that led in part to the expenditure of Superfund monies. Costs of cleaning up the contamination were $200,000. This is a substantial expenditure. The district court correctly applied § 2Q1.2(b)(3). However, since Chau was charged with violating the federal requirements of the Clean Air Act, his apparent violation of a city permit, quite independent of the Clean Air Act, cannot be the basis for an enhancement of his sentence for violating that statute. Thus, the district court erred in applying the § 2Q1.2(b)(4) enhancement.

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

United States v. West Indies Transport, Inc., 127 F. 3d 299 (3d Cir. 1997). Defendants were convicted of visa fraud, environmental crimes, conspiracy, and racketeering. On appeal, defendants contended that the six level enhancement for ongoing, continuous, or repetitive discharge of a pollutant under §2Q1.3(b)(1)(A) should be reduced because the raw human sewage defendants dumped into navigable waters was "fully biodegradable." The Court of Appeals affirmed the district court, commenting "untreated human sewage falls within the clear meaning of 'pollutant' under §2Q1.3(b)(1)(A)."

§ 2Q2.1 Offenses Involving Fish, Wildlife, and Plants

United States v. Menon, 24 F. 3d 550 (3d Cir. 1994). The Third Circuit held that the district court violated the ex post facto clause by applying the sentencing enhancement under §2Q2.1(b)(3)(A) which provided for an enhancement according to the table in §2F1.1, "if the market value of the fish, wildlife, or plants exceeds $2,000." Even though the enhancement was in effect when defendant was sentenced, it was not part of the guidelines at the time of defendant's conduct. The conduct at issue occurred in July of 1991 when the guidelines provided for an upward adjustment only "if the market value of the specially protected fish, wildlife, or plants exceeded $2,000." The general rule is that a sentencing court must apply the guidelines in effect at the time of sentencing. *See U.S. v. Cherry*, 10 F. 3d 1003, 1014 (3d Cir. 1993) and *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991). But changes in sentencing guidelines that enhance the penalty offend the Ex Post Facto Clause of Article I of the U.S. Constitution. *See Miller v. Florida*, 482 U.S. 423, 431-435 (1987) and *U.S. v. Kopp,* 951 F. 2d at 526.

Part S -- Money Laundering and Monetary Transaction Reporting

§ 2S1.1 Laundering of Monetary Instruments

United States v. Bifield, No. 00-4386 (3d Cir. August 31, 2001). A federal grand jury indicted Daniel Bifield, Beverly Davis, William McDermott, and several others with conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h). Evidence at trial showed the tax fraud scheme in which they were involved to be under the control of inmates at the United States Penitentiary in Allenwood, Pennsylvania. Rodney Archambeault and Anthony Pfeffer recruited other inmates, such as Thomas McDermott and Daniel Bifield, to prepare fraudulent state income tax returns requesting refunds and smuggle them to friends and relatives who were not incarcerated. The various conspirators outside the prison would collect checks subsequently received and deposit them in bank accounts. After the checks cleared, the proceeds usually would be withdrawn, converted into postal money orders, and mailed to the prisoners' commissary accounts, co-conspirators, or third-party creditors. Generally, the co-conspirator who cashed the check would keep one third of the money, another third would be sent to the prisoner who coordinated the receipt of the check, and the remaining third would go to Archambeault and Pfeffer.

After analyzing *Smith, Cefaratti, Mustafa* and *Bockius*, the Court of Appeals reaffirmed in *Diaz* that, in cases not governed by Amendment 591, "the money laundering guidelines are not applicable to ordinary cases of routine fraud, to the simple receipt and deposit or use of illegally obtained funds, or to cases in which any money laundering is not separate from the underlying fraud, but merely an 'incidental by product' of that underlying fraud. Sentencing under the money laundering guidelines is not appropriate in cases in which the money laundering is minimal when evaluated against the overall offense conduct ... We conclude that where the defendant has not made a serious, concerted effort to conceal or to legitimize the funds or to reinvest them in additional criminal activity, it is not appropriate to sentence that defendant under the money laundering guideline." *Diaz*, 245 F. 3d at 310 (citations omitted).

Applying *Diaz* and the decisions on which it relied to the present case, the Court of Appeals found it impossible to identify any "serious, concerted effort" by the defendants to conceal the proceeds of the tax fraud or to reinvest them in additional criminal activity. The Court of Appeals vacated the sentences and remanded for resentencing under the appropriate guideline, § 2F1.1.

United States v. Omoruyi, 260 F. 3d 291 (3d Cir. 2001). In February 1999, a person not known to the authorities stole seven blank "convenience checks" attached to the bottom of First USA credit card statements from the mail in Texas. In April 1999, a similarly unknown person stole three blank American Express convenience checks from the mail in New York. In approximately March and April 1999, the defendant opened three savings accounts in fictitious names. Thereafter, all ten of the stolen checks were made payable to the fictitious names in amounts varying between $5,100 and $9,890, and deposited in the savings accounts. The defendant began withdrawing funds from the accounts via automatic teller machine and teller windows. The defendant was convicted of mail fraud and money laundering.

On appeal, the defendant argued that his sentence should have been calculated under the fraud guidelines because his money laundering conduct was minimal and incidental to the mail fraud. The Court of Appeals disagreed and held that the district court properly sentenced the defendant under the money laundering guidelines. "First, the conduct charged in the indictment, eight teller window withdrawals, was separate from the underlying crime of obtaining fraudulently and mailing the convenience checks to the various banks. Further, this case is distinguishable from *Diaz* as there the money laundering count was predicated only on the defendant's deposit of the federal student assistance checks in the school's bank account. Arguably, had Omoruyi merely deposited the checks, his conduct would not be deemed separate from the underlying crime, and this case would be more akin to *Diaz*. However, Omoruyi took the additional step of withdrawing the proceeds of his criminal conduct, an activity clearly not part of the underlying mail fraud. Second, Omoruyi's conduct involved a concerted effort to conceal or to legitimize the funds obtained through the mail fraud. In that regard, the case is quite similar to *Mustafa*.

United States v. Mustafa, 238 F. 3d 485 (3d Cir. 2001). A federal grand jury returned a 46 count indictment charging the defendant with mail fraud, malicious destruction of a building by fire, use of fire to commit a felony, food stamp fraud, money laundering and making false statements in obtaining a bank loan. The defendant operated a supermarket in the building he purchased with loan proceeds. He fraudulently inflated his income in documents he had submitted in connection with the loan. The defendant also obtained an insurance policy on the building and business, and he subsequently caused it to be destroyed by fire. The indictment also charged that, while he operated the supermarket, he deposited over $1.5 million worth of fraudulently obtained food stamps into a bank account. The defendant pled guilty to all counts of the indictment except those related to the arson of the supermarket. On appeal, he argued that the district court erred in relying upon the money laundering guideline in calculating his sentence. The Court of Appeals concluded that, "Under 'heartland' analysis, application of money laundering guideline to defendant convicted of food stamp fraud and 40 counts of money

laundering for making deposits that were intended to disguise the source and nature of the proceeds of fraudulent activity was not plain error, where financial transactions involved in money laundering were separate from underlying crime of fraud and deposits were intended to make it appear that food stamps were legitimate."

United States v. Bifield, Docket No. 4:CR-97-0195 (Dec. 13, 2000 - Judge McClure). The court held that Amendment 591, made effective November 1, 2000, is a clarifying amendment. Thus the basic premise for the decisions in *Smith* and *Bockius* has been removed. For the purpose of determining the applicable guideline, the court does not engage in a "heartland" analysis, but simply applies "the offense guideline referenced in the Statutory Index for the statute of conviction."

United States v. Bockius, 228 F.3d 305 (3d Cir. 2000). The defendant pled guilty to wire fraud, foreign transportation of stolen funds, money laundering and forfeiture. Citing *United States v. Smith*, 186 F. 3d 290 (3d Cir. 1999), the district court declined to sentence the defendant under the money laundering guideline, § 2S1.1 because it believed the § 2S1.1 heartland includes only money laundering associated with extensive drug trafficking and serious crime. The government appealed, contending the district court misinterpreted *Smith* and adopted too narrow a view of the heartland. Because *Smith* made clear the heartland includes typical money laundering as well as the money laundering activities connected with extensive drug trafficking and serious crime, the Court of Appeals vacated the sentence and remanded. After embezzling $600,000, the defendant admitted engaging in several acts to conceal the illegal source of the money and his ownership. In violation of 18 U.S.C. § 1956 (a)(2)(B), he secretly carried the cash or proceeds to the Cayman Islands where he formed a corporation under a false name, planned on depositing the money in bank accounts under different names in amounts calculated to avoid reporting requirements and bought a house in the name of the Little Mermaid corporation. The Court of Appeals held, "Where money laundering is not "minimal or incidental," and is "separate from the underlying crime" and intended to "make it appear that the funds were legitimate" or to funnel the money into further criminal activities, § 2S1.1 is an applicable guideline. The guideline may also be applicable if there is evidence that the activities which fulfilled the broad statutory requirements for money laundering were connected with extensive drug trafficking or other serious crime."

United States v. Morelli, 169 F. 3d 798 (3d Cir. 1999). The defendant was convicted of a RICO conspiracy, racketeering, an extortion conspiracy, extortion, mail fraud, and general conspiracy. With respect to the RICO conspiracy, the jury found that the government had proven money laundering as one of the many predicate acts. Morelli was sentenced under the money laundering guideline. On appeal, the defendant contends that the district court erred in not granting him a downward departure from the money laundering guideline, U.S.S.G. § 2S1.1, because his conduct did not fall within the "heartland" of money laundering. The defendant relied on proposed amendments to the money guidelines, which Congress rejected in 1995, that would have tied money laundering sentences to the offense level of the underlying specified unlawful activity. Morelli also contends that he is entitled to a downward departure because the government charged him, unlike others who engaged in similar schemes but were prosecuted

separately, with money laundering. He claims this constitutes unfair sentence manipulation. The district court did grant Morelli a downward departure on the ground that the "value of the funds" adjustment under U.S.S.G. § 2S1.1(b)(2) overstated the seriousness of the money laundering that occurred. The Court of Appeals affirmed the sentence. Despite Morelli's repeated and vociferous arguments, proposed amendments to the Sentencing Guidelines do not provide independent legal authority for a downward departure. Furthermore, Morelli's invocation of *U.S. v. Lieberman*, 971 F. 2d 989, 994-96 (3d Cir. 1992), in which the Court of Appeals affirmed a district court's grant of a downward departure for manipulation of the indictment, does not help him since in that case the district court had decided in its discretion that a downward departure was appropriate and the question on appeal was whether the district court had authority to do so. Here, by contrast, the district court considered both of Morelli's proposed grounds for departure and exercised its discretion to reject them.

United States v. Smith, 186 F.3d 290 (3d Cir.1999). The defendants were convicted of conspiracy to defraud, interstate transportation of stolen property, causing unlawful interstate travel with intent to distribute stolen property, and money laundering. The district court used the more severe money laundering guideline instead of that for the fraud as the basis for sentencing. The money laundering counts carried an offense level of twenty, U.S.S.G. § 2S1.1(a)(2), while the fraud charge carried a level of six, U.S.S.G. § 2F1.1(a). In this case, the money laundering convictions were based on 15 checks sent to Smith's creditors. The money laundering activity, when evaluated against the entire course of conduct, was an "incidental by-product" of the kickback scheme. The Court of Appeals concluded that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime. That is not the type of conduct implicated here. The Court of Appeals reversed and directed the use of the fraud guidelines rather than that for money laundering. In making its selection, the sentencing court must determine if the conduct being punished falls within the particular guideline's heartland, a set of typical case embodying the conduct described in each guideline.

The Court of Appeals relied on a 1997 report to Congress by the Sentencing Commission, in which the Commission stated that the high base offense levels for money laundering reflected an effort to punish the activities which aroused Congressional concern: "1) situations in which the 'laundered' funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime; and, 2) situations in which the financial transaction was separate from the underlying crime and was undertaken to either: a) make it appear that the funds were legitimate, or b) promote additional criminal conduct by reinvesting the funds in additional criminal conduct." In the instant case, the Court of Appeals decided that the money laundering guideline was inappropriate because the defendants left a paper trail, conduct inconsistent with concealment, because any efforts at concealment were disingenuous, and because, when evaluated against the entire course of conduct, the money laundering was an incidental by-product of routine fraud.

United States v. Sokolow, 81 F. 3d 397 (3d Cir. 1996). A jury convicted defendant of 107 counts of mail fraud and 17 counts of money laundering. He was an attorney and licensed insurance agent who offered health benefits to small businesses and their employees. He collected more than $34 million in premiums from plan members and converted approximately $4 million for his own personal benefit. He received $2.2 million in commissions and $1.8 million in salary, officer's loans and other disbursements. Defendant laundered the funds through a number of bank and brokerage accounts, as well as real property and mortgages. In determining the sentencing guideline range, the district court grouped the mail fraud and money laundering counts pursuant to §3D1.2(c). The district court included the full $4 million in the value of the funds involved in the money laundering under §2S1.2(b). The Third Circuit affirmed, even though this amount was not charged in the money laundering counts. This amount was derived from the unlawful mail fraud scheme. The $4 million represented the total amount of funds disbursed to defendant during the relevant period. The commentary to §2S1.1 does not define the value of the funds.

United States v. Thompson, 40 F. 3d 48 (3d Cir. 1994). Defendant opened a bank account using a fictitious business name. He deposited 34 stolen checks with a total value of $352,220. The conspirators then withdrew all but $99,561 before the bank discovered the illegal activities and froze the account. The Third Circuit held that calculation of "the value of the funds" under 2S1.1(a)(2) includes the aggregate of all funds involved in money laundering scheme without regard to either the actual loss which victims suffered or the return of any monies to victims. Thus, the the value of the funds involved in unlawful activities was $352,220.

United States v. Carr, 25 F. 3d 1194 (3d Cir. 1994). Defendant was convicted of a money laundering conspiracy after being arrested at the Miami airport carrying $186,000. The Third Circuit upheld an enhancement under §2S1.1(b), agreeing that the evidence showed defendant knew the funds were proceeds from illegal drug transactions.

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

United States v. Hlinak, 2007 WL 431152 (3rd Cir.(Pa.))). In this appeal, the defendant argued that the district court inappropriately applied the sentencing guideline for money laundering. The defendant pleaded guilty to wire fraud in violation of 18 U.S.C. § 1957 and forfeiture in violation of 18 U.S.C. § 982. The district court applied the sentencing guideline for money laundering, U.S.S.G. § 2S1.2. Under the fraud guideline, Hlinak's offense level would have been lower, resulting in a less severe guideline sentencing range. In concluding that the district court correctly calculated Hlinak's guidelines range, the Court of Appeals noted that Amendment 591, effective November 1, 2000, eliminated the text relied on in United States v. Smith, 186 F. 3d 290 (3d Cir. 1999). The Sentencing Commission explained that Amendment 591 clarified "that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction" unless the defendant has stipulated to the commission of a more serious offense in a plea agreement. The conduct giving rise to Hlinak's wire fraud offense occurred after November 2000, and Hlinak did not argue that the 2000

sentencing guidelines were inappropriately applied. The Court of Appeals concluded that under the guidelines as amended, which are applicable in this case, courts have no discretion to decide that the money laundering guideline is inappropriate or not the most applicable guideline on the facts of a given case. Accordingly, the district court properly calculated Hlinak's offense level.

United States v. Grasso, 381 F. 3d 160 (3rd Cir. 2004). The Court of Appeals held that "proceeds," as that term is used in the money laundering statute, means gross receipts rather than profits. The case was remanded, however, for the district court to determine whether frozen funds were sufficient to cover the ordered restitution, and, if so, to determine the manner in which, and schedule according to which, restitution was to be paid.

United States v. Binkley, 2002 WL 1396793 (3rd Cir.(Pa.))). The defendant and Ruth Streeval, her co-defendant and sister, created false inheritance documents that purported to show that Binkley was the beneficiary of George Earl Markham's estate. On two separate occasions Binkley and Streeval, posing as her attorney, borrowed money on the strength of these false documents. Upon receipt of the loans, Binkley obtained cash as well as a total of ten bank checks and money orders made payable to several of her creditors.

Binkley pled guilty to wire fraud, mail fraud and one count of money laundering in violation of 18 U.S.C. § 1957. The defendant appealed her sentencing, asserting that she should have been sentenced under the fraud guideline, U.S.S.G. § 2F1.1, instead of the money laundering guideline, U.S.S.G. § 2S1.2. She argued that because she merely spent the money obtained by fraudulent means, rather than concealing its illicit origins, her conduct does not fall within the heartland of the money laundering guideline, and instead she should be sentenced under the less punitive fraud guideline. The Court of Appeals stated, "We do not simply apply U.S.S.G. § 2S1.2 automatically whenever there is a conviction for money laundering. Instead we analyze whether the case falls within the heartland of the money laundering guidelines. These include 'cases involving typical money laundering, financial transactions that are separate from the underlying crime and that are designed either to make illegally obtained funds appear legitimate, or to conceal the source of some funds.' *United States v. Diaz*, 245 F. 3d 294, 310 (3d Cir. 2001). The money laundering cannot be an 'incidental byproduct' of the underlying fraud. Id.

"Instead, there must be a 'serious, concerted effort to conceal or to legitimize' the funds. Id....Binkley's money laundering conduct does not evidence a concerted effort to conceal the funds' fraudulent origins. Binkley signed the money orders that she obtained. The bank checks were easily traceable to the issuing bank, which she provided with her name, address, social security number, driver's license number, date of birth, and occupation." This distinguishes the case from *United States v. Omoruyi*, 260 F. 3d 291 (3d. Cir. 2001), where the defendant opened several accounts and used fictitious names to do so. 260 F.3d 291, 301. Binkley left a 'paper trail...inconsistent with planned concealment.' *United States v. Smith*, 186 F.3d 290, 300 (3d Cir. 1999). As such, she should be sentenced under U.S.S.G. § 2S1.2, and we reverse the District Court's judgement of sentencing."

United States v. Cefaratti, 221 F.3d 502 (3rd Cir. 2000). The defendant pleaded guilty to four counts arising from his execution of a scheme to defraud the United States Department of Education out of student financial assistance funds. On appeal, he argued that the district court erred by applying U.S.S.G. § 2S1.2, the guideline applicable to a money laundering conviction under § 1957. He asserted that his is an "atypical case in which the guideline section indicated for the statute of conviction is inappropriate" and that he should have been sentenced under U.S.S.G. § 2F1.1, the fraud guideline. His argument was based on *United States v. Smith*, 186 F.3d 290, 300 (3d Cir. 1999), a recent case in which the Court of Appeals concluded that "the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime." In affirming the district court's sentence, the Court of Appeals held, "As it is clear Cefaratti used criminally derived property to promote further fraud, we cannot say that such conduct is minimal or incidental to the underlying fraud.

The Sentencing Commission in its report to Congress had suggested that the heartland of money laundering included not only the proceeds of serious drug trafficking and organized crime but also situations in which separate financial transactions were undertaken either to legitimize illegally obtained funds or to promote additional criminal conduct. Therefore, the heartland of U.S.S.G. § 2S1.2 included separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conduct. In the instant case, the defendant reinvested the proceeds of the mail and wire fraud in the school and therefore used the proceeds to continue the fraud. He continued the operation of the school, which only survived by receiving 90 percent of its revenue from student financial assistance programs. The continued operation of the school enabled it to receive Pell and Stafford funds to which it was not entitled after February 1996. This was different than *Smith*, which involved only routine fraud and the receipt, deposit, and use of the proceeds of that fraud without serious attempts to fund further criminal activity.

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

United States v. Azcarate, 2002 WL 205679 (3rd Cir.(N.J.). The defendant pleaded guilty to exporting monetary instruments of more than $10,000 in violation of 31 U.S.C. §§ 5316 and 5324. On appeal, he argued that the district court erred by enhancing his sentence under § 2S1.3(b)(1), which provides for a two level enhancement for a failure to report monetary transactions where the defendant "knew or believed that the funds were proceeds of unlawful activity." According to the defendant, the government did not prove by a preponderance of the evidence that he "knew or believed that the funds were proceeds of unlawful activity."

On March 5, 1998, the defendant attempted to board a non-stop flight from Newark Airport to Panama City, Panama with $133,576 in currency and $9,984 in unendorsed money orders hidden in his computer bag and shoes. Following his arrest, United States Customs officials repeatedly questioned him where the money he was transporting came from. At his sentencing hearing, the defendant testified that in response to these inquiries he ultimately replied, "It probably came from drugs, it probably came from something illegal." The district

court found that the defendant's testimony supports a belief that the funds were proceeds of illegal activity.

The defendant argued that his testimony is insufficient to support a determination that he knew or believed the money came from unlawful activity. According to the defendant, he was speculating about the money's origin at the behest of customs agents. Thus, at the sentencing hearing, the defendant testified, "I do not know where the money actually came from. I could not prove it."

The Court of Appeals affirmed the sentence, commenting "To the extent the district court's finding was based on the defendant's testimony at the sentencing hearing, the district court may simply have disbelieved the defendant because of his demeanor or tone of voice. A sentencing court may also consider evidence contained in a noticed presentence report. See, e.g., *United States v. Hart*, 273 F. 3d 363, 379 (3d Cir. 2001). According to the presentence report, which the defendant reviewed, upon his arrest the defendant stated that he "knew the confiscated cash/money orders represented proceeds from drug trafficking activity....All of these facts support the trial court's determination that the defendant believed the money he carried was from unlawful activity.

United States v. Marcello, 13 F. 3d 752 (3d Cir. 1994). The guideline for structuring currency transactions, §2S1.3, was amended effective November 1, 1993, to reduce the base offense level. The Third Circuit remanded to consider whether, under the amended guideline, a reduction was warranted pursuant to 18 U.S.C. §3582(c)(2) and §1B1.10(d). Defendant would be entitled to a modification only if the amendment was listed in the "retroactivity" section of the guidelines, §1B1.10(d), and the district court exercised its discretion to apply the more lenient guideline. Here, the amendment to §2S1.3 was listed in §1B1.10(d) and therefore the court had discretion to apply it retroactively.

United States v. Shirk, 981 F. 2d 1382 (3d Cir. 1992). A jury convicted defendant of two counts of structuring currency transactions to avoid federal reporting requirements. He was acquitted of tax evasion charges. On appeal, defendant contended that his base offense level should have been five rather than 13, because he had no unlawful objective and the funds were legitimate business proceeds. He also claimed that the district court improperly increased his offense level by four based on its finding that he structured funds in excess of $600,000. The Third Circuit affirmed, finding that §2S1.3(a)(1) and its commentary mandate a base offense level of 13, regardless of whether structuring was in some sense "technical" or whether the structured funds were legitimate. Substantial evidence supported finding that defendant structured all currency deposits made after his CTR filing exemption was revoked. These deposits totaled in excess of $600,000. Factors that defendant was acquitted on criminal tax charges, that he may have only structured legitimate proceeds into his own legitimate bank accounts, that he may not have realized structuring was a criminal act, and that he was subject to substantial forfeiture were adequately considered in guidelines and were not grounds for a downward departure in sentencing for structuring money transactions to avoid reporting requirements.

Part T -- Offenses Involving Taxation

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

United States v. King, 2005 WL 940622 (3rd Cir.(Pa.))). The defendant pled guilty to two counts of federal income tax evasion. On appeal, he argued that the sentencing judge erred in applying a sophisticated means enhancement under the sentencing guidelines. Application Note 4 to § 2T1.1 states that "'sophisticated means' . . . enhancement would be applied, for example, where the defendant used . . . transactions through corporate shells or fictitious entities." The Court of Appeals, in concluding that the sentencing judge did not err, indicated that the defendant clearly used dummy corporations and fictitious entities to evade paying taxes. The guidelines to not condition application of the sophisticated means enhancement on the amount of the loss or the size or duration of the scheme.

United States v. Karamanos, 2002 WL 626780 (3rd Cir.(N.J.))). The defendant pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); eleven counts of attempting to evade excise taxes (26 U.S.C. § 7201), five counts of wire fraud (18 U.S.C. § 1343); and two counts of money laundering (18 U.S.C. § 1957). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

On appeal, the defendant argued that the district court erred in giving him a two level upward adjustment for the use of "sophisticated means" to prevent the government from finding out about the existence or extent of the crime. The defendant was substantially involved in the creation, function, and maintenance of the "daisy chain," which was an elaborate, complex, and sophisticated scheme devised to avoid payment of millions of dollars in taxes. The daisy chain included the use of numerous sophisticated devices to keep the scheme successfully rolling and to avoid detection by authorities. This included, inter alia, the use of sham companies, offshore accounts, phony invoices, and stolen or improperly obtained tax licenses. The record was more than adequate to support an increase for sophisticated means.

United States v. Brennan, 2002 WL 237769 (3rd Cir.(N.J.))). Defense counsel identified as an arguable issue whether the district court erred in calculating the amount of tax due for purposes of determining the defendant's sentence. The Court of Appeals held that there is case authority for the proposition that a sentencing court may consider a defendant's tax liability for years not charged in the indictment. See *United States v. Rabin*, 986 F. Supp. 887, 890 (D.N.J. 1997), *aff'd* 159 F. 3d 1554 (3d Cir. 1998). The defendant did not cite authority to the contrary and, in any event, he failed to establish that he would have received a more lenient sentence had his tax liability been calculated excluding the disputed amounts.

United States v. Gricco, 277 F. 3d 339 (3d Cir. 2002). Anthony Gricco and Michael McCardell were convicted of conspiracy to defraud the United States, tax evasion, and making false tax returns. All of the charges related to the conspirators' failure to report on their personal income tax returns money that had been stolen from airport parking facilities. From 1990 10 1994, Gricco was the regional manager for private companies that contracted with the Philadelphia Parking Authority to operate the parking facilities at the Philadelphia International Airport. He was responsible for the general operation of the facilities, including the hiring of employees and the collection of parking fees. Michael McCardell, Gricco's brother-in-law, was Gricco's chief assistant. McCardell oversaw the day-to-day activities of the tollbooths and picked up the money from the cashiers at the end of their shifts.

Gricco, McCardell, and others made a plan to steal money by substituting customers' real tickets with replacement tickets showing false dates and times of entry. A customer who had parked in the lot for a long period of time would have a real ticket reflecting a high parking fee. On leaving the lot, the customer would pay this fee to the cashier. However, instead of inserting the real ticket into the ticket-reading machine, a cashier participating in the scheme would insert a replacement ticket, and the machine would calculate the parking fee based on the false date and time stamped on the replacement ticket. This replacement ticket would indicate that the customer had parked for only a short period of time, and thus the parking fee would be much lower. The thieves would pocket the difference between the amount paid by the customer and the amount of the fee shown on the replacement tickets.

At first, Gricco enlisted cashiers who had engaged in a similar but smaller scheme in 1988. He eventually recruited about 15 other cashiers to participate. Michael Flannery, a technician for the company responsible for maintaining the ticket machines, provided the replacement tickets. He also disabled the fare displays on the ticket-reading machines so that customers could not see that the parking fees that they were paying were higher than the fees recorded by the machines. Flannery delivered the counterfeit tickets to Gricco, McCardell, or McCardell's wife. McCardell then distributed the replacement tickets to the corrupt cashiers, and at the end of their shifts, McCardell picked up the stolen money and forwarded it to Gricco, who distributed the money among the participants. The cashiers received a portion of the proceeds stolen during their shifts, and the rest was divided into four equal sahres for Gricco, McCardell, Million, and Flannery. The participants did not report the unlawful income on their federal tax returns.

The Court of Appeals held that the total tax loss associated with the funds stolen from the airport by all of the participants was properly attributed to both Gricco and McCardell. "Any participant's failure to report unlawful proceeds was "in furtherance of the jointly undertaken activities, within the scope of the agreement, and reasonably foreseeable in connection with the embezzlement scheme. Consequently, the tax loss arising from the total amount of money stolen from the airport by all of the participants is properly attributed to both appellants....The estimate of the tax loss, however, still must be reasonable and based on available facts....Since the government's memorandum, the district court, and the PSRs all fail to provide a coherent factual basis for the calculation of a $3.4 million theft loss, the corresponding tax loss of $952,000 is not

a reasonable estimate. Accordingly, we remand for a new calculation of the amount of tax loss."

McCardell contests the two-level increase he received because he "failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity." U.S.S.G. § 2T1.1(b)(1). Flannery and Million testified to the amounts they received in each of the years from 1990 to 1994, and these annual amounts greatly exceeded $10,000. These amounts apply to McCardell as well, since he and the three other leaders received equal cuts. The sentencing enhancement was proper.

McCardell's and Gricco's offense levels were increased by two levels because the district court believed that their offenses "involved sophisticated concealment." U.S.S.G. § 2T1.1(b)(2). The findings that the appellants engaged in sophisticated concealment of their tax offenses are well-supported by the evidence. Gricco loaned cash to others and asked for repayment in the form of money orders and checks made out to him or to a title company. He purchased real estate in his name and in the names of family members. He gave cash to family members and received checks in return to buy more property. Between 1991 and 1994, Gricco spent over $1.365 million on real estate purchases. Of this amount, $160,000 was in cash, and $121,000 was from relatives. Real esate agent Capozzi testified that McCardell's wife used cash to purchase properties under both her name and McCardell's name. Between 1991 and 1994, McCardell spent $341,000 on real estate purchases. Of this amount, $33,000 was in cash, and $80,000 came from the accounts of family members. Evidence showed that McCardell structured his currency transactions, laundered money through real estate purchases, and hid assets under family members' names. The district court did not err in applying the enhancement.

United States v. Cianci, 154 F. 3d 106 (3d Cir. 1998). Defendant pled guilty to two counts of tax evasion. He argued that the district court erred in enhancing his offense level by two points pursuant to U.S.S.G. § 2T1.1(b)(2), because it was improperly premised upon its analysis of the embezzlement scheme that generated the income rather than the subsequent tax evasion offense to which he pled guilty. The defendant's plea agreement contained a stipulation that "sophisticated means were used to impede the discovery of the existence or extent of the offense" and as such "the offense level should be increased to 17." The court of appeals held that under the law of this circuit, the defendant cannot renege on his plea agreement. In *United States v. Melendez*, 55 F. 3d 130 (3d Cir. 1995), defendant's attempt to dispute a stipulation regarding the appropriate sentencing range was rejected. Similarly, in *United States v. Parker*, 874 F. 2d 174 (3d Cir. 1989), defendant was not allowed to argue facts which contradicted those he agreed to in his plea agreement. In *Cianci,* the court of appeals concluded that the district court was justified in holding the defendant to his stipulation that he used "sophisticated means" to impede the offense. "Even if we were inclined to look beyond the stipulation, there is adequate support for the district court's finding that the defendant employed sophisticated means to conceal his tax evasion from the IRS.

United States v. McLaughlin, 126 F. 3d 130 (3d Cir. 1997). Defendants were officers of a closely held corporation owned by them and their relatives. The corporation opened two bank accounts and deposited over $700,000 in each account. Neither the corporation nor defendants declared the roughly $1.4 million as income on federal tax returns. In determining tax loss, the district court took into account all funds deposited in both accounts, despite defendant's claim that one account was a reserve against future claims and that its balance therefore was being treated as accrued income over ten years. The Third Circuit upheld the district court's computation of tax loss. The government presented evidence that the funds in the disputed account were used to capitalize other ventures. The Third Circuit also upheld the inclusion of accumulated interest in the tax loss calculation. Including interest merely recognizes the time value of money. It is a rational calculation of the real loss sustained as a consequence of a taxpayer's illegally concealing his income from assessment.

United States v. Veksler, 62 F. 3d 544 (3d Cir. 1995). Over a two-year period, defendant was involved in a scheme to evade federal and state taxes on sales of a type of oil that can be used as either home heating oil or diesel fuel. At the time, neither the state nor the federal government imposed taxes on the sale of oil for use as home heating oil, but they did impose a tax on the sale of the oil for use as diesel fuel. The scheme involved the use of "daisy chains," a series of paper transactions through numerous companies, some of which were largely fictitious. The fictitious companies would purchase oil as tax-free heating oil and then sell it to another company as diesel fuel. The fictitious company would provide the purchaser with false invoices reflecting that the diesel fuel taxes had been paid and were reflected in the purchase price. The fictitious company would then disappear. The Third Circuit agreed that the "daisy chain" scheme used "sophisticated means" to impede discovery of the tax offense under §2T1.1(b)(2). Note 4 states that the enhancement applies where the defendant used transactions through corporate shells or fictitious entities.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). Defendants argued that the court erred in computing their sentences based upon the tax loss attributable to the employees of their companies rather than using losses attributable to the defendants individually. The Third Circuit affirmed, concluding that the tax fraud conspiracy alleged in the indictment was clearly intended to encompass the tax losses attributable to the employees of defendants' companies as well as the losses from the defendants' personal tax evasion. Defendants' cash skimming scheme defrauded the IRS out of the taxes owed by those employees receiving cash, as well as taxes owed by defendants.

United States v. Pollen, 978 F. 2d 78 (3d Cir. 1992). Defendant was convicted of income tax evasion. The IRS recovered some of his hidden assets, which were applied by the receiver to reduce the taxes, penalties and interest that defendant owed to the IRS, rather than reducing just the actual tax liability. Defendant's offense level under §2T1.1 was based on the actual amount of tax he owed, regardless of the interest and penalties also due to the IRS. Defendant argued that the court should have calculated the taxes as if the receiver's payments had been allocated solely to the taxes. The Third Circuit rejected this argument. Under §2T1.1, the sentence is to be based on the tax that the defendant attempted to evade. Thus, it would have been proper to

sentence defendant based on the full tax debt he attempted to evade, without any credit for the receiver's payments.

United States v. Astorri, 923 F. 2d 1052 (3d Cir. 1991). Defendant pled guilty to one count of wire fraud and one count of income tax evasion in connection with a fraudulent stock brokerage scheme. The Third Circuit found that the district court properly increased defendant's offense level for his tax evasion conviction. The tax evasion and fraud counts did not involve the same victims and thus grouping under §3D1.2(a) was inappropriate. The fraud count did not embody the conduct treated as a specific offense characteristic under the tax evasion count, and thus grouping under §3D1.2(c) was inappropriate.

Part X–Conspiracies, Attempts, Solicitations

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

United States v. Youla, 2002 WL 29704 (3rd Cir.(Del.))). The defendant pleaded guilty to social security number fraud in violation of 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 2. In February of 1998, the defendant attempted to purchase credit cards through an FBI informant. The informant purported to have a relative who worked for a bank and could acquire the cards, but would only engage in a transaction for a minimum of twenty cards. Although the defendant never actually purchased the credit cards, apparently because he suspected that the informant was connected with law enforcement, the defendant did organize the requisite number of buyers, agreed to the transaction, and provided the informant with sufficient names and social security numbers of prospective card purchasers (8 false and 12 authentic) to meet the twenty card order minimum. Each of the buyers was willing to pay at least $1,000 per card. The defendant and Mara, one of his confederates, met with the informant and an undercover FBI agent, who showed them twenty credit cards which the informant had procured using the information provided by the defendant and his group. The defendant and Mara sampled one of the credit cards, and agreed to meet with the informant the following day to consummate the transaction. Neither the defendant nor Mara appeared.

The defendant appealed, arguing that the district court failed to reduce his sentence under § 2X1.1. He asserted that because he had only attempted to commit bank fraud, the sentencing court erred by not reducing his guideline points. The Court held that a reduction under § 2X1.1 was not available. The defendant pleaded guilty to social security number fraud under 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 2, neither of which contains an attempt provision. The elements for a violation of 42 U.S.C. § 408(a)(7)(B) include (1) giving a false social security number, (2) represented as a true number, (3) with intent to deceive, (4) for the purpose of obtaining some benefit to which the defendant is not entitled. The defendant pleaded guilty to this offense, effectively conceding he completed all elements, and the evidence supports his plea.

United States v. Geevers, 226 F.3d 186 (3d Cir. 2000). The district court did not err in refusing to apply a three-level reduction in the guideline calculation for a defendant who had not completed his attempt to withdraw money in a bank fraud scheme, even though the amount of loss used in calculating his guideline level was based on intended loss. The defendant maintained because he did not complete the acts necessary to effect the intended loss, he was entitled to the reduction under the attempt guideline. The Court found no error in the district court's consideration that the defendant was only prevented from drawing on his worthless check because the bank closed his account after another bank notified it the check was not backed by sufficient funds. Therefore, the defendant was prevented from even attempting to draw on his worthless check, and it was not error for the court to consider that he would have completed his intended fraud but for the intervention of a third party.

United States v. Torres, 209 F. 3d 308 (3d Cir. 2000). The district court did not err when it found the defendant did not qualify for a three-level reduction for an incomplete attempt. The defendant opened a money market account in a false company name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third party check. He attempted to withdraw $24,900 but was unsuccessful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The defendant argued because his actions to defraud the bank were thwarted by the bank, he was eligible for a three-level reduction for an attempted offense. However, the Third Circuit stated he pled guilty to the substantive completed offense and not to a mere attempt. Further, the Court found with respect to the $24,900 attempted withdrawal, the defendant had "completed all the acts he believed necessary," and with respect to the balance of the fraudulently deposited funds, he was "about to complete all such acts" and was unsuccessful only because the bank was fortunate enough to be suspect.

United States v. Rosa, 891 F. 2d 1063 (3d Cir. 1989). In the absence of any evidence that defendant affirmatively renounced conspiracy prior to November 1, 1987, the effective date of the sentencing guidelines, defendant convicted of conspiracy could be sentenced on the basis of the guidelines.

§ 2X5.1 Other Offenses

United States v. Cothran, 286 F.3d 173 (3d Cir. 2002). A jury convicted the defendant of conveying false information and threats about carrying an explosive device on an airplane, in violation of 49 U.S.C. § 46507. The defendant was scheduled to fly from Philadelphia to Atlanta. He telephoned the U.S. Air Ticket Reservation Office and stated something to the effect that he was upset with U.S. Air for not letting him bring explosives on the plane, and that he wanted to blow a plane out at 35,000 feet. Later, the defendant was observed talking on a telephone at the airport and was overheard saying "don't tell me how to blow up a bomb." The defendant was arrested.

The presentence investigation report recommended applying U.S.S.G. § 2K1.5 as the most analogous guideline. Section 2K1.5 is the guideline applicable to "Possessing Dangerous Weapons or Materials While Boarding or Aboard and Aircraft." The district court demurred, finding § 2A6.1 the "appropriate section to apply to Cothran's conduct." Section 2A6.1 is the guideline applicable to "Threatening or Harassing Communications."

The Court of Appeals agreed that § 2A6.1 is the more analogous guideline. In contrast to § 2K1.5, it accurately embodies Cothran's conduct.

CHAPTER THREE: ***Adjustments***

Part A -- Victim-Related Adjustments

§ 3A1.1 Vulnerable Victim

United States v. Rosier, 2007 WL 520199 (3rd Cir.(Pa.))). The defendant created a fraudulent scheme in which he contacted individuals and informed them that they had won significant amounts of money, generally in overseas lotteries. He would then offer to help them collect their winnings if they would provide him with funds to launch the collection process. He repeatedly contacted individuals who positively responded to his scheme. Depending on each person's reaction to his offers, he would change his sales pitch, saying whatever needed to be said to that person to make a sale.

At the sentencing hearing, the government argued that several victims were previous victims of lottery frauds, a majority of the victims were elderly, and that the defendant "reloaded" his victims, repeatedly going back to the same victims after initially being successful at extracting money from them. As evidence, the government pointed to Robert Raynor, a man who had sent the defendant 358 checks over a four-and-a-half-year period. The checks totaled approximately $110,000. In addition, the government submitted several letters, including one from Raynor's daughter who indicated that the defendant established a relationship with Raynor over the course of the four-and-a-half year period, presenting himself as someone who wanted to help Raynor provide a better life for his family,

On appeal, the defendant argued that the district court improperly applied the vulnerable victim enhancement under § 3A1.1. In ruling that the enhancement was properly applied, the Court of Appeals noted that the district court could properly base the enhancement only on Raynor so long as he was, in fact, a particularly susceptible victim. Raynor was financially insecure and his repeated willingness to send the defendant money despite the fact that the defendant never followed through with an actual collection showed that he was particularly vulnerable to this kind of a fraudulent scheme. The Court of Appeals further found that during the defendant's four-and-a-half year relationship with Raynor, the defendant must have learned that Raynor was particularly susceptible to this kind of fraudulent scheme as the defendant repeatedly contacted Raynor for additional funds. Several sister circuits have determined that this kind of "reloading" of victims is sufficient to prove the vulnerable victim enhancement.

The defendant also argued that the district court erred by not providing notice of its intent to depart from the guidelines pursuant to Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a district court to give notice before granting an upward departure under the guidelines. He argued that the same kind of notice necessary for a district court to grant an upward departure under the guidelines is required for a district court to grant an upward variance under the § 3553(a) factors. The Court of Appeals held that this argument would fail under any standard of review as it is precluded by the decision in *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006). Where a district court's decision to sentence a defendant above the advisory guidelines range is based on its discretion under *Booker* and the § 3553(a) factors, not an upward departure from the guidelines, it is not obligated to provide the defendant with advance notice. The district court, therefore, did not err when failing to provide the defendant with notice that it intended to impose an above-the-guidelines sentence based on its consideration of the § 3553(a) factors.

United States v. Cramer, 2007 WL 63362 (3rd Cir.(Pa.)). The defendant entered a conditional plea to knowingly permitting a minor to engage in sexually explicit conduct for purposes of producing a visual depiction of such conduct in violation of 18 U.S.C. § 2251(b). He raised several issues on appeal. One of the issues involved the district court's application of a two-level enhancement for vulnerable victim pursuant to U.S.S.G. § 3A1.1(b)(1). The defendant argued that this enhancement was already incorporated into the specific offense characteristics and thus resulted in double counting.

According to the presentence report, the defendants' base offense level was 27 pursuant to U.S.S.G. § 2G2.1. Under specific offense characteristics, the defendant received a two-level enhancement because the victim had attained the age of 12, but not the age of 16 (U.S.S.G. § 2G2.1(b)(1)(B)) and a two-level enhancement because the victim was in his custody, care or supervisory control (U.S.S.G. § 2G2.1(b)(2).

The Court of Appeals found no error in the district court's conclusion that an enhancement under U.S.S.G. § 3A1.1(b)(1) was warranted. From reading the district court's statement at sentencing and its statement of reasons, the Court of Appeals concluded that, in adding two points pursuant to U.S.S.G. § 3A1.1(b)(1), the district court found that the victim was unusually vulnerable for reasons unrelated to those already accounted for in the specific offense characteristics. At the time of sentencing, the district court stated, in part, that the "defendant, who was not the biological father of the victim, but who had been romantically involved with the victim's mother for twelve years, was not a parent or care giver in name only. He lauded his parental power over the victim, specifically threatening the victim with punishment and the withdrawal of financial support if she refused to comply. His conduct spanned years, not months. He used force and violence. His conduct was unusually cruel and depraved in the he psychologically manipulated the victim to submit to his unlawful requests." The district court further indicated that it concluded that the offense was unusually aggravated, even for an offense of this nature and that the victim was unusually vulnerable.

United States v. Jimenez-Calderon, 2006 WL 1582040 (3rd Cir.(N.J.))). The defendant pled guilty to Conspiracy to Promote Sex Trafficking, in violation of 18 U.S.C. § 371, and Promoting Sex Trafficking by Force, in violation of 18 U.S.C. § 1591(a)(1). On appeal, the Court of Appeals rejected the defendant's suggestion that the victims were not particularly vulnerable. The girls were young, uneducated, naive and from extremely impoverished families. There is no question that there was a nexus between the victims' vulnerability and the ultimate success of the crime. Accordingly, the District Court did not err in applying the enhancement.

U.S. v. Kossak, 2006 WL 1172183 (3rd Cir. (Del.))). Kossak also objected to the two-level enhancement for targeting vulnerable victims. His victims included a 62 year old man in an oxygen tent, a 90 year old man, an 80 year old woman, a 59 year old blind woman, a 59 year old woman who was entirely unaware of the loan, a man who was 64 at the time of a first loan and 65 at the time of a second, a 68 year old man, a 73 year old woman, an 81 year old man living in a nursing home, a bankrupt man, who had lost his savings and whose wife had just lost her job at the time of the transaction, and a man who did not speak English.

The Court of Appeals found no error. Kossak stole significantly more from his elderly and disabled victims than he did from his younger and non-disabled victims. He exploited the vulnerable victims to a greater degree of success in accomplishing his crime.

United States v. Zats, 298 F. 3d 182 (3rd Cir. 2002). Zats was an attorney who specialized in collecting small debts, usually hundreds of dollars. Many of his clients were doctors whose patients owed money on their medical bills. These patients were frequently poor, facing desperate personal circumstances, and ignorant of their legal rights. The defendant used his debt collection practice to defraud creditors who hired him. One example illustrate Zats' practices. Edmond Jefferson had a disputed $6,000 debt with the physician treating his terminally ill wife. The physician explicitly instructed Zats not to pursue the money, but Zats nonetheless seized $6,000 from Jefferson's account. Jefferson called Zats to beg for the money. He explained that his wife was dying, his son had recently died, and he had no money to pay for food or funeral expenses. Zats laughed at him, kept the money, and never turned it over to the doctor.

Zats' failure to turn over his clients' funds eventually resulted in his arrest. He pled guilty to conspiracy to commit mail fraud, wire fraud, and a tax offense, all in violation of 18 U.S.C. § 371, as well as to attempted tax evasion in violation of 26 U.S.C. § 7201. The district court enhanced Zats' sentence two levels pursuant to U.S.S.G. § 3A1.1(b). The defendant appealed. He challenged the district court's interpretation and application of the vulnerable victim enhancement. His first argument is that the "victims" to which the vulnerable victim enhancement refers must be the victims of the offense of conviction. He contends that because he pled guilty only to defrauding his clients, who were not vulnerable, the enhancement cannot apply. With respect to this argument, the Court of Appeals held that the cases on this issue and the language of the Sentencing Guidelines refute Zats' argument. For the vulnerable victim enhancement to apply, the victim injured by the defendant's relevant conduct need not also be injured by the offense of conviction. See Cruz, 106 F.3d at 1137; Monostra, 125 F.3d at 189.

Zats intimidated the debtors and violated their rights under the Fair Debt Collection Practices Act. Applying §§ 1B1.3 and 3A1.1(b), the Court of Appeals found this sufficient to deem the debtors victims of Zats' conduct for purposes of the vulnerable victim enhancement.

The first requirement under *Iannone* for imposing a vulnerable victim enhancement is that the victim be "particularly susceptible or vulnerable to the criminal conduct." 184 F.3d at 220. Zats' victims, many of whom were poor, sick, facing personal emergencies, or all three, qualify. The second requirement is that "the defendant knew or should have known of this susceptibility or vulnerability." *Iannone*, 184 F. 3d at 220. Zats had every reason to know of his victims' vulnerabilities. He knew that the debts he colected were mostly for medical treatment and that the debtors were therefore likely to be less resistant. Moreover, he knew that his high-pressure tactics worked best against debtors who were impoverished, facing family or health emergencies, and ignorant of their legal rights. Many of the people he pursued badly needed cash when he seized their accounts, and thus quickly yielded to his pressure. The third requirement is that the debtor's "vulnerability or susceptibility facilitated the defendant's crime in some manner; that is, there was a "nexus between the victim's vulnerability and the crime's ultimate success." *Iannone*, 184 F.3d at 220. In this case, a clear causal connection exists. The debtors' particular vulnerabilities made it much more likely that Zats' heavy-handed methods would succeed. It is difficult to conceive that debtors with more financial resources, less urgent personal circumstances, or a better understanding of their rights would have agreed to his demands. In many cases, Zats collected from debtors who owed no debt or less than he claimed. In other cases, he apparently collected funds that were legally exempt from collection. Less vulnerable debtors might have refused to cooperate and in any event would have been better able to protect their rights.

The Court of Appeals concluded that the debtors in this case are properly considered victims of Zats' conduct, even though they are not direct victims of the particular offenses to which Zats pled guilty.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). Defendant-appellant pled guilty to interstate transportation of property taken by fraud, mail fraud and wire fraud. On appeal, he challenged the district court's decision to apply a two level adjustment under U.S.S.G. § 3A1.1(b). The Court of Appeals applied a three-step analysis to the decision to apply the vulnerable victim enhancement. The enhancement may be applied where: (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of this susceptibility or vulnerability; and (3) this vulnerability or susceptibility facilitated the defendant's crime in some manner; that is, there was "a nexus between the victim's vulnerability and the crime's ultimate success." The district court based its determination that the victim was a vulnerable victim on his individual personality traits and characteristics, as testified to by the victim at the sentencing hearing. Only after this specific inquiry did the court find that the victim was particularly vulnerable to one representing himself as a fellow combat veteran.

United States v. Bosha, No. 97-7141 (3d Cir. Feb. 23, 1998)(unpublished opinion). The defendant was a guardian of estates for individuals adjudged incapacitated by reasons such as mental illness, mental deficiency, chronic alcohol or drug use, or advanced age. He engaged in a scheme to bill for and receive excessive fees for guardianship services. A co-conspirator, as guardian of the person, submitted inflated bills to the defendant, who as guardian of the estate, approved the inflated bills and received a "kick back," normally amounting to one-third of the billed amount. The defendant pled guilty to bank fraud. He argued that the district court erred in imposing a two-level increase under § 3A1.1 for vulnerable victim. The Court of Appeals held that the enhancement was erroneous because the district court failed to find that the victims' susceptibility or vulnerability "somehow facilitated the success of the scheme." See *U.S. v. Monostra*, 125 F. 3d 183 (3d Cir. 1997). There must be some "nexus between the victim's vulnerability and the crime's ultimate success" before a § 3A1.1 enhancement is applied. See *Monostra*, 125 F. 3d at 190.

United States v. Monostra, 125 F. 3d 183 (3d Cir. 1997). Soon after assuming his duties at a small business, defendant issued 14 company checks totaling $657,160, forged the president's signature and deposited them into defendant's personal account. He was convicted of bank fraud. The district court applied a §3A1.1(b) enhancement based on the visual impairment of the company's president. The Third Circuit reversed because the record lacked any evidence that the president's visual impairment facilitated defendant's scheme. As recently held in *Cruz*, 106 F. 3d 1134 (3d Cir. 1997), §3A1.1 does not require that a defendant consciously target the victim because of his vulnerability or susceptibility. However, the enhancement may not be applied absent a showing that the victim's vulnerability or susceptibility facilitated the crime in some manner. The record here was devoid of such finding. Defendant did not present the stolen checks to the president for signature; he simply signed the president's name without authorization. There was no indication that the president reviewed the canceled checks or records, or that he would have done so if not for his impairment.

United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997). Defendant accomplished a carjacking by placing a semi-automatic gun to the head of a 12-year old passenger. The district court properly applied the vulnerable victim enhancement even though the victim was only a passenger in the carjacked vehicle and the crime was not committed with a view to her vulnerability. The appellate court held that the drafters of the guidelines did not intend to limit the application of §3A1.1 to situations in which the vulnerable person was the victim of the offense of conviction. Rather, trial courts may look to all conduct underlying an offense, using §1B1.3 as a guide. Section 3A1.1 does not require that the defendant consciously target the victim because of his or her vulnerability or susceptibility.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). Defendant pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion resulting from their operation of a roofing business. The Third Circuit affirmed a vulnerable victim enhancement under §3A1.1, finding that "the defendant's consumer fraud scheme depended in many instances on the inability of elderly homeowners to verify the need to repair or replace roofs."

United States v. Astorri, 923 F. 2d 1052 (3d Cir. 1991). The district court did not err in making a two-level adjustment, finding that two of the victims were particularly susceptible to defendant's persistent requests for funds because they were the parents of the defendant's girlfriend, whom he entirely supported.

§ 3A1.2 Official Victim

United States v. Martin, 2002 WL 31479075 (3rd Cir.(N.J.))). The defendant was found guilty by jury of assaulting FBI Special Agent Raymond Lovett in violation of 18 U.S.C. § 111(a) and (b). He argued on appeal that it was plain error to apply a § 3A1.2 "Official Victim" enhancement. His principal argument was that § 3A1.2(b) requires that the assault of the federal officer occurred while the defendant was committing another offense. The Court of Appeals ruled that the district court did not commit plain error.

United States v. Walker, 202 F.3d 181 (3d Cir. 2000). In this second appeal of a federal sentence arising out of a prisoner's assault on a prison employee, the Court of Appeals had to again consider whether a prison cook supervisor is a "corrections officer" for purposes of a three-level "Official Victim" enhancement under U.S.S.G. § 3A1.2(b). The Court of Appeals concluded that a prison cook supervisor was not a corrections officer. The record did not support the conclusion that the employee spent significant time guarding prisoners or that he was engaged in the act of guarding prisoners when he was struck by the defendant. The district court erred in enhancing the defendant's sentence.

United States v. Walker, 149 F. 3d 238 (3d Cir. 1998). Defendant pled guilty to possession of a prohibited object by an inmate, 18 U.S.C. § 1791, and impeding a federal officer, 18 U.S.C. § 111. On appeal, he contends that the district court erred by applying § 3A1.2(b) and imposing a three level enhancement to his sentence for assaulting a "corrections officer." The thrust of the defendant's argument is that the victim was not a "corrections officer" within the meaning of § 3A1.2(b). If the victim's title is "corrections officer," if he spends significant time guarding prisoners, or if he was, at the time of the assault, actually engaged in guarding prisoners, then he is entitled to the extra protection afforded an official victim, and defendant is subject to the enhancement provisions. There must be evidence that the victim held the title of "corrections officer" or spent a significant amount of time guarding inmates or that he was actually doing so at the time of the assault.

United States v. Green, 25 F. 3d 206 (3d Cir. 1994). Defendant requested his friend, a police officer, to run a records check on a postal inspector's license plate. He was convicted of making threats against a federal officer and the officer's family. He argued that the district court erred in applying a three level enhancement under §3A1.2(a) based on the intended victim's status as a law enforcement agent. Defendant argued that because the statute under which he was convicted specifically contemplated that the victim be a law enforcement officer, an enhancement under §3A1.2 constitutes double punishment. The Third Circuit upheld the enhancement, stating that the victim's status was incorporated in the applicable guideline, §2A6.1, which governs threats against a government official.

United States v. Cherry, 10 F. 3d 1003 (3d Cir. 1993). After being identified as a prime suspect in the murder of a police officer, defendant fled to Cuba. Upon his return to the United States, he pled guilty to unlawful flight to avoid prosecution. Since there was no guideline applicable to his offense, he was sentenced under §2J1.6, the most analogous guideline. The district court concluded that, by analogy to §3A1.2, defendant's unlawful flight was for the purpose of avoiding prosecution for a crime involving an official victim and departed upward by three levels. The Third Circuit reversed, finding there was no official victim of defendant's flight. The only victim of defendant's unlawful flight were the government and the justice system, not the slain officer, his family or fellow officers.

United States v. McNeil, 887 F. 2d 448 (3d Cir. 1989). Defendant was convicted of soliciting a person to murder his U.S. Probation Officer. He argued that he was subjected to cumulative punishment for the same offense when the sentencing court added three points to his base offense level pursuant to §3A1.2 because of the intended victim's status as a federal officer. The Third Circuit disagreed, holding that merely because 18 U.S.C. §1114 makes it a crime to assault, or attempt to kill, certain federal officers, a defendant convicted of this crime is not subject to cumulative punishment by virtue of having his sentence enhanced under §3A1.2. Defendant also argued that the Commentary to §2A1.2 provides that no enhancements should be applied in the case of mere solicitation. The Third Circuit held that this language only prohibited the application of specific offense characteristics, but not victim, role and obstruction of justice enhancements. The court relied on §1B1.1, which governs the manner of sentence determination, to affirm the use of a victim related enhancement in a solicitation to murder case.

Part B -- Role in the Offense

§ 3B1.1 Aggravating Role

United States v. Jimenez-Calderon, 2006 WL 1582040 (3rd Cir.(N.J.))). The defendant pled guilty to Conspiracy to Promote Sex Trafficking, in violation of 18 U.S.C. § 371, and Promoting Sex Trafficking by Force, in violation of 18 U.S.C. § 1591(a)(1). On appeal, the defendant argued that the District Court erred in applying a four-level enhancement pursuant to U.S.S.G. § 3B1.1(a) because she organized fewer than five coconspirators. The defendant enlisted her two brothers to produce the victims. She recruited another individual to assist in the obstruction of justice after the house of prostitution was raided. Another individual helped the defendant to enforce the rules and collect money. The defendant ran the brothel with her sister. She and her sister shared equal culpability. In sum, the defendant supervised four people - - her brothers and two others - while participating in a larger conspiracy with her sister. Accordingly, she was a leader of a criminal activity that involved more than five people. In view of these facts, the District Court did not err in imposing a four-point enhancement pursuant to § 3B1.1(a).

United States v. Armstrong, 2003 WL 21267479 (3rd Cir.(Pa.))). A jury found the defendant guilty of drug-related offenses. He appealed, arguing that the district court erred in imposing an enhancement for organizer or leader. The Court of Appeals concluded that the record supported the enhancement. The defendant decided who would purchase the cocaine and what price to charge. He recruited at least one other participant, handled the proceeds and drugs in all of the transactions and had virtually complete control over the customer end of the transactions.

United States v. Maswadeh, 2003 WL 1550808 (3rd Cir. (Pa.))). In this appeal, the defendant argued that the district court improperly enhanced his guidelines by giving him a two level enhancement for being an organizer, leader, manager, or supervisor of an arson conspiracy. The Court of Appeals affirmed, finding the arson scheme was conceived by the defendant, who recruited accomplices, specified when and how the crime was to be accomplished, and stood to benefit much more (retaining $150,000 of the $200,000 in anticipated insurance proceeds) than the other co-conspirators.

United States v. Torres, 2002 WL 31819728 (3rd Cir.(N.J.))). Torres challenged the district court's finding that he was a leader or supervisor of the offense. At the plea hearing, Torres admitted to hiring and paying Ovalles to recruit others to travel to and from the United States in order to transport cocaine back into the country in suitcases. He also acknowledged that he met with Muniz and Mendez, and instructed them to travel to Panama and to bring back suitcases containing cocaine, provided them with airline tickets and travel money, and promised to pay them $6,000 and $4,000, respectively. Such conduct constitutes management and supervision by Torres of Ovalles, Mendez, and Muniz.

The defendant also directly managed and supervised Muniz and Mendez, once they had been recruited by Ovalles. He met them in the Bronx, instructed them on what they were to do once they arrived in Panama, gave them cash and airline tickets, and promised to pay them for making the trip. In addition, Torres planned to take possession of the cocaine once the couriers returned to the United States. Torres' responsibility for distributing money to Ovalles, Muniz, and Mendez, as well as handling the cocaine upon its entrance into the country, shows that Torres maintained a position of authority and management within the drug conspiracy scheme. Accordingly, the district court correctly determined Torres' sentence based on an enhancement under § 3B1.1.

United States v. McKeithan, 2002 WL 31477304 (3rd Cir.(Pa.))). Following a trial by jury, the defendant was convicted of various drug-related offenses. He appealed his sentence, arguing that the district court erred in enhancing his sentence for his leadership and organizational role in the conspiracy. He contends that the government's evidence demonstrated only a loose collection of addicts, lacking any structure or hierarchy. In *United States v. Gricco*, 277 F.3d 339, 358 (3d Cir. 2002), the Court of Appeals explained the factors to be considered in enhancing a sentence for a leadership role. Here, the testimony of a dozen witnesses assigned McKeithan a central role in the purchase and distribution of crack cocaine in the Chambersburg area under the *Gricco* factors. These witnesses testified that McKeithan recruited their

participation, determined the time and place of drug purchases, retained the money from each transaction, coordinated the use of personal residences for drug trafficking, arranged the purchase of an automobile for deliveries, and coerced compliance of a subordinate with violence. Based on the foregoing evidence, the Court of Appeals concluded that the district court did not err in finding that McKeithan's leadership role extended to five or more participants.

United States v. Igein, 2002 WL 31429868 (3rd Cir.(N.J.)). The appellant, Abudu John Igein, and his co-defendant, Kehinde Musilu Ayinde, were indicted for conspiracy to commit mail, wire, and identification fraud in connection with subsidized housing and with loan and credit applications, all contrary to 18 U.S.C. §§ 1028(a)(2), 1341 and 1343, all in violation of 18 U.S.C. § 371. They were also charged with various other acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. The government and probation department recommended a two point enhancement pursuant to U.S.S.G. § 3B1.1(c) for Igein because he supervised Ayinde. The defense argued, however, that the enhancement was inappropriate here because, although Igein was a workplace supervisor and the owner of the business, he did not play a supervisory role over Ayinde in the criminal conspiracy. The district court found the enhancement applicable.

On appeal, Igein argued that the government produced no evidence, other than the claims of the co-defendant, that Igein acted as a supervisor regarding the printing of the documents. A leadership enhancement under the guidelines requires a showing that the defendant exercised supervisory control over another participant in the scheme. Merely playing an essential role in events as a business owner who could verify employment with the business, is not equivalent to exercising managerial control over other participants.

The district court considered the testimony of the two cooperating witnesses who testified at the trial, and although they obtained fraudulent documents from both the defendant and Ayinde, the defendant was in charge of the criminal enterprise at Power Electronics, their place of business. There was testimony about the activities of the defendant which demonstrated that he was in control and supervised Ayinde. Besides, ample testimony showed, as the government pointed out, that the defendant began his criminal activity before he hired Ayinde and then trained him in the fraudulent business in which he was engaged. Sufficient evidence supported the district court's finding that Igein exercised supervisory control over Ayinde.

United States v. Knox, 2002 WL 1723899 (3rd Cir.(N.J.))). On appeal, the defendant argued that the district court erred in finding that he played a managerial or supervisory role in criminal activity involving five or more participants under U.S.S.G. § 3B1.1(b). He did not argue that he did not manage or supervise others. Instead, he contends that the criminal activity in which he engaged did not involve five or more participants. He appears to suggest that because the district court did not find him accountable for the drug amounts attributable to his codefendants, it erred in holding him responsible for his codefendants' participation in the conspiracy in assessing whether the criminal activity involved five or more participants. The Court of Appeals affirmed the judgment of the district court. There was credible evidence to support this conclusion.

United States v. Prunty, 2002 WL 1747538 (3rd Cir.(N.J.))). The issue in this sentencing appeal is whether the district court erred in applying a four-level enhancement under U.S.S.G. § 3B1.1(a) for the defendant's role as organizer or leader of a criminal offense involving five or more participants. Prunty argued that there was insufficient evidence to prove he organized or led the criminal activity.

The Court of Appeals affirmed the judgment of the district court. The evidence indicates that Prunty was an organizer or leader. He recruited at least two other participants (Dean and DeCarlos Brown). He bankrolled Dean's purchase of the firearms and paid Dean for his participation. Prunty was personally involved in all aspects of the conspiracy- - including sales, purchasing, shipping, and firearms delivery. This evidence was sufficient to conclude Prunty organized and led a criminal offense involving five or more participants.

United States v. Chau, 293 F. 3d 96 (3d Cir. 2002). The defendant was indicted for violations of the Clean Air Act. He was charged with polluting the air when he cleaned up a building containing asbestos. Chau argued that a two level enhancement pursuant to U.S.S.G. § 3B1.1(c) was not appropriate. He argues that he merely directed his handyman, Fantom, to clean up the building with brooms, sledges and hefty trash bags. However, this is sufficient to impose the two level enhancement. Here, Chau ordered Turner to clean up the building. Later, he asked Fantom to help. Then, Chau worked with Fantom and Turner to dump asbestos at various sites in the city. Chau exercised some degree of control over Fantom and Turner.

United States v. Recupero, 2002 WL 962845 (3rd Cir.(N.J.))). The defendant's complaint on appeal was directed to the four-point leadership enhancement. He contends that the district court violated Fed.R.Crim.P. 32(c)(3)(A) in failing to ascertain whether he had been given the opportunity to read, understand, and challenge the findings of the presentence report, and that, as a result, he was denied the opportunity to object to the factual inaccuracies in the PSR. In particular, he argued that the PSR wrongly portrayed him as the ringleader of a criminal enterprise. He asserted that because the PSR conflicted with his sworn, unchallenged testimony and contained gross factual inaccuracies and inconsistencies, it lacked the "sufficient indicia of reliability" required to qualify for consideration by a sentencing court. The Court of Appeals affirmed the judgment of conviction and sentence. There were several opportunities in the proceedings at which the defendant could have objected to the PSR but neither the defendant nor his attorney disputed the PSR's characterization of the defendant as a ringleader. His attorney stated "we are not contesting that he has the four point enhancement for the leadership role.

United States v. Erlikh, 2002 WL 626226 (3rd Cir.(N.J.))). The defendant was president of Kings Motor Oil, a wholesale distributor of home heating oil and motor oil. He pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); money laundering (18 U.S.C. § 1957); and tax evasion (26 U.S.C. § 7201). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

The defendant appealed, challenging the district court's decision to give him a four level enhancement for his role as an "organizer or leader" in the criminal activity. The Court of Appeals upheld the four level enhancement. Erlikh played a key authoritative role in orchestrating the scheme. He was a pivotal decision maker at the Kings oil company and, as the district court noted, Kings would not have been involved in the scheme if Erlikh did not allow it. Erlikh had decision making authority over another Kings principal, coconspirator Demetrios Karamanos. It is also clear that five or mor participants were involved and the activity was extensive.

United States v. Chen, 2002 WL 229693 (3rd Cir.(N.J.))). Chen objected to the two-level adjustment based on his role in the offense. This objection stems from a discrepancy between the language of U.S.S.G. § 3B1.1(c) which provides for a two-level increase "if the defendant was an organizer, leader, manager, or supervisor in a criminal activity," and the following language in the PSR: "The defendant assumed an aggravating role yet less than an organizer, leader, manager, or supervisor. Pursuant to U.S.S.G. § 3B1.1(c), the offense is increased two levels." While the discrepancy exists, Chen did not object to the language used in the PSR, and, in fact, stipulated to a two level upward adjustment based on his role in the offense. The stipulation, made part of the plea agreement, reads: "Gui Feng Chen played a management/supervisory role in this offense which involved five or mor conspirators." Despite the inaccurate rendering of § 3B1.1(c) in the PSR, Chen received exactly that to which he stipulated and may not now attempt to repudiate that stipulation. *United States v. Cianci*, 154 F.3d 106, 109 (3d Cir. 1998).

United States v. Gricco, 277 F. 3d 339 (3d Cir. 2002). Anthony Gricco and Michael McCardell were convicted of conspiracy to defraud the United States, tax evasion, and making false tax returns. All of the charges related to the conspirators' failure to report on their personal income tax returns money that had been stolen from airport parking facilities. From 1990 10 1994, Gricco was the regional manager for private companies that contracted with the Philadelphia Parking Authority to operate the parking facilities at the Philadelphia International Airport. He was responsible for the general operation of the facilities, including the hiring of employees and the collection of parking fees. Michael McCardell, Gricco's brother-in-law, was Gricco's chief assistant. McCardell oversaw the day-to-day activities of the tollbooths and picked up the money from the cashiers at the end of their shifts.

Gricco, McCardell, and others made a plan to steal money by substituting customers' real tickets with replacement tickets showing false dates and times of entry. A customer who had parked in the lot for a long period of time would have a real ticket reflecting a high parking fee. On leaving the lot, the customer would pay this fee to the cashier. However, instead of inserting the real ticket into the ticket-reading machine, a cashier participating in the scheme would insert a replacement ticket, and the machine would calculate the parking fee based on the false date and time stamped on the replacement ticket. This replacement ticket would indicate that the customer had parked for only a short period of time, and thus the parking fee would be much lower. The thieves would pocket the difference between the amount paid by the customer and the amount of the fee shown on the replacement tickets.

At first, Gricco enlisted cashiers who had engaged in a similar but smaller scheme in 1988. He eventually recruited about 15 other cashiers to participate. Michael Flannery, a technician for the company responsible for maintaining the ticket machines, provided the replacement tickets. He also disabled the fare displays on the ticket-reading machines so that customers could not see that the parking fees that they were paying were higher than the fees recorded by the machines. Flannery delivered the counterfeit tickets to Gricco, McCardell, or McCardell's wife. McCardell then distributed the replacement tickets to the corrupt cashiers, and at the end of their shifts, McCardell picked up the stolen money and forwarded it to Gricco, who distributed the money among the participants. The cashiers received a portion of the proceeds stolen during their shifts, and the rest was divided into four equal sahres for Gricco, McCardell, Million, and Flannery. The participants did not report the unlawful income on their federal tax returns.

McCardell appealed the four-level increase in his base offense level under U.S.S.G. § 3B1.1 for his aggravating role. The determination of a defendant's role is based on all conduct within the scope of the relevant conduct guideline, U.S.S.G. § 1B1.3, and not solely on the acts in the counts of conviction. Introductory Commentary to U.S.S.G. Ch. 3 Pt. B. The district court did not err in applying the leadership role enhancement to McCardell. His role in the theft is relevant conduct under U.S.S.G. § 1B1.3, and the scheme involved four leaders and at least 15 cashiers. He was the "second man in command" under Gricco, and one cashier testified that McCardell was in charge when Gricco was not present. McCardell received the same amount of unlawful proceeds as Gricco, Million, and Flannery.

United States v. Antico, 275 F. 3d 245 (3d Cir. 2001). The defendant was convicted on one count of racketeering in violation of 18 U.S.C. § 1962(c)-part of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), nine substantive counts of extortion in violation of 18 U.S.C. § 1951 (known as the Hobbs Act), and eight substantive counts of wire fraud in violation of 18 U.S.C. § 1343.

On appeal, the defendant argued that the district court erred by enhancing his offense level by four levels because it determined that he was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive. The Court of Appeals agreed that the defendant was an organizer or leader of criminal activity. The evidence supports the conclusion that he played a decision-making role with two criminally responsible others. However, under the "five or more participants" prong of § 3B1.1, the Court of Appeals disagreed with the district court's inclusion of Maureen McCausland and Barbara Williams, victims of the defendant's extortion schemes, in the mix of five participants. Extortion victims, whether they operate legitimate or illegitimate businesses, are still victims. As this case demonstrates, owners of illegitimate businesses such as Maureen McCausland may be particularly vulnerable to an L&I official's abuse of power, but they are not more criminally responsible for the offense of extortion than legitimate business owners. By its definition, only the defendant, Meehan, and Antico, Jr. may be counted.

Alternatively, the district court ruled that defendant's criminal activity met the "otherwise extensive" prong of § 3B1.1, justifying a four level increase. The Court of Appeals held that, as set forth in *Helbling*, 209 F.3d at 247, "we adopted the three-step test from *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), to help determine whether the criminal activity is 'otherwise extensive.' A sentencing court must first separate out the 'participants' as defined by Application Note 1 from other individuals, non-participants, who were involved in the criminal activity . . . . The defendant may be considered as one of the participants. The court must next determine whether the defendant used each non-participants' services with specific criminal intent. Third, the court must determine the extent to which the services of each individual, non-participant, were peculiar and necessary to the criminal scheme. *Helbling*, 209 F.3d at 247-48.

"We add to this rule another consideration. The language of § 3B1.1 requires the court to consider the defendant's leadership role *with respect to the particular offense charged*. Although 'all persons involved during the course of the entire offense are to be considered,' this does not sanction a court taking the activities of non-participants from unrelated schemes and grouping them together to reach the 'functional equivalent' of five persons. The actions or services of non-participants must all relate to the common criminal activity or scheme - and to the offense charged. . . . In light of our ruling that victims may not be considered as participants, it is unclear from the record whether the district court properly completed the 'otherwise extensive' analysis. Assuming that the defendant, Meehan, and Antico, Jr., were participants, the district court next needed to determine whether the defendant used each non-participant L&I officials' services with specific criminal intent and as part of a single criminal scheme. The district court did not make explicit findings in this regard." The Court of Appeals remanded for re-sentencing in accordance with *Helbling*.

United States v. Barrie, 267 F. 3d 220 (3rd Cir. 2000). The defendant, Jane Barrie, pleaded guilty to knowingly conspiring to transfer identification documents and false identification documents knowing that such documents were produced without lawful authority, 18 U.S.C. §§ 371 and 1028(a)(2). This charge arose from her involvement in a scheme to sell social security cards to a number of West African immigrants. Jane Barrie's daughter, Yemma Barrie, was employed by the Social Security Administration as a clerk typist; one of her duties was entering data from SS-5 forms into the computer. A periodic review revealed that she had processed 73 social security cards without corresponding SS-5 forms. Investigators discovered that a number of these cards corresponded with applications processed by claims representative Angela Lucas and that Lucas failed to verify the supporting documentation for these and other applications. Together, Yemma Barrie and Lucas unlawfully issued over 100 social security cards.

At sentencing, the court found that the activities of Jane Barrie, Yemma Barrie, and Lucas resulted in the issuance of at least 108 social security cards. The presentence report recommended a four level increase in Jane Barrie's offense level for her role as an organizer or leader of a criminal activity that involved five or more participants. The district court agreed, finding that Jane Barrie solicited individuals to buy social security cards, that she forwarded SS-5 forms to Lucas and Yemma Barrie, and that although she needed Lucas and her daughter, Jane

Barrie "ran the show in a very significant way." The district court also found that the recipients of the cards were participants in the criminal activity because they had advance knowledge of the crime, had to execute SS5 forms or provide personal information to Jane Barrie, and expected to receive clean social security cards, which the court characterized as the "proceeds" of the crime.

The Court of Appeals found that the district court erred in enhancing the defendant's sentencing offense level by four levels for organizing or leading a criminal activity that involved five or more participants. It held that the recipients of the unlawfully produced social security cards were not participants in the criminal activity. The recipients were involved in a series of one-time transactions with one or more of the producers of the cards and were not participants with each other in the same criminal activity. The Court of Appeals noted that customers of drug dealers ordinarily cannot be counted as participants in a drug distribution conspiracy.

United States v. Cefaratti, 221 F.3d 502 (3rd Cir. 2000). The defendant pleaded guilty to four counts arising from his execution of a scheme to defraud the United States Department of Education out of student financial assistance funds. He appealed the district court's assignment of two levels for a managerial role, arguing that when "counts are grouped under U.S.S.G. § 3D1.2(a), (b), or (c), the guideline level [including any adjustments] for each count is first to be determined separately" before grouping. The Court of Appeals determined, however, that even if the defendant was correct that the court should have determined the applicability of the adjustment before grouping, there was sufficient evidence to support a leadership adjustment on both the fraud and the money laundering counts.

United States v. Helbling, 209 F. 3d 226 (3d Cir. 2000). A federal grand jury returned a thirty-five count indictment charging the defendant with one count of conspiracy to embezzle employee pension plan funds and falsify ERISA documents (18 U.S.C. § 371); four counts of embezzlement of employee pension plan funds from an ERISA covered plan (18 U.S.C. § 664); eighteen counts of falsifying documents required by ERISA (18 U.S.C. § 1027); six counts of wire fraud (18 U.S.C. § 1343); and six counts of mail fraud (18 U.S.C. § 1341). The mail fraud counts were dismissed during trial. The defendant was convicted by jury on the remaining counts.

The jury found that Helbling embezzled funds from a profit sharing plan covered by the Employee Retirement Income Security Act (ERISA) to pay the operating expenses of three failing companies he owned, and engaged two lawyers to help him by creating false documents indicating that the withdrawals had been part of a lawful Employee Stock Ownership Plan (ESOP) conversion.

Helbling contends that the district court erred by increasing his offense level four levels under U.S.S.G. § 3B1.1(a), "Aggravating Role," by increasing his offense level two levels for obstruction of justice, U.S.S. G. § 3C1.1, and by departing upwards two levels for psychological harm, U.S.S.G. § 5K2.3.

The Court of Appeals has held that to be a leader, "a defendant must have exercised some degree of control over others involved in the commission of the offense. *United States v. Phillips*, 959 F. 2d 1187, 1191 (3d Cir. 1992). Since the government acknowledges that Helbling, Susman and Sokolic are the only "participants," the Court of Appeals was required to determine when a criminal activity is "otherwise extensive." The Court of Appeals adopted the analysis found in *United States v. Carrozzella*, 105 F. 3d 796, 802-03 (2d Cir. 1997). In *Carrozzella*, the Court of Appeals for the Second Circuit explained that the analysis of "otherwise extensive" must focus initially upon the number of participants, and the knowing or unknowing persons, involved in the criminal activity, and then a subsequent determination must be made as to whether the roles and involvement of all those persons constitute the functional equivalent of five "participants" as defined by the Application Notes. The application notes and the commentary strongly indicate that the focus should be upon the number of persons involved. The Court in *Carrozzella* developed a three step inquiry to help determine which individuals should be counted. This test distinguishes non-participants who should be considered from those who should not be considered on the basis of the defendant's intent in involving them in the criminal activity and the nature of their role in the offense. Under this test, a sentencing court must first separate out the "participants" as defined by Application Note 1 from other individuals, non-participants, who were involved in the criminal activity. The court must next determine whether the defendant used each non-participants' services with specific criminal intent. Third, the court must determine the extent to which the services of each individual, non-participant, were peculiar and necessary to the criminal scheme. Utilizing this test, the Court of Appeals for the Second Circuit has upheld the consideration of individuals used by the defendant to legitimize, facilitate or hide the criminal activity.

After deciding which individuals may be counted, the court must then consider whether the sum of the participants and countable non-participants is the "functional equivalent" of five participants.

In applying the *Carrozzella* test, the Court of Appeals for the Third Circuit held that "Helbling's criminal activity involved three criminally responsible participants and five other non-participant individuals whose involvement Helbling directed and whose actions were peculiar and necessary to the furtherance of Helbling's efforts. Given the nature of Helbling's criminal conduct, the combination of those participants and non-participants was properly held by the district court to be the functional equivalent of five participants.

United States v. Bennett, 161 F. 3d 171(3d Cir. 1998). The defendant was sentenced to 144 months imprisonment for perpetrating the largest charity fraud in history. On appeal, he argued that the district court erred in imposing a four level enhancement for leadership role. The court of appeals upheld the enhancement, stating it was appropriate because the criminal activity was "otherwise extensive." The guidelines instruct that in assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. The defendant actively used his staff to perpetrate the fraud.

United States v. Fiorelli, 133 F.2d 218 (3d Cir. 1998). Defendant, a union official, was found guilty of extorting money and services from contractors. He contended that the district court made no findings to support its enhancement under §3B1.1(c) for being an organizer and supervisor. The appellate court upheld the enhancement, finding that the district court adopted express findings that "Fiorelli recruited and supervised James Siesser."

United States v. Knobloch, 131 F. 3d 366 (3d Cir. 1997). Defendant pled guilty to drug charges. He argued for the first time on appeal that the district court erred in relying on testimony from another trial to support a §3B1.1 enhancement. The Third Circuit upheld the role enhancement. Although a defendant must be given reasonable opportunity to respond to evidence, defendant's counsel clearly was not surprised by any reference to the testimony. Counsel was given ample opportunity after the prosecutor's response to say anything she wished about the testimony.

United States v. DeGovanni, 104 F. 3d 43 (3d Cir. 1997). The Third Circuit held that one is only a "supervisor" under USSG §3B1.1(c) when he is so involved in, and connected to, the illegal activity of others that he actually supervises their illegal conduct, and is not just a supervisor by virtue of his *de jure* position in the police department hierarchy. In the context of USSG. §3B1.1(c), the two-level enhancement applies only when the "supervisor" is a supervisor in the criminal activity. The only activity that distinguishes defendant from other participants was his silence. He fulfilled his duties as a sergeant without reporting the illegal, extracurricular activities of his inferior officers. Such silence, although reprehensible, does not make him a "supervisor" for purposes of §3B1.1(c).

United States v. Bethancourt, 65 F. 3d 1074 (3d Cir. 1995). Defendant conspired to import more than 500 grams of cocaine into the U.S. He disputed the two point enhancement under §3B1.1(c), correctly noting that the enhancement is only appropriate if the defendant directed and controlled at least one individual. However, the appellate court affirmed the sentence, finding that defendant, rather than his associate who transported the cocaine from Panama, was the leader of the conspiracy. The telephone conversations between defendant and the associate concerned only the associate delivering the cocaine to defendant. They did not discuss splitting profits derived from the sale of the cocaine or selling the cocaine jointly. Defendant arranged for his contacts in Panama to supply the associate with a kilogram of cocaine. Finally, the associate testified that defendant was to pay him $500 for his services as a courier.

United States v. Felton, 55 F. 3d 861 (3d Cir. 1995). Defendant, a tax examining assistant with the Automated Collection Service of the IRS, was convicted of demanding and accepting a bribe and demanding illegal gratuities to "fix" taxpayers problems with the IRS. The district court added two points to his offense level under §3B1.1 for aggravating role. The Third Circuit upheld the enhancement. Several uncontested facts in the presentence report supported the conclusion. First, defendant made all initial contacts with fraud victims. Second, the co-worker performed much of the menial work of the scheme, driving defendant to meetings with the victims, taking notes during those meetings, and amending the victims' tax returns. Although defendant was legally blind and thus unable to perform these tasks, these activities showed some

authority over the co-worker. Finally, defendant was involved in more incidents than his co-worker, suggesting that it was defendant's scheme and that defendant recruited the co-worker.

United States v. Bass, 54 F. 3d 125 (3d Cir. 1995). Defendant and others conspired to illegally purchase, transport and sell firearms. He challenged a §3B1.1(a) leadership enhancement since there was no evidence that he actually participated in the purchase, transportation or sale of the guns. The Third Circuit upheld the enhancement, finding that leadership is not inconsistent with a refusal to participate in the actual implementation of a criminal plan. Defendant bankrolled a large part of the gun purchasing program, took immediate possession of some of the weapons after they were purchased, assumed control over the shipments when they arrived at their destination, and identified buyers for the weapons. A person who plans, funds, and supervises a criminal enterprise does not immunize himself from an upward adjustment under §3B1.1 just because he does not join in all of the mechanics and various activities of the illegal enterprise.

United States v. Hunter, 52 F. 3d 489 (3d Cir. 1995). Defendant and others conspired to use unauthorized credit cards. The Third Circuit upheld a §3B1.1(c) managerial enhancement. The fact that defendant did not receive the bulk of the conspiracy's $321,000 in illegal profits or live a lavish lifestyle as a result of the crime does not change the analysis of her relative individual conduct and culpability. Evidence showed that she recruited two accomplices, received credit card information from them and others, used the data to place orders for merchandise, created fictitious distributors, and signed fraudulent credit card slips.

United States v. Fields, 39 F. 3d 439 (3d Cir. 1994). Defendant sold heroin to an informant. The Third Circuit held that a two-level enhancement under §3B1.1(c) for a supervisory role was supported by evidence that defendant directed a young man or boy, whom defendant identified as his cousin, to deliver a package of heroin to the informant. After the delivery, defendant criticized the boy for being too open in his manner of handling the package.

United States v. King, 21 F. 3d 1302 (3d Cir. 1994). Defendant sold stolen government savings bonds to a government informant. He contended that the court erred in increasing his offense level under §3B1.1(c) because the government agent was not a participant in the scheme. The Third Circuit affirmed, noting that defendant recruited his co-defendant to assist in selling the bonds, directed the co-defendant to deliver the first batch of 20 bonds, and planned the mechanics of the exchange of other bonds. Even if agent masterminded the scheme to sell the bonds, that in no way detracts from the evidence that defendant directed his co-defendant's role in the scheme.

United States v. Colletti, 984 F. 2d 1339 (3d Cir. 1992). Defendant was convicted of conspiracy to transport stolen diamonds. The Third Circuit agreed with appellant that a four-level enhancement under §3B1.1(a) for being a leader of a criminal activity involving five or more participants was improper. The district court properly counted defendant, two co-defendants and an unindicted co-conspirator as participants. However, the receiver of the stolen diamonds could not be counted as a participant in the conspiracy. "Criminal activity" is not synonymous with relevant conduct. The robbery of the diamonds was completed before the

receiver became involved in any way, or even became aware of the criminal enterprise. While there may be circumstances in which receivers of stolen goods can properly be regarded as participants in the theft, this was not such a case. There was no information suggesting receiver was expecting arrival of the diamonds, participated in the planning and execution of the robbery, or received any of the proceeds of the offense.

United States v. Katora, 981 F. 2d 1398 (3d Cir. 1992). The district court imposed an organizer enhancement on two defendants under §3B1.1(c), concluding each shared responsibility for creating and carrying out the offense. The Third Circuit reversed, holding that §3B1.1 cannot be used to enhance the sentences for a duo when they bear equal responsibility for "organizing" their own commission of a crime. Neither defendant directed the other, and they did not direct or organize a culpable third party. To apply §3B1.1, a defendant must exercise control over at least one other person.

United States v. Pollen, 978 F. 2d 78 (3d Cir. 1992). For the first time on appeal, defendant argued that the court erred in considering relevant conduct in making a four level leadership enhancement under §3B1.1(a). The Third Circuit agreed, ruling that under its decision in *U.S. v. Murillo*, 933 F. 2d 195 (3d Cir. 1991), consideration of relevant conduct was plain error. The court noted that the guidelines were amended effective November 1, 1990, a few months after defendant was sentenced, to specify that relevant conduct should be considered in making role adjustments. But the court ruled that if the guideline in effect at the time of the offense is more favorable to a defendant, it must be applied.

United States v. Belletiere, 971 F. 2d 961 (3d Cir. 1992). The district court imposed a four-level enhancement under §3B1.1(a). The Third Circuit reversed, finding the evidence is not applicable to a defendant convicted of a series of solitary, unrelated drug sales to various individuals, and there is no organization or scheme between sellers and buyers, or between buyers themselves. None of the buyers were "led" or "organized" by, nor "answerable" to, the defendant. The defendant had no control over the buyers or their resale of the cocaine.

United States v. Phillips, 959 F. 2d 1187 (3d Cir. 1992). The Third Circuit affirmed a four level enhancement under §3B1.1 for defendant who was the source of cocaine for five or more people. He chose the times when he would travel to Philadelphia, recruited people to travel with him, stored cocaine at two different locations and when his supply was gone, he directed buyers to another source. The defendant was equally culpable with the other source as an organizer of the distribution scheme.

United States v. Badaracco, 954 F. 2d 928 (3d Cir. 1992). In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The Third Circuit rejected the government's contention that the developers were criminally responsible, and thus could be considered "participants" for purposes of imposing a leadership enhancement on defendant under §3B1.1(c). Adjustments under §§3B1.1 and 3B1.2 is permissible only where there is more than one "participant" in the offense. There was no evidence that the developers were criminally culpable.

United States v. Fuentes, 954 F. 2d 151 (3d Cir. 1992). The Third Circuit rejected a managerial enhancement under §3B1.1 for a crack house manager. There was no evidence that he had control over others. In the context of §3B1.1, the terms "managing or supervising" refer only to the management of others.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). Two level enhancement under §3B1.1 appropriate where defendant supplied cocaine that co-defendant sold to an undercover agent and recruited another co-defendant for surveillance purposes.

United States v. Cusumano, 943 F. 2d 305 (3d Cir. 1991). The Third Circuit affirmed a two level enhancement under §3B1.1. Evidence supported district court's conclusion that defendant played more central role in scheme which involved embezzlement, kickbacks relating to employee benefit plan, and money laundering. He first approached others to suggest scheme, demanded that one co-defendant obtain a 20 percent commission rate to increase their return and participated in organizing all aspects of the scheme, including the financial transactions. He suggested that because others were leaders, he could not be. This position was clearly rejected by the Sentencing Commission. See §3B1.1, comment. (n. 3).

United States v. Murillo, 933 F. 2d 195 (3d Cir. 1991). The Third Circuit held that in making role in the offense determinations for defendants whose crimes were committed before November 1, 1990, a court should consider both conduct comprising the offense of conviction and conduct in furtherance of the offense of conviction. For defendants whose crimes were committed on or after November 1, 1990, a court should consider all relevant conduct under §1B1.3 of the guidelines.

United States v. Inigo, 925 F. 2d 641 (3d Cir. 1991). Defendant attempted to extort $10 million from a manufacturing firm in exchange for stolen proprietary information to compete with them. Defendant contended that his offense did not involve five or more participants, and therefore it was improper to increase his offense level under §3B1.1(a). The Third Circuit upheld the enhancement, finding that participants include persons who are used to facilitate a criminal scheme. The three people who stole the proprietary information and used it to design a plant for defendant were "participants" under §3B1.1(a). Even though the evidence was insufficient to convict them of Hobbs Act violations codefendants criminal conduct made the scheme possible. One other individual was a participant because he interviewed DuPont employees that defendant sought to hire. Another individual was a participant because he permitted his home to be used as headquarters for the conspiracy, and his presence gave the deal credence in the eyes of others.

United States v. Gonzalez, 918 F. 2d 1129 (3d Cir. 1990). The Third Circuit rejected defendant's argument that he should not have received a two level enhancement under §3B1.1. Defendant handled the original negotiations with an undercover agent and determined both the location and the price of the drugs. He reached agreements with the undercover agent, used another defendant as an intermediary, and had another defendant bring cocaine to him so he could complete the sale.

United States v. Wickstrom, 893 F.2d 30 (3d Cir. 1989). Two level enhancement under §3B1.1(c) for managerial or supervisory role appropriate for defendant who made initial contact with undercover agent in order to establish a supply of counterfeit currency. He provided agent with the paper on which to print the counterfeit currency and asked if agent could provide false identification papers and silencers for .22 caliber Rugers and ultimately paid for the silencers.

United States v. Ortiz, 878 F.2d 125 (3d Cir. 1989). Defendant received a four-level increase for his role in the offense under §3B1.1(a) as an "organizer or leader" in a criminal activity involving five or more participants. He argued that the scope of the illegal activity was quite narrow. It involved one distribution of four kilograms of cocaine, and no evidence established the size of his share of the fruits of the crime. The commentary to the guidelines of course is intended only to suggest various factors to be weighed. There need not be evidence of every factor before a defendant is found to be a leader or organizer. The four point increase was appropriate. He made decisions regarding place, quantity and price to be paid for cocaine, gave directions to some of the others involved in transactions, and directed his son to act as a lookout.

§ 3B1.2 Mitigating Role

United States v. Medina, 2006 WL 3322292 (3rd Cir. (N.J.)). The defendant pled guilty to conspiring to distribute 178.8 grams of crack cocaine. Prior to sentencing, he moved for a two-point downward adjustment under U.S.S.G. § 3B1.2(b) based on what he claimed to be his minor role in the offense. He insisted that he had played a relatively minor role in a drug business operated by his co-defendant, Domingo Valentin. After an evidentiary hearing, this motion was denied and he raised this issue on appeal.

In affirming the district court's decision, the Court of Appeals noted that the factors to be considered in determining whether a defendant's role was minor are: "the nature of the defendant's relationship to other participants, the defendant's awareness of the nature and scope of the criminal enterprise, and the importance of the defendant's actions to the success of the venture. *United States v. Rodriguez*, 342 F.3d 296, 299 (3d Cir. 2003). The district court found that the defendant's role was to recruit customers for Valentin and to act as a translator for him when the customers spoke only English. It stressed that the defendant's participation was mot an isolated incident, but rather involved repeated sales. The district court further observed that the defendant had previously sold drugs and was not a stranger to what selling drugs means and what the consequences are.

The Court of Appeals stated that while it is true the record would support a finding that Valentin was the organizer and leader of this conspiracy and that the defendant was somewhat less culpable, the "mere fact that a defendant is less culpable than his co-defendants does not entitle the defendant to minor participant status. *United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2001). If this were the case, then the least culpable member of any conspiracy would be a minor participant.

United States v. Gonzalez, 2006 WL 1096169 (3rd Cir.(Pa.))). In this case, the Court of Appeals concluded that the district court erred in its interpretation of the mitigating role guideline, by determining, as a legal matter, that the defendant was precluded from consideration because he was not charged with a conspiracy offense. The defendant pled guilty to two counts of interstate travel in aid of drug racketeering. Even though the defendant was the sole participant charged with the interstate travel offense, the nature of the offense as an activity in aid of a racketeering enterprise necessarily implies the existence of a racketeering enterprise, and hence implicates "concerted criminal activity" undertaken by other members of the drug-trafficking enterprise. The fact that the defendant was not convicted of a conspiracy offense does not preclude a court from considering him as part of a larger enterprise, and does not automatically dictate that he cannot be viewed as a minimal or minor participant in particular conduct in which others also participated.

United States v. Ordaz, 2005 WL 82212 (3rd Cir.(Pa.)). On appeal, the defendant argued that the district court erred by not granting him a mitigating role reduction for his part in the conspiracy. The Court of Appeals was satisfied that the district court's finding that the defendant was not entitled to a reduction for being a "minor" or "minimal" participant was not clearly erroneous. As the district court noted, the defendant was "a courier again and again and again, to the extent that it might have been weekly." The substantial weight of the evidence established that the defendant's activities occurred not only frequently but also more often than other players in the conspiracy. The defendant played a crucial role in the conspiracy relative to others (i.e., by obtaining the cocaine and transporting it to Philadelphia for packaging and sale). He also had a close relationship with the organization's leadership.

United States v. Vaden, 2004 WL 2965428 (3rd Cir.(Pa.)). From July 2002 through February 2003, Marc Corbin, Vaden's co-conspirator, received approximately 4.5 ounces of crack cocaine and one ounce of powder cocaine twice a week from a supplier. Corbin used middle men, including Vaden, to distribute crack cocaine to his customers. According to Vaden, he received no money, but rather was compensated with drugs for his part in the transactions.

The conspiracy to which Vaden pled guilty ran from October 22, 2002 through January 22, 2003 - a subset of the larger drug conspiracy with which Corbin was charged. On each of those two dates, a confidential informant engaged in a controlled buy from Corbin through Vaden. On October 22, 2002, the confidential informant purchased 13.3 grams of crack cocaine. On January 22, 2003, the confidential informant purchased one ounce of crack cocaine.

At the sentencing hearing, Vaden argued that he was entitled to a minor role adjustment because although he admittedly made the connection between Corbin and the informant and brokered the transactions between them, Corbin used Vaden "strictly as a middleman." The district court denied Vaden's request.

Vaden appealed, arguing that although he may have been necessary to the transaction in that, as a middle man, the transaction could not have taken place without him, he was nonetheless less culpable than Corbin who both supplied the drugs and received the monetary profits. In affirming the judgment of the district court, the Court of Appeals stated, "Vaden

significantly under emphasizes his role in the drug conspiracy. Vaden was not merely a necessary link in the physical completion of the drug transaction. Vaden admitted that he was the party responsible for bringing Corbin and the informant together. He had met Corbin because Corbin used an apartment next door to Vaden's home. In addition, Vaden had met the confidential informant several years before then at a halfway house. Thus, unlike a drug courier, who may not even know the various members of the larger drug conspiracy, Vaden was the only participant who had a personal relationship with his co-conspirators.

"Furthermore, as the district court found, Vaden was integral to the success of the venture. Vaden testified that on the occasion of each controlled buy, the confidential informant asked Vaden to procure cocaine, the confidential informant then arrived at Vaden's home and gave him money, at which point Vaden would call Corbin who would arrive at Vaden's home with the cocaine. Thus, Vaden did not merely act as the point of exchange for the drugs and money. Rather, he was instrumental in effecting the drug conspiracy."

United States v. Clarke, 2004 WL 2203977 (3rd Cir. (N.J.)). The Court of Appeals concluded that the defendant was not a minor participant. He actively recruited and engaged another in the conspiracy and was fully aware of the nature and scope of the criminal enterprise insofar as he knew what he was transporting, where the narcotics had come from, and to whom he was to deliver the package. Further, his role as a mule was essential to the ultimate success of the conspiracy.

United States v. Rodriguez, 2003 WL 21467225 (3rd Cir.(N.J.)). The defendant pled guilty to conspiracy to distribute and possess with intent to distribute more than 500 kilograms of cocaine. On appeal, he argued that the district court improperly refused to grant downward adjustments of one-level and two-levels under §§ 3E1.1(b)(2) and 3B1.2(b). On appeal, the defendant claims he was entitled to a reduction for minor participant because no member in the conspiracy was ranked lower than him and because he received only $150,000 for shipments of cocaine worth $24,000,000. The Court of Appeals disagreed. The fact that an individual was less culpable than an average member of a conspiracy is not determinative. *See United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2001). The defendant possessed a thorough knowledge of the nature and scope of the conspiracy and its operations, including capabilities, dates and amounts of shipments, names of high-ranking co-conspirators, and decisions regarding strategies to avoid detection by authorities. Luis Diaz, a high-level member of the conspiracy, with whom the defendant coordinated to off-load, account for and deliver cocaine shipments suggests that his role was not that of a minor participant. The defendant was responsible for providing counter-surveillance and for off-loading and protecting at least 9000 kilograms of cocaine, for which he was paid $150,000 per load.

United States v. Aguado, 2003 WL 1564268 (3rd Cir.(N.J.))). The defendant pleaded guilty to conspiracy to import heroin into the United States from Panama in violation of 21 U.S.C. § 963. On June 8, 2001, Alberto Rankin, a drug courier, confessed to customs officials upon his entry into the United States that he had ingested a quantity of heroin, and was to be paid $10,000 upon delivery of the drugs in the United States. Rankin agreed to cooperate with officials, and, after he had passed the drugs, he called and arranged to meet the defendant at

Newark International Airport to deliver the heroin to him. Because another member of the conspiracy had failed to give the defendant money to pay Rankin, the defendant withdrew $3,000 from the business bank account of his auto body shop to give to Rankin. The defendant expected to be reimbursed by other members of the conspiracy. The defendant was arrested when he arrived to meet Rankin at the airport.

Agudao appealed his sentence, contending that he played a minor role. The Court of Appeals disagreed: "Here, the record contains no evidence that Aguado's involvement, knowledge, and culpability were materially less than those of other participants in the heroin trafficking conspiracy, *United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2001), especially in light of the fact that he used his own money to pay Rankin with the expectation of reimbursement from other members of the conspiracy."

United States v. Valletto, 2003 WL 294498 (3rd Cir.(N.J.))). A jury found Anthony Valletto guilty of conspiracy to distribute and to possess with intent to distribute more than 100 grams of methamphetamine. On appeal, he argued that the district court erred in denying his request for a four-level decrease for minimal participation in criminal activity. Valletto participated on a continuing basis, if in a peripheral way, by driving Chianese to meetings (on at least one occasion with a pound of methamphetamine in his car), conducting counter-surveillance, transporting drugs and accompanying Chianese to a drug transaction in Pennsylvania, and visiting Lopa on his own accord to discuss possible future transactions. Given this evidence of Valletto's knowledge of and participation in all aspects of the conspiracy, the district court did not commit a clear error by concluding that Valletto was not a minimal participant.

United States v. Carter, 2002 WL 31819727 (3rd Cir.(Del.))). The defendant and nine others were involved in a conspiracy to transport and distribute marijuana from Tucson, Arizona to Dover, Delaware. The distribution ring operated for three years and was organized by two co-conspirators. The defendant's role in the conspiracy was to allow his home in Smyrna, Delaware to be used by other conspirators as a place to meet and break down the marijuana into one-pound bags. He kept a scale in his home for that purpose. On at least one occasion, the defendant traveled to BWI Airport to pick up couriers from the airport. In exchange, the defendant received one-half pound of marijuana for each 35-50 pound shipment brought into his house.

On appeal, the defendant argued that the district court erred in denying him a mitigating role adjustment pursuant to U.S.S.G. § 3B1.2, asserting that he was less culpable than his co-defendants. Although it is clear that the defendant's participation was minor in comparison to that of the two organizers, he introduced no evidence suggesting that his participation was minor in comparison to the remaining co-defendants. Second, the district court suggested that the defendant's actions were critical to the success of the venture, and this was not clearly erroneous since defendant provided a safe haven to the couriers where they could receive payment and break down their shipments. Finally, it was permissible for the district court to conclude that, because the defendant allowed 17 drug shipments to arrive at his house over the course of three years, the scope of the conspiracy and its illegality was "obvious' to him. Accordingly, the denial of a minor role reduction was not clearly erroneous.

United States v. Rosario, 2002 WL 318546197 (3rd Cir.(Pa.))). FBI agents intercepted a shipment of 1,500 pounds of marijuana. They decided to follow through with the planned transaction in an undercover operation at the shipment's destination in Philadelphia, making arrangements to deliver the drugs to conspirator Joaquin Rosa-Pagan. On one occasion, Rosa-Pagan used Rosario as an intermediary when speaking with the undercover agents. Rosario also accompanied Rosa-Pagan on a "counter surveillance" monitoring of the truck with which the conspirators intended to transport the marijuana. When a driver arrived with the loaded truck at the designated location, agents arrested Rosa-Pagan and two other conspirators. Rosario was not present at this scene, but he held the $75,000 "transportation fee," most of which he returned to an intimate acquaintance of Rosa-Pagan's following the arrests, but $5,000 of which he kept in satisfaction of a legitimate and unrelated debt.

At sentencing, the district court granted Rosario a two level reduction for "minor" participation. The district court held that Rosario knew the major players, was entrusted to answer the telephone and communicate with other participants, and passed on directions in furtherance of the conspiracy. It contrasted this with the archetypal minimal participant, the "mule" who merely delivers drugs ignorant of the actual people in charge. The defendant appealed, arguing that he was entitled to a four level reduction for minimal participant.

The Court affirmed the district court's judgment. Accompanying a significant player on a counter surveillance operation surely constitutes "physical participation" in the more central operations of the conspiracy even if one's presence is not necessary.

United States v. Grier, 2002 WL 31501852 (3rd Cir.(N.J.))). The defendant pled guilty to distribution and possession with intent to distribute more than five grams of crack cocaine in violation of 21 U.S.C. § 841(a). He argued on appeal that the district court erred in denying his request for a downward adjustment for a minor role in the offense.

On June 20, 2000, a confidential informant working for the Drug Enforcement Agency asked Grier for 60 grams of crack cocaine. Grier agreed and they arranged to meet to complete the sale a short time later. Grier arrived at the predetermined location, entered the CI's vehicle, and handed the CI approximately 58.6 grams of crack cocaine, receiving in exchange $2,000 from the CI. Grier was then arrested by DEA agents who witnessed the transaction.

The defendant argues that he was a minor participant because he was not the only individual sought by law enforcement agents and because he was not the only individual who participated in the offense. He notes that the CI originally sought to purchase drugs from a street dealer who did not appear, and only then did the CI seek to buy the drugs from Grier. This did not establish that there were other individuals involved in the crime but at most that there were multiple dealers in that area. The Court of Appeals affirmed the judgment of conviction and sentence, stating: "As the district court stated at Grier's sentencing hearing, 'Grier negotiated and carried out the entire transaction.'" Thus, Grier was the central, if not the principal, participant in the crime, and as such, his role was far more extensive than a minor participant.

United States v. Johnson, 31341338 (3rd Cir.(Pa.))). The defendant pled guilty to aiding and abetting interstate transportation of false securities in violation of 18 U.S.C. §§ 2314 and 2 and one count of conspiracy in violation of 18 U.S.C. § 371. On appeal, he argued that he was entitled to a two level reduction in offense level under U.S.S.G. § 3B1.2(b) because he was a "minor participant" in a scheme to sell automobiles with "rolled back" odometers. He contends that his role was limited to selling the cars at a local auto auction. He did not personally roll back odometers or alter any automobile's paperwork. He sold only 109 of the 408 cars involved in the conspiracy and received only $150 in profit per car, for a total profit of $16,350. The Court of Appeals held that the district court's finding that Johnson was no less culpable than his co-conspirators was not clearly erroneous. On one hand, Johnson dealt with only 27% of the automobiles involved in the conspiracy. Yet he admitted knowledge of the conspiracy's nature and scope. Johnson's selling the automobiles with altered odometers was the final step essential for the coconspirators to profit from their actions. Furthermore, he was responsible for forwarding falsified paperwork to the Pennsylvania Department of Transportation.

United States v. Chambers, 2002 WL 31059148 (3rd Cir.(N.J.))). On July 25, 2000, the defendant flew from Jamaica to Newark, New Jersey. A routine customs inspection at Newark Airport revealed cocaine in the shoes she was wearing and in a pair of shoes inside her suitcase. After being arrested, the defendant agreed to cooperate in a controlled delivery. Two other defendants were arrested.

At sentencing, the defendant requested a two level reduction in her offense level for minor role. The district court denied her request and the defendant appealed. The district court adopted the findings of the presentence report and assessed the defendant's relationship to the other participants, the importance of her actions to the venture, and her awareness of the nature and scope of the conspiracy. *United States v. Isaza-Zapata*, 148 F.3d 236, 239 (3d Cir. 1998). The district court considered that the defendant had a direct relationship with the manager of the conspiracy; that she assisted two others when they imported cocaine; that she received wired funds to facilitate the conspiracy and obtain the cocaine; that she knew she was importing drugs; and that she willingly participated in the importation. In light of these facts, the Court of Appeals held that the finding that the defendant did not play a minor role is not clearly erroneous.

United States v. Mellott, 2002 WL 1885919 (3rd Cir.(Pa..))). The defendant pleaded guilty to conspiracy to distribute cocaine and methamphetamine. Mellot's trial counsel did not file or make any motions for a downward departure at sentencing. However, in his notice of appeal, trial counsel identified a number of reasons why he believed Mellott's sentence was improper. Counsel asserted that the court should have further reduced Mellott's sentence on the basis of his "minor" role in the offense; his post-offense rehabilitation; his physical disability as an amputee; and the fact that his criminal history category overstates the seriousness of his prior convictions.

The Court of Appeals held, "With respect to the suggested downward departure for a minor role in the offense, the record contains no basis for such an evaluation. The record reflects that Mellot, along with several defendants, was a dealer who participated in acquiring the drugs that the defendants distributed in the community. The mere fact that Mellot did not sell cocaine

but only methamphetamine does not affect this conclusion. Mellot's claim that the record establishes post-offense rehabilitation, that he has become a better and more responsible person, especially a better and quite responsible parent, which we commend, does not even approach the very high standard required for a downward departure on that ground. Neither does his physical disability as an amputee. We also see no basis for the claim that the criminal history category overstates the seriousness of his prior convictions.

United States v. Dowe, 2002 WL 1723864 (3rd Cir. (N.J.))). Dowe purchased substantial quantities of cocaine and transported that cocaine back to Atlantic County. Dowe appears to have worked closely with those who organized the time, place and price of the cocaine purchases. Like the other coconspirators, Dowe sold the cocaine on returning to Atlantic County. He was involved in the conspiracy for over four years.

Dowe's involvement as a trusted and experienced courier and seller of cocaine were important to the success of the conspiracy. The record supports the district court's conclusion that Dowe did not merit a mitigating role adjustment.

United States v. Andrews, 2002 WL 1585669 (3rd Cir.(Pa.))). Terrence Andrews and Eric Myrieckes pled guilty to possessing crack cocaine with intent to sell and to conspiracy to sell crack cocaine. Andrews claimed that the district court erred when it found that he was not a minor participant in the drug conspiracy. He contends that the evidence shows that he was less culpable than Myrieckes. The Court of Appeals did not agree with Andrews. Although Andrews did not own or drive the car, did not bring the scale ostensibly used for weighing the drugs, was not identified by the informant as a drug dealer, and may have depended on Myrieckes' connections in Cleveland to acquire the drugs, there is substantial evidence of his culpability. Andrews, with Myrieckes, asked the driver of the car for a ride to Cleveland, rode to Cleveland to get the drugs, discussed future profits from the sale of the drugs, and had drugs on or near his person when arrested. This evidence indicates Andrews was Myrieckes' partner.

United States v. Gomez, 2002 WL 1575908 (3rd Cir.(Del.))). Alonzo Gomez was stopped by Delaware Police officers who searched his car and found over seven kilograms of cocaine. He was convicted for possession of cocaine with the intent to distribute. The district court denied Gomez's application for a minor role adjustment. He appealed.

The Court of Appeals held that Gomez failed to satisfy the requirements for a minor role adjustment. Section 3B1.2 of the guidelines permits a reduction in the offense level by two if the defendant was a minor participant in the criminal activity. To receive such an adjustment, a defendant must show that (1) there were multiple participants in committing the crime, and (2) the defendant was among the least culpable of the participants. See *United States v. Isaza-Zapata*, 148 F. 3d 236, 238-39 (3d Cir. 1998).

Regarding the second prerequisite of relative culpability, to assess a defendant's culpability as a courier in relation to the other participants, one must consider factors such as the nature of the defendant's relationship to the other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness if the nature and scope of the

criminal enterprise. *Headley*, 923 F. 2d at 1084. The defendant bears the burden of demonstrating that the minor role adjustment should apply. *Isaza-Zapata*, 148 F. 3d at 240.

In this case, there were multiple participants. Gomez failed to establish, however, that he was among the least culpable participants. The record does not indicate the extent of Gomez's relationship with the other participants. Thus, no conclusion can be drawn concerning this factor. Moreover, Gomez cannot show that his actions were not essential to the success of the venture. To the contrary, Gomez owned the car with the secret compartment that stored the cocaine, and he agreed to drive the cocaine from New York to Washington, D.C. Finally, Gomez failed to show that he did not understand the nature and scope of the criminal enterprise of which his role as carrier was one part. The record indicates that Gomez knew that he was delivering drugs and not jewelry. Moreover, Gomez did not establish that his role in the operation was limited to transporting a small amount of drugs in a single transaction. Because Gomez failed to carry his burden of showing that his culpability was less than that of the other participants in the criminal endeavor, the district court did not erroneously deny his request for a minor role adjustment.

United States v. Gonzalez, 2002 WL 1305583 (3rd Cir.(N.J.))). The defendant appealed her sentence for conspiracy to distribute more than 500 grams of cocaine. She argued that the district court failed to consider all of the relevant facts and erroneously concluded that her role was only minor and not minimal, thereby resulting in a two level downward adjustment rather than a three or four level downward adjustment pursuant to U.S.S.G. § 3B1.2. The Court of Appeals affirmed the sentence. Gonzalez admitted that one of the originators of the scheme recruited her. She also conceded to communicating directly and having a relationship with the other courier. She was aware of two of the three other participants in the scheme. Moreover, the record establishes that her involvement was commensurate with that of the other smuggler and that she was important to the success of the venture. Despite only participating in a single smuggling transaction, both she and the other courier were recruited to smuggle packages of drugs from Puerto Rico to New Jersey. Both couriers traveled between these locations. Further, both couriers were carrying similar quantities of cocaine and were to receive $1,000 per package. Because the defendant participated as one of two couriers and carried half the delivery, she was not substantially less culpable than the average participant. The defendant was aware of the nature and scope of the criminal activity. She knew the originators of the scheme and their relationship with the other participants. She also knew that couriers traveled to Puerto Rico to pick up packages of illegal drugs, met with members of the drug group to obtain clothing to secret the drugs, and returned to New Jersey to deliver the drugs for distribution.

United States v. Cort, 2002 WL 1275443 (3rd Cir.(N.J.))). Thed defendant pleaded guilty to conspiracy to import approximately 500 grams of cocaine in violation of 21 U.S.C. §§ 952 and 963. At sentencing, the district court declined to award a downward adjustment for "minor role." Cort appealed, alleging that he was brought into the conspiracy by a man only known as "Yankee." As part of the conspiracy, Cort recruited his co-defendant, Doreen Rodriguez, to act as a drug courier on a round trip between the United States and Jamaica. Cort made all of Rodriguez's travel arrangements and paid her travel expenses. Rodriguez flew to Jamaica on April 26, 2001, to meet with the drug suppliers there. When she learned that she would have to

swallow some 80 pellets filled with cocaine, she balked. The drug suppliers in Jamaica called Cort to resolve the problem. Cort spoke with Rodriguez and convinced her to swallow the pellets.

The defendant appealed, arguing that the district court committed legal error in denying him a downward adjustment for minor role because it failed to compare his culpability with that of participants other than Rodriguez. The Court of Appeals has held that the principles relevant to determining the application of § 3B1.2 are (1) the nature of the defendant's relationship to the other participants, (2) the importance of the defendant's actions to the success of the venture, and (3) the defendant's awareness of the nature and scope of the criminal enterprise. Such an inquiry is necessarily fact-intensive and requires consideration of the defendant's culpability as against that of the other participants, indicted or not. At the end of the day, "the reduction is available for a defendant whose role in the offense makes him substantially less culpable that the average participant."

At sentencing, the district court stated: "It is clear from the record that there are other participants besides Mr. Cort and Ms. Rodriguez. And ...I must consider his conduct relative to the conduct of other participants, as well as Mr. Cort's relationship to those other participants, the importance of Mr. Cort's actions to the success of the venture, and Mr. Cort's awareness of the nature and scope of the criminal enterprise." In other words, the district court expressly acknowledged its obligation to consider "relative culpability" vis-a-vis the other participants in the conspiracy and recited the precise factors set forth in *Isaza-Zapata*. Cort correctly notes that, after stating the legal standard, the district court emphasized two facts it considered "determinative" of the issue, namely Cort's role as the recruiter of Rodriguez and his relationship with the drug suppliers in Jamaica, who turned to Cort when Rodriguez initially refused to ingest the cocaine filled pellets. The focus on these two critical facts, however, does not mean that the district court failed to apply the correct legal standard. The Court of Appeals concluded that there was no legal error in the district court's rejection of a minor role adjustment.

United States v. Martin, 2002 WL 808573 (3rd Cir.(Pa.))). The defendant pleaded guilty to armed bank robbery and brandishing a firearm during a crime of violence. He argued that the district court erred in failing to grant a downward adjustment under U.S.S.G. § 3B1.2 for minor participant. The judgment of sentence was affirmed. The evidence demonstrated that the defendant provided his co-defendant with the handgun used in the robbery and participated as the getaway driver.

United States v. Perdomo, 2002 WL 753834 (3rd Cir.(N.J.))). The defendant appealed from a judgment entered following his guilty plea to conspiracy to distribute and possess with the intent to distribute more than 500 kilograms of cocaine. He argued that the district court erred in finding that he was not a minor participant in the conspiracy. In this case, the district court found that the defendant 1) agreed with others to distribute more than 500 kilograms of cocaine; 2) he agreed to distribute more than 500 kilograms of cocaine on at least three occasions by facilitating the transportation of the cocaine; 3) he accomplished this by helping to transport the cocaine from interstate tractor trailers to trucks and vans for delivery to New York; and 4) he arranged to store the cocaine until the purchasers of the cocaine were ready to receive it from him. The

Court of Appeals held that the record clearly supported the district court's conclusion that the defendant was not a "minor player" in the conspiracy. The facts clearly demonstrate that 1) the defendant was aware of the nature and scope of the enterprise; 2) for five months the defendant worked closely with several members of the conspiracy, such that he had significant involvement with his coconspirators; and , 3) his involvement was important to the success of the conspiracy.

United States v. Perez, 280 F. 3d 318 (3rd Cir. 2002). The defendants argued that the district court erred in denying them minor role reductions under § 3B1.2. The Court of Appeals upheld the denial, stating "The Court analyzed their respective participation against that of each co-defendant and found that each was no less culpable than any other, and therefore did not qualify for the departure."

United States v. Moore, 2002 WL 125541 (3rd Cir.(N.J.))). The defendant pled guilty to manufacturing paper similar in size to U.S. currency in violation of 18 U.S.C. § 491. He was involved in a counterfeit money operation led by David Delisi that also involved Kirsten Kirch and two other juveniles. The defendant, Delisi and one of the juveniles passed three counterfeit $20 Federal Reserve notes at a convenience store. Joined by Kirch and the other juvenile, they subsequently passed a total of 16 counterfeit $20 notes at a theme park. Delisi accepted responsibility as the leader of the operation. He created the counterfeit notes at his home using a personal computer, scanner, printer and paper cutter. The defendant assisted in manufacturing by cutting sheets of counterfeit notes into individual notes. With the defendant's assistance, Delisi created $2000 in counterfeit $20 notes. The sentencing judge denied the defendant's motion for a minor role reduction under U.S.S.G. § 3B1.2.

The issue on appeal is whether the district court erred in not applying the minor role reduction under U.S.S.G. § 3B1.2. A "minor role" reduction is applicable when the defendant is less culpable than most of the other participants. Sentencing courts have broad discretion in applying § 3B1.2, and their rulings are left largely undisturbed by the courts of appeal. *Isaza-Zapata*, 148 F. 3d at 238. The factual determination depends on "(1) the defendant's awareness of the nature and scope of the criminal enterprise; (2) the nature of the defendant's relationship to the other participants; and (3) the importance of the defendant's actions to the success of the venture." *United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2000). These factors should be weighed comparatively between the defendant and other participants. The record supports the sentencing court's determination that the defendant was not less culpable than most of the participants involved in the criminal conduct.

United States v. Brown, 250 F. 3d 811 (3d Cir. 2001). The defendant and five co-conspirators were charged with purchasing a total of nine firearms. She acted as a straw-purchaser in a firearms acquisition scheme. The defendant herself allegedly purchased two semi-automatic pistols, for which she pleaded guilty. At the sentencing hearing, the defendant filed a motion for a reduction pursuant to § 3B1.2. She requested a downward adjustment of four levels for her minimal participation in the offense or, at the very least, a two level downward adjustment for her minor participation. The district court denied the requested adjustment, finding that the defendant knew that others were involved in a criminal enterprise, knew of its scope, and was important to its success. On appeal, the defendant argued that the district court

erred by refusing to grant her a downward departure. She asserted that the presentence investigation supported her position; it states that she is less culpable than others because she only made one purchase. The Court of Appeals noted that the "mere fact that a defendant was less culpable than his co-defendants does not entitle the defendant to 'minor participant.'...If this were the case, then the least culpable member of any conspiracy would be a minor participant, regardless of the extent of that member's participation." In *United States v. Headley*, 923 F.2d 1079, 1084 (3d. Cir. 1991), the Court of Appeals held that a defendant's eligibility for "minor participant" status turned on whether the defendant's "involvement, knowledge and culpability" were materially less than those of other participants. This determination depends upon the following: (1) the defendant's awareness of the nature and scope of the criminal enterprise; (2) the nature of the defendant's relationship to the other participants; and (3) the importance of the defendant's actions to the success of the venture. In the instant case, the Court of Appeals held that the record amply supported the district court's decision that Brown failed to demonstrate that she merited a mitigating role adjustment. She was responsible for recruiting her cousin to participate in the scheme, presented the nature of the scheme to her cousin, was essential to the acquisition of firearms, and knew that a co-conspirator planned to remove the guns' serial numbers, making them untraceable, and have the defendant report them as stolen.

United States v. Holman, 168 F. 3d 655 (3d Cir. 1999). The defendant argues that he was entitled to a decrease in his offense level for mitigating role pursuant to § 3B1.2. He had participated in a large conspiracy, but he argues that his role in that conspiracy was minor. The defendant admitted to serving as a distributor in the conspiracy. The record shows that the total amount of cocaine distributed by the conspiracy during the defendant's involvement was 50 kilograms. The defendant concedes that of this amount 10 kilograms of cocaine can be attributed to him. The Court of Appeals concluded that the district court did not err in determining that the distributor does not play a mitigating role in a conspiracy to distribute 10 kilograms of cocaine.

United States v. Riddick, 156 F. 3d 505 (3rd Cir. 1998). Defendant was convicted of drug conspiracy charges. In the plea agreement, the parties stipulated that defendant's minor role in the conspiracy warranted a minor role reduction under § 3B1.2. However, the PSR concluded that defendant was a career offender. The district court agreed that defendant's minor role would ordinarily warrant a downward adjustment, but held that the minor role adjustment did not apply to career offenders. The Third Circuit agreed, ruling that career offenders are not eligible for minor role reductions. The sequence of the Sentencing Guideline Application Instructions in § 1B1.1 indicates that after career offender status is imposed, downward adjustments are allowed for acceptance of responsibility. If the sequence in § 1B1.1 was arbitrary, the additional provision for an acceptance of responsibility reduction would have been unnecessary.

United States v. Johnson, 155 F. 3d 682 (3rd Cir. 1998). The issue on appeal was whether the sentencing guidelines allow a downward adjustment in offense level for a defendant's minor role in a crime when the career offender provision applies. The district court held that because the defendant was a career offender under the sentencing guidelines, the district court lacked authority to grant a minor role downward adjustment. Based on the plain language of the sentencing guidelines, their legislative history, and the sequence of the relevant provisions, the court of appeals affirmed the district court's holding that minor role downward adjustments

do not apply to career offenders.

United States v. Isaza-Zapata, 148 F. 3d 236 (3d Cir. 1998). The defendant was approached by two other individuals to transport heroin to the United States. He knew no one else involved in the scheme, and had no knowledge of the scope of the conspiracy. The two other individuals provided the defendant with more than 100 grams of pre-packaged heroin, showed him how to swallow the packages and how to travel, and provided him with a plane ticket. At sentencing, the defendant requested a two-level reduction for minor role. The government agreed, however, the district court declined to grant the reduction. The Court of Appeals held that in determining whether a defendant qualifies for a minor role, the district court must examine all relevant conduct, not merely the defendant's, in assessing his relative culpability. Accordingly, the mere fact that a courier was not charged with conspiracy or was charged only with the amount of drugs in his possession does not necessarily preclude consideration of a minor role adjustment. In *Headley*, the Court of Appeals for the Third Circuit adopted the following principles in determining whether a courier is a minor participant: "the nature of the defendant's relationship to the other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise."

United States v. Haut, 107 F.3d 213 (3d Cir. 1997). The district court did not err in finding that the defendants were minimal participants under USSG §3B1.2(a). The commentary to §3B1.2 states that minimal participants are "among the least culpable of those involved in the conduct of a group." Defendants' mother was the officer of a company that owned and operated a bar. She and another officer burned the bar in order to collect insurance proceeds. The defendants had no financial interest in the bar and did not benefit in any manner from the fire. Neither brother took an active role in the actual burning or benefitted financially from its occurrence. Both brothers were present at meetings when the arson was discussed. Economic gain and the extent of physical participation may inform findings regardging minimal-participant status.

United States v. Romualdi, 101 F. 3d 971 (3d Cir. 1996). Defendant pleaded guilty to possessing three or more videotapes containing child pornography in violation of 18 U.S.C. §2252(a)(4). The district court departed downward, citing the opinion in *U.S. v. Bierley*, 922 F. 2d 1061 (3d Cir. 1990). In *Bierley*, the undercover postal inspector acted as the distributor and after the magazines were delivered, inspectors searched Bierley's residence. Unlike the search of Romualdi's, the inspectors found no other articles of child pornography except for the magazines that Bierley had received through the sting operation. The government appealed, arguing that case was not analogous to *Bierley.* The crime to which Romualdi pled, possession, not receipt, of child pornography, is a crime that on its face requires no concerted activity. In reversing the departure, the Third Circuit held that possession of child pornography was a single person offense which does not involve concerted activity. Here, defendant pled guilty to possession of child pornography and obtained the benefit of a lower offense level than had the crime been receipt of child pornography.

United States v. Stuart, 22 F. 3d 76 (3d Cir. 1994). Defendant was not a minimal participant under §3B1.2(a) in a scheme involving the selling of stolen government bonds. He had full knowledge of the scheme, scope and structure of the enterprise, and of the activities of others. However, remand was required because the district court failed to address whether defendant was a minor participant under 3B1.2(b), warranting a two level decrease, or whether his conduct fell somewhere in between subsections (a) and (b), warranting a three level decrease.

United States v. Price, 13 F. 3d 711 (3d Cir. 1994). Defendant was not shown to be a minimal or minor participant in drug distribution conspiracy and, therefore, was not entitled to a sentencing reduction on that basis, even though he was not mentioned often at trial and even though none of his six co-defendants were denominated minor participants. The defendant was aware of scope of conspiracy and was involved in distribution of drugs and acts of violence.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). District court's determination that defendant was a minor rather than a minimal participant was not clearly erroneous. Evidence showed defendant promoted the cocaine a co-defendant was supplying to undercover officer and encouraged future transactions.

United States v. Gonzales, 927 F. 2d 139 (3d Cir. 1991). Defendant contended that he should have received a four-point reduction for being a minimal participant in a drug transaction rather than the two-point reduction he received for being a minor participant. The Third Circuit rejected this contention, finding that defendant's characterization as a minor participant may have been generous. Defendant participated in a meeting where the sale of drugs was discussed, drove a van to another meeting, and at the time of arrest had in his possession documents which indicated that the van was owned by a female residing at his residence.

United States v. Headley, 923 F. 2d 1079 (3d Cir. 1991). The presentence report indicated that defendant's involvement in an extensive cocaine conspiracy may have been limited to being a courier on several occasions. This put counsel on notice that it might have been fruitful to seek a downward adjustment based on defendant's mitigating role. However, defendant's counsel did not argue for an adjustment based upon role in the offense. The court of appeals found that this failure constituted ineffective assistance of counsel, and remanded the case. It noted, however, that the fact that a defendant's participation in a drug operation was limited to that of a courier is not alone indicative of a minor or minimal role. "The culpability of a defendant courier must depend necessarily on such factors as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise."

United States v. Bierley, 922 F. 2d 1061 (3d Cir. 1990). Defendant received magazines depicting child pornography from an undercover postal inspector. He pled guilty to receipt of child pornography in violation of 18 U.S.C. §2252(a)(2). The district court concluded that an adjustment for mitigating role under §3B1.2 was not available inasmuch as defendant was the sole "criminally responsible" participant in the offense. The district court adduced a number of factors which it thought pointed to a downward departure but which it said were, in totality, not sufficient to support a departure. The Third Circuit held that the district court did not err in

concluding that §3B1.2 was, in itself, not the basis for a downward adjustment since defendant was only "criminally responsible" participant. However, a departure by analogy to §3B1.2 is available if defendant's conduct would qualify as "minor" or "minimal" had the supplier, a postal inspector, been a criminally culpable participant.

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

United States v. Rodriguez-Rijo, 2007 WL1433773 (3rd Cir.(Virgin Islands))). The defendant appealed, challenging the district court's application of a two-point adjustment under U.S.S.G. § 3B1.3 for use of a "special skill" in operating a vessel. The Court of Appeals, distinguishing the instant case from *United States v. Batista De La Cruz*, 460 F. 3d 466 (3d Cir. 2006), found that the defendant used a special skill in piloting a vessel.

In this case, the defendant piloted a high-speed vessel, in the darkness of night and without using navigation lights, to a pre-determined location in the open ocean. Once detected, the defendant attempted to elude apprehension by leading law enforcement authorities on a high-speed chase across the dark sea. The defendant had prior experience piloting this very vessel, for which he received substantial compensation. Members of the public would lack the skills necessary to successfully perform the nearly identical task entrusted to the defendant in this case.

United States v. Evans, 2007 WL 495017 (3rd Cir.(Pa.))). The defendant, while employed as the commanding officer of the mounted unit of the Philadelphia Police Department, engaged in a scheme to defraud the City of Philadelphia by ordering items not authorized under various supply contracts.

On appeal, the defendant objected to the district court's application of a two level enhancement for abuse of position of trust. The case against the defendant was founded on his participation in a scheme to manipulate the city's invoice system to obtain unauthorized materials. As head of the mounted unit, he was in a position where his signature on an invoice led to the commission of a crime that was difficult to detect, as the signature allowed a second set of records to be kept. He used his position of authority within city government to allow the scheme to continue, and accordingly the Court of Appeals found no error.

United States v. Batista De La Cruz, 460 F.3d 466 (3d Cir. 2006). On appeal, the defendant challenged the district court's two-level upward adjustment of his sentence on the ground that he employed "special skills" in operating a 20-foot fishing boat with a 40 horsepower engine from Puerto Rico to St. Thomas, Virgin Islands, to pick up and transport cocaine. The Court of Appeals agreed with the defendant and reversed the judgment of the district court. There was no evidence that the defendant received substantial education, training or licensing with boating. The record was also devoid of evidence that he frequently boated on his own to develop and hone his skills beyond those in the general public. There was no evidence that the trip to St. Thomas was particularly challenging on the day in question due to rough waters or other reasons. Unlike the defendants in *United States v. Calderon*, 127 F. 3d 1314 (11th Cir. 1997), the defendant employed simple line-of-sight navigation in making the approximately 50

mile trip to St. Thomas. Authorities found no charts, compasses or other navigational devices on his boat. He operated the boat during the daylight.

United States v. Hertzog, 2006 WL 2034457 (3rd Cir.(Pa.))). The defendant pled guilty to charges arising from his illegal possession of firearms. At sentencing, the district court determined that the defendant's skill in converting multiple types of legal, semi-automatic weapons into illegal automatic weapons qualified as a special skill. The defendant also used raw materials to create prohibited silencers and explosive devices. The Court of Appeals concluded that the district court was justified in enhancing the defendant's sentence pursuant to U.S.S.G. § 3B1.3 based upon the skill he employed in committing the instant offense.

United States v. Rhoades, 2006 WL 1438729 (3rd Cir.(Pa.))). The defendant pleaded guilty to two counts of mail fraud and one count of wire fraud. He was sentenced to 46 months imprisonment to be followed by three years of supervised release. On appeal, he argued that the District Court erred in deciding that he occupied a position of trust for purposes of § 3B1.3. The defendant acted as a financial advisor to Venango County and Northwestern School District. By misusing the authority the county and school district granted him to place funds for investment, he caused heavy losses to both governmental agencies. The district judge found that the defendant's position "allowed him to commit a difficult to detect wrong," he had authority to carry out the wrongful act, and that Venango County and Northwestern School District relied on his integrity. The Court of Appeals concluded that the District Court did not err in finding that the defendant occupied a position of trust and therefore an enhancement was proper.

United States v. Matura, 2006 WL 1024139 (3rd Cir. (Pa.))). The defendant, a chiropractor, pled guilty to healthcare fraud in violation of 18 U.S.C. § 371, and obstruction of a healthcare fraud investigation in violation of 18 U.S.C. § 1518. He appealed his sentence, contending that the district court improperly enhanced his sentence based upon an erroneous determination that he had abused a position of trust. The defendant stated that the enhancement was improper for two reasons: 1) He did not occupy a position of trust with respect to the insurance company; and 2) Abuse of trust is an element of a greater offense and therefore should have to be admitted by a defendant or proven beyond a reasonable doubt.

The Court of Appeals held that the defendant's contention that he did not occupy a position of trust with regard to the insurance company was without merit. In United States v. Sherman, 160 F.3d 967 (3d. Cir. 1998), the court held that the defendant, a doctor who had fraudulently billed insurance companies, had abused a position of trust. The Court of Appeals stated that "to determine whether a position of trust exists, we consider three factors: (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority . . . which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position." In Sherman, the Court of Appeals found that these factors weighed in favor of finding that the doctor occupied a position of trust with respect to the insurance companies he billed. These companies utilized an honor system and lacked any other means of monitoring the defendant's billing practices. The facts in Matura closely resemble those in Sherman. Furthermore, the

Court of Appeals expressed no opinion as to whether abuse of trust is an element of a greater offense rather than a sentencing factor; however, the Court of Appeals noted that it has held that sentencing judges may make findings of fact by a preponderance of the evidence regarding such elements. See United States v. Cooper, 437 F. 3d 324, 330 (3d Cir. 2006) (citing United States v. Mack, 229 F.3d 226, 233-35 (3d Cir. 2000).

United States v. Brown, 2004 WL 602748 (3rd Cir.(Del.))). Brown became the campaign manager for Wilmington's former Mayor James H. Sills during the 1996 election. Following Sills's election, Brown became the executive director of the Wilmingtonians, an organization created to address social issues and provide solutions for Wilmington citizens. Brown then became president of the organization, and in this capacity was responsible for its daily operations including maintaining control over the finances and any mail containing checks payable to the Wilmingtonians.

In sentencing the defendant, the district court imposed a two level enhancement for abuse of a position of trust. The Court of Appeals affirmed, stating that the wrong committed by Brown was difficult to detect. He was responsible for the daily financial operations of the organization, and the organization's accountant relied directly on the materials he received from Brown in order to keep the books. That Brown exercised a high degree of authority is plain from his position as President. Placement of him in the position as President where he controlled the group's finances necessarily implies reliance on his integrity.

United States v. McNeil, 2003 WL 21279426 (3rd Cir.(Pa.))). The defendant appealed an order of the district court that imposed a two-level upward departure pursuant to U.S.S.G. § 3B1.3 for abuse of position of trust. The Court of Appeals held that the defendant was bound by the stipulation in his plea agreement which indicated that such an enhancement was applicable. The plea agreement was signed by the defendant.

United States v. Thomas, 315 F.3d 190 (3d Cir. 2003). A jury found the defendant guilty of bank fraud in violation of 18 U.S.C. § 1344 and fraudulently inducing a person to travel in interstate commerce in violation of 18 U.S.C. § 2314. Anne Weygandt, then aged 88, employed the defendant as a home health care aide. Weygandt believed herself to be in fair health, although she had suffered a minor stroke. She frequently made loans to her nephew and also authorized others, including the defendant, to complete checks which she had pre-signed, by filling in the amount and name of the payee. These checks were used for various purposes, including the payment of bills. The defendant also received and sorted Weygandt's mail. From November 1997 to July 1998, the defendant induced Weygandt to sign numerous checks for the pretextual purpose of transferring money among Weygandt's several bank accounts or for the purchase of groceries. Instead, the defendant cashed the cheks, made out either to the defendant or to cash, at Weygandt's banks, and pocketed all or most of the proceeds. She withdrew approximately $124,300 from Weygandt's Mellon Bank accounts and $9,400 from her Citizen's Bank account.

Weygandt was physically present at the bank with the defendant when the withdrawals occurred, and she herself endorsed those checks made out to cash. After the defendant originally sought to cash Weygandt's checks by herself, one of the tellers insisted that Weygandt be present before the bank would honor the checks. Despite Weygandt's presence, the transactions still aroused the suspicion of bank tellers, who asked the defendant the purpose of the withdrawals. Either the defendant or Weygandt would respond that the money was for travel, or for transfers among Weygandt's accounts, or for shopping.

On appeal, the defendant argued that the district court erred in imposing a two level enhancement for abuse of trust. The Court of Appeals held that there was ample evidence to show that the defendant held a position of trust with respect to Weygandt. The defendant argued that she was merely a health aide. There is evidence that the defendant opened Weygandt's mail for her without supervision and that she gave the defendant authority to pay bills for her. These tasks clearly invested the defendant with considerable. discretion since Weygandt did not monitor the defendant closely and appeared to rely on her judgment and integrity. The wrong was difficult to detect because the defendant was the person who filled in the amounts and payees on the checks, and Weygandt did not independently verify them. There was substantial reliance on the good faith of the defendant, as there would be in any relationship where financial matters are entrusted to another.

There was also ample evidence that the defendant abused a position of trust. Her unique position enabled her to protect Weygandt against financial theft because Weygandt signed checks at the defendant's request and on the defendant's assurances as to their purpose. Moreover, without Weygandt's credulity and trust, it appears likely that the checks would not have been signed, and that Weygandt would not have accompanied the defendant to the bank to vouch for the checks. The district court committed no error.

United States v. Gallagher, 2002 WL 31723117 (3rd Cir.(Pa.))). Gallagher was an independent diamond salesman who sold diamonds on commission for, among others, N. Gogolick & Sons. As part of his position, Gallagher maintained what is known as a "road line" of diamonds owned by Gogolick, which Gallagher would place on consignment with his retail and wholesale customers. To replenish his "road line," Gallagher from time to time would request that Gogolick ship him additional diamonds.

Gallagher also had an expensive gambling habit. To finance his extracurricular activities, he requested that, on nine separate occasions, Gogolick ship loose diamonds to various jewelry retailers in western Pennsylvania. On each occasion, Gallagher retrieved the diamonds. Gogolick never received proceeds from the sale of the diamonds or their return.

On appeal, Gallagher argued that his position was akin to that of an ordinary bank teller or clerk. He asserted that he was not given substantial discretion, as he was subjected to regular and surprise audits that made it "absolutely inevitable" that his crime would be discovered. The Court of Appeals held that Gallagher did abuse a position of trust. He worked independently and possessed significant authority to request diamonds from Gogolick. He possessed substantial

discretion to deal with diamonds on Gogolick's behalf and Gogolick relied on Gallagher's integrity in shipping diamonds at Galagher's request. This indicates that Gallagher occupied a position of trust. Whether Gogolick regularly audited Gallagher did not alter the conclusion of the Court of Appeals.

United States v. Huber, 2002 WL 1877026 (3rd Cir.(Pa.))). The defendant pleaded guilty to mail fraud, and aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2. She appealed her sentence, claiming that she did not occupy a position of trust because she had no managerial or professional discretion and her crime was easily discoverable. She also claims that if she did hold a position of trust, she did not abuse her position. The defendant argued that the fraud she committed was not difficult to detect. She stated that the only reason it was not detected was that her supervisor did not review invoices or credit card statements. She also supports her argument by pointing out that her fraud was discovered in only eight months. As established by the district court, Huber's position allowed her to commit a fraud that was difficult to detect in that she used company credit cards and checks with little or no supervision, she kept her door and filing cabinets locked, and while on vacation she instructed a co-worker to hold the mail while she was away. The fact that she could write checks, and request and use credit cards with little or no supervision, suggests that she did indeed have discretionary judgment in her job. Huber's supervisor relied on her integrity. The defendant held a position of trust and abused that position.

United States v. Castro, 2002 WL 373084 (3rd Cir.(N.J.))). The defendant pleaded guilty to knowingly transporting forged and altered securities in interstate commerce, in violation of 18 U.S.C. § 2314, and filing a false 1997 tax return, in violation of 26 U.S.C. § 7201. In mid-1993, Fund Securities Incorporated (FSI) employed the defendant as its secretary and bookkeeper. She maintained all of the corporation's financial accounts and records, and was responsible for maintaining a journal of cash and checks received by FSI, and for the flow of funds into and out of FSI. An investigation in 1999 revealed that the defendant had forged 128 checks aggregating in excess of $2 million and deposited them in her personal account or in the account of Tuscany Food Corp., a restaurant owned by her and her husband.

The sole issue on appeal is whether the district court erred in enhancing the defendant's sentence when it found that she occupied a position of trust pursuant to U.S.S.G. § 3B1.3. At sentencing, the court found that the Palaces (owners of FSI) "trusted the defendant totally, treating her with a trust one would accord a family member in giving her almost complete control of the daily operations of the business. She was the sole bookkeeper employed by FSI and had great discretion in managing customer accounts. She lulled the Palaces into the false sense of security enabling her to steal immense sums of money. This was possible only because she held a position of trust."

The Court of Appeals affirmed the sentence. The record reveals that the position the defendant filled allowed her to commit a difficult-to-detect wrong because the Palaces relied fully on her integrity to control and maintain the books and cash flow. She abused a position of trust in a way that significantly facilitated her crime.

United States v. Gricco, 277 F. 3d 339 (3d Cir. 2002). Anthony Gricco and Michael McCardell were convicted of conspiracy to defraud the United States, tax evasion, and making false tax returns. All of the charges related to the conspirators' failure to report on their persoanl income tax returns money that had been stolen from airport parking facilities. From 1990 10 1994, Gricco was the regional manager for private companies that contracted with the Philadelphia Parking Authority to operate the parking facilities at the Philadelphia International Airport. He was responsible for the general operation of the facilities, including the hiring of employees and the collection of parking fees. Michael McCardell, Gricco's brother-in-law, was Gricco's chief assistant. McCardell oversaw the day-to-day activities of the tollbooths and picked up the money from the cashiers at the end of their shifts.

Gricco, McCardell, and others made a plan to steal money by substituting customers' real tickets with replacement tickets showing false dates and times of entry. A customer who had parked in the lot for a long period of time would have a real ticket reflecting a high parking fee. On leaving the lot, the customer would pay this fee to the cashier. However, instead of inserting the real ticket into the ticket-reading machine, a cashier participating in the scheme would insert a replacement ticket, and the machine would calculate the parking fee based on the false date and time stamped on the replacement ticket. This replacement ticket would indicate that the customer had parked for only a short period of time, and thus the parking fee would be much lower. The thieves would pocket the difference between the amount paid by the customer and the amount of the fee shown on the replacement tickets.

At first, Gricco enlisted cashiers who had engaged in a similar but smaller scheme in 1988. He eventually recruited about 15 other cashiers to participate. Michael Flannery, a technician for the company responsible for maintaining the ticket machines, provided the replacement tickets. He also disabled the fare displays on the ticket-reading machines so that customers could not see that the parking fees that they were paying were higher than the fees recorded by the machines. Flannery delivered the counterfeit tickets to Gricco, McCardell, or McCardell's wife. McCardell then distributed the replacement tickets to the corrupt cashiers, and at the end of their shifts, McCardell picked up the stolen money and forwarded it to Gricco, who distributed the money among the participants. The cashiers received a portion of the proceeds stolen during their shifts, and the rest was divided into four equal sahres for Gricco, McCardell, Million, and Flannery. The participants did not report the unlawful income on their federal tax returns.

Gricco and McCardell argued that they never held a position of trust in relation to the victim which, in this case is the IRS. They further argue that they did not even hold a position of trust at the airport at which they were employed. The appellant's first argument is directly foreclosed by *United States v. Cianci*, 154 F. 3d 106 (3d Cir. 1998). In *Cianci*, the defendant's position as a high-ranking official in a corporation enabled him to embezzle money and receive kickbacks but, the defendant argued, he did not hold a position of trust with respect to the IRS, and the IRS was the victim of his offense of conviction. "This court rejected the defendant's argument, reasoning that consideration of the defendant's trust relationship to his corporation was proper consideration of 'relevant conduct' under U.S.S.G. § 1B1.3." Both Gricco and

McCardell had sufficient managerial and discretionary authority to warrant sentencing enhancements for an abuse of a position of trust.

United States v. Hart, 273 F. 3d 363 (3rd Cir. 2001). Between 1991 and 1995, the defendants were licensed brokers who worked in managerial positions for L.C. Wegard and Co., Inc., a securities brokerage firm. During this time, the defendants coordinated a massive fraudulent scheme that employed intentionally misleading sales scripts and boiler room pressure tactics to defraud tens of thousands of investors. Customers were lured into investing nearly one hundred million dollars in highly speculative securities on the basis of sales scripts containing gross misrepresentations of material fact and baseless predictions about future growth.

On appeal, the defendant challenges the district court's two level enhancement for abuse of position of trust. We determine whether a defendant occupied a "position of trust" under a three-part test: "(1) whether the position allows the defendant to commit a difficult to detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been a reliance on the integrity of the person occupying the position." *U.S. v. Pardo*, 25 F.3d 1187, 1192 (3d Cir. 1994). The defendant's activities satisfy the first *Pardo* prong because they: (1) recommended stocks that were traded on the NASDAQ "small cap" or OTCBB electronic markets, making it difficult for the inexperienced investor to acquire independent information; (2) refused to take telephone calls from customers requesting to sell stocks; (3) falsely recorded customer preferences on new account forms; and (4) destroyed evidence of fraudulent sales scripts. The second *Pardo* prong is satisfied because the defendant was vested with the requisite degree of authority vis-a-vis the object of his wrongful act. Finally, the third *Pardo* factor is satisfied because the customers relied on the defendant's perceived integrity as Wegard stockbrokers.

United States v. Yeaman, 194 F. 3d 442 (3d Cir. 1999). The defendant, along with four other defendants, was convicted of various counts of conspiracy, wire fraud, and securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of three public companies to the Teale Network, a fraudulent network of offshore and domestic companies. Teale represented these leased stocks as assets available to pay claims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Company. When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless. In combination, the parties raised four sentencing issues. The government finds three flaws in the district court's application of the sentencing guidelines: (1) the finding of no loss under U.S.S.G. § 2F1.1; (2) the failure to impose a four level increase under U.S.S.G. § 2F1.1(b)(6) for a substantial effect on a financial institution; and (3) the rejection of a special skills enhancement under U.S.S.G. § 3B1.3. The defendant challenges the district court's upward departure based on its finding that the defendant's fraudulent acts resulted in loss of confidence in an important institution.

The government contends that the district court erred in refusing to impose an enhancement on the defendant based on his specialized knowledge of the stock market as a prior stock broker and his particular knowledge acquired over the decades of experience in the over-the-counter (bulletin board) market, the inner workings of a brokerage firm, and use of a transfer agent. Accordingly, the Court of Appeals remanded for initial findings as to whether the defendant possessed special skills within the meaning of § 3B1.1 and, if so, whether he used these skills to significantly facilitate the commission of the offense. Enhancements based on a defendant's special skills he or she developed as a broker or financier and used in the commission of securities fraud are proper in some circumstances.

United States v. Holmes, 199 F.3d 200 (3d Cir. 1999). The defendant, a disbarred attorney and accountant, pled guilty to conspiracy; bank, wire and mail fraud; interstate transportation of stolen property; income tax fraud and forgery. On appeal, he asserts that the district court erred in granting an upward departure for extraordinary abuse of trust. He argues that there was nothing extraordinary about his situation that warranted the upward departure, and contends that the other level enhancements included in his sentence accounted for any egregious actions on his part so that the two level upward departure was in effect double counting. Holmes perpetrated various and distinct schemes, all involving abuse of positions of trust. He prepared legal documents out of whole cloth, and then forged the signature of two federal judges. He defrauded clients, next door neighbors, and investors. His activities were successful in eight separate schemes because of the positions of trust he held. The Court of Appeals stated, "We see nothing in the background and commentary sections that accompany the abuse-of-trust guideline that suggests the Sentencing Commission envisioned multiple acts of abuse of trust to the degree that was present in this case. The two level departure was appropriate.

United States v. Nathan, 188 F. 3d 190 (3d Cir. 1999). Electrodyne Systems Corporation, a defense contracting company, specialized in providing military components to the United States government. Nathan was Electrodyne's president and vice-president. Between November 1989 and March 1994, Electrodyne entered into six contracts to provide U.S. government agencies and the U.S. military including NASA and the Air Force with electronic components to be used in research, communications, radar, and weapons systems. Each contract required Electrodyne to comply with the Buy American Act, 41 U.S.C. § 10a-10d (1988), and in each contract Nathan (on Electrodyne's behalf) represented that Electrodyne (a) intended to manufacture the components in the United States; (b) would not use foreign components; and (c) would not use offshore manufacturing sites. Despite their contractual and statutory obligations, Nathan and Electrodyne entered into agreements with foreign companies in Russia and the Ukraine to build the components specified in the contracts. In so agreeing, Nathan disclosed to the foreign manufacturers the drawings, specifications, and technology of the contracted for components. Nathan failed to disclose these foreign contracts to the government and failed to register with the State Department as a manufacturer or exporter of defense articles. Nathan pled guilty to illegally importing goods into the U.S. because he failed to mark the items with the country of origin in violation of 18 U.S.C. § 545.

The district court found that Nathan's position allowed him to commit hard-to-detect crimes, since he was able to breach contracts without interference from superiors and was able to conceal those breaches through instructions to subordinates. The Court of Appeals wrote, "In analyzing whether a defendant held a position of trust in a contracting situation, courts have given weight to whether the victim reposed additional trust in the defendant by ceding its ability to confirm compliance with the contract, thus relying more heavily on the honesty of the defendant than an ordinary party to a contract would." The Court of Appeals ruled that Nathan held a position of trust vis-a-vis the government. The defendant, as president of the company, was in a unique position to make decisions for the company and to decide how Electrodyne would fill the government contracts. Since no one else - - neither the government nor anyone at Electrodyne -- was supervising his acts, he held a position that allowed him to commit wrongs, and that permitted him to make those wrongs harder to detect by requiring subordinates to mark over foreign labels and add "Made in the U.S.A." labels. Importantly, the government did not appoint a quality assurance representative to monitor the contracts. Thus, the government vested a significant degree of authority in Nathan. The defendant used his position of trust to significantly facilitate his crimes. He was able to order his employees to help him cover up the telltale signs that his products were not being made in the U.S., could instruct the Ukranian and Russian companies not to label their products, and was successful in covering up the operation for five years.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). Defendant-appellant pled guilty to interstate transportation of property taken by fraud, mail fraud and wire fraud. On appeal, the defendant claimed that the district court erred in applying a two level enhancement pursuant to U.S.S.G. § 3B1.3. The Court of Appeals considers three factors in determining whether a defendant occupies a position of trust: (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in the defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position. The facts of this case show that all three factors have been met. The defendant's position as head of the company in which the victims invested made his fraud difficult to detect, vested him with significant authority over the victim's investment monies, and encouraged his victims to rely on his perceived integrity.

United States v. Bennett, 161 F. 3d 171(3d Cir. 1998). The defendant was sentenced to 144 months imprisonment for perpetrating the largest charity fraud in history. On appeal, the defendant argued that the district court erred in imposing a two-level increase for abuse of a position of trust. In upholding the enhancement, the court of appeals noted that the defendant's position as president and sole director of the New Era organizations greatly reduced the probability that the offenses would be detected. It was the defendant's position of trust that cloaked him with the requisite authority to deceive. He acted without supervision and exercised unlimited managerial discretion over the organizations and their staffs. The victims relied on his integrity when making decisions.

United States v. Sherman, 160 F. 3d 967 (3rd Cir. 1998). The defendant, a medical doctor, pled guilty to five counts of mail fraud for mailing bills to a health insurance company for medical services that were never rendered. The trial court at sentencing found that Doctor Sherman occupied and abused his position of trust vis-a-vis the defrauded insurance company and accordingly enhanced his offense level by two levels pursuant to § 3B1.3. The court of appeals upheld the enhancement. Doctor Sherman's position allowed him to commit a difficult-to-detect wrong and he took advantage of the discretion granted to him in a way which significantly facilitated the fraud.

United States v. Cianci, 154 F. 3d 106 (3d Cir. 1998). Defendant pled guilty to two counts of tax evasion. He argued that the district court erred in enhancing his offense level by two points pursuant to U.S.S.G. § 3B1.3 based upon relevant conduct. The court of appeals held that it was proper to take into account relevant conduct.

United States v. Sain, 141 F. 3d 463 (3rd Cir. 1998). A federal grand jury indicted the defendant and his company, Advanced Environmental Associates, Inc., on 46 counts of fraud. He challenged the district court's conclusion that he possessed a special skill and used that skill to significantly facilitate the offense. In affirming the sentence, the Court of Appeals noted that to impose this enhancement, a district court must find: (1) the defendant possessed a special skill and (2) used it to significantly facilitate the commission of the offense. See *Maurello*, 76 F. 3d at 1314. Here, the district court found that Sain possessed special skills relating to his education as a professional engineer, his experience with waste-water treatment, and his "intimate knowledge" of the design and workings of the AEC waste-water treatment plant. Without those skills and credentials, Sain could not have gained the Army's confidence and convinced it to use the amounts and type of carbon upon which he insisted. His skills and guile influenced the Army to rely on him.

United States v. Urban, 140 F. 3d 229 (3d Cir. 1998). Defendant was found guilty by jury of possession of an unregistered destructive device in violation of 26 U.S.C. § 5861(d). He was a "self-taught bomb maker." On appeal, he argued that the district court erred as a matter of law in applying a special skill enhancement under U.S.S.G. § 3B1.3. Defense Counsel argued that the enhancement did not apply to self-taught skills. The Court of Appeals affirmed the district court's sentence, stating that Urban used his mechanical skills, life experience, and self education to invent a method of molding the highly unstable TATP into "blocks of explosive material." The district court did not err in concluding that § 3B1.3 is applicable to a person who has developed a special skill through self education and his or her work experience and uses it to facilitate the commission of a crime.

United States v. Fiorelli, 133 F.2d 218 (3d Cir. 1998). Defendant, a union official, was found guilty of extorting money and services from contractors. He contended that the district court made no findings to support its enhancement under §3B1.3 for abusing a position of trust. The appellate court upheld the enhancement, finding that the district court adopted express findings that "Fiorelli was the business manager of Local 1955 and in that position he was afforded substantial judgment that is ordinarily given considerable deference ... and he used this

position to coerce and extort money from contractors." Defendant also erred in arguing that "abuse of trust is an element inherent in the offense of extortion" so that an adjustment for such abuse would somehow amount to double counting.

United States v. Sokolow, 81 F. 3d 397 (3d Cir. 1996). Defendant, an attorney and licensed insurance agent, was convicted of mail fraud and money laundering in connection with his operation of a company offering health benefits to small businesses and their employees. He argued that an abuse of trust enhancement was improper because he was not in a position of trust and there were no "victims" to the money laundering. The Third Circuit found that defendant held a position of trust under §3B1.3. As president of the company, he was able to commit a "difficult-to-detect" wrong as he had sole control over the company's accounts without oversight or supervision. Second, he exercised the requisite degree of authority over the object of his wrong. It was within defendant's authority to withdraw funds and that authority was necessary for the commission of the money laundering offenses. Finally, the funds laundered were derived from his marketing of the insurance plans to small business owners and self-employed persons who placed a measure of reliance on the integrity of defendant in his position as president of the company.

United States v. Maurello, 76 F. 3d 1304 (3d Cir. 1996). Defendant, a disbarred lawyer, was convicted of mail fraud in connection with his unauthorized practice of law. District court's decision to adjust sentence upwardly for use of a special skill was not clearly erroneous. Defendant was experienced in setting up a law practice and soliciting clients. These skills are not possessed by the general public, and he used these skills to facilitate his fraudulent scheme and to avoid detection. Additionally, enhancing sentence under §3B1.3 for use of a special skill and under §2F1.1(b)(3)(B) for violating a judicial or administrative order did not result in impermissible double counting. In the absence of a guideline prohibition against the two enhancements, there was no double counting problem.

United States v. Boggi, 74 F. 3d 470 (3d Cir. 1996). Adjustment for abuse of position of trust appropriate in case involving union official who conducted and participated in the affairs of the union through a pattern of racketeering and extortion, and betrayed the union membership to enrich himself. Defendant was a business agent for a labor union. His position was central to his offense. Union members elected him to represent their interests.

United States v. Coyle, 63 F. 3d 1239 (3d Cir. 1995). Defendant was the chief financial officer of a company that administered health care benefits. He prepared false financial reports that concealed the company's true disbursements and administrative costs, thereby allowing the company to retain a higher amount than reported. His position as chief financial officer afforded him the authority to conceal the company's true profits and his accounting expertise allowed him to commit a "difficult-to-detect" wrong. An enhancement for abuse of position of trust was appropriate.

United States v. Pardo, 25 F. 3d 1187 (3d Cir. 1994). Defendant engaged in a "classic" check kiting scheme in which he defrauded a bank and numerous clients. His "position" as a friend of the bank manager was not a position of trust under §3B1.3. In determining whether a position constitutes a position of trust for purposes of §3B1.3, a sentencing court must consider: (1) whether the position allows the defendant to commit a "difficult-to-detect" wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position. "These factors should be considered in light of the guiding rationale of the section--to punish 'insiders' who abuse their position rather than those who take advantage of an available opportunity."

United States v. Craddock, 993 F. 2d 338 (3d Cir. 1993). Enhancement under §3B1.3 warranted in case involving teller who processed Western Union money orders knowing they were based on fraudulent credit card transactions. Defendant argued that he did not hold a position of trust in light of the application note to §3B1.3 that states that the enhancement should not be applied to an ordinary bank teller engaged in embezzlement. The district court disagreed, and the Third Circuit affirmed. The court noted that "one has been placed in a position of trust when, by virtue of the authority conferred by the employer and the lack of controls imposed on that authority, he is able to commit an offense that is not readily discoverable." Unlike a bank teller, whose skimming from the till would be readily detected, defendant bypassed security measures designed to guard against fraud, and his scheme was difficult to detect. The standard is "(1) whether the authority conferred and the absence of controls indicate that the employer relied on the integrity of the defendant to protect against the loss occasioned by the crime; and (2) whether the trust aspect of the job made the commission or concealment of the crime significantly easier."

United States V. Hickman, 991 F. 2d 1110 (3d Cir. 1993). A licensed contractor, convicted of defrauding victims who had paid him to construct house that was never built, did not use a "special skill" to facilitate commission or concealment of offense. Examples of special skills given in the guidelines seem to require more skilled education, training and licensing than is usually associated with being a general contractor. Moreover, the government offered no evidence as to what skill requirements, if any, must be met to obtain a contractor's license in the Virgin Islands. Defendant simply took advantage of the trust engendered in a business-client relationship to misappropriate funds.

United States v. Brann, 990 F. 2d 98 (3d Cir. 1993). Defendant, a Virgin Islands drug agent, misappropriated federal funds in violation of 18 U.S.C. §666. The Third Circuit upheld an abuse of trust enhancement under §3B1.3, because abuse of trust is not a required element of 18 U.S.C. §666. Although not every embezzlement by a law enforcement officer will justify an enhancement under §3B1.3, defendant held a position of trust, and he used that position to facilitate the commission and concealment of his offense.

United States v. Lieberman, 971 F. 2d 989 (3d Cir. 1992). Two-level enhancement for abuse of position of trust may be applied because abuse of position of trust is not "included in the base offense level or specific offense characteristic" applicable to bank embezzlement. Defendant alone was responsible for balancing the suspense account and accomplished embezzlement by transferring money from this account over a four year period. Thus, his position of trust contributed in a substantial way toward both the commission and concealment of the crime.

United States v. Barr, 963 F. 2d 641 (3d Cir. 1992). Defendant lied about his past and present cocaine use to obtain a position as assistant to the U.S. Attorney General. The district court departed upward because defendant held a high ranking position with the Department of Justice and because criminal behavior by public officials tends to erode public trust. Defendant claimed that the issues relating to his employment and to conduct affecting public trust were already considered by the guidelines in §3B1.3. According to defendant, a combination of high-ranking position and criminal activity other than that which specifically falls under §3B1.3 can never justify an upward departure. The Third Circuit rejected defendant's claim that §3B1.3 barred an upward departure based upon his high-ranking position. The court also affirmed the district court's determination that in his position as assistant to the Attorney General, defendant was involved in preventing criminal activity by public officials.

United States v. Georgiadis, 933 F. 2d 1219 (3d Cir. 1991). Defendant, who was an assistant vice president of a bank, pled guilty to embezzling bank funds by diverting money from mortgage settlements into his own accounts. He contended that it was improper to assess the two-level enhancement under §3B1.3 because abuse of trust was an element of his embezzlement offense. The Third Circuit rejected this, finding position of trust under the guidelines is not an element of embezzlement under 18 U.S.C. §656, and abuse is not incorporated in the base offense level of §2B1.1(a). Whether a particular embezzler abused a position of trust for purposes of upward adjustment under §3B1.3, requires consideration of matters beyond the elements of embezzlement under 18 U.S.C. §656. Adjustments under §§2B1.1(b)(1) and 3B1.3 are independent sentencing considerations. Upward adjustments for bank embezzlement on the basis of abuse of trust as well as adjustments based on the magnitude of the loss and more than minimal planning did not constitute double counting.

United States v. McMillen, 917 F. 2d 773 (3d Cir. 1990). The defendant, a bank manager who was convicted of misapplying funds, approved fraudulent loans to himself, created a false savings certificate to serve as collateral for the loans and opened a checking account in a fictitious name. His authority to approve loan applications, issue savings certificates, and sign bank documents without supervisory approval supported finding that he abused a position of trust. He also used his position to facilitate the crime by approving approved the fraudulent loans to himself, creating a false savings certificate, and opening a false checking account in the fictitious name.

United States v. Zaku, 2006 WL 1026445 (3rd Cir. (N.J.))). In this appeal, the defendant argued that the trial court erred in finding that he "used" a minor in the conspiracy because he did not "decide" to use the minor. Rather, he states that two co-conspirators "decided" to use the minor and the defendant merely "accepted" their decision. The government countered that during the defendant's sworn admission during his plea hearing that he approached and asked the minor to join the conspiracy, retrieved airline tickets for the minor, and helped drive the minor to the airport.

The Court of Appeals affirmed the judgment of the trial court. Section 3B1.4 merely "requires some affirmative act." See *United States v. Pojilenko*, 416 F. 3d 243, 247 (3d Cir. 2005. The admitted acts clearly constitute "some affirmative act beyond mere joint participation in a crime with a minor."

United States v. Pojilenko, 416 F.3d 243 (3rd Cir. 2005). The Third Circuit determined that, in order to apply the 'use of a minor' enhancement under U.S.S.G. § 3B1.4, the district court must find an affirmative act, rather than just mere participation in a crime with a minor.

Also, the Court disagreed with the Eleventh Circuit, and ruled that where a defendant participates in a conspiracy, and a member of that conspiracy "used a minor" as described in § 3B1.4, such use could not be attributed to the defendant, even if the co-conspirator's 'use of a minor' was foreseeable. This holding may have greater ramifications upon the government's ability to assign relevant conduct where the justification is simply vicarious liability under conspiracy law.

United States v. Thornton, 306 F.3d 1355 (3d Cir. 2002). The district court imposed a two level enhancement pursuant to § 3B1.4 because a minor sold crack cocaine for Mr. Thornton's organization. The defendant appealed, arguing that § 3B1.4 should not apply because he had no knowledge that his criminal activity involved the use of a minor. The Court of Appeals held that the language of § 3B1.4 clearly dictates that if the defendant used or attempted to use a minor in the commission of the offense, the sentencing enhancement applies. The enhancement's unambiguous language does not contain a scienter requirement, and we refuse to find ambiguity where none exists to defeat the plain meaning of the guidelines. When Congress wanted to include such a requirement in the Guidelines, it knew exactly how to do so. See, e.g., U.S.S.G. § 2K1.3(b)(2) (applying enhancement when the offense involved any explosive material that the defendant knew or had reason to believe was stolen); U.S.S.G. § 3C1.1 (applying enhancement when defendant willfully obstructed or impeded, or attempted to impede, the administration of justice).

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

Part C -- Obstruction

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

United States v. DiAmbrosio, 2007 WL 3089590 (3d Cir. (Pa.)). The presentence investigation prepared in this case recommended a two-level adjustment for obstruction of justice because the defendant apparently committed perjury when he testified in his own defense at trial. During the sentencing hearing, the defendant did not object to that enhancement. Nonetheless, the sentencing court sua sponte, asserted that the recommended adjustment for obstruction of justice was "fundamentally unfair." The sentencing judge also stated that § 3C1.1 was "wrong" and "unconstitutional." Furthermore, the judge explained that "in my calculations of the guidelines that are going to be advisory to me, I am not going to include the enhancement." The government appealed and the case was remanded..

The Court of Appeals noted that in *United States v. Dunnigan*, 507 U.S. 87 (1993), the Supreme Court rejected the contention that § 3C1.1 was "unconstitutional on the simple basis that it distorts a defendant's decision whether to testify or remain silent." Moreover, the Court of Appeals have explained that sentencing courts are not free to ignore enhancements under the guidelines even though the guidelines are now advisory.

United States v. Nunez-May, 2007 WL 1573815 (3rd Cir.(N.J.)). The defendant pleaded guilty on June 26, 2001, to conspiracy to commit food stamp fraud, in violation of 18 U.S.C. § 371. She was released on bond pending sentencing with the requirement that she remain in Essex County, New Jersey. In December of 2005, the defendant vacated her home in New Jersey and traveled to the Dominican Republic using a fraudulent passport. On January 31, 2006, the district court issued a warrant for her arrest. Two weeks later, marshals located her in the Domican Republic and instructed her to return to the United States. The defendant then traveled to Puerto Rico where she was arrested.

On appeal, the defendant argued that her unauthorized trip to the Dominican Republic constituted run-of-the-mill unauthorized travel, not obstruction of justice. She also argued that the penalty for obstruction only applies once a defendant misses a scheduled court date. Among the acts covered by U.S.S.G. § 3C1.1 is "escaping or attempting to escape from custody before trial or sentencing." In this case, the defendant gathered false identification documents as early as May of 2005, applied for and received a fraudulent passport, left the territorial jurisdiction of the United States, failed to inform pretrial services of her whereabouts, and showed no signs of returning to the United States until marshals intervened.

The Court of Appeals concluded that the defendant's flight out of the country, which imposed costs on pretrial services and the marshals, qualified as more than an attempt to escape. The district court did not err in deciding to impose a two level enhancement for obstruction of justice.

United States v. Batista, 483 F. 3d 193 (3d Cir. 2007). The defendant was arrested on September 19, 2002, for his involvement in the sale of crack cocaine. Not long after an unsuccessful proffer session with the government, the defendant's attorney requested an evaluation of the defendant to determine if he was competent to stand trial. Over the course of the next two years, the defendant was evaluated on at least five occasions. Three doctors concluded that the defendant was feigning a mental illness to avoid going to trial.

The defendant was sentenced on June 2, 2005. At sentencing, the government made a motion for a two-level enhancement for obstruction of justice based on the defendant's attempts to avoid trial by feigning mental illness. A federal agent testified that a co-conspirator told him that the defendant planned to feign mental illness to avoid standing trial. The defendant opposed this motion and made his own motion for a reduction in his base offense level for acceptance of responsibility.

The district court expressly found that the defendant had obstructed justice under U.S.S.G. § 3C1.1 by feigning mental illness to avoid trial, transmitting his plan to feign mental incompetence to a co-conspirator, and choosing not to take his medication so as to increase his chances of being found incompetent. While the district court found that the defendant had shown some acceptance of responsibility by admitting his guilt and initially trying to cooperate with the authorities, this was counteracted by the defendant's later attempts to avoid trial by feigning mental incompetence.

The Court of Appeals affirmed the sentence, finding that an enhancement for obstruction of justice was proper. The defendant's conduct required substantial expenditures of government resources and the district court's time. It also found that the defendant's false representation of mental illness was sufficient for the district court to find that he had not accepted responsibility pursuant to U.S.S.G. § 3E1.1. His initial admission of guilt was not sufficiently extraordinary to overcome the later behavior that led to the obstruction of justice enhancement.

United States v. Manigault, 2007 WL 1109243 (3rd Cir. (Pa.))). The facts of this case are as follows: A tow truck operator towing an illegally parked car spotted a gun on the front seat of the car. When the police arrived, the tow truck operator opened the door of the car and the police recovered the gun, some marijuana, and 32 grams of crack cocaine. The registered owner, Richena Stanley, called the police to report that her car had been stolen. When the police contacted her, she told them that the defendant bought and used the car, but registered it in her name. She also told them that she had falsely reported the car as stolen on the defendant's instructions. She cooperated with the police, who recorded a phone call in which the defendant again instructed her to report the car as stolen. The defendant was subsequently sentenced to 235 months imprisonment following his plea of guilty to two counts of violating 21 U.S.C. § 841(a)(1)(distribution and possession with intent to distribute crack cocaine).

On appeal, he objected to enhancements for obstruction of justice (U.S.S.G. § 3C1.1) and possession of a deadly weapon (U.S.S.G. § 2D1.1) as well as to his classification as a career offender (U.S.S.G. § 4B1.1). The defendant's first objection was that the application of § 3C1.1, allowing a sentencing enhancement for obstruction of justice, was not warranted for his instructions to Stanley to falsely report the car as stolen. He argued that Application Note 4(g) of U.S.S.G. § 3C1.1, one example in a non-exhaustive list of conduct warranting the enhancement, requires that a false statement have "significantly obstructed or impeded" the investigation. He also directed the court's attention to Application Note 5(b), which states that "making false statements, not under oath, to law enforcement officers" does not warrant the enhancement unless Application Note 4(g) applies.

The Court of Appeals held that the conduct addressed in Application Note 5 references ordinary, and less culpable, evasive conduct than that attributed to the defendant. He twice requested that Stanley lie in an effort to interfere with the police investigation. A false record was produced (the stolen car report made by Stanley at the defendant's behest) during the investigation, and Stanley was directed to conceal evidence material to an investigation. U.S.S.G. § 3C1.1 Application Note 4(c) and (d). The Court of Appeals held that the enhancement was properly applied.

The defendant's next objection was to the application of § 32D1.1(b)(1) for possession of a deadly weapon during a drug trafficking offense. He argued that the district court relied upon "hearsay" and not an admission by him or a finding by the jury that he possessed the gun found on the front seat of the car, in violation of *United States v. Booker*, 543 U.S. 220 (2005). Moreover, because the gun possession count was dropped as a result of the plea agreement, he argued that his sentence was enhanced for "acquitted conduct" in violation of the Sixth Amendment, again citing *Booker*. The Court of Appeals disagreed.

Booker's teachings regarding the requirements of jury factfinding or admissions by a defendant were only applicable when the sentencing guidelines were mandatory. Judges have broad discretion to impose a sentence within a statutory range. Indeed, unindicted conduct rising to the level of a crime can be found, by a preponderance of the evidence, to be a factor for enhancement so long as the sentence lies within the statutory maximum. See *Grier*, 475 F. 3d at 561. It was undisputed, moreover, that a gun was recovered from the car along with the drugs the defendant admitted to possessing. Given the proximity of the gun to the recovered drugs - -

both in the front seat of the car - - it is not "clearly improbable that the weapon was connected with the offense. U.S.S.G. § 2D1.1, Application Note 3. And even assuming the defendant was "acquitted" of the gun possession charge when it was dismissed as part of the plea agreement, no relief is in order after *Booker*. See *United States v. Watts*, 519 U.S. 148, 156-57 (1997)(allowing sentencing enhancements for acquitted conduct. Based on the foregoing, the Court of Appeals held that the enhancement for possession of a deadly weapon (U.S.S.G. § 2D1.1) was properly applied.

Finally, the defendant disputed the district court's finding that he was a "career offender" under U.S.S.G. § 4B1.1. He argued that one of his predicate convictions, Recklessly Endangering Another Person in violation of 18 Pa.C.S.A. 2705, was not a crime of violence as defined in U.S.S.G. § 4B1.2(a). The Court of Appeals looked only to the elements of the crime. The two elements of the crime are recklessness and placing another in danger of death or serious bodily injury. The Court of Appeals concluded that recklessly placing another in danger of death or serious bodily injury is clearly conduct presentencing a "serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 Application Note 1. Therefore, the Court of Appeals held that a violation of 18 Pa.C.S.A. § 2705 is a crime of violence and the defendant is a career offender under § 4B1.2.

United States v. Evans, 2007 WL 495017 (3rd Cir.(Pa.))). The defendant, while employed as the commanding officer of the mounted unit of the Philadelphia Police Department, engaged in a scheme to defraud the City of Philadelphia by ordering items not authorized under various supply contracts. He testified at trial in his defense and acknowledged ordering certain items and not following proper procedure, but he denied knowledge of falsified invoices and any criminal intent on his part. However, during the investigation, the defendant lied about the origin of certain items and about his purchases. Moreover, there was some evidence that he encouraged others to lie when questioned and urged employees who received such items to get rid of them. He was convicted of mail and wire fraud.

On appeal, the defendant objected to the district court's application of a two level enhancement for obstruction of justice. In applying this enhancement, the district court found that the defendant's act of providing two misleading documents to an investigator (after an inventory of items in the mounted unit was undertaken) supported the enhancement, as did false statements made to the investigating officers that impeded the investigation. The Court of Appeals found no error.

United States v. Hertzog, 2006 WL 2034457 (3rd Cir.(Pa.))). The defendant pled guilty to charges arising from his illegal possession of firearms. At the time of sentencing, the district court concluded that the defendant obstructed justice and enhanced his offense level by two levels pursuant to U.S.S.G. § 3C1.1.

Following his arrest, the defendant told his daughter to post an email to members of the Pennsylvania Militia to inform them of his arrest and advise them that some members of his group were actually undercover officers. The email that was sent warned members not to trust the named officers, and announced that the media reports about the defendant's arrest for a traffic violation were false. The Court of Appeals ruled that the defendant's post-arrest conduct

significantly hampered the officers' ability to continue the investigation into illegal purchases of weapons that had involved the defendant.

United States v. Wiggins, 2004 WL 835979 (3rd Cir.(Pa.))). The defendant was an inmate at the Lewisburg Penitentiary. During a visit, his girlfriend inserted contraband into his mouth. Prison authorities placed Wiggins in a "dry cell." More than a day after being in the dry cell, Wiggins had a bowel movement that may have contained a balloon of heroin. Prison authorities observed him attempt to eat his feces. The Court of Appeals ruled that the district court did not err in imposing a two level enhancement for obstruction of justice.

United States v. Bush, 2004 WL 817426 (3rd Cir. (Pa.))). While in custody awaiting sentencing, the defendant sent a letter to his wife, in which he stated, "I will get that prosecutor, Seth Weber, for doing this to me and (SA) Neeson for fucking up our getaway trip for that weekend." The Court of Appeals held that the district court did not err in granting an adjustment for obstruction of justice.

United State v. Baker, 2004 WL 817402 (3rd Cir.(Pa.))). Baker pled guilty to mail fraud in violation of 18 U.S.C. § 1341, based upon her embezzlement of over $400,000 from two former employers. Baker admitted to using the proceeds to purchase several pieces of diamond jewelry that had been seized on November 19, 2001, by the FBI. On March 25, 2002, the district court entered a Preliminary Order of Forfeiture that identified the seized jewelry as property subject to forfeiture. In July 2002, Baker sent the FBI several pieces of jewelry as part of her restitution obligation; she later identified the sent items as the diamond jewelry identified in the order. When the FBI brought the jewelry to an appraiser, however, it discovered that the jewelry was made not of diamond, but of cubic zirconia. The government then learned that Baker had purchased the cubic zirconium jewelry, which costs substantially less than the diamond jewelry, subsequent to the issuance of the forfeiture order.

At her sentencing hearing, Baker testified that she had purchased the cubic zirconium jewelry for her personal use, to replace the diamond jewelry seized by the FBI. She claimed that she directed her husband to send the diamond jewelry to the FBI because she was ill at the time, and that her husband inadvertently sent the cubic zirconia instead. The district court had grave questions about Baker's credibility with regard to her explanation, and found that the defendant had obstructed justice.

She argued on appeal that the district court erred in finding that she had obstructed justice in connection with her submission of fake jewelry as part of her restitution obligation. The Court of Appeals found no merit to her argument that concealment of forfeited assets and false representations to law enforcement as to those assets falls outside the scope of U.S.S.G. § 3C1.1. Baker willfully submitted fake jewelry in an attempt to retain the fruits of her illegal activity. The district court committed no error.

United States v. Worley, 2004 WL 602748 (3rd Cir.(Del.))). Following Worley's conviction, the district court placed her on 24 hour home confinement, with electronic monitoring, pending sentencing. Electronic monitoring began on August 30, 2002, and sentencing was to take place on October 2, 2002. However, on September 19, 2002, she cut off her electronic monitor and fled her home detention, allegedly in an attempt to find her daughter, who had run away, and to place her in a safe home. The probation office was unable to locate Worley until she surrendered to the U.S. Marshal's Service on September 24, 2002.

The Court of Appeals affirmed the district court decision's to grant a two level enhancement for obstruction of justice.

United States v. Ortiz, 2004 WL 413233 (3rd Cir.(Pa.))). Ortiz argued on appeal that the district court improperly enhanced his sentence under U.S.S.G. § 3C1.1. The Court of Appeals held that the enhancement was proper. Ortiz's claim that his testimony was not perjurious is belied by the record, which indicates that, in convicting Ortiz, the jury necessarily rejected his testimony that he was not involved in the crime, and credited the testimony of three witnesses who testified to the contrary.

United States v. Armstrong, 2003 WL 21267479 (3rd Cir.(Pa.))). A jury found the defendant guilty of drug-related offenses. He appealed, arguing that the district court erred in imposing an enhancement for obstruction of justice because of his false testimony at a suppression hearing. The sought suppression of his statement on the ground that he was not advised of his rights. The record showed that he was read his rights and given a written list of his rights with a waiver form. He signed the waiver form in two places. The Court of Appeals affirmed the judgment of conviction and sentence.

United States v. Brennan, 326 F.3d 176 (3d Cir. 2003). Defendant was convicted of concealing from the bankruptcy court, almost $4 million in bearer bonds that he gave to Bond, the CEO of a company that assisted individuals in hiding assets from potential creditors. Shortly before trial, the defendant produced eight letters addressed from defendant to Bond, which purported to show that money Bond had wired on defendant's behalf had come from other investors rather than defendant. At sentencing, the district court concluded that defendant had fabricated the letters, and applied an obstruction of justice increase. The court incorrectly stated on three separate occasions that defendant had the burden of proving by a preponderance of the evidence that the obstruction of justice increase was not applicable. Nonetheless, despite this error, the Third Circuit affirmed the obstruction increase. The court essentially corrected the earlier misstatements by declaring that the government "clearly and convincingly . . . established what we have here is false statements." Although the court's statements about the burden of proof were wrong, the court ultimately placed the burden where it belonged.

United States v. Kemmerer, 2003 WL 980620 (3rd Cir.(Pa.))). A former correctional officer pleaded guilty to one count of conspiracy to receive bribes, 18 U.S.C. § 371, and one count of receipt of bribes by a public official, 18 U.S.C. § 201(b)(2)(c). He argued that the evidence did not support the district court's determination that he testified falsely at the sentencing hearing for which he received a two point enhancement for obstruction of justice. The Court of Appeals upheld the enhancement.

United States v. Clark, 316 F.3d 210 (3rd Cir. 2003). The defendant pleaded guilty to one count under 18 U.S.C. § 911 for falsely representing himself to be a citizen of the United States. The indictment charged "that defendant did falsely state to agents and employees of the United States Department of Justice, Immigration and Naturalization Service, Bureau of Prisons, and the United States Probation Office, United States District Court for the District of Columbia, that he was born in the Virgin Islands" when, in fact, he was born in Jamaica. The presentence report recommended an enhancement for obstruction of justice under U.S.S.G. § 3C1.1, application note 4(c), because the defendant attempted to hinder the INS investigation by providing a counterfeit birth certificate. At sentencing, the government contended that providing the bogus birth certificate was additional criminal conduct separate and apart from the basic underlying offense of falsely representing identity and nationality. The sentencing judge accepted that argument and applied the enhancement. The Court of Appeals reversed, holding that the conduct cited as the basis for the obstruction enhancement was actually activity that is part of the underlying charged offense. Production of the counterfeit birth certificate was coterminous with the offense to which the defendant pleaded.

United States v. Guadarrama, 2002 WL 31667647 (3rd Cir.(N.J.))). On appeal, the defendant argued that the district court should not have imposed a two-level sentencing enhancement for obstruction of justice. The district court ordered the enhancement because it concluded that the government had proven by clear and convincing evidence, that the defendant had committed perjury at the suppression hearing, since the defendant's testimony was false, material and willful. The Court of Appeals upheld the enhancement.

United States v. Vanasse, 2002 WL 31151325 (3rd Cir.(Pa.)). The defendant pleaded guilty to one count of conspiracy to distribute and to possess with intent to distribute more than five kilograms of cocaine, contrary to 21 U.S.C. § 841(a)(1), in violation of 21 U.S.C. § 846. He appealed, asserting that the district court erred by imposing a two-level offense enhancement under U.S.S.G. § 3C1.1 for obstruction of justice based on threatening statements the defendant made to and regarding the prosecutor. The government presented a number of letters the defendant sent to the prosecutor which discuss the prosecutor's minor children and the likelihood of their future involvement in drugs. The district court found that the defendant had attempted to intimidate the prosecutor through his letters. The Court of Appeals concluded that the enhancement for obstruction of justice was proper.

United States v. Johnson, 302 F.3d 139 (3d Cir. 2002). The defendant was convicted of possessing drugs with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). He appealed his conviction and sentence, arguing that the district court improperly imposed a two level sentencing enhancement for obstruction of justice after finding that he committed perjury during several portions of his trial testimony, and mistakenly imposed a two level sentencing enhancement for possession of a firearm because he had a loaded revolver in the same bag as his drugs.

Sworn to tell the truth, Johnson testified that the coat he was wearing when he was arrested was not his, that he did not know the coat contained crack cocaine, that the drug-laden bag found at a residence was not his, and that he had never seen that bag before it was introduced into evidence. The district court found that by convicting Johnson, the jury rejected these

portions of his testimony. Therefore, the court concluded that Johnson had perjured himself at trial. Because several portions of Johnson's sworn testimony at trial were irreconcilably inconsistent with the jury's verdict, the Court of Appeals concluded that the district court did not clearly err in finding that a § 3C1.1 enhancement was required.

United States v. Padilla, 2002 WL 1885900 (3rd Cir.(Pa.)). While awaiting sentencing, the defendant testified as a defense witness for his two co-conspirators. The district court found that Padilla had obstructed justice and that a two level sentencing enhancement was appropriate. For a trial court to find that perjury has occurred, it must find: (1) that the defendant gave false testimony; (2) concerning a material matter; and (3) with the intent to provide false testimony. The sentencing judge determined that Padilla's testimony met all the requirements of perjury. The judge concluded that "all three defendants...were willfully untruthful in their testimony at trial with respect to material matters designed to substantially affect the outcome of their case." The district court's issuance of the sentencing enhancement was not clearly erroneous.

United States v. Gutierrez, 2002 WL 1754381 (3rd Cir.(Pa.)). The Third Circuit held that the district court did not err in enhancing the defendant's sentence for obstruction of justice. It heard extensive evidence at trial and the defendant's testimony, and heard argument as to whether he had perjured himself at trial.

United States v. Is'Haq, 2002 WL 1754463 (3rd Cir.(N.J.)). The defendant conceded that he committed perjury during his trial. But he suggests enhancing his sentence by two levels was improper, because with proper legal representation, he would never have had a trial or an opportunity to obstruct justice. Under the facts of the case, the Court of Appeals held that a two level enhancement for obstruction of justice was justified. The defendant admitted he committed perjury during trial and induced his father to testify falsely, hoping to establish an alibi.

United States v. Heimer, 2002 WL 1765106 (3d Cir.(Pa.))). In this appeal, the defendant argued that unsworn testimony at the sentencing hearing should not have been admitted to support an obstruction of justice enhancement under U.S.S.G. § 3C1.1 because it did not meet the "indicia of reliability" standard required by U.S.S.G. § 6A1.3. In the presentence report, the probation officer recommended a two-level enhancement for obstruction of justice based on Heimer's untruthful allegation that her employer had participated in her fraudulent activities. Heimer objected to the enhancement for obstruction of justice admitting that the statements were false, but arguing that they did not impede the federal investigation significantly enough to warrant the two-level enhancement. The district court conducted a sentencing hearing. A special agent of the FBI, without taking an oath, answered the court's questions by explaining that Heimer had initially provided the victims' attorney a taped confession admitting she forged the victims' checks. After Heimer received a target letter from the United States Attorney, she alleged that one of the victims had assisted and directed her to cash the checks fraudulently and told her she would receive a part of the proceeds. The agent explained various additional steps which were taken as a result of Heimer's false statement. He concluded that it delayed the indictment for about two years and that 90 to 95 percent of the investigation was conducted after Heimer provided the false information.

Regarding the indicia of reliability of the agent's testimony, the objection to the obstruction of justice enhancement was not to show that the appellant did not give a false statement to the FBI. Heimer readily admitted the falsity of her statement and apologized to the court for implicating the victim. Instead, the objection contested the degree upon which the false statement impeded the investigation. The information provided to the court by the agent concerned the amount of effort and time which was put into the investigation after the false statement was given.

The Court of Appeals held that "The subject of the testimony pointed to the details of the investigation and not to whether Heimer's statement was false. If the falsity of the statement had been at issue, the reliability of the testimony may have been more questionable because opposing testimonies may have been voiced. Since there was no evidence to oppose the agent's testimony and his experience with the information was first-hand, a sufficient indicia of reliability regarding the evidence was shown. Additionally, the sentencing court had the benefit of observing the proceedings, including the agent's testimony....We give great deference to a presiding district judge in such proceedings, because he or she is able to directly observe the parties, witnesses, interactions and events of the court room."

United States v. Gricco, 277 F. 3d 339 (3d Cir. 2002). Anthony Gricco and Michael McCardell were convicted of conspiracy to defraud the United States, tax evasion, and making false tax returns. All of the charges related to the conspirators' failure to report on their personal income tax returns money that had been stolen from airport parking facilities. From 1990 to 1994, Gricco was the regional manager for private companies that contracted with the Philadelphia Parking Authority to operate the parking facilities at the Philadelphia International Airport. He was responsible for the general operation of the facilities, including the hiring of employees and the collection of parking fees. Michael McCardell, Gricco's brother-in-law, was Gricco's chief assistant. McCardell oversaw the day-to-day activities of the tollbooths and picked up the money from the cashiers at the end of their shifts.

Gricco, McCardell, and others made a plan to steal money by substituting customers' real tickets with replacement tickets showing false dates and times of entry. A customer who had parked in the lot for a long period of time would have a real ticket reflecting a high parking fee. On leaving the lot, the customer would pay this fee to the cashier. However, instead of inserting the real ticket into the ticket-reading machine, a cashier participating in the scheme would insert a replacement ticket, and the machine would calculate the parking fee based on the false date and time stamped on the replacement ticket. This replacement ticket would indicate that the customer had parked for only a short period of time, and thus the parking fee would be much lower. The thieves would pocket the difference between the amount paid by the customer and the amount of the fee shown on the replacement tickets.

At first, Gricco enlisted cashiers who had engaged in a similar but smaller scheme in 1988. He eventually recruited about 15 other cashiers to participate. Michael Flannery, a technician for the company responsible for maintaining the ticket machines, provided the replacement tickets. He also disabled the fare displays on the ticket-reading machines so that customers could not see that the parking fees that they were paying were higher than the fees recorded by the machines. Flannery delivered the counterfeit tickets to Gricco, McCardell, or

McCardell's wife. McCardell then distributed the replacement tickets to the corrupt cashiers, and at the end of their shifts, McCardell picked up the stolen money and forwarded it to Gricco, who distributed the money among the participants. The cashiers received a portion of the proceeds stolen during their shifts, and the rest was divided into four equal sahres for Gricco, McCardell, Million, and Flannery. The participants did not report the unlawful income on their federal tax returns.

Gricco and McCardell each received a two-level increase under U.S.S.G. § 3C1.1 for obstruction of justice. The district court here failed to make specific findings as to which statements constituted perjury. The district court stated only that Gricco had "testified falsely regarding material matter during trial" and that McCardell was receiving "two levels upward adjustment for obstruction of justice." The Court of Appeals stated, "Nevertheless, as in *Boggi*, we will not remand simply for the district court to make findings of fact that are implicit in the record. It is obvious that Gricco and McCardell - - both of whom denied any participation in embezzling the money from the airport and in underreporting their income - - committed perjury."

United States v. Garcia, 2002 WL 130418 (3rd Cir.(Pa.))). The defendant pleaded guilty to maliciously destroying or attempting to destroy a building by fire or destructive device in violation of 18 U.S.C. § 844(I). He was hired by Rifat Ismail to burn down Ismail's store to collect insurance proceeds. At the behest of agents, Ismail met with the defendant. During a recorded conversation, Ismail informed the defendant that he had received a grand jury subpoena and asked the defendant several times what he should do. The defendant made comments that the district court construed as exhortations to Ismail to lie to the grand jury about his knowledge of the arson. On the basis of these exhortations, the district court added a two level enhancement for obstruction of justice to the defendant's base offense level. On appeal, the defendant argued that the district court committed clear error when it increased the offense level by two, predicated on the defendant's alleged attempt to suborn perjury by urging co-conspirator Ismail falsely to inform the grand jury that Ismail knew nothing about the arson fire. He contends that "when all of his statements are read in context, it is clear that he was simply urging Ismail not to say anything to the grand jury." At one point, the defendant told Ismail that all he has to say is "you don't know what they are talking about." Later in the conversational exchange, the defendant urges Ismail to say "what are you talking about?" The judgment and sentence of the district court was affirmed.

United States v. Weston, 279 F. 3d 163 (3rd Cir. 2002). The defendant was convicted of conspiring to distribute and possess with intent to distribute cocaine and cocaine base (crack). Thomas Weston manufactured crack cocaine and enlisted numerous persons to distribute large quantities of crack and powder cocaine in Asbury Park, New Jersey, between 1995 and 1998. The evidence at trial established that Weston purchased 3 to 5 kilograms of cocaine powder from a wholesale distributor in New York City. He converted cocaine powder into crack cocaine, delivered cocaine to a coterie of street level dealers for distribution in Asbury Park, and personally "cooked" at least 200 grams of cocaine powder into crack cocaine.

Weston directly and indirectly attempted to coerce a witness into signing a copy of an exculpatory letter. The Court of Appeals held that the district court did not err in concluding that a two level enhancement for obstruction of justice was warranted.

United States v. Jenkins, 275 F. 3d 283 (3d Cir. 2001). This appeal involved an interpretation of U.S.S.G. § 3C1.1. A jury convicted the defendant for unlawfully possessing firearm ammunition. The district court increased the defendant's offense level by two levels under U.S.S.G. § 3C1.1 for obstructing justice by failing to appear at a state court hearing. The Court of Appeals, in reversing the district court's decision stated, "In its current construction, we find the defendant need not be aware of the federal investigation at the time of the obstructive conduct. But the obstructive conduct cannot merely affect some global application of 'the administration of justice.' The federal proceedings must be obstructed or impeded by the defendant's conduct. In other words, there must be a nexus between the defendant's conduct and the investigation, prosecution, or sentencing of the federal offense. Jenkins's failure to appear in state court on March 4, 1999 did not obstruct the federal proceedings initiated against him the previous day."

United States v. DeSumma, 272 F. 3d 176 (3rd Cir. 2001). A jury convicted the defendant on one count of conspiracy, four counts of extortion in the collection of extension of credit in violation of 18 U.S.C. § 894(a), and use of a firearm during the commission of a crime in violation of 18 U.S.C. § 924(c). He was also found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The defendant acted as a collector for one Peter D'Amelio, intimidating individuals who had defaulted on loans or submitted bad checks. In January 1998, D'Amelio and the defendant appeared at the offices of brothers Andy and Gary Shull to confront them with the fact that $40,000 in checks that they had written had proved to be worthless. After some heated discussion, the defendant drew a handgun and fired a shot past Andy Shull's head and into the wall behind him.

The Shulls agreed to cooperate with the FBI. Six months later, the defendant met with the Shulls at a restaurant. He searched them for recording devices and warned them not to cooperate with the FBI. He also reminded them of the January 1998 shooting incident, and threatened them with harm if they turned on him.

During the sentencing proceeding, D'Amelio testified that just before the start of trial, the defendant threatened him with death if he testified for the prosecution. The district court found that the defendant had obstructed justice and, therefore, added a two-point enhancement to the offense level. In addition to threatening D'Amelio, the testimony at trial revealed that the defendant similarly threatened to intimidate the Shulls and performed body searches on them.

On appeal, the defendant contends that the obstruction issue should have been submitted to the jury in accordance with *Apprendi*. The Court of Appeals has previously ruled that when the actual sentence imposed does not exceed the statutory maximum, *Apprendi* is not implicated. The defendant's contention that he was entitled to have the obstruction of justice issued submitted to a jury must fail because he was not convicted of that crime. Although his conduct resembled this offense, it was simply relevant conduct that had a bearing on the appropriate sentence.

United States v. Miller, No. 00-3750 (3d Cir. April 6, 2001, Unreported). The defendant pled guilty to felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On December 15, 1999, the defendant was visiting with his neighbor, Lloyd Gastley, and the two were shooting at deer in a field while standing on Gastley's porch. Someone contacted the game commission and state police. When officers arrived at Gastley's residence, the defendant remained inside while Gastley spoke to police. Gastley admitted that he and the defendant had been shooting at deer with a .35 caliber rifle that belonged to the defendant. Gastley related that he had also seen other guns in the defendant's residence just two or three weeks prior. The defendant came out and refused to consent to a search of his residence which was next door to Gastley's. While one officer went to obtain a search warrant, the defendant re-entered Gastley's residence and telephoned a Mr. Tipton. Tipton was the defendant's tenant who rented an apartment which was separated from the defendant's residence by a party wall which included a doorway. The defendant asked Tipton to remove several guns and ammunition from the defendant's residence and place them in Tipton's residence. Mr. Tipton complied. The defendant left and did not return. He surrendered on March 22, 2000.

During the execution of the search warrant, officers did not locate any firearms in the defendant's residence. The following day, officers interviewed Mr. Tipton and he surrendered the firearms.

On appeal, the defendant objected to a two level enhancement for obstruction of justice. He argued that the concealment of the firearms occurred contemporaneously with his arrest and did not materially hinder the investigation. The Court of Appeals upheld the enhancement stating, "Plainly Miller's conduct was not contemporaneous with his arrest. Indeed, it is undisputed that he was not arrested until three months after the facts constituting the obstruction of justice. While we do not doubt that if he had not fled from the scene he would have been arrested three months earlier, he did flee."

United States v. Helbling, 209 F. 3d 226 (3d Cir. 2000). A federal grand jury returned a thirty-five count indictment charging the defendant with one count of conspiracy to embezzle employee pension plan funds and falsify ERISA documents (18 U.S.C. § 371); four counts of embezzlement of employee pension plan funds from an ERISA covered plan (18 U.S.C. § 664); eighteen counts of falsifying documents required by ERISA (18 U.S.C. § 1027); six counts of wire fraud (18 U.S.C. § 1343); and six counts of mail fraud (18 U.S.C. § 1341). The mail fraud counts were dismissed during trial. The defendant was convicted by jury on the remaining counts.

The jury found that Helbling embezzled funds from a profit sharing plan covered by the Employee Retirement Income Security Act (ERISA) to pay the operating expenses of three failing companies he owned, and engaged two lawyers to help him by creating false documents indicating that the withdrawals had been part of a lawful Employee Stock Ownership Plan (ESOP) conversion.

Helbling contends that the district court erred by increasing his offense level four levels under U.S.S.G. § 3B1.1(a), "Aggravating Role," by increasing his offense level two levels for obstruction of justice, U.S.S.G. § 3C1.1, and by departing upwards two levels for psychological harm, U.S.S.G. § 5K2.3.

The district court applied a two level enhancement on the basis of two acts by Helbling which it found were "clear-cut attempts to influence" testimony and which it concluded were covered under Application Note 4. The first act relied upon by the district court was a letter written by Helbling to his two attorneys, Susman and Sokolic, in which he threatened to file malpractice actions and file complaints with the bar association if they refused to stand behind the documents they created. The second act was a conversation between Helbling and Donald Mayle during which Helbling pressured Mayle to say his signature on the board of directors' consent was genuine. The letter demanded that the lawyers stand behind documents found by the jury to be false, and threatened adverse consequences if they did not do so. With respect to the conversations with Mayle, the inference drawn from the conversations is that Helbling desired Mayle to say that he signed the board of directors' consent and was urging Mayle to lie. The district court's findings that these acts represented attempts to influence testimony was not clearly erroneous.

United States v. Imenec, 193 F.3d 206 (3d Cir. 1999). The defendant was arrested after selling crack cocaine to undercover police officers on four separate occasions. He was charged with state drug offenses and released on bail with an order to appear in state court for a preliminary hearing on November 26, 1991. One day before the hearing, the U.S. Attorney's Office for the ED/PA secured a warrant for the defendant's arrest on federal drug offenses based on the same events. Federal authorities intended to arrest the defendant when he appeared at the state court proceeding. The defendant did not appear at his preliminary hearing, however, and subsequent attempts to locate him proved fruitless. In October 1992, a federal grand jury returned an indictment against the defendant. On May 31, 1995, the defendant was arrested in New York under the alias "Jose Estevez," and charged with conspiracy to distribute cocaine. Arrangements were made to have him brought to Pennsylvania to face the charges set forth in the 1992 federal indictment. He ultimately pled "guilty" to one count of conspiracy to distribute cocaine. At sentencing, the district court concluded that the defendant had obstructed justice when he failed to appear at the state court preliminary hearing in 1991, and based on that finding, imposed a two point enhancement, pursuant to U.S.S.G. § 3C1.1.

The sole issue on appeal was whether the imposition of the enhancement was appropriate. The defendant conceded that he failed to appear at a state judicial proceeding, but he argues that, because it was a state, rather than a federal court, his failure to appear was outside the ambit of § 3C1.1. The only "effect" his action had upon federal proceedings, he argues, was to avoid or delay his arrest, an action that Application Note four of § 3C1.1 clearly excludes. The Court of Appeals concluded that the answer to whether a § 3C1.1 obstruction of justice enhancement is appropriate in this case depends on whether "instant offense" is understood to refer to the criminal conduct underlying the specific offense of conviction, as the government contends, or is read to be limited to the specific offense of conviction itself, as the defendant insists. In upholding the enhancement, the Court of Appeals concluded that the Sentencing Commission's intent was to impose an enhancement for any conduct that obstructs an investigation,

prosecution, or sentencing proceeding that is based on the criminal conduct underlying the specific statutory offense for which the defendant is being sentenced. It is appropriate where the defendant has obstructed an investigation of the criminal conduct underlying the offense of conviction, even where the investigation was being conducted by state authorities at the time. Given that interpretation, "we hold that a § 3C1.1 enhancement is appropriate where the defendant has obstructed a prosecution based on the same criminal conduct underlying the offense of conviction even though that prosecution is going forward in state court."

United States v. Abuhouran, 162 F.3d 230 (3d Cir. 1998). The defendant was released on bond with home confinement with electronic monitoring pending sentencing. He cut the monitoring bracelet and made his way to Kennedy Airport where he was apprehended at the ticket counter of Royal Jordanian Airlines with $10,800 in cash attempting to buy a ticket to Jordan. The district court in determining his sentence added two points for obstruction of justice. On appeal, Abuhouran argued that he was not "in custody," so that the example of flight from custody given in Application Note 3 to U.S.S.G. § 3C1.1 does not apply. Held: Assuming but not deciding that Abuhouran was not in custody, the appellate court found his bold breaking of the bracelet and brazen trip to Kennedy to be a very serious obstruction of justice. His acts were calculated to prevent the culmination of his criminal trial, the judicial imposition of sentence.

United States v. Williamson, 154 F. 3d 504 (3d Cir. 1998). On appeal, the defendant argued that the district court erroneously believed that it was required to apply a 3C1.1 enhancement once it determined that the defendant had committed perjury at trial. He asserted that the failure of 3C1.1 to include words such as "must" or "shall" renders it ambiguous as to whether the enhancement must automatically follow a determination that the defendant has engaged in qualifying conduct. The court of appeals held that the two level enhancement under § 3C1.1 is mandatory once a district court determines that a defendant has obstructed justice.

United States v. Fiorelli, 133 F.2d 218 (3d Cir. 1998). Defendant, a union official, was found guilty of extorting money and services from contractors. The district court imposed a two level enhancement under §3C1.1. The Court of Appeals reversed, stating "if a sentencing court is going to rely on a jury verdict as part of the foundation for a §3C1.1 enhancement, there should be no question but that the relevant finding was necessarily made by the jury.... In this context, we are hesitant to conclude that the falsity of Fiorelli's testimony about the absence of any threats by him is necessarily inherent in the jury's verdict on the extortion charges." The record was inadequate to support §3C1.1 enhancement. On remand, the district court is to determine whether the government met its burden of proving each of the elements of perjury and should make appropriate specific findings to reflect its decision. The Court of Appeals also noted that, contrary to its decision in *Colletti*, the "perjury does not have to be so far-reaching as to impose some incremental burdens upon the government."

United States v. McLaughlin, 126 F. 3d 130 (3d Cir. 1997). Defendant was convicted of income tax evasion. At trial, he testified that a particular bank account was a reserve against future warranty claims and that its balance therefore was being treated as accrued income over a 10 year period. As a result, McLaughlin contended that there was no tax loss attributable to the income deposited in that account. The defendant also sent investigators to obtain tape-recorded statements from witnesses in an effort to demonstrate that the investigating IRS agent had

violated defendants' rights. At sentencing, the district court imposed a §3C1.1 enhancement. The Third Circuit reversed, holding that the jury had "returned a general verdict of guilty that did not distinguish between the various accounts." It thus did "not disclose whether the jury rejected all or only part of defendant's testimony." Accordingly, the falsity of McLaughlin's testimony regarding the First Fidelity account was not necessarily implicit in the verdict. A jury finding of falsity does not necessarily mean "willful intent to provide false testimony." Although secret tape-recording by persons who conceal their identity may be prohibited under the laws of some states, it does not amount to obstruction of justice.

United States v. Powell, 113 F. 3d 464 (3d Cir. 1997). Defendant and his brother were indicted on conspiracy and drug distribution charges. Defendant pled guilty and his brother was convicted by a jury. Defendant testified at his brother's trial that his brother was not involved in the drug distribution conspiracy, despite extensive government evidence to the contrary. He challenged an obstruction of justice enhancement based on his perjury at his brother's trial, contending that it was not perjury in "the instant offense." The Third Circuit affirmed the enhancement because the perjury related to the same offense for which defendant was convicted.

United States v. Arnold, 106 F. 3d 37 (3d Cir. 1997). In applying a §3C1.1 enhancement, a district court must use the "clear and convincing standard, place the burden of proof upon the government, and support its decision with the findings required by the Supreme Court's decision in *Dunnigan.*

United States v. Boggi, 74 F. 3d 470 (3d Cir. 1996). Boggi, a union official, was found guilty of extorting money and services from contractors. At trial, he took the stand in his own defense and flatly denied all charges. The Court of Appeals upheld the enhancement under 3C1.1, ruling that "express separate findings are not required" under *Dunnigan*.... Where "the record establishes that the district court's application of the enhancement necessarily included a finding as to the elements of perjury, and those findings are supported by the record, we will not remand merely because the district court failed to engage in a ritualistic exercise and state the obvious for the record." Application of §3C1.1 enhancement based on perjury by defendant at trial did not violate defendant's right to testify on his own behalf. Right to testify does not include right to commit perjury.

United States v. Bethancourt, 65 F. 3d 1074 (3d Cir. 1995). Defendant challenged a §3C1.1 enhancement, arguing that he did not "willfully" attempt to obstruct justice by offering perjured testimony. The Third Circuit ruled that defendant's contention had no merit. It held that offering perjured testimony is an attempt to obstruct justice. Defendant intentionally lied in an attempt to exclude a valid confession.

United States v. Kim, 27 F.3d 947 (3d Cir. 1994). The district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to USSG. § 3C1.1. Defendant was arrested carrying drugs on a train. He offered to cooperate with the DEA. He deliberately concealed prior trip to obtain drugs, concealed identity of source of drugs, and informed intended recipient of drugs about his cooperation with government before participating in an attempt at a controlled delivery. The government's investigation of the other participants in the offense directly bore upon defendant's knowledge and intent to distribute.

United States v. Woods, 24 F. 3d 372 (3d Cir. 1994). Defendant was convicted of two armored truck robberies. The district court enhanced his sentence under §3C1.1 because he had given the government misleading information to avoid implicating his friends in a third armored truck robbery. The Third Circuit reversed since the enhancement under §3C1.1 applies only when the defendant has made efforts to obstruct the investigation, prosecution or sentencing of the offense of conviction. It is inappropriate where defendant did not obstruct investigation or prosecution of offense of conviction, but gave misleading information to officials about crime for which he was not indicted. Application notes 3(g) and 4(b) demonstrate that the Sentencing Commission considered false statements like those involved here, and elected not to punish them as part of the conviction for the instant offense.

United States v. Porat, 17 F. 3d 660 (3d Cir. 1994). The government argued that the district court should have imposed an obstruction of justice enhancement because defendant attempted to disguise his handwriting in exemplars provided to the government and submitted a passport (obtained from defendant's lawyer) which contained three identification numbers, but the defendant submitted a copy which only contained two of the numbers. The third identification number, written in by the Israeli Consulate in New York, was crucial because it matched an identification number on a Swiss bank account. The Third Circuit upheld the district court's refusal to impose an enhancement for obstruction of justice. Defendant admitted his signature at trial. His defense was that his brother gave him the signature card which he signed without examining it. Although defendant refused to admit that all of the signatures bearing his name on the Swiss bank account were his, it was not clear error for the district court to find that defendant admitted his signature at trial. The letter from the Israeli government did not convince the court that defendant willfully altered the passport. The court was reluctant to rely on this evidence because defendant was unable to cross-examine someone familiar with the contents of the letter.

United States v. Dersham, 16 F. 3d 406 (3d Cir. 1993). State police troopers found defendant passed out behind the wheel of his automobile in a parking lot. The engine was running and a .45 caliber semi-automatic handgun was on the front seat. Although the gun was in a holster and the safety mechanisms were engaged, the weapon was cocked and loaded with a bullet in the chamber and with five bullets in the inserted clip. An unplugged police scanner programmed to local law enforcement frequencies was in the car. Richard H. Lang, a retired Marine Corps Major, testified at the presentence hearing that he owned the weapon found in Dersham's possession and that Dersham had stolen it from him. Dersham testified at the presentence hearing that he bought the weapon from Lang for $649. The district court concluded that Dersham had committed perjury and applied a two level enhancement under 3C1.1. The Court of Appeals affirmed.

United States v. Dunnigan, 113 S. Ct. 1111 (1993). The district court increased defendant's sentence for obstruction of justice under §3C1.1 after she testified untruthfully at trial. The Fourth Circuit reversed, finding that an increase based on a defendant's perjury at trial would be unconstitutional. The Supreme Court ruled that if the accused has committed perjury at trial, a two-level enhancement under §3C1.1 is required by the guidelines and is not in violation of a defendant's privilege to testify. The district court must review the evidence and make independent findings to establish a willful obstruction or an attempt to obstruct justice. A

witness testifying under oath commits perjury under federal law if he or she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory.

United States v. Colletti, 984 F. 2d 1339 (3d Cir. 1992). Defendant received an enhancement for obstruction under §3C1.1 based upon his perjury at trial. In light of the Supreme Court's pending decision in *U.S. v. Dunnigan*, 944 F. 2d 178 (4th Cir. 1991), the Third Circuit refused to express a "firm view" on whether such an obstruction enhancement violates constitutional rights. However, the court expressed its view that in order to warrant the enhancement, "the perjury must not only be clearly established and supported by evidence other than the jury's having disbelieved him, but also must be sufficiently far-reaching as to impose some incremental burden upon the government, either in investigation or proof, which would not have been necessary but for the perjury." Here, the judge relied on the fact that virtually all of defendant's testimony was disputed by other witnesses, and defendant's demeanor while testifying made it "obvious" he was lying.

United States v. Shirk, 981 F. 2d 1382 (3d Cir. 1992). The Third Circuit affirmed the district court's refusal to enhance defendant's sentence under §3C1.1 for providing his probation officer with false information on a sworn financial statement. The probation officer recommended against an enhancement because the false information was not material. The district court made no finding on the issue of materiality, but the court's statements suggested that defendant did not obstruct justice willfully.

United States v. Frazier, 981 F. 2d 92 (3d Cir. 1992). Two-level increase under §3C1.1 for reckless endangerment is appropriate in case involving high speed chase. When DEA agents attempted to arrest defendant, he led them on a high-speed chase, swerved around DEA cars which were attempting to block him, and struck one of the DEA cars while an agent was inside it. It is not necessary that presentence report contain miles-per-hour figures or list traffic ordinances violated.

United States v. Belletiere, 971 F. 2d 961 (3d Cir. 1992). The district court imposed an enhancement for obstruction of justice based upon defendant's quit-claim of his interest in a residence to his wife, knowing that the house was subject to forfeiture, and defendant's misrepresentations to his probation officer that he never personally used drugs. Defendant subsequently tested positive for cocaine use during a random drug test while on bail. The Third Circuit reversed, ruling that the government failed to prove by a preponderance of the evidence that defendant "willfully" attempted to obstruct justice. The government conceded that the quit-claim deed would have no real effect on the government's ability to gain the property through forfeiture. Misstatement regarding defendant's use of drugs had nothing to do with the offenses for which he was convicted, and was not material to the probation officer's investigation.

United States v. Cusumano, 943 F. 2d 305 (3d Cir. 1991). Defendant told his probation officer that certain stock he owned was "essentially worthless," when in fact he was negotiating to sell it for half a million dollars. The Third Circuit upheld an enhancement under §3C1.1 for obstruction of justice. The fact that he was negotiating for the sale of the stock, apart from the magnitude of the sale, was inconsistent with his statement that the stock was worthless. The

misrepresentation was material, since the determination of one's ability to pay is a necessary step in the imposition of a fine.

United States v. McDowell, 888 F. 2d 285 (3d Cir. 1989). Defendant pled guilty to firearms offenses, and the district court increased his offense level under §3C1.1 because he had suborned his son's grand jury testimony. The Third Circuit affirmed, holding that because the government had shown a particularized need for disclosure of the grand jury testimony at the sentencing hearing, it was proper for the sentencing court to consider it.

§ 3C1.2 Reckless Endangerment During Flight

United States v. Acevedo-Bruce, 2006 WL3779721 (3rd Cir.(N.J.)). In this appeal, the defendant argued that the district court erred in finding that the evidence presented at his sentencing hearing supported a two-level enhancement under U.S.S.G. § 3C1.2, and in determining that he was ineligible for the safety-valve under U.S.S.G. § 5C1.2(a) because he used violence in connection with his offense.

An agent testified that she was part of the team that surveilled and arrested the defendant. When a signal was given, several police officers wearing tactical vests and jackets labeled "POLICE" in yellow letters had approached the defendant's van to arrest him. He ignored the orders to stop, and then drove his van into the passenger side of the unmarked police car that the agent was in despite the fact that it had its red and blue lights flashing on its dashboard and its front and rear lights flashing. The defendant attempted to push the police vehicle out of his way in an attempt to leave the parking lot. He argued through his attorney that his conduct in the parking lot was based upon his belief that he was under attack from disgruntled drug buyers.

The Court of Appeals held that the district court's finding that the defendant deliberately rammed his car into the agent's vehicle created a substantial risk of death or serious bodily injury to the agent. This finding clearly supported the two-level enhancement under § 3C1.2.

Next, the district court concluded the defendant was ineligible for the safety-valve under § 5C1.2(a)(2) because his "willful bashing" of his van into the unmarked police car was tantamount to using violence under § 5C1.2(a)(2). Based on the defendant's conduct, the Court of Appeals affirmed the district court's determination that the defendant used violence in connection with his offense and was ineligible for application of the safety valve.

United States v. Dodd, 2004 WL 1059833 (3rd Cir.(Pa.))). The Court of Appeals held that the defendant's attempt to retrieve a gun from his waistband while wrestling with officers was conduct which could have resulted in the death of one or both officers, or an innocent bystander. Additionally, while running from officers, the defendant threw a loaded 9mm semiautomatic pistol on the pavement, creating the risk that the gun could have accidentally fired. Under these circumstances, a two level enhancement for reckless endangerment was appropriate.

Part D -- Multiple Counts

§ 3D1.2 Groups of Closely-Related Counts

United States v. Lee, Sr., 359 F.3d 194 (3rd Cir. 2004). The Court of Appeals held that the district court could group tax offenses with conspiracy to engage in money laundering and interstate travel in aid of racketeering. The counts involved substantially the same harm.

United States v. Cordo, 324 F.3d 223 (3rd Cir. 2003). The primary issue on appeal was whether Cordo's mail fraud and money laundering convictions should have been grouped under § 3D1.2. The government asserted that there were different victims involved here. Whereas the mail fraud offenses took as their victim the investors themselves, the money laundering offenses effected only a societal harm. In *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991), the Court of Appeals held that under § 3D1.2, money laundering charges should be grouped with the charges that generated the funds unless the money laundering was somehow a separate operation, distinct from the scheme itself. It is undisputed that all of the laundering activity at issue involved funds that were proceeds of the fraudulent investment scheme. The laundering was simply the final step in the operation. In other words, "the evidence demonstrated that" the mail fraud and money laundering were "part of one overall scheme to obtain money from the investors and to convert it to the use of" Cordo and his co-defendants. Thus, the acts of money laundering were a further victimization of the defrauded investors, and therefore did have identifiable victims. Because this was a "single course of conduct with a single criminal objective" imposing "essentially one composite harm" on the same victims," the charges should have been grouped.

United States V. Behmanshah, 2002 WL 31167423 (3rd Cir.(Del.))). The defendant was convicted of health care fraud, money laundering and mail fraud. She appealed her sentence, asserting that the district court erred by not grouping the fraud and money laundering.
The money laundering began later than the fraud and involved different conduct, i.e., financial transactions rather than preparation and filing of billing records. The Court of Appeals affirmed the judgment of conviction and sentence.

United States v. Corbett, 2002 WL 1798817 (3rd Cir.(Pa.))). The defendant was convicted of five counts of income tax evasion, two counts of wire fraud and two counts of mail fraud. She was sentenced to 30 months imprisonment and ordered to make restitution. She appealed. The defendant asserted that the tax evasion counts should have been grouped with the mail and wire fraud counts under U.S.S.G. § 3D1.2 because her criminal conduct was all part of one scheme to defraud the United States.

At sentencing, Corebett advanced arguments under each of the four subsections.
It appears, however, that the district court rejected Corbett's arguments based on our decisions in *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 1991), and *United States v. Vitale*, 159 F.3d 810 (3d Cir. 1998). The district court was correct in relying on Astorri and Vitale in rejecting Corbett's argument under 3D1.2(c). See Astorri, 923 F.2d at 1057; Vitale, 159 F.3d at 815. Neither case, however, discusses the propriety of grouping tax evasion counts with fraud counts under the remaining subsections. Accordingly, the Court of Appeals ordered that Corbett's sentence be remanded to the district court for analysis under U.S.S.G. § 3D1.2(a), (b), and (d).

"In analyzing the issue of grouping, the district court should consider those subsections' requirements. In order for 3D1.2(a) and (b) to apply, there first must be a finding that the counts involve the same victim. Indirect and secondary victims should be excluded. U.S.S.G. § 3D1.2, cmt. n. 2 (2001)....If the district court concludes that there is only one victim, it should proceed to the second requirement of 3D1.2(a), the same act or transaction, and of 3D1.2(b), two or more acts connected by a common objective. Although legally distinct, offenses may be grouped if they 'are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim.' U.S.S.G. 3D1.2, cmt. n. 4 (2001); see *United States v. Riviere*, 924 F.2d 1289, 1306 (3d Cir. 1991); see also *United v. Cusumano*, 943 F.2d 305, 313 (3d Cir. 1991) (upholding district court's grouping of conspiracy, money laundering, embezzlement, unlawful kickbacks, and travel act offenses).

"Finally, the district court should consider whether grouping would be appropriate under 3D1.2(d). This subsection permits grouping when the counts are of 'the same general type' and 'the offense level is determined largely on the basis of the total amount of harm or loss.' *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1992)(citations omitted); see *United States v. Rudolph*, 137 F.3d 173, 180 (1998)."

United States v. Enright, 2002 WL 826442 (3rd Cir.(N.J.))). The defendant was president of Petro Plus Oil, a company that bought and sold fuel at the bottom of the chain. He pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); money laundering (18 U.S.C. § 1957); and tax evasion (26 U.S.C. § 7201). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

The defendant appealed, asserting that the district court should have grouped the tax evasion with his wire fraud and money laundering offenses. The Court of Appeals held that the district court did not err when it determined that the tax evasion offenses did not involve substantially the same harm as the money laundering and wire fraud convictions. The tax evasion guideline bases the offense level on the amount of money involved, while the guideline for money laundering does not.

United States v. Thayer, 201 F. 3d 214 (3d Cir. 2000). Defendant was convicted on twenty counts of criminal liability for willful failure to pay over federal withholding and F.I.C.A. taxes in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2; willful filing of false claims against the government in violation of 18 U.S.C. §§ 2, 152; and willful concealment of bankruptcy-estate assets in violation of 18 U.S.C. §§ 2, 152. Because the victims of the bankruptcy and tax offenses were not the same, the district court properly refused to group the bankruptcy and tax offenses under § 3D1.2(b).

United States v. Vitale, 159 F.3d 810 (3d. Cir.1998). Francis Vitale pled "guilty" to one count of wire fraud and one count of tax evasion. The charges stemmed from his embezzlement of approximately $12 million from his employer. The district court rejected Vitale's argument that the wire fraud and tax evasion counts should be grouped. On appeal, Vitale argued that the offenses should have been grouped under § 3D1.2(c). In upholding the district court's decision

not to group the two counts, the appellate court rejected the response given in the Sentencing Commission's *Most Frequently Asked Questions About the Sentencing Guidelines*, Volume VII, Question No. 45, construing U.S.S.G. §§ 3D1.2(c) and 2T1.1(b)(1). The response is to the effect that tax evasion and the conduct generating the income should "always" be grouped regardless of whether an enhancement under § 2T1.1(b)(1) was applied.

United States v. Rudolph, 137 F.3d 173 (3d Cir. 1998). The defendant, an INS Special Agent, accepted a total of $1,500 (bribe offense) for an INS metal template, a device that imprints a marking when fingerprints and signatures are affixed to alien registration "green" cards to demonstrate authenticity, and delivered a federal presentence report prepared by the U.S. Probation Office in the Southern District of New York to a cooperating witness in exchange for $1,000 (sale of government property offense). Defendant argued that the district court erred in refusing to group the bribery offense and the offense of sale of government property. The appellate court affirmed the district court's decision not to group the two counts. Although the plea agreement stipulated that the offenses were groupable under § 3D1.2(d), it expressly acknowledged that the stipulation did not bind the sentencing court. The two counts addressed distinct criminal acts, neither of which encompassed conduct that affected defendant's sentence for the other. The primary societal interest jeopardized by defendant's acceptance of the bribes was the integrity and efficacy of the nation's immigration policies, arguably a victimless crime. In contrast, the theft of the PSR was directed to an identifiable victim, the individual for whom the PSR was prepared.

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). Grouping offenses resulting from defendant's possession, receipt, transportation, distribution, and reproduction of child pornography in violation of 18 U.S.C. §§2252(a)(1), (a)(2), and (a)(4)(B) was inappropriate under §3D1.2(b) since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted in the pornographic materials, and because the defendant's four counts of conviction involved different children.

United States v. Griswold, 57 F. 3d 291 (3d Cir. 1995). Over a two year period, defendant purchased seven firearms from a licensed dealer on five different occasions. Each time he used a fictitious name and misrepresented that he had never been convicted of a felony. He was later found in possession of two of the illegally purchased guns. Defendant pled guilty to seven counts of making false statements in connection with a firearm purchase, and one count of being a felon in possession of a firearm. The district court ruled that the eight counts formed five separate groups under §3D1.2. The Third Circuit upheld the separate grouping. Section 3D1.2(b) was not applicable because each time defendant illegally acquired a firearm, there was a separate and distinct fear and risk of harm to society. Section 3D1.2(c) did not require grouping. Finally, the offenses did not need to be grouped simply because unlicensed firearm dealing counts are grouped together under §3D1.2(d).

United States v. Bush, 56 F. 3d 536 (3d Cir. 1995). Defendant made five separate firearm purchases over a period of several months, in three separate bursts of activity, by misrepresenting that she had never been convicted of a felony. The district court divided the counts into three separate groups based on the time frame in which the purchases were made. The Third Circuit rejected defendant's claim that the counts should be grouped together. Defendant's conduct was

not ongoing and continuous under §3D1.2(d). There was nothing in the record to suggest that the purchases were tied together in any respect.

United States v. Bertoli, 40 F. 3d 1384 (3d Cir. 1994). Defendant was convicted of obstruction of justice and conspiracy to obstruct justice. The obstruction occurred in 1990, while the conspiracy occurred between 1983 and 1992. Defendant argued that the district court should have used the 1989 guidelines to calculate his base offense level, because a 1991 substantive change to the obstruction guideline resulted in more severe penalties. The district court failed to consider this claim, since it grouped the two counts together, and treated them as one course of conduct. The Third Circuit reversed, holding that the grouping of various counts did not override ex post facto concerns.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy, and tax evasion resulting from their operation of a roofing business. The district court properly treated the counts as three groups: mail fraud, bribery and tax evasion. Each involved a different victim, so that grouping under either subsection §§3D1.2 (a) or (b) would have been inappropriate. Although all of the counts were listed in subsection (d) as appropriate for grouping, that did not mean the counts must be grouped. Counts must be of the same general type before grouping is appropriate.

United States v. Cusumano, 943 F. 2d 305 (3d Cir. 1991). Defendant contended that his money laundering counts were ancillary, rather than related, to the other counts in the indictment, and therefore the district court should not have grouped the money laundering offenses with his other offenses. Evidence demonstrated that unlawful kickbacks, embezzlement, conspiracy, travel act violations, and money laundering were all part of one overall scheme to obtain money from employee welfare benefit fund and convert it to use of defendant and others. The Third Circuit found no merit in defendant's argument, concluding that the issue under the guidelines is whether the convictions involved the same victim and two or more acts that were part of the same common scheme or plan. Here, the victim of all the offenses was the same pension fund and its beneficiaries.

United States v. Johnson, 931 F. 2d 238 (3d Cir. 1991). Defendant and a codefendant assaulted three Assistant U.S. Attorneys but pled guilty to assaulting only one of them. The district court departed upward by three levels based on defendant's assault of multiple victims. The Third Circuit affirmed, finding no evidence that the sentencing commission considered multi-victim aggravated assaults in formulating guideline §2A2.2(b)(1). The three-level departure was also reasonable, even though only two additional victims were involved. The district court structured the departure using the concept of grouping the counts, treating defendant as if he had been convicted of three counts of aggravated assault.

United States v. Riviere, 924 F.2d 1297 (3d Cir. 1991). The district court did not err in grouping convictions for possession of firearms by a felon, delivery of firearms to a common/contract carrier, and possession of an altered firearm into a single group. The guidelines already provided for enhanced punishment for possession of a firearm by a felon if that firearm was altered and grouping of the offenses of possession of a firearm by a felon and delivery to a common/contract carrier was required because to hold otherwise would provide enhanced

punishment for defendant's status as a felon, rather than his additional conduct that is not otherwise accounted for by the guidelines.

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). Not proper to group tax evasion and wire fraud counts. Each involved different harms. While the various private investors suffered the harm of defendant's fraudulent conduct, his tax evasion targeted the government.

§ 3D1.4 Determining the Combined Offense Level

United States v. MacLeod, 80 F. 3d 860 (3d Cir. 1996). The commentary to §3D1.4 permitted upward departure in case involving defendant convicted of inducing 10 minors to engage in sexual activity for purpose of producing child pornography. Guidelines only account for six victims. However, the Third Circuit found that the extent of the departure violated the rule of "declining marginal punishment." The first five additional victims, which was the maximum recognized by the guidelines, raised term of imprisonment by 11 months per offense, but departure of four levels for the four additional victims raised sentence by 21 months per victim. An upward departure of no more than two levels was warranted for the four additional victims. This would increase sentence by approximately nine months per offense.

Part E -- Acceptance of Responsibility

§ 3E1.1 Acceptance of Responsibility

United States v. Nunez-May, 2007 WL 1573815 (3rd Cir.(N.J.)). The defendant pleaded guilty on June 26, 2001, to conspiracy to commit food stamp fraud, in violation of 18 U.S.C. § 371. She was released on bond pending sentencing with the requirement that she remain in Essex County, New Jersey. In December of 2005, the defendant vacated her home in New Jersey and traveled to the Dominican Republic using a fraudulent passport. On January 31, 2006, the district court issued a warrant for her arrest. Two weeks later, marshals located her in the Domican Republic and instructed her to return to the United States. The defendant then traveled to Puerto Rico where she was arrested.

On appeal, the defendant argued that her unauthorized trip to the Dominican Republic constituted run-of-the-mill unauthorized travel, not obstruction of justice. She also argued that the penalty for obstruction only applies once a defendant misses a scheduled court date. Among the acts covered by U.S.S.G. § 3C1.1 is "escaping or attempting to escape from custody before trial or sentencing." In this case, the defendant gathered false identification documents as early as May of 2005, applied for and received a fraudulent passport, left the territorial jurisdiction of the United States, failed to inform pretrial services of her whereabouts, and showed no signs of returning to the United States until marshals intervened.

The Court of Appeals concluded that the defendant's flight out of the country, which imposed costs on pretrial services and the marshals, qualified as more than an attempt to escape. The district court did not err in deciding to impose a two level enhancement for obstruction of justice.

On appeal, the defendant also argued that she deserved a two level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1.. She argued that she flew to the Dominican Republic to visit her ailing mother, who had suffered a stroke on December 5, 2005. In light of the defendant's obstruction, her conduct during pre-trial release and the principles underlying Application Note 4 to § 3E1.1, the Court of Appeals also determined that the district court did not err by finding that the defendant failed to accept responsibility for her actions.

United States v. Batista, 483 F. 3d 193 (3d Cir. 2007). The defendant was arrested on September 19, 2002, for his involvement in the sale of crack cocaine. Not long after an unsuccessful proffer session with the government, the defendant's attorney requested an evaluation of the defendant to determine if he was competent to stand trial. Over the course of the next two years, the defendant was evaluated on at least five occasions. Three doctors concluded that the defendant was feigning a mental illness to avoid going to trial.

The defendant was sentenced on June 2, 2005. At sentencing, the government made a motion for a two-level enhancement for obstruction of justice based on the defendant's attempts to avoid trial by feigning mental illness. A federal agent testified that a co-conspirator told him that the defendant planned to feign mental illness to avoid standing trial. The defendant opposed this motion and made his own motion for a reduction in his base offense level for acceptance of responsibility.

The district court expressly found that the defendant had obstructed justice under U.S.S.G. § 3C1.1 by feigning mental illness to avoid trial, transmitting his plan to feign mental incompetence to a co-conspirator, and choosing not to take his medication so as to increase his chances of being found incompetent. While the district court found that the defendant had shown some acceptance of responsibility by admitting his guilt and initially trying to cooperate with the authorities, this was counteracted by the defendant's later attempts to avoid trial by feigning mental incompetence.

The Court of Appeals affirmed the sentence, finding that an enhancement for obstruction of justice was proper. The defendant's conduct required substantial expenditures of government resources and the district court's time. It also found that the defendant's false representation of mental illness was sufficient for the district court to find that he had not accepted responsibility pursuant to U.S.S.G. § 3E1.1. His initial admission of guilt was not sufficiently extraordinary to overcome the later behavior that led to the obstruction of justice enhancement.

United States v. Severino, 454 F.3d 206 (3rd Cir. 2006). On appeal, the defendant argued that the District Court erred by failing to recognize its authority to issue a sentence below the range suggested by the guidelines on the basis of his extraordinary acceptance of responsibility. Under the sentencing terminology adopted by the Court of Appeals, such a sentence "not based on a specific guideline-departure provision" would constitute a "variance," as opposed to a departure. The defendant maintained that based on comments made by the district judge at sentencing, the district court erred in ruling that the guidelines prevented her from considering extraordinary acceptance of responsibility in issuing a variance below the guideline range.

The Third Circuit agreed with the guidance of other courts that after *Booker*, "a guidelines departure prohibition does not preclude a district court from considering that factor when the issue is a variance under *Booker*." *United States v. Gatewood*, 438 F. 3d 894, 897 (8th Cir. 2006); see also *United States v. Lake*, 419 F.2d 111, 114 (2d Cir. 2005)(commenting that "absent the strictures of the guidelines, counsel would have had the opportunity to urge consideration of circumstances that were prohibited as grounds for a departure" under § 5K2.0(d)). Therefore, if a District Court holds that it could not consider extraordinary acceptance of responsibility under the sentencing factors of § 3553(a), such error could render the defendant's sentence unlawful under 18 U.S.C. § 3742(a)(1) and require reversal. However, the Court of Appeals was not required to consider this issue because the District Court did not hold that reliance on a guideline-prohibited factor was impermissible.

In considering the defendant's motion for a variance, the District Court properly consulted the guidelines and reasonably concluded that § 5K2.0(d) prohibited a downward departure under the guidelines based on extraordinary acceptance of responsibility. The District Court never said that it lacked authority otherwise to consider this factor, only that the guidelines themselves do not allow departure on that basis.

After making these guideline determinations, the District Court proceeded to an express consideration of the sentencing factors under § 3553(a). The District Court addressed each factor and arguments pursuant to each factor. The District Court's statement that the defendant's impressive acceptance of responsibility "isn't something that I'm going to reduce your sentence for" clearly implies that the District Court understood that it could reduce sentence on that basis, but that it chose not to do so based upon its consideration of the § 3553(a) factors. The Court of Appeals concluded that the District Court's sentence was reasonable under *Booker*.

In *United States v. Neal*, 2006 WL 1080693 (3rd Cir. (Pa.))), the defendant was acquitted by a jury of possession of a stolen firearm but convicted of possession of a firearm by a convicted felon. He was sentenced to 55 months imprisonment. He appealed his conviction and sentence, arguing that the District Court erred by (1) applying a two-level upward adjustment after finding that the firearm was stolen and (2) by refusing to apply a downward adjustment for acceptance of responsibility.

As for his first argument, the defendant asserted that once a defendant is found not guilty of certain conduct under the beyond a reasonable doubt standard by a jury, the prosecution should not be permitted to use this same conduct, considered now using the lower preponderance of the evidence standard, to enhance the defendant's sentence. In rejecting Neal's argument that his sentence could not be adjusted under 2K2.1(b)(4) for possession of a stolen firearm, the Court of Appeals stated that the Supreme Court has expressly held that an acquittal on a charge does not prevent the District Court from considering at sentencing the underlying conduct so long as it has been proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed. 2d 554 (1997)(per curiam)(holding that defendant's acquittal of using a firearm in relation to a drug trafficking crime by a jury did not preclude sentencing court from determining that firearm was possessed in furtherance of possession of cocaine base with intent to distribute).

With respect to Neal's contention that his sentence should have been adjusted under 3E1.1 for acceptance of responsibility, the Court of Appeals held there was no error. As made clear in *United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996), application not 1(b) to 3E1.1 states that sentencing courts should consider, in addition to other factors, the defendant's "voluntary termination or withdrawal from criminal conduct or associations" in determing whether a defendant has accepted responsibility. Here, despite warnings from probation officers and the District Court, Neal repeatedly returned to drug use, flouting federal and state laws, and the terms of the Court's orders of pretrial and presentence release. His continued abuse of cocaine subsequent to conviction but prior to sentencing countermands any inclination to determine that he is eligible for an acceptance of responsibility adjustment.

United States v. Pletcher, 2005 WL 3309674 (3rd Cir.(Pa.))). The defendant was charged with possession of a firearm by a convicted felon. He entered into a plea agreement which included the following conditional promise: "if the defendant can adequately demonstrate an acceptance of responsibility to the government, the United States hereby moves that at sentencing the defendant receive a three-level reduction in the defendant's offense level for acceptance of responsibility."

After entering his plea of guilty, the defendant was released pending sentencing on several conditions, including that he not use any unlawful controlled substances. At a June 1, 2004, hearing before a magistrate judge, the defendant admitted that he had violated this condition repeatedly and his bail was revoked.

In the presentence report, the probation officer did not recommend a reduction for acceptance of responsibility. This recommendation was based on three positive drug screens for marijuana and one positive drug screen for cocaine while under bail supervision. At the sentencing proceeding on August 10, 2004, the prosecution echoed the presentence report and recommended that District Judge Sylvia Rambo not apply the reduction for acceptance of responsibility because the defendant abused drugs while awaiting sentencing. The Court did not apply the reduction.

The defendant appealed his sentence. He argued that (1) the government breached the plea agreement when it recommended that the court deny him credit for acceptance of responsibility, (2) Judge Rambo erred when she accepted the recommendation, and (3) the sentencing guidelines were unconstitutional under Blakely v. Washington, 542 U.S. 296 (2004).

After briefing was complete on this appeal, the Supreme Court decided United States v. Booker, 543 U.S. 200 (2005). The defendant submitted a supplemental letter brief arguing that because Judge Rambo treated the guidelines as mandatory when she sentenced him, Booker required remand.

The Court of Appeals held that the government did not breach the plea agreement when it recommended that the court deny the defendant credit for acceptance of responsibility. The government promised in the plea agreement to recommend that the court give such credit if the defendant demonstrated acceptance of responsibility. When the defendant violated the terms of his release, he failed to fulfill this explicit condition to the government's satisfaction. The Court

of Appeals also found that the court correctly interpreted U.S.S.G. § 3E1.1, and did not clearly err when she determined that the defendant's violation of the terms of his release was inconsistent with any genuine acceptance of responsibility.

Despite these holdings, in accordance with Booker and United States v. Davis, 407 F.3d 162 (3d Cir. 2005)(en banc), the Court of Appeals vacated the sentence and remanded for resentencing.

United States v. Gonzalez, 2005 WL 1427496 (3rd Cir.(Pa.))). The defendant appealed his sentence, arguing that the district court erred in failing to grant him a reduction of one additional point under U.S.S.G. § 3E1.1(b). The Court of Appeals examined the record and found no error in the district court's findings. The commentary to Section 3E1.1 makes clear that the additional one-point reduction should be awarded only where the defendant's guilty plea permitted the government to avoid lengthy and unnecessary trial preparation. Gonzalez did not enter his guilty plea "particularly early in the case." Rather, he plead guilty the morning trial was scheduled to begin, only after losing his motion to suppress the evidence seized during the stops of his vehicle. The government had already prepared for trial. Moreover, Gonzalez refused to commit to the government in advance that he would plead guilty if his suppression motion was denied. The tardiness of Gonzalez's plea required the government to prepare for the suppression hearing - - which involved the testimony of several witnesses - - and for the commencement of trial later that same day.

United States v. Wallace, 2005 WL 713716 (3rd Cir.(Pa.))). On November 5, 2003, a grand jury indicted the defendant on one count of making false statements in connection with the acquisition of a firearm, in violation of 18 U.S.C. § 922(a)(6). She was released on bail and, pursuant to a plea agreement, pleaded guilty on January 29, 2004. While out on bail, the defendant was charged in state court with passing numerous bad checks. She also tested positive for marijuana in six separate drug tests. At that point, the United States moved to revoke her bail. At a bail revocation hearing on April 12, 2004, the defendant denied using marijuana. She instead claimed that her positive drug tests were the result of second-hand smoke inhalation. She did, however, admit to passing bad checks.

Instead of revoking the defendant's bail, the district court requested that the probation office provide the court with the specifics of the defendant's two most recent drug tests in order to determine whether the levels of marijuana in her system were consistent with her claim of second-hand inhalation. The district court also ordered the defendant to undergo more drug testing, for which it requested the specific levels as well. The defendant took a drug test that same day and tested positive for marijuana. She tested positive for marijuana once more - - for the eighth time - - a week later on April 19, 2004. An amended presentence investigation report, filed on April 28, 2004, advised the district court that the levels of marijuana found in the drug tests indicated positive use, not second-hand inhalation. Because of her repeated positive drug tests and passing of bad checks, the presentence report recommended that the defendant not receive the two level reduction for acceptance of responsibility despite her cooperation with authorities on the day of her arrest.

At sentencing on June 7, 2004, the district court found that the defendant was not entitled to the two level sentence reduction for acceptance of responsibility. According to the district court, "the continued use of drugs and criminal conduct that occurred after the entry of the plea negates any consideration of that factor."

The defendant appealed, arguing that her cooperation with authorities after her arrest entitles her to a sentencing reduction for acceptance of responsibility. The Court of Appeals ruled that "the district court's determination that Wallace did not merit a two level reduction for acceptance of responsibility due to her ongoing criminal activity is not clearly erroneous."

United States v. Lott, 2004 WL 1375697 (3rd Cir.(Pa.))). The Court of Appeals held that the district court did not err in denying a reduction for acceptance of responsibility for a defendant who frivolously contested relevant conduct by denying all responsibility for the actions of his co-conspirator

United State v. Baker, 2004 WL 817402 (3rd Cir.(Pa.))). Baker pled guilty to mail fraud in violation of 18 U.S.C. § 1341, based upon her embezzlement of over $400,000 from two former employers. Baker admitted to using the proceeds to purchase several pieces of diamond jewelry that had been seized on November 19, 2001, by the FBI. On March 25, 2002, the district court entered a Preliminary Order of Forfeiture that identified the seized jewelry as property subject to forfeiture. In July 2002, Baker sent the FBI several pieces of jewelry as part of her restitution obligation; she later identified the sent items as the diamond jewelry identified in the order. When the FBI brought the jewelry to an appraiser, however, it discovered that the jewelry was made not of diamond, but of cubic zirconia. The government then learned that Baker had purchased the cubic zirconium jewelry, which costs substantially less than the diamond jewelry, subsequent to the issuance of the forfeiture order.

At her sentencing hearing, Baker testified that she had purchased the cubic zirconium jewelry for her personal use, to replace the diamond jewelry seized by the FBI. She claimed that she directed her husband to send the diamond jewelry to the FBI because she was ill at the time, and that her husband inadvertently sent the cubic zirconia instead. The district court had grave questions about Baker's credibility with regard to her explanation, and found that the defendant had obstructed justice.

She argued on appeal that the district court erred in denying her a three-point reduction for acceptance of responsibility. The Court of Appeals found no merit to her argument. The district court properly weighed all circumstances including her apparent disregard for her restitution obligation, as evidenced by her purchase of two new vehicles to replaced vehicles seized by the FBI in connection with her embezzlement, her purchase of $1,700 worth of jewelry to replace the seized diamond jewelry, and her attempt to pass off fake jewelry in satisfaction of the forfeiture order.

United States v. Lucas, 2004 WL 161337 (3rd Cir.(Pa.))). The defendant pleaded guilty to two counts of bank robbery, three counts of armed bank robbery and one count of brandishing a firearm during a crime of violence. The presentence investigation report did not recommend a reduction for acceptance of responsibility, concluding that the defendant's violent and intimidating conduct while in custody is inconsistent with acceptance of responsibility. The report detailed 22 separate instances of misconduct by the defendant while in custody following his arrest. Fourteen of these incidents took place after the defendant entered into the plea agreement. The defendant appealed. The Court of Appeals affirmed the judgment, stating that the denial for acceptance of responsibility was appropriate.

United States v. Walker, 2003 WL 21577934 (3rd Cir.(Pa.))). On appeal, the defendant challenged the district court's denial of his request for a two level downward adjustment for acceptance of responsibility. After the defendant pled guilty to possessing at least five grams of crack cocaine with intent to distribute, he requested independent testing of the composition of the drugs. The district court held that the defendant's plea, and his multiple admissions during his colloquy that the controlled substance was crack, provided a sufficient basis for the court to find that the controlled substance was in fact crack cocaine. It was the court's view that, by contesting this finding for purposes of sentencing, the defendant had falsely denied relevant conduct, thereby demonstrating that he did not accept responsibility. The Court of Appeals agreed with the district court. . . "when Walker requested an independent test of the composition of the drugs, he contested a fact that the court had properly determined to be true."

United States v. Rodriguez, 2003 WL 21467225 (3rd Cir.(N.J.))). The defendant pled guilty to conspiracy to distribute and possess with intent to distribute more than 500 kilograms of cocaine. On appeal, he argued that the district court improperly refused to grant downward adjustments of one-level and two-levels under §§ 3E1.1(b)(2) and 3B1.2(b).
Under § 3E1.1(b)(2), a defendant will not receive an additional one-level decrease in offense level, unless the defendant assisted authorities "in the investigation or prosecution of his own misconduct by . . . timely notifying authorities of his intention to enter a plea of guilty." Timeliness requires that the notice provides the government and the court an opportunity to conserve resources. *See Zwick*, 199 F.3d at 691.

In this case, the defendant had the opportunity to notify the authorities of his intent to make a guilty plea prior to the time he made it. Almost eight months passed between the time of the defendant's arrest and the time he notified authorities of his intent to plead guilty. During this time, four trial dates were set and continued. The government and the court were prepared on these dates to go forward. Moreover, in at least four proffer sessions with the U.S. Attorney's office, the defendant adamantly denied involvement in the conspiracy. The Court of Appeals held that the untimeliness of the defendant's notice of his intent to plead guilty was not clearly in error.

United States v. Munoz-Valencia, 2003 WL 873983 (3rd Cir.(Virgin Islands))). The defendant was a Columbian citizen who was arrested on December 14, 2000, while attempting to board an airplane. He was carrying $90,000 of undeclared currency and using a false resident alien identification card. He pled guilty to fraud and misuse of documents in violation of 18 U.S.C. § 1546(a). The sentencing judge found the defendant's admission of possessing and

using the false resident alien card insufficient to constitute acceptance of responsibility. The defendant appealed, arguing that he had accepted responsibility. At the time of his arrest, the defendant admitted possessing the false resident alien card for six months and using it to enter the United States illegally. Because the defendant was found carrying $90,000 in undeclared currency, the district court concluded he was involved in something else, because he did not make any attempt to declare that currency. Thus, the district court did not believe that he had accepted appropriate responsibility. The Court of Appeals found no clear error and affirmed the judgment of conviction and sentence.

United States v. Arreguin-Jimenez, 2003 WL 356440 (3rd Cir.(Pa.))). The defendant was charged with illegal reentry after deportation by an alien previously convicted of an aggravated felony offense, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). During a bench trial, the defendant stipulated that he reentered illegally, but challenged whether he was previously convicted of an aggravated felony.

On appeal, the defendant argued that the district court impermissibly considered his refusal to concede that he was convicted of terroristic threats in the Court of Common Pleas as a basis for its rejection of his request for a reduction for acceptance of responsibility. The government listed the charge in the indictment to include the fact that the defendant was previously convicted of an aggravated felony, thus increasing its burden in proving the prior conviction. The Court treated the fact of prior conviction of an aggravated felony as an element of the crime charged and the defendant presented a vigorous challenge at the bench trial to the government's argument that he was previously convicted of terroristic threats. Under these circumstances, the Court of Appeals held that it was reasonable for the district court to find that the defendant had not accepted responsibility for the crime.

United States v. Peppers, 2003 WL 329246 (3rd Cir.(Pa.))). Maurice Peppers pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). His presentence report recommended against an adjustment for acceptance of responsibility based on two misconducts that Peppers incurred while incarcerated prior to sentencing. The first misconduct was for "threatening a correctional employee or their family." The second was issued after Peppers tested positive for, and admitted to smoking, marijuana. At sentencing, the district court judge stated "it is very, very difficult to give someone acceptance of responsibility when they absolutely flaunted the law in becoming involved with drugs after the plea and awaiting sentencing." The Court of Appeals held that the decision to deny acceptance of responsibility was not clearly erroneous.

United States v. White, 2003 WL 164736 (3rd Cir.(Pa.)). The defendant pled guilty to two counts of bank fraud, pursuant to 18 U.S.C. § 1344, and was sentenced. On appeal, he contends that the district court erred by (1) compelling him to testify to allegedly incriminating relevant conduct as a condition precedent to determining whether he had accepted responsibility under 3E1.1 in violation of his Fifth Amendment rights, and (2) concluding that he had failed to renounce his criminal associations as a basis for finding that he had not accepted responsibility under 3E1.1.

After advising the defendant of his Fifth Amendment rights, the district court informed him that it would consider the government's evidence that he had been found with counterfeit access devices and arrested for a violation of bail and that he had an opportunity to make a statement about that or anything else he wanted the district court to consider. The defendant never asserted his Fifth Amendment privilege. "Requiring a defendant to accept responsibility in order to obtain a sentence reduction is not a threat to impose punishment for an assertion of the Fifth Amendment privilege." *Frierson*, 945 F.2d at 661. Moreover, the district court neither required the defendant to make a statement nor conditioned the two-level reduction for acceptance of responsibility, either expressly or by implication, on his making a statement. Because the district court did not compel him to admit possession of the counterfeit access devices, his Fifth Amendment rights were not violated.

Second, the defendant argues that the district court erred in concluding that he had failed to renounce his criminal associations as a basis for finding that he had not accepted responsibility under 3E1.1. In finding that the defendant had not renounced his criminal associations, the district court credited the special agent's testimony that the defendant was discovered with several counterfeit access devices after entering into his plea agreement and was arrested for violating the conditions of his bail. The defendant's possession of the counterfeit devices is relevant criminal conduct that the district court properly considered in determining whether he had accepted responsibility. The judgment of the district court was affirmed.

United States v. Williams, 2003 WL 42471 (3rd Cir.(Pa.)). The defendant founded and incorporated MICOM, Inc., a telemarketing firm which offered and sold licensed application preparation services for paging and mobile radio Federal Communication Commission licenses. He later recruited Joseph Viggiano to run the day-to-day operations of the firm. In November 1994, MICOM began to advertise to potential investors that the firm would assist them in acquiring the FCC licenses, aleging that the licenses would lead to huge profits through either lease or resale to large telecommunication firms. In fact, the licenses had no resale value and telecommunications companies do not lease such licenses from individuals. Nonetheless, approximately 175 investors gave MICOM about $1,650,000 based on these false representations.

After initially founding MICOM and developing its fraudulent licensing concept, in 1995, Mr. Williams entered into negotiations with Mr. Viggiano to sell his interest in MICOM. Once a deal was reached, Williams transferred his interest in the on-going conspiracy to Viggiano for $60,000, an amount that represented one-half the value of the business. Between August 10 and November 17, 1995, Viggiano proceeded to wire transfer a total of $62,000 to Williams, who had taken up residence in Brazil. A few months later, the Federal Trade Commission closed MICOM following an investigation by that agency.

On appeal, Viggiano argued that the district court erred in refusing to grant him a sentence reduction for acceptance of responsibility. He asserts that the district court (1) improperly considered his pre-indictment conduct in determining whether Viggiano cooperated with authorities; (2) improperly considered Viggiano's failure to voluntarily make restitution because he lacked the financial means to do so; and (3) his post-indictment conduct was forthcoming and not evasive.

The Court of Appeals affirmed the judgment and sentence. The primary impetus for the denial seemed to be a belief that Viggiano failed both to acknowledge the harm caused to the victims of his crime and to demonstrate remorse for his actions. Despite his assistance in the apprehension of his co-defendant, it was not clear error for the district court to reason that Mr. Viggiano had not sufficiently exhibited acceptance of responsibility. It was not erroneous for the district court to have considered his pre-indictment conduct where, as here, the prior denials were of the same conduct at issue in the criminal offense and the denials continued into the criminal investigation.

United States v. Hinton, 2003 WL 40479 (3rd Cir.(Pa.)). The district court found that Hinton falsely denied at sentencing that the drugs at issue were crack after he had explicitly acknowledged during the guilty plea colloquy that the drugs were indeed crack cocaine. In light of this about face, and in the absence of any indication by Hinton earlier in the proceedings that he intended to challenge the identity of the drugs at sentencing, the Court of Appeals affirmed the judgment of the district court.

United States v. Thomas, 2002 WL 31894884 (3rd Cir.(Pa.)). A jury found the defendant guilty of bank fraud in violation of 18 U.S.C. § 1344 and fraudulently inducing a person to travel in interstate commerce in violation of 18 U.S.C. § 2314. Anne Weygandt, then aged 88, employed the defendant as a home health care aide. Weygandt believed herself to be in fair health, although she had suffered a minor stroke. She frequently made loans to her nephew and also authorized others, including the defendant, to complete checks which she had pre-signed, by filling in the amount and name of the payee. These checks were used for various purposes, including the payment of bills. The defendant also received and sorted Weygandt's mail. From November 1997 to July 1998, the defendant induced Weygandt to sign numerous checks for the pretextual purpose of transferring money among Weygandt's several bank accounts or for the purchase of groceries. Instead, the defendant cashed the cheks, made out either to the defendant or to cash, at Weygandt's banks, and pocketed all or most of the proceeds. She withdrew approximately $124,300 from Weygandt's Mellon Bank accounts and $9,400 from her Citizen's Bank account.

Weygandt was physically present at the bank with the defendant when the withdrawals occurred, and she herself endorsed those checks made out to cash. After the defendant originally sought to cash Weygandt's checks by herself, one of the tellers insisted that Weygandt be present before the bank would honor the checks. Despite Weygandt's presence, the transactions still aroused the suspicion of bank tellers, who asked the defendant the purpose of the withdrawals. Either the defendant or Weygandt would respond that the money was for travel, or for transfers among Weygandt's accounts, or for shopping.

The defendant appealed her sentencing, arguing that the district court erred in denying her a reduction for acceptance of responsibility. The district court, in denying the reduction, relied chiefly on the defendant's decision to make the government prove its case at trial. In rebuttal, the defendant points to her pretrial confession to police investigators, which the government repeatedly referred to in its arguments to the jury, and claims that the government's factual case was essentially established by virtue of the confession. She further argues that the confession admits to the fundamental wrongdoing and that proceeding to trial was intended not to establish

her factual innocence, but to determine whether her conduct fell within the parameters of the bank fraud statute.

The Application Notes do permit a district court to consider truthful admissions to the conduct for which defendant is criminally responsible, so long as no relevant conduct is not falsely or frivolously denied or contested. However, in *United States v. DeLeon-Rodriguez*, 70 F. 3d 764, 767 (3d Cir. 1995), it was held that "a reduction is generally not meant to apply to a defendant who puts the government to its burden of proof at trial." Thus, while there was no colorable legal defense to the travel fraud charge, the defendant nonetheless forced the government to prove its case at trial. Thus, this is not the "rare situation" where a defendant did accept guilt, despite seeking a trial. The district court committed no error in rejecting the appellant's challenge.

United States v. Is'Haq, 2002 WL 1754463 (3rd Cir.(N.J.))). The Court of Appeals affirmed the district court's denial of a two point reduction for acceptance of responsibility. Is'Haq's refusal to plead guilty resulted in a lengthy trial, during which he falsely testified about the robberies and lied to his trial counsel. In addition, the district court determined that Is'Haq had "obstructed justice." Conduct resulting in an enhancement under U.S.S.G. § 3C1.1 ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.

United States v. Albright, et.al, 2002 WL 538749 (3rd Cir.(Pa.))). The defendants pled guilty to criminal charges arising from participation in a conspiracy to steal cash, stock certificates, bond certificates, certificates of deposit, jewelry, and other property from a safe in a Mercersburg, Pennsylvania apartment. Mark Ortega claimed that the court wrongly denied him a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 because he used illegal drugs while released on bail post-indictment and before sentencing. He contends that his drug use was unrelated to the crimes charged and did not alter the fact that he manifested acceptance of responsibility through his statements to and cooperation with the police. The Court of Appeals affirmed, citing *United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996).

United States v. Fleming, 2002 WL 242335 (3rd Cir.(Pa.))). The defendant pled guilty to violations of 18 U.S.C. §§ 2252(a)(2), and (a)(4). He argued that the district court erred in failing to credit him with a three point reduction pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b)(2). The defendant asserts that the district court erred in considering conduct that he engaged in after entering a plea. He stresses that the conduct may have been distasteful, vulgar, and even reprehensible, but that it was not unlawful. He concedes that a court may rely upon post-indictment unlawful conduct in determining whether to grant § 3E1.1 reduction for acceptance of responsibility, quoting *Ceccarini* 98 F. 3d at 130, but argues that the district court erred in relying upon lawful conduct to deny a reduction in sentence.

The Court of Appeals affirmed the denial of acceptance of responsibility, stating "Under § 3E1.1(a), a defendant is entitled to a reduction in sentence if he or she 'clearly demonstrates acceptance of responsibility....' Despite defendant's protestation to the contrary, the issue here is not the legality of the defendant's behavior, but the significance of that behavior insofar as it is reflected upon his purported remorse and 'acceptance of responsibility' for his offense....The evidence that the government introduced at sentencing included numerous letters which

evidenced a total absence of remorse and no acceptance of responsibility beyond the simple fact of the plea agreement itself....The sentencing court correctly determined that defendant's letters painted a much clearer picture of his remorse and acceptance of responsibility than his guilty plea. In one such letter, the defendant expressed his gratitude for materials containing the kind of references to children that led to his prosecution in the first place. He also spoke of how he missed the 'good old days,' of having sex with children.

United States v. Hernandez, 218 F.3d 272 (3d Cir. 2000). The defendant argued that the district court erred in refusing to grant him an additional one level reduction under U.S.S.G. § 3E1.1. The district court found that the defendant's actions with respect to pleading guilty were both equivocal and tactical. The court believed that the defendant was maneuvering in an effort to obtain the benefit of a plea agreement without having to implicate his son during the allocution. Also, the defendant's equivocal nature of the defendant's offer to plead guilty required the government to continue preparing its case for trial and forced the court to reserve a portion of its calendar for trial. The Court of Appeals affirmed, noting that after sending a letter to the district court informing the court of his willingness to plead guilty, the defendant continued to send signals suggesting that he intended to put the government to its burden of proof. For example, he served a four-page omnibus discovery demand on the government. He also forwarded to the district court objections to the government's proposed jury charge and included a jury charge of his own. Finally, the day before trial, the defendant wavered before pleading guilty.

United States v. Zwick, 199 F.3d 672 (3d Cir. 2000). On appeal, the defendant argued that the district court erred in failing to award him an additional one point reduction pursuant to U.S.S.G. § 3E1.1(b). The district court adopted the probation office's conclusion that Zwick was not entitled to the extra point under subsection (b) because the government was required to prepare for trial, noting also that defendant made factual arguments at trial. Instead of concluding that the one point deduction was foreclosed simply because the government prepared for trial, the district court should have considered whether Zwick timely provided complete information as the guideline requires. The Court of Appeals stated, "However, because the district court did not fully address, let alone resolve, whether Zwick's pre-trial activity entitled him to a reduction under the specific terms of § 3E1.1(b), we will remand for consideration of whether Zwick timely provided complete information to the government under § 3E1.1(b), or if his expression of his intent to plead guilty was sufficiently timely under § 3E1.1(b)(2) to permit the conservation of government and court resources.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). A federal grand jury returned an indictment charging the defendant with premeditated murder of his wife by stabbing her repeatedly with a butcher knife. On the eve of trial, the government and the defendant agreed that he would plead guilty to second degree murder. At the time of the murder, the couple lived in Lewisburg, Pennsylvania, where she worked as a psychologist at the United States Penitentiary. On appeal, he argued that, even though the district court granted him a two level adjustment for acceptance of responsibility, it erred by denying his motion for an additional one level adjustment pursuant to § 3E1.1 of the guidelines. The district court concluded that the defendant did not qualify for the additional one level reduction because his decision to plead guilty after the jury was selected did not constitute timely notification within the meaning of

§ 3E1.1(b)(2). The Court of Appeals reversed and remanded for the defendant to be resentenced to reflect an additional one level reduction in his offense level. The record indicates that the defendant did provide complete information regarding his involvement in the offense. A defendant need only meet one of the two requirements for the additional one level reduction. The defendant called 911, reported that he had stabbed his wife, provided directions to his home and the location of the weapon, remained on the phone until authorities arrived, and cooperated with the authorities while the crime scene was investigated.

Mitchell v. U.S., __ U.S. __, 119 S. Ct. __(April 5, 1999) No. 97-7541. Petitioner pled guilty to conspiracy and three substantive counts of selling cocaine within 1,000 feet of a school, reserving the right to contest the drug quantity. At sentencing, she put on no evidence and did not testify to rebut the government's evidence, claiming the Fifth Amendment privilege against self-incrimination. Nevertheless, the judge "held it against" her that she did not testify at sentencing. The Supreme Court reversed, unanimously agreeing that defendant had the right to invoke the Fifth Amendment privilege at sentencing. Moreover, splitting 5-4, the majority held that the sentencing judge may not draw an adverse inference from the defendant's silence. The majority expressed "no view" as to whether a defendant's silence may be considered in determining acceptance of responsibility under the sentencing guidelines.

United States v. Cohen, 171 F. 3d 796 (3d Cir. 1999). Gerson Cohen, a meat salesman for Butler Foods, paid kickbacks totaling $111,548.21 to five meat managers for Thriftway Food Stores. A jury convicted him on 25 counts of mail fraud and he pleaded guilty to three counts of income tax fraud. In computing Cohen's offense level, the district court used the actual dollar amount of the kickbacks and granted him a two level reduction for acceptance of responsibility. The Government appealed, claiming that the district court erred by using the dollar amount of the bribes rather than the benefit conferred by the bribe, and by granting a reduction for accepting responsibility. This case presents the unusual situation in which the defendant has pleaded guilty to some of the charges against him while going to trial on the others. The Court of Appeals held that in cases such as this, the trial judge "has the obligation to assess the totality of the situation in determining whether the defendant accepted responsibility." As a result, the "totality" assessment must include the fact that Cohen originally pleaded not guilty to all the counts and put the Government to its burden of proof on the majority of the charges, pleading guilty to the tax counts only after being convicted on the bribery charges. Cohen's sentence was vacated and remanded for resentencing. Acceptance of responsibility reduction does not place unconstitutional burden on right to trial.

United States v. Bennett, 161 F. 3d 171 (3d Cir. 1998). The defendant was sentenced to 144 months imprisonment for perpetrating the largest charity fraud in history. On appeal, the defendant argued that the district court erred in denying a two-level downward adjustment for acceptance of responsibility. In upholding the denial, the court of appeals noted that the defendant continued to "deny factual guilt and criminal intent for his actions." In the press release announcing his decision to plead nolo contendere, the defendant made a point of stating that he did not admit to the government's version of the facts. More importantly, at the sentencing hearing the defendant continued to deny culpability.

United States v.Muhammad, 146 F. 3d 161 (3rd Cir. 1998). The defendant was charged with two firearms offenses including possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). At his arraignment, he pled not guilty and was released on bond. He fled and was arrested two weeks later. A superseding indictment was returned charging the defendant with the two original firearms count plus an additional count for failure to appear (bail jumping). A jury convicted him on the bail jumping charge, but was unable to reach a verdict on the firearms charges which were ultimately dismissed. On appeal, the defendant challenged the district court's refusal to award him a reduction in his sentence based on acceptance of responsibility. In denying the reduction, the district court found that the defendant had engaged in "some tactical maneuvering" to gain a benefit (non-admission of the evidence related to the bail jumping offense) in return for a guilty plea. The court also found that, by going to trial, the defendant "presented the government not only with the need to prove its case, but also with the risk of jury nullification." The denial was affirmed. Clearly demonstrating acceptance of responsibility requires a genuine show of contrition. Even though the defendant took the stand and admitted the essential facts underlying the bail jumping charge, he offered no affirmative statement of remorse or contrition.

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996). Positive drug tests and failure to participate in a drug rehabilitation program that occurred post-indictment and before sentencing, which are wholly unrelated to the crime charged, can be properly considered by the sentencing court in denying a reduction for acceptance of responsibility. Defendant's post-offense conduct can shed significant light on the genuineness of a defendant's claimed remorse. The appellate court noted that USSG. §3E1.1 Application Note 1 sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts. USSG. § 3E1.1, comment. (n.1(g)).

United States v. DeLeon-Rodriguez, 70 F. 3d 764 (3d Cir. 1995). Denial of reduction for acceptance of responsibility was warranted based on finding that defendant contested his factual guilt beyond a mere legal challenge.

United States v. Thompson, 70 F. 3d 279 (3d Cir. 1995). Subsequent to defendant's sentencing, the Sentencing Commission amended §3E1.1 to provide for an additional one level reduction for acceptance of responsibility. The Third Circuit refused to apply the amendment retroactively. The statute that permits the Commission to make reductions retroactive, 18 U.S.C. §3582(c)(2), states that a reduction is proper if consistent with the applicable policy statements of the Sentencing Commission. Guideline §1B1.10 states that an amendment not listed in subsection (c) may not be applied retroactively. The amendment to §3E1.1 was not listed in §1B1.10(c).

United States v. Veksler, 62 F. 3d 544 (3d Cir. 1995). The Third Circuit upheld the denial of a reduction for acceptance of responsibility under §3E1.1 even though defendant made "significant admissions" to investigating officers during the execution of a search warrant and during a subsequent interview. Defendant did not admit that he had personally committed the crimes charged in the indictment. Moreover, the adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial.

United States v. Evans, 49 F. 3d 109 (3d Cir. 1995). Defendant gave a false name at his arrest, and used that false name in at least three court appearances. He revealed his true identity to a probation officer after he pled guilty but before sentencing. Except for defendant's voluntary disclosure, his true identity would not have been ascertained. His real identity increased his criminal history category. The fact that, after pleading guilty, defendant moved to withdraw guilty plea and, when that motion was denied, contested extent of his involvement in drug conspiracy and disputed claim that he held position as supervisor were factors for court to consider in determining whether to depart downward on theory of acceptance of responsibility in excess of the norm.

United States v. Fields, 39 F. 3d 439 (3d Cir. 1994). Sentencing court incorrectly considered defendant's failure to admit conduct not comprising part of the offenses of conviction in denying one level decrease under §3E1.1(b). A defendant is not required to affirmatively admit relevant conduct beyond the offense of conviction in order to obtain an acceptance of responsibility reduction.

United States v. Pardo, 25 F. 3d 1187 (3d Cir. 1994). Defendant argued that he should have received a three-level, rather than a two-level, reduction for acceptance of responsibility. The Third Circuit found that defendant was not entitled to the additional reduction. His plea was not timely but came after a long period of flight during which the government was put to a continuing investigation of defendant's many criminal schemes. Also, he had provided incomplete information to investigators regarding the fraudulent activities of others.

United States v. Price, 13 F. 3d 711 (3d Cir. 1994). The Third Circuit upheld the denial of a reduction for acceptance of responsibility to a defendant who admitted that he had "done wrong," but nonetheless seemed to challenge the jury's verdict. On cross-examination, he refused to state plainly that he was a member of a drug organization and denied most of the testimony at trial concerning him. The only unlawful conduct he admitted was cheating a drug dealer and selling small amounts of drugs, and he denied that those activities were linked to the drug organization.

United States v. Dersham, 16 F. 3d 406 (3d Cir. 1993). State police troopers found defendant passed out behind the wheel of his automobile in a parking lot. The engine was running and a .45 caliber semi-automatic handgun was on the front seat. Although the gun was in a holster and the safety mechanisms were engaged, the weapon was cocked and loaded with a bullet in the chamber and with five bullets in the inserted clip. An unplugged police scanner programmed to local law enforcement frequencies was in the car. Richard H. Lang, a retired Marine Corps Major, testified at the presentence hearing that he owned the weapon found in Dersham's possession and that Dersham had stolen it from him. Dersham testified at the presentence hearing that he bought the weapon from Lang for $649. The district court concluded that Dersham had committed perjury, applied a two level enhancement under 3C1.1 and denied a reduction for acceptance of responsibility. The Court of Appeals affirmed.

United States v. Rodriguez, 975 F. 2d 999 (3d Cir. 1992). Sentencing court erred in failing to consider defendants' reasons for refusing to plead guilty to entire indictment in determining not to grant a two-level reduction for acceptance of responsibility. Defendants gave full and accurate statements after they were arrested detailing nature of scam as well as identities of various participants. Defendants were willing to plead guilty to conspiracy to distribute cocaine, and issues which defendants were unwilling to plead guilty on, involving gun possession count and quantity of cocaine involved, were subsequently decided in their favor.

United States v. Lieberman, 971 F. 2d 989 (3d Cir. 1992). One level departure for "extraordinary acceptance of responsibility" was appropriate for defendant who readily admitted offense when confronted, resigned his position, started making restitution after his embezzlement was discovered, agreed to pay about $34,000 more than he thought was owed and to which he pled guilty, and met with bank officials to explain how in the future they could detect improper transactions.

United States v. Barr, 963 F. 2d 641 (3d Cir. 1992). District court did not err in denying a reduction for acceptance of responsibility even though defendant claimed he went to trial only to preserve the issue of the applicability of the "exculpatory no" doctrine to the facts of his case for appeal, not to contest his factual guilt. The parties gave conflicting accounts of the course of the pre-trial negotiations, and the probation officer found that defendant's written statement "fell short as a direct acknowledgment of essential misconduct."

United States v. Frierson, 945 F. 2d 650 (3d Cir. 1991). Defendant pled guilty to unarmed robbery. His voluntary statement to probation officer, denying that he was armed during robbery, was not compelled within meaning of Fifth Amendment. Thus, the sentencing court was free to rely on such denial in face of contrary evidence to deny defendant two-level reduction for acceptance of responsibility. Defendant did not claim privilege in his meeting with probation officer, and was not threatened with denial of sentence reduction if he invoked privilege. Section 3E1.1 authorizes the sentencing court to consider related conduct as well as conduct constituting the offense of conviction in determining whether a defendant has accepted responsibility. However, when defendant consistently asserts privilege against self-incrimination as to acts beyond those of offenses of conviction, judge cannot rely on defendant's failure to admit such acts as basis for denying two-level reduction.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). Defendant not entitled to reduction for acceptance of responsibility despite admissions to probation officer that he participated in transactions for which he was convicted but also gave a number of excuses for his conduct. He claimed that he was addicted to drugs, became involved in the transactions at the request of a government informant, and denied that he was ever in the business of selling cocaine for profit.

United States v. Demes, 941 F. 2d 220 (3d Cir. 1991). Defendant contended that he was entitled to a reduction for acceptance of responsibility because he cooperated with government agents, explained where he obtained his cocaine, and was fully debriefed by the government. He went to trial and raised an entrapment defense. The Third Circuit rejected defendant's claim, finding it difficult to reconcile defendant's claim of entrapment with his claim that he accepted responsibility.

United States v. Singh, 923 F.2d 1039 (3d Cir. 1991). The district court did not err by failing to make an adjustment for acceptance of responsibility where the appellant denied to the probation officer having knowingly committed a crime. Neither plea stipulation, nor any other submission made by parties, can override discretion of sentencing judge, who bears ultimate responsibility for determining whether defendant is entitled to offense level reduction for acceptance of responsibility. There is also nothing inherently inconsistent in finding that defendant had substantially assisted government and thus qualified for downward departure, but had not accepted responsibility under §3E1.1.

United States v. Audinot, 901 F. 2d 1201 (3d Cir. 1990). The defendant remained at large for two and one-half years following his escape. While he supplied some evidence of remorse, he never attempted to contact authorities or turn himself in. The Third Circuit upheld the district court's denial of acceptance of responsibility.

United States v. Cianscewski, 894 F. 2d 74 (3d Cir. 1990). Proper not to grant reduction for acceptance of responsibility when defendant refuses to cooperate with probation officer, maintains he was entrapped and failed to show at his original sentencing hearing.

United States v. McDowell, 888 F. 2d 285 (3d Cir. 1989). The Third Circuit held that the guidelines clearly state that an adjustment for acceptance of responsibility is only to be made after multiple counts are grouped. Thus, defendant's obstruction of justice on one of three counts precluded adjustment for acceptance of responsibility.

United States v. Ortiz, 878 F.2d 125 (3d Cir. 1989). Defendant asserted that the district court's finding that he had not accepted personal responsibility was in error. He argues that his entry of a guilty plea, his guilty plea colloquy, and his waiver of all procedural rights, all without a plea bargain, demonstrate his acceptance of responsibility. The Third Circuit upheld the denial of acceptance. The defendant attempted to minimize his role in the offense in discussions with the probation officer. Merely pleading guilty is not enough to raise a presumption of acceptance of responsibility.

United States v. Ofchinick, 877 F. 2d 251 (3d Cir. 1989). Fact that escapee attempted to make arrangements for his surrender did not justify reduction for acceptance of responsibility given that he did not surrender but attempted to negotiate with government.

CHAPTER FOUR: ***Criminal History and Criminal Livelihood***

Part A -- Criminal History

§ 4A.1.1 Criminal History Category

United States v. Greenidge, 2007 WL 1379964 (3rd Cir.(N.J.))). The district court increased the defendant's criminal history category from Category III to Category IV because the defendant was on parole at the time of the instant offense (U.S.S.G. § 4A1.1(d)), and the offense was committed less than two years after his release from custody (U.S.S.G. § 4A1.1(e)).

On appeal, the defendant argued that the district court was not permitted to consider the details of his prior convictions, namely, the dates that he was paroled and released from custody, in sentencing him because those details were not included in the indictment. He did not contend, however, that the information about his prior convictions relied upon by the district court was inaccurate. The Court of Appeals, citing *United States v. Booker*, 543 U.S. 220, 224 (2005), held that the defendant's Sixth Amendment rights were not violated based on facts concerning his prior convictions that were not admitted by him or found by a jury beyond a reasonable doubt.

United States v. Cousin, 2007 WL 625638 (3d Cir.(Pa.))). In the presentence investigation report, the probation officer examined computer records and determined that the defendant had two prior juvenile adjudications. Pursuant to U.S.S.G. §§ 4A1.1(c) and 4A1.2(d)(2)(B), one point was added for each adjudication. Defense counsel argued that the district court may have erred by relying on computerized court documents rather than a physical copy of the defendant's juvenile court record.

In affirming the judgment and conviction of the district court, the Court of Appeals held that the district court's careful analysis of the computerized records more than met the preponderance threshold set forth in *United States v. Grier*, 475 F. 3d 556 (3rd Cir. 2007). A district court determines all sentencing facts under the preponderance of evidence standard, so long as the sentence remains under the statutory maximum. See *Grier.*

United States v. Siegel, 477 F.3d 87 (3rd Cir. 2007). The defendant's prior criminal record included more than one indecent assault conviction which were adjudicated at the same time and received points under U.S.S.G. § 4A1.1(f). The question presented on appeal was whether the defendant's conviction for indecent assault under Pennsylvania law in violation of 18 PA. CONS. STAT. § 3126 constitutes a "crime of violence" within the meaning of U.S.S.G. § 4B1.2.

In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court announced a "formal categorical approach" to determine whether an offense falls within the category of "crime of violence." Since its decision in *Taylor*, the Supreme Court has looked at the categorical approach and modifications thereto in the context of situations where, like here, a defendant has pleaded guilty to a prior conviction. In *Shepard v. United States*, 544 U.S. 13, 16-17 (2005), the Supreme Court held that "a later court determining the character of an admitted prior conviction is generally limited to examining the statutory definition, charging document, written plea

agreement, transcript of plea colloquy, and any explicit factfinding by the trial judge to which the defendant assented," or other "comparable judicial records" of the prior conviction.

Given *Shepard's* strictures on review, the vagueness of the Pennsylvania charging documents, and the absence of the plea colloquy from the defendant's sentencing hearing in Pennsyvania court, the Court of Appeals looked to a description of the state offenses in the instant federal presentence report, which indicated that the defendant physically restrained and forced the victim to accede to his assaults. There was nothing in the record to show that the defendant objected to the factual description of the assaults, nor did he challenge these descriptions on appeal. The Court of Appeals, therefore, held that the facts averred in the presentence report acceded to by the defendant avoid the "collateral trial," and "judicial factfinding" preempted by the Court's holding in *Shepard*. The Court of Appeals affirmed the district court's decision that the indecent assaults were crimes of violence.

United States v. McNeal, 2006 WL 929357 (3rd Cir.(Pa.))). The defendant pled guilty on January 13, 2005, to a firearm conspiracy. He was sentenced on May 6, 2005, to 18 months imprisonment followed by two years of supervised release. The defendant appealed his sentence, alleging that the district judge erred in calculating his criminal history category. He argued that placement in a residential program for delinquent youth is not a "juvenile sentence of confinement" under U.S.S.G. § 4A1.2(d)(2)(A). The defendant was adjudicated delinquent approximately 11 months prior to the instant offense, at the age of 17, for various charges and committed to Abraxas Leadership Development Program. He was released approximately four months after his commitment, and released from supervision approximately seven months after committing the instant federal offense. This juvenile adjudication resulted in five criminal history points (two under 4A1.2(d)(2)(A) and 4A1.1(b), two under 4A1.1(d), and one under 4A1.1(e).

The Court of Appeals held that the district judge properly treated the defendant's commitment to Abraxas Leadership Development Program as a sentence of "confinement" or "imprisonment" that added five criminal history points.

United States v. Wright, 2004 WL 2241358 (3rd Cir.(Pa.)). On appeal, the defendant argued that the district court erred in admitting hearsay evidence regarding his youthful offender adjudication. Wright maintained that the evidence adduced by the probation officer was not reliable inasmuch as she did not have a certified record of his conviction. The defendant pointed out that the probation officer relied on "hearsay in the form of part of a draft of some report done by some unidentified personnel of the Bronx County probation office" and a New York State rap sheet. In affirming the judgment of the district court, the Court of Appeals wrote, "Indeed, all of the evidence of record indicates that Wright's burglary offense concluded with a youthful offender adjudication in 1990 which resulted in a sentence of one to three years imprisonment. Even the Certificate of Disposition produced by Wright confirms that the records of the Supreme Court of the State of New York, Bronx County, reflect that Wright was charged with burglary and adjudicated a youthful offender. Thus, we conclude that the evidence marshaled by the probation officer was reliable and appropriately considered by the District Court."

Further, the Court of Appeals noted that certified judgments of conviction are not required in every case. See *United States v. Watkins*, 54 F.3d 1163, 168 (3d Cir. 1995). And New York law provides that even though the official records regarding the adjudication are confidential, such records are accessible by the New York probation department and may be shared, as they were in this instance, with other sate and federal law enforcement and judicial agencies. The Court of Appeals also indicated that a youthful offender adjudication was appropriately considered as a conviction for purposes of computing the guidelines.

United States v. Neary, 2004 WL 1414208 (3rd Cir.(N.J.))). The defendant argued on appeal that the prior offenses that were considered in the determination of his career offender status were "related," and, therefore, should be treated as one offense for purposes of § 4A1.1(a), (b), and (c). Having found that there were no intervening arrests between his prior bank robbery offenses, the district court determined that Neary's previous convictions, from Florida and Washington, were not consolidated for trial or sentencing. Neary argued that a similar motive, target, modu operandi, and substantive offense provide the necessary basis for a finding that the bank robberies were part of a common scheme or plan. The Court of Appeals disagreed. The finding of a "common scheme or plan" is based upon something more than similarity of purpose, motive and target.

United States v. Melendez, 2004 WL 334338 (3rd Cir.(N.J.))). The defendant challenged the district court's sentencing calculation, arguing that it erroneously assigned three criminal history points to his prior conviction, for which he was sentenced to "time served," not to a specific period of time. The sentencing guidelines direct the sentencing court to "add three points for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). The district court assessed three points based on the defendant's prior conviction of making terroristic threats, for which he was sentenced to time served - - 448 days in prison. Therefore, the Court of Appeals concluded that the district court correctly applied the guidelines when it assigned three criminal history points to the prior sentence.

United States v. Merlino, 349 F.3d 144 (3d Cir. 2003). The district court added two points to defendant's criminal history score after finding that he committed the charged extortion conspiracy while serving a three-year term of probation. He argued that the court erred in finding that the offense began prior to September 6, 1992, the date on which his probation ended. However, the indictment charged that the extortion conspiracy began in April of 1992, and the district court found that the extortion began in April of 1992, citing testimony that defendant and others were performing shakedowns at that time. When confronted with this testimony at sentencing, counsel responded that it was not specific since it did not specify the victims of the extortion or the amounts extorted. This lack of specificity argument was unpersuasive. The Third Circuit ruled that the district court's approval and adoption of the probation department's finding that defendant was on probation when he committed some of the crimes of conviction was not clearly erroneous.

United States v. Yednak, 2003 WL 21267476 (3rd Cir.(Pa.))). In this appeal, the defendant argued that the district court erred in attributing one point for a retail theft conviction that was a summary offense. The judgment and commitment order of the district court was affirmed.

United States v. Maswadeh, 2003 WL 1550808 (3rd Cir.(Pa.))). In this appeal, the defendant argued that the district court erred in calculating his criminal history. On October 5, 2002, the Court of Common Pleas of Cumberland County, Pennsylvania, found him in contempt of court for failure to pay child support and sentenced him to six months imprisonment. The sentence was vacated 15 days later when the defendant satisfied his support obligations. The Court of Appeals held that the district court properly added one criminal history point.

United States v. Riviere, 2003 WL 214465 (3rd Cir.(Del.))). In her appeal, the defendant argued that the district court erred in adding three points to her criminal history calculation for her prior Florida conviction. She argued that the conviction was rendered in absentia, violating her constitutional rights, and was therefore void. The Court of Appeals held that this constitutional challenge to the Florida conviction was never made in the Florida courts. For that reason, she cannot now collaterally attack her Florida conviction which enhances her federal sentence. If she had wished to challenge the constitutionality of the conviction, she had to do so in the Florida courts.

United States v. Escobales, 218 F.3d 259 (3d Cir. 2000). This appeal, which arose out of a cocaine distribution case in which the defendant pled guilty to violating 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), presents the narrow question whether a defendant, during sentencing, can lodge a collateral attack based on an alleged denial of his sixth-amendment right to a jury trial, thereby challenging the constitutionality of an underlying state court conviction used to calculate the sentencing guidelines criminal history category under § 4A1.1. Because neither 21 U.S.C. § 841 nor U.S.S.G. § 4A1.1 explicitly provides defendants the right to make a collateral challenge during federal sentencing proceedings, and because the defendant's constitutional challenge is not based on an alleged *Gideon* violation, the Court of Appeals held that the district court properly refused to entertain the defendant's collateral attack.

United States v. Oser, 107 F. 3d 1080 (3d Cir. 1997). The Third Circuit rejected defendant's argument that the district court erroneously assigned criminal history points under § 4A1.1(a) for prior conviction for under-reporting transport of cash abroad. There was nothing to show a relationship between the offense of under-reporting the currency carried and drug conspiracy offenses. Indeed, the New Jersey indictment to which defendant pled guilty alleged an agreement and acts that began after defendant's arrest for under-reporting the currency charges.

United States v. Fields, 39 F. 3d 439 (3d Cir. 1994). Court of appeals did not consider defendant's contention that district court erred in awarding criminal history point for prior sentence. If defendant's argument had been accepted, defendant would have remained in the same criminal history category and his sentence would have been unaffected.

United States v. Audinot, 901 F. 2d 1201 (3d Cir. 1990). Proper to add criminal history points under §§4A1.1(d) and (e) for escape offense. Defendant committed offense while under criminal justice control and while incarcerated.

United States v. Medieros, 884 F. 2d 75 (3d Cir. 1989). Section 4A1.1(d) adds two points to a defendant's criminal history score if the offense is committed while the defendant is still serving any criminal sentence. Section 4A1.1(e) adds one point if the current offense is committed less than two years after release or if the defendant is still in confinement. Application of these sections is not double counting when the offense in question is escape from prison, even though an element of that offense is that the defendant be in custody. The court found only that "the guidelines give adequate consideration to the interplay among these sections."

United States v. Ofchinick, 877 F.2d 251 (3d Cir. 1989). Defendant argued that base offense level of 13 under §2P1.1(a)(1) took into account the fact that he was in custody, as that was an element of the offense of escape. Therefore, he claims it was double counting to add 3 points in computing his criminal history category under §4A1.1(a) for the sentence he was serving at the time of the escape. The Third Circuit upheld the enhancements. District court did not err by adding two points under §4A1.1(d) on basis that defendant escaped while under criminal justice sentence of imprisonment, even though element of offense of escape was that defendant be in custody. Additionally, it was not improper to add one point under §4A1.1(e) for commission of offense less than two years after release from imprisonment, although sentence was imposed for defendant's escape from prison and not an offense which occurred after release.

§ 4A1.2 Definitions and Instruction for Criminal History

United States v. Haggart, 2007 WL 1228954 (3rd Cir.(Pa.))). The defendant appealed, arguing that the district court improperly used his prior convictions of reckless driving in computing his criminal history points, pursuant to U.S.S.G. § 4A1.1(c), 4A1.2(c)(1), because those prior convictions resulted in sentences of unsupervised probation. These convictions resulted in separate imprisonment sentences that were suspended for three years each, during which time the defendant was ordered to serve unsupervised probation.

Under U.S.S.G. § 4A1.2(c)(1)(A), reckless driving convictions are counted when determining a defendant's criminal history points if "the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days." The Court of Appeals held that the defendant's probation sentences, regardless of how extensively supervised, exceeded one year and, thus, were properly counted by the district court in computing his criminal history points under § 4A1.2(c)(1). Other Circuit Courts of Appeals have concluded that the term "probation" under U.S.S.G. § 4A1.2(c)(1) encompasses unsupervised probation.

United States v. Milstein, 2006 WL 3496853 (3rd Vir.(N.J.))). On appeal, the defendant argued that the district court erred in attributing a criminal history point to his prior New York state court conviction and sentence for falsifying business records in violation of McKinney's Penal Law § 175.05. Because the defendant paid a $500 fine but was not imprisoned for the New York state conviction, the district court assigned one criminal history point under U.S.S.G. § 4A1.1(c). The defendant claims that his prior sentence fell within the category of certain excluded misdemeanor and petty offenses for which, circumstances depending, a criminal history point is not assigned. See U.S.S.G. § 4A1.2(c).

The Court of Appeals held that the district court did not err in assessing one criminal history point.

United States v. Lyons, 2006 WL 3057558 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred in attributing two criminal history points to him under U.S.S.G. § 4A1.2(d)(2)(A) based on his placement in a residential school following an adjudication of delinquency. He was committed on December 13, 2001, to the Glen Mills School, a private residential facility designed to rehabilitate juvenile delinquents, and on January 15, 2003, he was released.

The Court of Appeals held that the defendant's assertion was contrary to established circuit law. In *United States v. Davis*, 929 F.2d 930 (3d Cir. 1991), the Court of Appeals upheld the assignment of two criminal history points under § 4A1.2(d)(2)(A) for the defendant's prior juvenile adjudications which resulted in his commitment to the Glen Mills School. Although the defendant's primary assertion was that his several confinements to the school should not have been counted under § 4A1.2(d)(2)(A) because they were indeterminate sentences, these commitments were within the term "sentence of imprisonment" in § 4A1.2(d)(2)(A). Sister circuits have reached the same conclusion. See *United States v. Williams*, 891 F.2d 212, 216 (9th Cir. 1989) ("Because of the deprivation of liberty, we find that commitment to juvenile hall is a form of confinement and therefore comes within § 4A1.2(d)(2)(A) of the guidelines."). See also *United States v. Wilson*, 41 F.3d 1403, 1404 (10th Cir. 1994); *United States v. Unger*, 915 F.2d 759, 761 n.3 (1st Cir. 1990)

United States v. McKoy, 452 F. 3d 234 (3rd Cir. 2006). The primary question on appeal was whether or not the District Court incorrectly treated the defendant's juvenile court dispositions as "sentences" for purposes of calculating his criminal history points. The defendant argued that under the New Jersey Code of Juvenile Justice, juveniles who are adjudicated delinquent are not sentenced but rather are subject to a "dispositional hearing." In determining what constitutes a "prior sentence" under the Guidelines, the Court of Appeals held that courts must look to federal, not state law.

Under federal law, "prior sentence" is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). The Application Notes explain that § 4A1.2(d) is intended to reduce disparity caused by varying state juvenile systems and varying availability of juvenile records among the states. The Court of Appeals stated, "As the Government correctly points out, if New Jersey juvenile court "dispositions" are not treated as "sentences" under the guidelines, defendants would be immune from receiving criminal history points for juvenile offenses committed in New Jersey, yet would receive points for juvenile offense committed in other states." The District Court therefore properly considered the defendant's juvenile "dispositions" as "sentences" under the guidelines and § 3553(f). In accordance with federal law, the punishments the defendant received as a juvenile were sentences "imposed upon adjudication of guilt" regardless of the terminology New Jersey used to describe them.

The defendant also argued that his juvenile court dispositions could not be counted because they are "diversionary." As discussed above, the state law nomenclature for a juvenile offense is irrelevant to the interpretation of the sentencing guidelines. His juvenile disposition does not fit the definition of "diversion" because there was "no deferral in the prosecution." New Jersey law provides for a type of deferred prosecution disposition, which the juvenile court did not impose on the defendant. N.J. Stat. Ann. 2A:4A-43(b) (juvenile court may adjourn entry of a disposition for up to twelve months to determine "whether the juvenile makes a satisfactory adjustment"). Because the defendant's juvenile dispositions did not involve any form of deferred prosecution, the Court of Appeals ruled that they were not diversionary and that the District Court properly considered them in calculating his criminal history points.

United States v. Jackson, 2006 WL 463903 (3rd Cir.(Pa.))). The defendant pled guilty to making a false statement to an agency or department of the United States in violation of 18 U.S.C. § 1001. In the presentence investigation report, the defendant was assigned a total offense level of ten and a criminal history category of III based on four criminal history points. The resulting guideline range was 10 to 16 months. The defendant objected to three of the four criminal history points: one each for convictions for failure to pay a local tax, for scattering rubbish, and for violation of Pennsylvania's compulsory school attendance law. At the sentencing hearing, the district court removed the point assigned for the scattering rubbish offense, lowering the defendant's criminal history category to II and the guideline range to 8 to 14 months.

On appeal, the defendant renewed her objections to the assignment of criminal history points for her convictions under Pennsylvania's compulsory school attendance law and for failure to pay a local tax. The Court of Appeals ruled that the district court properly assigned a criminal history point for the defendant's conviction under Pennsylvania's compulsory school attendance law. Here, the "substance of the underlying state offense" was the defendant's failure to take reasonable steps to ensure her child's attendance at school. This is not a juvenile status offense, nor is it truancy, for purposes of the federal sentencing scheme. Th Court of Appeals did not address the defendant's arguments regarding her local tax offense. Even if that conviction were removed, the defendant's criminal history category and guideline range would be unaffected.

United States v. Schnupp, 368 F.3d 331 (3rd Cir. 2004). The issue on appeal was whether a criminal sentence served in an alternative housing facility, such as a halfway house, can qualify as "a prior sentence of imprisonment" under § 4A1.1(a) of the sentencing guidelines. In two separate cases before the Court of Appeals, the defendants argued that because their prior sentences were served in a halfway house, not a jail, the sentences do not qualify as a "sentence of imprisonment" under § 4A1.1(a). Rather, they should be counted as a "prior conviction" under § 4A1.1(c). The defendants were sentenced to terms of imprisonment but allowed to serve their sentences at the Alcohol Rehabilitation House, a halfway house that permits work release and judicially authorized passes. The Court of Appeals ruled that "A sentence to prison or jail is a 'sentence of imprisonment' under § 4A1.1(a) and (b) and results in the assignment of additional points, whether or not permission is given for work release, furlough or placement in a less restrictive alternative facility."

United States v. Roman, Jr., 2004 449244 (3rd Cir.(Pa.)). On appeal, the defendant argued that his prior conviction for possession of less than three grams of marijuana should not have been assessed one point because he was sentenced to 30 days probation, rather than 30 days in jail or one year's probation, and because the prior offense was not similar to the instant offense. All misdemeanors and petty offenses are counted, except for certain enumerated offenses which are counted only if they meet the sentencing requirements set forth in U.S.S.G. § 4A1.2(c)(1). The Court of Appeals held that possession of marijuana is not listed as one of the enumerated offenses that limits counting, regardless of the sentence associated with it.

United States v. Cashwell, 2003 WL 21347265 (3rd Cir.(N.J.))). The defendant pled guilty to possession of a firearm by a convicted felon. He was sentenced to 60 months imprisonment. This resulted from the fact that the district court increased his base offense level and criminal history score based upon its determination that his two prior drug convictions were not related cases under Application Note 3 of U.S.S.G. § 4A1.2. He contends that this determination was in error.

On November 9, 1988, the defendant was arrested by state authorities following a drug raid. On November 11, 1989, he was convicted of conspiring to possess cocaine with intent to distribute from March 21, 1988, through December 21, 1988 (hereinafter the "sate offense"). On August 6, 1990, the defendant was arrested by federal agents. He ultimately pled guilty to a count charging him with conspiring to distribute cocaine and marijuana from March 1, 1987, through January 1, 1990 (hereinafter the "federal offense"). The district court concluded that the defendant was arrested for the first offense prior to committing the second offense and, accordingly, that the prior state and federal offenses were not related for purposes of U.S.S.G. § 4A1.2, Application Note 3. The Court of Appeals agreed.

United States v. Harrity, 2003 WL 1973178 (3rd Cir.(N.J.))). In this case, the Court of Appeals held that the defendant's prior conviction for loitering to obtain a controlled substance in violation of N.J.S.A. § 2C:33-2.1 was properly counted in calculating the defendant's criminal history category.

United States v. Vogues, 2002 WL 957377 (3rd Cir.(N.J.))). On appeal, the defendant argued that the district court misapplied the sentencing guidelines in calculating his criminal history score. He asserts that his 1995 cocaine convictions are so "related" they should have been treated as one under U.S.S.G. § 4A1.2(a)(2). However, as the district court noted, the arrests were separated by ten months. The defendant committed the second crime while out on bail for the first.

United States v. Blair, 2002 WL 125584 (3rd Cir.(N.J.))). The defendant pleaded guilty to being a convicted felon in possession of a firearm that was in or affecting commerce in violation of 18 U.S.C. § 922(g)(1). He argued that two of his prior state convictions were part of a single scheme or plan. The Court of Appeals held the argument meritless. Even though the defendant's first offense had not been adjudicated prior to his second arrest, the sentences arose from offenses that were separated by an intervening arrest. (See Application Note 3 of § 4A1.2).

United States v. King, No. 01-1311, Unreported (September 20, 2001 - Judge Kane). The defendant appealed the determination of the district court that his offense for bail jumping was not "related to" his robbery charge for purposes of U.S.S.G. § 4A1.2(a)(2). In October 1995, the defendant was found guilty of robbery in Winnebago County Court in Illinois. Following sentencing, he was permitted to voluntarily surrender to a state correctional facility, but failed to appear and his bond was revoked. He was thereafter charged with violating his bail bond to which he pled guilty and was sentenced to two years imprisonment. The defendant received three criminal history points for the robbery and three points for the bail violation. He contends that he should have been assigned points for only one offense. The Court of Appeals affirmed the district court's assessment of six criminal history points.

Daniels v. U.S., __ U.S. __, 121 S.Ct. __ (April 25, 2001) No. 99-9136. Affirming the Ninth Circuit's decision in *U.S. v. Daniels*, 195 F.3d 501 (9th Cir. 1999), the Supreme Court held that - except for convictions obtained in violation of the right to counsel - a motion under 28 U.S.C. § 2255 cannot be used to challenge a federal sentence on the ground that it was enhanced by an allegedly unconstitutional prior conviction. The majority thus extended the rule of *Custis v. U.S.*, 511 U.S. 485, 490-497 (1994), which held that a defendant could not collaterally attack prior state convictions during his federal sentencing proceeding.

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000). The most interesting issue on appeal, and one as to which there is a dearth of caselaw in this or any other court, is Mackins's contention that the district court erred in calculating his criminal history category because it counted the sentence on his Alford plea. The Court of Appeals concluded that an Alford plea is an adjudication of guilt under § 4A1.2(a)(1) and that any sentence imposed pursuant to an Alford plea is a "prior sentence" for purposes of § 4A1.1. The district court, therefore, did not err by including the sentence on Mackins's Alford plea in the calculation of his criminal history category.

United States v. Elmore, 108 F. 3d 23 (3d Cir. 1996). The district court did not err in assessing criminal history points for prior offenses involving harassment and assault and assigning two criminal history points on the basis of an outstanding warrant. The defendant contended that his prior convictions for harassment and assault should be excluded from his criminal history because the conduct underlying these offenses is similar to disorderly conduct, an offense excluded under §4A1.2(c)(1). The statutory definitions of the offenses at issue are not similar to that of disorderly conduct. The plain language of §4A1.1(d) indicates that two points are to be added whenever an outstanding warrant is in existence, irrespective of whether it is stale at the time of sentencing.

United States v. Marrone, 48 F. 3d 735 (3d Cir. 1995). Defendant was convicted of RICO charges. Conduct charged as part of the "pattern of racketeering activity" that was the subject of an earlier conviction and sentence should be treated as a "prior sentence" under §4A1.2(a)(1) and not as part of the "instant offense" if the defendant was convicted for that conduct before the "last overt act of the instant offense."

United States v. Thomas, 42 F. 3d 823 (3d Cir. 1994). The district court, when sentencing defendant as a career offender, cannot entertain a constitutional challenge to the underlying convictions unless the defendant can show that his right to counsel had been denied. The reasoning of the Supreme Court in *Custis v. U.S.*, 114 S. Ct. 1732 (1994) applies with equal force to sentencing under §4B1.1. There is no basis to distinguish a prior conviction used to justify an enhancement under the guidelines from a prior conviction used to justify an enhancement under the Armed Career Criminal Act.

United States v. Hallman, 23 F. 3d 821 (3d Cir. 1994). Defendant argued that his prior state forgery conviction was improperly counted in his criminal history because it was "related" to the instant federal charge of possession of stolen mail. The Third Circuit agreed, holding that the two offenses were part of a common scheme or plan. It was reasonable to infer that mail was stolen to find checks or other instruments that could be converted to use through forgery. Defendant also argued that two of his prior sentences were "related" under §4A1.2(a)(2) because they were consolidated for sentencing. However, whenever offenses are separated by intervening arrests (i.e., the defendant is arrested for the first offense prior to committing the second offense), the sentences are unrelated regardless of whether they were consolidated for sentencing. See Application Note 3 to §4A1.2.

Nichols v. United States, 114 S. Ct. 1921 (1994). The Supreme Court overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980) and held that an uncounseled misdemeanor conviction for which no prison term was imposed, may be used to enhance punishment for a later conviction. In the present case, the petitioner was assessed one criminal history point for a state misdemeanor conviction for driving under the influence for which he was not incarcerated. Even though he was not represented by counsel at the DUI proceeding, his conviction was valid under *Scott v. Illinois*, 440 U.S. 367 (1979), which held that there is no right to counsel in a misdemeanor proceeding where no imprisonment is imposed.

Custis v. United States, 114 S. Ct. 1732 (1994). Defendant was convicted of possession of a firearm by a felon under 18 U.S.C. §922(g)(1). At sentencing, the judge sentenced him under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(1), because he had three prior state felony convictions. Defendant claimed his prior state convictions were invalid due to ineffective assistance of counsel. The district court refused to entertain this collateral attack, noting that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [§924(e)(1)] provides no statutory right to challenge prior convictions." The Supreme Court affirmed, holding that with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to collaterally attack prior state convictions that are used to enhance his sentence under the Armed Career Criminal Act.

Beecham v. United States, 114 S. Ct. 1669 (1994). Under 18 U.S.C. §922(g), it is a crime for a person convicted of a felony to possess a firearm. However, any conviction for which civil rights have been restored "shall not be considered a conviction." In these consolidated cases, the defendants claimed that their civil rights had been restored by state statutes after they had been convicted in federal court of the predicate felonies on which their present convictions

for being felons in possession of firearms were based. The Supreme Court held that restoration of civil rights by a state statute does not remove the disabilities imposed as a result of a defendant's federal conviction. Individuals convicted of a felony "can take advantage of §921(a)(20) only if they have had their civil rights restored under federal law."

United States v. Dersham, 16 F. 3d 406 (3d Cir. 1993). The probation officer assigned a criminal history point for defendant's 1991 conviction for retail theft. Defendant objected stating that the conviction is excludable under § 4A1.2(c)(1) because the penalty in that offense involved neither a period of probation for one year nor a term of imprisonment for 30 days. He specifically argued that § 4A1.2(c)(1) excludes insufficient funds check, and that Pennsylvania law analogizes such an offense to retail theft. The district court rejected this argument, concluding that the list of offenses excluded by § 4A1.2(c)(1) is exhaustive and particularized. Because the offense of retail theft is not listed as excludable, the probation officer properly considered it in determining the defendant's criminal history score. The Court of Appeals affirmed.

United States v. Tabaka, 982 F. 2d 100 (3d Cir. 1992). Sentence for DWI offense, which had occurred after conduct that is basis of instant federal offense, was properly included in defendant's criminal history score as a "prior sentence." Focus under §4A1.2(a)(1) is whether the sentence was "previously imposed," not on when the offense occurred. In calculating defendant's criminal history, when previous sentence for unrelated offense is "suspended," sentencing court, pursuant to §4A1.2(b)(2), must consider only time served prior to suspension of sentence.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). Defendant's prior conviction for sale of heroin was a prior felony conviction of controlled substance offense within meaning of career offender. Though defendant received suspended sentence for conviction, his probation was revoked and §4A1.2(k)(1) authorized the court to add the sentence imposed upon revocation to the original sentence. When the 500 days defendant served upon his revocation of probation were added to the original sentence, the total sentence exceeded one year and one month. Since the 1975 conviction fell within the 15-year period under §4A1.2(e)(1), it was countable for criminal history purposes.

United States v. Davis, 929 F. 2d 930 (3d Cir. 1991). The district court did not err in assigning two criminal history points for each of the defendant's juvenile adjudications under §4A1.2(d)(2)(A), which applies only to "adult or juvenile sentences to confinement of at least 60 days." Sections 4A1.1(a) and (b), which apply to offenses committed by defendants age 18 or over, assign criminal history points based on the "sentence of imprisonment," which is defined to mean "the maximum sentence imposed," rather than the length of time actually served. "Sentence of confinement" has the same meaning as "sentence of imprisonment." Defendant's prior juvenile adjudications qualified for two criminal history points under §4A1.2(d)(2) because in each case the "maximum sentence imposed" was at least 60 days. If this methodology overvalued the severity of prior juvenile adjudications, a district court could depart from the guideline range.

United States v. Bucaro, 898 F.2d 368 (3d Cir. 1990). Counting prior Pennsylvania juvenile delinquency adjudications does not violate Pennsylvania law or principles of due process notice. 42 Pa. Cons. Stat. §6354 permits the use of juvenile adjudications at later sentencing proceedings, although it is unclear what use may be made of them. Giving equal weight to juvenile and adult adjudications of criminal wrongdoing does not violate due process.

§ 4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. King, 454 F.3d 187 (3d Cir. 2006). Over a twenty-year period, defendant engaged in identity theft, using the social security number and date of birth of another man with the same name, and causing losses exceeding $166,000. Although defendant's guideline range was 30-37 months, the district court sentenced him to 72 months. He argued that the court erred by not following the methodology established prior to *Booker* for imposing a sentence above the guideline range. When departing upward based on an under representation of criminal history, district courts are required to apply U.S.S.G. § 4A1.3 and consider each higher criminal history category in sequence. See *U.S. v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990). If the court were under the pre-*Booker* mandatory guideline scheme, the failure of the district court to have expressly followed that approach would have required remand because the appellate court would have assumed prejudice. Post-*Booker*, the Third Circuit ruled that it would not presume prejudice, but would review the sentence for plain error. The court here provided an adequate explanation for the sentence on the record. It gave extensive attention to the circumstances of defendant's life and offense and the harm done to the victim. Defendant was a career criminal who was not deterred by prosecution in state or federal court. A lengthy prison sentence was clearly warranted to prevent and deter defendant from re-offending. Because the district court "did in fact touch all the bases required," the panel affirmed the sentence imposed. Nonetheless, it emphasized that "the sentencing courts in this circuit should continue to follow the requirement to 'consider' the guidelines by calculating a guidelines sentence as they would have before *Booker*, including formally ruling on the motions of both parties and stating on the record whether they are granting a departure and how that departure affects the guidelines calculation, and taking into account this circuit's pre-*Booker* caselaw, which continues to have advisory force."

United States v. Hertzog, 2006 WL 2034457 (3rd Cir.(Pa.))). The defendant pled guilty to charges arising from his illegal possession of firearms. At the time of sentencing, the district court concluded that criminal history I did not adequately reflect the likelihood that the defendant would commit other crimes. This conclusion was based upon statements the defendant made to undercover officers prior to his arrest and internet postings. Accordingly, the district court increased the criminal history category. The Court of Appeals ruled that based upon the record's support for the enhancement, the sentence was reasonable.

United States v. Miller, 2004 WL 817442 (3rd Cir. (Pa.))). The Court of Appeals ruled that the district court erred in granting the defendant a downward departure under U.S.S.G. §§ 4A1.3 and 5K2.0, and by sentencing the defendant to 41 months.. The defendant's status as a career offender enhanced his criminal history score from a category V to a category VI. With the enhancement, Miller's guideline range increased from 37 to 46 months to 151 to 188 months. In sum, Miller's initial criminal history category of V indicated a serious criminal history. After consideration of the nature of Miller's convictions and the fact that Miller was not deterred from committing other crimes while on probation, the Court of Appeals concluded that there is no support in the record for the district court's conclusion that Miller's guideline range over-represented either his criminal history or the likelihood that Miller would commit additional crimes upon release from prison for the instant offense.

In addition, the Court of Appeals ruled that a downward departure pursuant to § 5K2.0 was not warranted. Although the district court cited before granting Miller's motion for departure his poor background, his military service, and the fact that he was intelligent, articulate and able to stand on his own two feet, none of these factors can support a departure.

United States v. Boynes, 2003 WL 21267472 (3rd Cir.(Pa..))). The crux of this appeal is that the district court erred in denying a downward departure pursuant to U.S.S.G. § 4A1.3. At the time of his arrest, the defendant was 23 years old. He had 11 prior adult arrests and seven adult convictions, not including the instant offense for which he was sentenced. The defendant argued that when he fashioned his request for a downward departure under § 4A1.3, he explicitly stated that he sought a departure solely on the grounds that his designation as a career offender over-represented the seriousness of the offense. When assessing the appropriateness of a departure under § 4A1.3, a court should consider all relevant factors, including recidivism. Had § 4A1.3 omitted "the likelihood that the defendant would commit other crimes," the Court of Appeals would have agreed that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct. He qualified as a career offender. One of his predicate crimes was a conviction for escape where he ran away after having been handcuffed. The other crime of violence was a conviction for resisting arrest following a scuffle, his having been apprehended for a traffic offense. The judment of the district court was affirmed.

United States v. Paulk, 2003 WL 1860551 (3rd Cir.(N.J.))). In this appeal, the defendant argued that his criminal history category of VI significantly over-represents the seriousness of his criminal history, and that the district court abused its discretion when it denied his motion for downward departure pursuant to U.S.S.G. § 4A1.3. The Court of Appeals held that the district court recognized its authority to depart and declined to do so. The judgment of the district court was affirmed.

United States v. Mayo, 2003 WL 358427 (3rd Cir.(Pa.))). The defendant appealed and argued that the district court failed to determine that his criminal history score significantly under-represented his past criminal conduct. The sentencing judge did state, however, that the defendant's "criminal history category of six significantly under-represents the seriousness of defendant's criminal history." The district court explained

United States v. Freeman, 316 F. 3d 386 (3d Cir. 2003). Freeman pleaded guilty to receipt and possession of child pornography under 18 U.S.C. §§ 2252(a)(2) and (4)(B). At sentencing, the district court departed upward from Criminal History Category I to Criminal History Category III. The Court of Appeals vacated the sentence. Though the district court was justifiably concerned about Freeman's extensive molestation of children in the past and his likelihood of committing such crimes in the future, it failed to follow the procedures set forth under § 4A1.3 for departing in such cases. If the court is considering departing by more than one category, moreover, it is obliged to proceed sequentially and it may not move to the next higher category before it finds that all lesser categories are inadequate. This racheting requirement is designed to ensure that the sentencing court's reasons for rejecting each lesser category be clear from the record as a whole. The district court must provide an adequate basis for the Court of Appeals to determine whether it completed its task of identifying the category encompassing those defendants whose criminal histories most closely resemble the defendant's own.

United States v. Ramos, 2003 WL 23541 (3rd Cir.(N.J.))). At sentencing, the defendant moved for a downward departure pursuant to U.S.S.G. § 4A1.3 on the basis that his criminal history category of V over-represented the seriousness of his prior conduct and his risk of recidivism because all but one of his convictions were for possession of narcotics due to his addiction and the single non-drug related conviction was for criminal trespass, for which he served one day. He pointed out that he had served a combined total time of less than eight and a half months for committing minor offenses but was being placed in the same criminal history category as hard-core criminals who have committed several violent offenses, such as armed robbery or aggravated assault, and who would have served a substantially longer time in prison for those offenses. He further argued that the district court erroneously disregarded evidence of accomplishments suggesting that his risk of recidivism had been lowered, such as his achievement of sobriety, completion of his GED, and enrolment in job skills courses.

The Court of Appeals concluded that it was clear from the record that the district court thoroughly considered the arguments advanced by the defendant in support of his motion for downward departure and acted well within its discretion in denying the relief sought. The district court expressly acknowledged its awareness of the addiction which motivated the defendant's criminal conduct and there efforts the defendant had undertaken to recover from his addiction.

United States v. Cicirello, 301 F.3d 135 (3d Cir. 2002). The defendant pleaded guilty to unlawfully disposing of stolen firearms in violation of 18 U.S.C. § 922(j). On January 9, 2001, Mark Smith, James Williams, and Christopher Williams burglarized a sporting goods store and stole 22 firearms, all but one of which were handguns. They had discussed the plan with Michael Cicirello, but he declined to participate. However, after the burglary, Cicirello agreed to dispose of the firearms and did so the next day, then turning over the proceeds to the burglars. The sentencing judge departed from a criminal history category of I to category III.. The Court of Appeals held that the district court erred by not engaging in the necessary analysis, namely, by departing from category I without noting why Cicirello's history did not "fit" within that category, and to category III without assessing the adequacy of category II.

United States v. McArthur, 2002 WL 1558319 (3rd Cir.(N.J.))). The defendant pleaded guilty to possessing crack cocaine with intent to distribute. He argued on appeal that the district court erred in refusing to grant a downward departure pursuant to U.S.S.G. § 4A1.3 on the basis that his criminal history category overstated the seriousness of his past crimes. The district court, finding McArthur's criminal history "truly appalling," determined that a downward departure was not warranted given the facts of the case. Moreover, it is noted that regardless of the departure, McArthur would have a criminal history category of VI. The Court of Appeals lacked jurisdiction to "review a refusal to depart downward when the district court, knowing it may do so, nonetheless determines that departure is not warranted."

United States v. Allen, 2002 WL 125588 (3rd Cir.(N.J.))). In this case, the defendant asked for a downward departure, contending that the defendant's criminal history overstated the severity of his past offenses. Both parties presented relevant case law to the district court supporting its discretionary authority to grant a downward departure, if it found such a departure warranted in this case. The government conceded that the district court had the power to grant the downward departure, while arguing that it should not do so given the facts of this case. The district court ultimately agreed with the government's position. Although the district court said that it saw no basis for granting the downward departure, the Court of Appeals interpreted this statement to mean that the facts here did not warrant the downward departure. This interpretation was bolstered by the district court's statement that it could see no basis for the departure "in this case." Under this reasonable interpretation, the district court's conclusion would be an unreviewable discretionary refusal to depart.

United States v. Fordham, 187 F.3d 344 (3d Cir. 1999). The defendant argued that the district court erred when it adjusted upward his criminal history category from I to II because not only did it lack reliable information concerning the foreign conviction, but the information that it possessed pertained solely to a single offense that was not serious in nature. He also contends that his case is unlike the example provided in the policy statement accompanying U.S.S.G. § 4A1.3, involving a defendant with a criminal history that is extensive and serious in nature. The Court of Appeals upheld the departure. To establish reliability of the foreign conviction, certified copies of the conviction albeit desirable are not required for the sentencing court's determination as to whether an upward departure is warranted. Not only was the court apprised of the possible constitutional infirmities surrounding the foreign conviction, but the court also identified that evidence which it believed justified upward departure.

Koon v. United States, 116 S. Ct. 2035 (1996). The district court departed downward in sentencing the officers who were convicted of beating Rodney King on the ground that the officers were particularly unlikely to commit crimes in the future, and the need to protect the public from their future criminal conduct was "absent to a degree not contemplated by the guidelines." The Supreme Court held that this was an abuse of discretion because guideline §4A1.3 specifically states that "a departure below the lower limit of the guideline range for criminal history category I on the basis of the adequacy of criminal history cannot be appropriate." Therefore, low likelihood of recidivism is not a basis for departure.

United States v. McQuilkin, 97 F. 3d 723 (3d Cir. 1996). Defendant argued that his designation as a career offender overstated his criminal history, and that the district court should have departed downward. The Third Circuit held that the district court's refusal to depart was not reviewable because the court neither misunderstood nor misapplied the law in evaluating defendant's request. While the district court did not explain its rationale for declining to exercise its discretion to depart under §4A1.3, the court explicitly stated that the guidelines were necessary because defendant was a danger to himself and other people. This statement reinforces the district court's conclusion that defendant's criminal history designation did not overstate his past criminal conduct or the likelihood he would commit future crimes.

United States v. Harris, 44 F. 3d 1206 (1995). Defendant had only one criminal history point, but confessed his involvement in four pending state prosecutions involving murder, assault and multiple counts of robbery, and admitted that he had been present during a drug-related murder. The district court departed upward from criminal history category I to VI. The Third Circuit remanded for resentencing. The district court failed to use required step-by-step process in departing upward. It merely stated that criminal history categories II through V are "too lenient." It would be reasonable for the court to consider what defendant's criminal history category would be if he had been convicted of the pending crimes.

United States v. Shoupe, 35 F. 3d 835 (3d Cir. 1994). In defendant's previous appeal, *U.S. v. Shoupe*, 988 F. 2d 440 (3d Cir. 1993), the Third Circuit held that a court may depart downward in the criminal history category where defendant's career offender status over-represents his criminal history and likelihood of recidivism. Here, the Third Circuit held that a sentencing court may depart downward on both a defendant's offense level and criminal history designation if the defendant's career offender status overstates his criminal history and likelihood of recidivism. Career offender status enhances both criminal history and base offense level categories.

United States v. Harvey, 2 F. 3d 1318 (3d Cir. 1993). The district court found defendant's criminal history category did not adequately reflect the scope of his criminal activities, and departed upward under §4A1.3 by increasing his offense level from 13 to 22. The Third Circuit reversed. An upward departure under §4A1.3 must be calculated by "stepping up the criminal history category, not by increasing the base offense level."

United States v. Hickman, 991 F. 2d 1110 (3d Cir. 1993). Defendant's guideline range was 18 to 24 months. The district court determined that criminal history category of III did not adequately represent his long history of similar conduct, and imposed a 48-month sentence by "doubling the top of the guideline range." The court gave no further explanation. The Third Circuit remanded, holding that in departing upward under §4A1.3, a court must determine which criminal history category best represents a defendant's prior history by proceeding sequentially through the criminal history categories. For departures above category VI, the court should also analyze the nature of the prior offenses, not simply their number.

United States v. Shoupe, 988 F. 2d 440 (3d Cir. 1993). Downward departure may be warranted in career offender case if criminal history over-represents seriousness of prior criminal history.

United States v. Thomas, 961 F. 2d 1110 (3d Cir. 1992). The district court departed upward in part because no points were added for two burglaries defendant committed as a juvenile. The Third Circuit held that a court may not depart upward based on juvenile crimes not specified in §4A1.2(d). Under §4A1.2(d), only three types of juvenile convictions can be considered in the calculation of a defendant's criminal history. The guidelines specifically allow upward departures based on foreign offenses, tribal offenses, and expunged convictions, all of which are not counted, but no provision is made for uncountable juvenile convictions. However, a departure would be appropriate if the juvenile convictions were for conduct similar to the instant offense.

The district court departed upward from criminal history category VI based in part on defendant's likelihood of recidivism. The Third Circuit rejected this as a ground for departure. Defendant's previous sentences did not resemble any of the examples set forth in the guidelines as situations where a departure might be justified. There was no evidence that defendant's previous adult convictions were lightly punished, or so similar to the instant offense as to justify an upward departure, and his 15 criminal history points did not greatly exceed the 13 point minimum for criminal history category VI. .

The district court departed upward in part because defendant had his parole revoked on at least two occasions. The Third Circuit rejected this as a ground for departure, ruling that the sentencing commission adequately provided for parole revocation in the calculation of criminal history points. Note 11 to §4A1.2 specifies that the original sentence and the sentence imposed after probation is revoked are counted as if they were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation was subsequently revoked. The presentence report assessed three points for both of defendant's sentences in which parole was revoked. The appellate court did state that an upward departure based upon parole revocation might be justified in some circumstances, such as where a defendant has a long history of violating parole.

United States v. Kikumura, 918 F. 2d 1084 (3d Cir. 1990). Defendant was arrested transporting a homemade bomb which he intended to detonate in New York City. Defendant had no prior criminal convictions and fell into criminal history category I. However, defendant had received terrorist training in Lebanon. He also provided training in the use of explosives to members of a group publicly committed to perpetrating acts of terrorism against Americans. Although defendant had been arrested in 1986 in the Netherlands in connection with terrorist activities, he was subsequently released due to an illegal search. The Third Circuit found that these facts justified an upward departure from criminal history category I to category VI. "Defendant is a professional terrorist who is extremely likely to commit other equally serious crimes in the future." Therefore, it was reasonable to analogize defendant to a category VI offender.

United States v. Touby, 909 F. 2d 759 (3d Cir. 1990). The district court departed upward from Criminal History Category I to Criminal History Category II pursuant to §4A1.3(d), which authorizes a departure when the defendant is pending trial, sentencing or appeal on another charge at the time of the offense. Defendant had pled guilty to several drug charges in another state, but planned to withdraw his guilty pleas as permitted by such state. Defendant argued that it was therefore improper to use these charges as the basis of a departure. The Third Circuit disagreed, noting that even if defendant withdrew his guilty pleas, the charges would still be "pending."

Part B -- Career Offenders and Criminal Livelihood

§ 4B1.1 Career Offender

United States v. Grant, 2007 WL 1643184 (3rd Cir.(Pa.))). The defendant appealed his sentence, arguing that the District Court erred in finding that he was a career offender under the guidelines. He asserted that his convictions for simple assault and escaping from a halfway house do not constitute crimes of violence under U.S.S.G. § 4B1.1. The Court of Appeals affirmed the sentence, noting that it had previously held that both a conviction for simple assault under Pennsylvania law and a conviction for escape from a halfway house under Pennsylvania law constitute convictions for crimes of violence for career offender purposes. *United States v. Dorsey*, 174 F. 3d 331, 333 (3d Cir. 1999 (simple assault); *United States v. Luster*, 305 F. 3d 199, 201-02 (3d Cir. 2002) (escape from a halfway house).

United States v. Ford, 481 F. 3d 215 (3d Cir. 2007). On appeal, the defendant contested the District Court's application of the career offender provision. He argued that the District Court erroneously treated his prior conviction for escape as a crime of violence. The Court of Appeals, citing its previous decision in *Luster*, 305 F. 3d 199 (3d Cir. 2002), noted that every escape is a crime of violence for purposes of § 4B1.1 because of its serious potential to erupt into violence. *Luster*, 305 F. 3d at 202. It held the District Court did not err in applying the career offender provision on the basis of the defendant's prior conviction for escape.

United States v. Falls, 2006 WL 2641831 (3rd Cir.(Pa.))). The defendant pled guilty to two counts of armed bank robbery in violation of 18 U.S.C. § 2113(d) and one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). The presentence investigation report revealed that he had two prior adult felony convictions involving robberies. He was classified as a career offender.

Prior to sentencing, in response to the defendant's motion for downward departure, the government produced certified copies of the defendant's two prior robbery convictions. At sentencing, the defendant argued that the District Court should not use evidence of these prior convictions to find that he was a career offender, unless the government proved them to a jury beyond a reasonable doubt. The District Court rejected the defendant's argument, holding that, under current law, a judge can make a finding as to evidence of prior convictions, and that the

government had provided sufficient proof.

On appeal, the defendant argued that the District Court violated his Fifth and Sixth Amendment rights when it substantially increased the upper limit of the applicable imprisonment range under the sentencing guidelines by finding, by a preponderance of the evidence, that the defendant had two prior convictions. The Court of Appeals affirmed the defendant's sentence citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)

United States v. Nabried, 2006 WL 2474026 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred in applying the career offender provision of the guidelines because *United States v. Booker*, 543 U.S. 220 (2005), made the sentencing guidelines, including the career offender provision, advisory. The Court of Appeals disagreed, holding that a sentencing court must calculate the correct sentence under the guidelines, including, if applicable, § 4B1.1, the career offender provision. The guideline range is one of several factors a district court must consider under 18 U.S.C. § 3553(a). A trial court must calculate the correct guideline range applicable to a defendant's particular circumstances.

United States v. Salah, 2006 WL 1707973 (3rd Cir.(Pa.))). The defendant was charged in a 28-count indictment with distributing cocaine base. He thereafter entered into a plea agreement in which he stipulated that he was involved with the distribution of between 50 and 150 grams of cocaine base. The presentence investigation concluded that he had two prior convictions that would qualify him as a career offender under the sentencing guidelines. One of the convictions was a conviction for Criminal Sale of a Controlled Substance in New York State. He had pled guilty to that charge and was adjudicated a "youthful offender" under New York State law.

On appeal, he argued that (1) the District Court erred in finding that his New York State youthful offender adjudication was an eligible predicate offense for a "career offender" categorization; (2) there was sufficient proof of this adjudication to consider it as a predicate offense; and (3) it was constitutionally permissible to consider a prior conviction in the context of the guidelines' criminal history provisions.

The defendant asserted that under *United States v. Driskell*, 277 F.3d 150, 154 (2d Cir. 2002), his youthful offender adjudication can only be used as a predicate offense under the guidelines if he was "tried in adult court, convicted as an adult, and received and served a sentence exceeding one year and one month in an adult prison." However, the Third Circuit ruled that the defendant's reliance on *Driskell* is misplaced. In *Driskell*, the defendant received a three level enhancement under U.S.S.G. § 4A1.2(d), which requires that the offender receive "a sentence of imprisonment exceeding one year and one month." The defendant, on the other hand, was deemed a "career offender" under § 4B1.1(a), and thus subject to a different set of criteria .... The language of the career offender guidelines explicitly contradicts the defendant's argument. Note 1 of § 4B1.2 "dictates that the career offender inquiry examine only whether the convictions in question are adult convictions, and not what kind of sentences resulted from those convictions." *United States v. Moorer*, 383 F. 3d 164, 168 (3d Cir. 2004).

The defendant further argued that it was unclear whether his youthful offender adjudication was pursuant to an "adult conviction." However, under the New York youthful offender statute, N.Y. Crim. Proc. Law § 720.20(1)(a), an "eligible youth" is "convicted as an adult and only later may, in the court's discretion, have that conviction vacated and replaced by a youthful offender finding." *Driskell*, 277 F. 3d at 154-55. The "youthful offender adjudication does not alter the substance of the defendant's adult conviction." *United States v. Reinoso*, 350 F. 3d 51, 54 (2d Cir. 2003). Thus, the Court of Appeals concluded that the defendant received "an adult conviction," and that the New York conviction was properly considered a predicate for career offender status despite the subsequent youthful offender adjudication.

With respect to the defendant's claim that it was error for the District Court to rely upon the PSR for proof of the adjudication, the Court of Appeals noted that it explicitly rejected that argument in the past, and it is therefore foreclosed now. In *United States v. Watkins*, 54 F. 3d 163, 167-68 (3d Cir. 1995), the Court of Appeals explained that "it is well established in this circuit, and all others, that a sentencing court may rely on the facts set forth in the presentence report when their accuracy is not challenged by the defendant." See Fed. R.Crim. Proc. 32(b)(6)(D). In the case at hand, the defendant did not challenge any of the facts in the PSR; thus, the District Court properly relied on them.

Finally, the defendant argued that it was constitutionally impermissible for the District Court to impose a sentence that included a career offender categorization. He maintained that the decision to increase a sentence on the basis of a prior conviction should be left entirely to the discretion of the district judge, and not rooted in the guidelines criminal history and criminal livelihood provisions. The Court of Appeals, however, held that this argument is foreclosed by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 259 (2005). In the instant case, the District Court did as *Booker* mandates. The court viewed the guidelines as advisory, selected a sentence that reflected considerations of parity, and considered mitigating circumstances presented by the defendant.

For all of the foregoing, the District Court's sentence was affirmed.

Salinas v. United States, __ U.S. __, 126 S. Ct. __ (April 24, 2006). Under § 4B1.1, a defendant's prior conviction for a "controlled substance offense" is counted in determining whether the defendant is a career offender. The term "controlled substance offense" is defined in part as "the possession of a controlled substance...with intent to manufacture, import, export, or distribute." In a short per curiam opinion, the Supreme Court held that simple possession of a controlled substance is not a "controlled substance offense" under § 4B1.1

United States v. Hartman, 2004 WL 2931055 (3rd Cir.(Pa.))). Hartman appealed his sentence, arguing that one of the predicate convictions relied on by the district court to establish his status as a career offender should not count because, although he was charged and convicted as an adult, he was sentenced as a youthful offender. A separate panel of the Court of Appeals rejected an identical argument in *United States v. Moorer*, 383 F.3d 164 (3d Cir. 2004). Accordingly, Hartman's sentence was affirmed.

United States v. Trala, 386 F.3d 536 (3d Cir. 2004). Defendant was convicted of bank robbery and related charges. In a supplemental brief, defendant argued that the career offender enhancement he received under U.S.S.G. § 4B1.1 violated *Blakely v. Washington*, 124 S.Ct. 2531 (2004), because it required a district court's findings as to whether the instant offense and a prior conviction qualified as crimes of violence. The Third Circuit found *Blakely* inapplicable, because whether an offense is a crime of violence or a controlled substance offense is a legal determination, which does not raise an issue of fact.

United States v. Moorer, 383 F. 3d 164 (3d Cir. 2004). The defendant's main argument on appeal is that his 1990 conviction in New Jersey Superior Court should not count toward career offender status because he was sentenced as a juvenile rather than an adult. However, the defendant did not contest that he was convicted as an adult. Rather, the defendant argued that a conviction is a "prior felony conviction" under § 4B1.1(a) only if both 1) the conviction occurs in an adult proceeding (instead of in juvenile court), and 2) the conviction results in an adult sentence. He asserted that his sentence for the 1990 conviction for aggravated assault was served concurrently with a prior sentence that he was already serving pursuant to a juvenile adjudication, and was therefore a juvenile sentence.

The Court of Appeals disagreed, concluding that the guidelines belie the defendant's premise that an adult conviction must be accompanied by an adult sentence to count toward career offender status. Note 1 to § 4B1.1(a) clearly defines a "prior felony conviction" purely in terms of the kind of conviction the defendant had, not the kind of sentence. The defendant's prior conviction for aggravated assault was a prior felony conviction which counted towards his career offender status, even though he was only 17 years old at the time of the crime, where the prior conviction was an adult conviction. As the government pointed out, New Jersey law makes it clear that once a juvenile is referred to an adult court, his entire case falls under the Code of Criminal Justice rather than the Code of Juvenile Justice.

In a footnote, the Court of Appeals noted that the defendant submitted a pro se brief arguing that under *Blakely v. Washington*, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004), a jury should have determined whether he was a career offender. The Court of Appeals rejected this argument, as *Blakely* governed only factual determinations, and Moorer's status as a career offender was purely a matter of law under the Sentencing Guidelines.

United States v. Mora-Zapata, 2004 WL 758744 (3rd Cir.(Pa.))). The district court in the Eastern District of Pennsylvania designated Mora-Zapata as a career offender under § 4B1.1(a) because of his two prior felony drug convictions in the United States District Court for the Middle District of Pennsylvania - - Criminal No. 84-00159, a conviction for drug distribution-related offenses based on conduct that occurred on or about September 25, October 2 and October 25, 1984 (the "159 offense" or "159 conviction"); and Criminal No. 85-00193, a conviction for drug distribution-related offenses based on conduct that occurred between early 1983 and the summer of 1984, though distinct from the conduct underlying the 159 offense (the "193 offense" or "193 conviction"). Mora-Zapata contends that the 159 and 193 convictions were not separate "prior felony convictions" because (a) they "occurred on the same occasion" or

(b) "were part of a single common scheme or plan" within the meaning of Application Note 3 to § 4A1.1.

The Court of Appeals concluded that the district court's determination that Mora-Zapata's 159 and 193 convictions were not "related cases" was not erroneous under any standard of review. The 159 and 193 convictions were not "related cases" because the offenses underlying them did not occur on the "same occasion." Mora-Zapata argued that an "occasion" can be months, or even years; that the conduct underlying the 193 conviction, alleged in the indictment to have occurred during the period from early 1983 through December 1984, defines an "occasion"; and that because the conduct underlying the 159 conviction occurred between early 1983 and December 1984, it occurred on the "same occasion" as the 193 conviction. The Court of Appeals commented, "While we decline to say precisely how close together in time offenses must have occurred in order to have taken place on the "same occasion," it is clear that where, as here, offenses occurred on multiple different days over a span or more than one year, they cannot be said to have occurred on the "same occasion."

Mora-Zapata's attempt alternatively to fit his 159 and 193 convictions into the "single common scheme or plan" prong of § 4A1.2 similarly fails. He argues that his prior convictions were part of a "single common scheme or plan" because they involved "alleged cocaine sales during the same continuous period of time in the Pocono area of the Middle District of Pennsylvania." In other words, Mora-Zapata would have us find that repeated commissions of the same crime in the same general geographic area over a span of more than one year suffices to establish a "single common scheme or plan." The Court of Appeals held that the district court did not err in concluding that the 159 and 193 offenses were not part of a "single common scheme or plan."

United States v. Johnson, 2004 WL 637134 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred in calculating his sentence. Because his record included several prior drug convictions, Johnson's presentence report noted that he was subject to an enhanced mandatory term of ten years and maximum term of life imprisonment for Count One. But Johnson alleges that the court erred in invoking this enhanced sentence because the government failed to file a notice of its intent to seek the enhancement under 21 U.S.C. § 851.

Johnson's prior convictions qualified him as a career offender, so under U.S.S.G. § 4B1.1 calculation of his base offense level depended on the maximum possible penalty for his offense. Based on the enhanced sentence carrying a maximum term of life imprisonment, the court calculated Johnson's offense level to be 37. Johnson argued that the appropriate maximum term, due to the government's § 851 omission, was 40 years, and therefore the appropriate offense level was 34, under § 4B1.1(b)(B).

The Court of Appeals found no reason to disturb the district court's sentence. Johnson was clearly aware that the government sought to use specific prior convictions to obtain an enhanced sentence. Johnson's indictment included a "Notice of Prior Convictions" which listed five prior felony convictions for purposes of enhanced sentencing in connection with his

indictment on Count Three (felon in possession of a firearm). This included three convictions for robbery and two for serious drug offenses. At trial, the jury returned a supplemental verdict form in which it specifically determined that Johnson was previously convicted of five prior violent felony and serious felony drug offenses listed in the indictment. At no point did Johnson contest his criminal history or allege that any of the prior convictions could not be counted.

United States v. Reyes, 2002 WL 31819754 (3rd Cir.(N.J.))). The district court determined that the defendant was a career offender and refused to grant a downward departure because his criminal history is overstated. Reyes challenged both rulings. He argued that the district court erred in imposing a 19 level upward departure under U.S.S.G. § 4B1.1 because he does not have a second felony conviction for a crime of violence. He claims that his May 9, 1997, conviction for eluding a police officer is not a crime of violence under § 4B1.2. Alternatively, Reyes maintains that although the judgment of conviction for his May 1997 crime states that it is second degree eluding, he was in fact convicted of third degree eluding because the sentence he received was below the sentencing range for second degree eluding. Thus, he claims, because third degree eluding is not a crime of violence, he cannot be a career offender.

The Court of Appeals found the arguments without merit. The Supreme Court has stated that when determining whether a prior conviction constitutes a "crime of violence," the sentencing court needs "to look only to the fact of conviction and the statutory definition of the prior offense" when the identity of the statute of conviction is clear from the judgment of conviction. *Taylor v. United States*, 495 U.S. 575, 602 (1990). When a sentencing court determines whether a prior crime meets the test of § 4B1.2, it should begin with the language of the statute and if that is clear, it should not look beyond the statute's text to the actual conduct. *United States v. Shabazz*, 233 F. 3d 730, 732 (3d Cir. 2000). Here, the judgment of conviction clearly states that the defendant's May 1997 conviction was for "eluding a police officer," a "2nd degree" offense, in violation of N.J.S.A. 2C:29-2b. The statutory language of N.J.S.A. 2C:29-2b defines this offense as a crime of violence. The defendant's contention that he was actually convicted for third degree eluding, which is not a crime of violence, was also unpersuasive. The statements he made at both the state court colloquy for the eluding conviction and at the sentencing hearing from which the instant appeal arises, confirm that he pled guilty to second degree eluding, a crime of violence.

The Court of Appeals did not have jurisdiction to examine the district court's discretionary decision to make a downward departure. Here, the district court stated that it recognized its discretion to depart downward during the sentencing hearing, but elected not to exercise it.

United States v. Oliver, 2002 WL 31474532 (3rd Cir.(Pa.))). The defendant was sentenced as a career offender, On appeal, he contends that the district court erred under *Apprendi* in sentencing him as a career offender. He maintains that *Apprendi* requires that his prior convictions be pled in the indictment and proven beyond a reasonable doubt. The Court of Appeals held that the district court was not in error. The Supreme Court ruled in *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998), that the existence of a prior conviction that

increases the statutory maximum sentence need not be alleged or established as an element of the offense. Additionally, since the sentence imposed is within the statutorily allowed maximum, there is no *Apprendi* issue.

United States v. Rolon, 2002 WL 1840807 (3rd Cir.(N.J.))). At sentencing, the defendant moved for a downward departure on the ground that the career offender category over-represented his criminal history and his offense conduct. The district court was aware that it had the authority to depart and exercised its discretion in denying this request. Under these circumstances, the Court of Appeals lacked jurisdiction to review the sentence imposed by the district court.

United States v. Horne, 2002 WL 1754428 (3rd Cir.(Pa.))). The defendant was classified as a career offender. He did not challenge his career offender status. But, because of the classification, the guidelines call for an enhancement from 30-37 months, to 151-188 months, which he argues is both cruel and unusual. The district court lowered his criminal history category to V, and dropped the offense level to 23, indicating a range of 84 to 140 months. He was sentenced to 84 months imprisonment. The Court of Appeals concluded that this sentence, lying at the absolute bottom of the range, does not offend the constitutional proscription of cruel and unusual punishments. The district court did all it was required to do and left this sentence within the constitutional range of proportionality.

United States v. Matos, 2002 WL 1305580 (3rd Cir.(Pa.))). Matos argued that his prior convictions and status as a career offender should have charged in the information and proven beyond a reasonable doubt to a jury because they were used to increase his sentence range. The Court of Appeals held that when a sentence is imposed below the statutory maximum, it is not constitutionally objectionable under *Apprendi*. The judgment and conviction was affirmed.

United States v. McCulligan, 256 F. 3d 97 (3rd Cir. 2001). The jury found defendant guilty of assaulting a federal officer under 18 U.S.C. § 111(a), but failed to convict on two counts of assault with a dangerous weapon under 18 U.S.C. § 111(b). At sentencing, defendant argued that his actions amounted to nothing more than "simple assault" which carries a maximum term of one year. Nevertheless, the district court noted that § 111(a) also provides for three years imprisonment in "all other cases" of assault, and concluded that defendant's crime was "non-simple assault." On appeal, the Third Circuit reversed, holding that § 111(a) describes two separate offenses, and the district court's finding that defendant was guilty of "non-simple assault" exceeded the "simple assault" found by the jury. This finding violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because it increased the statutory maximum to three years. In addition, by increasing the maximum term of imprisonment beyond one year, the assault qualified as a "crime of violence" for purposes of the career offender guideline § 4B1.1, which increased defendant's Criminal History Category from V to VI. The sentence was reversed.

United States v. Shabazz, 223 F. 3d 730 (3d Cir. 2000). The sole question on appeal is whether the defendant's state conviction for employing a minor in the distribution of a controlled substance is properly classified as a predicate controlled substance offense pursuant to U.S.S.G . § 4B1.1. The Court of Appeals stated, "In order to classify a prior conviction as a controlled substance offense, the sentencing court should begin with the language of the statute. If the statute of conviction is clear, the court should not look beyond that statute's text. See *United States v. Hernandez*, 218 F. 3d 272, 279 (3d Cir. 2000). However, if the statute of conviction is unclear or broad enough to criminalize acts that are not properly classified as a controlled substance offense, the sentencing court may look beyond the bare elements of the statute....When considering the classification of a criminal statute as a controlled substance offense, the sentencing court should ascertain if the conduct that causes a conviction under the statute was a controlled substance offense....The disputed statute of conviction in this case is entitled "Employing a Juvenile in a Drug Distribution Scheme"....Evidence of the conduct underlying the defendant's violation of N.J.S. S 2C:35-6 is provided in the presentence report and the state court's opinion denying post conviction release. According to the police report, police officers observed the defendant and two others conducting drug sales. One of the two other dealers was a juvenile. The New Jersey court recounted the facts as follows: 'Defendant acknowledged that he used S.G., a 17 year old juvenile, as a lookout while preparing to sell a large quantity of cocaine." The Court of Appeals concluded that this conduct would be sufficient to qualify as a controlled substance offense pursuant to U.S.S.G. § 4B1.1.

United States v. Hernandez, 218 F.3d 272 (3d Cir. 2000). The government sought to enhance the defendant's sentence pursuant to U.S.S.G. § 4B1.1. To do so, the government offered two certificates of disposition of the county clerk of a state court certifying that the defendant had two prior convictions for possession of a narcotic with intent to sell. The defendant challenged the accuracy of these certificates, contending that the convictions at issue were for possession only, a crime which could not be the predicate for enhancement under the guidelines. To support his claim, the defendant sought to introduce the transcript of his plea colloquy in the state court for the offenses in question. The district court accepted the certificates of disposition into evidence, but refused to consider the transcript of the plea colloquy proffered by the defendant. Thus, relying solely on the certificates of disposition, the district court classified the defendant as a career offender.

The transcript from the plea colloquy revealed that the defendant pled guilty to only one charge of criminal sale of a controlled substance. The other charges involved a plea of guilty to possession of a controlled substance and possession of a weapon. The district court ruled that, as a matter of law, it could not consider anything but the certificates of disposition in determining whether the defendant's prior offenses constituted controlled substance offenses. The Court of Appeals disagreed. Contrary to the government's repeated assertions, the certificates of disposition are not the judgments of conviction. Rather, they are handwritten documents prepared by a clerk more than nine years after the defendant's convictions. Accordingly, it was held that when deciding whether a prior conviction based on a guilty plea in the state court qualifies as a predicate offense under the federal sentencing guidelines, and the accuracy of a certificate of disposition for that conviction is seriously called into question, the federal

sentencing judge may, and under the circumstances here must, look to the plea colloquy in the state court to resolve the accuracy of the certificate of disposition. On remand, the government will have the opportunity to obtain the judgments of conviction, or certified copies thereof, for the offenses in question. If the judgments show that the defendant was convicted of section 220.16(1), then the defendant may be sentenced as a career offender.

United States v. Beckett, 208 F.3d 140 (3rd Cir.2000). Appellant James C. Beckett was found guilty on two counts each of robbery and armed robbery in violation of 18 U.S.C. §§ 2113(a) and (d). At the sentencing hearing, the district court heard arguments on the question of whether the career offender provisions of the sentencing guidelines applied in light of Beckett's two prior convictions for bank robbery in 1982. The district court found that the two prior convictions were not part of a single common plan or scheme, and that the career offender provisions applied. On appeal, Beckett argued that the district court erred by declaring him a career offender, claiming that his two prior bank robbery convictions were part of a common scheme. Therefore, he argued, they should have been counted as a single prior conviction, and the career offender enhancement should not have been applied to him. Beckett's convictions stemmed from (1) the robbery of the Western Savings Bank; and (2) the robbery of the Benjamin Franklin Federal Savings and Loan. Beckett was arrested on April 2, 1982 for both robberies. Beckett's two prior convictions for bank robbery were thus not separated by an intervening arrest. However, they did not result from offenses that occurred on the same occasion, nor from offenses that were consolidated for trial or sentencing. He was charged by separate federal indictments, the cases were assigned to different federal judges, and the proceedings were never consolidated. The only question is whether they were part of a single common scheme or plan. The Court of Appeals held that the two prior convictions were properly considered as separate felony convictions. The district court did not err by applying the career offender enhancement.

United States v. Williams, 176 F. 3d 714 (3d Cir. 1999). The defendant appealed the district court's decision to sentence him as a career offender. He argued that his conviction under 21 U.S.C. § 841(b) is not a controlled substance offense for purposes of determining career offender status. The Court of Appeals disagreed. Where a particular § 843(b) conviction establishes that the defendant committed, caused, or facilitated one of the acts enumerated in § 4B1.2(2), that conviction qualifies as a controlled substance offense for purposes of determining career offender status. The offense underlying the defendant's § 843(b) conviction was the distribution of heroin in violation of 21 U.S.C. § 841(a).

United States v. Dorsey, 174 F. 3d 331 (3d Cir. 1999). Defendant pled guilty to three counts of bank robbery. The district court sentenced him as a career offender based on his prior convictions for aggravated and simple assault. The defendant challenged the sentence arguing that simple assault is not a crime of violence for purposes of the career offender guideline. The Court of Appeals held that because all three parts of Pennsylvania's definition of simple assault necessarily involve "conduct that presents a serious potential risk of physical injury," a conviction under the statute is one for a "crime of violence." Defendant also argued the sentence should be vacated because the court did not consider the facts contained in the charging documents. However, sentencing judges are not required to examine the actual underlying

behavior when conducting career offender analysis. *McQuilkin*, 97 F. 3d at 727.

United States v. Johnson, 155 F. 3d 682 (3rd Cir. 1998). The issue on appeal was whether the sentencing guidelines allow a downward adjustment in offense level for a defendant's minor role in a crime when the career offender provision applies. The district court held that because the defendant was a career offender under the sentencing guidelines, the district court lacked authority to grant a minor role downward adjustment. Based on the plain language of the sentencing guidelines, their legislative history, and the sequence of the relevant provisions, the court of appeals affirmed the district court's holding that minor role downward adjustments do not apply to career offenders.

United States v. LaBonte, 117 S. Ct. 1673 (1997). In 28 U.S.C. §994(h), Congress directed the Sentencing Commission to "assure" that the guidelines specify a prison sentence "at or near the maximum term" for career offenders. Effective November 1, 1994, the Sentencing Commission amended Commentary Note 2 to the career offender guideline, §4B1.1, to define the phrase "offense statutory maximum" to mean the maximum term "not including any increase in the maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record," such as 21 U.S.C. §841(b). This new definition was challenged by the Department of Justice. The Supreme Court agreed with the Justice Department and held that the Commission's interpretation was inconsistent with the plain language of 28 U.S.C. §994(h). Thus, the court held that the "maximum term authorized" must be read to include all applicable statutory sentencing enhancements, including the recidivist enhancements in §841(b).

United States v. McQuilkin, 97 F. 3d 723 (3d Cir. 1996). The Third Circuit held Application Note 2 to §4B1.1invalid because it conflicts with the statutory mandate of 28 U.S.C. §994(h). "Maximum term authorized" could only be interpreted to mean "maximum enhanced term authorized."

Beecham v. United States, 114 S. Ct. 1669 (1994). Under 18 U.S.C. §922(g), it is a crime for a person convicted of a felony to possess a firearm. However, any conviction for which civil rights have been restored "shall not be considered a conviction." In these consolidated cases, the defendants claimed that their civil rights had been restored by state statutes after they had been convicted in federal court of the predicate felonies on which their present convictions for being felons in possession of firearms were based. The Supreme Court held that restoration of civil rights by a state statute does not remove the disabilities imposed as a result of a defendant's federal conviction. Individuals convicted of a felony "can take advantage of §921(a)(20) only if they have had their civil rights restored under federal law."

Stinson v. United States, 113. S. Ct. 1913 (1993). The Supreme Court held that, in accordance with the amendment to the commentary to §4B1.2, the crime of being a felon in possession of a firearm is not a crime of violence for career offender purposes.

United States v. Ricks, 5 F. 3d 48 (3d Cir. 1993). Defendant argued that his prior state burglary conviction should not count as a predicate "felony conviction" for career offender purposes, since his actual sentence was less than a year. The Third Circuit rejected this, finding application note 3 to §4B1.2 clearly provides that "felony conviction" means a conviction punishable by a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

United States v. Brown, 991 F. 2d 1162 (3d Cir. 1993). Sentencing judge has authority under application note 6 to §4A1.2 to permit defendant to attack constitutionality of prior convictions as part of sentencing proceedings.

United States v. Joshua, 976 F. 2d 844 (3d Cir. 1992). Defendant was found to be a career offender based in part on his conviction for being a felon in possession of a firearm. While his appeal was pending, the Sentencing Commission promulgated a clarifying amendment to the commentary to §4B1.1. The amendment clarified that felon in possession of a firearm is not a crime of violence. Moreover, the amendment also demonstrated the Commission's intent that sentencing courts make the determination whether a crime "otherwise involves conduct that presents a serious potential risk of physical injury" by looking only at the conduct expressly charged in the indictment. The Third Circuit held that it was free to consider a new commentary regarding an ambiguous guideline in determining how that guideline should be applied, even where a prior panel had resolved the ambiguity to the contrary. However, the court found that the guideline would not support the amended commentary's position that possession of a firearm by a felon is never a crime of violence. Nevertheless, the court found that the commentary properly directed the court to consider only the conduct alleged in the indictment. Since the indictment did not allege that defendant's conduct posed a serious potential risk of physical injury, his conviction was not a crime of violence.

United States v. Day, 969 F. 2d 39 (3d Cir. 1992). Defendant alleged that the district court erred in sentencing him as a career offender because the government failed to give him notice of his career offender status before trial under 21 U.S.C. §851(a)(1). The Third Circuit rejected this claim, holding that §851(a)(1) does not require the government to file notice in order to sentence a defendant as a career offender.

United States v. Parson, 955 F. 2d 858 (3d Cir. 1992). Defendant was classified as a career offender based in part upon a prior Delaware state conviction for reckless endangering. Delaware law defines this offense as recklessly engaging in conduct that creates a substantial risk of death to another person. The Third Circuit "reluctantly" held that the reckless endangering offense constituted a crime of violence for career offender purposes. The original guidelines definition of crime of violence, derived from 18 U.S.C. §16, appeared to include only crimes requiring a specific intent to use force. The present version of the guidelines, effective November 1989, expands the definition of crime of violence to include actions that merely risk causing physical injury. Under the expanded definition, reckless endangering constitutes a crime of violence.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). For career offender purposes, the defendant must have at least two prior felony convictions of either a crime of violence or controlled substance offense. This does not mean that the offender must have committed two prior felonies involving a controlled substance or two prior felonies involving violence. One felony from each category fulfills the two prior felony requirement.

United States v. John, 936 F. 2d 764 (3d Cir. 1991). The district court properly considered facts underlying defendant's larceny conviction to determine that it was a crime of violence as defined in USSG §4B1.2(1), and thus to determine that defendant was a career offender and sentence him accordingly. Larceny is not specifically listed as a crime of violence but defendant's larceny did "present a serious potential risk of physical injury to another." Defendant and two associates entered a house and threatened the occupants with a gun to obtain property and money.

United States. v. Shoupe, 929 F.2d 116 (3d Cir. 1991). The district court erred in making a downward departure from the career offender guideline range of 168 to 210 months to a sentence of 84 months based on (1) appellant's youthfulness and immaturity at time of prior convictions, (2) the short time span between the commission of the offenses, (3) the defendant's cooperation with the authorities, and (4) his responsibilities to support his minor child. The circuit court found the circumstances relied upon by the district court were adequately taken into account by the Commission.

United States v. McAllister, 927 F.2d 136 (3d Cir. 1991). The district court erred in making a downward departure from the career offender guideline where the defendant had two prior adult felony convictions for crimes of violence. Robbery per se is a "crime of violence" for purposes of the career offender provision. Sentencing courts need not look beyond the fact of the conviction and the charge to ascertain whether the conviction was a "violent felony."

United States v. Amis, 926 F.2d 328 (3d Cir. 1991). A defendant whose conviction for drug offenses was subject to the enhanced penalty provision of 21 U.S.C. § 841(b)(1) could also be treated as a career offender under the guidelines.

United States v. Whyte, 892 F.2d 1170 (3d Cir. 1989). The career offender guideline does not violate the Commission's delegated authority under 28 U.S.C.§ 994(h) by considering convictions for conduct described in 21 U.S.C. §§ 841, 952(a), 955, 955(a), or 959 and not merely convictions under those specific federal statutes. It is appropriate for the Commission to consider similar state offenses as subjecting offenders to career offender treatment. Defendant argued that his 35 year sentence for being a career offender was disproportionate to his crime of selling $4,000 worth of cocaine and pulling a loaded gun on a policeman thus violating the 8th Amendment. The Third Circuit upheld the sentence.

United States v. Williams, 892 F. 2d 296 (3d Cir. 1989). In sentencing defendant as a career offender, the district court found that the crime of being a felon in possession of a firearm was a "violent felony." The Third Circuit affirmed, ruling that since the facts showed that

defendant possessed the gun while firing it at another individual, it was a violent felony.

United States v. Huff, 873 F.2d 709 (3d Cir. 1989). Inasmuch as career offender table had no provision for adjustments, career offender was not entitled to two-level reduction for acceptance of responsibility.

§ 4B1.2 Definitions for Career Offender

United States v. Beason, 2007 WL 2343764 (3rd Cir.(Pa.))). In this case, the Court of Appeals held that the defendant's Pennsylvania conviction for resisting arrest, in violation of 18 Pa.C.S. § 5104, was a crime of violence under U.S.S.G. § 4B1.2(a).

United States v. Manigault, 2007 WL 1109243 (3rd Cir. (Pa.))). The facts of this case are as follows: A tow truck operator towing an illegally parked car spotted a gun on the front seat of the car. When the police arrived, the tow truck operator opened the door of the car and the police recovered the gun, some marijuana, and 32 grams of crack cocaine. The registered owner, Richena Stanley, called the police to report that her car had been stolen. When the police contacted her, she told them that the defendant bought and used the car, but registered it in her name. She also told them that she had falsely reported the car as stolen on the defendant's instructions. She cooperated with the police, who recorded a phone call in which the defendant again instructed her to report the car as stolen. The defendant was subsequently sentenced to 235 months imprisonment following his plea of guilty to two counts of violating 21 U.S.C. § 841(a)(1)(distribution and possession with intent to distribute crack cocaine).

On appeal, he objected to enhancements for obstruction of justice (U.S.S.G. § 3C1.1) and possession of a deadly weapon (U.S.S.G. § 2D1.1) as well as to his classification as a career offender (U.S.S.G. § 4B1.1). The defendant's first objection was that the application of § 3C1.1, allowing a sentencing enhancement for obstruction of justice, was not warranted for his instructions to Stanley to falsely report the car as stolen. He argued that Application Note 4(g) of U.S.S.G. § 3C1.1, one example in a non-exhaustive list of conduct warranting the enhancement, requires that a false statement have "significantly obstructed or impeded" the investigation. He also directed the court's attention to Application Note 5(b), which states that "making false statements, not under oath, to law enforcement officers" does not warrant the enhancement unless Application Note 4(g) applies.

The Court of Appeals held that the conduct addressed in Application Note 5 references ordinary, and less culpable, evasive conduct than that attributed to the defendant. He twice requested that Stanley lie in an effort to interfere with the police investigation. A false record was produced (the stolen car report made by Stanley at the defendant's behest) during the investigation, and Stanley was directed to conceal evidence material to an investigation. U.S.S.G. § 3C1.1 Application Note 4(c) and (d). The Court of Appeals held that the enhancement was properly applied.

The defendant's next objection was to the application of § 32D1.1(b)(1) for possession of a deadly weapon during a drug trafficking offense. He argued that the district court relied upon "hearsay" and not an admission by him or a finding by the jury that he possessed the gun found on the front seat of the car, in violation of *United States v. Booker*, 543 U.S. 220 (2005). Moreover, because the gun possession count was dropped as a result of the plea agreement, he argued that his sentence was enhanced for "acquitted conduct" in violation of the Sixth Amendment, again citing *Booker*. The Court of Appeals disagreed.

Booker's teachings regarding the requirements of jury factfinding or admissions by a defendant were only applicable when the sentencing guidelines were mandatory. Judges have broad discretion to impose a sentence within a statutory range. Indeed, unindicted conduct rising to the level of a crime can be found, by a preponderance of the evidence, to be a factor for enhancement so long as the sentence lies within the statutory maximum. See *Grier*, 475 F. 3d at 561. It was undisputed, moreover, that a gun was recovered from the car along with the drugs the defendant admitted to possessing. Given the proximity of the gun to the recovered drugs - - both in the front seat of the car - - it is not "clearly improbable that the weapon was connected with the offense. U.S.S.G. § 2D1.1, Application Note 3. And even assuming the defendant was "acquitted" of the gun possession charge when it was dismissed as part of the plea agreement, no relief is in order after *Booker*. See *United States v. Watts*, 519 U.S. 148, 156-57 (1997)(allowing sentencing enhancements for acquitted conduct. Based on the foregoing, the Court of Appeals held that the enhancement for possession of a deadly weapon (U.S.S.G. § 2D1.1) was properly applied.

Finally, the defendant disputed the district court's finding that he was a "career offender" under U.S.S.G. § 4B1.1. He argued that one of his predicate convictions, Recklessly Endangering Another Person in violation of 18 Pa.C.S.A. 2705, was not a crime of violence as defined in U.S.S.G. § 4B1.2(a). The Court of Appeals looked only to the elements of the crime. The two elements of the crime are recklessness and placing another in danger of death or serious bodily injury. The Court of Appeals concluded that recklessly placing another in danger of death or serious bodily injury is clearly conduct presentencing a "serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 Application Note 1. Therefore, the Court of Appeals held that a violation of 18 Pa.C.S.A. § 2705 is a crime of violence and the defendant is a career offender under § 4B1.2.

United States v. Hull, 456 F. 3d 133 (3rd Cir. 2006). The defendant was the Imperial Wizard of the White Knights, a splinter group of the Ku Klux Klan. A search warrant was executed at his home. Agents found loaded handguns, a rocket tube, military-style weapons, ammunition, a silencer and accompanying instructions for manufacture, diagrams and instructions for making pipe bombs and booby-traps, explosives components, and, outside the home, cars damaged by explosions but still containing parts of pipe bombs. He was found guilty by a jury on seven of ten counts, including count seven which charged teaching or demonstrating, and distributing information regarding, the making and use of a pipe bomb with the intent that the teaching or information be used for a "Federal crime of violence" ("unlawful possession of a pipe bomb") in violation of 18 U.S.C. § 842(p)(2)(A).

On appeal, the defendant argued that mere simple "possession" of a pipe bomb, as opposed to the use or detonation of a pipe bomb, does not qualify as a "Federal crime of violence" under 18 U.S.C. § 842(p)(2)(A), and that his conviction at Count 7 must be vacated. The Court of Appeals agreed, looking at 18 U.S.C. § 16's definition of "crime of violence" for the purposes of 18 U.S.C. § 842(p). *Leocal v. Ashcroft*, 543 U.S. 1, 7 n. 4 (2004)("a number of statutes criminalize conduct that has as an element the commission of a crime of violence under § 16. See, e.g., 18 U.S.C. § 842(p)"). 18 U.S.C. § 16 defines "crime of violence" as follows: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

The Court of Appeals noted that to commit the offense of possession, the defendant merely had to exercise control or dominion over the pipe bomb. There is no risk that physical force might be used against another to commit the offense of possession, regardless of whether pipe bombs have a legitimate purpose or not. In contrast, had the defendant been charged with using a pipe bomb, then commission of such an offense would "involve a substantial risk that physical force against the person or property of another may be used in the course of committing" that offense. 18 U.S.C. § 16(b).

The Court of Appeals held U.S.S.G. § 4B1.2 inapposite to this case. First, *Leocal* explicitly rejected using § 4B1.2 to interpret § 16 (and by extension § 842(p)). *Leocal*, 543 U.S. at 10 n. 7. Second, § 4B1.2 specifically sets apart "use of explosives" from any other "conduct that presents a serious potential risk of physical injury to another." The Court of Appeals stated that "This implies that 'possession' of an explosive cannot qualify as a crime of violence under § 4B1.2; if it did, we would be required to read 'use of explosives' out of the guideline provision.

United States v. Jarrett, 2006 WL 1379638 (3rd Cir.(Pa.))). The defendant pled guilty to one count of possession of a firearm by a convicted felon. In calculating the guidelines range, the District Court determined that a 1990 conviction for indecent assault was not a crime of violence under § 4B1.2(a). However, the District Court concluded that a conviction entered at the same time for corruption of a minor qualified as a crime of violence. Defendant appealed, contending that the corruption of a minor offense did not, by its nature, present a serious potential risk of physical injury, and that by ruling that the state offense constituted a crime of violence, the District Court created a mandatory presumption that violates Due Process and the Sixth Amendment. The Court of Appeals affirmed the Judgment of the District Court, finding no violation of any constitutional right.

United States v. Fields, 2006 WL 1049654 (3rd Cir.(Pa.)). The defendant was convicted of possession with intent to distribute heroin and possession of ammunition by a convicted felon. On appeal, the defendant argued that the district court erred in finding that his prior conviction for possession of an unregistered short-barreled rifle in violation of 26 U.S.C. § 5861(d) constituted a "crime of violence," a determination which subjected him to an enhanced sentence as a career offender. The Court of Appeals agreed with several sister circuits in holding that

possession of a weapon in violation of § 5861(d) constitutes a crime of violence because it involves conduct that presents a serious potential risk of physical injury to another. These courts have reasoned that, in enacting § 5861, Congress determined that such weapons are, by their very nature, inherently dangerous, lack usefulness, and their possession involves substantial risk of improper physical force.

United States v. Thompson, 2004 WL 322668 (3rd Cir.(Pa.))). One of the defendant's qualifying predicate offenses was a simple assault which is classified as a misdemeanor in Pennsylvania. However, because it had a potential sentence in excess of 12 months, the Court of Appeals ruled that it qualified as a predicate offense for purposes of career offender designation.

United States v. Luster, 305 F.3d 199 (3rd Cir. 2002). The defendant pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). On appeal, he argued that the district court erroneously calculated his offense level by counting a prior felony conviction for escape from prison as a crime of violence. The district court concluded that escape is neither an enumerated offense nor a crime that has the use of force as a necessary element under Pennsylvania law. It held, however, that the crime of escape, "by its nature, presents a serious potential risk of physical injury to another." The state criminal information relating to the defendant's escape charged: "The actor unlawfully removed himself or herself from official detention, namely The Renewal Center, in violation fo 18 Pa. C.S.S. 5121(a).

The Court of Appeals held that escape presents a serious potential risk of physical injury. Escape is a continuing crime; it does not end when the escapee completes the act of leaving a correctional facility. Rather, the escapee must continue to evade police and avoid capture. Thus, "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. The conduct set forth in the defendant's count of conviction by its nature presents a serious potential risk of physical injury to another.

United States v. Walker, 2003 WL 21577934 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court erred by treating him as a career offender. One of the two offenses that qualified him as a career offender, possession with intent to deliver cocaine base, resulted from an arrest on December 3, 1991. The other, delivery of cocaine base and possession of cocaine base, resulted from an arrest on December 16, 1994. The defendant contends these cases were related because they were "consolidated for trial or sentencing." The Court of Appeals affirmed the sentence and judgment, stating that "consolidated sentencing for previous offenses does not make them related where a defendant was arrested at different times for the offenses." The defendant's two offenses were separated by an intervening arrest.

United States v. Kenney, 310 F.3d 135 (3d Cir. 2002). The defendant was found guilty by jury of possession of contraband by an inmate, in violation of 18 U.S.C. § 1791(a)(2). The district court found that Kenney's conviction for possession of the contraband, a razor blade inside a matchbook, was for a crime of violence as defined in U.S.S.G. § 4B1.2(a)(2) and thus in view of Kenney's criminal history he was a career offender within the meaning of U.S.S.G.

§ 4B1.1. Kenney appealed, asserting that his 1791(a)(2) conviction was not for a crime of violence and thus he is not a career offender. The Court of Appeals affirmed the judgment and conviction. Possession of razor blade by defendant, in violation of statute prohibiting possession of contraband by prisoner, was "crime of violence" even though defendant did not use the razor blade and there was no evidence of defendant's intent to use it. By its nature, the offense presented a serious potential risk of physical injury to other persons in prison.

United States v. Blair, 2002 WL 125584 (3rd Cir.(N.J.))). The defendant pleaded guilty to being a convicted felon in possession of a firearm that was in or affecting commerce in violation of 18 U.S.C. § 922(g)(1). He argued that the district court erred by finding that one of his prior convictions, "employment of a juvenile in a drug distribution," was a controlled substance offense as defined under U.S.S.G. § 4B1.2(b). The Court of Appeals rejected this argument. First, the defendant stipulated in his plea agreement to that fact. Moreover, the evidence of record and the state court documents fully support the district court's finding that the defendant employed a juvenile to distribute cocaine.

United States v. Beckett, 208 F.3d 140 (3rd Cir.2000). Appellant James C. Beckett was found guilty on two counts each of robbery and armed robbery in violation of 18 U.S.C. §§ 2113(a) and (d). At the sentencing hearing, the district court heard arguments on the question of whether the career offender provisions of the sentencing guidelines applied in light of Beckett's two prior convictions for bank robbery in 1982. The district court found that the two prior convictions were not part of a single common plan or scheme, and that the career offender provisions applied. On appeal, Beckett argued that the district court erred by declaring him a career offender, claiming that his two prior bank robbery convictions were part of a common scheme. Therefore, he argued, they should have been counted as a single prior conviction, and the career offender enhancement should not have been applied to him. Beckett's convictions stemmed from (1) the robbery of the Western Savings Bank; and (2) the robbery of the Benjamin Franklin Federal Savings and Loan. Beckett was arrested on April 2, 1982 for both robberies. Beckett's two prior convictions for bank robbery were thus not separated by an intervening arrest. However, they did not result from offenses that occurred on the same occasion, nor from offenses that were consolidated for trial or sentencing. He was charged by separate federal indictments, the cases were assigned to different federal judges, and the proceedings were never consolidated. The only question is whether they were part of a single common scheme or plan. The Court of Appeals held that the two prior convictions were properly considered as separate felony convictions. The district court did not err by applying the career offender enhancement.

United States v. Taylor, 98 F.3d 768 (3d. Cir. 1996). In concluding that defendant's prior convictions were "crimes of violence," the sentencing courts originally looked to the underlying conduct which gave rise to the offense. This analysis was affirmed in *U.S. v. John*, 936 F. 2d 764, 767 (3d Cir. 1991). On November 1, 1991 and November 1, 1992, however, Application Note 2 to §4B1.2 was modified. Following these amendments, the appellate court reconsidered its holding. In *U.S. v. Joshua*, 976 F. 2d 844, 852 (3d Cir. 1992), the court of appeals noted that its prior holding in *John* entitled the sentencing court to look beyond the facts charged in the indictment to the defendant's underlying conduct, including all relevant conduct under §1B1.3, in

determining whether defendant's predicate offense involved a serious potential risk of injury to another. The court acknowledged, however, that the amendment to Application Note 2 restricted the sentencing court's power to look beyond the conduct expressly charged in the indictment. The court then concluded that, "a sentencing court should look solely to the conduct alleged in the count of the indictment charging the offense of conviction in order to determine whether that offense is a crime of violence under subsection (ii) of the guideline."

In the instant case, conviction for indecent exposure constituted "crime of violence," to support designation as career offender, since facts alleged in indecent exposure count presented potential for serious injury to minor victim. The count alleged that defendant forced victim onto her bed and, while holding her down, opened his trousers and exposed himself.

United States v. McQuilkin, 97 F.3d 723 (3d Cir. 1996). Defendant's prior conviction for aggravated assault, stemming from a motorcycle accident, was a crime of violence for purposes of §4B1.2. In reaching its decision, the Third Circuit stated that since aggravated assault is expressly listed as a crime of violence, a more detailed inquiry into the underlying facts is inappropriate.

United States v. Marrone, 48 F. 3d 735 (3d Cir. 1995). Defendant was convicted of RICO charges. He had previously been convicted in state court for a predicate act charged in one of the counts of convictions. The district court did not factor the predicate act, an arson, into defendant's base offense level. Instead, the court relied on the arson conviction, as well as an unrelated extortion conviction, to classify defendant as a career offender under §4B1.1. The Third Circuit held that the district court's action was consistent with note 4 to §2E1.1, which directs a court to include a prior conviction for a predicate act in a RICO defendant's criminal history score. The two prior felony convictions referred to in § 4B1.1 need only be separate from each other, they need not be separate from the instant offense.

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

United States v. Remoi, 2007 WL 504894 (3rd Cir.(Pa.))). The defendant appealed, contending the district court erred under *Shepard v. United States*, 544 U.S. 13 (2005) by concluding, based solely on the charging document and without consulting the record of his guilty plea, that his 1990 New Jersey conviction on two counts of criminal sexual contact involved physically helpless victims and therefore qualified as a crime of violence under U.S.S.G. § 2L1.2. He read *Shepard* to mean that a district court must look to both the adjudicative records surrounding the defendant's guilty plea and the charging document to determine whether a defendant's prior conviction is of a kind that triggers an enhancement under the guidelines. Given this reading, the defendant stated that because he never specifically admitted to sexual contact with a "helpless victim" during his plea colloquy, the government cannot show that his prior conviction was for a crime of violence under the "categorical approach."

The Court of Appeals held that the defendant's reliance on *Shepard* was misplaced. The charging document leading to the 1990 conviction is clear, charging in both counts of criminal sexual contact that the defendant committed an act of sexual contact with A.C. when A.C. was one whom the defendant knew was physically helpless for the purpose of ... contrary to the provisions of N.J.S.A. 2C:14-3(b). There was no need to look further than that document.

United States v. Shepard, 544 U.S. 13 (2005). In this case the Supreme Court explained how the exception to the categorical approach, previously set forth in the context of convictions following trial in *Taylor v. United States*, 495 U.S. 575 (1990), should be applied to convictions following plea agreements. In *Taylor*, the court determined that an exception to the strict categorical approach was necessary when the statute under which the defendant was previously convicted includes multiple offenses, not all of which contain each of the elements necessary to trigger a sentencing enhancement. In the case of these "divisible statutes," the sentencing court must still determine whether the conviction necessarily encompassed all of the elements of the qualifying offense. However, to do so, the Supreme Court held that a sentencing court was permitted to look beyond the plain language of the statute - - the usual limit of its gaze under the strict categorical approach - - but that it could examine no more than the charging document and jury instructions from the previous trial. *Taylor*, 495 U.S. at 602.

Extending this rule to those situations in which a sentencing court is called upon to examine a conviction following a guilty plea, rather than following a full trial, the Supreme Court in *Shepard* set forth the universe of documents a sentencing court could examine and specifically declined to permit inquiry into police reports. The court noted: "We hold that inquiry ... is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information. 544 U.S. at 26.

United States v. Faines, 2007 WL 470508 (3rd Cir.(Del.))). The appeal presented in this case was whether the district court erred in calculating the defendant's sentence by considering his prior offense of attempted escape as a crime of violence, which enhanced his sentence as a career offender. The Court of Appeals found no error.

United States v. Amster, 193 F. 3d 779 (3d Cir. 1999). The defendant appealed, contending that his prior nolo contendere pleas and sentences which were dismissed should not have increased his federal criminal history category. This appeal raises the narrow issue whether the district court correctly treated those prior dispositions as sentences under U.S.S.G. § 4A1.2(f) when calculating the defendant's criminal history score under U.S.S.G. § 4A1.1(c). The Sentencing Guidelines specify that "A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted ... even if a conviction is not formally entered." U.S.S.G. § 4A1.2(f). The defendant argues that the county court did more than withhold adjudication; it vacated his pleas and dismissed his cases. The Court of Appeals ruled, "In light of the clear and unambiguous language of the guideline and the lack of applicable ameliorating language in the application notes, the defendant cannot avoid the effect of his prior pleas on his present sentence. Accordingly, we will affirm the judgment of

sentence."

United States v. Bennett, 100 F. 3d 1105 (3d Cir. 1996). The district court did not err in determining that the defendant's three Pennsylvania burglary convictions qualified as predicate offenses for purposed of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The defendant pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g), and was sentenced under section 924(e) for violating 922(g) having previously been convicted of three "violent felonies" or "serious drug offenses." The defendant asserted that the Pennsylvania burglary statute was broader than the generic burglary definition ion section 924(e) and, therefore, the government had the burden of showing that the trier of fact found all of the elements of generic burglary. For purposes of section 924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining if the elements of generic burglary were found in defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions." Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution."

United States v. McClenton, 53 F. 3d 584 (3d Cir. 1995). Defendant had three prior convictions for burglarizing hotel rooms. The Court of Appeals ruled that burglary of a hotel room qualifies as a "crime of violence" under §4B1.2. The only issue to decide is whether defendant's prior convictions for burglary involved a dwelling. Because burglary of a dwelling is specifically enumerated in the Guidelines, no further inquiry is warranted. Burglary of a dwelling is a crime of violence under the guidelines regardless of whether anyone is present in the dwelling at the time it is burglarized.

United States v. Hightower, 25 F. 3d 182 (3d Cir. 1994). Defendant argued that only offenses listed in 28 U.S.C. §994(h)(1) can be "controlled substance offenses" under the career offender guideline. Thus, he claimed that the Sentencing Commission exceeded its authority in expanding the definition under note 1 to §4B1.2 to include conspiracy to distribute a controlled substance. The Third Circuit held that the commentary's expansion of the definition of a controlled substance was binding, since it was not inconsistent with §4B1.2(2), did not violate the constitution or a federal statute, and explained how the guideline should be applied.

United States v. Preston, 910 F. 2d 81 (3d Cir. 1990). Defendant's previous conviction of criminal conspiracy to commit robbery was a "violent felony" within meaning of Career Criminals Amendment Act of 1986, 18 U.S.C. §924(e). The court noted that the current version of USSG. §4B1.2 (definition of crimes of violence) lends support to its holding that violent felonies under 18 U.S.C. § 924(e) includes aiding and abetting, conspiring and attempting to commit such offenses.

United States v. Williams, 892 F. 2d 296 (3d Cir. 1989). In sentencing defendant as a career offender, the district court found that the crime of being a felon in possession of a firearm was a "violent felony." The Third Circuit affirmed, ruling that since the facts showed that defendant possessed the gun while firing it at another individual, it was a violent felony. Defendant was also subject to a 15 year minimum and life maximum under §924(e). Note that the definition of crime of violence has subsequently been amended effective November 1, 1989.

§ 4B1.3 Criminal Livelihood

United States v. Cianscewski, 894 F.2d 74 (3d Cir. 1990). The criminal livelihood provision applies only to defendants whose yearly profit from crime is more than 2,000 times the hourly minimum wage.

§ 4B1.4 Armed Career Criminal

James v. United States, ___ U.S. ___, 127 S.Ct. 1586 (April 18, 2007). Supreme Court clarifies categorical approach and holds that attempted burglary is a "violent felony" under Armed Career Criminal Act.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), defines the term "violent felony" to include a crime punishable by more than a year that is "burglary" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." Under Florida law, attempted burglary requires proof of an "overt act directed toward entering or remaining in a structure or conveyance." The Supreme Court held that attempted burglary under Florida law categorically qualifies as a "violent felony" because it poses a serious potential risk of physical injury to another. The Court held that the commission of an offense need not pose the requisite risk of physical injury in every case; instead, the proper inquiry under the categorical approach is whether the conduct encompassed by the elements of the offense ordinarily presents a serious potential risk to another.

United States v. Coker, 2007 WL 931107 (3rd Cir.(Pa.))). The defendant pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He was sentenced to a prison term of 192 months. The defendant appealed, asserting that the evidence presented by the Government at sentencing was insufficient to establish the application of the armed career criminal enhancement. The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a 15-year term of imprisonment on defendants who are convicted under 18 U.S.C. § 922(g)(1) of possessing a firearm and who have three prior convictions for a serious drug offense. The defendant did not deny his three previous controlled substance convictions. He instead challenged the evidence the district judge relied on to make the determination that he was indeed an armed career criminal.

In reaching its determination to affirm the sentence, the Court of Appeals noted, "The fact of prior convictions is not an element of the crime and need not be found by a jury. See *Almendarez-Torres v. United States*, 523 U.S. 224, 239-248 (1998); *United States v. Ordaz*, 398 F. 3d 236, 240-41 (3d Cir. 2005). There is no per se rule that certified copies of judgments of conviction are required before a judge "may determine that the defendant's prior convictions are for serious drug offenses within the meaning of 18 U.S.C. § 924(e)(2)(A)(iii). *United States v. Watkins*, 54 F. 3d 163, 168 (3d Cir. 1995). That a criminal defendant was previously convicted of a crime may be confirmed by the terms of the plea agreement, the charging document, the transcript of colloquy between judge and defendant, or some other comparable judicial record of this information. See *Shepard v. United States*, 544 U.S. 13, 16 (2005)(holding that inquiry under the Armed Career Criminals Act to determine statutory elements of prior conviction is limited to judicial records and may not include documents that simply purport facts, like police reports)."

In the instant case, the District Court was presented during the sentencing hearing with the bill of information and the criminal complaint outlining three previous convictions in the Philadelphia Court of Common Pleas. Each document, certified by the Philadelphia Court of Common Pleas and given to the District Court, showed that the defendant was convicted three separate times for controlled substance crimes involving cocaine base. The information provided in these documents enabled the District Court to ascertain with certainty the drug offense convictions.

United States v. Altsman, 2004 WL 434152 (3rd Cir.(Pa.))). The defendant appealed the district court's sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), arguing that his 1986 conviction for attempted kidnapping was not a "violent felony" for sentencing purposes. The Court of Appeals held that it did constitute a violent felony under the ACCA.

United States v. Richardson, 313 F.3d 121 (3d Cir 2002). The defendant was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act (ACCA). At sentencing, the district court considered whether the Armed Career Criminal Act, 18 U.S.C. § 924(e), applied to enhance Richardson's sentence. The court concluded that a 1994 juvenile adjudication for robbery and other offenses, along with two adult convictions for possessing crack cocaine with intent to distribute, satisfied section 924(e)'s requirement that the defendant be convicted of at least three prior violent felonies or serious drug offenses. As a result, Richardson faced a statutory minimum term of imprisonment of fifteen years with sentencing guidelines of 235-293 months. Defense counsel argued that the juvenile adjudication did not qualify as a "violent felony" under § 924(e)(2)(B) because it was unclear from the juvenile records whether a knife was actually used in the robbery, and for a juvenile offense to count as a predicate offense (or "violent felony"), the statute requires that a firearm, knife, or destructive device have been used or carried. The district court found that although it could not be determined from the complaint or the Family Court records whether Richardson himself held a knife in the 1994 robbery, a knife had been involved and a "newly discovered police report" showed that it was held by Richardson's accomplice.

The Court of Appeals vacated Richardson's sentence and remanded. It held that "in determining whether the defendant's prior juvenile adjudication was a "violent felony" constituting a predicate offense under the ACCA, a sentencing court must apply the categorical approach, mandating a review of the criminal statutes underlying the juvenile adjudication rather than a separate factual determination by the sentencing court." There is no real dispute that the district court did not comply with the categorical approach mandated by the Supreme Court in *Taylor*, 495 U.S. 575, 602, 110 S.Ct. 2143. Indeed, neither side urged the categorical approach and both sides argued only their version of the facts. Had the district court applied the categorical approach, however, all it would have had to do would be to review the Pennsylvania criminal statutes underlying the juvenile adjudication, which review would have left no doubt that none of the offenses which Richardson was found to have committed had as a necessary element "the use or carrying of a firearm, knife, or destructive device" required for a juvenile adjudication to count as a predicate offense under the ACCA.

United States v. Mack, 229 F. 3d 226 (3d Cir. 2000). After a jury trial, the defendant was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Following the conviction, the district court sentenced the defendant pursuant to the enhanced penalties under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(1). On appeal, the defendant argued that (1) the district court erred in enhancing his sentence under the ACCA in the absence of formal pretrial notice of the government's intention to seek enhancement and of the specific prior convictions supporting its application; (2) the district court's finding that the defendant used or possessed a firearm in connection with a crime of violence was erroneous because it was based on a preponderance of evidence standard rather than the required and higher "clear and convincing" evidence standard; and (3) the evidence was insufficient to support the district court's finding that the defendant used or possessed a firearm in connection with a crime of violence.

The defendant did not challenge the validity of the convictions supporting the application of the ACCA before the district court. On appeal, the defendant did not assert that he was provided insufficient time to contest these prior convictions nor claims that the district court's finding that he qualified as an armed career criminal was erroneous. Instead, pointing to the importance of pretrial knowledge of the applicability of the ACCA in deciding whether to plead guilty or to go to trial, he contends that his due process rights were violated by the application of the ACCA, because he did not receive formal, pretrial notice of the government's intent to seek an enhanced sentence under the ACCA and of the particular prior convictions that would underlie the application of the ACCA. The Court of Appeals concluded that the defendant received constitutionally adequate notice. First, the government provided him with actual notice prior to trial, including certified copies of the relevant prior convictions. Second, three and a half months before sentencing, the defendant received the PSR, which stated that the defendant was subject to being sentenced under the ACCA's enhancement provisions and specified the prior convictions that qualified him for that enhancement. Third, the government filed an additional notice ten days before sentencing formally notifying the defendant that he could be sentenced as an armed career criminal. The Court of Appeals also held that "the clear and convincing standard of proof is not compelled, and we review the government's proof at sentencing under

the preponderance of the evidence standard." Also, the Court of Appeals held that the shooting of Wessels constitutes a crime of violence, and the defendant used or possessed a firearm in connection with that crime.

United States v. Cornish, 103 F. 3d 302 (3d Cir. 1997). At sentencing, the district court held that defendant's prior conviction for third degree robbery in Pennsylvania was not a "violent felony" and, therefore, the defendant did not have the third prior violent offense necessary for application of §924(e)'s enhanced penalty provisions. The appellate court held that the appropriate method for determining whether a particular offense qualifies as a "violent felony" is the categorical approach, which allows the court to look only to the statutory definition of the prior offense, or when necessary, the indictment or information papers and the jury instructions. Any conviction for robbery under Pennsylvania robbery statute, regardless of the degree, has as an element the use of force against the person of another. Thus, defendant's conviction for third degree robbery is a "violent felony" pursuant to 18 U.S.C. §924(e)(2)(B)(i).

United States v. Bennett, 100 F. 3d 1105 (3d Cir. 1996). The district court was correct in concluding that defendant's three Pennsylvania burglary convictions qualified as predicate offenses for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). For purposes of §924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining if the elements of generic burglary were found in defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions." Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution."

United States v. Jefferson, 88 F. 3d 240 (3d Cir. 1996). The district court, holding that defendant had the requisite three "previous convictions," each for a "serious drug offense," sentenced defendant to a mandatory 15-year term of imprisonment pursuant to the Armed Career Criminal Act, 18 U.S.C. §924(e). The question on appeal was whether defendant was subject to that provision, when, for two of his previous offenses, guilty pleas had been entered but sentences had not yet been imposed at the time of commission of the weapons possession offense. In affirming the sentence, the court of appeals concluded that, for the purpose of enhanced sentencing under the Armed Career Criminal Act, the term "conviction" is defined by the jurisdiction in which the proceedings were held, and that under the laws of Pennsylvania and New Jersey, defendant's guilty pleas constituted convictions.

United States v. Watkins, 54 F. 3d 163 (3d Cir. 1995). Defendant's presentence report identified five prior felony convictions by court, file number, date of arrest and sentencing, offense charged, and sentence imposed. In addition, it described the conduct leading to each conviction. Defendant argued that the information in the presentence report was inadequate to prove that the convictions were for "violent felonies" under the Armed Career Criminal Act. The

Third Circuit rejected a per se rule requiring certified copies of convictions to prove that prior convictions were violent felonies.

United States v. Jacobs, 44 F. 3d 1219 (3d Cir. 1995). Defendant argued that the Sentencing Commission was only authorized to promulgate guidelines for categories of offenses, and could not issue guidelines for sentencing enhancement statutes such as the Armed Career Criminal Act. The Third Circuit upheld the Commission's authority to promulgate §4B1.4, the Armed Career Criminal guideline. Section 4B1.4 defines a particular category of defendants, armed career offenders, and sets out special rules for calculating their offense levels and criminal history categories. Thus, in every case in which it applies, this guideline, together with other applicable guidelines, establishes a sentencing range for the relevant offense and the relevant category of defendants. Thus, it falls squarely within the Commission's authority.

Custis v. United States, 114 S. Ct. 1732 (1994). Defendant was convicted of possession of a firearm by a felon under 18 U.S.C. §922(g)(1). At sentencing, the judge sentenced him under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(1), because he had three prior state felony convictions. Defendant claimed his prior state convictions were invalid due to ineffective assistance of counsel. The district court refused to entertain this collateral attack, noting that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [§924(e)(1)] provides no statutory right to challenge prior convictions." The Supreme Court affirmed, holding that with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to collaterally attack prior state convictions that are used to enhance his sentence under the Armed Career Criminal Act.

United States v. Gilbert, 20 F. 3d 94 (3d Cir. 1994). The district court refused to sentence defendant under the Armed Career Criminal Act, finding that five of defendant's seven prior felony convictions were constitutionally invalid. The government asserted that it was improper to allow defendant to collaterally attack his prior state convictions, since no "fundamental error" was alleged. The Third Circuit rejected this assertion. The question is not whether a district court is required to consider collateral attacks which are based on fundamental errors, but whether the district courts have the discretionary authority to do so. Two recent Third Circuit cases reviewed district court decisions involving collateral attacks on prior convictions. Neither case involved a fundamental error, and in neither case was the district court's authority to review the prior convictions rejected. Therefore, the court's authority to review the prior sentences must be upheld here. However, defendant's case was remanded because district court failed to explain reasoning for conclusory finding that defendant's prior state convictions offered by government as predicate offenses.

Taylor v. United States, 495 U.S. 575 (1990). The Supreme Court considered the application of 18 U.S.C. §924(e) where the issue was whether second-degree burglary under Missouri law qualified as a "violent felony," and held that the meaning of burglary for purposes of section 924(e)(2)(B)(ii) was not dependent on the state's definition of burglary. Rather, the offense will be deemed to qualify as a violent felony if "its statutory definition substantially corresponds to 'generic' burglary--an unlawful or unprivileged entry into, or remaining in, a

building or other structure, with intent to commit a crime-- or if the charging papers and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." The sentencing court must generally adopt a formal categorical approach in applying the enhancement provision, looking only to the fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts.

CHAPTER FIVE: *Determining the Sentence*

Part B -- Probation

§ 5B1.1 Imposition of a Term of Probation

United States v. Warren, 186 F. 3d 358 (3d Cir. 1999). The district court imposed a special condition to bar the defendant's travel outside the United States. The defendant appealed. In imposing the special condition, the district court did not make findings in support of the travel restriction, nor did it indicate how the restriction fit within the statutory aims of probation. The Court of Appeals vacated the sentence and remanded for resentencing.

United States v. Jacobs, 919 F.2d 10 (3d Cir. 1990). Amendment to 18 U.S.C. §3359(a) changing classification of offenses with maximum prison terms of 20 years from Class B to Class C, making defendants convicted of such offenses eligible for probation, was a change in "penalty" within meaning of 1 U.S.C. § 109 (1985), commonly known as the "savings clause," so that defendant being prosecuted at the time of amendment was not entitled to probation.

Part C -- Imprisonment

§ 5C1.1 Imposition of a Term of Imprisonment

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The Court of Appeals held that under § 5C1.1, "community confinement" cannot constitute "imprisonment" for purposes of fulfilling the requirement that one-half of a split sentence be satisfied by imprisonment.

United States v. Perakis, 937 F. 2d 110 (3d Cir. 1991) The circuit court lacked jurisdiction to review the district court's imposition of a term of imprisonment instead of a period of home, community or halfway house detention as requested by defendant.

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

U.S. v. Warren, 2003 WL 21805622 (3rd Cir. (PA)). The defendant pled guilty to Conspiracy to Distribute in Excess of Five Kilograms of Cocaine. The presentence report reflected that he did not qualify for the application of the safety valve provisions because he had declined to provide the identities of his drug suppliers and customers. At sentencing, the defendant argued that complete compliance with the Government's request would have jeopardized the safety of his family. The District Court denied the defendant's objection and sentenced him to the mandatory minimum term of 120 months.

The defendant appealed claiming that his Fifth Amendment right against self-incrimination was violated by the District Court's insistence that he provide the information requested by the Government in order to qualify for the safety valve. The Court of Appeals characterized a failure to qualify for the safety valve as a denied benefit rather than a penalty and found that it does not impose an unconstitutional condition on defendants seeking it advantages.

United States v. Boddie, 318 F.3d 491 (3rd Cir. 2003). The issue presented in this case is whether a district court has authority under the Sentencing Guidelines to apply the safety valve to a defendant whose criminal history category of II overstated the seriousness of the defendant's prior record. The Court of Appeals, agreeing with seven other courts of appeals, held that a district court is precluded from applying the safety valve provision where a defendant has more than one criminal history point as determined under § 4A1.1, notwithstanding the fact that the court granted a downward departure after finding that the criminal history category is overstated.

United States v. Moncado-Polomo, 2002 WL 31716400 (3rd Cir. (Virgin Islands))). The defendant appealed his sentence arguing that the district court erred in failing to adjust his sentence downward pursuant to the "safety valve." The district court found that he did not meet prong 5 of the safety valve in that he was not entirely forthcoming with the government. The court heard the testimony of a special agent and found that the defendant had not been truthful because he failed to account for documents in his possession, provide any information about the people on the boat from which he and the drugs came, and did not provide any details about the objects he threw overboard. The Court of Appeals ruled that the district court's findings were not clearly erroneous.

United States v. Giraldo, 2002 WL 31667847 (3rd Cir.(N.J.))). Prior to a re-sentencing hearing, the defendant submitted a certification to the district court and prosecutor outlining his involvement in the charged offense. The district court held that the "safety valve" provision did not apply because Giraldo's application for a determination that he was eligible for a "safety valve" reduction was not timely. The defendant appealed this decision. The Court of Appeals agreed with the government's assertion that, by failing to make his proffer before the first sentencing hearing, Giraldo waived his ability to invoke the safety valve provision in his subsequent re-sentencing....Giraldo's proffer came too late.

United States v. Chambers, 2002 WL 31059148 (3rd Cir.(N.J.))). The defendant appealed the district court's decision not to grant her a two point downward adjustment under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. The district court found that as of the time of the sentencing hearing, the defendant had not truthfully provided the government with all relevant information regarding the conspiracy, and therefore that she had not met prong (5) of the safety valve requirements. Specifically, the district court adopted the PSI findings that the defendant had provided two others with cocaine filled shoes and found the defendant's denial of her participation to be a lie. The Court of Appeals concluded that the defendant's failure to tell the government the truth about her participation in the importation up to and including the time of sentencing hearing was sufficient to warrant the district court to refuse to apply the safety valve.

United States v. Rendon, 2002 WL 1754391 (3rd Cir.(Pa.))). The defendant asserted that the district court erred in its denial to reduce his offense level under the safety valve provision. The record established that the defendant was responsible for the distribution of approximately 800 kilograms of cocaine. He maintained through sentencing that he was responsible for distributing only five kilograms of cocaine. Because the defendant minimized his role and failed to give a full, forthright account of his involvement in the conspiracy, the district court did not err in finding the safety valve provision inapplicable.

United States v. Roldan-Hernandez, 2002 WL 1754439 (3rd Cir.(Pa.))). The issue is whether the district court improperly denied the defendant an offense level reduction under the safety valve provision. The district court denied the reduction because the defendant was not forthcoming and truthful in his totality of involvement in the conspiracy to distribute cocaine. The record establishes that the defendant was responsible for the distribution of approximately 800 kilograms of cocaine, but the defendant maintained through the time of sentencing that he was responsible for distributing only five kilograms of cocaine. He thus failed to give a full, forthright account of his involvement in the conspiracy. Under these circumstances, the district court did not err in finding the safety valve provision inapplicable.

United States v. Holman, 168 F. 3d 655 (3d Cir. 1999). The Third Circuit refused to review whether the defendant would have been entitled to relief under the safety valve because § 5C1.2 would not have helped him. The defendant faced a mandatory minimum sentence of ten years under 21 U.S.C. § 841(a)(1). The district court determined the applicable guideline range to be 108-135 months. Because the record indicated that the court determined the sentence without regard to the statutory minimum, the defendant's sentence would have been the same even if he had qualified for the safety valve.

United States v. Sabir, 117 F. 3d 750 (1997). The court of appeals held that mere fact that a defendant is entitled to a two-or three-level reduction in his offense level for acceptance of responsibility does not establish that the defendant has satisfied the requirements of 18 U.S.C. §3553(f)(5). Defendant failed to give a "full forthright account of his activities to the government."

United States v. Wilson, 106 F. 3d 1140 (3d Cir. 1997). The district court did not err in concluding that defendant did not qualify for sentencing under the "safety valve provision" because he possessed a firearm in connection with the offense. This finding was grounded in its belief that defendant's past drug dealing constituted conduct relevant to the offense of conviction and that defendant's involvement with guns was connected to this relevant conduct. The commentary to the safety valve provision defines "offense" as "the offense of conviction and all relevant conduct."

United States v. McQuilkin, 78 F. 3d 105 (3d Cir. 1996). The safety valve provision does not apply to defendants convicted under 21 U.S.C. §860 of selling drugs within 1,000 feet of a school. The Third Circuit noted that by its terms, 18 U.S.C §3553(f) applies only to convictions under 21 U.S.C. §§841, 846, 961, and 963.

Part D -- Supervised Release

§ 5D1.1 Imposition of a Term of Supervised Release

United States v. Lovett, 467 F. 3d 374 (3rd Cir. 2006). On appeal, the defendant challenged the district court's imposition of a three year period of supervised release. He acknowledged that 18 U.S.C. § 3559(a) determines the letter classification of his criminal offense based on the "maximum term or imprisonment authorized...." He also agreed that the letter classification governs the maximum term of supervised release under 18 U.S.C. § 3583(b)(2). Because he committed his offense of conviction before the Supreme Court issued its opinion in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005), the defendant argued that under § 3559(a) the "maximum term of imprisonment authorized" should have been computed based on his maximum term of imprisonment under the then mandatory United States Sentencing Guidelines, not the statutory maximum term of ten years. Thus, he argued that, consistent with his guideline range of 12 to 18 months, his offense under § 3559(a) should have been classified as a Class E felony for which the term of supervised release should not have exceeded one year, instead of a Class C felony subject to not more than three years of supervised release. See 18 U.S.C. § 3559(a).

The Court of Appeals held that the defendant's maximum term of supervised release was properly computed based on the maximum term of imprisonment authorized by the statute of conviction as no more than three years both before and after *Booker*.

United States v. Williams, 369 F. 3d 250 (3rd Cir. 2004). The defendant pleaded guilty to Bank Fraud and Obstruction of Correspondence. He was sentenced to 16 months imprisonment and five years supervised release. After he completed his term of imprisonment on July 18, 1997, he was released to the custody of the Immigration and Naturalization Service. On July 23, 1997, he was deported to Nigeria. Sometime after his deportation, but before his term of supervised release was to end, the defendant re-entered the United States. On September 6, 2001, he was arrested under an alias in the Northern District of Illinois and eventually charged with illegally re-entering the United States.

On May 31, 2002, the District Court for the District of New Jersey issued an order to show cause why Williams should not be found in violation of the conditions of supervised release. He subsequently pleaded guilty to violating the conditions of supervised release. The defendant appealed, arguing that his term of supervised release terminated on the date he was deported from the United States. The Court of Appeals disagreed. Supervised release is not automatically extinguished by deportation.

United States v. Foster, 2004 WL 790308 (3rd Cir. (Pa.))). The defendant appealed and argued that the district court abused its discretion when it revoked his supervised release and sentenced him to three years in prison, in excess of the sentencing range provided by the guidelines. The Court o Appeals affirmed. The range in the guidelines is "merely advisory." As long as the sentencing court considers this range in its evaluating process, the sentence is not reversible solely because it exceeded the range.

United States v. Powell, 2003 WL 214773 (3rd Cir.(Pa.))). The district court held a revocation hearing to determine if Powell had committed Grade A violations of supervised release. The basis for the Grade A violations was two arrests on drug charges. After hearing testimony by three Philadelphia police officers, the district court found that Powell had violated his supervised release by committing the two Grade A violations. Powell argued on appeal that the government failed to prove by a preponderance of the evidence that he had committed the Grade A violations. The Court of Appeals held that the evidence before the district court supported the conclusion that Powell had committed two Class A violations. Furthermore, contrary to Poweell's assertion, there is no constitutional requirement that the revocation hearings be postponed until after the state criminal proceedings have been completed. *See United States v. Babich*, 785 F.2d 416 (3d Cir. 1986).

United States v. Sanchez-Gonzalez, 294 F. 3d 563 (3d Cir. 2002). Defendant argued that his ten-year supervised release term violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The statutory provision governing offenses involving an unspecified quantity of cocaine, 21 U.S.C. § 841(b)(1)(C), provides for up to 30 years imprisonment and at least six years of supervised release. Defendant's supervised release term thus did not exceed the statutory maximum in § 841(b)(1)(C). However, defendant argued that the ten-year term exceeded the maximum contained in 18 U.S.C. § 3583, which limits the maximum term of supervised release from one to five years for varying classes of felonies, except as otherwise provided." The Third Circuit held that § 3583 does not impose a limit on the terms of supervised release available under § 841. The plain meaning of § 3583 is that it always yields to other statutes, such as § 841, that specifically provide terms of supervised release. Any other reading fails to give full effect to the language "except as otherwise provided."

United States v. Sicher, 239 F. 3d 289 (3d Cir. 2000). The defendant pled guilty to one count of conspiracy to distribute cocaine and marijuana in violation of 21 U.S.C. § 846 and one count of aiding and abetting the distribution of marijuana near a school in violation of 21 U.S.C. § 860(a). As a special condition of supervised release, the district court ordered that she not enter the Allentown area, i.e. Lehigh or Northampton counties, unless given permission to do so by her probation officer. On appeal, the defendant argued that the condition was invalid for three reasons. First, she argues, it is not reasonably related to the nature and circumstances of her crime. Second, it involves a greater deprivation of liberty than is reasonably necessary. Third, it is inconsistent with the pertinent policy statements of the Sentencing Commission. The Court of Appeals affirmed. There was ample evidence that if the defendant were to return to the location and associates that shaped her youth, she would be extremely likely to return to a life of crime. Here, the defendant is prohibited from entering two counties. That prohibition is not absolute, however, because she can enter either county with the permission of her probation officer. Moreover, the territorial limitation is clearly intended to promote her rehabilitation by keeping her away from the influences that would most likely cause her to engage in further criminal activity. Furthermore, the fact that the special condition preventing her from entering two counties is not explicitly authorized by the policy statements simply does not cause the condition to be inconsistent with the policy statements.

United States v. Loy, 237 F.3d 251 (3d Cir. 2001). This is the second time the defendant asked the court of appeals to review the special conditions imposed on his supervised release. Following remand, the district court entered an order amending the defendant's sentence to eliminate the condition that he undergo testing and treatment for alcohol abuse while on supervised release. The court then reimposed the conditions barring the defendant from possessing pornography of any type, as well as from having any unsupervised contact with minors, adding the further requirement that any supervision must come from someone other than his wife. The essence of the defendant's claim was that not knowing the scope of the pornography proscription is, in itself, a hardship. He argued that because of the vagueness, he will not know what he can and cannot view. The court of appeals held that to "the extent that the condition might apply to a wide swath of work ranging from serious art to ubiquitous advertising, the condition is overly broad and violates the First Amendment." The defendant also argued that there is insufficient evidence in the record to support the condition barring him from having any unsupervised contact with minors. The Court of Appeals affirmed the condition restricting the defendant's contact with minors.

United States v. Johnson, 120 S. Ct. 1114, 1117-19 (2000). While in prison, defendant had two of his multiple felony convictions overturned. As a result, his revised sentence was shorter than the time he had already spent in prison. He was released and moved to have his term of supervised release shortened by the excess period of imprisonment. The district court denied the motion, but the Sixth Circuit reversed, holding that "the date of his 'release' for purposes of §3624(a) was the date he was entitled to be released rather than the day he walked out the prison door," and the extra time defendant served in prison should be credited toward his supervised release term.

The Supreme Court unanimously reversed. "On the issue presented for review - whether a term of supervised release begins on the date of actual release from incarceration or on an earlier date due to a mistaken interpretation of federal law - the language of 18 U.S.C. § 3624(e) controls." That statue "directs that a supervised release term does not commence until an individual 'is released from imprisonment.'... [T]he ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey."

United States v. Loy, 191 F.3d 360 (3d Cir. 1999). The defendant pled "guilty" to child pornography offenses. On appeal, he argued that the district court abused its discretion in imposing the special conditions of supervised release. The defendant argued that since there was no indication in the presentence report or elsewhere in the record that he ever used drugs, the condition for testing and treatment for drug abuse is not reasonably related to any statutory goal and involves a greater deprivation of liberty than required. He asserts that the statute provides that the condition "may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. The Court of Appeals concluded that "What Loy overlooks in making this argument is that the relevant provision merely suggests that the court "may" ameliorate or suspend the condition where there is a low risk of future substance abuse. It does not state that the court is required to do so. Consequently, the district court cannot be said to have abused its discretion in imposing drug testing as a condition of Loy's supervised release, despite his lack of prior drug usage.

The defendant also argued that the district court abused its discretion by ordering him to submit to alcohol testing and treatment, prohibiting him from having unsupervised contact with minors, and forbidding him from possessing pornography of any kind. The Court of Appeals remanded the case and directed the district court to state its reasons for imposing these conditions. While the district court has broad discretion in fashioning conditions of supervised release, the sentencing judge is required by statute to state the reasons in open court for imposing a particular sentence.

United States v. Porat, 17 F. 3d 660 (3d Cir. 1994). The court imposed five months imprisonment followed by five months supervised release, conditioned on home detention in Israel. The Third Circuit rejected this, holding that to ensure adequate supervision, defendant must serve his complete sentence in the United States. Electronic monitoring by an American company in Israel would not be an adequate substitute for the supervisory role of the probation officer.

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The defendant pled guilty to receiving child pornography. The district court attached a special condition to his supervised release that limits his computer use. On appeal, Crandon challenged the special condition. The Court of Appeals held that the condition is reasonably related to the defendant's criminal activities, to the goal of deterring him from engaging in further criminal conduct, and to protecting the public. In this case, the defendant used the Internet as a means to develop an

illegal sexual relationship with a young girl over a period of several months. The defendant also argued unsuccessfully that the special condition may hamper his employment.

United States v. Kenrick, 2007 WL 2384232 (3rd Cir. (Pa.))). The defendant pleaded guilty to Interstate Travel to Engage in Illicit Sexual Conduct in violation of 18 U.S.C. § 2423(b).

The defendant, then a 46-year-old Georgia resident, met the victim, then a 13-year-old Pennsylvania resident, online in May 2002. Over the next several years, the defendant and the victim communicated regularly, both online and by telephone. Subsequently, when the victim turned 15, the defendant asked her to marry him, indicating that he was going to come to Pennsylvania to meet and live with her.

In August 2004, the defendant did indeed travel from Georgia to Pennsylvania where he went to the victim's home. The victim, however, was not there when he arrived. The defendant returned several days later, meeting the victim in person for the first time. Although the defendant returned to Georgia, he subsequently traveled back to Pennsylvania, this time staying with the victim's family. While in the victim's home, the defendant and the victim engaged in various sexual acts. The defendant eventually moved into an apartment located in Canonsburg, Pennsylvania, the town in which the victim lived, and continued to see her for several weeks. Ultimately, however, the victim's parents asked the defendant not to see the victim any longer.

The district court sentenced the defendant to 46 months imprisonment and imposed a lifetime term of supervised release. As special conditions of supervised release, the court ordered the defendant to participate in a mental health treatment program, including sex offender treatment, as approved and directed by his probation officer and abide by all rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph examination to determine compliance with the conditions of supervision. It also prohibited the defendant from possessing any pictures, books, writings, drawings, videos, DVDs, video games, or other similar material depicting or describing sexually explicit conduct as defined by Title 18, United States Code, Section 2256(2). Finally, it ordered the defendant to cooperate in the collection of his DNA at the direction of his probation officer.

The defendant appealed the lifetime term of supervised release as well as the outlined conditions. The Court of Appeals, citing *United States v. Voelker*, 487 F. 3d 139 (3d Cir. 2007), agreed that the prohibition against possessing sexually explicit materials violates First Amendment rights. It explained that although a ban on accessing sexually explicit material involving children would certainly be reasonable, there are First Amendment implications for a ban that extends to explicit material involving adults. Further, and more disturbingly, the restriction arguably sweeps within its reach materials that may not fairly be deemed pornography under any standard such as completely appropriate description in novels written for the legitimate literary market of intimate private conduct of married couples. The Court of Appeals therefore vacated the special condition prohibiting the defendant from possessing sexually explicit

materials during the term of his supervised release. In a footnote, the Court of Appeals stated that "We do not suggest that the court may not impose a narrower condition relating to pornography consistent with this opinion."

Further, with respect to the term of supervised release itself, the Court of Appeals noted that our discussion of the propriety of the conditions imposed...applies to duration of the term with equal force. While the Court of Appeals was mindful that the 2004 Sentencing Guidelines expressly provide for the possibility of a lifetime term of supervised release for the offense, inasmuch as the district court did not provide adequate reasons for its decision, the Court of Appeals vacated this provision of the sentence. The Court of Appeals noted that "the district court offered little more than a paraphrasing of the section 3553(a) factors as justification for the sentence it imposed."

Next, the Court of Appeals addressed the condition dealing with polygraph examinations. The Court of Appeals, citing *United States v. Lee*, 315 F. 3d 206, 217 (3d Cir. 2003) and *United States v. Warren*, 76 Fed. Appx. 432, 436 (3d Cir. 2003), concluded that the district court did not abuse its discretion in requiring the defendant to submit to random polygraph examinations as a condition of his supervised release.

Finally, the Court of Appeals considered the district court's order that the defendant submit DNA samples at the direction of his probation officer. Citing, *United States v. Sczubelek*, 402 F. 3d 175, 184 (3d Cir. 2005), cert. Denied, 126 S. Ct. 2930 (2006), the Court of Appeals stated that the taking of a DNA sample from an individual on supervised release is not an unreasonable search.

In summary, the Court of Appeals vacated the judgment of conviction and sentence insofar as it imposed a lifetime term of supervised release and prohibited the defendant from possessing sexually explicit materials.

United States v. Voelker, 489 F. 3d 139 (3rd Cir. 2007 - discussed the propriety of the conditions of supervised release imposed on a defendant who pled guilty to receipt of material depicting the sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(2).

The background of this case is as follows: During an investigation, FBI agents monitored a computer "chat" between the defendant and another individual. The defendant briefly exposed the buttocks of his three year old daughter over a webcam that was connected to his computer. When he was confronted by the FBI, the defendant acknowledged downloading child pornography onto his computer, and he directed agents to computer discs where the files were stored. He also admitted to partially exposing his daughter over his webcam, but insisted that statements he had made about sexual contact with minors or offering his daughter for sex were merely gratuitous statements in the nature of "role-playing." Agents subsequently searched Voelker's home and seized computer files containing child pornography.

The defendant was sentenced to 71 months imprisonment followed by a lifetime term of supervised release pursuant to 18 U.S.C. § 3583(k). The lifetime term of supervised release and three conditions the court imposed were the subject of the appeal.

The conditions are as follows: 1) The defendant is prohibited from accessing any computer equipment or any "on-line" computer service at any location, including employment or education. This includes, but is not limited to, any internet service provider, bulleting board system, or any other public or private computer network; 2) The defendant shall not possess any materials, including pictures, photographs, books, writings, drawings, videos or video games depicting and/or describing sexually explicit conduct as defined at 18 U.S.C. § 2256(2); and 3) The defendant shall not associate with children under the age of 18 except in the presence of a responsible adult who is aware of the defendant's background and current offense and who has been approved by the probation officer.

Although the defendant challenged the lifetime term of his supervised release, the Court of Appeals did not separately address this challenge**,** indicating that their discussion of the propriety of the conditions imposed on that term applies to duration of the term with equal force. Accordingly, the focus was on the propriety of the conditions of supervised release.

Prohibition of Computer Equipment and the Internet

The defendant argued that a lifetime ban on using computers and computer equipment as well as accessing the internet, with no exception for employment or education, involved a greater deprivation of liberty than is reasonably necessary and is not reasonably related to the factors set forth in 18 U.S.C. § 3583.

The Court of Appeals agreed, noting that the condition is the antithesis of a "narrowly tailored" sanction; the district court could clearly have imposed some limitations on the defendant's access to computers and the internet. The Court of Appeals mentioned the availability of filtering software that could allow the defendant's internet activity to be monitored and/or restricted. The lifetime ban on all computer equipment and the internet is the functional equivalent of prohibiting a defendant who pleads guilty to possession of magazines containing child pornography from ever possessing any books or magazines of any type during the remainder of his/her life.

The government argued that this case warranted the kind of special supervisory condition the Court of Appeals allowed in *Crandon*. In *Crandon*, the Court of Appeals upheld a condition that the defendant not "possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office." The Court of Appeals stated that the government's reliance on *Crandon* ignores the glaringly obvious difference between the duration of Crandon's conditions and the duration of Voelker's conditions. Crandon's restrictions remained in place for three years, Voelker's restrictions will last as long as he does. Crandon used computers and the internet to actually seek out, and then communicate with, his

victim. Crandon traveled across the country to have sex with the minor he met and seduced online. Still, Crandon was allowed to continue using stand-alone computers and computer equipment, and he retained the right to use the internet with the consent of the probation office. Voelker was not afforded either of these options. Although Voelker's conduct was reprehensible, he did not use his computer equipment to seek out minors nor did he attempt to set up any meetings with minors over the internet as Crandon did. Since Voelker's conduct was not nearly as predatory as Crandon's, the latter actually counsels against the much more intrusive lifetime restriction on Voelker.

Prohibition on Sexually Explicit Materials

The defendant was prohibited from possessing any textual descriptions or visual descriptions of sexually explicit conduct, as defined by 18 U.S.C. 2256(2)(A). He argued that this condition violates the First Amendment and, like the ban on computer and internet access, also involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and protect the public. In ordering that the condition be vacated, the Court of Appeals stated that although a ban on accessing sexually explicit material involving children would certainly be reasonable, there are First Amendment implications for a ban that extends to explicit material involving adults. There was nothing in the record to suggest that sexually explicit material involving only adults contributed in any way to the defendant's offense, nor is there any reason to believe that viewing such material would cause the defendant to re-offend.

Restriction on Associating with Children

The defendant was prohibited from associating with minors without the prior approval of the probation officer and mandated that any such contact be in the presence of an adult who is familiar with the defendant's criminal background. The defendant argued that this condition prevents him from having unsupervised contact with his two children or any children he may have in the future. He claimed that it therefore interferes with his constitutional right of procreation, as well as his fundamental liberty and his freedom of association under the First Amendment.

Though there was evidence in the record that the defendant exposed his three year old daughter's buttocks over the internet using his webcam and jeopardized his minor daughter's welfare by offering her for sex during an online communication, the Court of Appeals ruled that the "court delegated absolute authority to the probation office to allow any such contacts while providing no guidance whatsoever for the exercise of that discretion. Thus, Voelker's probation officer becomes the sole authority for deciding if Voelker will ever have unsupervised contact with any minor, including his own children, for the rest of his life. This is the very kind of unbridled delegation of authority that we struck down in *Loy II*. *See* 237 F. 3d at 266."

While not expressing any opinion about the legality of a condition that so drastically interferes with one's right to associate with one's own children, the Court of Appeals stated that on remand, the district court will have another opportunity to clarify the intended scope of this

restriction and to provide sufficient guidance for the exercise of the probation officer's discretion if a ban on associating with minors is reimposed. The Court of Appeals noted that on remand, the district court may wish to supplement the record with expert testimony from persons knowledgeable in this area in order to better resolve the dispute about Voelker's potential threat to children, particularly his own children, rather than merely adopting the findings of the presentence report without further explanation.

United States v.Smyth, No. 05-1046 (3rd Cir. January 11, 2007). The defendant pleaded guilty to destroying a computer hard drive with the intent to obstruct a federal investigation into child pornography, in violation of 18 U.S.C. § 1519. He was sentenced to a term of imprisonment to be followed by a term of supervised release. The defendant appealed, arguing that the district court abused its discretion because two of the non-standard conditions of supervised release imposed by the court did not reasonably relate to the offense of conviction. He also argued that one of the conditions was overbroad and vague, thereby subjecting him to a greater deprivation of liberty than is reasonably necessary. The two conditions at issue are as follows: (1) The defendant shall participate in a sex offender treatment program, which may include risk assessment testing, counseling, and therapeutic polygraph examinations, and shall comply with all requirements of the treatment provider. The defendant shall contribute to the cost of the treatment in an amount to be determined by the probation officer, and the treatment is to be conducted by a therapist approved by the probation officer; and (2) The defendant shall not associate with the children, other than his own children, under the age of 18 except in the presence of an adult who has been approved by the probation officer.

In light of the defendant's criminal history and the nature and circumstances of the offense, the Court of Appeals held that the non-standard conditions imposed were reasonably related to the factors set forth in 18 U.S.C. § 3553(a)(1). Specifically, the conditions were reasonably related to the "nature and circumstances of the offense." The FBI was involved in a child pornography investigation. A screen name indicated that the defendant may have been in possession of child pornography. The FBI contacted him and asked him to turn over his computer hard drive. The defendant dropped the hard drive in a body of water, which imped the investigation.

In addition, the Court of Appeals held that the conditions reasonably related to the "history and characteristics of the defendant." The defendant's criminal history includes a conviction for providing alcohol to three underage boys. More importantly, he was convicted of open lewdness because he was naked on a couch, covered only by a blanket, beside a naked four year old boy. The Court of Appeals also held that the conditions reasonably related to affording adequate deterrence, protecting the public from further crimes of the defendant, and providing the defendant with correctional treatment.

The defendant also argued that the condition limiting contact with children is unnecessarily broad because it could be read to, for example, prohibit him from being in contact with minor family members - even those accompanied by adults. During the sentencing hearing, Defense Counsel questioned the meaning of this condition. While the Court of Appeals agreed

that a limitation on the defendant's contact with minors is appropriate, see *Loy*, 237 F.3d at 267-68 (holding that it is appropriate to prohibit a defendant from all unsupervised contact with minors even though the defendant was only convicted of possession of child pornography), the limitation imposed in the instant case leaves too much guess as to its meaning and its application. For the foregoing reason, the case was remanded for the District Court to develop an association condition that is not overbroad and vague.

United States v. Smith, 445 F. 3d 713 (3rd Cir. 2006). The defendant pleaded guilty to wire fraud in violation of 18 U.S.C. § 1343. The circumstances giving rise to the wire fraud conviction are as follows: "In 1994, he started a business named Litigation Support Services, holding himself out as a legal consultant with purported connections to Motorola Corporation. In this capacity, he orchestrated a scheme in 1994 wherein he obtained some $589,750 from four individuals by misrepresenting his ability to broker for them a deal with Motorola."

After pleading guilty, the defendant was sentenced to 41 months imprisonment and three years of supervised release. In May 2004, in preparation for the defendant's release from federal incarceration, he was transferred to a community corrections center. At this time, local attorneys who knew the defendant offered to hire him during his period of supervised release. This offer was rejected by the Bureau of Prisons, probation office, and staff of the community corrections center.

In July 2004, the defendant, through the attorneys who had offered to hire him in May, petitioned the District Court to allow the employment. The District Court denied the petition. The defendant began serving his term of supervised release in September 2004, and subsequently filed a motion for reconsideration of the denied petition.

At about the same time, the government petitioned the District Court to modify the defendant's term of supervised release to impose an occupational restriction barring the defendant from seeking or obtaining any type of employment with a law firm or any other entity where the defendant would have access to personal information of legal or business clients.

After a consolidated hearing on February 17, 2005, the District Court denied the defendant's motion to reconsider and granted the government's petition to modify the defendant's term of supervised release. However, the District Court limited the scope of the government's proposed restriction, banning the defendant only from employment related to attorneys and/or law firms.

At the February hearing, the government established, and the defendant did not dispute, previous convictions in the years 1991 through 1993 for the following crimes: (a) tampering with records, wherein the defendant had prepared a fraudulent court order and a fraudulent letter, with a forged attorney's signature on the attorney's letterhead, and forwarded it to the Pennsylvania Board of Probation and Parole as well as the Allegheny County Court of Common Pleas; (b) altering, forging, or counterfeiting documents, wherein the defendant had engaged in the unauthorized practice of law by holding himself out to others as an attorney and collecting legal

fees; (c) intimidating a witness/victim and obstructing the administration of law, wherein the defendant had threatened the victim of an individual to whom the defendant had represented himself to be an attorney; (d) tampering with records or identification, wherein the defendant falsified a court order with the intent to deceive the Pennsylvania Board of Probation and Parole; and (e) theft by deception, wherein the defendant withheld $25,700 from another by creating the false impression that he was an attorney.

The defendant appealed, arguing that the District Court's imposition of the occupational restriction was improper because it did not bear a reasonably direct relationship to the offense of conviction and because it exceeded the minimum scope and duration necessary to protect the public. The Court of Appeals disagreed, concluding that the occupational restriction was reasonably related to statutory goals, was consistent with policy, and was narrowly tailored such that the liberty deprivations are no greater than is reasonably necessary to achieve the deterrence, public protection, and/or correctional treatment for which it is imposed. See 18 U.S.C. § 3583(b); see also *Loy*, 237 F. 3d at 256.

United States v. Carroll, 2006 WL 1222344 (3rd Cir.(Pa.)). The defendant pled guilty to one count of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a). He was subsequently sentenced to 175 months imprisonment. The Court also ordered three years of supervised release with a special condition that the defendant cooperate in the collection of a DNA sample. On appeal, the defendant challenged, as unconstitutional, the requirement that he submit a DNA sample as a condition of supervised release. The defendant acknowledged that the Court of Appeals had already considered this issue in detail in *United States v. Sczubelek*, 402 F. 3d 175, 187 (3d Cir. 2005), in which the collection of DNA samples from criminal offenders was upheld as a reasonable search. Accordingly, the Court of Appeals rejected Carroll's argument that his Fourth Amendment rights were violated by the requirement that he submit a DNA sample as a condition of supervised release.

United States v. Sczubelek, 402 F. 3d 175 (3rd Cir. 2005). On June 17, 1994, a jury convicted the defendant of three counts of bank robbery under 18 U.S.C. § 2113(a) and one count of structuring cash transactions under 31 U.S.C. §§ 5322(a) and 5324(3). On September 16, 1994, he was sentenced to 87 months imprisonment and three years supervised release. The conditions of supervised release did not expressly include submitting a DNA sample. On October 6, 2000, the defendant began serving his term of supervised release. Shortly thereafter, Congress enacted the DNA Act. The submission of a DNA sample then became a mandatory condition of supervised release. Approximately one year after the defendant commenced serving his term of supervised release, a probation officer informed him that he must submit to DNA collection on September 25, 2002. The defendant refused.

On October 1, 2002, the probation office filed a petition for violation of a mandatory condition of supervised release, and the district court issued a summons ordering the defendant to appear for a hearing, which was held on October 15, 2002. After briefing and a hearing, the court ordered the defendant to report by May 9, 2003, to a phlebotomist to have his blood taken.

On April 14, 2003, the defendant filed a notice of appeal. On April 15, 2003, he moved the district court to stay its order pending his appeal. On April 16, the district court issued an order granting the stay. The defendant's term of supervised release expired on October 5, 2003. The probation office sent him a letter notifying him that his term of supervised release had been terminated and that he had satisfied all terms and conditions of his supervised release.

On January 26, 2004, the defendant filed a motion to dismiss his appeal, asserting that the case was moot because he was no longer on supervised release and the district court no longer had jurisdiction over him to collect a DNA sample. The government argued on the other hand, that pursuant to 18 U.S.C. § 3583(I), the district court's jurisdiction to enforce an order it entered during the term of supervised release survives the expiration of the term of supervised release. The Court of Appeals agreed with the government, holding that pursuant to 18 U.S.C. § 3583(i) the district court retained jurisdiction to adjudicate the DNA collection condition of the defendant's supervised release after his term had ended because the summons for the violation was issued during the supervised release period and the delay between the expiration of the term of supervised release and the adjudication of the district court's DNA collection order had been reasonably necessary to determine the constitutionality of the order.

The defendant also argued that the compelled extraction of his blood to obtain a DNA sample violated his Fourth Amendment right against unreasonable searches because it was a search executed without individualized suspicion of any criminal wrongdoing. In view of the importance of the public interests in the collection of DNA samples from criminal offenders for entry into a national DNA database and the degree to which the DNA Act serves to meet those interests, balanced against the minimal intrusion occasioned by giving a blood sample and the reduced privacy expectations of individuals on supervised release, the Court of Appeals concluded that the collection of DNA samples from individuals on supervised release, pursuant to the DNA Act, is not an unreasonable search in violation of the Fourth Amendment.

The defendant also argued that the DNA Act violated the separation of powers doctrine because it turns probation officers into "adjunct law enforcement officers" by mandating that they seize DNA samples by force if necessary. He further claimed that the DNA Act requires the probation office to exceed its role as a neutral arm of the judiciary by adding adversarial and law enforcement aspects to the supervisory role it already holds. The Court of Appeals held that there was no separation of powers violation. Collection of DNA falls within the probation office's supervisory function and does not compromise the integrity of the Judicial Branch.

The Court of Appeals affirmed the district court's order requiring the defendant to report to a phlebotomist and give a DNA sample, and remanded the case to the district court for further proceedings.

United States v. Pruden, 398 F. 3d 241 (3rd Cir. 2005). In this case, the Court of Appeals held that the district court erred in imposing, as a condition of supervised release, that the defendant obtain mental health counseling at the discretion of his probation officer. The presentence report did not report any mental health problems. Conditions of supervised release must be reasonably related to specified statutory purposes (18 U.S.C. § 3553(a)), and there was no evidence in the record that linked the condition to any of the enumerated purposes. Here, the district court did not point to any evidence that any of the § 3553(a) factors were present in the defendant's case. Additionally, the district court granted the probation officer the discretion to decide whether the defendant would have to undergo mental health counseling. This was an impermissible delegation of the judicial power: while probation officers may have discretion to decide the details of a defendant's mental health treatment, they may not be given the authority to decide whether or not such treatment will be required.

United States v. Landry, 2004 WL 2786317 (3rd Cir.(N.J.))). On July 24, 2002, the defendant was pulled over in New Jersey by the police for driving an unregistered vehicle. After the defendant was unable to produce a driver's license, officers discovered through a radio check that his Virginia license was suspended and also that there existed an outstanding warrant for his arrest, which had been issued in Maryland. As a result, the defendant was arrested. A search of his vehicle resulted in the seizure of a fraudulent Maine driver's license and some fraudulent personal and commercial checks.

Shortly after arriving at the police station, the defendant confessed to creating the fraudulent materials found in his car using his personal computer. He consented to a search of his motel room. Officers discovered the equipment used to make the licenses and checks, as well as blank check stock, more Maine driver's licenses, and 13 photographs of minors engaged in explicit sexual conduct. One of these photographs depicted salacious conduct involving an adult male and a minor female. The defendant admitted that he knew the girl in that picture and that he in fact had taken the picture himself. A subsequent search of the equipment found in the defendant's room revealed various materials for forgery of identification documents and checks and an extensive collection of child pornography, consisting of several hundred movies and images.

In an interview with the Secret Service, the defendant explained that he posted child pornography on a website. The defendant eventually pled guilty to one count of possession of child pornography. The presentence report indicated that (1) the defendant admitted to knowing the minor in one of the photographs found in his motel room and to actually having taken that picture; (2) he admitted to prior recreational drug use as a teenager and to having been ordered to enter a substance abuse program; (3) there is a pending charge against him for possession of paraphernalia associated with crack cocaine; and (4) he once attempted suicide through the swallowing of prescription drugs.

Among the terms of his sentence was a three year term of supervised release. On appeal, the defendant challenged three of the conditions of supervised release: a blanket restriction on internet use, an order to complete a substance abuse program, and a prohibition on working with minors.

The Court of Appeals affirmed the sentence, stating that the presentence report, explicitly adopted by the court, provided ample support for the conditions. The internet restriction is supported by the fact that the defendant used that medium to trade child pornography for identification information. Thus, the internet facilitated his creation of forged documents and opened an avenue up for him to disseminate child pornography. The work restriction finds support in his apparent attraction to minors and willingness to exploit them for his own benefit. His teenage substance abuse and more recent substance-based suicide attempt provide sufficient support for the drug treatment order.

United States v. Harding, No. 02-2102 (3d Cir. January 28, 2003). The defendant pled "guilty" to receiving in interstate commerce visual depiction of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1). At sentencing, the district court imposed a supervised release condition that restricted appellant's use of a computer during his period of supervised release. The Court of Appeals concluded that the district court did not exceed the limits of a permissible exercise of discretion.

United States v. Lee, 315 F.3d 206 (3d Cir. 2003). Defendant pleaded guilty to travel for purposes of having sex with a minor, transportation of child pornography, and enticing a minor by computer to engage in sex. He was sentenced to 57 months imprisonment and three years supervised release. As a condition of supervised release, the defendant was required to submit to random polygraph examination to be administered by a certified examiner at the direction and discretion of the United States Probation Officer. The defendant appealed, arguing that the polygraph condition (1) violated his Fifth Amendment right due to the potential for self-incrimination; (2) is unnecessary and overly burdensome because the results of the examination are not likely to be admissible in court; (3) is void for vagueness because it leaves too much discretion to the probation officer; and (4) constitutes an abuse of discretion because the district court failed to warn him in advance that it was considering such a condition and did not allow additional briefing on this issue at the sentencing hearing. The Court of Appeals concluded that the condition did not violate the appellant's Fifth Amendment right and the district court did not abuse its discretion in imposing the polygraph condition. The judgment of the district court was affirmed.

United States v. Freeman, 316 F. 3d 386 (3rd Cir. 2003). Freeman pleaded guilty to receipt and possession of child pornography under 18 U.S.C. §§ 2252(a)(2) and (4)(B). At sentencing, the district court imposed a special condition forbidding Freeman from possessing any computer in his home or using any on-line computer service without the written approval of the probation officer. The Court of Appeals found that this condition was overly broad; it involved a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and to protect the public. There is no need to cut off Freeman's access to email or

benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on Freeman's hard drive or removable disks. There is nothing in the record to suggest that Freeman had used the internet to contact children. The Court of Appeals noted, however, that "We are not in any way limiting our ability to so restrict the use of computers when a defendant has a past history of using the internet to contact children."

See United States v. Evans, 155 F. 3d 245 (3d Cir. 1998), 18 U.S.C. 3583, p. 41.

See United States v. Dozier, 119 F. 3d 239 (3d Cir. 1997), 18 U.S.C. § 3583, p. 41.

See United States v. Brady, 88 F. 3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997), 18 U.S.C. § 3583, p. 40.

Part E -- Restitution, Fines, Assessments, Forfeitures

§ 5E1.1 Restitution, Fines, Assessments, Forfeitures

United States v. Corley, 500 F. 3d 210 (3d Cir. 2007). In this precedential opinion, the Court of Appeals addressed whether the District Court impermissibly delegated to the Bureau of Prisons its duty under § 206 of the MVRA, 18 U.S.C. § 3664(f), to set the manner and schedule of restitution payments during the defendant's term of imprisonment.

At sentencing, the district court ordered Corley to pay $47,532.36 in restitution, a fine of $500, and a special assessment of $200. The court ordered the payments for the fine and restitution to "begin immediately," subject to the following additional instructions: "The defendant shall make restitution and fine payments in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. The restitution and fine shall be due immediately. Any balance remaining upon release from custody shall be paid at a rate of no less than $100 per month**."**

In decisions interpreting the MVRA, the Court of Appeals for the Third Circuit has held that the plain language of § 3664(f) – stating that "the court shall" order restitution and specify the manner and schedule of payments – means that ordering restitution is a judicial function that cannot be delegated, in whole or in part. *United States v. Coates*, 178 F. 3d 681, 684-85 (3d Cir. 1999); see also *Lessner*, No. 06-1030, __ F. 3d at __, slip op. At 26.

The Court of Appeals, therefore, compelled by its holding in *Coates*, concluded that there was an impermissible delegation in Corley. Although the District Court discharged its responsibility to fix the amount of restitution and the schedule of payments once Corley is released, by its terms the order delegates to the Bureau of Prisons the task of determining how Corley will pay his obligations while he is in prison. As such, the Court of Appeals ordered a remand.

Against that conclusion, the Government argued that the District Court's order was proper because it ordered that "the restitution and fines shall be due immediately." Because the MVRA permits sentencing courts to order immediate payment, rather than payment on an installment schedule, the Government argued, the District Court may order immediate payment with the understanding that the defendant will make payments to the extent he can in good faith. The Bureau of Prisons may permissibly ensure through the Inmate Responsibility Program that the defendant makes satisfactory progress toward his obligations while he is in prison.

The Court of Appeals, citing *United States v. Prouty*, 303 F. 3d 1249, 1255 (11th Cir. 2002), disagreed. As explained in *Poutry*, orders directing "immediate" payment under such circumstances are indistinguishable in principle from outright delegations of authority to the Bureau of Prisons.

United States v. Leahy, 438 F.3d 328 (3d. Cir. 2006). The Court of Appeals held that *Blakely* and *Booker* do not apply to orders of restitution imposed as part of a criminal sentence under the Mandatory Victim Restitution Act.

United States v. Jackson-El, 2006 WL 1506715 (3rd Cir.(Pa.))). The defendant was convicted by a jury of bank robbery and related crimes. He was sentenced to 198 months imprisonment, five years supervised release, and ordered to pay restitution in the amount of $12,320. The judgment and commitment order set no formal schedule for the amount or timing of payments. Instead, the court specified that the "monetary penalties" were due "in full immediately" and payable during the period of incarceration.

From October 2004 to February 2005, while incarcerated at USP Terre Haute, the defendant made monthly restitution payments of $35 pursuant to an agreement he made with the Bureau of Prisons under the Inmate Financial Responsibility Program ("IFRP").

In March 2005, he filed a motion for modification of his order of restitution in District Court, claiming that he lacked sufficient funds to make further monthly restitution payments and asking the district court to set a restitution payment schedule. He also noted that the sentencing court's failure to set such a schedule ultimately rendered him ineligible for the IFRP and, in turn, subjected him to various "sanctions."

The District Court denied the motion, concluding that the sentencing court is under no obligation to set a schedule for restitution payments. It further determined that because the IFRP is a voluntary program, the defendant could restore his privileges by re-enrolling.

The Court of Appeals, in affirming the District Court's denial, noted that a request to "set a schedule of payment and the amount to be paid during a defendant's period of incarceration" is properly brought pursuant to 18 U.S.C. § 3664(k). That statute provided that, upon notice "of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution," the District Court may "adjust the payment schedule, or require immediate payment in full, as the interests of justice require." 18 U.S.C. § 3664(k). Before

adjusting a defendant's restitution payment schedule, the District Court must receive certification from the Attorney General that those owed restitution have been informed of the defendant's changed circumstances. United States v. Grant, 235 F.3d 95, 100 (2d Cir. 2000).

The Court of Appeals concluded that the District Court could not grant the defendant's request under § 3664(k). He did not allege a material change in his economic circumstances, nor did he follow the procedural requirements for obtaining an adjustment in his restitution payment schedule. Even assuming, arguendo, that § 3664(k) could be used by the defendant to allege that the sentencing court impermissibly delegated its judicial authority, the defendant's claim would be rejected. The sentencing court did not delegate the scheduling of the restitution payments to the Bureau of Prisons. Rather, it simply exercised its authority to direct that "monetary penalties," including the restitution, be paid "in full immediately." See 18 U.S.C. § 3572(d)(1). Ordering immediate payment is not an impermissible delegation because "such directives generally are interpreted to require not immediate payment in full but payment to the extent that the defendant can make it in good faith, beginning immediately." See McGhee v. Clark, 166 F.3d 884, 886 (7th Cir. 1998)(finding no conflict between a restitution order directing immediate payment and the BOP initiating an IFRP plan). The defendant's alleged inability to make the $35 monthly payments under the IFRP agreement does not require that the District Court establish a payment schedule.

United States v. Walker, 2005 WL 2007006 (3rd Cir.(Pa.))). The defendant pled guilty to destroying a business and adjacent apartment building by fire. As part of his written plea agreement, the defendant agreed to voluntarily enter the Inmate Financial Responsibility Program (IFRP) administered by the Federal Bureau of Prisons. He acknowledged that the Bureau of Prisons would collect up to 50% of his prison salary to be applied to payment of any outstanding fine and restitution orders. The defendant was subsequently sentenced to 120 months imprisonment, 3 years supervised release and ordered to pay restitution in the amount of $1,318,645. The judgment and commitment order provided that the amount was due in full immediately, that payment was to begin immediately, and was payable during incarceration. It also provided for payment of any remaining balance during supervised release.

The defendant filed a motion titled, "Motion for Definitive Determination of Amount and Timing of Restitution Payments During Incarceration," in which he claimed that the sentencing judge had neglected to set forth the amount and timing of his restitution payments during his incarceration. He alleged that the court's failure to do so impermissibly delegated that judicial function to the Bureau of Prisons.

In affirming the district court's judgment, the Court of Appeals stated, "It is true that the MVRA requires that the sentencing court 'specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid.' 18 U.S.C. 3664(f)(2). The sentencing court cannot delegate the scheduling of restitution to a probation officer or to the BOP, as we have held that the fixing of restitution payments is an exclusively judicial act. *United States v. Coates*, 178 F.3d 681, 685 (3d Cir. 1999). However, while a sentencing court may not impose restitution and then delegate the scheduling of payment to the BOP, that is not

what occurred here. The sentencing court here stated in its restitution order that Walker's payment of $1,318,645 was 'due in full immediately' The court did not order payment of the fine in installments, and it did not delegate to its authority to the BOP to schedule payments. Indeed, nowhere in the restitution order did the sentencing court delegate a judicial function to the BOP. Instead, the court merely exercised its authority to require immediate payment....such an order for immediate payment does not impermissibly delegate judicial authority, it is permissible for the BOP to administer collection through the IFRP....there is simply no conflict between a restitution order directing immediate payment and the BOP initiating an IFRP payment plan." See *McGhee v. Clark*, 166 F. 3d 884, 886 (7th Cir. 1999).

United States v. Trala, 386 F.3d 536 (3d Cir. 2004). Defendant was convicted of bank robbery and related charges. He challenged the district court's order of restitution in light of *Blakely v. Washington*, 124 S.Ct. 2531 (2004). The Third Circuit rejected the claim. *Blakely* and *Apprendi* apply only where there is a resolution of disputes issues of fact that results in a sentencing enhancement beyond the statutory maximum. Here, there was no contested evidence about the amount of money that was taken. Therefore, the amount of restitution was not a disputed issue of fact under *Blakely*.

United States v. Grasso, 381 F. 3d 160 (3rd Cir. 2004). The Court of Appeals held that "proceeds," as that term is used in the money laundering statute, means gross receipts rather than profits. The case was remanded, however, for the district court to determine whether frozen funds were sufficient to cover the ordered restitution, and, if so, to determine the manner in which, and schedule according to which, restitution was to be paid.

United States v. Latimer, 2004 WL 1328247 (3rd Cir. (Virgin Islands))). The defendant appealed the decision of the District Court of the Virgin Islands ordering him to pay almost $59,000 in restitution. He was convicted of three violations of 18 U.S.C. § 1920 (False statement or fraud to obtain Federal employee's compensation). The defendant argued that the district court erred in ordering restitution because he lacked the ability to pay. The Court of Appeals found that restitution was mandatory under 18 U.S.C. § 3663A. However, the case was remanded because the district court did not establish a restitution schedule.

United States v. Hayward, 359 F.3d 631 (3rd Cir. 2004)). The Court of Appeals that parents of minor victims were entitled to restitution for reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial.

United States v. Quillen, 335 F.3d 219 (3rd Cir. 2003). On October 19, 2001, the defendant mailed a threatening letter containing a white powdery substance that appeared to be anthrax to the Pennsylvania Board of Probation and Parole. It was later determined that the substance was not anthrax. The defendant subsequently pled guilty to Mailing a Threatening Communication. He was sentenced to 40 months imprisonment, 3 years supervised release and ordered to pay restitution including $4,026.55 for hazardous material (hazmat) cleanup relating to the suspected anthrax.

In his appeal, the defendant argues that the restitution order for the hazmat cleanup was improper because his conduct did not actually damage the victim's property and, therefore, is not authorized by 18 U.S.C. § 3663(A)(b)(1). The Court of Appeals rejected the argument and affirmed the District Court's sentence.

United States v. Feldman, 2003 WL 21751935 (3rd Cir.(Pa.))). The defendant filed a bankruptcy petition in which he vastly understated the amount of property he owned. Indicted for concealing assets and making false declarations in the bankruptcy, he pled guilty to four counts of bankruptcy fraud and was sentenced to 15 months imprisonment and ordered to pay restitution to his creditors. On appeal, the defendant argued that the district court erred by awarding restitution since his creditors incurred no actual loss because the property that he did not report would not have been reachable by his creditors even if he had disclosed it because it was held by him and his wife as tenants by the entireties. In Feldman's submission, this result follows from Section 522 of the Bankruptcy Code, 11 U.S.C. § 522, which allows the debtor to utilize state law bankruptcy exemptions and the fact that in Pennsylvania, property owned by both husband and wife as tenants by the entireties is not reachable by the creditors of only the husband or the wife. See 42 Pa.C.S.A. § 8123.

The Court of Appeals vacated the judgment awarding restitution and remanded so that the district court can determine actual loss and thus the proper amount of restitution, if any, that should be awarded to Feldman's creditors. The district court was instructed to consider whether Feldman would have been entitled to an exemption for property owned by him and his wife as tenants by the entireties if he had acted lawfully and whether the bankruptcy trustee would have recommended discharge, even if the property was exempt from bankruptcy, in light of the large amount of property owned by Feldman and his wife.

United States v. Parasconda, 2003 WL 21363403 (3rd Cir.(Pa.))). The defendant pleaded guilty to aiding and abetting in the transport in interstate commerce of falsified certificates of title for motor vehicles in violation of 18 U.S.C. § 2 and 2314, and conspiracy to commit the same in violation of 18 U.S.C. § 371. As part of the plea agreement, the defendant acknowledged causing a loss of no more than $120,000, but reserved the right to show that the loss was as low as $30,000. He also agreed to make full restitution according to a schedule to be determined by the Court.

The defendant was sentenced to eight months imprisonment, a fine of $20,000, special assessments totaling $200 and two years supervised release. The district court did not discuss the defendant's finances and merely stated that it adopts the factual findings in the guideline application in the presentence report and finds that the defendant has the ability to pay a fine. On appeal, the defendant argued that the factual findings in the presentence report did not support a conclusion that he is able to pay a fine in the amount of $20,000. The government argued that since the defendant admitted in his plea agreement to causing a loss of approximately $30,000 and agreed to make full restitution in accordance with a schedule to be determined by the court, he implicitly admitted his ability to pay a fine of $20,000 and the district court did not have to make any factual findings on ability to pay or consider the other factors in U.S.S.G.

§ 5E1.2(d) and 18 U.S.C. § 3572 relevant to deciding the amount of a fine. The court of appeals affirmed, stating that "since the district court declined to impose any restitution, but only imposed a fine, appellant's promise to make full restitution for a loss that was larger than the amount of the fine constitutes an admission of ability to pay and no factual finding was necessary.

United States v. Terlingo, 327 F.3d 216 (3rd Cir. 2003). The defendant assert that the order of restitution imposed by the district court is invalid because it was imposed more than 90 days after sentencing in contravention of 18 U.S.C. § 3664(d)(5). The government argued that because the delay was the fault of the defendants, it would equitably toll the time-bar and allow the hearing to take place outside the 90 day limit. This appeal raised a question of first impression: Is the 18 U.S.C. § 3664(d)(5) time limit subject to equitable tolling, and if so, under what circumstances ? The Court of Appeals stated that "in the case at bar, it is clear that there was no bad faith on the part of the defendants. Still, the defendants were, in significant part, the cause of the delay because their lawyers could not appear at, and moved to continue, the originally scheduled restitution hearing. Equitable tolling was therefore proper, and the district court did not err when it tolled the 90 day time limit."

United States v. Millner, 2003 WL 1889612 (3rd Cir.(Pa.))). The defendant was convicted of bank fraud. As part of his sentence, he was ordered to pay full restitution of $85,455.40 as follows: $50 monthly during the first year of supervised release, $100 monthly during the second year, $150 monthly during the third year, $200 monthly during the fourth year, and $250 monthly during the fifth year. The defendant appealed the restitution order, claiming the district court erred in ordering him to pay all $85,455.40 without an adequate consideration of his ability to pay. The Court of Appeals affirmed the sentence. Read together, 18 U.S.C. §§ 3663A(c)(1)(A)(ii) and 3664(f)(1)(A) require that, when a defendant is convicted of a specified property offense, the district court must order restitution totaling the full amount if the victim's loss, regardless of the defendant's financial situation. Here, the district court properly ordered full restitution and then set a payment schedule taking into account the defendant's financial situation. Working for the minimum wage of $5.15 an hour in a forty-hour per week job, the defendant can earn $10,712 a year. Allowing eighty percent of the yearly sum for subsistence leaves $2,142 a year, or $178.50 per month, for restitution.

United States v. Latimer, 2002 WL 31831567 (3rd Cir.(Virgin Islands))). While the district court must specifically limit its calculation of loss to the specific dates included in the criminal conviction for purposes of calculating restitution, it is not so limited for purposes of applying the sentencing guidelines. *United States v. Silkowski*, 32 F. 3d 682, 687 (2d Cir. 1994).

United States v. Saxton, 2002 WL 31479074 (3rd Cir.(Pa.))).In 1979, Sue Ellen Saxton was elected Prothonotary and Clerk of Courts for Mifflin County, Pennsylvania, an office she held until August 2000. An investigation revealed that throughout her twenty-year career, she embezzled funds collected in the normal course of business and converted these funds for the personal use of herself and her husband, Frederick Saxton. She pled "guilty" to conspiracy in violation of 18 U.S.C. § 371 involving: the embezzlement of money from a program receiving

federal funds, 18 U.S.C. § 666(a)(1)(A); the transportation of stolen money in interstate commerce, 18 U.S.C. § 2314; and the receipt of stolen money which has crossed a state or United States boundary, 18 U.S.C. § 2315. As part of the plea agreement, she agreed that the amount of the loss to all victims as a result of her conduct was more than $800,000, but less than $1,500,000 and she agreed to make full restitution as determined by the district court. The district court departed upward from an offense level of 21 (37 to 46 months) to level 24 (51 to 63 months). The district court found that this upward departure was warranted under (1) U.S.S.G. § 5K2.0 because the value used to calculate the sentence under the guidelines did not capture the aggregate harm of Sue Ellen's actions and under (2) U.S.S.G. § 5K2.7 because her embezzlement of public funds over twenty years caused a significant disruption of a governmental function. The district court also determined that the amount of restitution was to be calculated based on the period of time from 1980 to 2000 - - the period of Sue Ellen's entire tenure as Prothonotary. The amount of restitution ordered by the district court was $995,930.90.

Accordingly, the district court sentenced Sue Ellen to 60 months imprisonment, the statutory maximum under 18 U.S.C. § 371 and restitution in the amount of $995,930.90 ($741,444.81 plus $254,486.09). Sue Ellen objected to the upward departure and the $995,930.90 restitution. At sentencing, the district court overruled both objections stating that the value used in calculating her sentence under the guideline failed to capture the extensive harm that she caused because the embezzlement of public funds over an approximate twenty-year period caused significant disruption of a governmental function. The district court also stated that the value used to calculate the guideline failed to capture the additional expenses that have been incurred, as well as the intangible harm from her conduct - - the public's loss of trust in public officials. In denying Sue Ellen's objection to the restitution amount, the district court ruled that under the plea agreement she had agreed to satisfy in full the restitution ordered by the court.

Sue Ellen had two arguments on appeal. First, she argued that the district court erred in imposing a three level upward departure because the guideline offense level which provided for a 13 level increase for embezzlement for more than $800,000 but less than $1,500,000 fully accounted for the additional financial losses that the district court assessed. Second, she argued that the district court erred in holding her liable for an additional $254,486.09 of restitution to account for losses from January 1, 1980 through December 31, 1992 because those monies reflect losses for a period not charged in the Information and because her plea agreement to make "full restitution" was ambiguous. She did not contest the upward departure pursuant to § 5K2.7 (disruption of a government function).

The Court of Appeals upheld the restitution order. Saxton explicitly agreed in her plea agreement to make full restitution in an amount between $800,000 and $1,500,000.

Galluzzi v. Jusino, No. 01-2706 (3d Cir. October 2, 2002). The defendant was sentenced to 96 months imprisonment, three years supervised release, and ordered to pay restitution in the amount of $350,000, due immediately. In the event the entire amount was not paid prior to commencement of supervision, the court ordered that the probation officer shall pursue collection of the amount due and shall request the court to establish a payment schedule, if appropriate. Upon his arrival at FCI Allenwood, the defendant entered into an agreement with the Bureau of Prisons to make monthly payments of $50 toward the restitution order. This agreement was made pursuant to the BOP's Inmate Financial Responsibility Program. Approximately one year later, the defendant entered into a new IFRP agreement with the BOP, agreeing to increase his payment to $400 per month.

On appeal, the defendant challenged the BOP's authority to set the amount and timing of his restitution payments through the IFRP. The Court of Appeals held that the BOP's use of the IFRP to set the amount and timing of Galluzzi's restitution payments did not conflict with case law or with the terms of the sentencing court's restitution order. It is true that, under both the VWPA and the MVRA, the sentencing court cannot delegate the scheduling of restitution to a probation officer or to the BOP, as the fixing of restitution payments is an exclusively judicial act. Galluzzi thus contends that because the sentencing court did not set a specific schedule for his payments, the court effectively delegated that duty to the BOP, and that the BOP exceeded its authority by setting a payment schedule under the IFRP. The Court of Appeals disagreed. While it is true that a sentencing court may not impose restitution and then delegate the scheduling of payment to the BOP, that is not what occurred here. The sentencing court here stated in its restitution order that Galluzzi's payment of $350,000 "shall be due immediately." The court did not order payment if the fine in installments, and it did not delegate its authority to the BOP to schedule payments. Indeed, nowhere in the restitution order did the sentencing court delegate a judicial function to the BOP. Instead, the court merely exercised its authority to require immediate payment.

Because such an order for immediate payment does not impermissibly delegate judicial authority, it is permissible for the BOP to administer collection through the IFRP. There is simply no conflict between a restitution order directing immediate payment and the BOP initiating an IFRP payment plan. The BOP did not exceed its authority in setting the terms of Galluzzi's restitution through the IFRP.

United States v. Rabinovich, 2002 WL 1466241 (3rd Cir.(Pa.))). The defendant pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. As part of his sentence, the district court ordered him to pay $170,000 in restitution to six injured insurance companies. On appeal, the defendant challenged the propriety of the restitution order. The district court based its restitution order on the loss amount provided in the presentence investigation report, and adopted the allocation suggested by the Assistant U.S. Attorney in her letter. The court provided defense counsel with many opportunities to dispute the figures in the presentencing report and the allocation of these amounts presented in the Assistant U.S. Attorney's letter. Defense counsel did not object. The Court of Appeals found that by failing to object to the factors underlying the district court's restitution order, and explicitly agreeing with the district court's determination,

the defendant waived his right to challenge the amount of the loss and the relevant time frame.

United States v. Syme, 2002 WL 15373 (3rd Cir.(Del.))). The defendant was ordered to pay $100,000 in restitution pursuant to 18 U.S.C. § 3663. He contends that the restitution order violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000). The jury in this case was not charged with finding the amount of restitution owed to the victim. The question is whether the district court's restitution order increased beyond the statutory maximum the penalties that the defendant faced. The Court of Appeals held that § 3663 does not specify a maximum amount of restitution that a court may order. The statute provides guidelines that a sentencing judge may use to determine the amount of restitution, but does not prescribe a maximum amount. The Apprendi rule therefore does not apply to restitution orders made pursuant to 18 U.S.C § 3663, because Apprendi applies only to criminal penalties that increase a defendant's sentence "beyond the prescribed statutory maximum."

United States v. Diaz, 245 F. 3d 294 (3rd Cir. 2001). The defendant pled guilty to a four count information that included charges of fraud in violation of 18 U.S.C. §§ 1341 and 1342, and money laundering, in the form of engaging in a monetary transaction in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957(a). On appeal, the defendant challenged the amount of restitution she was ordered to pay. She was ordered to pay restitution of $846,000, the full amount of the victim's loss. The defendant argued that her two co-defendants were also ordered to pay $846,000. She suggests that the district court may have ordered restitution in an amount greater than the actual loss. In affirming this aspect of the sentence, the Court of Appeals concluded that it appeared that the district court intended to impose joint and several liability on each defendant, permitting the victim to recover its losses from all or some of the wrongdoers. However, on remand, the district court should clarify its intentions.

United States v. Simmonds, III, 235 F.3d 826 (3d Cir. 2000). The defendant and five others burglarized the residence of Assistant U.S. Attorney Curtis Gomez on the Virgin Islands and set fire to the home. On appeal, the defendant argued that the district court miscalculated the appropriate amount of restitution by including the value of the victims' lost insurance premium discounts and the depreciation attributable to the victims' furniture in its restitution order. The Court of Appeals held that the district court properly considered "replacement value" as a measure of restitution and that it did not abuse its discretion by opting for the replacement value of the victims' furniture rather than the market value. Inclusion of the depreciation attributable to the furniture destroyed in the fire was proper under statute. "Market value" refers to the actual price that the furniture in question would have commanded on the open market on the date of destruction. "Replacement value," in contrast, refers to the amount of money necessary to replace the furniture. "Replacement value" exceeds "market value" by an amount equal to the depreciation attributable to the furniture. However, the Court of Appeals held that because the victims' lost insurance premium discounts do not constitute "property" that was damaged, lost or destroyed by the criminal acts, the district court erred by including the value of the victims' "clean renewal discount" and "no claim discount" in its restitution order. The victims' lost insurance premium discounts are unquestionably a result of the defendant's criminal conduct.

However, under 18 U.S.C. § 3663A, the victims' lost insurance premium discounts are consequential damages and do not in any way constitute or represent "the value of the property lost, damaged or destroyed as a result of the crimes."

United States v. Mustafa, 238 F. 3d 485 (3d Cir. 2001). For the first time on appeal, defendant sought to withdraw his guilty plea, claiming that the court failed to inform that restitution could be ordered as part of the sentence. However, although the word "restitution" was never used during defendant's plea colloquy, the government did inform defendant that he could be fined $1,260,000 plus twice the amount involved in the money laundering scheme. While restitution is not the same as a fine, the distinction was irrelevant here. See *U.S. v. Electrodyne Systems*, 147 F.3d 250 (3d Cir. 1998). The Third Circuit ruled that defendant's substantial rights were not affected by the district court's failure to specifically mention restitution or inform defendant that he could be ordered to compensate the victims for any financial loss. Defendant was informed of the potential financial exposure that his plea subjected him to, and the amount he was ordered to pay was far less than the maximum that he could have been ordered to pay.

Rashid v. United States, 210 F. 3d 201 (3d Cir. 2000). A federal jury convicted appellant Abdur Amin Rashid of fifty-four counts, including mail fraud, wire fraud and money laundering, which stemmed from Rashid's operation of a fraudulent commercial loan operation. The district court ordered restitution in the amount of $1,696,470. Confronted with considerable debt after his federal conviction, Rashid filed for Chapter 7 bankruptcy protection. Among his creditors were the victims of his fraud to whom he owed in excess of $1.6 million pursuant to a criminal restitution order. On July 6, 1994, Rashid filed his voluntary bankruptcy petition and on August 4, 1994, the Bankruptcy Court clerk mailed a notice of bankruptcy to his creditors including the United States. The question is whether an order to pay restitution to fraud victims in a federal criminal proceeding at a time prior to the October 1998 amendments of the Bankruptcy Code is dischargeable in bankruptcy under 11 U.S.C. § 523. The Court of Appeals concluded that the restitution obligation was dischargeable in bankruptcy because it was payable to the benefit of his defrauded victims and not "to and for the benefit" of any governmental unit.

United States v. Beckett, 208 F.3d 140 (3rd Cir.2000). Appellant James C. Beckett was found guilty on two counts each of robbery and armed robbery in violation of 18 U.S.C. §§ 2113(a) and (d). The provisions of 18 U.S.C. § 3663 in effect at the time of Beckett's offenses required sentencing courts to make findings concerning a defendant's present and future ability to pay restitution. At the close of Beckett's second sentencing hearing, his new counsel requested that the district court make specific findings concerning Beckett's ability to pay approximately $11,000 in restitution. The district court declined, on the ground that it could adjust the restitution order after Beckett began to serve his term of supervised release, if necessary. The Court of Appeals held that the district court erred by imposing restitution without determining Beckett's ability to pay.

United States v. Akande, 200 F.3d 136 (3rd Cir. 2000). Defendant pled guilty to an Information charging her with conspiracy to commit credit card fraud. The alleged conspiracy, according to the Information, took place from "on or about December 31, 1997 to on or about July 8, 1998." In the presentence report, the probation officer calculated the victims' losses at $83,137. This sum included two instances of fraud predating December 31, 1997. On appeal, the defendant argued that restitution is due only for conduct occurring on or after December 31, 1997. Because the district court added restitution for fraudulent conduct that occurred before the date of the offense as established in the plea agreement and colloquy, the Court of Appeals remanded for a reduction in the amount assessed. The appellate court held that "In the absence of a specific agreement to the contrary, an order of restitution in a criminal case may not include losses caused by conduct that falls outside the temporal limits established by a guilty plea. As in *Hughey*, restitution must be linked directly to the offense of conviction.

United States v. Coates, 178 F.3d 681 (3d Cir.1999). On appeal, the defendant argued that the district court erred by ordering him to pay restitution without specifying in the restitution order the manner and schedule of payments to be made and without considering his financial resources, projected earnings, and financial obligations. The MVRA was applicable in this case. The Court of Appeals vacated the restitution order and remanded for resentencing. The MVRA makes restitution mandatory for certain offenses. After ordering full restitution, the district court shall "specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid." In so doing, the district court is required to consider the financial resources, projected earnings, and financial obligations of the defendant. See 18 U.S.C. § 3664(f)(2)(A)-(C).

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The defendant pled guilty to one count of receiving child pornography. On appeal, he argued that the district court erred when it ordered him to pay restitution for psychiatric medical expenses of his victim. The district court concluded by a preponderance of the evidence that the defendant's conduct was the proximate cause of the 14 year old victim's losses. In reaching its conclusion, the district court relied upon the expert opinion of Jodi Pritchard, a licensed social worker and treatment coordinator at the long-term psychiatric facility where the girl was treated. The defendant challenged the court's consideration of Mrs. Pritchard's medical opinion on the ground that she is not a medical doctor. This type of challenge has been repeatedly rejected. See *Waldorf v. Shuta*, 142 F. 3d 601, 625 (3d Cir. 1998) (permitting social worker to serve as expert witness regarding personal injury). The defendant also asserted that his actions cannot be considered the proximate cause of the girl's losses because the government's mental health experts conceded that she may have suffered from pre-existing, untreated psychological problems prior to their relationship. Despite that reality, it was entirely reasonable for the district court to conclude that the additional strain or trauma stemming from the defendant's actions was a substantial factor in causing the ultimate loss. The district court did not abuse its discretion in concluding that the defendant's conduct was the proximate cause of the victim's hospitalization. The defendant also argued that neither his current economic circumstances nor those in the foreseeable future allow for payment in full; therefore, the district court should have imposed "nominal periodic payments." In this case, the district court noted that the defendant "is a man with a college education with some master's

points...his financial future is not bereft of hope." These findings, which are not disputed, suggest that the defendant's potential earning capacity precludes a determination of indigency. Accordingly, the Court of Appeals did not find the imposition of full restitution to be an abuse of discretion.

United States v. Edwards, 162 F. 3d 87 (3d Cir. 1998). Between December of 1992 and October of 1993, the defendant was involved in various schemes involving counterfeit checks, forged commercial checks, and stolen travelers' checks. He was sentenced on December 23, 1997. The district judge found that although the defendant did not have the present ability to pay restitution, the MVRA required restitution and ordered full restitution in the amount of $418,397. The Court of Appeals was asked to determine whether the Victim and Witness Protection Act (VWPA) or the Mandatory Victims Restitution Act (MVRA) applies to the imposition of restitution in sentencing a defendant who committed his offenses prior to the effective date of the statute but is convicted on or after its effective date. The appellate court held that the application of the MVRA in this case constitutes a violation of the ex post facto prohibition. Both the statutory scheme and the legislative history of the MVRA point toward a determination that restitution should be considered a form of punishment under the statute.

United States v. Cottman, 142 F. 3d 160 (3rd Cir. 1998). Defendant pled guilty to conspiracy to possess, sell, and dispose of stolen property. He asserted that the district court improperly ordered him to pay restitution to the FBI for the money it paid him to acquire the illegal cable boxes. The district court imposed the restitution order as a condition of supervised release under 18 U.S.C. § 3583(d). The Court of Appeals held that the FBI was not a victim and, as a result, the conditions of the defendant's supervised release cannot include a requirement that the defendant pay restitution to the FBI.

United States v. West Indies Transport, Inc., 127 F. 3d 299 (3d Cir. 1997). Defendants were convicted of visa fraud, environmental crimes, conspiracy, and racketeering. The district court ordered defendants to pay restitution to offset the costs of cleaning up their environmental crime. Restitution is authorized only for violations of Title 18 and some Title 49 provisions. See 18 U.S.C. §3663. On appeal, defendants contended the trial court erred by ordering restitution for Title 33 offenses. The Court of Appeals ruled that the argument was meritless. Each Title 33 offense also charged a violation of 18 U.S.C. §2.

United States v. Gaydos, 108 F. 3d 505 (3d Cir. 1997). In ordering defendant to pay $190,139.42 in restitution, the district court relied on a listing of assets contained in the presentence report. At sentencing, defendant and her counsel raised doubts concerning her ability to pay restitution. The district court never made specific factual findings with respect to these contentions. Rather, it settled the issue by agreeing to a proposal by the government that the amount of restitution could be remitted at a later date. The Third Circuit vacated the restitution order and remanded, directing the sentencing court to make specific factual findings regarding defendant's ability to pay.

Rutledge v. United States, 116 S. Ct. 1241 (1996). The Supreme Court ruled that conspiracy to distribute controlled substances is lesser included offense of the continuing criminal enterprise offense. Conviction for conspiracy to distribute controlled substances, in addition to the CCE offense conviction, amounted to improper cumulative, second punishment because district court imposed statutorily required special assessment of $50 on each of the convictions.

United States v. Sokolow, 81 F. 3d 397 (3d Cir. 1996). The Third Circuit remanded, finding that the basis upon which the restitution awards were granted was unclear from the government's exhibits, and was often contradicted by trial testimony. On remand, the district court must make specific factual findings regarding the actual amount of recoverable loss sustained by these claimants.

United States v. Kones, 77 F. 3d 66 (3d Cir. 1996). The district court did not err in concluding that appellant could not be awarded restitution under 18 U.S.C. §§3663-3664, the Victim and Witness Protection Act of 1982 (VWPA). The VWPA provides that a defendant make restitution to "any victim of such offense," which has been interpreted to allow restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990). Not long after *Hughey,* Congress amended the VWPA by adding 18 U.S.C. §3663(a)(2) which authorizes restitution to "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern of criminal activity. Under this provision, a victim is entitled to restitution if they are harmed directly by the criminal conduct; "direct" is interpreted to require the harm to be closely related to the underlying scheme. The defendant pleaded guilty to mail fraud counts related to insurance claims for never performed medical services. Appellant, who was one of the patients for whom non-existent medical services were claimed, asserts that she is a "victim" due to malpractice by the defendant in proscribing excessive amounts of drugs to her to further his underlying scheme. Since the conduct alleged by appellant is not covered by the mail fraud statute the defendant was convicted under, the circuit court held that appellant could not be considered a "victim" under the VWPA.

United States v. Maurello, 76 F. 3d 1304 (3d Cir. 1996). Defendant challenged the court's $5,000 restitution order, claiming he lacked the ability to pay. The Third Circuit remanded because the district court failed to make factual findings as to defendant's ability to pay and the relationship between the restitution ordered and the loss. The court need not make a separate finding as to the amount of restitution due each victim. The court may establish a formula and authorize the probation office, not the U.S. attorney, to apply it.

United States v. Graham, 72 F. 3d 352 (3d Cir. 1995). The Third Circuit upheld the reliance on the probation officer's calculation of amount of loss, since it was based on documentation that the probation department had received from the victims. This information had previously been supplied to and verified by the FBI. However, the government conceded that the district court failed to make specific findings on the defendant's ability to pay restitution. The Third Circuit remanded so these findings could be made. On remand, the court also directed

the district court to designate the timing and amount of restitution payments. The court improperly delegated to the probation officer the timing of the restitution installment payments.

United States v. Hunter, 52 F. 3d 489 (3d Cir. 1995). The district court ordered defendant to pay $75,000 in restitution in installments over her three-year period of supervision. The Third Circuit reversed, finding no reasonable basis to believe that defendant would be able to meet her restitution obligation. Restitution is only appropriate in an amount that the defendant can realistically be expected to pay. The fact that defendant was now working, and could be expected to pay "some portion" of her restitution obligation was insufficient.

United States v. Carrara, 49 F. 3d 105 (3d Cir. 1995). Although defendant had no assets to pay restitution, he had filed claims with insurance companies seeking funds with which to repay his victims. The district court ordered him to pay $650,000 restitution, but added that he would be credited for payments made by insurance companies or third parties. The Third Circuit remanded for factual findings to support the restitution order. The district court did not make specific findings on whether third-party payers exist or whether defendant was able to pay without them. Moreover, the restitution order should expressly state whether the restitution was to be conditioned on payments from insurance companies or third party payers, or if defendant's liability had an upper limit. Finally, the court should structure the award so that no portion of defendant's restitutionary burden was relieved by payments from insurance companies.

United States v. Turcks, 41 F. 3d 893 (3d Cir. 1994). The district court originally ordered defendant to pay $102,137.99 in restitution. It later reduced the amount to $85,835.99 after further calculations by the probation department. The Third Circuit held that the district court failed to find to whom the payments should be made, in what amount, and failed to make any findings regarding defendant's ability to pay.

Government of the Virgin Islands v. Davis, 43 F. 3d 41 (3d Cir. 1994). The Court of Appeals held that the plain and unambiguous language of 18 U.S.C. § 3663(b)(1), the amount of a restitution order under the VWPA may not include compensation for legal expenses . Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order.

United States v. Copple, 24 F. 3d 535 (3d Cir. 1994). The district court erred in assessing a restitution order in the amount of $4,257,940 without making a finding with respect to defendant's ability to pay. Before ordering restitution, a district court must consider the following factors: 1) the amount of loss, 2) the defendant's ability to pay and the financial need of the defendant and the defendant's dependents, and 3) the relationship between the restitution imposed and the loss caused by the defendant's conduct.

United States v. Hallman, 23 F. 3d 821 (3d Cir. 1994). Defendant argued that a $34,282 restitution order was an abuse of discretion because the district court failed to make specific factual findings as to defendant's ability to pay. The Third Circuit found that the record supported defendant's ability to pay the restitution order, even though the district court found defendant did not have the ability to pay a fine. Indigency at the time of sentencing is not a bar to ordering restitution. The district court stated at sentencing that defendant by education and natural ability had the capacity to earn lawful income.

United States v. Colletti, 984 F. 2d 1339 (3d Cir. 1992). The Third Circuit found that resentencing was necessary because, without explanation and without an indication that the judge considered defendant's ability to pay, the judge ordered defendant to make restitution in the amount of $289,749.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion resulting from their operation of a roofing business. The Third Circuit remanded for recalculation of restitution based upon *Hughey v. U.S.*, 495 U.S. 411 (1990). The court must make findings as to (1) the amount of loss actually sustained by the victim, (2) how the loss is connected to the offense of conviction, and (3) the defendant's financial needs and resources. The court must designate recipients of the restitution. Although a court may properly direct that payments be made to the U.S. Attorney, unguided discretion to determine who are "victims" may not be entrusted to either the U.S. Attorney or the Probation Office.

United States v. Logar, 975 F. 2d 958 (3d Cir. 1992). Appellate court ruled that restitution order could not be based on fortuity of defendant coming into some money. A sentencing court is required to make specific findings regarding defendant's ability to pay before imposing restitution order.

United States v. Badaracco, 954 F. 2d 928 (3d Cir. 1992). In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The district court ordered restitution equal to the sum of the three electrical contracts awarded to the family companies by the developers. The Third Circuit reversed, ruling that the restitution figure must be based on the losses actually suffered by the bank as a result of defendant's fraud. Since this constituted plain error, the court did not need to decide whether defendant waived the issue by not raising it below.

Hughey v. United States, 110 S. Ct. 1979 (1990). The Victim and Witness Protection Act of 1982 authorizes federal courts to sentence defendants convicted of certain offenses to make "restitution to any victim of such offense." Defendant was charged with multiple counts of use of unauthorized credit cards; he pled guilty to one count in return for the government's agreement to dismiss the other counts. The district court judge ordered restitution of the entire amount lost due to defendant's conduct, and defendant appealed on the grounds that restitution should be limited to losses suffered as a result of offenses of conviction. The Supreme Court

agreed, stating that the plain language of the Act supported such a construction. Moreover, even if the statute were ambiguous, the Court noted that the "longstanding principles of lenity" would demand resolution of the ambiguity in defendant's favor.

§ 5E1.2 Fines for Individual Defendants

United States v. Kadonsky, 242 F.3d 516 (3d Cir. 2001). The defendant appealed the imposition of a $40,000 fine. The defendant tendered evidence to the Probation Office and the Court tending to show that he was unable to pay, and not likely to become able to pay, a fine in any significant amount. This evidence indicated that the defendant already owed the State of New Jersey $515,000 in unpaid fines. Over the defendant's objection, the district court imposed a $40,000 fine based on the fact that he had two suits pending against the government in which claims totaled $527,715. The court did so without evaluating these claims and, accordingly, without making a determination as to whether it was more likely than not that the defendant would become able to pay the fine. Instead, the court indicated that if it turned out that the defendant did not ultimately realize sufficient funds in this litigation to pay the fine, he could always return to court and secure a reduction in the fine. The Court of Appeals reversed, holding that the district court committed two related errors of law. First, it erred in concluding that the defendant could come back and have a $40,000 fine reduced in the event the two lawsuits did not produce sufficient funds to pay both the New Jersey and federal fine. As a result of this first erroneous legal conclusion, the district court found no occasion to evaluate - - or, as the court put it, "handicap" - - the claims asserted in the two lawsuits. This, too, was an error of law. On remand, the district court must consider that information and make a finding as to whether it is more likely than not that the defendant will be unable to pay any contemplated fine.

United States v. Torres, 209 F. 3d 308 (3d Cir. 2000). The district court did not err in imposing a fine without making specific findings on the record. The district court imposed a $5,000 fine under § 5E1.2, within the permissible range of $2,000 to $1,000,000, to be paid in equal monthly installments over his five year period of supervised release. The Third Circuit found while the district court did not make explicit findings of the defendant's ability to pay, it implicitly did so when it stated it could impose a fine within the guideline range only if the defendant had the ability to pay that fine, and then imposed a fine within the range. Further, the facts at the district court's disposal in determining the defendant's ability to pay included his young age, his receipt of a high school and associates degree, his ability to speak four languages, and the fact he has held several short-term positions and had served in the Army Reserves. These facts were unchallenged by the defendant, and supported the imposition of the $5,000 fine.

United States v. Bertoli, 40 F. 3d 1384 (3d Cir. 1994). The district court departed upward from a guideline maximum fine of $125,000 to a fine of $7 million. This was the amount necessary to disgorge defendant of illegal profits he kept hidden in foreign bank accounts. The Third Circuit held that this departure, by a factor in excess of 50, had to be supported by clear and convincing evidence. The court's findings were not supported by the record, and therefore were clearly erroneous.

United States v. Carr, 25 F. 3d 1194 (3d Cir. 1994). Defendant had a negative net worth of $20,000 and a negative net monthly cash flow. Nevertheless, the district court imposed the guideline minimum $10,000 fine based on defendant's future ability to pay a fine. The district court noted that defendant's net worth was about $20,000 when an undocumented, unsecured $30,000 loan payable to his mother was subtracted from his total liabilities. The Third Circuit upheld the fine. Imposing a fine based solely on future ability to pay is permissible.

United States v. Seale, 20 F. 3d 1279 (3d Cir. 1994). Defendants each had a guideline fine range of $25,000 to $250,000. The case had been sensational, and there was likelihood that defendants would receive considerable sums of money for rights to tell their story in books, magazines, motion pictures, newspapers, and similar outlets. To ensure that defendants did not profit, the district court departed upward to a fine of $1.75 million for one defendant and $500,000 for the other. The Third Circuit reversed both departures. The seven-fold, $1.5 million departure for the first defendant was sufficiently extreme to require a clear and convincing standard of proof. That standard was not met here. The facts supporting the other departure were even less compelling. Thus, although proof by clear and convincing evidence was not required for the two-fold departure, the evidence did not meet this standard. The Third Circuit held it was proper for the district court to consider the possibility that defendants would sell the story of their crime in determining that they were each able to pay a fine. Section 5E1.2(a) speaks in terms of whether a defendant is likely to become able to pay. A court is not required to consider whether a defendant actually intends to do that which enables him or her to pay. Thus, the fact that one defendant disclaimed any interest in capitalizing on her story did not diminish her capability to do so.

United States v. Carrozza, 4 F. 3d 70 (3d Cir. 1993). Defendant argued for the first time on appeal that a cost of imprisonment fine under §5E1.2(i) was invalid. The Third Circuit refused to address this issue. First, defendant did not raise this issue below. Circuit courts are divided on the issue, and therefore the decision to impose the fine could not be "plain error." Second, since defendant was already to be resentenced based on other reasons, his fine had to be vacated. At resentencing, the district court could consider his claim about §5E1.2(i).

United States v. Harvey, 2 F. 3d 1318 (3d Cir. 1993). Defendant was convicted of child pornography charges, and the district court ordered him to make a $5,000 donation to the Pittsburgh Coalition Against Pornography and pay incarceration costs of $17,904. The Third Circuit reversed. There is nothing in the Sentencing Reform Act or the guidelines permitting the court to order a defendant to make a donation to a charitable organization. Moreover, in *U.S. v. Spiropoulos*, 976 F. 2d 155 (3d Cir. 1992), the court held that a fine based on the costs of incarceration was invalid.

United States v. Joshua, 976 F. 2d 844 (3d Cir. 1992). The Third Circuit rejected defendant's claim that the district court improperly failed to consider his ability to pay a $3,000 fine. The government presented evidence that defendant was a judgment creditor of the Virgin Islands and was owed $3,000. The district court properly considered this in imposing the $3,000 fine.

United States v. Spiropoulos, 976 F. 2d 155 (3d Cir. 1992). The Third Circuit held that a fine under §5E1.2(i) to pay the costs of imprisonment was not authorized by the Sentencing Reform Act (SRA). Neither 18 U.S.C. §3553(a), which sets forth the purposes in sentencing, nor §3572(a), which details the factors to consider in imposing a fine, authorizes fines to pay the costs of incarceration.

United States v. Demes, 941 F. 2d 220 (3d Cir. 1991). The Third Circuit found that the district court made no finding as to defendant's ability to pay a fine, and thus, remanded the case for resentencing on the fine. In cases where it is clear that a defendant has the ability to pay a fine, such an omission might be harmless. Here, however, the presentence report concluded that defendant did not have the ability to pay a fine. Although defendant had $60,000 worth of equity in real property, the mortgage was in arrears and the property was being foreclosed.

United States v. Preston, 910 F.2d 81 (3d Cir. 1990). The circuit court upheld the imposition of a $2,000.00 fine, which would require the appellant to sell his house to pay. There was evidence to indicate that the appellant's dependents did not live in the house and that appellant had been living with a girlfriend, using his house mainly for business purposes. The appellant failed to produce any evidence to the contrary, nor did he submit a financial statement to aid the district court in sentencing.

Part G -- Implementing the Total Sentence of Imprisonment

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

Santana v. United States, 98 F. 3d 752 (3d Cir. 1996). Defendant, contending that he was eligible for a minimum sentence of 87 months, argued that his counsel failed to object to a miscalculation of his sentence. The Third Circuit rejected the ineffective assistance claim, because the mandatory minimum sentence for his offense was 120 months. Under §5G1.1(c)(2), where the statutory minimum sentence exceeds the defendant's guideline range, the court is required to impose the statutory minimum sentence. A court is powerless to impose a sentence below the statutory minimum without a government motion.

§ 5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Velasquez, 304 F. 3d 237 (3d Cir. 2002). The defendant in this case was convicted of a drug conspiracy and use of a telephone in connection with the trafficking. The trial judge concluded that in light of *Apprendi* the statutory maximum of 240 months set out in 21 U.S.C. § 841(b)(1)(C) applied to the conspiracy conviction, rather than the guideline computation of 292 to 365 months. The court grouped the conspiracy with the communications offense, denied the government's request for consecutive sentences totaling 288 months, and imposed a sentence of 240 months. The government cross-appealed, insisting that the district judge should have made the sentence for use of a communications device consecutive, instead of concurrent.

The Court of Appeals stated: "This case illustrates the need for respecting the discretion of the sentencing judge preserved in section 3854. By simply adding a count for conduct that is within the trafficking offense, the government puts 5G1.2 into play and effectively nullifies congressional judgment on the proper maximum sentence. If only the drug trafficking conviction were at issue, here the guideline sentence would be the statutory maximum of 240 months. Adding a consecutive sentence under 5G1.2 without consideration of other factors, is in conflict with the guideline policy of imposing 'incremental punishment only for significant additional criminal conduct.' No such 'significant additional criminal conduct' exists in the case before us. By imposing concurrent sentences as authorized by section 3584, the district judge carried out the guideline policy of avoiding excessive sanctions caused by blindly allowing a legally distinct, but realistically indistinct, offense inherent in the principal count to gain sway." The Court of Appeals concluded that the sentencing judge properly exercised his discretion under section 3584 of the Sentencing Reform Act, and in accordance with the policy expressed in the guidelines grouping provisions, decided that concurrent sentences were appropriate.

United States v. Enright, 2002 WL 826442 (3rd Cir.(N.J.))). The defendant was president of Petro Plus Oil, a company that bought and sold fuel at the bottom of the chain. He pled guilty to violating 18 U.S.C. § 371 by conspiring to defraud the United States and to commit tax evasion, contrary to the provisions of 26 U.S.C. § 7201, to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); money laundering (18 U.S.C. § 1957); and tax evasion (26 U.S.C. § 7201). These offenses arose from a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes.

United States v. Beckett, 208 F.3d 140 (3rd Cir.2000). Appellant James C. Beckett was found guilty of two counts each of robbery and armed robbery in violation of 18 U.S.C. §§ 2113(a) and (d). The Court of Appeals held that the district court erred by sentencing the defendant concurrently on both the charge of armed bank robbery and on the lesser included offense of robbery. The concurrent sentences imposed on Counts one and three for the lesser included offenses of bank robbery violated the Double Jeopardy Clause.

United States v. Pollen, 978 F. 2d 78 (1992). Defendant was convicted of several pre-guidelines counts and one guidelines count of tax evasion. He received a 60 month sentence on his guideline count to be served consecutively to concurrent 60-month sentences on the pre-guidelines counts. With regard to pre-guidelines counts, a district court has virtually unfettered discretion in imposing a sentence if it falls within the statutory limits. The district court did not abuse its discretion in imposing a consecutive sentence.

United States V. Reeves, 2007 WL 1034829 (3d Cir. (N.J.))). After pleading guilty to conspiracy to distribute more than 500 grams of cocaine in violation of 21 U.S.C. § 841 and 846, the defendant was sentenced to 78 months imprisonment. He appealed that sentence, claiming the District Court improperly failed to grant a discretionary downward departure for time the defendant spent in detention on state charges.

At sentencing, defense counsel argued for a reduction in sentence pursuant to § 5G1.3(c), which would have given the defendant credit for time spent serving his state sentences. The District Court denied that motion in part, granting the defendant credit for the time he was in prison between February 22, 2002 and March 7, 2003, and between April 5, 2005, and his sentencing on November 29, 2005. The District Court did not grant the defendant credit for the time he was in prison from March 7, 2003 until April 5, 2005, as that time was credited against his state sentence.

The Court of Appeals held that the defendant's reliance on § 5G1.3(c) was mistaken. Section 5G1.3(c) refers only to undischarged terms of imprisonment. By the time the defendant was sentenced, his term of imprisonment for the state charges had been discharged. According to application note 4 to § 5G1.3, departures based on discharged terms of imprisonment are covered by § 5K2.23. The Court of Appeals held that the District Court properly understood that it had discretion to award the defendant a downward departure if the defendant could properly prove he met the requirements of § 5K2.23, but chose not to do so as the heroin offense for which the defendant was serving his state sentence was unrelated to the cocaine conspiracy which was the foundation of his federal charge. As the District Court properly understood its discretion but chose not to exercise that discretion, the Court of Appeals may not review its decision.

United States v. Brown, 2005 WL 3086548 (3rd Cir. (Pa.))). The defendant was sentenced on May 14, 1997, in a New York state court to one to three years in custody. On December 2, 1997, he was taken into federal custody on a writ of habeas corpus ad prosequendum to answer federal charges. On August 27, 1999, the defendant was sentenced to 97 months imprisonment on the federal charges. The sentencing court ordered that the sentence "shall run concurrently to the sentence defendant received on May 14, 1997, in the related New York state case." After the federal sentencing, New York authorities informed the Bureau of Prisons that the defendant would have been conditionally released from his state prison term on February 26, 1999, prior to the imposition of his federal sentence.

The Bureau of Prisons had given the defendant credit for pre-trial-detention from February 26, 199, through August 27, 1999. The defendant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, claiming that, because his related federal and state sentences were intended to run concurrently, he should instead receive credit or an adjustment for the time he served from May 14, 1997, to August 27, 1999. The district court denied his petition and he appealed.

In affirming the district court's order, the Court of Appeals stated, "pursuant to § 5G1.3(b) of the Sentencing Guidelines, a federal sentence imposed in a case related to a state conviction can run "fully or retroactively concurrently, not simply concurrently with the remainder of the defendant's undischarged sentence. *Ruggiano v. Reish*, 307 F.3d 121, 128 (3d Cir. 2002). When imposing the defendant's sentence, the sentencing court acted under the belief that the defendant remained in primary state custody. See id. At 125 (holding that a prisoner detained pursuant to a writ ad prosequendum is considered to remain in the primary custody of the first jurisdiction unless and until the first sovereign relinquishes jurisdiction over the person. However, the sentencing court's intent to impose the defendants federal sentence either fully or retroactively concurrently with his state sentence is not apparent from the sparse record before the Court. Although the sentencing court ordered that the federal sentence 'shall run concurrently' to his state sentence, the court did not specify that the defendant was entitled to credit for time served, as in other cases in which courts have imposed retroactively concurrent sentences. See *Ruggiano*, 307 F.3d at 131-32, *Rios v. Wiley*, 201 F.3d 257, 267-68, 271 (3d Cir. 2000). The sentencing court did not otherwise indicate its intent, as by making an adjustment to the defendant's sentence using the suggested methodology set forth in the application notes of the Sentencing Guidelines. See U.S. Sentencing Guidelines § 5G1.3 app. (B). [FN1].

"Furthermore, any intent to impose a concurrent sentence could not have been realized. The defendant, who completed serving his state sentence on February 26, 1999, was no longer subject to an undischarged term of imprisonment when he was sentenced for the federal law violations on August 27, 1999. Therefore, as the district court determined without explicitly considering the section 5G1.3(b) issue, the defendant's federal sentence commenced when it was imposed on August 27, 1999. The Bureau of Prisons' rejection of the defendant's application for time served beyond the time he served in pretrial detention from February 26, 1999, to August 27, 1999, was proper."

United States v. Pray, 373 F.3d 358 (3rd Cir. 2004). During the summer of 1998, Pray joined a narcotics distribution ring, and on September 24, 1998, he was arrested by Philadelphia police officers. He later pled guilty to state charges of conspiracy and possession with intent to distribute 22 grams of crack cocaine and was sentenced to one to two years of imprisonment on the possession count and a suspended sentence on the conspiracy count. On January 20, 200, after completing several months of his sentence, the Commonwealth paroled Pray.

On May 31, 2000, while Pray was on parole from his state conviction, a grand jury in the Eastern District of Pennsylvania indicted Pray on one count of conspiring to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1). These charges related to his participation in the drug ring. Pray was arrested on the federal charge and a state parole detainer was lodged against him.

At sentencing Pray argued that the district court should adjust Pray's sentence under U.S.S.G. § 5G1.3 and its application Note 2 to reflect the time that he had already spent in custody on the state charges. He argued that he was serving "an undischarged term of imprisonment" on the state charges because a state detainer had been lodged against him for

alleged violations of parole. The government opposed Pray's request, arguing that § 5G1.3 applies only when a defendant is actually serving a state sentence at the time of sentencing on the federal charges. The district court rejected Pray's request to credit his time served on the state charges against his federal sentence.

Pray appealed. He asserted that he was serving "an undischarged term of imprisonment" because he was still "in the legal custody of the state" due to the lodging of a state parole detainer. The Court of Appeals held that Pray was not entitled under U.S.S.G. § 5G1.3(b) and its Application Note 2 to credit for the time he spent in state custody. The term "imprisonment" in U.S.S.G. § 5G1.3 and Application Note 2 does not include parole. In ordinary usage, "imprisonment" generally means physical confinement. Also, the district court exercised its discretion not to depart.

United States v. Swan, 275 F. 3d 272 (3d Cir. 2002). In April 2000, the Pittsburgh Housing Authority Police responded to a call reporting a suspicious gathering. When they arrive, they saw the defendant walk quickly toward a car, holding onto his pocket. After the defendant jumped into the car, one of the officers saw him pull a holster containing a gun from his waistband and place it under the seat of the car. The police stopped the car and arrested the defendant.

It was soon discovered that the defendant had been convicted in 1992 of carrying a firearm during a drug trafficking crime and of two drug counts. He was on supervised release from this 1992 conviction at the time he was arrested.

The United States District Court for the Western District of Pennsylvania held a hearing in May 2000 to consider the supervised release violation, and revoked the defendant's supervised release because he had violated the conditions that he participate in residential drug treatment and that he not commit a crime or possess a firearm. The defendant was sentenced to 21 months.

While serving this term, the defendant was indicted and eventually pled guilty to the charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), also in the Western District of Pennsylvania before the same judge. Prior to sentencing the defendant's counsel filed a motion urging that the defendant's sentence for the felon in possession offense should run concurrently or partially concurrently with the sentence the defendant was already serving. At issue was the meaning of Application Note 6 to § 5G1.3(c) of the Sentencing Guidelines.

After ordering briefing on this issue, the district court concluded that "[i]n the absence of binding precedent, . . . Application Note 6 [of § 5G1.3] requires the court to impose a consecutive sentence in this case." The court then imposed a sentence of 65 months to run consecutively to the defendant's 21-month sentence.

The Court of Appeals held that: (1) undischarged term did not result from offenses fully taken into account in determining offense for felon-in-possession charge, as would operate under Sentencing Guidelines to require concurrent sentences, and (2) as a matter of first impression, Sentencing Guidelines application note under which a sentence for offense committed while defendant was on federal or state probation, parole, or supervised release "should" be imposed to run consecutively to term imposed for violation of probation, parole, or supervised release does not mandate consecutive sentences.

United States v. Saintville, 218 F. 3d 246 (3d Cir. 2000). After originally asking for a downward departure, Saintville's attorney changed her request and asked the court to run his sentence on the federal charge concurrently with his state sentence. In support of this request she indicated that she had calculated that the hypothetical combined sentencing range, treating both the federal and state charges as having been prosecuted in the federal court, would have been 51 to 63 months imprisonment, a calculation with which the government did not take issue. The prosecutor, however, had a different approach. He said that he "would simply point out that it is within the court's discretion to enter the sentence consecutively or concurrently. If the court does enter a completely concurrent sentence, that would have the effect of imposing no punishment for this offense."

Ultimately, after hearing extensive colloquy, the district court sentenced the defendant to 46 months which was at the bottom of his imprisonment range of 46 to 57 months. The court further provided that ten months would be concurrent to the undischarged state sentence and the balance would be consecutive to the state sentence.

On appeal, Saintville contends that the district court erred as a matter of law because it failed to consider the hypothetical combined sentencing range which would have been applied if the United States had prosecuted both the unrelated state drug offenses and the illegal entry offense in the district court. In considering Saintville's argument, the Court of Appeals recognized, as the government acknowledges, that § 5G1.3(c) and its Commentary prior to its 1995 amendment would have required the court to consider the hypothetical combined range. However, in view of the 1995 amendment, a sentencing court no longer must make the hypothetical calculation contemplated in *Rios v. Wiley*, 201 F.3d 257 (3d Cir. 2000). Now, as the Commentary to § 5G1.3 sets forth, the court, "[t]o achieve a reasonable punishment and avoid unwarranted disparity,...should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of the factors set forth in § 5G1.3(c), comment. (N.3) (1998).

United States v. Dorsey, 166 F. 3d 558 (3d Cir. 1999). The defendant appealed the district court's refusal at sentencing to follow commentary to U.S.S.G. § 5G1.3(b) in application note 2 to the guideline. Under that note, the court could have reduced Dorsey's federal sentence by a certain amount of time he had spent in state custody, thereby essentially giving him credit for that period of imprisonment before the federal sentence was imposed. The Third Circuit held that the district court erred in deciding that only the Bureau of Prisons has the authority to grant sentencing credits. The case was reversed and remanded for resentencing. The Third Circuit directed that the district court comply with the procedure set forth in the application note.

United States v. Higgins, 128 F. 3d 138 (3d Cir. 1997). Defendant was sentenced for an offense committed while serving a previous term of imprisonment. The district court ordered a portion of the sentence to run concurrently with the previously imposed sentence. The court of appeals reversed, holding that §5G1.3(a) mandates a consecutive sentence. Where the guidelines prescribe circumstances under which the court should impose the sentence either consecutively or concurrently, a district court is not free to exercise unfettered discretion. Further, §5G1.3(a) is not in conflict with 18 U.S.C. §3584(a) merely because the guideline limits sentencing discretion in the exceptional case of an offense committed while serving or awaiting a term of imprisonment

United States v. Oser, 107 F. 3d 1080 (3d. Cir. 1997). Defendant argued that the district court erred in ordering that the sentences imposed run consecutively rather than concurrently with the term of imprisonment he was serving for a currency reporting violation in the federal court in New York. The Third Circuit held that sentences in instant case did not have to be imposed concurrently with eariler imposed sentence for underreporting transport of cash abroad, despite three-level enhancement to conspiracy sentence on ground that offense was committed while defendant was on presentence release from currency reporting offense. The district court provided satisfactory basis for use of methodology different from that suggested by §5G1.3(c), comment. (n.3) and, thus, for refusing to impose sentences for drug importation conspiracies concurrently with months remaining on earlier imposed sentence for underreporting transport of cash abroad. It explained that concurrent sentence would run against policy of Congress and sentencing guidelines in requiring that sentence be enhanced if crime was committed while on release elsewhere.

United States v. Spiers, 82 F. 3d 1274 (3d Cir. 1996). The district court did not err in declining to impose § 5G1.3's suggested penalty. At sentencing, the district court found that the defendant did not deserve a concurrent sentence. Instead, the district court ordered the defendant to serve a 110-month federal sentence to run consecutively from the completion of his 50-year state sentence. The defendant argues that the reasons offered by the district court when it rejected the suggested penalty are inadequate and that the resulting sentence was impermissibly indeterminate. On appeal, the court reaffirmed its holding in *United States v. Holifield*, 53 F. 3d 11 (3d Cir. 1995) that, although a district court must determine the Guideline's suggested "reasonable incremental punishment" according to the commentary's methodology, the imposition of the commentary's suggested penalty remains within the district court's discretion. The court further held that the district court may impose a different penalty as long as it indicates its reasons for imposing the penalty in such a way as to allow the appellate court to see that it has considered the commentary's methodology. In addition, the court held that because the date upon which practically any consecutive sentence will take effect is uncertain, a consecutive sentence will not be voided simply because its beginning or ending date is indeterminate.

United States v. Brannan, 74 F. 3d 448 (3d Cir. 1996). The district court erred in believing it lacked authority to "give credit" for an undischarged state sentence and had no choice but to sentence defendant to a concurrent term. The district judge correctly looked to USSG. §5G1.3(c), but erroneously read it to indicate that a concurrent sentence was required unless it believed an incremental punishment was required, in which case the sentence should run consecutively. Although expressing "discomfort" in doing so, the district judge did not see a need for an incremental punishment and, therefore, imposed a 100 month--the low end of the guideline range-- sentence concurrent with the undischarged term. The circuit court stated that § 5G1.3(c) should be applied to determine a sentence had all of the offenses been federal offenses sentenced at the same time. The court noted that such a determination may involve an approximation and can be a departure.

United States v. Sabarese, 71 F. 3d 94 (3d Cir. 1995). In Pennsylvania federal court, defendant was sentenced to probation for a fraud scheme, and the court considered some related criminal conduct in New Jersey. Defendant then pled guilty to the related charges in New Jersey federal court, but the New Jersey judge found that the Pennsylvania offense was not related to the New Jersey offense, and sentenced defendant to 16 months in custody. Defendant argued that §5G1.3 required the New Jersey sentence to run concurrently with the Pennsylvania sentence because they were related, and that under 18 U.S.C. §3564(b) the only type of sentence that can run concurrently with a sentence of probation is a sentence of imprisonment for less than 30 days. The Third Circuit held that § 3564(b) did not restrict the type of sentence the New Jersey judge could impose. That section merely clarifies that a term of probation will run only during a concurrent term of probation or a sentence of imprisonment of less than 30 days. Moreover, the concurrent "sentence" requirement in §5G1.3 clearly refers to a sentence of imprisonment. Finally, §5G1.3 could not trump §3564(b)'s provision that a term of probation cannot run concurrently with a sentence of imprisonment longer than 30 days.

United States v. Holifield, 53 F. 3d 11(3d Cir. 1995). Trial court could impose 15-month sentence for wire fraud offense to run concurrently with 21-month sentence for prior wire fraud offense of which 17 months had been served at time of sentencing, even though defendant claimed that had he been convicted of both offenses at same time, his maximum guideline term would have been 24 months, leaving seven months as appropriate sentence under §5G1.3(c). While this provision required court to "consider" imposing incremental penalty that would result in punishment of approximating result if sentences for offenses had been imposed at same time, 15-month sentence for current offense was bottom of guidelines range, and trial court was not required to fashion incremental penalty involving downward departure from range. However, the sentencing court can depart if it believes it should do so in order to arrive at the appropriate sentence.

United States v. Chasmer, 952 F. 2d 50 (3d Cir. 1991). While awaiting a hearing on a probation violation, defendant walked away from custody. He was eventually apprehended and pled guilty to obstructing a court order. The sentence was ordered to run consecutively to the sentence defendant received for his probation violation. The Third Circuit upheld the consecutive sentences. Section 5G1.3, permitting concurrent sentences if the instant offense

arose out of the same transaction as the unexpired sentence, was not applicable. Defendant's obstruction offense did not rise out of the same transaction as the sentence he received after his probation violation. For purposes of determining "the same transactions or occurrences" under §5G1.3, if an offense is committed while a defendant is on parole, that offense is compared to the offense for which defendant is on parole, rather than to the acts constituting the parole violation. Though judgment did not indicate that sentence was to be served consecutively to the sentence he was already serving, the Third Circuit upheld the consecutive sentence because when an orally pronounced sentence conflicts with a judgment and commitment order, the orally pronounced sentence controls.

United States v. Nottingham, 898 F.2d 390 (3d Cir. 1990). Defendant went on crime spree while on parole from prior robbery conviction and received sentence to run consecutively to that for parole violation as directed by USSG. §5G1.3. The Third Circuit held that under 18 U.S.C. §3584(a) a judge has discretion to impose a concurrent or consecutive sentence.

United States v. Medieros, 884 F. 2d 75 (3d Cir. 1989). Defendant walked away from a prison farm camp to visit his recently hospitalized son. In deciding to impose a consecutive, rather than a concurrent sentence, the district court found that to impose a concurrent sentence would depreciate the seriousness of the offense. It would also circumvent the guidelines by imposing a shorter sentence than the guidelines warrant, because it would, in effect, be no sentence at all.

Part H -- Specific Offender Characteristics

§ 5H1.1 Age (Policy Statement)

United States v. Rodriguez, 2004 WL 1894126 (3rd Cir.(N.J.))). The defendant was arrested at Newark International Airport when nearly three kilograms of heroin were discovered in suitcases she had brought into the United States from Panama. At the time, the defendant was 18 years old. She subsequently pleaded guilty to importation of heroin in violation of 21 U.S.C. §§ 952(a) and 960(b)(1)(A), a class A felony with a mandatory minimum sentence of ten years imprisonment. Because the defendant was eligible for the "safety valve" provisions under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a), the district court was permitted to impose a sentence below the statutory minimum. Her guideline custody range was 46 to 57 months, which included adjustments for minor role and acceptance of responsibility. The district court granted the defendant's motion for a downward departure based on her youth and her post-offense rehabilitation and imposed a sentence of 13 months to be served at a halfway house.

The government filed an appeal, arguing that the downward departure was erroneously granted and, in the alternative, that the extent of the departure was unreasonable.

This was the defendant's first adult arrest, and she had no prior convictions. During the several months that she spent in pretrial detention, she took a preparatory course for the GED test, volunteered as a bilingual interpreter, taught fellow inmates to read and write in English, and

took religious courses. After she was released on bail, she expressed a desire to speak about her experience at her local high school. She also moved back in with her family, obtained a high school equivalency diploma and began taking cosmetology classes.

The defendant's motion for a downward departure was based on age, which is addressed by § 5H1.1 of the guidelines, and post-offense rehabilitation, which the Court of Appeals has recognized as a permissible basis for a departure in *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). She also sought a departure based on a combination of those two considerations, pursuant to § 5K2.0 of the guidelines. The Court of Appeals ruled that neither factor alone rendered her case extraordinary, nor did the two factors, when added together, remove her situation from the heartland of comparable cases. The Court of Appeals commented that the defendant is relatively young, and she has made some commendable efforts at improving herself as a result of the offense, but she is not substantially distinguishable from many other criminal defendants who commit similar offenses. Thus, no departure was warranted and the case was remanded for sentencing.

United States v. Marin-Castaneda 134 F.3d 551 (3d Cir. 1998). Defendant, a Colombian national, pleaded guilty to importing 1,227 grams of heroin into the United States. He argued that the district court had authority to depart downward based on his willingness to consent to deportation, his age and the ordeal caused by ingestion of the heroin pellets. The district court did not depart. The court of appeals found no error, concluding that the three proposed bases for downward departure–consent to deportation, age and physical trauma–did not warrant a departure, either individually or collectively. Defendant did not assert any extraordinary condition other than the fact that he was 67 years old at the time of sentencing. He did not seem to suffer from any unusual impairments for a man his age. He was aware of the health risks involved in ingesting heroin prior to his trip, and his willingness to be deported and reliance on 8 U.S.C. §1231(a)(4)(B) is misplaced.

United States v. Sally, 116 F. 3d 76 (3d Cir. 1997). Defendant was convicted of drug and firearm charges. He was a bagger and look-out for a crack conspiracy. Defendant argued that the district court erred by failing to depart downward under §5H1.1. His request was based on (1) the fact that he was 17-18 years old when he joined the conspiracy; and (2) since being jailed, he had demonstrated increased maturity by earning his GED and nine college credits. The Court of Appeals found no error in the district court's refusal to depart under §5H1.1; however, the case was remanded for the court to consider a downward departure for defendant's post-conviction rehabilitation. Post-offense rehabilitation efforts, including those that occur post-conviction, may constitute a sufficient ground for downward departure provided that the efforts are so exceptional as to remove the case from the heartland in which the acceptance of responsibility guideline was intended to apply.

United States v. Monaco, 23 F. 3d 793 (3d Cir. 1994). In imposing sentence for conspiracy to engage in fraudulent billing scheme under government contract, it was not appropriate to grant downward departure because defendant was 57 years old, lost his business, became involved in civil litigation, had poor prospects for future employment, and was unable to hold public office.

United States v. Seligsohn, 981 F. 2d 1418 (3d Cir. 1992). Defendant was 62 years old, but was not alleged to be in poor physical health. The district court departed downward because of defendant's age, and to reduce disparity with codefendants' sentences. The Third Circuit remanded. Departures based on age are permitted when defendants are elderly and infirm, and home confinement is equally efficient and less costly. However, the district court did not make appropriate findings to support a downward departure on this ground. Under *U.S. v. Higgins*, 967 F. 2d 841 (3d Cir. 1992), sentence disparity among co-defendants is not a sufficient basis for departure. However, because it was unclear from the record whether there were unusual circumstances that would constitute an exception to the *Higgins* rule, the case was remanded for reconsideration.

United States v. Higgins, 967 F. 2d 841 (3d Cir. 1992). Disparity of sentences among co-defendants is not proper basis for a downward departure. Defendant also requested a downward departure based in part upon his young age, his steady employment and his stable employment record. The district court ruled that these factors were considered by the guidelines, and therefore it lacked discretion to depart on these grounds. However, the Third Circuit held that in "extraordinary" circumstances, the guidelines permit a downward departure based on age, employment record, and family ties and responsibilities. on the stated grounds.

United States v. Shoupe, 929 F. 2d 116 (3d Cir. 1991). Defendant was classified as a career offender. The district court departed downward based on defendant's youthfulness and immaturity at the time he committed two of the prior offenses, the short time span between the commission of the offenses, defendant's prior cooperation with authorities and his dependent child. The Third Circuit reversed, finding that all of these factors were adequately considered by the Sentencing Commission.

§ 5H1.2 Education and Vocational Skills (Policy Statement)

United States v. Sharapan, 13 F. 3d 781 (3d Cir. 1994). The district court departed downward because it believed that defendant's incarceration would cause his business to fail and result in the loss of about 30 jobs and other economic harm to the community. The Third Circuit reversed, holding that this departure was inconsistent with §5H1.2, which provides that departures based on a defendant's "vocational skills" are generally not permitted.

United States v. Mele, 2003 WL 1914113 (3rd Cir.(Pa.))). The defendant appealed, contending that the district court erred in not granting a downward departure in light of his history of prostate cancer, heart problems, and diabetes. While the Court of Appeals did not doubt the seriousness of the defendant's medical condition, it lacked jurisdiction to review the district court's refusal to depart downward. The Court of Appeals also noted the availability of federal healthcare facilities to attend to the defendant's medical needs.

United States v. Aguado, 2003 WL 1564268 (3rd Cir.(N.J.))). The defendant pleaded guilty to conspiracy to import heroin into the United States from Panama in violation of 21 U.S.C. § 963. On June 8, 2001, Alberto Rankin, a drug courier, confessed to customs officials upon his entry into the United States that he had ingested a quantity of heroin, and was to be paid $10,000 upon delivery of the drugs in the United States. Rankin agreed to cooperate with officials, and, after he had passed the drugs, he called and arranged to meet the defendant at Newark International Airport to deliver the heroin to him. Because another member of the conspiracy had failed to give the defendant money to pay Rankin, the defendant withdrew $3,000 from the business bank account of his auto body shop to give to Rankin. The defendant expected to be reimbursed by other members of the conspiracy. The defendant was arrested when he arrived to meet Rankin at the airport.

At sentencing, the defendant argued for a downward departure due to his medical condition - - specifically, the fact that his rectal bleeding for the last two years may indicate that he has colon cancer. The district court recognized its discretion to depart but chose not to do so. There was no clear diagnosis that Duran actually had cancer and he had not shown that the Bureau of Prisons would be unable to provide appropriate medical treatment.

United States v. McKeithan, 2002 WL 31477304 (3rd Cir.(Pa.))). Following a trial by jury, the defendant was convicted of various drug-related offenses. He appealed his sentence, arguing that the district court erred in denying his request for a downward departure in light of his physical impairments. Section 5H1.4 states that the physical condition of a defendant is normally not relevant to the calculation of a sentence. *United States v. Iannone*, 184 F.3d 214, 227 n. 10 (3d Cir. 1999). However, 5H1.4 notes that "an extraordinary physical impairment may be reason to impose a sentence below the applicable guideline range. *United States v. McQuilkin*, 97 F.3d 723, 730 (3d Cir. 1996).

Prior to sentencing, McKeithan established a history of heart problems, including significant congestive heart failure and chronic obstructive pulmonary disease. Based on these conditions, McKeithan argued that absent a heart transplant his life expectancy was between three and five years. The government did not challenge McKeithan's medical claims, and instead argued that his health problems could be adequately treated while incarcerated. The Court of Appeals held that it lacked jurisdiction to review McKeithan's argument because the district court, knowing of its authority to depart downward, nonetheless determined that departure was

not warranted. The district court explained its decision to deny the motion for a downward departure as follows: "I think that any downward departure that I could possibly give would in any event still amount for his purposes to a life sentence. The court believes that to do so under the circumstances of this case would set bad precedent."

United States v. Mellott, 2002 WL 1885919 (3rd Cir.(Pa..))). The defendant pleaded guilty to conspiracy to distribute cocaine and methamphetamine. Mellot's trial counsel did not file or make any motions for a downward departure at sentencing. However, in his notice of appeal, trial counsel identified a number of reasons why he believed Mellott's sentence was improper. Counsel asserted that the court should have further reduced Mellott's sentence on the basis of his "minor" role in the offense; his post-offense rehabilitation; his physical disability as an amputee; and the fact that his criminal history category overstates the seriousness of his prior convictions.

The Court of Appeals held, "With respect to the suggested downward departure for a minor role in the offense, the record contains no basis for such an evaluation. The record reflects that Mellot, along with several defendants, was a dealer who participated in acquiring the drugs that the defendants distributed in the community. The mere fact that Mellot did not sell cocaine but only methamphetamine does not affect this conclusion. Mellot's claim that the record establishes post-offense rehabilitation, that he has become a better and more responsible person, especially a better and quite responsible parent, which we commend, does not even approach the very high standard required for a downward departure on that ground. Neither does his physical disability as an amputee. We also see no basis for the claim that the criminal history category overstates the seriousness of his prior convictions.

United States v. Yocum, No. 01-2400 (3d Cir. December 12, 2001). On appeal, the defendant argued that the district court erred in denying his motion for downward departure for "extraordinary physical impairment." The defendant has a large arachnoid cyst within his skull which distorts his brain architecture. His physician wrote that the defendant will continue to need expert neurological and neurosurgical care, including adjustment of medications, sophisticated brain imagery and possible surgery. The record indicates, however, that in previous incarcerations, the defendant did have care in the federal prison system under competent neurosurgeons.

While at the Federal Medical Center in Lexington, the defendant was taken to the University of Kentucky at Lexington Hospital, where he was seen by Doctor Brian Young, a neurosurgeon. Doctor Young had previously been taught by the defendant's neurosurgeon, Doctor Joseph Rasenhoff. The defendant had two MRI's performed during the time he was on transfer to the hospital. Although Doctor Young recommended surgical intervention to determine the extent of the midline pressure on defendant's brain, the defendant declined the recommended surgical intervention. The district court properly took into account that defendant had been sent to the Federal Medical Center in Lexington from which an appropriate referral was made to a highly qualified neurosurgeon. In light of this information, the district court determined that absent further evidence that the Bureau of Prisons could not adequately care for

his condition, a downward departure was not appropriate. The Court of Appeals affirmed.

United States v. Chen, 2002 WL 229693 (3rd Cir.(N.J.))). At sentencing, the defendant requested a downward departure pursuant to U.S.S.G. § 5H1.4 based on his having been diagnosed with a peptic ulcer and a precancerous lesion. The district court declined to depart stating that downward departure based on medical reasons was not warranted here "where the defendant appears to have a treatable condition," and "the Bureau of Prisons is able to provide suitable care." In his pro se brief, Chen states that he has not, in fact, received suitable care. Chen does not challenge the calculation of his sentence per se. Even had he raised a sentencing claim, the Court of Appeals lacked jurisdiction to review the district court's discretionary decision not to grant a downward departure. See, *United States v. Denardi*, 892 F. 2d 269, 270-72 (3d Cir. 1989). This claim should be addressed in administrative proceedings with the Bureau of Prisons. See 28 C.F.R. § 542.10 et. seq.

United States v. Hernandez, 218 F. 3d 272 (3d Cir. 2000). The defendant was diagnosed with AIDS. At the sentencing hearing, he contended that this condition was an extraordinary physical impairment warranting a departure. The transcript reveals that the district court declined to depart in this case because the defendant had committed the instant crime subsequent to his diagnosis with AIDS, and because the defendant could obtain adequate medical care while incarcerated. Admittedly, the statement of the district court pointed to by the defendant suggests that the district court incorrectly believed that a terminal illness could never serve as a basis for departure. However, when viewed in the entire context of the sentencing hearing, the Court of Appeals did not believe this statement reflects the district court's rationale for not departing.

United States v. Roman, 121 F. 3d 136 (3d Cir. 1997). Defendant contended that his mental and emotional condition was due to the murder of his father when defendant was only five and his extensive abuse of drugs and alcohol. However, §5H1.4 states that drug or alcohol dependency or abuse is not a reason for a downward departure. Thus, the Third Circuit held a departure was not warranted.

United States v. McQuilkin, 97 F. 3d 723 (3d Cir. 1996). As a result of a motorcycle accident, defendant suffered injuries to his left arm. He also had a congenital defect in his left eye, affecting the eye muscle. Defendant argued for a downward departure under §5H1.4, claiming his extraordinary physical impairment would place him at risk for improper medical treatment in prison and make him a target of other prison inmates. The Third Circuit upheld the district court's refusal to grant a departure.

United States v. Veksler, 62 F. 3d 544 (3d Cir. 1995). Defendant sought a downward departure under §5H1.4 due to his medical condition (a seriously decreased lung function). The Third Circuit did not review the matter, finding the refusal to depart was based on defendant's failure to present sufficient evidence to warrant a departure under §5H1.4. The district court's refusal to exercise its discretion is not reviewable.

United States v. Schein, 31 F. 3d 135 (3d Cir. 1994). The district court departed downward to a 12-month probation term, stating that the guideline sentence overstated the seriousness of defendant's offense. The Third Circuit reversed. There is no provision in the guidelines authorizing a downward departure because the guidelines overstate the seriousness of the offense. However, on remand, the court might consider whether §5H1.4 provided a basis for departure for an "extraordinary physical impairment."

United States v. Little, 919 F.2d 137 (3d Cir. 1990). Defendant who suffered from chronic obstructive pulmonary disease was subject to a 6-12 month range and received a downward departure by magistrate to 2 months under §5H1.4. Defendant argued that §5H1.4 required imposition of a term other than imprisonment. The district court affirmed, holding that §5H1.4 contemplates a range of departures in extraordinary cases with the extent of departure dependent upon the seriousness of the physical impairment.

United States v. Pharr, 916 F. 2d 129 (3d Cir. 1990). Defendant, who was convicted of selling stolen treasury checks, admitted that his crime was prompted by his heroin addiction. The district court departed downward because it found defendant had made a conscientious effort to overcome his addiction, and that sentencing him to jail would disrupt his drug rehabilitation efforts. The Third Circuit reversed, finding that the policy statement to §5H1.4 provides that "drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." Therefore, separation from such addiction is also not a ground for a downward departure. Since only those addicted to drugs would be eligible for such a departure, a downward departure would reward defendants for being addicted.

§ 5H1.5 Previous Employment Record (Policy Statement)

United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990). The district court did not err in refusing to consider defendants' military records as grounds for departure. The court notes that the guidelines nowhere speak of the military record of a defendant.

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

United States v. Thomas, 2006 WL1308573 (3rd Cir. (Pa.))). Sonia Thomas pled guilty to one count of conspiring to possess with intent to distribute 100 kilograms or more of marijuana in violation of 21 U.S.C. § 846, and one count of conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). The day before sentencing, the defendant filed a motion for a downward departure from the guidelines pursuant to U.S.S.G. § 5H1.6 on the grounds that "service of a sentence within the applicable guidelines range will cause substantial, direct, and specific loss of essential caretaking, or essential financial support to the defendant's family." Thomas was the mother of seven children, six of whom are minors. Her husband, who was the father of the six minor children, was a codefendant. He was sentenced to a term of imprisonment. Thomas asserted that she is the sole caretaker and means of financial support for the children and that she has no other family members who can care for her children while she is incarcerated.

On March 26, 2004, Thomas failed to appear at her sentencing hearing. She was captured on March 11, 2005, in California, and was transferred back to the Western District of Pennsylvania. At sentencing, the District Court heard argument from both parties on Thomas' motion for downward departure for extraordinary family responsibilities. The Government opposed the motion. Thomas was sentenced to 46 months imprisonment.

The defendant's sole contention on appeal was that the District Court erred in denying her request for a downward departure. The Court of Appeals held that "although the circumstances in this case are certainly unfortunate, they simply do not qualify as 'extraordinary' under this Court's precedents. See *United States v. Sweeting*, 213 F. 3d 95, 108-109 (3d Cir. 2000)(finding that the district court abused its discretion in granting a downward departure to a single mother providing for five children, one of whom had a neurological disorder); *United States v. Headley*, 923 F. 2d 1079, 1082 (3d Cir. 1991)(affirming the denial of departure for a single mother of five minor children and observing that "every court to consider the issue of a departure based on the effect that sentencing a single parent to prison will have on minor children has found the circumstances not to be extraordinary").

United States v. Dorrier, Jr., 2004 WL 322487 (3rd Cir.(Pa.))). The Court of Appeals upheld the district court's decision not to grant a downward departure. Dorrier argued his incarceration would cause a hardship on his wife who was in poor health, suffering from diabetes, hypertension and several other conditions, and in need of assistance with basic daily tasks such as walking and bathing. The sentencing judge found it "regrettable" that Dorrier's wife was ill and that he had been her primary caretaker. The Court also found that Dorrier's wife had one son who worked in the area and might be available to help her despite long work hours and another son who would be released from incarceration "very soon" and might also contribute to her care. Despite Dorrier's loss of income and the aforementioned circumstances, the sentencing judge found that the family circumstances were not so extraordinary as to warrant a decrease in Dorrier's sentence.

United States v. Elvey, 2003 WL 68078 (3rd Cir.(Pa.))). In this case, the Court of Appeals held that an illegal reentry for the purpose of watching a daughter graduate from kindergarten does not constitute an extraordinary family situation. Many persons who have been deported would like to attend family ceremonies, some more significant than graduation from kindergarten, such as graduation from college, weddings, or even funerals. Separation from family members at such times is the price that deported persons must pay for the misconduct that led to deportation.

United States v. Shabazz, 2002 WL 1732553 (3rd Cir.(Pa.))). On appeal, the defendant argued that the district court did not consider his family hardship when imposing sentence. At sentencing, the defendant moved for a downward departure based on a family hardship pursuant to U.S.S.G. § 5H1.6 (Family Ties and Responsibilities, and Community Ties). In this case, the district court expressly acknowledged it had the power to depart from the guidelines, but determined the defendant's family hardship did not warrant departure. Thus, the Court of Appeals lacked jurisdiction over this matter under 18 U.S.C. § 3742.

United States v. Dominguez, 296 F.3d 192 (3d Cir. 2002). The defendant is an unmarried woman in her mid-forties, and the only child of Cuban immigrants. During her brief tenure as a bank branch manager, she acceded to a customer's request to open accounts under different names and to omit filing certain reports of deposits. When the customer was indicted for money laundering, Dominguez was indicted for, and convicted of, conspiring to structure financial transactions to avoid reporting requirements.

Dominguez has no criminal record, nor was there evidence that she profited in any way from her assistance to the customer.

The defendant resided with her elderly parents, who were physically and financially dependant upon her. The record indicates that they could not afford paid assistance. Her father had undergone brain surgery and had suffered a heart attack in 1998. He is non-ambulatory, obese, incontinent, has significantly impaired mental ability, and experiences difficulty speaking. Her mother has severe arthritis and heart problems which prevented her from physically caring for her husband (e.g., she cannot lift the amount of weight necessary to assist him), and, although she is 75 years old, is now forced to support him.

At sentencing, the district court concluded that it had no choice but to sentence Dominguez to the imprisonment term fixed by the guidelines. The sentencing judge stated, "Applying *United States v. Sweeting*, 213 F. 3d 95 (3d Cir. 2000), I conclude that I lack discretion to grant a downward departure in the circumstances of this case. If I had such discretion I'd be inclined to depart by four levels so as to reduce the period during which defendant's parents would remain without her assistance. Lacking such discretion, the guideline calculations contained in the presentencing report will be applied."

The Court of Appeals vacated sentence and remanded the matter to the district court for re-sentencing, commenting "Having now clarified our jurisprudence, we observe that in this case such a downward departure would be within the district court's discretion giving the findings regarding Dominguez'z extraordinary family needs and the absence of any other readily available source of meeting those needs. Dominguez has been terminated from her banking position and poses no threat to society, so incapacitation appears unjustified. She has lost her employment and her reputation, and hurt and humiliated her parents, all for no gain, and hence, her punishment will have a significant deterrent effect. Her very low level of culpability is apparent, and it would be within the district court's discretion to conclude that a reduced sentence has a penal valence equal to the crime. Finally, as Dominguez is a contrite, and educated woman with no past criminal history, and has received mental health counseling, the trial court may conclude that incarceration would serve no rehabilitative purpose. In sum, the district court would be well within its discretion in determining that none of the purposes underlying the guidelines would be disserved by reducing Dominguez's sentence.

The Third Circuit ruled that the district court misunderstood *U.S. v. Sweeting*, which held that a district court cannot grant a downward departure base principally on generic concerns regarding breaking up families. That case did not diminish the discretion granted to the district court for downward departures when the evidence supports a finding of unusual family circumstances.

United States v. Spinello, 265 F.3d 150 (3rd Cir.2001). The defendant argued that the district court relied on an erroneous legal standard in denying his motion for a downward departure due to an "extraordinary situation" which he analogizes to that which warranted a departure in United States v. Monaco, 23 F. 3d 793 (1994), where a father had unwittingly involved his son in a crime. Spinello contends that the district court ruled as a matter of law that it lacked the authority to grant a departure because of its belief that the basis for departure in *Monaco* was limited to the "special relationship that fathers have with their sons" where, here, Spinello was invoking his relationship with his brother, Michael, and the anguish he felt over having caused his brother to be indicted and tried for perjury. The Court of Appeals held, "While the court did, in fact, note that the absence of a father-son relationship was a ground for its ruling, it did not say that it was the only ground. Rather, the Court stated that it was "not convinced that even if what happened in *Monaco* happens here, that Spinello suffered greater moral anguish and remorse than is typical." This statement demonstrates that wholly aside from the district court's belief that the application of a *Monaco* departure was limited to a father-son or even parent-child relationships, Spinello failed to show that his anguish and remorse rose to a level warranting relief.

United States v. Yeaman, 248 F. 3d 223 (3d. Cir. 2001). The United States appealed the sentences of David Yeaman and Nolan Mendenhall on several counts of mail and wire fraud. The convictions of Yeaman and Mendenhall stemmed from their leasing worthless stocks as assets available to pay insurance claims. When these assets were called upon to pay outstanding medical reinsurance claims, the scheme was uncovered. The Court of Appeals reversed the original sentences of both defendants following a previous government appeal, finding that the district court had failed to apply the Sentencing Guidelines properly. *United States v. Yeaman*, 194 F.3d 442, 465 (3d Cir. 1999). At resentencing, the district court departed downward 17 levels for Yeaman and 16 levels for Mendenhall. The downward departures resulted in no additional incarceration.

The district court stated that "reincarceration would result in disruption of . . . [defendants'] relationships with family members, which have been strained and are now being strengthened and substantial economic hardship on . . . [defendants'] families." This suggested to the Court of Appeals that family circumstances may have constituted a basis for the district court's downward departure. Our opinion in *United States v. Sweeting*, 213 F.3d 95 (3d Cir. 2000), "recognizes this basis for downward departure outside the Guidelines, but it also forecloses the possibility of any such departure on this record." *See id*. at 102 (stating that family disruption is a normal consequence of incarceration).

United States v. Sweeting, No. 99-3774 (3d Cir. May 3, 2000). The sole question on appeal was whether the district court abused its discretion in awarding the defendant a 12-level downward departure for extraordinary family ties and responsibilities pursuant to U.S.S.G. § 5H1.6. The district court predicated its ruling on the fact that Sweeting "is a single parent providing for five children, one of whom has a substantial neurological deficit in the form of Tourette's Syndrome. The Court of Appeals held that Sweeting's responsibilities are not "extraordinary" and that she was not entitled to a downward departure.

United States v. Fiorelli, 1998 WL 1955 (3rd Cir. (Pa.)). Defendant, a union official, was found guilty of extorting money and services from contractors. At sentencing, he moved for a downward departure based on extraordinary family circumstances. This was premised on the fact that he played an important role in the life of his granddaughter who suffers from cerebral palsy. The district court heard extensive evidence in support of this request, but ultimately exercised its discretion to deny it. Since it was clear that the district court recognized that it had discretion to depart downward on the basis of extraordinary circumstances, the Court of Appeals concluded that it lacked jurisdiction to review the lower court's decision not to depart. See *U.S. v. Denardi*, 892 F. 2d 269, 272 (3d Cir. 1989).

United States v. Monaco, 23 F. 3d 793 (3d Cir. 1994). The district court departed downward in part based on the mental anguish defendant felt seeing his son, otherwise a law-abiding citizen with an excellent future, convicted of a crime because of his father's fraudulent scheme. The Third Circuit affirmed.

United States v. Gaskill, 991 F. 2d 82 (3d Cir. 1993). Though disintegration of family life as a result of incarceration generally is not enough to warrant departure, the district court had discretion to depart downward in sentencing defendant convicted of fraudulent use of social security numbers on ground he was solely responsible for care of mentally ill wife. For almost thirty years, his wife suffered from a serious mental illness. The degree of care required for defendant's wife, the lack of close supervision by any family member other than defendant, the risk to the wife's well being, the relatively brief imprisonment sentence called for by the guidelines , the lack of any end to be served by imprisonment, and the lack of any threat to the community all were factors that warranted a departure.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). The Third Circuit rejected defendant's claim that the district court erred in not departing downward based upon his work history, family responsibility, role in community affairs and lack of criminal history. The Sentencing Commission has determined that factors such as family responsibility, work history and ties to the community may not be taken into consideration in determining an appropriate sentence. Moreover, defendant's lack of criminal history was taken into account in placing him in criminal history category I.

United States v. Carr, 932 F. 2d 67 (3d Cir. 1991). Defendants' family responsibilities to their four year old son and the fairness of the sentence in comparison with other sentences imposed by the court do not constitute legitimate grounds for a downward departure. The district court could have limited impact on son within guidelines' regimen by staying execution of sentence of one parent until other's sentence had been served.

United States v. Shoupe, 929 F. 2d 116 (3d Cir. 1991). Defendant was classified as a career offender. The district court departed downward based on defendant's youthfulness and immaturity at the time he committed two of the prior offenses, the short time span between the commission of the offenses, defendant's prior cooperation with authorities and his dependent child. The Third Circuit reversed, finding that all of these factors were adequately considered by the Sentencing Commission.

United States v. Headley, 923 F. 2d 1079 (3d Cir. 1991). Defendant was a single mother with five children under the age of 11. The district court denied a downward reduction on the basis of defendant's family ties and responsibilities on the ground that it lacked legal authority. The Third Circuit affirmed, noting that §5H1.6 provides that family ties and responsibilities are "not ordinarily relevant" in determining whether a departure is justified. Although the "not ordinarily relevant" language suggests that "in extreme circumstances" departure based on family ties and responsibilities may be permissible, defendant did not present extreme circumstances. The imprisonment of a single parent is not extraordinary. Imposition of a prison sentence normally disrupts parental relationships.

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

United States v. Yu, 954 F. 2d 951 (3d Cir. 1992). Defendant, a Korean immigrant, attempted to bribe an IRS agent with $5,000 after being advised that he owed $27,000 in tax deficiencies and penalties. He urged the district court to depart downward based upon the cultural differences between Korea and the United States. The Third Circuit, assuming without deciding that in some cases cultural differences might justify a downward departure, found defendant did not present such a case. Defendant had been in the country for 12 years and was a naturalized citizen when he committed the offense. He was a professional tax preparer who had accumulated property and thus had some familiarity with United States laws. He had some college level and legal education in this country, and extensive education in Korea. Defendant almost admitted that he knew his actions were a crime. The obvious conclusion was that defendant was motivated by a desire to save $22,000, not his belief that he was culturally bound to offer the bribe.

§ 5H1.11 Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. Cooper, 394 F. 3d 172 (3rd Cir. 2005). The defendant pleaded guilty to securities fraud and making and subscribing to a false tax return. He was the CEO and CFO of Biocontrol Technology (BICO), Inc., a publicly traded Pennsylvania corporation engaged in the development of medical devices. The defendant's failure to make accurate reports to his shareholders contributed to the misconceptions that they held about BICO's financial health. Thousands of shareholders lost millions of dollars when the value of BICO's stock plummeted..

The defendant's guidelines sentencing range was 15 to 21 months in prison. The district court granted him a four level downward departure for charitable works (one more level than he hade requested), and sentenced him to 36 months probation, including six months house arrest. The departure was based on the following: (1) For 27 years, the defendant threw an annual Christmas party for underprivileged children; (2) He founded and funded, at an unknown cost, an area athletic organization entitled "Athletes Against Drugs and Violence," and provided equipment for the organization; (3) He organized two youth football teams and went into inner-city Pittsburgh to offer kids the chance to participate, driving many of them back and forth to the suburbs for practice; (4) He donated his own money to enable four boys who participated on one of the football teams to leave their inner-city school and attend a better school in the suburbs. He also donated money to help some of them through college; (5) He extensively mentored one of the boys on the team, helping him with family and school problems. The boy eventually graduated from college and attributes his success to Cooper's intervention; (6) He arranged for BICO to make donations to several charities for two compute learning centers in depressed areas; and (7) He helped advise the Mel Blount Youth Home.

The government appealed the sentence. The Court of Appeals affirmed the sentence stating, in part, "Cooper presented evidence of financial donations he made personally and had BICO make to various charitable organizations. Were this Cooper's only evidence of good works, we would not affirm the downward departure. Cooper, however, presents more.

United States v. Wright, 363 F.3d 237 (3d Cir. 2004). On appeal, the defendant argued that the district court erred in holding that it lacked the power to grant a downward sentencing departure based on the charitable acts that the defendant performed as a minister. The Court of Appeals upheld the district court's decision that the "defendant's net charitable and civic contributions - - taking into account both the good and bad that he did in his capacity as a member of the clergy - - cannot be considered as so extraordinary positive as to warrant a downward departure.

United States v. Serafini, 233 F. 3d 758 (3d Cir. 2000). The defendant, a wealthy state legislator, was convicted of perjury based on his false testimony before a federal grand jury investigating election law violations. The Court of Appeals upheld the district court's three level downward departure for the defendant's community and charitable activities. Such departures are discouraged but not forbidden by the guidelines. The letters describing defendant as a good

person, and referring to his activities as a state legislator, did not provide an adequate basis for departure. However, the letters describing defendant's assistance to individuals and local organizations did provide an adequate basis for the departure. These letters described defendant's generosity to friends and constituents in unique and meaningful ways during times of serious need. Although defendant was wealthy, and part of his largesse was financial, the departure was not improperly based on socioeconomic status. He mentored a young man with a disability , encouraged him to attend college, and loaned him tuition money. The young man eventually became an attorney, and attributed his success to the defendant. The district court found that all of defendant's contributions, not merely his monetary ones, were exceptional. The district court found that defendant's acts of personal kindness and good works were above and beyond customary political or charitable giving.

§ 5H1.12 Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

United States v. Roman, 121 F. 3d 136 (3d Cir. 1997). Defendant claimed that his mental and emotional condition was due to the murder of his father when defendant was only five and his extensive abuse of drugs and alcohol. Section 5H1.12 states that lack of youthful guidance is not grounds for departure.

Part K -- Departures

Standard of Appellate Review -- Departures and Refusals to Depart

United States v. Garcia, 2007 WL 986874 (3rd Cir.(Pa.))). At the sentencing hearing, the District Court departed upward by 4 levels. The defendant was not given reasonable notice of the court's intention to do so.

The Court of Appeals was satisfied that the District Court erred because it departed from the guidelines without giving the defendant notice. It is noted that in *United States v. Vampire Nation*, 451 F. 3d 189, 195 (3d Cir. 2006), it drew a distinction between a variance from a guideline range and a departure from a guideline range. A court varies from a guideline range when it imposes a sentence outside the range by considering the list of factors set forth in 18 U.S.C. § 3553(a) of which the application of the now advisory guidelines are but one component. But if a court calculates a sentencing level by expressly departing, as it did in the instant case, then it cannot be said that it has varied from the range, particularly when, as in the instant case, it relies heavily on the guideline calculations in imposing the sentence.

Though the Court of Appeals noted that cases will arise in which it will be difficult to determine if a court has varied or departed from the guideline range, it was clear that the instant case was not one of them. The District Court clearly stated that it was departing upwards by 4 levels and then increased the sentencing level from 25 to 29. The sentence was vacated and the case was remanded for resentencing.

United States v. Colon, 474 F. 3d 95 (3rd Cir. 2007). The defendant's guideline range was 70 to 87 months. He was sentenced to 180 months imprisonment. On appeal, the defendant argued that the district court's "upward departure" did not follow the required ratcheting procedures set forth in *United States v. Kikumura*, 918 F. 2d 1084, 1110-19 (3d Cir. 1990).

The Court of Appeals held that it will uphold an above-the-guidelines sentence so long as it is reasonable and the district court's statement of reasons supports it. Therefore, if a district court is sentencing above the guidelines range, as it did in this case, based on the section 3553(a) factors without granting a departure from the guidelines range, it is not bound by the ratcheting procedures set forth in *Kikumura* and *United States v. Hickman*, 991 F. 2d 1110, 1113-14 (3d Cir. 1993). The fact is that when a court sentences post-*Booker* and views all of the section 3553(a) factors, the guidelines range is simply one factor for it to consider in arriving at the sentence. Consequently, so long as the court takes each of "the factors into account in sentencing," *Cooper*, 437 F. 3d at 329, it may impose a sentence in excess of the top of the range, provided the sentence is within the statutory range and is reasonable. In the instant case, notwithstanding the sentence being far in excess of the top of the sentencing range, the Court of Appeals determined it was reasonable.

United States v. Kellum, 2004 WL 103411 (3rd Cir.(Pa.))). The defendant appealed from the district court's imposition of the statutory mandatory minimum sentence under 21 U.S.C. § 841, 18 U.S.C. § 924(c) and the sentencing guidelines. He contends that the district court erred by imposing the minimum mandatory sentence because it was unaware that it had authority under 18 U.S.C. § 3553(a) to impose a sentence below the statutory minimum if it believed that the statutory minimum was greater than necessary to achieve the four goals of sentencing. The Court of Appeals held § 3553(a) did not give the district court the authority to sentence Kellum below the statutorily mandated minimum sentence.

United States v. Bishop, 2002 WL 1162355 (3rd Cir.(Pa.))). This appeal presented the oft-recurring question whether a sentencing court that declined to depart downward understood that it had authority to depart but exercised its discretion not to, or rather was ruling (as a matter of law) that it lacked power to depart. Here, the defendant argued for a downward departure based upon diminished mental capacity pursuant to § 5K2.13 and family circumstances pursuant to § 5K2.0. The district court denied the request. In so ruling, the court did not state whether its denial was based on legal or discretionary grounds. However, the Court of Appeals was satisfied that the record shows that the decision not to depart was discretionary. It commented, "We hope and trust that instances where the district courts within this Circuit fail to articulate the basis for their departure rulings will disappear.

United States v. Wilson, 2002 WL 1041113 (3rd Cir.(Pa.))). The Court of Appeals held that "generally, disparities in sentences among co-defendants do not constitute a valid basis for downward departure in the absence of any proof of prosecutorial misconduct." In this case, there has been no allegation of prosecutorial misconduct.

United States v. Levi, Nos. 01-2332, 01-2333, 01-2334, 01-2335 & 01-2336 (McClure, 3d Cir. 2002). The defendant argued that the district court abused its discretion by departing only one level downward for diminished capacity. The Court of Appeals held that it lacked jurisdiction to review and exercise of discretion by a district court in granting or denying a departure. See *United States v. Denardi*, 892 F. 2d 269 (3d Cir. 1989).

United States v. Powell, 269 F.3d 175 (3d Cir. 2001). The defendant pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). While in custody awaiting sentencing, Powell sent a letter to the district court complaining of what he characterized as substandard conditions at the Hudson County Jail in New Jersey where he was being detained pending sentencing. He attached a list of those conditions, and argued that the conditions entitled him to a downward departure. Inasmuch as the district court sentenced Powell without ruling on his request for a downward departure, the Court of Appeals had no way of knowing why the district court denied the requested departure. The government concedes that under *United States v. Mummert*, this matter should be remanded to afford the district court an opportunity to explain its refusal to grant Powell's pro se motion.

United States v. Yeaman, 248 F. 3d 223 (3d Cir. 2001). The United States appealed the sentences of David Yeaman and Nolan Mendenhall on several counts of mail and wire fraud. The convictions of Yeaman and Mendenhall stemmed from their leasing worthless stocks as assets available to pay insurance claims. When these assets were called upon to pay outstanding medical reinsurance claims, the scheme was uncovered. The Court of Appeals reversed the original sentences of both defendants following a previous government appeal, finding that the district court had failed to apply the Sentencing Guidelines properly. *United States v. Yeaman*, 194 F.3d 442, 465 (3d Cir. 1999). At resentencing, the district court departed downward 17 levels for Yeaman and 16 levels for Mendenhall. The downward departures resulted in no additional incarceration.

The district court stated that "imposing what is concededly a substantial downward departure . . . would tned to make the sentences more compatible with the defendant's other cohorts in this scheme for which the defendants have been found guilty, and would more fairly level the playing field." The Court of Appeals held, "Lacking any findings of fact from the district court as to which co-defendants were similarly situated and how the government committed prosecutorial misconduct, it is impossible for us to determine if and why the district court intended to depart downward on the basis that some sentences were dissimilar. In the absence of any factual findings of specific disparities or prosecutorial misconduct, the departures challenged by the government cannot be sustained on the basis of sentencing disparity.

Further, the district court specifically departed downward on that basis that Yeaman and Mendenhall had served their original sentences and that it would be cruel to return the defendants to prison following the completion of their original sentences. The district court here held that reincarceration in and of itself constitutes an aggravating or mitigating factor not adequately taken into account by the Guidelines scheme. The Court of Appeals did not agree. It held, "Rather, reincarceration as a means to correct error is inherent in the process of Guideline sentencing. Indeed, as we have indicated, the correction of error through reincarceration provides the only means of preserving the appropriateness and uniformity of sentencing.

United States v. Queensborough 227 F.3d 149 (3d Cir. 2000). The defendant and a juvenile accomplice accosted a man and a woman who were staying at a campground at a National Park in the Virgin Islands. They robbed the campers; then forced them to an isolated area. The defendant held a gun to the woman's head, raped her, made her perform oral sex, and raped her again. His accomplice also raped the woman at gunpoint and forced her to perform oral sex. They then ordered the couple to have sex with each other while the defendant and his accomplice watched. Throughout the ordeal, they threatened the two victims with death at gunpoint. The total offense level for the aggravated rape was 32 and the guideline range for that count was 121 to 151 months. After hearing from the parties, the district court sentenced the defendant on the aggravated rape count to 20 years, which represented a substantial upward departure. On the firearm count, the court sentenced the defendant to a consecutive term of 60 months. On appeal, the defendant argued that the district court failed to give him notice of its intent to upwardly depart from the sentencing guidelines and failed to identify with specificity the grounds for said departure. The government argued that the defendant was given advance notice that satisfied *Burns* because the ground for departure on which the court relied was "identified as ... ground[s] for upward departure ... in the presentence report." Paragraph 92 of the PSR read, "According to U.S.S.G. § 2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, See § 5K2.8 (Extreme Conduct).' The Court of Appeals agreed that the PSR gave the required notice that a departure could be warranted and that it could be on the basis of extreme conduct, a conclusion supported by the PSR's reference to § 5K2.8 and extreme conduct in its quotation of the application note. Furthermore, the Court of Appeals held that the extent of the departure was reasonable.

United States v. Medford, 194 F. 3d 419 (3d Cir. 1999). The defendant appealed his sentence after pleading guilty to conspiracy, theft, and receipt of cultural objects from a museum in Philadelphia. On appeal, the defendant maintained that remand is required under *Burns v. United States*, 501 U.S. 129, 138 (1991) because the district court departed upward without providing advance notice to the defendant of its intention to upwardly depart. The Court of Appeals agreed.

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). Francis Vitale pled "guilty" to one count of wire fraud and one count of tax evasion. The charges stemmed from his embezzlement of approximately $12 million from his employer. On appeal, Vitale challenged the district court's refusal to grant a downward departure for manipulation of the charging document. His argument did not differ from his grouping argument. He asserts that a downward departure is proper to compensate for multiple counts when grouping is unavailable. In upholding, the district court's decision not to depart, the appellate court noted that "here, the district court clearly understood it had power to depart but declined to exercise it."

United States v. Murray, 144 F. 3d 270 (3rd Cir. 1998). Michael Murray was convicted of the intentional killing of another in furtherance of a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848(e)(1)(A); conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846; and distribution of and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). He was sentenced to life for the CCE and to two concurrent 10 year sentences on the drug counts. The Court of Appeals reversed Murray's conviction on the murder charge. On remand, the district court determined that the offense level for the drug offenses was 34, and that the murder was relevant conduct which could justify an upward departure pursuant to U.S.S.G. §§ 5K2.1 (Death); and 5K2.8 (Extreme Conduct). The district court departed upward and sentenced Murray to two concurrent life terms on the drug counts. On appeal, Murray argued that the nine-level upward departure was not reasonable. The Court of Appeals affirmed the departure.

United States v. Sally, 116 F.3d 76 (3d Cir. 1997). The court of appeals held that post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply. The circuit court, adopting its analysis of Koon v. United States, 116 S.Ct. 2036 (1996), held that the factor of "post-offense rehabilitation" had not been forbidden by the Sentencing Commission as a basis for departure under the "appropriate" circumstances. The case was remanded for the district court to determine whether the defendant's post-conviction rehabilitation efforts were so extraordinary or exceptional to qualify him for a downward departure.

Koon v. United States, 116 S. Ct. 2035 (1996). The Supreme Court rejected the government's argument that four of the considerations underlying the district court's second downward departure were impermissible departure factors under all circumstances. It would usurp the policy making authority that Congress has vested in the Commission if courts were to conclude that particular factors must never be considered. Unless the Commission has specifically proscribed a factor as a categorical matter, the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the "heartland" of a particular guideline.

The Supreme Court held that where a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless the reviewing court determines that the district court would have imposed the same sentence absent reliance on the invalid factors. The district court here stated that none of the four factors it relied on would justify departure standing alone. Therefore a remand was required because it was not evident that the court would have imposed the same sentence if it had relied only on the valid factors.

All nine justices of the Supreme Court agreed that an appellate court should not review de novo a decision to depart from the guidelines, but instead should ask whether the court abused its discretion. The limited appellate review provided in 18 U.S.C. §3742 directs appeals courts to "give due deference" to the district court's application of the guidelines to the facts. Thus the statute was not intended to vest in appellate court's wide ranging authority over district court sentencing decisions. In most cases a departure decision will be due "substantial deference" because it embodies the sentencing court's traditional exercise of discretion. This is true whether a given factor is present to a degree not adequately considered by the commission or whether a discouraged factor nevertheless justifies departure because it is present in some unusual or exceptional way.

The district court also departed downward on the ground that the police officers who were convicted of beating Rodney King would lose their jobs and be disqualified from other law enforcement careers. The Supreme Court held that this departure was an abuse of discretion. It is to be expected that a public official convicted of using governmental authority to violate a person's rights would lose his or her job and be barred from similar employment in the future. Therefore, it must be concluded that the Commission adequately considered these consequences in formulating §2H1.4, the civil rights guideline. The career loss factor, as it existed in this case, did not take the case out of the §2H1.4 "heartland."

In this case, the district court departed downward because the officers would be unusually susceptible to abuse in prison and because of the burden of successive prosecutions, since they were earlier acquitted in state court. The Supreme Court said that both of these decisions by the district court were entitled to due deference on appeal and the court could not conclude that the district court abused its discretion.

United States v. Needle, 72 F. 3d 1104 (3d Cir. 1995), *amended*, 79 F. 3d 14 (3d Cir. 1996). When Hurricane Hugo hit the Virgin Islands, defendant's fraudulently underfunded insurance company was unable to meet the claims of its policyholders. The district court departed one level under note 9 to §2F1.1 for the psychological harm risked or caused by the offense and one level for the loss of confidence in an important institution. The Third Circuit reversed since the departures were based on speculation rather than evidence. Although a court has considerable deference in assessing psychological impact on victims, the court must not merely speculate regarding psychological harm. There was no evidence here regarding physical or psychological harm to the victims. The departure based on harm to the insurance industry was not based on sworn testimony, but on an unsupported judicial conclusion. Such judicial speculation cannot provide the basis for an upward departure.

United States v. Veksler, 62 F. 3d 544 (3d Cir. 1995). Defendant participated in a tax evasion scheme involving the use of "daisy chains," a series of paper transactions through numerous companies, some of which were largely fictitious. The district court attributed to defendant about $1.4 million in tax losses from transactions in which he participated. Defendant requested a downward departure, arguing that the tax loss overstated his culpability. The Third Circuit upheld the refusal to depart, since the tax loss was foreseeable to defendant, who participated in a "very integral part" of the daisy chain. Nothing in §2T1.1 or its commentary suggests that a court has the discretion to depart from the offense level established through the calculation of tax loss. Although a court may have authority to depart even in the absence of explicit authorization, this is limited to instances where a particular guideline linguistically applies but the conduct of the defendant significantly differs from the norm.

United States v. Miller, 59 F. 3d 417 (3d Cir. 1995). Defendant argued that the district court erred in refusing to depart despite her claims of duress, ill health, and diminished capacity. The Third Circuit held that it lacked appellate jurisdiction over the issue, since the record demonstrated that the district court was aware of its power to depart, but in an exercise of discretion, chose not to do so.

United States v. Mummert, 34 F. 3d 201 (3d Cir. 1994). Defendant argued that the district court erred in denying his request for a downward departure for diminished capacity under §5K2.13. The Third Circuit remanded for the court to clarify why it refused to depart. Since §5K2.13 makes clear that a downward departure for diminished capacity is permissible under some circumstances, it was likely the refusal to depart was discretionary. However, the basis for the refusal to depart was impossible to discern from the record.

United States v. Reilly, 33 F. 3d 1396 (3d Cir. 1994). Defendant was convicted of making a false statement under oath. He argued that his false declaration was "atypical" because he had nothing to do with the underlying offense. He also contended that a downward departure was warranted because his conviction might result in the suspension of all future government contracts for himself and other businesses owned by his family. The Third Circuit found that it had jurisdiction to review the matter because the district court concluded that the guidelines did not authorize it to depart. However, neither of defendant's reasons justified a downward departure. The fact that defendant had nothing to do with the underlying offense did not show that his offense differed from the norm. Note 3 to §2J1.3 shows that the sentencing commission intended the perjury guideline to apply regardless of whether there was a conviction for the underlying offense. Nor did the financial consequences for defendant and his family justify a downward departure. Section 5H1.2 says that a departure based on defendant's vocational skills should only be granted in exceptional circumstances.

United States v. Copple, 24 F. 3d 535 (3d Cir. 1994). Defendant, the president of an investment firm specializing in the management of "pre-need" funeral funds, was convicted of mail fraud and income tax evasion. The district court departed upward based on the large number of victims (31) and the amount of monetary loss ($4.9 million), purportedly following §2F1.1(b)(2)(B). The Third Circuit reversed, finding that the guidelines adequately considered both the number of victims and the amount of loss. The $4.9 million loss fit squarely within the loss table's range of $2000 to $80 million. Although 31 victims was far more than necessary to trigger the two level enhancement under §2F1.1(b)(2), it was not so extraordinarily large a number in a case of this type that it fell outside the heartland of the fraud provisions.

United States v. Monaco, 23 F. 3d 793 (3d Cir. 1994). Because defendant's company was short of cash, defendant prepared false labor sheets which enabled the company to receive about $140,000 in accelerated payments from the government. When the company's bank took over, it placed the company in Chapter 7 bankruptcy. As a result, what would have been merely an interest free loan from early payments became a loss of over $381,000 to the government. The Third Circuit upheld a downward departure based on overstatement of criminality by the loss tables, relying on note 11 to §2F1.1. Defendant's intent was not to steal money from the government, but to expedite payments that would have been due at some future time. Without the bankruptcy, it was possible that the loss to the government would have been far less.

United States v. Marcello, 13 F. 3d 752 (3d Cir. 1994). Defendant was convicted of structuring bank deposits to evade currency reporting requirement. The currency was loan proceeds from a legitimate transaction. Defendant argued that a downward departure was warranted under §5K2.11 because his conduct did not cause or threaten the harm that the statute sought to prevent. The district court rejected the argument, finding that *U.S. v. Shirk*, 981 F. 3d. 1382 (3d Cir. 1992) barred a departure, and the Third Circuit agreed. Defendant's violation was not "technical." He structured the transactions to prevent the filing of the currency transaction reports. The fact that defendant's money was legally obtained and subject to tax did not distinguish it from *Shirk*. Defendant's conduct fell squarely within the conduct prohibited by statute.

United States v. Lieberman, 971 F. 2d 989 (3d Cir. 1992). Defendant was convicted of embezzlement and tax evasion. The district court found that grouping of the two counts was not permitted under the guidelines, but that it was highly unusual for a defendant to be charged with both embezzlement and tax evasion for the monies he embezzled. The court departed downward by two levels to correct this "inappropriate manipulation of the indictment." The Third Circuit upheld the departure, holding that a court may depart downward for manipulation of the indictment. Policy Statement 4(a) in Chapter 1, Part A in the Introduction to the Guidelines states that the Sentencing Commission recognized that a charge offense system has drawbacks and that a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. The district court properly fixed the amount of departure by reference to the two-level increase caused by the failure to "group" the offenses.

Burns v. United States, 111 S. Ct. 2182 (1991). The Supreme Court held that "before a district court can depart upward on a ground not identified for upward departure either in the presentence or in a prehearing submission by the government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." This notice must specifically identify the ground on which the district court is contemplating an upward departure. The court did not decide how much notice is "reasonable," leaving it to the lower courts to adopt appropriate rules.

United States v. Johnson, 931 F. 2d 238 (3d Cir. 1991). Defendant and a co-defendant assaulted three Assistant U.S. Attorneys but pled guilty to assaulting only one of them. The district court departed upward by three levels based on defendant's assault of multiple victims. The Third Circuit affirmed, finding no evidence that the sentencing commission considered multi-victim aggravated assaults in formulating guideline §2A2.2(b)(1). The three-level departure was also reasonable, even though only two additional victims were involved. The district court structured the departure using the concept of grouping the counts, treating defendant as if he had been convicted of three counts of aggravated assault.

United States v. Kikumura, 918 F. 2d 1084 (3d Cir. 1990). Defendant had an applicable guideline range of 27 to 33 months. The district court departed upward on various grounds and imposed a sentence of 30 years. The departure was based in part on the hearsay statement of a confidential informant which linked defendant to terrorist activities. The Third Circuit held that in cases involving such extreme departures, the standard for admissibility of evidence used in the sentencing hearing must be increased. Where the magnitude of the contemplated departure is sufficiently great, a"court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations." The court held that in extreme departure situations, the fact finding underlying the departure must be established by at least clear and convincing evidence. The court must examine "the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy." In this case, the heightened standard has been met. The informant's testimony regarding defendant's presence and activities in a terrorist training camp was verified by other information in the record, including defendant's possession of materials to make explosive devices in the manner described by the informant.

The Third Circuit also held in *Kikumura* that, wherever possible, an offense-based departure should be based on determining the offense level that most closely approximates a defendant's conduct. Thus, if a departure is based upon aggravating conduct that itself would constitute a separate offense under a different guideline, the reasonableness of a departure may be evaluated by "treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it." A court must apply the guidelines' grouping rules. If the aggravating factor is not a separate crime, but is a special offense characteristic, "the gravity attached to the characteristic in the other guidelines provides appropriate guidance as to what degree of departure would be reasonable." Thus, if the aggravating factor were more than minimal planning, " a departure equivalent to increasing defendant's offense level by more than two levels would be presumptively unreasonable." The court recognized that there would be

cases where the guidelines provide no useful analogies, and in such cases, there may be other "vehicles for making offense-related departures under §5K of the guidelines."

United States v. Parker, 902 F.2d 221 (3d Cir. 1990). An appellate court has no jurisdiction to hear an appeal where there has been a downward departure and the defendant seeks a further departure.

United States v. Rosen, 896 F. 2d 789 (3d Cir. 1990). The Third Circuit held that the combination of factors which in themselves are not grounds for departure does not justify departure on the ground that they are of a different "degree" than those considered by the commission. "To justify a departure any time a conjunction of considered factors is involved would make every case different and undermine the uniformity" in guideline sentencing. "A combination of typical factors does not present an unusual case."

United States v. Wickstrom, 893 F.2d 30 (3d Cir. 1989). It is a matter of district court's discretion whether or not to depart from the guidelines on the basis of defendant's cooperation with
the government.

United States v. Whyte, 892 F.2d 1170 (3d Cir. 1989). "Discretionary refusals to depart are not appealable." A discretionary refusal to depart is one where the "court concludes that departure is inappropriate even if not prohibited by section 3553(b) -- must be distinguished from cases involving a claim that the district court refused to depart because it concluded that section 3553(b) prohibited departure."

United States v. Denardi, 892 F.2d 269 (3d Cir. 1989). Appellate court lacks jurisdiction to review district court's exercise of discretion in refusing to reduce sentence below sentencing guidelines.

United States v. Medeiros, 884 F. 2d 75 (3d Cir. 1989). In deciding whether a departure from the guidelines is legally permissible, review is plenary. Appellate court had jurisdiction to review failure to depart where defendant argued that district court had misconstrued a federal statute.

United States v. Uca, 867 F. 2d 783 (3d Cir. 1988). Two defendants pled guilty to a conspiracy to purchase 56 untraceable handguns for shipment overseas. The Third Circuit held that the trial court's upward departure was impermissible and remanded for resentencing. The panel held that the guidelines adequately consider 1) the number of guns involved, 2) the traceability of the weapons, 3) the ultimate (unlawful) purpose for which the guns were to be used and 4) the threat to public welfare posed by handguns.

Refusal to Depart Not Appealable

United States v. Walker, 2006 WL 1911336 (3rd Cir.(Pa.))). In this case, the Court of Appeals ruled that because the District Court plainly acknowledged its ability to depart from the sentencing guidelines and made a discretionary decision not to do so, its decision is not reviewable by the Court. The Court of Appeals lacks jurisdiction to review a District Court's discretionary determination not to further downwardly depart from the sentencing guidelines. As long as the District Court understands the advisory nature of the guidelines and its authority to grant a downward departure, the extent to which it downwardly departs is not reviewable by the Court of Appeals unless there is an allegation of a legal error. See *Cooper*, 437 F. 3d at 332-33.

United States v. Vilcapoma, 2002 WL 1284104 (3rd Cir.(N.J.))). The defendant, a Peruvian native, pled guilty to illegal re-entry, a violation of 8 U.S.C. § 1326. He moved for a downward departure based on cultural assimilation, overstatement of criminal history and the totality of circumstances, including his cultural ties to the United States and his addiction to narcotics. The district court recognized its ability to depart but declined to grant a departure. The Court of Appeals therefore lacked jurisdiction to review the district court's denial of downward departure.

United States v. Perakis, 937 F. 2d 110 (3d Cir. 1991). Defendant received a four-month term of imprisonment, at the bottom of his guideline range. He contended that the district court abused its discretion by denying his request to substitute confinement of home, community or halfway house detention. The Third Circuit found that it did not have jurisdiction to review a sentencing court's discretionary refusal to impose a substitute detention under guidelines section 5C1.1(c)(2). The rationale of cases holding that a court has no jurisdiction to review a failure to depart downward applied here as well.

United States v. Georgiadis, 933 F. 2d 1219 (3d Cir. 1991). Defendant argued that it was not clear from the record that the district court considered his request for a downward departure. The Third Circuit disagreed. The transcript of the sentencing hearing showed that defendant's attorney requested a downward departure. The judge then stated that it was giving defense counsel's arguments "full weight" and had taken off one point in formulating the guideline range.

§ 5K1.1 Substantial Assistance to Authorities (and 18 U.S.C. §3553(e))

United States v. Floyd, 499 F. 3d 308 (3d Cir. 2007). As part of a plea agreement, the government agreed to dismiss the remaining charges and request a downward departure based on the defendant's substantial assistance. The defendant's guideline range was 41 to 51 months. At sentencing, however, the government did not move for a downward departure. In the government's view, its dismissal of the remaining charges resulted in a sufficient reduction in the defendant's sentence. The defendant was sentenced to 48 months in prison.

The defendant appealed, arguing that the government breached its promise to move for a downward departure. *Floyd I,* 428 F. 3d at 514. The Court of Appeals agreed with the defendant, reasoning that "the government did not reserve the right not to recommend a downward departure on the ground that the charge bargain turned out to be more favorable than it had originally anticipated." *Id*. At 517. The Court of Appeals remanded the case to District Court to determine whether the defendant's assistance was "substantial." Id. at 518. On remand, however, the government chose to forego an evidentiary hearing and simply moved for the downward departure.

At the resentencing, the District Court adopted the original guideline range of 41 to 51 months. It concluded that the case marginally met the criteria for a downward departure from the original sentence of 48 months. The Court then sentenced the defendant to 42 months imprisonment. Defense counsel objected, arguing that despite having granted the government's downward departure motion, the Court had "in essence ... imposed a guideline sentence, just downward from the initial sentence."

The defendant again appealed, arguing that a downward departure under the guidelines must result in a sentence below the otherwise applicable range and that the District Court "misunderstood the definition of a downward departure."

The Court of Appeals vacated the sentence and remanded for resentencing, stating "it is unclear whether the Court meant that Floyd's substantial assistance satisfied the requirements for a § 5K1.1 departure (thereby warranting consideration of a sentence below the guidelines range) or if Floyd's assistance warranted only a reduction within the range (but not a departure below it). The Court of Appeals noted that the District Court could have departed below the 41 to 51 month range, and then varied upward within the range by balancing the § 3553(a) factors. Moreover, as noted in *United States v. Faulks*, 143 F. 3d 133 (3d Cir. 1998), the District Court could have denied the motion for a departure and then gone on to acknowledge the defendant's substantial assistance by sentencing lower in the guideline range than it would otherwise have done.

United States v. Floyd, 428 F. 3d 513 (3d Cir. 2005). Bennae Floyd pled guilty to interstate travel to facilitate drug trafficking. The plea agreement stated that the government "may request" a downward departure for Floyd's cooperation if Floyd "renders substantial assistance."

On appeal, Floyd argued that the government acted in bad faith by entering a plea bargain which contemplated a downward departure in exchange for assistance when the government never intended to consider a downward departure. The government argued that its refusal to move for a downward departure was not based on the quality of Floyd's assistance, but rather on the fact "that the maximum possible sentence ... the defendant could receive under the terms of the plea agreement was far below what the government believed the guideline range to be " pursuant to the indictment. The government further stated that because no PSR was available at the time it drafted and signed the plea agreement, it "had no means of weighing the value of

Floyd's cooperation against the charge bargain that Floyd already received. When it learned that the sentence calculated for Floyd in the PSR was only one-sixth as long as it could have been had she been convicted as charged in the indictment, it decided not to move for a downward departure.

The Court of Appeals vacated the sentence and remanded for an evidentiary hearing on whether Floyd's assistance, without reference to her charge bargain, was substantial enough to warrant a motion for a downward departure by the government. The government did not act in good faith by failing to recommend departure on ground that charge bargain turned out to be more favorable than originally anticipated, "may request" language did not signify that the government had complete discretion, and government entered agreement aware that it possessed limited knowledge of potential sentencing guideline range.

United States v. Carey, 2004 WL 1945321 (3rd Cir.(Pa.))). As part of her plea agreement, the defendant agreed to provide assistance to the government in the prosecution of her co-defendant, Jack Ogden. She testified against him at trial, but the jury acquitted. Following the Ogden trial, the government filed a § 5K1.1 motion for a downward departure stating that "Carey gave truthful responses to all questions put to her and has otherwise cooperated fully and completely within the meaning of her plea agreement and § 5K1.1."

The guideline calculation yielded a range of 30-37 months incarceration. After counsel's argument at the sentencing hearing, the district court judge commented on the defendant's extensive criminal history, filled as it was "with theft and fraud offenses so great that she is in the same category as career offenders for sentencing purposes." He noted that he had intended to give her the maximum penalty of 37 months; however, he agreed to consider the government's motion for a sentence reduction for the defendant's assistance during the Ogden trial. In determining the downward departure, the judge noted that he was taking the accuracy of her testimony in the Ogden case into account. The judge commented that he did not believe she was truthful during the testimony and that she embellished the criminality of her co-defendant in order to get this downward departure. He sentenced her to 24 months imprisonment.

Following the sentencing hearing, the defendant moved to reopen the record, asserting that the court's failure to put her on notice that the truthfulness of her testimony was a disputed sentencing factor foreclosed her opportunity to respond. The district court denied the motion and the defendant appealed, citing § 6A1.3, which states that a court should not rely on a factor important to a sentencing determination without first alerting the parties that the factor is in dispute and granting the right to challenge any adverse finding. She also claimed that this lack of notice denied her Due Process under the Fifth Amendment. The Court of Appeals affirmed the judgment of the district court. The government's motion for downward departure based on defendant's substantial assistance satisfied rule of criminal procedure requiring notice of possible departure. The rule did not require that defendant also receive notice that extent of departure might be affected by court's doubts as to truthfulness of her testimony. Furthermore, § 6A1.3 does not require sentencing court to disclose in advance such matters as its appraisal of the undisputed material contained in the presentence report, impressions created by the defendant's

conduct during a trial, or the nature of the violation.

United States v. Jones, 382 F. 3d 403 (3rd Cir. 2004). At sentencing, the defendant moved for a downward departure pursuant to U.S.S.G. § 5K2.0, in the absence of a government motion, on the basis of his cooperation with the SEC and FBI in reporting a business's activities, uncovering its financial inaccuracies and misappropriations, and exposing undercover embezzling by officers of the corporation. The government opposed Jones' motion. The district court denied the defendant's motion.

Jones appealed, contending that the district court improperly held that it did not have authority to grant a downward departure under § 5K2.0 without an accompanying motion by the government. The Court of Appeals held that departures pursuant to § 5K2.0 do not hinge upon a government's motion in support thereof. The more difficult question raised by this case was whether a defendant's assistance in connection with a civil investigation or case falls within the scope of § 5K2.0, as Jones contends, rather than within the scope of § 5K1.1. Jones argued that the Court of Appeals should confine the supporting motion requirement of § 5K1.1 to substantial assistance on criminal matters and that the Court of Appeals should hold that district courts have the discretion to grant departures for assistance in civil matters under § 5K2.0, which does not require a supporting government motion. The Court of Appeals held that although the assistance which Jones relied on was to the SEC it was, in fact, related to a criminal investigation. Because Jones' cooperation fell within § 5K1.1 (had the assistance been sufficiently substantial to warrant the government's motion to depart) and § 3E1.1, it was not appropriate for consideration under § 5K2.0. The district court did not err in denying his motion for departure under § 5K2.0.

Wade v. United States, 504 U.S. 181, 112 S.Ct. 1840 (1992). The Supreme Court held that district courts have the authority to review the government's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial assistance motion, say, because of the defendant's race or religion.

United States v. Santos, 932 F.2d 244 (3d Cir. 1991). The Third Circuit joins several other courts of appeal in rejecting due process challenges to the substantial assistance provisions of the guidelines. The district court did not err in finding that it did not have the authority to make a departure for substantial assistance in the absence of a government motion.

United States v. Gonzales, 927 F. 2d 139 (3d Cir. 1991). Defendant contended that the government did not act in good faith in refusing to request a downward departure under §5K1.1 for his cooperation. Moreover, he contended that the district court erred in not granting a downward departure, even in the absence of such a motion. The Third Circuit rejected both contentions. First, prior case law does not require the government to act in good faith in refusing to request a downward departure. Second, in the absence of such a motion, the district court is without authority to depart downward. The district court did consider defendant's cooperation, but did not think much of it. Thus, it sentence him at the top of the guideline range.

United States v. Parker, 902 F. 2d 221 (3d Cir. 1990). Defendant claimed that resulting sentence was essentially equivalent to minimum sentence under the guidelines and that government's motion for departure for substantial assistance was ignored. The court of appeals held that sentencing requirement that defendant reside for six months in community corrections facility as condition of probation, subject to defendant's being released to go to work, could not be equated with equivalent period of imprisonment, for purposes of determining whether there was a downward departure from applicable guideline range of six to twelve months.

United States v. Bruno, 897 F.2d 691 (3d Cir. 1990). District court erroneously believed that USSG. §5K1.1, prevented consideration of defendant's cooperation in sentencing within the guideline range, absent a government motion. However, a court may not depart downward for cooperation absent a government motion.

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

United States v. Vampire Nation, 451 F. 3d 189 (3rd Cir. 2006). This appeal addressed the question whether or not a District Court is obligated to provide advance notice of its intent, under *Booker*, to vary its sentence from the advisory sentence range set forth in the guidelines.

Although the defendant's advisory guideline range was 46 to 57 months, the District Court "varied" from the guidelines and imposed a sentence of 60 months. The District Court did not make a formal departure from the guideline range. On appeal, the defendant argued that the District Court erred by varying its sentence upward and failing to provide adequate notice of its intention to do so. The Court of Appeals, in joining the First, Seventh, Eighth, and Eleventh Circuits, held that a defendant is not entitled to advance notice under Rule 32(h) of a District Court's intent to "vary" its sentence from the guideline range where that variance is based on the Court's discretion under *Booker* and § 3553(a) and not on a departure from the advisory guideline range.

Rule 32(h) was a response to the Supreme Court's decision in *Burns v. United States* , 501 U. S. 129 (1991), where the Court held that an earlier version of Rule 32 required district courts to give defendants advance notice before engaging in sua sponte upward departures from guideline sentences. Rule 32(h) was adopted at a time when courts could only avoid a guideline range by departing from the guidelines. However, the Supreme Court made clear in *Booker* that the guidelines are now advisory. Thus, District Courts, post-Booker, exercise broad discretion in imposing sentences, so long as they begin with a properly calculated guidelines range, fully consider the broad range of factors set forth in 18 U.S.C. § 3553(a), and all grounds properly advanced by the parties at sentencing. See *Cooper*, 437 F. 3d at 329-30. Because defendants are aware that District Courts will consider the factors set forth in § 3553(a), the Court of Appeals believes the element of "unfair surprise" that *Burns* sought to eliminate is not present.

Nevertheless, the Court of Appeals instructed that if a court is contemplating a departure, it should continue to give notice as it did before *Booker*, see *Cooper*, 437 F. 3d at 327, and district courts should be careful to articulate whether a sentence is a departure or a variance from an advisory guidelines range.

United States v. Jones, 382 F. 3d 403 (3rd Cir. 2004). At sentencing, the defendant moved for a downward departure pursuant to U.S.S.G. § 5K2.0, in the absence of a government motion, on the basis of his cooperation with the SEC and FBI in reporting a business's activities, uncovering its financial inaccuracies and misappropriations, and exposing undercover embezzling by officers of the corporation. The government opposed Jones' motion. The district court denied the defendant's motion.

Jones appealed, contending that the district court improperly held that it did not have authority to grant a downward departure under § 5K2.0 without an accompanying motion by the government. The Court of Appeals held that departures pursuant to § 5K2.0 do not hinge upon a government's motion in support thereof. The more difficult question raised by this case was whether a defendant's assistance in connection with a civil investigation or case falls within the scope of § 5K2.0, as Jones contends, rather than within the scope of § 5K1.1. Jones argued that the Court of Appeals should confine the supporting motion requirement of § 5K1.1 to substantial assistance on criminal matters and that the Court of Appeals should hold that district courts have the discretion to grant departures for assistance in civil matters under § 5K2.0, which does not require a supporting government motion. The Court of Appeals held that although the assistance which Jones relied on was to the SEC it was, in fact, related to a criminal investigation. Because Jones' cooperation fell within § 5K1.1 (had the assistance been sufficiently substantial to warrant the government's motion to depart) and § 3E1.1, it was not appropriate for consideration under § 5K2.0. The district court did not err in denying his motion for departure under § 5K2.0.

United States v. Kalwaytis, 2002 WL 31723126 (3rd Cir.(Pa.))). The defendant had a guideline custody range of 24 to 30 months. At sentencing, the government moved for a one level downward departure pursuant to U.S.S.G. § 5K1.1. The court granted this motion. The resulting guideline custody range was 21 to 27 months. Kalwaytis received a sentence of 27 months. He appealed, arguing that the district court erred in its application of § 5K1.1 by granting the government's motion for a downward departure but not actually departing from the original guideline range. The Court of Appeals affirmed the sentence. Simply because the sentence imposed was still within the guidelines of the original offense level does not mean that a downward departure was not granted. In this case, the district court apparently reduced Kalwaytis' sentence by three months through the downward departure. The district court clearly implied that had it not granted the downward departure Kalwaytis would have been sentenced to 30 months in prison. As the sentence imposed was within the appropriate guideline range of 21 to 27 months and was lawfully imposed, the Court of Appeals had no jurisdiction to review the sentence.

United States v. Romero, 2002 WL 144 6614 (3rd Cir.(Pa.))). The sole issue in this appeal is whether the district court erred in "failing to give Romero sufficient credit for his cooperation." The Court of Appeals held it was without jurisdiction to review the extent of a downward departure granted by the district court. *United States v. Khalil*, 132 F. 3d 897 (3d Cir. 1997).

United States v. Villegas, 2002 WL 1754400 (3rd Cir.(Pa.))). The sole issue is whether the district court sufficiently considered the five sentencing factors listed in U.S.S.G. § 5K1.1 prior to sentencing the defendant. At sentencing, the government moved for a downward departure under U.S.S.G. § 5K1.1. After a hearing, the district court granted the government's motion and departed downward one year from the applicable sentence range. The Court of Appeals held that the district court adequately considered the factors. The extent of a downward departure is a matter of discretion vested solely in the district court and the Court of Appeals does not have appellate jurisdiction over the extent of a district court's exercise of this discretion.

United States v. Fiet, 2002 WL 1765107 (3rd Cir.(Pa.))). Defendant had a guideline custody range of 135 to 168 months. The government moved for a downward departure under § 5K1.1. The district court granted it, and imposed a sentence of 156 months. Fiet appealed, contending that the sentencing court erred by failing to conduct an individualized qualitative analysis of the relevant factors under U.S.S.G. § 5K1.1 before imposing sentence. The substance of Fiet's argument on appeal is that under *United States v. Torres*, 251 F.3d 138 (3d Cir. 2000), which was decided some 18 months after his sentencing, the district court should have conducted a more thorough analysis, explaining its reasons for the sentence imposed. The Court of Appeals declined to retroactively apply the standards set in *Torres*. The record clearly establishes that before granting the downward departure, the district court considered Fiet's cooperation and balanced it against the seriousness of the crimes.

United States v. Hammond, 2002 WL 808721 (3rd Cir.(Pa.))). At sentencing, the government moved for a reduction in sentence based on the defendant's substantial assistance. The defendant subsequently filed a pro se motion for a further sentencing reduction. He alleged bad faith on the part of the government in refusing to move for a second departure for assistance under § 5K1.1. The district court held an evidentiary hearing and determined that the defendant did not provide substantial assistance after his sentencing. The defendant appealed. After careful review of the briefs and the accompanying materials of record, the Court of Appeals held that the defendant failed to demonstrate that an agreement with the government existed, and even if one existed, his assistance did not warrant a further reduction in his sentence.

United States v. Albright, et.al, 2002 WL 538749 (3rd Cir.(Pa.))). The defendants pled guilty to criminal charges arising from participation in a conspiracy to steal cash, stock certificates, bond certificates, certificates of deposit, jewelry, and other property from a safe in a Mercersburg, Pennsylvania apartment. Prior to Albright's sentencing, the Government filed a motion for a downward departure under U.S.S.G. § 5K1.1 based on Albright's substantial assistance. The Government recommended a two month departure. This request was rejected by

the district court which held that "the nature and significance of the cooperation was not that great that it should warrant a downward departure." The Court of Appeals affirmed.

John Bigiarelli raised a similar challenge to the district court's denial of a downward departure under § 5K1.1. As in Albright's case, the Government filed a motion recommending a downward departure for substantial assistance, and the court denied the motion. Bigiarelli appealed, arguing that his case should be remanded because the district court might have been under the "mistaken impression" that it did not have the legal authority to grant the downward departure. He contends that the court might have thought that analysis of the five § 5K1.1 factors were prerequisites to the exercise of its departure authority, rather than simply considerations in the exercise of its discretion. The Court of Appeals ruled that the sentencing hearing transcript reveals that the court knew it could act, because the court considered each of the § 5K1.1 factors, and concluded that "the nature and significance of the cooperation this Court doesn't feel is sufficient to warrant a downward departure."

United States v. Peoples, 2002 WL 537653 (3rd Cir.(Pa.))). The defendant pled guilty to conspiring to distribute cocaine. Claiming that the government reneged on its promise to seek a reduction of his sentence in exchange for substantial assistance in investigating two other individuals, the defendant filed a motion to compel the government to file a motion under Rule 35(b) to reduce his sentence. The district court denied the defendant's motion, finding that he failed to establish that he substantially assisted the government or that the government acted in bad faith in refusing to file a motion for the reduction of his sentence. Assistant U.S. Attorney Seth Weber testified for the government and said that he never promised a Rule 35(b) motion to the defendant, and that, in his opinion, the defendant failed to provide information amounting to substantial assistance. The Court of Appeals affirmed.

United States v. Vasquez, 2002 WL 485757 (3rd Cir.(Pa.))). The defendant pled guilty to drug related offenses. He appealed the extent of the § 5K1.1 departure granted by the district court. His guideline range was 180 to 195 months. The district court granted the government's 5K1.1 motion, departed downward 36 months and imposed a sentence of 144 months. The Court of Appeals lacked jurisdiction to review the district court's discretionary decision to depart only three years. The defendant also suggested that the district court did not adequately analyze the evidence before it when considering the government's departure motion. The Court of Appeals commented, "A district court's consideration of the § 5K1.1 motion will be adequate if it balances the seriousness of the defendant's offense against his or her efforts to assist the government's investigation." Though the district court did not "make specific findings regarding each factor and articulate thoroughly whether and how [it] used any proffered evidence to reach [its] decision [,]" *Torres*, 251 F.3d at 147, the record does reveal that it balanced the seriousness of Vasquez's offense against his substantial efforts to assist the government. *Id*. at 149. Furthermore, the district court considered the seriousness of Vasquez's crime when it took note of Vasquez's active involvement in and organization of the narcotics activity. Consideration of the "seriousness of the crime" in determining the extent of a departure under § 5K1.1 is a consideration well within the district court's discretion. *Torres*, 251 F.3d at 148 (citing *United States v. Casiano*, 113 F.3d 420, 431 (3d Cir. 1997).

United States v. Matthews, 2002 WL 205678 (3rd Cir.(Pa.))).The defendant argued on appeal that the district court erred in imposing the mandated enhanced sentence under 18 U.S.C. § 924(c)(1)(C) for a second or subsequent conviction and the district court erred in failing to examine the factors set forth in U.S.S.G. § 5K1.1 before determining the extent of the downward departure based on the defendant's cooperation. He contends that the district court did not follow the requirements set out in *United States v. Torres*, 251 F. 3d 138 (3d Cir. 2001), that it make explicit findings justifying the departure. The Court of Appeals stated, "Under Torres, a sentencing court must indicate its consideration of the § 5K1.1 factors as well as any factors outside those listed in § 5K1.1. However, Torres only urges, but does not require, sentencing judges to make specific findings regarding each factor. Here, the district judge was made well aware of Matthew's cooperation from the Sentencing Memorandum and Motions for Departure Pursuant to Sentencing Guideline § 5K1.1 and 18 U.S.C. § 3553(e), which was filed by the government prior to sentencing. In addition, at the commencement of Matthew's sentencing hearing, the government recited for the district court the grounds for the departure motions. The court heard this evidence and stated before imposing sentence, 'Mr. Matthews, I want you to know, sir, that I've given you a substantial reduction in your sentence, pursuant to the government's § 5K1.1 motion and 355(e).'" The Court of Appeals concluded that the district court judge met the Torres requirements and did not err.

United States v. Cap, 2002 WL 229686 (3rd Cir.(N.J.))). The defendant pled guilty to conspiracy to distribute and to possess with the intent to distribute more than one kilogram of methamphetamine. As part of a written plea agreement, the government agreed to recommend a downward departure pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). The government subsequently filed and the district court granted the government's motion. The district court sentenced the defendant to 100 months imprisonment, departing downward from the minimum guideline range by 68 months, and departing downward from the applicable statutory mandatory minimum term of incarceration by 20 months. Cap was dissatisfied with the amount of the downward departure. The Court of Appeals held that it had no jurisdiction to review the extent or degree of a district court judge's discretionary downward departure from the applicable sentencing guideline range. See, *U.S. v. Khalil*, 132 F. 3d 897, 898 (3d Cir. 1997).

United States v. Torres, 251 F. 3d 138 (3d Cir. 2001). At sentencing, the government had requested a downward departure pursuant to U.S.S.G. § 5K1.1 based on the defendant's substantial assistance in a federal investigation of police corruption and illegal gambling enterprises in northern New Jersey. According to the government, which submitted a six-page letter to the district court exhaustively detailing and commending the defendant's assistance, the cooperation lasted for approximately five years and eventually resulted in the criminal convictions of thirty individuals on charges of racketeering, extortion, and obstruction of justice. The district court granted the § 5K1.1 motion but, despite the government's presentation, chose to reduce the defendant's sentence by only one month. On appeal, the defendant argued that the district court erred by 1) failing to examine and weigh § 5K1.1's enumerated factors in a sufficiently thorough manner in determining the extent of his sentencing reduction for substantial assistance; 2) announcing his sentencing reduction in terms of months rather than offense levels; and 3) granting him too small a downward departure under § 5K1.1. The Court of Appeals held

that "when considering a departure for substantial assistance, a sentencing court not only must conduct a qualitative, case-by-case analysis, but also must examine § 5K1.1's enumerated factors. That is, when presented with a motion for downward departure a sentencing judge must, at the very minimum, indicate his or her consideration of § 5K1.1's five factors in determining whether and to what extent to grant a sentencing reduction. Further, a sentencing judge must indicate his or her consideration of any factors outside those listed in § 5K1.1. We strongly urge sentencing judges to make specific findings regarding each factor and articulate thoroughly whether and how they used any proffered evidence to reach their decision. In sum, it is incumbent upon a sentencing judge not only to conduct an individualized examination of the defendant's substantial assistance, but also to acknowledge § 5K1.1's factors in his or her analysis....It is important to note, however, that our holding today in no way prevents a sentencing judge from considering factors beyond § 5K1.1's enumerated list....Although we conclude that, in Torres's case, the district court's consideration was minimally sufficient, we also stress that a sentencing court would be best served by carefully reciting on the record the factors it evaluated in arriving at its § 5K1.1 departure decision, and the manner in which it weighed those factors."

With respect to the defendant's argument that the district court improperly applied the guidelines when it announced the extent of his departure in terms of months rather than offense levels, the Court of Appeals ruled that "neither the Sentencing Reform Act nor the Guidelines contain such a requirement." Finally, the Court of Appeals was without jurisdiction to review the defendant's argument that the district court erred by not granting him a more significant downward departure.

United States v. Clark, 237 F.3d 293 (3d Cir. 2001). The defendant pled guilty to possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). The government agreed to file motions, pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), for substantial assistance. The government filed the promised motions. At sentencing, it was determined that the guideline offense level was 29 - - signifying a guideline range of 108 to 135 months - - and that the statutory mandatory minimum was 120 months. The district court imposed a term of 90 months imprisonment. On appeal, the defendant argued that the district court, in calculating an appropriate departure, chose as its base line the 120 month statutory minimum rather than the 108 month bottom of the guideline, a choice resulting in a sentence appreciably longer that it would have been had the district court calculated the downward departure from a base line of 108 months. The Court of Appeals, in affirming the district court's departure, noted that in the absence of the government's motion, the guidelines would have required a sentence in the range of 120 to 135 months.

United States v. Swint, 223 F.3d 249 (3rd Cir. 2000). The defendant entered into a written plea agreement pursuant to which he agreed to fully cooperate with the government. The government agreed not to prosecute him for other criminal activity committed during the time of his charged offenses and to move for a downward departure in his sentence in exchange for Swint's "substantial assistance" with one or more government investigations and not committing any additional crimes. After entering into the agreement but before sentencing, Swint committed

two more offenses. The government informed Swint that he had violated the plea agreement and that it would not seek the downward departure. Swint appealed, arguing that the government breached the plea agreement. The Court of Appeals affirmed...."The plea agreement by the clearest implication contemplates that the government may elect not to move for a downward departure in the event of Swint's non-compliance."

United States v. Medford, 194 F. 3d 419 (3d Cir.1999). The defendant appealed his sentence after pleading guilty to conspiracy, theft, and receipt of cultural objects from a museum in Philadelphia. On appeal, he contends that the government violated the plea agreement and that the district court misapplied the sentencing guidelines. The defendant entered into a plea agreement under which the government promised to "make a motion to allow the district court to depart from the sentencing guidelines pursuant to § 5K1.1. The defendant contends that the government violated the plea agreement by filing a downward departure motion and then stating at the sentencing hearing that it did not recommend a downward departure. The Court of Appeals held that when the government filed the 5K1.1 motion, it complied with the terms of the plea agreement. Contrary to the defendant's suggestion, the plea agreement did not require the government to recommend a downward departure at the sentencing hearing; nor did it prohibit the government from stating at the sentencing hearing that it did not recommend departure.

United States v. Huang, 178 F. 3d 184 (3d Cir. 1999). The defendant pled guilty to conspiracy to distribute and possess with intent to distribute 700 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846. Under the terms of a plea agreement, the defendant agreed to cooperate with the Government, including truthfully disclosing all information concerning all matters about which the Government inquired. The agreement also provided that if (1) the defendant fully complied with the terms of the agreement and (2) provided substantial assistance with respect to one or more persons who have committed offenses, the Government would move the sentencing court for a downward departure pursuant to U.S.S.G. § 5K1.1. Prior to sentencing, the Government informed the defendant that he failed to honor his obligations under the plea agreement, and that it would not be moving for a downward departure. On appeal, the central question was whether the district court erred in its interpretation that the plea agreement required the defendant to satisfy the Government that he complied with its terms and provided substantial assistance. The statute and the policy statement of U.S.S.G. § 5K1.1 both provide for downward departures when a defendant furnishes substantial assistance. Such departures may be made upon motion of the Government. The Court of Appeals agreed with the district court, holding that the Government's decision not to move for a departure is reviewable only for bad faith or an unconstitutional motive. The defendant has not alleged bad faith or an unconstitutional motive.

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The defendant argues that he was entitled to a reduction for substantial assistance. The government, however, found him to be of no help, explaining that he offered only general information which was of no government use. It is the government's prosecutorial decision whether or not to seek a downward departure under § 5K1.1.

United States v. Abuhouran, 161 F. 3d 206 (3d Cir. 1998). This appeal required the court of appeals to consider, whether in the wake of *Koon v. United States*, 518 U.S. 81 (1996), Sentencing Guideline § 5K2.0 gives a district court the authority to grant a defendant a downward departure from the guidelines range on the ground that he offered substantial assistance to the government even though the government has not moved for such a departure under § 5K1.1. The court of appeals held that departures are permissible under § 5K2.0 for substantial assistance without a government motion only in those cases in which a departure is already permitted in the absence of a government motion under § 5K1.1. The only cases falling outside this heartland are those in which the government improperly –either because it has an unconstitutional motive or because it has acted in bad faith with regard to a plea agreement–refuses to offer a motion, and possibly those in which the assistance is not of the sort covered by § 5K1.1.

United States v. Faulks, 143 F. 3d 133 (3rd Cir. 1998). Defendant entered into a plea agreement which required him to cooperate with the government. In exchange, the government agreed to file a § 5K1.1 motion. The defendant argued that the district court misapplied the guidelines because it granted the government's motion but, nevertheless, imposed a sentence within the applicable guideline range. The Court of Appeals held that the district court's statement that it was granting a departure was harmless error and accordingly, did not mandate a sentence below the applicable guideline range. The record was clear that the district court was aware of its discretion to depart below the guideline range based on defendant's substantial assistance and that, in its discretion, that assistance did not warrant a departure. If the court believes it has given sufficient credit for the substantial assistance by moving down within the range, it may deny the government's motion.

United States v. Isaac, 141 F. 3d 477 (3rd Cir. 1998). In this case, defendant reached a plea agreement with the government that does not expressly promise that the government will file a § 5K1.1 motion; rather, the government has retained "sole discretion" whether to make the motion. The question in this case is whether the district court can review a prosecutor's refusal to make the motion under such restrictive terms. The district court decided that though "*Wade* did not involve a plea agreement, its holdings nonetheless applies." The Court of Appeals held that a district court has jurisdiction to determine whether the government's refusal to file a § 5K1.1 motion in circumstances such as these is attributable to bad faith and accordingly, in violation of the plea agreement. "By so holding we do not suggest that an evidentiary hearing must be held every time a defendant challenges the prosecutor's exercise of discretion.... Rather, unless the government's reasons are wholly insufficient or unless the defendant's version of events, supported by at least some evidence, contradicts the government's explanation, no hearing is required."

United States v. Khalil, 132 F. 3d 897 (3d Cir. 1997). The district court granted a downward departure under § 5K1.1. Defendant challenged the extent of the departure. The appellate court upheld the sentence, commenting "we have no jurisdiction to review the district court's discretionary downward departure."

United States v. Roman, 121 F. 3d 136 (3d Cir. 1997). The Third Circuit upheld the district court's finding that the defendants breached their agreement by failing to provide "complete" information about the offense. Therefore, the government was not required to file a 5K1.1 motion.

United States v. Casiano, 113 F. 3d 420 (3d Cir. 1997). Defendant pled guilty to conspiracy to commit car jacking and kidnaping, aiding and abetting carjacking, two counts of use of firearm in relation to crime of violence, and kidnaping. The victim was a priest who was pistol whipped , lost consciousness several times, and eventually shot and wounded. The court of appeals held that in granting a §5K1.1 departure, a sentencing court may consider "the extreme seriousness of the crime and the impact on the victim, in limiting the extent of the departure."

Melendez v. United States, 116 S. Ct. 2057 (1996). The Supreme Court held that a separate motion under 18 U.S.C. §3553(e) is required to depart below a statutory mandatory minimum sentence.

United States v. King, 53 F. 3d 589 (3d Cir. 1995). The district court erred in departing downward pursuant to the government's 5K1.1 substantial assistance motion. The sentencing court incorrectly applied a "sentencing procedure" to determine the extent of the departure. The sentencing court must instead make an "individualized qualitative examination" of the defendant's cooperation. The case was remanded for re-sentencing.

United States v. Carrara, 49 F. 3d 105 (3d Cir. 1995). The plea agreement required defendant to provide truthful information and to testify truthfully at trial. Defendant agreed that if he gave any materially false information or testimony, his plea agreement would be void. The government agreed to file a §5K1.1 motion if defendant fully complied with the agreement. Defendant breached the plea agreement by filing an affidavit in support of a motion to withdraw his plea in which he falsely stated that he was innocent. If the affidavit were true, his earlier trial testimony would have been perjury. The Third Circuit held that the government did not breach the plea agreement by refusing to move for a §5K1.1 departure.

United States v. Paramo, 998 F. 2d 1212 (3d Cir. 1993). The Third Circuit held that even absent a motion by the government, a district court has authority to grant a downward departure for substantial assistance if the government's sole motive for withholding a §5K1.1 motion was to penalize the defendant for exercising his constitutional right to a trial. Under *Wade v. U.S.*, 112 S. Ct. 1840 (1992), any unconstitutional motive is subject to judicial review. Remand was necessary because the district court may have believed it lacked discretion to depart even if it found the government withheld a § 5K1.1 motion to penalize defendant for going to trial. On remand, defendant will have the burden of proving prosecutorial vindictiveness. Since the government articulated legitimate reasons for not filing the motion, no presumption of vindictiveness will apply, and defendant must prove actual vindictiveness in order to prevail.

United States v. Love, 985 F. 2d 732 (3d Cir. 1993). Sentencing guideline allowing downward departure, on motion of the government, for defendant who has provided substantial assistance, applies to assistance to any governmental authorities, including state and local. Thus, assistance to state and local authorities is not proper ground for downward departure under §5K2.0.

United States v. Higgins, 967 F. 2d 841 (3d Cir. 1992). Following the Supreme Court's decision in *U.S. v. Wade*, 60 U.S.L.W. 4389 (May 18, 1992), the Third Circuit affirmed that in the absence of a government motion, the district court lacked the ability to depart downward under §5K1.1. Defendant did not allege that the government refused to file the motion for suspect reasons such as race or religion. Even if defendant's assistance was unquestionably substantial, such a showing is neither necessary or sufficient. Similarly, defendant's offer to provide assistance was not a proper basis for departure under §5K2.0.

Wade v. United States, 504 U.S. 181, 112 S.Ct. 1840 (1992). The Supreme Court held that district courts have the authority to review the government's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial assistance motion, say, because of the defendant's race or religion.

United States v. Santos, 932 F.2d 244 (3d Cir. 1991). The Third Circuit joins several other courts of appeal in rejecting due process challenges to the substantial assistance provisions of the guidelines. The district court did not err in finding that it did not have the authority to make a departure for substantial assistance in the absence of a government motion.

United States v. Gonzales, 927 F. 2d 139 (3d Cir. 1991). Defendant contended that the government did not act in good faith in refusing to request a downward departure under §5K1.1 for his cooperation. Moreover, he contended that the district court erred in not granting a downward departure, even in the absence of such a motion. The Third Circuit rejected both contentions. First, prior case law does not require the government to act in good faith in refusing to request a downward departure. Second, in the absence of such a motion, the district court is without authority to depart downward. The district court did consider defendant's cooperation, but did not think much of it. Thus, it sentence him at the top of the guideline range.

United States v. Parker, 902 F. 2d 221 (3d Cir. 1990). Defendant claimed that resulting sentence was essentially equivalent to minimum sentence under the guidelines and that government's motion for departure for substantial assistance was ignored. The court of appeals held that sentencing requirement that defendant reside for six months in community corrections facility as condition of probation, subject to defendant's being released to go to work, could not be equated with equivalent period of imprisonment, for purposes of determining whether there was a downward departure from applicable guideline range of six to twelve months.

United States v. Bruno, 897 F.2d 691 (3d Cir. 1990). District court erroneously believed that USSG. §5K1.1, prevented consideration of defendant's cooperation in sentencing within the guideline range, absent a government motion. However, a court may not depart downward for cooperation absent a government motion.

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

United States v. Rodriguez, 2004 WL 1894126 (3rd Cir.(N.J.))). The defendant was arrested at Newark International Airport when nearly three kilograms of heroin were discovered in suitcases she had brought into the United States from Panama. At the time, the defendant was 18 years old. She subsequently pleaded guilty to importation of heroin in violation of 21 U.S.C. §§ 952(a) and 960(b)(1)(A), a class A felony with a mandatory minimum sentence of ten years imprisonment. Because the defendant was eligible for the "safety valve" provisions under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a), the district court was permitted to impose a sentence below the statutory minimum. Her guideline custody range was 46 to 57 months, which included adjustments for minor role and acceptance of responsibility. The district court granted the defendant's motion for a downward departure based on her youth and her post-offense rehabilitation and imposed a sentence of 13 months to be served at a halfway house.

The government filed an appeal, arguing that the downward departure was erroneously granted and, in the alternative, that the extent of the departure was unreasonable.

This was the defendant's first adult arrest, and she had no prior convictions. During the several months that she spent in pretrial detention, she took a preparatory course for the GED test, volunteered as a bilingual interpreter, taught fellow inmates to read and write in English, and took religious courses. After she was released on bail, she expressed a desire to speak about her experience at her local high school. She also moved back in with her family, obtained a high school equivalency diploma and began taking cosmetology classes.

The defendant's motion for a downward departure was based on age, which is addressed by § 5H1.1 of the guidelines, and post-offense rehabilitation, which the Court of Appeals has recognized as a permissible basis for a departure in *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). She also sought a departure based on a combination of those two considerations, pursuant to § 5K2.0 of the guidelines. The Court of Appeals ruled that neither factor alone rendered her case extraordinary, nor did the two factors, when added together, remove her situation from the heartland of comparable cases. The Court of Appeals commented that the defendant is relatively young, and she has made some commendable efforts at improving herself as a result of the offense, but she is not substantially distinguishable from many other criminal defendants who commit similar offenses. Thus, no departure was warranted and the case was remanded for sentencing.

United States v. Jones, 382 F. 3d 403 (3rd Cir. 2004). At sentencing, the defendant moved for a downward departure pursuant to U.S.S.G. § 5K2.0, in the absence of a government motion, on the basis of his cooperation with the SEC and FBI in reporting a business's activities, uncovering its financial inaccuracies and misappropriations, and exposing undercover embezzling by officers of the corporation. The government opposed Jones' motion. The district court denied the defendant's motion.

Jones appealed, contending that the district court improperly held that it did not have authority to grant a downward departure under § 5K2.0 without an accompanying motion by the government. The Court of Appeals held that departures pursuant to § 5K2.0 do not hinge upon a government's motion in support thereof. The more difficult question raised by this case was whether a defendant's assistance in connection with a civil investigation or case falls within the scope of § 5K2.0, as Jones contends, rather than within the scope of § 5K1.1. Jones argued that the Court of Appeals should confine the supporting motion requirement of § 5K1.1 to substantial assistance on criminal matters and that the Court of Appeals should hold that district courts have the discretion to grant departures for assistance in civil matters under § 5K2.0, which does not require a supporting government motion. The Court of Appeals held that although the assistance which Jones relied on was to the SEC it was, in fact, related to a criminal investigation. Because Jones' cooperation fell within § 5K1.1 (had the assistance been sufficiently substantial to warrant the government's motion to depart) and § 3E1.1, it was not appropriate for consideration under § 5K2.0. The district court did not err in denying his motion for departure under § 5K2.0.

United States v. Forrest, 2003 WL 1919363 (3rd Cir.(Pa.))). At the time of sentencing on June 27, 2002, the government filed a Superseding Information Charging Prior Offense based on a felony drug conviction entered by the Philadelphia Court of Common Pleas on or about March 30, 1977. Because the defendant's offense involved more than 50 grams of crack cocaine and occurred after a separate felony drug conviction, the district court imposed the mandatory minimum sentence of twenty years imprisonment under § 841(b)(1)(A). The defendant appealed, arguing that the district court should have departed downward from the statutory minimum sentence based on the age of the prior conviction that triggered the enhanced penalty provision of § 841(b)(1)(A). The Court of Appeals affirmed the judgment. Unlike the sentencing guidelines, § 841(b)(1)(A) provides no general authority for a departure, nor any authority to depart based on the age of a prior conviction. Sentencing courts may depart below the statutory mandatory minimum only if particular requirements are met, including the condition that the defendant does not have more than one criminal history point, as determined under the sentencing guidelines. 18 U.S.C. § 3553(f). Unfortunately, the defendant fails to meet this requirement.

United States v. Sonowo, 2003 WL 1269316 (3rd Cir.(Del.))). The defendant was one of several persons indicted for involvement in a fraudulent scheme, known as the "black money" scheme. He and his cohorts tricked a number of persons in the United States into sending them funds that were to be used to purchase a special cleaning chemical that would be used to clean U.S. currency previously stamped with the letters "CBN" (Central Bank of Nigeria) in black ink. In turn, the cleaned money allegedly was to be used to set up churches. The defendant pled "guilty" to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371.

At sentencing, the district court upwardly departed after noting the "unusual" degree of harm to the victims, the "sheer number" of victims, the potential use of "mass-marketing" in soliciting victims, and the duration and "extensive" planning and execution of the scheme. The Court of Appeals held that the departure was reasonable.

United States v. Saxton, 2002 WL 31479074 (3rd Cir.(Pa.))).In 1979, Sue Ellen Saxton was elected Prothonotary and Clerk of Courts for Mifflin County, Pennsylvania, an office she held until August 2000. An investigation revealed that throughout her twenty-year career, she embezzled funds collected in the normal course of business and converted these funds for the personal use of herself and her husband, Frederick Saxton. She pled "guilty" to conspiracy in violation of 18 U.S.C. § 371 involving: the embezzlement of money from a program receiving federal funds, 18 U.S.C. § 666(a)(1)(A); the transportation of stolen money in interstate commerce, 18 U.S.C. § 2314; and the receipt of stolen money which has crossed a state or United States boundary, 18 U.S.C. § 2315. As part of the plea agreement, she agreed that the amount of the loss to all victims as a result of her conduct was more than $800,000, but less than $1,500,000 and she agreed to make full restitution as determined by the district court. The district court departed upward from an offense level of 21 (37 to 46 months) to level 24 (51 to 63 months). The district court found that this upward departure was warranted under (1) U.S.S.G. § 5K2.0 because the value used to calculate the sentence under the guidelines did not capture the aggregate harm of Sue Ellen's actions and under (2) U.S.S.G. § 5K2.7 because her embezzlement of public funds over twenty years caused a significant disruption of a governmental function. The district court also determined that the amount of restitution was to be calculated based on the period of time from 1980 to 2000 - - the period of Sue Ellen's entire tenure as Prothonotary. The amount of restitution ordered by the district court was $995,930.90.

Accordingly, the district court sentenced Sue Ellen to 60 months imprisonment, the statutory maximum under 18 U.S.C. § 371 and restitution in the amount of $995,930.90 ($741,444.81 plus $254,486.09). Sue Ellen objected to the upward departure and the $995,930.90 restitution. At sentencing, the district court overruled both objections stating that the value used in calculating her sentence under the guideline failed to capture the extensive harm that she caused because the embezzlement of public funds over an approximate twenty-year period caused significant disruption of a governmental function. The district court also stated that the value used to calculate the guideline failed to capture the additional expenses that have been incurred, as well as the intangible harm from her conduct - - the public's loss of trust in public officials. In denying Sue Ellen's objection to the restitution amount, the district court ruled that under the plea agreement she had agreed to satisfy in full the restitution ordered by the court.

Sue Ellen had two arguments on appeal. First, she argued that the district court erred in imposing a three level upward departure because the guideline offense level which provided for a 13 level increase for embezzlement for more than $800,000 but less than $1,500,000 fully accounted for the additional financial losses that the district court assessed. Second, she argued that the district court erred in holding her liable for an additional $254,486.09 of restitution to account for losses from January 1, 1980 through December 31, 1992 because those monies

reflect losses for a period not charged in the Information and because her plea agreement to make "full restitution" was ambiguous. She did not contest the upward departure pursuant to § 5K2.7 (disruption of a government function).

The Court of Appeals held that the district court exercised its discretion and determined that an upward departure was warranted because the financial loss calculation based on Saxton's embezzlement failed to adequately reflect the intangible, non-monetary harm caused by her theft, namely, the loss of public confidence and trust in elected officials. Accordingly, the district court did not abuse its discretion in determining Saxton's sentence based on an upward departure under U.S.S.G. § 5K2.0.

United States v. Kitchen, 2002 WL 31309261 (3rd Cir.(Pa.))). The defendant pled guilty to violating 18 U.S.C. § 1791(a)(2) by possessing a prohibited object at the Allenwood Federal Corrections Complex. He and his co-defendant stabbed another prisoner with a knife ten times. The Court of Appeals ruled that the district court acted within its discretion in awarding an upward departure in light of the significant physical injury inflicted and the dangerous nature and injurious use made of the prohibited object - - considerations otherwise not accounted for in Kitchen's sentence. The district court did not buse its discretion by awarding a three-level upward departure pursuant to U.S.S.G. §§ 5K2.2 and 5K2.6.

United States v. Vilcapoma, 2002 WL 31027882 (3rd Cir.(N.J.))). The issue in this appeal is whether the defendant was entitled to downward departures based on "cultural assimilation" and the "totality of the circumstances." The defendant, a Peruvian native, was admitted into the United States in 1973, at the age of three, and became a permanent resident in 1984. In 1990, he was convicted in New Jersey of distributing heroin within 1,000 feet of school property. Although the defendant was subject to deportation, an immigration judge allowed him to remain in the United States. In a deportation appeal, INS reversed that decision, holding the defendant had shown a disregard for the welfare of the United States. The defendant was deported to Peru in 1995.

In January 1996, with the assistance of a paid smuggler, the defendant crossed the Mexican border into Texas. He was charged with illegal re-entry, a violation of 8 U.S.C. § 1326, and pled guilty.

The district court recognized its authority to depart, but exercised its discretion not to do so. The Court of Appeals dismissed the appeal for lack of jurisdiction.

United States v. Colon, 2002 WL 2007189 (3rd Cir.(Pa.))). The defendant appealed, contending that the district court erred when it denied his request for a downward departure based on his status as a convicted deportable alien. The defendant requested the departure pursuant to U.S.S.G. § 5K2.0 on the ground that as a convicted deportable alien he was subject to potential consequences not visited upon others convicted of the same offenses. Because the district court believed it had the authority to depart, but exercised its discretion not to do so, the Court of Appeals dismissed the appeal for lack of jurisdiction.

United States v. Zemo, 2002 WL 1575911 (3rd Cir.(Pa.))).The Government cross-appealed the district court's decision to grant a downward departure. A departure form a sentencing guideline is permitted only in those rare cases where "certain aspects of the case are found unusual enough for it to fall outside the heartland of cases in the guideline." *Koon v. United States*, 518 U.S. 81, 98 (1996). In deciding whether to depart from the guidelines, a district court should be informed "by its vantage point and day-to-day experience in criminal sentencing," as the unusual nature of any given case will be "determined in large part by comparison with the facts of other Guideline cases." *Id.* The district court followed Koon when it departed downward based on the stark disparity between Zemo's theft and other thefts in the same sentencing category.

The unique circumstances surrounding Zemo's offense become apparent when her actions are compared to those of her co-conspirator, Steven McLaughlin. Zemo was secretary/treasurer for the Eastern Montgomery Area Local 2233 postal workers union, and she helped McLaughlin, its president, steal from the union by unquestioningly reimbursing the exorbitant bills McLaughlin presented to her. McLaughlin received almost all of the benefits from the thefts. Zemo's benefits were limited to taking two vacations with McLaughlin and three other trips paid for by the union.

Although Zemo and McLaughlin were charged with the same counts of conspiracy and theft of union funds, Zemo was convicted on only 17 of the 21 counts brought against her. McLaughlin, however, was convicted of all 21 counts.

The district court found Zemo's offense to be unusual and outside the heartland, however, when compared with the 24 month incarceration period that the guidelines established for McLaughlin. McLaughlin pocketed the bulk of the proceeds stolen from the union, while Zemo received very little benefit. Thus, to reflect the unusually limited benefit Zemo gained by virtue of her property offense, the district court readjusted her offense level from 14 (15-21 months) to 10. She was placed on three years probation.

The Court of Appeals affirmed the judgment of conviction and sentence. "In conclusion, the benefits that Zemo received from her theft of union funds were unusually limited in comparison to the benefits received by McLaughlin or by the vast majority of other offenders convicted of stealing property worth $20,000 to $40,000." The district court did not abuse its discretion.

United States v. Davis, 2002 WL 1478505 (3rd Cir.(N.J.))). The defendant argued that the district court erred when it declined to depart from the sentencing guidelines. He asserts that he deserved a downward departure based upon his post-offense rehabilitation efforts or a combination of other remarkable factors. Post-offense rehabilitation may constitute a ground for a departure where the defendant's efforts are "exceptional." *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). Similarly, a combination of other remarkable factors may justify a downward departure, although such cases are "extremely rare." U.S.S.G. § 5K2.0, Commentary. In either case, the district court's decision to grant or not grant a downward departure is discretionary. *United States v. Yeaman*, 248 F.3d 223, 227 (3d Cir. 2001); U.S.S.G. 5K2.0, Commentary.

United States v. Cort, 2002 WL 1275443 (3rd Cir.(N.J.))). The defendant pleaded guilty to conspiracy to import approximately 500 grams of cocaine in violation of 21 U.S.C. §§ 952 and 963. At sentencing, the district court declined to grant Cort a downward departure. Cort appealed, arguing that when it promulgated the guidelines, the Sentencing Commission could not have envisioned the terrorist attacks of September 11, 2001 and the response by the federal government. Specifically, Cort contends that because of the government's response to the September 11 attacks, in particular the increased effort to prevent the unlawful entry of aliens in the United States, the need for deterrence by virtue of stiff sentences for illegal aliens has been removed. He argues that such aliens will not be able to re-enter the United States nearly as easily, if at all, following deportation. Moreover, Cort opined, the waste of financial resources on the incarceration of convicted drug dealers who happen to be illegal aliens is a basis for a downward departure because those funds could be more profitably used in the war on terrorism. The Court of Appeals upheld the district court's decision not to depart. As the government noted, granting such a downward departure would create two classes of drug sentences, one for United States citizens and one for illegal aliens.

United States v. Cefalo, 2002 WL 1284193 (3rd Cir.(Pa.))). This appeal presented the oft recurring question whether a sentencing court that declined the invitation of the defendant to depart downward under § 5K2.0 understood that it had the authority to depart but exercised its discretion not to, or rather was ruling that it lacked power to depart. The problem frequently arises where, as here, the district court has already exercised its discretion to depart downward under § 5K1.1 of the Guidelines and plainly thinks that that departure was enough, but does not clarify its position under § 5K2.0. The generally applicable rule is stated in *United States v. Mummert*, 34 F.3d 201, 205 (3d Cir. 1994), where the Court of Appeals held that where it is impossible to tell whether the district court's ruling is based upon the proper exercise of discretion or an improper interpretation of the applicable legal standard, the correct course of action is to vacate the sentence and remand to the district court for clarification.

In *Cefalo*, the defendant made a strong argument for a downward departure additional to that under § 5K1.1 based upon his alleged vulnerability to abuse in prison. In support, Cefalo presented evidence regarding his sexual orientation, his frail physique, and his history of mental illness. Though the district court did not make the clear statement counseled by *Mummert*, it was aware of its authority to depart downward.

United States v. Alba, 2002 WL 522819 (3rd Cir.(N.J.))). The defendant, a convicted heroin and cocaine dealer, was deported to the Dominican Republi on January 16, 1990. At the time of his deportation, the INS provide Alba with Form I-294, which provided in pertinent part, that: Should you wish to return to the United States, you must first write this office...as to how to obtain permission to return after deportation. By law (8 U.S.C. § 1326), any deported person who within five years returns without permission is guilty of a felony.

On August 17, 2000, Alba entered the United States at Newark International Airport and was arrested when a customs check revealed his prior deportation. He was convicted, following a bench trial, of illegally entering the country in violation of 8 U.S.C. §§ 1326(a) and (b)(2). The district court granted him a five level downward departure, finding that the circumstances surrounding Alba's crime removed his case from the heartland of similar cases. In granting the departure, the district court stated that it was not aware of a "single case where the defendant takes an airplane into the United States, walks through Customs, hands them his green card and says here I am. In every single one of these cases, the person is found in the United States. He has slipped back into the country. In other words, Alba reentered the country forthrightly versus surreptitiously." In reaching this conclusion, the district court observed that Alba only had a sixth grade education, was given Form I-294, was left with his green card, and had been working in the Dominican Republic without further legal troubles. The purported purpose of Alba's trip to the United States was to visit with his 16 year old son and that Alba had made "full disclosure at every step in this case of what he was doing."

The government appealed. The Court of Appeals affirmed the downward departure.

United States v. Sees, 2002 WL 226335 (3d Cir.(N.J.))). The defendant contends that the district court erred in failing to grant a downward departure under U.S.S.G. § 5K2.0 based on extraordinary post-offense rehabilitation. At sentencing, the district court explicitly articulated more than once that it had the power to depart from the guidelines based on defendant's post-offense rehabilitation efforts. The district court decided, however, that defendant's post-offense conduct was not "so exceptional" as to warrant a downward departure from the guidelines. As a result, the Court of Appeals lacked jurisdiction to review the district court's refusal of a downward departure in this matter.

United States v. Santiago, 201 F.3d 185 (3d Cir. 2000). The defendant had a guideline imprisonment range of 70 to 87 months. There was a mandatory minimum term of 10 years imprisonment. At sentencing, the defendant argued for a downward departure from the mandatory minimum sentence pursuant to U.S.S.G. § 5K2.0. The district court did not grant the departure. The Court of Appeals affirmed the sentencing, stating "Any deviation from the statutory minimum sentence can only be had through the specific procedures established through 18 U.S.C. §§ 3553(e), 3553(f), which are not applicable here."

United States v. Medford, 194 F. 3d 419 (3d Cir.1999). The defendant appealed his sentence after pleading guilty to conspiracy, theft, and receipt of cultural objects from a museum in Philadelphia. The defendant contends that the district court's upward departure was improper because the cultural value of the stolen objects is an element of 18 U.S.C. § 668 already taken into consideration by the sentencing guidelines. The Court of Appeals agreed with the district court. The price set by the commercial market is insufficient to "fully capture the harmfulness of the defendant's conduct. The antiques stolen in this case unquestionably have historical and cultural importance.

United States v. Nathan, 188 F. 3d 190 (3d Cir. 1999). Electrodyne Systems Corporation, a defense contracting company, specialized in providing military components to the United States government. Nathan was Electrodyne's president and vice-president. Between November 1989 and March 1994, Electrodyne entered into six contracts to provide U.S. government agencies and the U.S. military including NASA and the Air Force with electronic components to be used in research, communications, radar, and weapons systems. Each contract required Electrodyne to comply with the Buy American Act, 41 U.S.C. § 10a-10d (1988), and in each contract Nathan (on Electrodyne's behalf) represented that Electrodyne (a) intended to manufacture the components in the United States; (b) would not use foreign components; and (c) would not use offshore manufacturing sites. Despite their contractual and statutory obligations, Nathan and Electrodyne entered into agreements with foreign companies in Russia and the Ukraine to build the components specified in the contracts. In so agreeing, Nathan disclosed to the foreign manufacturers the drawings, specifications, and technology of the contracted for components. Nathan failed to disclose these foreign contracts to the government and failed to register with the State Department as a manufacturer or exporter of defense articles. Nathan pled guilty to illegally importing goods into the U.S. because he failed to mark the items with the country of origin in violation of 18 U.S.C. § 545.

After sentencing Nathan under the fraud guidelines, the district court held that even if the defendant did not stipulate to fraud, it would have reached the same sentence had it used the smuggling guidelines, which were the guidelines to which the defendant stipulated. Under the smuggling guidelines, the district court found that an upward departure based on the "seriousness of the offenses" was appropriate. The Court of Appeals found no support in the record for the departure. In fact the record was uniformly and explicitly to the contrary.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). Defendant-appellant pled guilty to interstate transportation of property taken by fraud, mail fraud and wire fraud. On appeal, the defendant challenged the district court's decision to impose an upward departure of two levels pursuant to U.S.S.G. § 5K2.0 based on (1) defendant's masquerade as a decorated Vietnam combat veteran, a person in the witness protection program, and a government agent on a secret mission; (2) defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) defendant's attempt to conceal his fraud by faking his own death; (4) defendant's fabricated story about his family's having been killed by a drunk driver; and (5) the severe psychological harm defendant's fraud caused his victims. The Court of Appeals that the district court acted within its discretion in concluding that

this combination of five unmentioned factors was sufficient to take the defendant's case out of the guidelines' heartland. The commentary to the fraud guideline states that upward departures may be warranted in cases in which the loss does not fully capture the harmfulness and seriousness of the conduct. Furthermore, while no existing guideline enhancement covers the defendant's conduct, two areas of the guidelines provide specific bases for upward departures based on conduct similar to this. The extent of the district court's departure was reasonable.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). A federal grand jury returned an indictment charging the defendant with premeditated murder of his wife by stabbing her repeatedly with a butcher knife. On the eve of trial, the government and the defendant agreed that he would plead guilty to second degree murder. At the time of the murder, the couple lived in Lewisburg, Pennsylvania, where she worked as a psychologist at the United States Penitentiary. On appeal, the defendant challenged the district court's refusal to grant a downward departure for "aberrant behavior." The district court found that the defendant had ample time in the minutes preceding the stabbing to think about whether to murder his wife, and that the number of times the defendant stabbed his wife indicates that he thought about the act as it was being done. These penultimate findings amply support the ultimate finding that the murder was not "thoughtless." The Court of Appeals affirmed the denial of a departure for aberrant behavior.

United States v. Faulks, 143 F. 3d 133 (3rd Cir. 1998). On appeal, defendant argued that the district court erred in declining to depart downward pursuant to § 5K2.0 based on his agreement not to oppose certain administrative forfeitures. He cites this as extraordinary acceptance of responsibility. The Court of Appeals remanded the case for further proceedings, stating that, on the surface, this does not appear to be an extraordinary situation.

United States v. Sally, 116 F. 3d 76 (3d Cir. 1997). Defendant was convicted of drug and firearm charges. He was a bagger and look-out for a crack conspiracy. Defendant argued that the district court erred by failing to depart downward under §5H1.1. His request was based on (1) the fact that he was 17-18 years old when he joined the conspiracy; and (2) since being jailed, he had demonstrated increased maturity by earning his GED and nine college credits. The Court of Appeals found no error in the district court's refusal to depart under §5H1.1; however, the case was remanded for the court to consider a downward departure for defendant's post-conviction rehabilitation. Post-offense rehabilitation efforts, including those that occur post-conviction, may constitute a sufficient ground for downward departure provided that the efforts are so exceptional as to remove the case from the heartland in which the acceptance of responsibility guideline was intended to apply.

United States v. Baird, 109 F. 3d 856 (3d. Cir. 1997). The Third Circuit held that a district court may depart upward based on conduct underlying counts that are dismissed as part of a plea agreement, if it is related to the conduct in the remaining counts and is proven by a preponderance of the evidence. In *U.S. v. Watts*, 177 S. Ct. 633 (1997), the Supreme Court held that a sentencing court is permitted to consider acquitted conduct. The conduct need not fit the definition of relevant conduct to be related, but it must "exhibit commonalities of factors

sufficient to allow for a reasonable grouping of the separate, individual acts into a larger, descriptive whole."

United States v. Haut, 107 F. 3d 213 (3d Cir. 1997). The district court erred in departing downward to mitigate the impact of a jury verdict the judge believed to be incorrect. At sentencing, the district court judge departed six levels based on the incredibility of the prosecution witnesses and his belief that the defendants should have been found not guilty. Noting that *Koon v. United States,* 116 S. Ct. 2035 (1996) states that a departure factor not mentioned in the guidelines must be examined to determine if it is "sufficient to take the case out of the Guideline's heartland," the circuit court stated that this departure was "categorically inappropriate." The district court stated that certain prosecution witnesses were biased and had the case been a bench trial he would have found the defendants not guilty. The district court asserted that for sentencing determinations, it was appropriate to make credibility determinations. The circuit court noted that the district court may enter a judgment of acquittal if the circumstances of the case make the verdict unsupportable. See Fed. R. Crim. P. 29. In this case, however, the district court found that a judgment of acquittal was not appropriate because the evidence, if believed, did support the verdict. The circuit court stated that to affirm the departure taken by the district court would "sap the integrity of both the Guidelines and the jury system."

United States v. Bass, 54 F. 3d. 125 (3d Cir. 1995). Defendant and others conspired to illegally sell firearms. The district court departed upward, finding the 1989 guidelines did not account for the fact that defendant should have known that the weapons would be used to commit further crimes. The Third Circuit reversed, holding that the 1989 guidelines took this into account. The fact that the 1991 firearms amendments added an enhancement under §2K2.1(b)(5) for transferring a weapon with knowledge, intent or reason to believe that it would be used in another felony, did not prove that the 1989 guidelines failed to account for this. The 1991 amendments consolidated §§2K2.1 through 2.3 into a single guideline. The 1989 version of §2K2.3 covered defendants who received or transferred firearms with intent or knowledge to commit another crime. The new §2K2.1(b)(5) enhancement serves a part of the function that §2K2.3 served in 1989.

United States v. Evans, 49 F. 3d 109 (3d Cir. 1995). During the presentence investigation, the defendant voluntarily revealed his true identity to the probation officer which, because of his criminal history, increased his sentence. The probation officer conceded that he would not have discovered the defendant's true identity if not for the defendant's own admission. Accordingly, the defendant argued that the district court should have departed downward based on his extraordinary acceptance of responsibility, and that the court did not so depart because it mistakenly believed it did not have the authority to do so. The appellate court found the district court's discussion of the departure ambiguous. Therefore, the court considered the issue of whether or not this factor is an appropriate basis for departure. The court held that the disclosure of identity could constitute a "mitigating circumstance" within the meaning of guideline § 5K2.0. The appellate court based its holding on the recent amendment to § 5K2.0, which allows a judge to use a broad range of factors to depart as long as those factors promote the statutory purposes of sentencing. The case was remanded for resentencing for the district court to determine whether a

downward departure is appropriate.

United States v. Raven, 39 F. 3d 428 (3d Cir. 1994). Defendant argued that the district court should have departed downward based on "sentencing entrapment." The Third Circuit refused to determine whether sentencing entrapment was a valid ground for departure, since it did not exist in this case. The government suggested that the conspirators import three to four kilograms of heroin, instead of some smaller amount, because it was not feasible for suppliers in Thailand or importers in the U.S. to set up such a big trip to just bring back one or two kilograms. Defendant was an experienced drug courier who demonstrated a "yeoman's attitude" towards the venture. He indicated that he was willing to transport whatever quantity of heroin was available.

United States v. Smith, 27 F.3d 649 (3d Cir. 1994). The defendant, an illegal alien, pled guilty to unlawful possession of five grams or more of cocaine base with intent to distribute. He appealed his sentence because the district court, though expressing a desire to reduce his sentence, declared, "I really don't see any basis for departure." The defendant claims such a ground, arguing that in two ways his status as a deportable alien will - - adventitiously, as he sees it - - subject him to harsher conditions than an otherwise identical citizen. First, his status as a deportable alien renders him almost certainly ineligible for the benefits of 18 U.S.C. § 3624(c), which directs the Bureau of Prisons, to the extent practicable, to assure that prisoners spend part if the last 10% of their sentences (but no more than six months) under conditions - - possibly including home confinement - - that will "afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community." Bureau of Prisons regulations bar non-U.S. citizens from assignment to a Community Corrections Center except in what appear to be rare circumstances. More important, Bureau of Prisons policy prevents him from being assigned to serve any part of his sentence in a minimum security prison, subject to the same exceptions as community confinement. The Court of Appeals held that downward departure from recommended range of Sentencing Guidelines may be appropriate if defendant's status as deportable alien is likely to cause fortuitous increase in severity of his confinement. For a departure on such a basis to be reasonable the difference in severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence. Finally, as the defendant's status as a deportable alien is by no means necessarily unrelated to his just deserts, even a court confident that the status will lead to worse conditions should depart only when persuaded that the greater severity is undeserved. Thus, the court will fulfill the Guidelines' command that such departures will be "highly infrequent." U.S.S.G., Ch. 1, Pt. A, § 4(b).

United States v. Marcello, 13 F. 3d 752 (3d Cir. 1994). Defendant was convicted of structuring financial transactions to evade reporting requirements. The Third Circuit agreed with the district court that a downward departure based on "aberrant behavior" was not permitted, holding that aberrant behavior is a spontaneous single act that is unplanned. The court rejected the "expansive" view taken by the 9th Circuit that permits consideration of whether a defendant is a first-time offender. Aberrant behavior must be something more than merely "out of character" or the defendant's first offense. It must involve a lack of planning; it must be a single

act that is spontaneous and thoughtless, and no consideration is given as to whether defendant is a first-time offender. The district court correctly applied this standard and found that some pre-planning was required to deposit $9,000 each day over a one-week period.

United States v. Newby, 11 F. 3d 1143 (3d Cir. 1993). While in prison, defendants were involved in an altercation with several prison guards. As a result, they were found to have violated prison regulations and were deprived of good time credits thay had previously earned. In addition, they were convicted in federal court of impeding and interfering with a federal prison guard. The Third Circuit held that even though loss of good time credits did not appear to have been addressed by the Sentencing Commission, it was not a proper basis for a downward departure. The gravamen of a mitigating circumstance is that it somehow reduces the defendant's guilt or culpability. Loss of good time credits was not such a circumstance. Because of the different purposes that the disciplinary sanctions and criminal sentences are designed to serve, granting a downward departure to compensate for the defendant's loss of good time credits would defeat the goals of the criminal justice system.

Defendant argued that the district court's decision to sentence him at the top of the guideline range was based on the fact that his co-defendant received a longer sentence, and that considering this fact violated the law. The Third Circuit found that the district court did not rely on an improper factor in sentencing. Defendant pointed only to a statement by the district judge noting the disparity in sentences for the defendants. However, the disparity was based on a difference in criminal histories. Moreover, there is nothing to preclude a district court from considering a co-defendant's sentence when selecting a sentence within the guideline range.

United States v. Cherry, 10 F. 3d 1003 (3d Cir. 1993). After being identified as a prime suspect in the murder of a police officer, defendant fled to Cuba, where he remained for 20 years. When he returned to the U.S., he pled guilty to unlawful flight to avoid prosecution. He was sentenced under §2J1.6, Failure to Appear, as the most analogous guideline. The Third Circuit upheld a two-level departure under §5K2.0 by analogy to the obstruction of justice enhancement, §3C1.1. The parties agreed that the obstruction guideline could not be applied to the Failure to Appear guideline. However, the aggravating circumstances surrounding defendant's flight--the length of his absence ,his flight to a country from which he could not be extradited, the resulting difficulty in prosecuting the underlying offense--were extreme and had the effect of obstructing justice. The Sentencing Commission, in promulgating §2J1.6, did not adequately consider such extreme aggravating circumstances.

The district court departed upward three levels by analogy to §3A1.2 (official victim enhancement) because defendant's unlawful flight was for the purpose of avoiding prosecution for killing a police officer. The Third Circuit concluded that there was no official victim of defendant's flight and therefore the district court erred in using §3A1.2 by analogy as a grounds for departure. The only victim of defendant's unlawful flight were the government and the justice system, not the slain officer, his family or fellow officers. Defendant's offense, the flight, was not motivated by the status of his victim, but by the fear of prosecution.

United States v. Schweitzer, 5 F. 3d 44 (3d Cir. 1993). Defendant bribed government employees for confidential information, which he then resold to his clients for a profit. The district court departed upward because of the volume of defendant's dealings in confidential information and the magnitude of the resulting invasion of personal privacy. The court also noted that defendant's appearance on the Oprah Winfrey Show and elsewhere had significantly enhanced the loss of public confidence in government caused by his offense. The Third Circuit remanded. It agreed that defendant's conduct went well beyond the heartland bribery offense covered by §2C1.1 both because of its extent and because the consequences for the large number of victims involved. It was also appropriate to take into account the corruption of government caused by defendant's conduct as well as the loss of public confidence necessarily occasioned by its original disclosure. However, it was inappropriate to enhance defendant's sentence because he sought to call attention to a situation that was unquestionably a matter of public concern.

United States v. Williams, 112 S. Ct. 1112 (1992). The Supreme Court held that when a departure is based on both permissible and impermissible grounds, reviewing courts should use a "harmless error" analysis to decide whether the defendant would have received the same sentence even if the sentencing judge had not given the impermissible reasons. Although defendant bears the initial burden of showing that the district court relied on an invalid factor at sentencing, he does not have the additional burden of proving that the invalid factor was determinative. "Rather, once the Court of Appeals has decided that the district court misapplied the guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed."

United States v. Shirk, 981 F. 2d 1382 (3d Cir. 1992). Factors that defendant was acquitted on criminal tax charges, that he may have only structured legitimate proceeds into his own legitimate bank accounts, that he may not have realized structuring was a criminal act, and that he was subject to substantial forfeiture were adequately considered in guidelines and were not grounds for a downward departure in sentencing for structuring money transactions to avoid reporting requirements. requirements.

United States v. Lieberman, 971 F. 2d 989 (3d Cir. 1992). Although defendant received an adjustment for acceptance of responsibility, the district court found that defendant's conduct differed "from the norm" in terms of the kind and degree of his acceptance of responsibility and departed downward by one level. The Third Circuit held that a sentencing court may depart downward when the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present. Here, there was a sufficient basis for the departure. Defendant, a bank vice president who embezzled bank funds, not only began to make restitution to the bank shortly after his embezzlement was discovered, but also entered into an agreement to pay about $34,000 more than he thought was owed and to which he pled guilty. Besides admitting the full extent of his wrongdoing when confronted by bank officials, resigning his position, and making voluntary and truthful admissions to authorities (acts which would not take him out of the usual case), he met with bank officials to explain how in the future they could detect improper transactions.

United States v. Higgins, 967 F. 2d 841 (3d Cir. 1992). Defendant argued that the district court mistakenly believed that it lacked the authority to depart downward on various offered grounds. The Third Circuit held that to the extent that the disparity of sentence among the co-defendants was alleged to be a mitigating factor, it was not a proper basis for a downward departure.

United States v. Barr, 963 F. 2d 641 (3rd Cir. 1992). The government objected to defendant's initial presentence report because it failed to accord "sufficient recognition to the unique combination of offense and governmental position in defendant's case." The amended presentence report considered this issue, and concluded that this matter was better addressed, if at all, through a higher sentence within the applicable guideline range rather than through an upward departure. The district court commented that the probation officer had resolved all of the objections correctly. It then departed upward because defendant held a high-ranking position with the Department of Justice. The Third Circuit reversed, ruling that the district court failed to give reasonable notice of its intent to depart upward on grounds not identified in the presentence report or in a prehearing submission by the government, as required by *Burns v. U.S.*, 111 S. Ct. 2182 (1991).

United States v. Thomas, 961 F. 2d 1110 (3d Cir. 1992). Defendant pled guilty to four counts of making false statements in connection with the acquisition of firearms in return for the government's agreement not to charge defendant with the more serious crime of possession of a firearm by a felon. The false statement convictions resulted in a guideline range of 24 to 30 months. The government argued that the district court's departure to a 60 month sentence was justified by the fact that defendant could have been charged with the firearm possession charge, which would have resulted in a mandatory 15 year sentence. The Third Circuit held that it was error to depart upward to compensate for the government's decision not to charge defendant with a more serious crime. An upward departure in offense level may not be based upon uncharged crimes. Fairness dictates that the government not be allowed to bring the firearm possession crime through the "back door" in the sentencing phase, when it had previously chosen not to bring it through the "front door" in the charging phase.

The district court departed upward because defendant held a high ranking position with the Department of Justice and because criminal behavior by public officials tends to erode public trust. Defendant claimed that the issues relating to his employment and to conduct affecting public trust were already considered by the guidelines in §3B1.3. The Third Circuit rejected defendant's claim that §3B1.3 barred an upward departure based upon his high-ranking position. The court also affirmed the district court's determination that in his position as assistant to the Attorney General, defendant was involved in preventing criminal activity by public officials.

United States v. Johnson, 931 F.2d 238 (3d Cir. 1991). The district court did not err in basing a departure on the number of victims involved in an aggravated assault. According to the circuit court, "the language of [USSG §2A2.2(b)(3)] suggests that the typical cases contemplated by the Commission were single-victim assaults." The circuit court also found that the "structured" departure based on the group counting guideline was reasonable.

United States v. Shoupe, 929 F. 2d 116 (3d Cir. 1991). Defendant was classified as a career offender. The district court departed downward based on defendant's youthfulness and immaturity at the time he committed two of the prior offenses, the short time span between the commission of the offenses, defendant's prior cooperation with authorities and his dependent child. The Third Circuit reversed, finding that all of these factors were adequately considered by the Sentencing Commission.

United States v. McAllister, 927 F.2d 136 (3d Cir. 1991). The district court erred in making a downward departure from the career offender guideline where the defendant had two prior adult felony convictions for crimes of violence. Robbery per se is a "crime of violence" for purposes of the career offender provision. Sentencing courts need not look beyond the fact of the conviction and the charge to ascertain whether the conviction was a "violent felony."

United States v. Bierley, 922 F. 2d 1061 (3d Cir. 1990). Defendant received magazines depicting child pornography from an undercover postal inspector. He pled guilty to receipt of child pornography in violation of 18 U.S.C. §2252(a)(2). The district court concluded that an adjustment for mitigating role under §3B1.2 was not available inasmuch as defendant was the sole "criminally responsible" participant in the offense. The district court adduced a number of factors which it thought pointed to a downward departure but which it said were, in totality, not sufficient to support a departure. The Third Circuit held that the district court did not err in concluding that §3B1.2 was, in itself, not the basis for a downward adjustment since defendant was only "criminally responsible" participant. However, a departure by analogy to §3B1.2 is available if defendant's conduct would qualify as "minor" or "minimal" had the supplier, a postal inspector, been a criminally culpable participant.

United States v. Pharr, 916 F.2d 129 (3d Cir. 1990). The district court erred in making a downward departure from a guideline range of 15-21 months to five months probation for a conviction on one count of sale of stolen United States Treasury checks based on the appellant's "post-arrest efforts to overcome his drug addiction and the effect that incarceration would have had on those efforts." According to the circuit court, the guidelines represent a shift away from a system that attempts to rehabilitate the individual.

United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990). Three defendants were convicted of conspiring to receive and barter stolen property. The court departed upward for all defendants on the basis of risk of harm to the public during a high speed chase, the "magnitude of the thievery," and the close relationship of the defendants to the sophisticated burglars who took the valuable antiques. The "magnitude of the thievery" was accounted for in USSG §2B1.2 by the loss table and was an impermissible basis for departure. The close relationship between the defendants and the sophisticated thieves is a necessary ingredient of all offenses under USSG. §2B1.2 and, therefore, is accounted for in that guideline, providing no basis for departure. The significant risk of injury posed by the high-speed chase in downtown Tampa was not adequately accounted for in the applicable guideline, §2B1.2 and was a permissible basis for departure pursuant to USSG. §5K2.14 so long as high speed flight was "reasonably foreseeable" to each defendant. As to defendant Durish, it was not reasonably foreseeable that his codefendants would engage in dangerous high speed flight. He was not in vehicle and was acting as lookout.

United States v. Rosen, 896 F.2d 789 (3d Cir. 1990). Fact that defendant did not truly intend to carry out extortionate threats was considered by the Commission under U.S.S.G. § 2B3.2. See Application Note 2 ("if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person . . ."). Fact that defendant was compulsive gambler was not sufficiently unusual. "[A] combination of typical factors does not present an unusual case."

United States v. Medeiros, 884 F.2d 75 (3d Cir. 1989). Downward departure denied. -- Defendant sought downward departure -- argued that Commission did not adequately consider the difference between walking away from a non-secure prison farm camp and escaping from a secure institution such as a penitentiary. § 2P1.1. -- Defendant also asserted that the Commission is considering amending the guidelines to grant a reduced offense level for an individual who escapes from a non-secure vs. secure institution, and has sought public comment. District Court held that fact that such an amendment is being considered does not automatically mean that the guidelines did not give "adequate consideration" to the difference between escape from secure v. non-secure institution. -- This case not "sufficiently atypical" to warrant departure from guideline range.

United States v. Uca, 867 F.2d 783 (3d Cir. 1989). Upward departure reversed. Interstate sale of firearms. -- Departure impermissible because based on factors adequately considered in guideline. -- Interprets §§ 2K2.3, 5K2.0, 5K2.14, 18 U.S.C. § 3553(b).

United States v. Ryan, 866 F. 2d 604 (3d Cir. 1989). Defendant charged with possession of controlled substance with intent to distribute was convicted on lesser included offense of simple possession. His guideline range was 0-6 months. The district court departed upward and imposed a sentence of 10 months imprisonment. The departure was based on the amount, purity, and packaging of the drugs. The Third Circuit affirmed , holding that a district court is permitted to consider evidence on counts on which a defendant is acquitted.

§ 5K2.2 Physical Injury (Policy Statement)

United States v. Kitchen, 2002 WL 31309261 (3rd Cir.(Pa.))). The defendant pled guilty to violating 18 U.S.C. § 1791(a)(2) by possessing a prohibited object at the Allenwood Federal Corrections Complex. He and his co-defendant stabbed another prisoner with a knife ten times. The Court of Appeals ruled that the district court acted within its discretion in awarding an upward departure in light of the significant physical injury inflicted and the dangerous nature and injurious use made of the prohibited object - - considerations otherwise not accounted for in Kitchen's sentence. The district court did not buse its discretion by awarding a three-level upward departure pursuant to U.S.S.G. §§ 5K2.2 and 5K2.6.

United States v. Philiposian, 267 F. 3d 214 (3d Cir. 2001). On January 12, 1999, after contemplating suicide, the defendant picked up his rifle, an AK-47, and loaded it with a double thirty round magazine containing fifty-nine rounds of ammunition. The magazine contained two types of ammunition: full metal jacket ammunition designed for warfare, and jacketed and hollow point bullets designed to expand on contact and cause aggravated wounds. At the same time, a letter carrier for the U.S. Postal Service was delivering mail in the defendant's neighborhood. Instead of shooting himself, the defendant fired two shots at the letter carrier. One bullet hit the carrier in the arm, ripping a four centimeter hole just above her left elbow. The bullet then entered her abdomen and bullet fragments were spread throughout, severing the left lobe of her liver, perforating her duodenum, lacerating her pancreas, and fracturing her ribs. As a result of the injuries, the victim was hospitalized for one month. She underwent four additional surgeries for her arm but has not regained full use of her hand and arm due to extensive nerve damage. Additionally, doctors implanted a steel cylindrical sleeve within her arm to contain the many unrepaired bone fragments. In a letter to the Probation Department, the victim stated that she suffers serious physical pain every day, including pain and indigestion when she eats, serious pain in her arm, as well as the inability to perform daily functions such as cutting food or typing letters.

The defendant argued on appeal that the two level upward departure under U.S.S.G. § 5K2.2, based on the nature of the injuries and pain, was unjustified because these factors were already taken into account by the upward adjustment under U.S.S.G. § 2A2.2(b)(3)(C), which added six levels for causing permanent or life-threatening bodily injury. He contends that the district court erred in concluding that the injury and pain caused by the shooting fell outside the "heartland" or "permanent or life-threatening" injury under § 2A2.2(b)(3)(C). Thus, the defendant argued that the upward departure pursuant to U.S.S.G. § 5K2.2 for the extent of the injuries and extreme physical pain constituted impermissible double counting.

The Court of Appeals affirmed the judgment stating, "Here, the District Court determined that although the victim's injuries were somewhat accounted for in the six level enhancement under U.S.S.G. § 2A2.2(b)(3)(C), her 'permanent injuries accompanied by serious and unremitting pain' were 'above and beyond the typical case contemplated by the six level adjustment and warranted further upward departure.'"

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

United States v. Jarvis, 258 F. 3d 235 (3d Cir. 2001). The defendant pled "guilty" to one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342. He admitted to participating in two separate fraudulent schemes that bilked investors of more than $800,000. The presentence investigation report set the defendant's guideline sentencing range at 24 to 30 months. However, after determining that the defendant caused psychological injury to his victims [U.S.S.G. § 2F1.1, comment. n. 11(c); see also U.S.S.G. § 5K2.3] and knowingly endangered their solvency [U.S.S.G. § 2F1.1, comment. n. 11(f)] , the district judge imposed a five-level upward departure. This increased the defendant's offense level from 20 to 25, which, combined with a criminal history category of II, resulted in a guideline range of 63 to 78 months. The defendant was sentenced to the statutory maximum of 60 months. On appeal, the defendant claims that his conduct did not go beyond the heartland of typical fraud cases, and that the court misapplied the guidelines. The defendant's fraudulent scheme caused several victims to suffer severe emotional trauma. Two victims were prescribed depression medication and had to see a mental health professional in order to deal with their losses. In addition, the defendant divested one victim of her liquid assets, amounting to $45,444, and endangered the insolvency of another. The Court of Appeals noted that actual insolvency is not required and affirmed the district court's decision.

United States v. Helbling, 209 F. 3d 226 (3d Cir. 2000). A federal grand jury returned a thirty-five count indictment charging the defendant with one count of conspiracy to embezzle employee pension plan funds and falsify ERISA documents (18 U.S.C. § 371); four counts of embezzlement of employee pension plan funds from an ERISA covered plan (18 U.S.C. § 664); eighteen counts of falsifying documents required by ERISA (18 U.S.C. § 1027); six counts of wire fraud (18 U.S.C. § 1343); and six counts of mail fraud (18 U.S.C. § 1341). The mail fraud counts were dismissed during trial. The defendant was convicted by jury on the remaining counts.

The jury found that Helbling embezzled funds from a profit sharing plan covered by the Employee Retirement Income Security Act (ERISA) to pay the operating expenses of three failing companies he owned, and engaged two lawyers to help him by creating false documents indicating that the withdrawals had been part of a lawful Employee Stock Ownership Plan (ESOP) conversion.

Helbling contends that the district court erred by increasing his offense level four levels under U.S.S.G. § 3B1.1(a), "Aggravating Role," by increasing his offense level two levels for obstruction of justice, U.S.S. G. § 3C1.1, and by departing upwards two levels for psychological harm, U.S.S.G. § 5K2.3.

Helbling argues that the district court abused its discretion when it departed upward two levels on the basis of extreme psychological damage to the victims because there was insufficient evidence of psychological harm to justify the departure. The Court of Appeals held that the district court's findings were clearly supported by the record. "Helbling caused psychological injury much more serious than would normally result from his type of fraudulent activity. The

government has convincingly detailed the emotional and psychological costs of surviving Helbling's crimes and resisting his harassment. These costs include the humiliation of being forced to seek work at an advanced age and rely on help from family members, the trauma that comes with losing one's savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from the tax authorities.

United States v. Jacobs, 167 F. 3d 792 (3d Cir. 1999). The defendant pled "guilty" to aggravated assault on his former girlfriend on federal property in violation of 18 U.S.C. § 113(a)(3). In his appeal, the defendant asserts that the court erred in upwardly departing five levels and that the court also erred on the degree of the departure due to insufficient findings that Jacobs had inflicted "extreme psychological injury" upon the victim. The Court of Appeals found that the sentencing judge did not make the specific factual findings required for an appropriate departure based on "extreme psychological injury" resulting to the victim from Jacobs' assault, and did not specifically articulate the reasons for the degree of the departure. In accordance with United States v. Kikumura, 918 F. 2d 1084 (3d Cir. 1990), a sentencing judge must engage in the analogic reasoning that is required in arriving at a five level departure, as opposed to some other numerical level of departure. A court invoking the authority of § 5K2.3 must find that a victim suffered psychological injury "much more serious than that normally resulting from the commission of the particular offense" for which the defendant is being sentenced. United States v. Neadle, 72 F. 3d 1104, 1111-12 (3d Cir. 1996) (the record must support a finding that "the victims suffered psychological ... harm, which exceeded that occurring in the heartland of fraud offenses, to such a degree as to justify an upward departure." United States v. Astorri, 923 F. 2d 1052, 1059 (3d Cir. 1991) ("The evidence supports the District Court's findings that the victims suffered much more psychological injury than that normally resulting from the commission of a wire fraud offense.")

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The district court did not err in making a two-level upward departure on the grounds that the appellant, who was convicted of wire fraud and tax evasion, inflicted extreme psychological injury on his victims. In this case, one family lost its life savings and the wife was forced to seek treatment for high blood pressure. Another family lost its life savings and an inheritance. One member of the family, who was already in poor health, "displayed adverse physical and behavioral effects" after the appellant's fraudulent scheme.

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

United States v. Kitchen, 2002 WL 31309261 (3rd Cir.(Pa.))). The defendant pled guilty to violating 18 U.S.C. § 1791(a)(2) by possessing a prohibited object at the Allenwood Federal Corrections Complex. He and his co-defendant stabbed another prisoner with a knife ten times. The Court of Appeals ruled that the district court acted within its discretion in awarding an upward departure in light of the significant physical injury inflicted and the dangerous nature and injurious use made of the prohibited object - - considerations otherwise not accounted for in Kitchen's sentence. The district court did not buse its discretion by awarding a three-level upward departure pursuant to U.S.S.G. §§ 5K2.2 and 5K2.6.

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

United States v. Kemmerer, 2003 WL 980620 (3rd Cir.(Pa.))). In this case, the Court of Appeals held that, considering that the defendant's improper and illegal conduct as a federal correctional officer certainly made possible the "disruption of a governmental function, the district court's upward departure was appropriate.

United States v. Baird, 109 F. 3d 856 (3d Cir. 1997). Defendant was one of a squad of corrupt police officers who caused false prosecutions and stole money and property. The government sought a downward departure for cooperation under §5K1.1, but the district court departed upward from 108 months to 156 months under §5K2.7 based on disruption of government services. The court said it would have imposed an even greater sentence but for defendant's cooperation. The Third Circuit affirmed, finding the disruption of government activities sufficiently exceptional to justify an upward departure. Victims of the corruption lodged numerous civil suits against the police department and the city, and settlements cost the city large sums of money. The district attorney's office was forced to review prosecutions arising from the squad activities, resulting in the release from prison of a number of innocent parties, and setting aside more than 150 convictions.

United States v. Riviere, 924 F.2d 1297 (3d Cir. 1991). The district court erred in making an upward departure for appellant's conviction of assaulting a federal officer based on disruption of governmental function. According to the circuit court, "[a]ssault of a federal marshal inherently disrupts a governmental function because it interferes with the marshal's performance of his or her duties; thus, the disruption of the marshal's ordinary activity 'would have to be quite serious to warrant departure from the guidelines.'" The disruption in this case is not of the nature or kind for which the Commission intended an upward departure.

§ 5K2.8 Extreme Conduct (Policy Statement)

United States v. Queensborough 227 F.3d 149 (3d Cir. 2000). The defendant and a juvenile accomplice accosted a man and a woman who were staying at a campground at a National Park in the Virgin Islands. They robbed the campers; then forced them to an isolated area. The defendant held a gun to the woman's head, raped her, made her perform oral sex, and raped her again. His accomplice also raped the woman at gunpoint and forced her to perform oral sex. They then ordered the couple to have sex with each other while the defendant and his accomplice watched. Throughout the ordeal, they threatened the two victims with death at gunpoint. The total offense level for the aggravated rape was 32 and the guideline range for that count was 121 to 151 months. After hearing from the parties, the district court sentenced the defendant on the aggravated rape count to 20 years, which represented a substantial upward departure. On the firearm count, the court sentenced the defendant to a consecutive term of 60 months. On appeal, the defendant argued that the district court failed to give him notice of its intent to upwardly depart from the sentencing guidelines and failed to identify with specificity the grounds for said departure. The government argued that the defendant was given advance notice that satisfied *Burns* because the ground for departure on which the court relied was

"identified as ... ground[s] for upward departure ... in the presentence report." Paragraph 92 of the PSR read, "According to U.S.S.G. § 2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, See § 5K2.8 (Extreme Conduct).' The Court of Appeals agreed that the PSR gave the required notice that a departure could be warranted and that it could be on the basis of extreme conduct, a conclusion supported by the PSR's reference to § 5K2.8 and extreme conduct in its quotation of the application note.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). A federal grand jury returned an indictment charging the defendant with premeditated murder of his wife by stabbing her repeatedly with a butcher knife. On the eve of trial, the government and the defendant agreed that he would plead guilty to second degree murder. At the time of the murder, the couple lived in Lewisburg, Pennsylvania, where she worked as a psychologist at the United States Penitentiary. On appeal, the defendant challenged the nine level upward departure pursuant to § 5K2.8. That section authorizes an upward departure "if the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim." The departure increased the adjusted guideline range from 108-135 months to 292-365 months. The top-of-the-range 365 month sentence actually imposed is 213.5 months greater than the median of the range for base second degree murder (135-168 months). The defendant contends that the district court failed to prove by clear and convincing evidence that his conduct was unusually heinous, cruel, brutal, or degrading to the victim. The Court of Appeals found this argument unconvincing. Paster next argued that the district court erred by enhancing his sentence for extreme conduct because the Sentencing Commission regarded second degree murder, per se, as unusually heinous, cruel, and brutal and established guidelines that adequately punish perpetrators on that assumption. The Court of Appeals was satisfied that the district court exercised appropriate discretion in determining that Paster's conduct was sufficiently more heinous than conduct that constitutes the so-called "heartland" of second degree murders. The judge specifically noted, for example, that Paster stabbed his wife 16 times with a butcher knife, that eight or nine of the wounds penetrated the heart area, that ten of the wounds were immediately life-threatening, and that Paster also inflicted eleven incisive wounds. The Court of Appeals held that the district court did not abuse its discretion in deciding to depart for extreme conduct. Finally, the defendant argued that the nine level upward departure , which increased by more than 17 years the applicable median sentence, was unreasonable. The Court of Appeals agreed, stating "The vice of the nine level upward departure is that the defendant has incurred for second degree murder a sentence that would be appropriate for first degree murder adjusted two levels for acceptance of responsibility....This lack of disparity between Paster's actual sentence and one he could have received had he pleaded guilty to, or been convicted of, a more serious crime distorts proportionality, a critical objective of the Sentencing Guidelines.

§ 5K2.9 Criminal Purpose (Policy Statement)

United States v. Cherry, 10 F. 3d 1003 (3d Cir. 1993). After being identified as a prime suspect in the murder of a police officer, defendant fled to Cuba. When he returned to the United States 20 years later, he pled guilty to unlawful flight to avoid prosecution. The district court departed upward by two levels pursuant to §5K2.9 on the grounds that defendant's unlawful flight was committed for the purposes of facilitating or concealing the underlying crime of murder. The Third Circuit concluded that this was error, since the undisputed facts revealed that defendant's unlawful flight did not facilitate or conceal the murder. He admittedly fled to avoid being charged, prosecuted or punished for the murder, but his conduct was not similar to the type of conduct under which other courts have departed upward under §5K2.9.

§ 5K2.10 Victim's Conduct (Policy Statement)

U.S. v. Mussayek, 2003 WL 21805625 (3rd Cir. (NJ)). In 1979, the defendant, an Israeli immigrant, settled in Brooklyn. He reportedly was defrauded by Ike Fogel and Phillip Ben Jacob in separate scams. In order to recoup his losses, the defendant and Joseph Aharanoff enlisted two undercover agents to extort money from Fogel and Jacob. Trial testimony indicated that the defendant directed the agents to break the legs of Fogel and Jacob or kill them. Further, the defendant was prepared to kidnap Fogel's daughter to obtain $1 million from him. On one occasion, Aharanoff traveled to Israel where he was met by Mussayek in an effort to locate Fogel. Aharanoff and an agent were en route to Israel to "complete Mussayek's mission" when they were stopped at JFK Airport.

The defendant was convicted after a jury trial of Conspiracy to Commit Extortion and Interstate Travel in Aid of Racketeering. He subsequently appealed three aspects of the guideline computations. He first argued that an enhancement for "an express or implied threat of death, bodily injury, or kidnapping" was not applicable because the threat had not been communicated to the victim. The Court of Appeals found no reason to limit the meaning of the term "threat" as used in § 2B3.2(b)(1) to contemplate only statements communicated to an intended victim and affirmed the enhancement.

Mussayek's also asserted that the District Court erred by finding that the conspiracy involved the "preparation to carry out a threat of ...serious bodily injury," or otherwise demonstrated the ability to carry out such a threat." He argued that the "preparation" would not have resulted in any actual extortion because it was part of a sting operation. The Court of Appeals concluded that the ultimate success of a scheme has no bearing on whether the enhancement is applicable.

The defendant's final sentencing argument was that a downward departure was warranted pursuant to § 5K2.10 because the victims provoked the offense. The Court of Appeals concluded that there was not sufficient evidence of provocation and that the defendant's behavior was "grossly disproportionate to any provocation" on the part of the victims.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). A federal grand jury returned an indictment charging the defendant with premeditated murder of his wife by stabbing her repeatedly with a butcher knife. On the eve of trial, the government and the defendant agreed that he would plead guilty to second degree murder. At the time of the murder, the couple lived in Lewisburg, Pennsylvania, where she worked as a psychologist at the United States Penitentiary. The defendant argued that the district court erred by denying his motion for a downward departure pursuant to § 5K2.10 of the guidelines. He argued that his wife's revelation of past infidelity exposed wrongful conduct and was the sole provocation for the fatal stabbing. By its terms, § 5K2.10 hinges a departure on two criteria: 1) the victim must have committed "wrongful conduct;" 2) and such conduct must have "contributed significantly to provoking the offense behavior." The policy statement sets forth five factors the court should consider in granting a sentence reduction. By delineating these factors, the guidelines contemplates departures where the victim's conduct posed actual, or reasonably perceived, danger to the defendant, with emphasis on physical danger. Generally, only violent conduct, albeit wrongful, justifies a downward departure. The district court denied a § 5K2.10 departure because there was no danger or reasonable perception of danger to the defendant. In affirming the district court's decision, the Court of Appeals held that "even if Margaret's conduct, as revealed moments before the attack, were wrongful within the meaning of § 5K2.10, Paster's response was grossly disproportionate to any provocation."

Koon v. United States, 116 S. Ct. 2035 (1996). In sentencing the police officers who were convicted of beating Rodney King, the district court departed downward for victim misconduct under USSG §5K2.10. The Supreme Court found no abuse of discretion, noting that victim misconduct is an encouraged basis for departure under 5K2.10. The departure was justified because the punishment prescribed by the civil rights guideline, 2A2.2 contemplates unprovoked assaults, not cases like the present one, where what began as legitimate force in response to provocation became excessive force.

§ 5K2.12 Coercion and Duress (Policy Statement)

United States v. Parra, 2002 WL 405746 (3rd Cir.(N.J.))). The defendant argued on appeal that the district court misapplied the duress guideline, U.S.S.G. § 5K2.12. The Court of Appeals found that the district court did not misapply or fail to understand the guideline. Rather, having developed an ample record and surveyed the situation, the district court exercised its discretion not to depart.

United States v. Cheape, 889 F.2d 477 (3d Cir. 1989). Defendant was convicted of bank robbery. Defendant raised the defense of coercion and duress at trial based on the fact that a codefendant put a gun to her head at one point and that she was unduly influenced by her relationship to the other defendant. Defendant's car was used in the offense, but she sat in back seat and did not leave car during robbery. The district court wanted to depart, but was of the opinion that the jury's rejection of the defendant's coercion and duress defense precluded downward departure on this basis. The circuit court reversed, holding that "we must read [§ 5K2.12] as providing a broader standard of coercion as a sentencing factor than coercion as

required to prove a complete defense at trial." If defendant proves coercion as used in § 5K2.12 by a preponderance of the evidence, then the district court is empowered to depart.

§ 5K2.13 Diminished Capacity (Policy Statement)

United States v. Overton, 2003 WL 179798 (3rd Cir.(Pa.))). Joseph Overton pled guilty to bank robbery and escape in violation of 18 U.S.C. §§ 2113(a) and 751(a). He moved for a downward departure under both U.S.S.G. § 5K2.0 and § 5K2.13. The defendant argued on appeal that the district court failed to rule on his § 5K2.0 motion. He asserted that a departure under § 5K2.0 was appropriate because his mental illness was so exceptional and severe.

After the district court expressly acknowledged its authority to depart, it used its discretion to deny the downward departure. The district court stated that it recognized Overton's mental health issues and had reviewed a doctor's report, but was still of the opinion that a departure was not warranted. This encompassed not only its reasoning on the diminished capacity ground but also the § 5K2.0 ground. The judgment of the district court was affirmed.

United States v. Wogan, Jr., Nos. 00-2308 and 00-2309 (3d Cir., filed Dec. 27, 2000). The defendant pled guilty to mail theft and with committing the offense while on release. He was sentenced to 33 months imprisonment. The defendant appealed on the ground that the district court abused its discretion in failing to award a downward departure based upon diminished capacity. Prior to sentencing and at defendant's request, the district court appointed a psychologist to evaluate the defendant. The psychologist submitted a comprehensive report, concluding that the defendant suffered from attention deficit disorder without hyperactivity as well as alcohol abuse and psychoactive substance abuse. At the time of sentencing, the court noted the defendant's extensive criminal history and that an upward departure may be appropriate. However, the court concluded that taking into account the defendant's psychological problems, a sentence within the guideline range was appropriate. The Court of Appeals dismissed the appeal, indicating that the defendant's reliance on *United States v. McBroom*, 124 F. 3d 533 (3d Cir. 1997) was misplaced. The colloquy between the court and defense counsel, and the court's explanation of its sentence, made it clear that the court had no doubt about its power to depart downward; it simply exercised its discretion not to depart downward.

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). Francis Vitale pled "guilty" to one count of wire fraud and one count of tax evasion. The charges stemmed from his embezzlement of approximately $12 million from his employer. On appeal, the defendant contended that the district court erroneously believed it lacked the authority to grant a downward departure based on his diminished mental capacity, in particular, his compulsion to purchase antique clocks. The appellate court affirmed the district court's decision. In its analysis, the district court noted that disorders such as gambling and intoxication do not ordinarily warrant a diminished capacity reduction. The court also noted the length of time and sophistication of Vitale's criminal activities, and commented that Vitale did not use his personal money but only money obtained from his employer to feed his clock compulsion.

United States v. Askari, No. 95-1662 (3d Cir. Nov. 5, 1998). This opinion was prompted by an unusual concatenation of circumstances: (1) the United States Sentencing Commission adopted an amendment to the Sentencing Guidelines rendering more flexible the circumstances under which a sentencing court can make a downward departure when a defendant convicted of certain kinds of offenses has been shown to possess significantly reduced mental capacity at the time of the offense; (2) the court of appeals, sitting *en banc*, filed an opinion one day before adoption of the Guideline amendment rejecting the interpretation that the Guideline amendment suddenly recognized; and (3) because the amendment is a "clarifying" amendment, which applies to pending cases, it becomes possible that the defendant, who sought relief and who clearly had significantly reduced mental capacity at the time of the instant offense, could receive a lesser sentence than that which the district court imposed and which the *en banc* court of appeals affirmed. The case is now remanded to the district court so that it may reconsider the sentence in light of the Guidelines amendment. The court of appeals noted that two fact finding issues remain in the wake of the amendment: (1) whether Askari's offense involved "actual violence or a serious threat of violence;" and (2) whether Askari's criminal history indicates "a need to incarcerate the defendant or protect the public."

United States v. Askari, 140 F. 3d 536 (3d Cir. 1998). The issue on appeal before the en banc court is the continuing validity of the court's opinion in *United States v. Rosen*, 896 F. 2d 789 (3d Cir. 1990), addressing § 5K2.13 which permits a downward departure based on diminished capacity where the crime is nonviolent. Askari was convicted of bank robbery in violation of 18 U.S.C. § 2113(a). The en banc court held "Although our initial view in *Rosen* was a reasoned interpretation that now represents the view of most courts of appeals, we now believe the analysis of the relationship between § 5K2.13 and § 4B1.2 articulated by the dissent in *Poff*, 926 F. 2d 588, 591 (7th Cir. 1990) and later developed in *Chatman*, 986 F. 2d 1446, 1450 (D.C. Cir. 1993) and *Weddle*, 30 F. 3d 532, 540 (4th Cir. 1994) is more convincing.... The content of the phrase 'non-violent offense,' as used in § 5K2.13 should not be determined by reference to the definition of the phrase 'crime of violence' in § 4B1.2." Departures under § 5K2.13 exclude conduct that involves actual force, threat of force, or intimidation, the latter two measured under a reasonable person standard. Therefore, "non-violent offenses" under § 5K2.13 are those which do not involve a reasonable perception that force against persons may be used in committing the offense." If the elements of the crime require a finding of violent conduct, then a valid conviction could hardly permit a sentence based on a finding of non-violent conduct. So long as the bank robbery victim has been threatened with harm, and is seen to have been threatened under an objective standard (reasonable person), the defendant cannot be found to have acted in a non-violent manner.

Nonetheless, it may be argued that conduct may be violent (as defined by statute) but still warrant a more lenient sentence if committed by a defendant with diminished mental capacity who is not dangerous to the public (as defined by his criminal history). This may be so, especially where violence is threatened, but the threat is not realized. To put it differently, does the term "non-violent offense" in § 5K2.13 include acts resulting in valid convictions under 18 U.S.C. § 2113(a) where the threat of violence was never carried out? Under the current guidelines, "we think the answer is yes."

Askari did not commit a non-violent offense and therefore could not qualify for a downward departure under § 5K2.13.

United States v. McBroom, 124 F. 3d 533 (3d Cir. 1997). Section 5K2.13 permits a downward departure for a significantly reduced mental capacity if the offense of conviction is a non-violent offense. The Third Circuit held that possession of child pornography is a non-violent offense. Under *U.S. v. Rosen*, 896 F. 2d 789 (3d Cir. 1997), the definition of crime of violence in §4B1.2 governs the meaning of non-violent offense. In reversing the district court's denial of a downward departure, the Third Circuit held that a person may be suffering from a "reduced mental capacity" for purposes of USSG §5K2.13 if either: (1) the person is unable to absorb information in the usual way or to exercise the power of reason; or (2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law. The first prong permits sentencing courts to consider defects of cognition. The second prong permits sentencing courts to consider defects of volition. Sentencing courts must consider both prongs before making a determination about a defendant's "reduced mental capacity."

A mere reduction in mental capacity is not sufficient to warrant a departure; §5K2.13 requires that the reduced mental capacity be "significant" before a downward departure may be considered. Likewise, a departure, if granted, should reflect the extent to which the offender's reduced mental capacity contributed to the commission of the offense. A departure may not be granted where the offense is not non-violent, and a departure is not warranted when defendant's criminal history indicates a need for incarceration to protect the public. In addition, the reduction in mental capacity may not be the result of defendant's voluntary use of drugs or other intoxicants. District courts retain their discretion to deny a downward departure even when a defendant does satisfy his burden.

The Third Circuit noted that defendant's average or above-average mental capacity in one aspect of his or her affairs is not necessarily relevant to a determination about defendant's mental capacity in another aspect. The fact that defendant may have been proficient on the Internet does not necessarily indicate that he was not compelled by reduced mental capacity to use that proficiency to obtain child pornography.

United States v. Rosen, 896 F.2d 789 (3d Cir. 1990). Defendant, convicted of making extortionate threats, could not receive a departure under §5K2.13 on theory that he was compulsive gambler because extortion was not a non-violent offense. "Non-violent offense," as used in USSG §5K2.13 means the opposite of "crime of violence" as used in USSG §4B1.2.

§ 5K2.14 Public Welfare (Policy Statement)

United States v. Tsai, 954 F. 2d 155 (3d Cir. 1992). Defendant was convicted of conspiring to export to Taiwan certain components of military equipment without the required export license. The district court departed upward from level 24 in §2M5.2 to level 29, based on the threat to national security and the large quantity of commerce involved. The Third Circuit reversed, holding that the case clearly fell within the heartland of cases considered by the sentencing commission. Application note 2 to §2M5.2 indicates that the guideline assumes some threat to national security. Although level 29 is the offense level for unauthorized disclosure of top secret information, where a guideline already contemplates the potential harm of a crime, the court cannot depart upward by analogy to another crime involving the same potential harm. Under application note 2, the amount of commerce would have to be extreme to justify an upward departure. Although defendant requested a price for 5,000 units of the equipment, only 11 units were ever exported, and there was no evidence that defendant's organization was capable of exporting any greater quantity.

United States v. Kikumura, 918 F. 2d 1084 (3d Cir. 1990). Defendant, a member of a violent terrorist organization, was arrested transporting homemade bombs which he intended to detonate in a federal building in New York City. The district court departed upward from 33 months to 30 years. Since defendant intended to use his bombs to kill people, an analogy to the attempted murder guideline, carrying a base offense level of 20, could be made. The district court could assume that defendant intended to detonate his bomb when at least six people were present, justifying a five-level upward adjustment. The district court also could reasonably have imposed a two-level increase for more than minimal planning. However, the court found that intent to disrupt a government function was an inappropriate ground for departure. Defendant's actions were intended to influence the government's terrorist policies with respect to Libya, which was "indistinguishable from the motivation underlying ordinary civil disobedience designed to change government policy." A departure of five levels could also be properly based on defendant's extreme conduct and threat to public safety. Adding all of these factors together, defendant's conduct could be analogized to a defendant with an offense level of 32. Based on a criminal history category of VI, the resulting range would be 210 to 262 months. Therefore, the district court's sentence of 360 months was unreasonable.

United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990). Three defendants were convicted of conspiring to receive and barter stolen property. The court departed upward for all defendants on the basis of risk of harm to the public during a high speed chase, the "magnitude of the thievery" and the close relationship of the defendants to the sophisticated burglars who took the valuable antiques. The "magnitude of the thievery" was accounted for in USSG §2B1.2 by the loss table and was an impermissible basis for departure. The close relationship between the defendants and the sophisticated thieves is a necessary ingredient of all offenses under USSG §2B1.2 and, therefore, is accounted for in that guideline, providing no basis for departure. The significant risk of injury posed by the high-speed chase in downtown Tampa was not adequately accounted for in the applicable guideline, and was a permissible basis for departure pursuant to USSG §5K2.14 so long as high speed flight was "reasonably foreseeable" to each defendant. As

to defendant Durish, it was not reasonably foreseeable that his co-defendants would engage in dangerous high speed flight. He was not in vehicle and was acting as lookout.

United States v. Uca, 867 F. 2d 783 (3d Cir. 1988). In a case involving a conspiracy to commit firearms offenses, the district court made an upward departure, based in part upon the threat to public welfare caused by untraceable handguns. The Third Circuit reversed stating that whenever firearms are involved, public safety is a consideration. However, §5K2.14 clearly states that departures on public safety are warranted only when the danger posed is to a degree substantially in excess of that which is ordinarily involved.

§ 5K2.17 High-Capacity, Semiautomatic Firearms (Policy Statement)

United States v. Philiposian, 267 F. 3d 214 (3rd Cir. 2001). On January 12, 1999, after contemplating suicide, the defendant picked up his rifle, an AK-47, and loaded it with a double thirty round magazine containing fifty-nine rounds of ammunition. The magazine contained two types of ammunition: full metal jacket ammunition designed for warfare, and jacketed and hollow point bullets designed to expand on contact and cause aggravated wounds. At the same time, a letter carrier for the U.S. Postal Service was delivering mail in the defendant's neighborhood. Instead of shooting himself, the defendant fired two shots at the letter carrier. One bullet hit the carrier in the arm, ripping a four centimeter hole just above her left elbow. The bullet then entered her abdomen and bullet fragments were spread throughout, severing the left lobe of her liver, perforating her duodenum, lacerating her pancreas, and fracturing her ribs. As a result of the injuries, the victim was hospitalized for one month. She underwent four additional surgeries for her arm but has not regained full use of her hand and arm due to extensive nerve damage. Additionally, doctors implanted a steel cylindrical sleeve within her arm to contain the many unrepaired bone fragments. In a letter to the Probation Department, the victim stated that she suffers serious physical pain every day, including pain and indigestion when she eats, serious pain in her arm, as well as the inability to perform daily functions such as cutting food or typing letters.

The first argument advanced on appeal by the defendant is that the two level upward departure for use of a high-capacity semiautomatic weapon under U.S.S.G. § 5K2.17 was unjustified because only two shots were fired, and thus the high-capacity nature of the weapon did not in this particular case increase the likelihood of death or injury. Th Court of Appeals, in affirming the judgment, held that the defendant's argument that § 5K2.17 was intended to apply solely to circumstances in which the weapon was used to fire a significantly large number of shots without reloading is contrary to the plain meaning of the Guideline. Section 5K2.17 applies if the defendant merely "possessed" a high-capacity semiautomatic firearm. There is no requirement that the defendant "use" that firearm to its full capacity. There is no requirement that the weapon even be fired. After finding that a defendant possessed a high-capacity, semiautomatic weapon, a district court must exercise its discretion in deciding the extent of the applicable upward departure. The amount of the increase depends on the degree to which the nature of the weapon increased the likelihood of death or injury.

§ 5K2.19 Post-Sentencing Rehabilitative Efforts (Policy Statement)

United States v. Lloyd, 469 F.3d 319 (3d Cir. 2006). The defendant was convicted of a narcotics trafficking conspiracy. Following remand for resentencing in light of *United States v. Booker*, the district court imposed the same sentence, at the bottom of the guidelines range. He appealed, arguing that the district court erred in failing to consider his post-sentence rehabilitation efforts. The Court of Appeals noted that "though U.S.S.G. § 5K2.19, as part of the guidelines as a whole, is now advisory, it would be an unusual case in which a defendant's post-sentence rehabilitation efforts following a *Booker* remand should impact on the sentence. The Court of Appeals was careful to state that it would not hold that a court never could consider a defendant's post-sentencing rehabilitation efforts when resentencing. It reiterated its view that a court, except in unusual circumstances should consider only conduct and circumstances in existence at the time of the original sentencing when it resentences following a *Booker* remand. After all, an approach permitting a defendant's post-sentencing rehabilitation efforts to impact on a resentence "would unfairly disadvantage defendants who were ineligible for re-sentencing and therefore had no opportunity to bring their rehabilitative efforts before the sentencing court. *United States v. Hertzog*, 186 Fed. Appx. 314,317 (3d Cir. 2006).

United States v. Rodriguez, 2004 WL 1894126 (3rd Cir.(N.J.))). The defendant was arrested at Newark International Airport when nearly three kilograms of heroin were discovered in suitcases she had brought into the United States from Panama. At the time, the defendant was 18 years old. She subsequently pleaded guilty to importation of heroin in violation of 21 U.S.C. §§ 952(a) and 960(b)(1)(A), a class A felony with a mandatory minimum sentence of ten years imprisonment. Because the defendant was eligible for the "safety valve" provisions under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a), the district court was permitted to impose a sentence below the statutory minimum. Her guideline custody range was 46 to 57 months, which included adjustments for minor role and acceptance of responsibility. The district court granted the defendant's motion for a downward departure based on her youth and her post-offense rehabilitation and imposed a sentence of 13 months to be served at a halfway house.

The government filed an appeal, arguing that the downward departure was erroneously granted and, in the alternative, that the extent of the departure was unreasonable.

This was the defendant's first adult arrest, and she had no prior convictions. During the several months that she spent in pretrial detention, she took a preparatory course for the GED test, volunteered as a bilingual interpreter, taught fellow inmates to read and write in English, and took religious courses. After she was released on bail, she expressed a desire to speak about her experience at her local high school. She also moved back in with her family, obtained a high school equivalency diploma and began taking cosmetology classes.

The defendant's motion for a downward departure was based on age, which is addressed by § 5H1.1 of the guidelines, and post-offense rehabilitation, which the Court of Appeals has recognized as a permissible basis for a departure in *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). She also sought a departure based on a combination of those two considerations, pursuant to § 5K2.0 of the guidelines. The Court of Appeals ruled that neither factor alone rendered her case extraordinary, nor did the two factors, when added together, remove her situation from the heartland of comparable cases. The Court of Appeals commented that the defendant is relatively young, and she has made some commendable efforts at improving herself as a result of the offense, but she is not substantially distinguishable from many other criminal defendants who commit similar offenses. Thus, no departure was warranted and the case was remanded for sentencing.

United States v. Mellott, 2002 WL 1885919 (3rd Cir.(Pa..))). The defendant pleaded guilty to conspiracy to distribute cocaine and methamphetamine. Mellot's trial counsel did not file or make any motions for a downward departure at sentencing. However, in his notice of appeal, trial counsel identified a number of reasons why he believed Mellott's sentence was improper. Counsel asserted that the court should have further reduced Mellott's sentence on the basis of his "minor" role in the offense; his post-offense rehabilitation; his physical disability as an amputee; and the fact that his criminal history category overstates the seriousness of his prior convictions.

The Court of Appeals held, "With respect to the suggested downward departure for a minor role in the offense, the record contains no basis for such an evaluation. The record reflects that Mellot, along with several defendants, was a dealer who participated in acquiring the drugs that the defendants distributed in the community. The mere fact that Mellot did not sell cocaine but only methamphetamine does not affect this conclusion. Mellot's claim that the record establishes post-offense rehabilitation, that he has become a better and more responsible person, especially a better and quite responsible parent, which we commend, does not even approach the very high standard required for a downward departure on that ground. Neither does his physical disability as an amputee. We also see no basis for the claim that the criminal history category overstates the seriousness of his prior convictions.

United States v. Yeaman, 248 F.3d 223 (3d Cir. 2001)). The United States appealed the sentences of David Yeaman and Nolan Mendenhall on several counts of mail and wire fraud. The convictions of Yeaman and Mendenhall stemmed from their leasing worthless stocks as assets available to pay insurance claims. When these assets were called upon to pay outstanding medical reinsurance claims, the scheme was uncovered. The Court of Appeals reversed the original sentences of both defendants following a previous government appeal, finding that the district court had failed to apply the Sentencing Guidelines properly. *United States v. Yeaman*, 194 F.3d 442, 465 (3d Cir. 1999). At resentencing, the district court departed downward 17 levels for Yeaman and 16 levels for Mendenhall primarily because both defendants had already completed erroneously lenient sentences. The downward departures resulted in no additional incarceration.

In *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997), the Court of Appeals held that "post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." *Id*. at 81; *see also United States v. Hancock*, 95 F. Supp. 2d 280, 287 (E.D. Pa. 2000) (declining to grant a *Sally* departure based on defendant's post-offense work record, where defendant was a college graduate and held noteworthy employment prior to arrest); *United States v. Kane*, 88 F. Supp. 2d 408, 409 (E.D. Pa. 2000)(noting it is inappropriate to grant a departure where the defendant simply engages in good conduct consistent with pre-offense activities).

The district court did state that the conduct of Yeaman and Mendenhall while in custody was exemplary and reflected a concentrated attitude of rehabilitation and cooperation, and that additional imprisonment would result in disruption of their rehabilitative efforts. However, the only evidence that speaks to rehabilitation at all is Mendenhall's pursuit of counseling. Pursuit of counseling is included as a factor weighing toward proof of acceptance of responsibility under U.S.S.G. § 3E1.1. In concluding that there was no basis for a *Sally* departure in the case of Mendenhall, the Court of Appeals that there was nothing "remarkable" or "exceptional" in his rehabilitation.

Turning to Yeaman, the record made it clear that he learned Spanish, participated in the prison choir, tutored other inmates, and generally behaved as a "model prisoner." The Court of Appeals held that, "while Yeaman's activities, especially the tutoring of fellow inmates, were commendable, they do not support a finding of extraordinary rehabilitation."

It is noted that the most recent version of the Sentencing Guidelines has been amended to forbid expressly downward departures based on post-sentencing rehabilitation.

§ 5K2.20 Aberrant Behavior(Policy Statement)

United States v. Dickerson, 381 F. 3d 251 (3rd Cir. 2004). Robin Dickerson pleaded guilty to importation of more than 100 grams of heroin in violation of 21 U.S.C. §§ 952(a) and 960(b)(2), a Class B felony with a five year mandatory minimum sentence. After acceptance of responsibility, minor role and "safety valve" adjustments, Dickerson's sentencing range was 30 to 37 months. However, the district court granted her motion for a downward departure based on aberrant behavior and Dickerson was placed on five years probation. The district court explained its major reasons for departing, namely, because Dickerson was exploited by those who directed the importation scheme, and because she had accomplished much in her life prior to the offense, as well as following her arrest.

The government appealed the sentence, urging that probation was an illegal sentence, and that the downward departure was erroneously granted. Dickerson disagreed, arguing that her satisfaction of the prerequisites for the safety valve renders her immune to the statutory ban on sentences of probation.

According to one statutory provision, a defendant who is found guilty of a class B felony may not be sentenced to a term of probation. 18 U.S.C. § 3651(a)(1). And, according to another statutory provision, a defendant who is found guilty under 21 U.S.C. § 952 of importing "100 grams or more of a mixture or substance containing...heroin" cannot be placed on probation. 21 U.S.C. § 960(b)(2). The Court of Appeals held that probationary sentences are barred where a defendant is convicted of a class B felony, or of violating 21 U.S.C. § 960(b)(2), notwithstanding eligibility for the safety valve.

The second issue raised by the government's appeal involved challenges to the departure for aberrant behavior. As the Court of Appeals has previously instructed, a sentencing court is required to engage in "two separate and independent inquiries" when considering a departure for aberrant behavior under § 5K2.20. *United States v. Castano-Vasquez*, 266 F.3d 228, 230 (3d Cir. 2001). One inquiry asks "whether the defendant's case is extraordinary," and the other asks "whether his or her conduct constituted aberrant behavior." Under the relevant guideline provisions, the sentencing court is free to address these inquiries in any order it chooses, as long as it considers both questions. In the instant case, the Court of Appeals held that the district court did not make any finding, either explicitly or implicitly, as to the extraordinary nature of Dickerson's case, as compared to other cases involving similar crimes. The Court of Appeals was convinced that Dickerson's case was not extraordinary, and that the district court erred in granting a downward departure for aberrant behavior.

United States v. Lahr, 2002 WL 31447574 (3rd Cir.(Pa.))). The defendant argued that the district court erred in not finding aberrant behavior under U.S.S.G. § 5K2.20. In view of the nature of the offense, including the fact that Lahr discussed the bank robbery with her co-defendant several months before the actual robbery, that the day before the robbery Lahr leased a vehicle which she knew was going to be used in the robbery, that she drove her co-defendant to the bank and acted as a look-out from the car, and that she then returned the car to the rental agency all indicate, as the district court found, that Lahr's conduct was "premeditated before and after the event." She did not meet the definition of aberrant behavior in § 5K2.20.

United States v. Victoria, 2002 WL 206486 (3rd Cir.(Pa.))). Victoria raised the issue of an aberrant behavior departure in his response to the presentence report. The district court refused to depart downward based on aberrant behavior. Victoria contends this matter should be remanded for resentencing so the district court can consider "aberrant behavior" under U.S.S.G. § 5K2.20, which went into effect on November 1, 2000. When the district court sentenced Victoria on July 21, 2000, it considered the issue of aberrant behavior before denying the defendant's request for a downward departure. But the district court did not consider whether Victoria's actions constituted "aberrant behavior" under § 5K2.20 because that section had not yet taken effect. The Court of Appeals has held that "§ 5K2.20 was a substantive change to the Sentencing Guidelines and cannot be applied retroactively." *United States v. Spinello*, 265 F. 3d 150, 162 (3d Cir. 2001). As a result, § 5K2.20 is inapplicable here and Victoria's argument is meritless.

United States v. Spinello, 265 F.3d 150 (3rd Cir.2001). On appeal, the defendant argued that the district court's reliance on the legal standard enunciated in *United States v. Marcello*, 13 F. 3d 752, 761 (3d Cir. 1994), in its denial of his motion for a downward departure based on "aberrant behavior," was erroneous. Under *Marcello*, aberrant behavior "must involve a lack of planning, it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first time offender." At sentencing, Spinello recognized that *Marcello* was circuit precedent which the district court was obliged to apply. However, effective November 1, 2000, subsequent to his sentencing, the Sentencing Commission amended the Guidelines via Amendment 603 to add § 5K2.20, which defines "aberrant behavior" in a manner different from *Marcello*, to wit: "'Aberrant behavior' means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." Spinello seeks a remand to give the district court the opportunity to consider § 5K2.20 and, hopefully, to resentence him to a lower term.

The remand which Spinello seeks as a result of the conflict between *Marcello* and § 5K2.20 is only possible if that guideline section can be applied retroactively. Because § 5K2.20 is not listed in § 1B1.10(c) for automatic retroactive application, the question is whether § 5K2.20 is a mere "clarification" of the law that merits retroactive application to a defendant on direct appeal or a "substantive change" to the Guidelines that does not. See *United States v. Marmolejos*, 140 F. 3d 488, 491 (3d Cir. 1998); see also U.S.S.G. § 1B1.11(b)(2) (The court shall consider subsequent amendments to the extent that such amendments are clarifying rather than substantive changes.). The Third Circuit concluded that Amendment 603, which added § 5K2.20, was a substantive change to the Guidelines rather than a mere clarification of the Guidelines, and cannot be applied retroactively to Spinello.

United States v. Castano-Vasquez, 266 F.3d 228 (3rd Cir. 2001). The defendant arrived at Newark International Airport on a flight from Bogota, Colombia. Agents searched a piece of luggage which the defendant had claimed and had given consent to search. The search revealed a false bottom, and further searching revealed a white powdery substance that tested positive for heroin. Subsequent lab analysis indicated that the net weight of the heroin was 985.5 grams. The defendant eventually pled "guilty" to knowingly and intentionally importing more than 100 grams of heroin . At sentencing, he moved for a downward departure under § 5K2.20, which permits a departure "in an extraordinary case" on the basis of the defendant's "aberrant behavior." The application notes to § 5K2.20 list three definitional characteristics of the behavior a defendant must meet before an aberrant behavior departure can even be considered and then lists five factors that a sentencing court may consider in determining if the case is extraordinary and a departure is warranted. The district court determined that the defendant met the three definitional characteristics but that his case was not extraordinary and, without referring to each of the five factors, denied the departure.

On appeal, the defendant argued that, in denying the departure, the court misread the guideline by failing to consider each of the enumerated factors. The Court of Appeals affirmed the judgment, stating "We conclude that the most natural reading of § 5K2.20, in the context of the Guidelines as a whole, requires a sentencing court to address two separate and independent inquiries: whether the defendant's case is extraordinary and whether his or her conduct constituted aberrant behavior. If the defendant cannot satisfy either of these two inquiries, then, of course, no departure would be warranted. Further, in determining whether a particular case is extraordinary, we hold that a sentencing court may, but is not obligated to, consider the five factors delineated in Application Note 2 of § 5K2.20. Because the district court here expressly considered two of the factors and certainly heard defense counsel's arguments as to all five, we conclude that the court properly exercised its discretion in denying the departure." It is noted that while a district court is statutorily obligated to "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. § 3553(c), it is not similarly obligated to explain its refusal to depart downwards, *United States v. Georgiadis*, 933 F. 2d 1219, 1222-23 (3d Cir. 1991).

§ 5K3.1 Early Disposition Programs (Policy Statement)

United States v. Villar, 2007 WL 1121737 (3rd Cir.(Virgin Islands)). At sentencing, the defendant sought adjustment of his sentence under the "fast track" section of 5K3.1. The district court imposed sentence without expressly addressing that requested adjustment. There is no early disposition or "fast track" program in the Virgin Islands. On appeal, the defendant argued that "fast track" departures in some districts but not others creates a sentencing disparity between similarly situated defendants that the district court should have considered pursuant to 18 U.S.C. § 3553(a)(6). The Court of Appeals, citing *United States v. Marcial-Santiago*, 447 F. 3d 715, 718 (9th Cir. 2006), affirmed the sentence, holding that "it is clear that the disparity Villar complains of has been sanctioned by Congress and a sentencing court is therefore not required to mitigate it when fashioning an appropriate sentence under 18 U.S.C. § 3553(a)."

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Burden of Proof

United States v. Kikumura, 947 F. 2d 72 (3d Cir. 1991). In *U.S. v. Kikumura*, 918 F. 2d 1084 (3d Cir. 1990)(*Kikumura I*), the Third Circuit held that (1) factual findings supporting an extreme departure must be proven by at least clear and convincing evidence, and (2) hearsay statements cannot be considered at sentencing unless other evidence demonstrates that they are reasonably trustworthy. The court assumed without deciding that the clear and convincing standard was sufficient because defendant did not ask for a higher standard of proof. In defendant's second appeal, the Third Circuit refused to reconsider these issues. Defendant could not "continue to litigate questions already decided by this court in a prior proceeding." The court's observation in *Kikumura I* that it might require a more demanding standard of proof at some later date" was not an invitation to bring a second appeal. Similarly, the court refused to consider defendant's claim that hearsay may only be admitted if it satisfies the Confrontation

Clause. This argument was rejected in *Kikumura I*, and was precluded by the law of the case.

United States v. McDowell, 888 F.2d 285 (3d Cir. 1989). The standard of proof is a preponderance of the evidence and the "burden of ultimate persuasion should rest upon the party attempting to adjust the sentence." The court specifically did not address the burden of proof "in cases where a sentencing adjustment constitutes more than a simple enhancement but a new separate offense."

Part A -- Sentencing Procedures

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

United States v.Reynoso, 254 F. 3d 467 (3d Cir.2001). The defendant pled guilty to conspiracy to distribute cocaine and to possession of cocaine with intent to distribute. Without affording pre-hearing notice to either the defendant or the government, the district court appears to have sentenced the defendant based in part on information that it learned during an earlier criminal trial in which the defendant was not involved. Some of the information which the court relied was not contained in either the presentence investigation report or the government's sentencing memorandum, nor was it brought out through the defendant's testimony at the sentencing hearing. The Court of Appeals held that "before a sentencing court may rely on testimonial or other evidence from an earlier proceeding, it must afford fair notice to both defense counsel and the government that it plans to do so. The court must identify the specific evidence upon which it expects to rely and the purposes for which it intends to consider the evidence, and the notice must be provided sufficiently in advance so as to ensure that counsel for both sides have a realistic opportunity to obtain and review the relevant transcripts and to prepare a response thereto."

United States v. Nappi, 243 F. 3d 758 (3d Cir.2001). The defendant pled "guilty" to possession of a firearm by a convicted felon. He challenged his sentence on appeal, claiming that it was improperly predicated on factual information contained in a state presentence report that was not presented to him or his attorney prior to, or during, the sentencing hearing, and on which he had no opportunity to comment prior to the district court's imposing sentence. He argued that Federal Rule of Criminal Procedure 32(c)(1) required the district court to provide him with the state PSI prior to the sentencing hearing so as to afford him a meaningful opportunity to comment on the information contained therein before the Court imposed its sentence. The Court of Appeals stated, "We recognize, of course, that the 'sentencing judge may attend to more than the PSI when making sentencing decisions,' *United States v. Pandiello*, 184 F.3d 682, 686 (7th Cir. 1999), and our holding today does not foreclose a sentencing court's reliance upon additional documents if it is helpful to do so. Nevertheless, when the district court relies on documents other than the federal PSI at sentencing, we hold that Rule 32(c)(1) requires the district court to share any such documents with counsel for the defendant and the government within a sufficient time prior to the sentencing hearing to afford them a meaningful opportunity to respond. Rule 32(c)(1) also mandates that the court provide counsel with a reasonable opportunity to comment on any such additional information prior to pronouncing its sentence."

U.S. Department of Justice v. Julian, 108 S. Ct. 1606 (1988). The Supreme Court held that a criminal defendant is entitled to obtain a copy of his or her own presentence report under the Freedom of Information Act.

§ 6A1.3 Resolution of Disputed Factors

United States v. Grier, 449 F. 3d 558 (3d Cir. 2006). The defendant pled guilty to possession of a firearm by a convicted felon. At sentencing, the District Court adopted the presentence report, including a finding that the defendant's conduct during the altercation with another individual constituted the felony offense of aggravated assault under Pennsylvania law, and that the offense had been committed in connection with the crime of conviction. This finding resulted in a four-level enhancement in the defendant's offense level, raising it from 23 to 27, *see* U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), and a fifty percent increase in the recommended imprisonment range, raising it from 84 to 105 months to 120 to 150 months. The final guideline range, in light of the statutory maximum sentence of ten years, was 120 months. The sentencing judge granted a two-level downward departure in light of the other individual's conduct, which was partly responsible for the four point enhancement. This resulted in a guideline custody range of 100 to 120 months.

The District Court recognized that the guidelines were advisory and imposed a sentence of imprisonment of 100 months, within the recommended range. It justified this sentence in a single statement: "The Court believes that 100 months is reasonable in view of the considerations of 18 U.S.C. § 3553(a)."

The defendant appealed, arguing that the District Court erred (1) in applying a preponderance standard to facts relevant to the four-level enhancement, rather than beyond a reasonable doubt, (2) in finding that he had committed aggravated assault under Pennsylvania law, and (3) in imposing sentence without fully articulating consideration of the factors set forth in 18 U.S.C. § 3553(a).

The primary issue in this appeal was whether the Due Process Clause requires facts relevant to enhancements under the guidelines, particularly those that constitute a "separate offense" under governing law, to be proved beyond a reasonable doubt.

The Court of Appeals affirmed the District Court's decision to apply the preponderance of evidence standard to all facts relevant to the Guidelines, including the finding that the defendant committed the crime of aggravated assault under Pennsylvania law. It ruled that, "There can be no question, in light of the holding of *Booker* and the reasoning of *Apprendi*, that the right to proof beyond a reasonable doubt does not apply to facts relevant to enhancements under an advisory Guidelines regime. Like the right to a jury trial, the right to proof beyond a reasonable doubt attaches only when the facts at issue have the effect of increasing the maximum punishment to which the defendant is exposed. *Apprendi*, 530 U.S. at 489-94. The advisory Guidelines do not have this effect. They require the district judge to make findings of fact, but none of these alters the judge's final sentencing authority. *Booker*, 543 U.S. at 233, 259. They

merely inform the judge's broad discretion. *Id*.

"The sole legislative restrictions on the judge's sentencing authority post-*Booker* are those found in the United States Code. The Code defines crimes and prescribes maximum sentences. It identifies the facts necessary to establish an offense and any aggravating circumstances ... that increase the maximum punishment. These facts must be established beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. But, once these facts are found, triggering the statutory maximum, the judge may impose a sentence anywhere under the maximum without constitutional qualm.

"... None of the facts relevant to enhancements or departures under the Guidelines can increase the maximum punishment to which the defendant is exposed."

The Court of Appeals then stated its intention to review factual findings relevant to the Guidelines by the "clearly erroneous" standard and to exercise plenary review over a district court's interpretation of the Guidelines. The challenged finding in this case, that the defendant committed aggravated assault, was not clearly erroneous.

The final question was whether the sentence was "reasonable." The touchstone of "reasonableness" is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a). The opinion in *Booker* did not alter the burden of proof or the standard of review for findings of fact relevant to sentencing. But it did, by rendering the Guidelines advisory rather than mandatory, place a premium on a thorough explanation of sentencing decisions. The Court of Appeals held that the explanation offered by the District Court - - "The Court believes that 100 months is reasonable in view of the considerations of § 3553(a)" - - fell short of this goal. "It simply recited the necessity of compliance with 18 U.S.C. § 3553(a) without expressly considering the relevant statutory factors." The Court of Appeals directed that the case be remanded to allow the District Court to reconsider the factors of 18 U.S.C. § 3553(a) on the record and to resentence the defendant.

United States v. Miller, No. 03-1519 (3d Cir. July 29, 2005) the Court, as is its custom, remanded a case for reconsideration under Booker. In Miller, the Third Circuit had affirmed the conviction and sentence before Booker, but on a petition for writ of certiorari the Supreme Court vacated the judgment and remanded for further proceedings in light of Booker.

In directing that the case now be returned to the district court, the Court stated that the guideline range must be treated as advisory. But it added:

We merely note that the District Court is free to engage in precisely the same exercise in judicial fact finding as it did in February 2003, so long as such fact finding is consistent with Booker. Cf. *United States v. Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005) ("The error is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system."). Likewise, nothing in

Booker causes us to retreat from our prior approval of the District Court's interpretation and application of the Guidelines to Miller's case (save, of course, the fact that the Court interpreted and applied the Guidelines as mandatory). Finally, as was true when it conducted its sentencing in February 2003, the District Court is free to use its ordinary discretion in handling the various procedural issues (such as the admission of additional evidence) that may arise.

United States v. Savage, 2006 WL 1276407 (3rd Cir.(Del.))). The defendant pled guilty to nine counts of bank robbery in violation of 18 U.S.C. § 2113(a). He was sentenced to 120 months imprisonment. The presentence investigation report listed a total offense level of 26. In reaching this offense level, the report applied, among other offense level adjustments, a two-level obstruction enhancement pursuant to U.S.S.G. § 3C1.2. At the sentencing hearing, the defendant urged that only facts proved to a jury or admitted by him could be taken into account for sentencing purposes, and he therefore contended that the two-level obstruction adjustment was inappropriate.

The District Court calculated the defendant's total offense level to be 24 and his criminal history category to be VI, resulting in a guidelines imprisonment range of 100 to 125 months. Raising the offense level to 26, the government's proposed offense level, resulted in a guidelines imprisonment range of 120 to 150 months. The District Court, recognizing the overlap in the two possible guidelines ranges, found it unnecessary to resolve the parties' dipute over the obstruction enhancement.

On appeal, the defendant argued that the District Court erred when it considered the guidelines ranges corresponding to both the correct offense level (24) and an incorrect offense level (26) in imposing sentence. The Court of Appeals concluded that it need not reach any of the constitutional questions raised by the defendant's argument. Even if the Court of Appeals accepted each of the defendant's contentions, his sentence would be proper pursuant to the "overlapping guidelines doctrine>" The two ranges considered by the District Court were 100 to 125 months imprisonment (the range advocated by Savage on appeal) and 120 to 150 months imprisonment. The District Court's chosen sentence, 120 months imprisonment, falls within both ranges. A dispute as to which of two overlapping guideline ranges is applicable need not be resolved where the sentence imposed would have been the same under either guideline range.

United States v. Electrodyne Systems Corporation, 147 F. 3d 250 (3rd Cir. 1998). During the taking of a Rule 11 plea, the district court erroneously informed the defendant that the maximum fine on one of the counts was the greatest of $10,000 or twice the gain or twice the loss. The correct statutory maximum fine was the greatest of $500,000 or twice the loss or twice the gain caused by the offense. The district court correctly stated that the maximum fine on another count was $1 million or twice the gain or twice the loss. The defendant was ordered to pay a fine of $1 million. The Court of Appeals concluded that, "when all is said and done, the immutable fact is Electrodyne was advised its maximum fine exposure was $1,010,000, when in fact the maximum fine exposure was $1,500,000. Defendant was fined $1,000,000, an amount below the exposure about which it was informed. Under this circumstance, the error must be characterized as harmless."

United States v. Mitchell, 122 F. 3d 185 (3d Cir. 1997). Defendant pled guilty to drug charges but reserved the right to contest the amount of cocaine for which she was responsible. At sentencing, various government witnesses testified or adopted their testimony at the trial of co-conspirators about drug quantities sold by the defendant. Defense counsel cross-examined the witnesses, but defendant provided no evidence and did not rebut the government's drug quantity evidence. At the close of the hearing, the judge stated that he believed defendant no longer retained a right not to testify because she had pled guilty to the underlying offense. He found the government witnesses credible and told defendant that he held it against her that she did not come forward and explain her side of the story. The Third Circuit held that a defendant who pleads guilty has no 5th Amendment right not to testify during sentencing. Defendant did not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense. Defendant was not asked to testify about offenses outside the scope of her guilty plea.

United States v. Tabares, 86 F. 3d 326 (3d Cir. 1996). The district court sentenced defendant at the top of the applicable guideline range, noting that she had previously been convicted of a drug offense and had not learned from experience, she was less than candid with the probation officer, and she was not remorseful. In fact, defendant had two prior arrests, but no prior convictions. The Third Circuit held that defendant was entitled to be resentenced based on accurate information as to her prior record.

United States v. Salemo, 61 F. 3d 214 (3d Cir. 1995). On three occasions, defendant moved pro se for a continuance of his sentencing date and the court granted the request. On the date of the hearing, defendant requested yet another continuance so that he could change counsel. The district court denied the request, so defendant represented himself at the sentencing hearing. Defendant's attorney was present but did not represent the defendant. The Third Circuit reversed, holding that defendant's Sixth Amendment right to counsel at sentencing was violated. At sentencing, just as at trial, a defendant's waiver of counsel is effective only where the district court has made a "searching inquiry" sufficient to satisfy it that defendant's waiver was understanding and voluntary. Defendant's purported waiver was accepted without such an inquiry and therefore it could not stand.

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). The Third Circuit held that "when the magnitude of a proposed departure dwarfs the guideline range applicable to the substantive offenses of conviction" the facts must be established by at least "clear and convincing" evidence. The appellate court recognized that other circuits have established that guideline sentencing factors need only be proven by a preponderance of the evidence. The court distinguished those cases from the instant case which involved "a twelve-fold, 330-month departure from the median of an applicable guideline range." In the instant case, the appellant was convicted of several explosives and passport offenses. The applicable guideline range was 27-33 months. The district court made an upward departure to a 30-year sentence based on evidence that the appellant had manufactured three lethal homemade fire bombs in preparation for a major terrorist attack in the United States. The appellate court found that the government had met its burden of proof in the case. The circuit court also concluded when courts "depart

upward dramatically from the guideline range," a higher standard of admissibility, beyond "minimal indicium of reliability," was required for hearsay evidence. The circuit court did not "superimpose the jurisprudence of the confrontation clause upon the sentencing phase," but did determine that these "dramatic" departures needed a new "intermediate" standard of admissibility. The district court "should examine the totality of the circumstances, including other corroborating evidence and determine whether the hearsay declarations are reasonably trustworthy." The appellate court found that there was sufficient corroboration of the hearsay evidence at trial to meet this heightened standard. However, the extent of the departure was not properly determined by using analogies to the guidelines. The case was remanded for resentencing with the maximum sentence impassable being 262 months, based on an offense level of 32 and a criminal history category of VI.

United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989). The Jencks Act, 18 U.S.C. § 3500, providing for production of government witness statements on motion of the defense after the witness has testified, applies at sentencing hearings. This was a pre-guidelines case, but the court specifically indicated that the basis for its ruling "may assume even greater importance when it is implemented in Guidelines cases."

Resentencing

United States v. Knight, 266 F.3d 203 (3d Cir. 2001). The defendant's presentence investigation report concluded that the defendant should be assigned to Criminal History Category VI based on either (a) his total of 14 criminal history points or (b) his classification as a "career offender." This criminal history produced a guidelines sentencing range of 151 to 188 months. No objection was raised to the presentence investigation report. The defendant was sentenced to 162 months imprisonment.

On appeal, the government conceded that the defendant's criminal history score was erroneously calculated as Category VI because that classification included (a) offenses which should properly have been excluded under U.S.S.G. § 4A1.2(d)(2)(B) and (b) a finding of "career offender" which was improperly premised on the inclusion of convictions for possession with intent to deliver cocaine and reckless endangerment. The defendant should have been sentenced based on Criminal History Category V, rather than VI. The correct guideline range was 140 to 175 months. The Court of Appeals held that under the plain error doctrine, application of an incorrect Federal Sentencing Guidelines range presumptively affects substantial rights, even if it results in a sentence that is also within the correct range. Accordingly, the district court committed plain error when it selected the defendant's sentence from within the wrong range.

United States v. Adams, 252 F.3d 276 (3rd Cir.2001). At sentencing, the district court heard argument both from defense counsel and the government and next inquired of defense counsel: "Okay. Would your client like to exercise his right of allocution?" After a pause, defense counsel replied "No." The Court of Appeals held that the district court committed plain error that should be corrected when it failed to personally address the defendant prior to sentencing, in violation of Federal Rule of Criminal Procedure 32(c)(3)(C).

United States v. Faulks, 201 F. 3d 208 (3rd Cir.2000). This appeal required the Court of Appeals to decide whether Faulk's sentencing must be returned to the district court for a third time because that court, which imposed the new sentence by a written judgment, did so in Faulk's absence. The Court of Appeals held that Faulks must be resentenced in person, notwithstanding that in an ancillary proceeding after the new sentence was imposed, the district court informed Faulks in open court of the sentence it had already imposed.

Review of Presentence Investigation Report

United States v. Stevens, 223 F.3d 239 (3rd Cir. 2000). The defendant pleaded guilty to an indictment charging him with one count of carjacking, in violation of 18 U.S.C. § 2119, and one count of carrying a firearm during the commission of a violent crime, in violation of 18 U.S.C. § 924(c). Subsequently, he pleaded guilty to an information charging another, separate carjacking offense. On appeal, the defendant argued that the district court erred in failing to "verify" whether he had read and discussed the presentence investigation report with his attorney. FED. R. CRIM. P. 32(c)(3)(A) requires that before imposing sentence, a district court must "verify that the defendant and defendant's counsel have read and discussed the presentence report." In the present case, it appears that the district court fell short of even this mark. In fact, the government concedes that the district court failed to satisfy this requirement. Because the defendant did not bring this matter to the district court's attention, the applicable standard of review is that of "plain error." The Court of Appeals stated, "district court errors like this one are regrettable and easily avoidable, and we exhort district courts to engage in the "simple practice" of addressing defendants directly to ensure they have read and discussed the PSR with counsel. See *Mays*, 789 F.2d, 78, 79 (3d Cir. 1986). Nevertheless, we cannot agree that this type of error constitutes a structural defect in the sentencing process. In the absence of any showing of prejudice or the denial of substantial rights caused by this error, the defendant's claim must fail."

Part B -- Plea Agreements

General

United States v. Powell, 269 F.3d 175 (3d Cir. 2001). The defendant pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The government filed a notice of prior convictions pursuant to 18 U.S.C. § 924(e). The written plea agreement indicated that the maximum term of supervised release was three years. At the plea colloquy, the government related that the maximum penalties are life imprisonment, a $250,000 fine, a three year term of supervised release, a $100 special assessment and a 15 year mandatory minimum prison term. The presentence report calculated the guideline custody range to be 180 to 210 months. The report also indicated that the maximum term of supervised release was not more than five years. Powell was sentenced to 192 months imprisonment followed by five years supervised release.

On appeal, Powell argued that he did not voluntarily and intelligently change his plea, and that the government breached its "promise" that he would not be exposed to more than three years of supervised release. The Court of Appeals ruled that despite Powell's current focus on the extra two years of supervised release he was not expecting, "we are satisfied that he would not have done anything differently had he known that he was exposing himself to five years of supervised release as opposed to three years at the conclusion of his prison sentence. Accordingly, we hold that the error here was harmless under Rule 11(h). That does not, however, mean that Powell is entitled to no relief....Inasmuch as we must remand this matter under *United States v. Mummert* in any event to resolve the motion for a downward departure, and inasmuch as the government is willing to make a three year recommendation for supervised release, we conclude that the issue of Powell's supervised release is best resolved by affording the government an opportunity to allow the district court to request a recommendation, and then sentence in the manner the court deems most appropriate under the circumstances."

United States v. Milner, 155 F. 3d 697 (3d Cir. 1998). Milner entered his plea pursuant to a plea agreement with the government in which the government agreed to "recommend the applicable mandatory minimum sentence of five (5) years imprisonment." Following Milner's guilty plea, the probation office conducted a presentence investigation, determined that Milner's actual name was Dwight Kavannah Carpenter and concluded that he qualified as a career offender under the guidelines. His guideline range was 188-235 months imprisonment. The government recommended the lowest possible sentence within the applicable guideline range. The court of appeals found the *Nolan-Cooper* exception controlling here, so that the government's actions do not constitute a breach.

United States v. Nolan-Cooper, 155 F.3d 221 (3d Cir. 1998). The court of appeals held that the government breached the plea agreement. The government agreed not to comment on the applicability of certain enhancements and did so.

United States v. Hyde, 117 S.Ct. 1630 (1997). In a unanimous opinion written by Chief Justice Rehnquist, the Supreme Court reversed the Ninth Circuit's ruling in *U.S. v. Hyde*, 92 F. 3d 779, 781 (1996), and held that a defendant may not withdraw his guilty plea unless he shows a "fair and just reason" under Rule 32(e), even if the district court defers acceptance of the plea agreement until sentencing. The Supreme Court found no support in either Rule 11, or Rule 32, Fed. R. Crim. P., to support the Ninth Circuit's ruling that a defendant had an absolute right to withdraw his guilty plea before the district court accepted the plea agreement. The court said the Ninth Circuit's holding was contradicted by the very language of the rules, and "would degrade the otherwise serious act of pleading guilty to something akin to a move in a game of chess." Under the rules, defendant must show "good cause" even if the district court has not yet accepted the plea agreement.

United States v. Parker, 874 F.2d 174 (3d Cir. 1989). Upheld district court's determination that defendant's guilty plea admitted the value of the stolen property for purposes of sentencing in this case. When plea agreement itself provides for a plea to the facts relevant to sentencing, court may relay on those admissions of material facts, and no separate stipulation is necessary.

§ 6B1.1. Plea Agreement Procedure (Policy Statement)

United States V. Lockett, 2005 WL 1038937 (3rd Cir.(Pa.))). On appeal, the defendant maintained that his sentence is inconsistent with the Supreme Court's recent decision in *United States v. Booker*, 543 U.S. _ _ _, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005). As part of his plea agreement, however, the defendant "voluntarily and expressly waived all rights to appeal or collaterally attack his convictions, sentence, or any other matter relating to the prosecution. The only exceptions listed in the plea agreement permitted an appeal based on a claim that the defendant's sentence exceeded the statutory maximum, that the sentencing judge erroneously departed upwards from the guidelines range, or that the district court erroneously decided the suppression issues. The Court of Appeals held that where a criminal defendant has voluntarily and knowingly entered into a plea agreement in which he or she waives the right to appeal, the defendant is not entitled to resentencing in light of *Booker*.

United States v. Rivera, 357 F.3d 290 (3d Cir. 2004). In this case, the Court of Appeals held that the prosecution's statement that it stood by the probation officer's recommendation in the presentence investigation report, that a four-level leadership role increase was required, making the total offense level 39, was a breach of the plea agreement. The plea agreement stipulated that the total applicable offense level would be 35. Although the plea agreement stated that government reserved the right to take any position with respect to sentencing, except as otherwise provided in the agreement, such broad provision was trumped by specific stipulation to offense level in agreement.

United States v. Gilchrist, 130 F. 3d 1131 (3d Cir. 1997). Defendant negotiated and executed a binding plea agreement pursuant to Rule 11(e)(1)(C). According to the agreement, defendant was to be sentenced to nine months imprisonment, one month home confinement, a $10,000 fine and a $50 special assessment. The district court imposed nine months imprisonment, a $10,000 fine, $50 special assessment and a one year term of supervised release, including one month home confinement. The court of appeals remanded to require specific performance of the plea agreement or to permit defendant to withdraw his plea.

United States v. Hayes, 946 F. 2d 230 (3d Cir. 1991). Defendant entered into a plea agreement with the government wherein the government promised to " make no recommendation as to the specific sentence." In its sentencing memorandum, the government expressly advocated a sentence within the standard range of the guidelines as to Count one (a range of 57 to 60 months incarceration) and a lengthy period of incarceration on the non-guidelines counts. The court of appeals concluded that the plea agreement was breached by the government and defendant's sentence must be vacated.

United States v. Torres, 926 F.2d 321 (3d Cir. 1991). Defendant challenged the consideration at sentencing of one kilogram of cocaine which the district court had earlier suppressed due to a Fourth Amendment violation. The Third Circuit upheld the district court's consideration of this evidence, citing "two strong currents in the law, one urging caution in invoking the exclusionary rule in Fourth Amendment cases, and the other permitting broad discretion in receiving evidence of conduct relevant to sentencing." However, because defendant's plea agreement stipulated to a lesser amount of cocaine, the court remanded the case to give defendant the opportunity to withdraw his plea. Although the plea agreement stated that the judge was not bound by any stipulations, the defendant may not have understood this to apply to the stipulated drug amount.

United States v. Gonzalez, 918 F. 2d 1129 (3d Cir. 1990). The government offered a plea agreement to three defendants, but demanded that all three accept the agreement. When only two of the defendants agreed to the plea package, the government withdrew the proposal. The proposal was never presented to the district court. The three defendants were tried and convicted by a jury. The Third Circuit rejected the argument that the government's withdrawal of the plea agreement was improper. Since the government had made unanimous acceptance of the agreement a condition precedent to the agreement, the district court did not err in refusing to order specific performance of the agreement.

United States v. Henry, 893 F. 2d 46 (3d Cir. 1990). Defendant argued that his plea should have been set aside because the district court failed to advise him of the "bottom end" of the guideline range for his offenses, and failed to advise him that the minimum period of supervised release would be three years. The Third Circuit noted that even under the December 1, 1989 amendment to Fed. R. Crim. P. 11(c)(1), the court is not required to advise the defendant which guidelines will be important. Moreover, the minimum term of supervised release was set forth in the plea agreement. Fed. R. Crim. P. 11(c)(1) does not require that defendants be informed of applicable guideline range before plea is taken, all that is required is that defendant be apprised of the applicability of the guidelines. It does require that defendant be informed of the statutory minimum and maximum penalties.

§ 6B1.4 Stipulations (Policy Statement)

United States v. Nathan, 188 F. 3d 190 (3d Cir. 1999). Electrodyne Systems Corporation, a defense contracting company, specialized in providing military components to the United States government. Nathan was Electrodyne's president and vice-president. Between November 1989 and March 1994, Electrodyne entered into six contracts to provide U.S. government agencies and the U.S. military including NASA and the Air Force with electronic components to be used in research, communications, radar, and weapons systems. Each contract required Electrodyne to comply with the Buy American Act, 41 U.S.C. § 10a-10d (1988), and in each contract Nathan (on Electrodyne's behalf) represented that Electrodyne (a) intended to manufacture the components in the United States; (b) would not use foreign components; and (c) would not use offshore manufacturing sites. Despite their contractual and statutory obligations, Nathan and Electrodyne entered into agreements with foreign companies in Russia and the

Ukraine to build the components specified in the contracts. In so agreeing, Nathan disclosed to the foreign manufacturers the drawings, specifications, and technology of the contracted for components. Nathan failed to disclose these foreign contracts to the government and failed to register with the State Department as a manufacturer or exporter of defense articles. Nathan pled guilty to illegally importing goods into the U.S. because he failed to mark the items with the country of origin in violation of 18 U.S.C. § 545.

At sentencing, both government and defense counsel asked the district court to sentence the defendant in accordance with his plea agreement but the court declined to do so. First, it found that the parties had stipulated to a more serious offense under § 1B1.2 based on the defendant's responses to questions posed at the plea colloquy. The court deemed the facts that came out at the colloquy to be "stipulations" to fraud offenses, rendering the fraud guidelines applicable. Second, the court stated that even if it sentenced the defendant under the smuggling guideline, it would reach the same ultimate sentence by relying on Application Note 2 of § 2T3.1 and § 5K2.0. The Court of Appeals reversed, concluding that the text of § 1B1.2(a), examined especially in light of the changes the Commission made from the earlier version of that section, indicates that a statement is a "stipulation" only if: (i) it is part of a defendant's written plea agreement; (ii) it is explicitly annexed thereto; or (iii) both the government and the defendant explicitly agree at a factual basis hearing that the facts being put on the record are stipulations that might subject a defendant to the provisions of § 1B1.2(a). Nathan's statements at the factual basis hearing do not meet the definition of "stipulation."

United States v. Trujillo, 920 F. 2d 202 (3d Cir. 1990). In defendant's plea agreement, the government agreed to stipulate at sentencing that defendant had accepted responsibility, provided the government did not receive additional evidence in conflict with this stipulation. At sentencing, the government argued that defendant had not accepted responsibility. The district court found that defendant had not accepted responsibility, but made no finding as to whether the government remained bound by its stipulation. The Third Circuit remanded, holding that the government could withdraw from the stipulation only upon a showing that would trigger the proviso, and the district court made no finding as to that. Even though the district court would not have been bound by the government's stipulation, the government had to keep its bargain.

United States v. Turner, 2007 WL 1379905 (3d Cir.(Pa.))). The defendant appealed his sentence arguing, among other things, that the district court's imposition of a condition of supervised release requiring him to cooperate in the collection of DNA under the DNA Collection Backlog Elimination Act , 42 U.S.C. § 14135a-14135e, was an unreasonable search under the Fourth Amendment. The Court of Appeals noting that it previously held in *United States v. Sczubelek*, 402 F. 3d 175, 182-87 (3d Cir. 2005), that the DNA Act survives Fourth Amendment scrutiny, affirmed the district court's judgment of sentence.

United States v. Bungar, 478 F. 3d 540 (3rd Cir. 2007)). The facts of this case are as follows: The probation office filed a Petition alleging that the defendant violated the terms of his supervised release by twice testing positive for cocaine use, failing to submit verification of his attendance at AA and NA meeting, changing his address without notifying the probation office, and failing to report that he was questioned by local police. In the violation worksheet submitted to the court, the probation office concluded that each violation was a Grade C violation and calculated the advisory range of imprisonment under § 7B1.4(a) to be 8 to 14 months.

The defendant requested a sentence of 12 months house arrest, and the government did not object. The district court, however, disagreed with the probation office's conclusions. Citing *United States v. Blackston*, 940 F.2d 877 (3d Cir. 1991), the court found that the defendant's admitted cocaine use also constituted circumstantial evidence of simple possession of a controlled substance in violation of 21 U.S.C. § 844, a Grade B violation, and, as required by 18 U.S.C. § 3583(g) and U.S.S.G. § 7B1.3(a)(1), revoked the defendant's supervised release. Under the advisory guidelines, the defendant therefore faced a term of imprisonment in the range of 21 to 27 months.

Based on the defendant's continuing abuse of drugs in spite of having received a significant downward departure at sentencing and his long history of offenses that included causing the deaths of two people and allegedly assaulting his girlfriend, the district court imposed a statutory maximum sentence of 60 months. The defendant appealed, arguing that the sentence was unreasonable. The Court of Appeals, however, held that the sentence was reasonable.

United States v. Dees, 467 F.3d 847 (3rd Cir. 2006). The defendant pled guilty to two counts of fraudulent use of unauthorized access devices and one count of interstate transportation of stolen goods. He was sentenced to 51 months in prison and 36 months of supervised release on each of the three counts, to run concurrently with each other. After he left prison, the defendant committed technical violations and non-technical Grade B violations, including cocaine and heroin use as well as unauthorized use of access devices and aggravated identity theft. The government petitioned to revoke the defendant's supervised release. The district court

granted the motion, and sentenced the defendant to the statutory maximum of two years in prison for each underlying conviction, but the sentences were imposed consecutively so that the defendant was sentenced to 72 months in prison.

The defendant presented five issues on appeal. All of the issues revolve around whether a district court can sentence a defendant for revocation of supervised release conditions consecutively even though the initial sentence ran concurrently. The Court of Appeals held that the (1) district court had authority to impose consecutive prison sentences upon revocation of concurrent terms of supervised release; (2) sentence was reasonable; (3) revocation sentence did not violate the Double Jeopardy Clause; (4) sentence did not implicate Sixth Amendment; and (5) district court did not violate defendant's due process rights by using a preponderance of the evidence standard at revocation hearing.

Contrary to the defendant's assertions, 18 U.S.C. § 3584(a) controls and permits a district court to impose consecutive terms of imprisonment upon revocation of supervised release - - even when the sentences for the underlying crimes ran concurrently. No fewer than six other circuits have agreed with the proposition that § 3584(a) applies to not only the imposition of one's initial sentence but also to a sentence imposed upon revocation of supervised release. Nothing in § 3584(a) states or implies that the statute does not extend to revocation proceedings. A district court has full authority under § 3584(a) to sentence a defendant consecutively for violations of supervised release.

The defendant argued in the alternative that he was convicted only of a Class E felony rather than a Class C felony, which means that the maximum revocation he can receive is one year or three years if the sentences run consecutively. The premise behind this statement is that, for supervised release purposes, the guidelines maximum rather than the statutory maximum determines the maximum length of the revocation sentences. The Court of Appeals also held that this argument is mistaken. Each of the three underlying offenses are, by statute, Class C or D felonies. By statute, the authorized revocation sentence was two years for each underlying offense. See 18 U.S.C. § 3583(e)(3) (two years maximum for both Class C and D felonies).

The final issue was whether the District Court violated the Fifth Amendment's Due Process Clause when it found a violation of the defendant's supervised release by a preponderance of the evidence standard rather than a reasonable doubt standard and imposed three consecutive terms in prison. The Court of Appeals held that the defendant's due process rights were not violated. The Supreme Court has stated that "although such violations often lead to re-imprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Johnson*, 529 U.S. at 700. *Apprendi* and *Booker* do not invalidate the preponderance of the evidence standard.

United States v. Washington, 2005 WL 2640984 (3rd Cir.(Pa.)). On September 10, 1993, the defendant pleaded guilty to a drug charge, and on October 27, 1994, he was sentenced to 100 months imprisonment and six years supervised release. While on supervised release, the defendant violated the conditions of his release, and on November 23, 2004, the district court revoked the defendant's supervised release and sentenced him to nine months imprisonment and 63 months supervised release.

On appeal, the defendant argued that the 63 months of supervised release could not be imposed because, he contends, the statutory amendment authorizing the imposition of the additional supervised release time was enacted subsequent to his commission of the criminal conduct for which he was sentenced. The Court of Appeals affirmed the sentencing order. In short, under the law as it stood at the time the defendant committed his offense, the district court had the power both to revoke his supervised release and send him back to prison upon violation of the terms of that release, and to impose an additional period of supervised release to follow that second term of incarceration. Within the temporal confines of the original sentence (in this case 172 months), the district court had the power to impose either imprisonment or supervised release. In this case, the defendant served 109 months in prison. The district court had the authority to order an additional 63 months of supervised release. See *Johnson v. United States*, 529 U.S. 694 (2000).

United States v. Poellnitz, 372 F. 3d 562 (3rd Cir. 2004). The defendant appealed the district court's order that he violated a condition of his supervised release by committing a state crime. He argued that (1) there was insufficient evidence to prove that he committed a state crime, namely because he pled nolo contendere (instead of guilty) to the crime in state court and passed a polygraph test, and (2) the delay between the filing of the supervised release petition and the supervised release violation hearing was not "reasonably necessary," as required by 18 U.S.C. § 3583.

On November 19, 1998, the defendant was released from custody and began to serve his term of supervised release. The term of supervised release was set to expire on November 18, 2001. On November 9, 2001, the probation office issued a "Status Report/Request for Warrant in Abeyance." The letter reported that Poellnitz was arrested on June 7, 2001, and charged with indecent assault, corruption of a minor, and endangering the welfare of a child. On November 13, 2001, the probation office filed a petition on Supervised Release, alleging Poellnitz violated conditions of supervised release and requesting the court issue a bench warrant to be held in abeyance until the pending state charges were resolved. On November 15, 2001, the district court granted the Petition, and on November 16, 2001, the district court issued the arrest warrant, to be held in abeyance.

On February 10, 2003, Poellnitz entered a plea of nolo contendere in the Court of Common Pleas of Allegheny County, Pennsylvania, to the charge of corruption of a minor. On February 20, 2003, the U.S. Probation Office filed a Supplemental Petition on Supervised Release, alleging violations of the supervised release and requesting issuance of a summons for Poellnitz to appear to show cause why the district court should not revoke his supervised release.

On February 25, 2003, the district court granted the Supplemental Petition and scheduled the revocation hearing for April 11, 2003. The district court subsequently sua sponte rescheduled the hearing on three occasions: On February 27, 2003, the hearing was rescheduled for May 2, 2003; on April 8, 2003, the hearing was again rescheduled for May 16, 2003; and, on May 28, 2003, the hearing was again rescheduled for June 20, 2003. Additionally, the hearing was continued once due to Poellnitz's health problems and twice due to motions filed by the government.

On October 2, 2003, the hearing actually took place. The district court found that Poellnitz had violated a state law while on supervised release and failed to pay full restitution. The term of supervised release was reinstated to commence October 2, 2003, and to rum for a term of five months. On October 9, 2003, the district court issued an Amended Order, pursuant to Rule 35(a). In the Amended Order, the district court found Poellnitz guilty of violating a state law while on supervised release, but contrary to the original Order did not find him guilty of paying full restitution. The district court treated the state law violation was a grade C violation and sentenced Poellnitz to one month imprisonment to be served in home confinement.

The Court of Appeals ruled that the district court erred by treating the state nolo plea as an admission by Poellnitz that he committed the crime. On remand, the district court was to consider whether there is sufficient evidence (under the preponderance of evidence standard) that Poellnitz violated a condition of supervised release, In conducting this inquiry, the district court should take into account all evidence in the record, including, but not limited to, evidence presented at Poellnitz's plea hearing.

With respect to Poellnitz's contention that the delay of nearly two years between the filing of the supervised release violation petition and the occurrence of the supervised release violation hearing was not "reasonably necessary," the Court of Appeals found that the delay did not prejudice Poellnitz's ability to contest the validity of his revocation.

United States v. Plotts, 359 F. 3d 247 (3rd Cir. 2004). The Court of Appeals held that the right to allocution extends to release revocation hearings.

Cornell Johnson v. United States, 529 U.S. 694, 120 S.Ct. 1795 (2000). The Court held that 18 U.S.C. § 3583(h), which expressly authorizes reimposition, is applicable only in those cases where the original offense conduct was committed after its enactment on September 13, 1994. However, the primary thrust of the opinion is that the law prior to the enactment of subsection (h) permitted reimposition of supervised release at revocation under § 3583(e). Therefore, reimposition of supervised release is available as an option for courts in all revocation proceedings, so long as the statutory criteria in § 3583(e)(3) or § 3583(h) are met. However, the criteria for how much supervision can be reimposed may vary, depending on when the original offense was committed.

Offenses Committed Prior to September 13, 1994: The Supreme Court held that the length of the supervised release term that can be reimposed was determined by § 3583(e). The maximum term that could be reimposed would be the term of supervised release originally imposed, minus the imprisonment imposed upon revocation.

Offenses Committed After September 13, 1994: For these offenses, § 3583(h) controls the length of the term of supervision that the court may impose when supervision is revoked and the offender is reincarcerated. That subsection provides that the court may, upon revocation and where "the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under (e)(3)," impose another term of supervised release no greater than the term "authorized by statute for the offense," less the term of imprisonment imposed at revocation.

United States v. Schwegel, 126 F. 3d 551 (3d Cir. 1997). Defendant pled guilty in 1993 to several drug charges. He violated the terms of his supervised release by testing positive for drugs. Under §7B1.4 defendant's range of imprisonment was 6 to 12 months, but the district court found this insufficient to "wean" defendant of his drug habit and sentenced him to three years imprisonment followed by one year of supervised release. Defendant argued that the sentencing range in §7B1.4 is mandatory. The Third Circuit disagreed, holding that the Chapter 7 sentencing ranges remain advisory even after the 1994 amendments to §3553. The purpose of the amendment was to "make it clear that resentencing for probation and supervised release violations should be based on sentencing guidelines and policy statements issued by the Commission specifically for that purpose, rather than upon the guidelines applicable to the initial sentencing."

United States v. Dozier, 119 F.3d 239 (3d Cir. 1997). Defendant was convicted in 1992 of the class D felony of transporting stolen cars across state lines. He was sentenced to 34 months imprisonment and three years supervised release--the maximum term of supervised release that could be imposed. In September 1996, the court revoked defendant's supervised release and sentenced him to six months imprisonment and pursuant to 18 U.S.C. §3583(h), imposed a new 24-month term of supervised release. However, §3583(h) was not enacted until September 13, 1994, more than two years after defendant committed the original offense of conviction. The Third Circuit held that retroactive application of §3583(h) following revocation of a prior term of supervised release increases the potential punishment for violations of supervised release and, therefore, violates the ex post facto clause. This holding was not contrary to *U.S. v. Brady*, 88 F. 3d 225 (3d Cir. 1996). *Brady* involved a class A felony, which involves a different statutory structure than for class B, C and D felonies.

United States v. Brady, 88 F. 3d 225 (3d Cir. 1996). When defendant was originally sentenced, 18 U.S.C. §3583 did not authorize a court to impose a new term of supervised release upon revocation of supervised release. However, before defendant violated his supervised release, subsection 3583(h) was added to allow this. The judge revoked supervised release and imposed a 12-month sentence followed by a three year term of supervised release under 18 U.S.C. §3583(h). The Third Circuit held that applying the new amendment did not violate the ex

post facto clause. Defendant was not prejudiced by the amendment. Before subsection (h), a defendant who violated supervised release could be sentenced to imprisonment for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release. Under subsection (h), the new term of supervised release may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed on revocation of the original term of supervised release.

United States v. DeRewal, 66 F. 3d 52 (3d Cir. 1995). Appellate court ruled that district court properly exercised its jurisdiction in revoking probation for pre-probation conduct occurring during a period of parole. Neither Rule 32.1(a)(2)(B) nor case law requires production of a probation officer's entire file, even where the officer is a witness. In order to revoke probation, it is necessary only that the court be reasonably satisfied that the probationer has violated one of the conditions of probation. See *U.S. v. Barnhart*, 980 F. 2d 219, 223 (3d Cir. 1992)(quoting *U.S. v. Manuszak*, 532 F. 2d 311, 317 (3d Cir. 1976).

United States v. Malesic, 18 F. 3d 205 (3d Cir. 1994). Supervised release revocation provision of Sentencing Reform Act, 18 U.S.C. §3583(e)(3), does not permit sentencing court to impose on person who has violated conditions of his or her supervised release both prison sentence and new supervised release term to follow period of incarceration. Once supervised release has been revoked under provision of Sentencing Reform Act authorizing court to alter supervised release term, there is nothing left to extend, modify, reduce or enlarge under that provision.

United States v. Gordon, 961 F. 2d 426 (3d Cir. 1991). Under 18 U.S.C. §3565(a), a probationer who is found in possession of a controlled substance must be resentenced to "not less than one-third of the original sentence." The Third Circuit held that the term "original sentence" refers to the original period of incarceration to which the defendant could have been sentenced, rather than the term actually imposed. In *U.S. v. Boyd*, 961 F. 2d 434 (3d Cir. 1992), issued by the same panel the same day as this decision, the court held that following a probation revocation, §3565(a)(2) only allows the imposition of prison sentence which could have been imposed at the time of initial sentencing for the underlying crime. Here, defendant had an original guideline range of zero to four months and was sentenced to three years probation. Under §3565(a)(2) she could be resentenced to zero to four months, but since she was found in possession of a controlled substance, §3565(a) established a "floor" of on and one-third months.

United States v. Blackston, 940 F. 2d 877 (3d Cir. 1991). Defendant's supervised release was revoked after he provided three consecutive urine specimens that tested positive for cocaine. Under 18 U.S.C. §3583(g), if a defendant on supervised release is found in possession of a controlled substance, the court must impose a prison term of at lease one-third of the supervised release term. The district court ruled that defendant had been "in possession" of a controlled substance as provided in §3583(g), and sentenced him to three years. The Third Circuit, finding the issue to be "exceedingly close," found that §3583(g) permitted consideration of defendant's drug use as circumstantial evidence of his possession of the drug. However, the court did not state that supervised release must be revoked just because a defendant tests positive for drugs.

Guideline §7B1.4(a) recommended a four to ten month sentence. However, because defendant was found to have been in possession of a controlled substance, 18 U.S.C. §3583(g) mandated a minimum two-year term of imprisonment, which became defendant's guideline range. The district court sentenced defendant to three years imprisonment, and the Third Circuit affirmed. The Chapter Seven policy statements are not "guidelines" binding upon a court.

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

Woodall v. Federal Bureau of Prisons, 2005 WL 3436626 (3rd Cir.(N.J.))). In this case, the defendant challenged recently adopted Bureau of Prison regulations that limit a prisoner's placement in community confinement to the lesser of ten percent of the prisoner's total sentence or six months.

The defendant was released from prison on March 26, 2004, to serve a three year term of supervised release. On April 7, 2004, he was arrested by California authorities for possession of a controlled substance. At sentencing, he represented that his offense was a result of the fact that he was released by the BOP on March 26, 2004, with "no money, no identification and no assets, into a community where he had no ties whatsoever." In September 2004, the District Court revoked his three year term of supervised release and sentenced him to 30 months imprisonment. On February 3, 2005, the District Court Judge entered an order amending the sentencing judgment and recommending to the Bureau of Prisons that the defendant spend the last six months of his sentence in a halfway house. The Assistant United States Attorney on the case "urged" that placement. However, the defendant was informed by the Unit Manager at Fort Dix that because of the BOP policy changes at issue in this appeal, he could be placed in a CCC for no more than 10 percent of his total sentence. Therefore, the defendant would be entitled to no more than eleven weeks of CCC placement.

The defendant thereupon filed a habeas petition pursuant to 28 U.S.C. 2241, arguing that the new BOP regulations impermissibly ignored tjhe placement recommendations of his sentencing judge. His petitiion was dismissed by the District Court for the District of New Jersey. He then appealed.

This appeal involved the interpretation of 18 U.S.C. 3621(b), which vests the BOP with authority to determine the location of an inmate's imprisonment, and 18 U.S.C. 3624(c), which describes the BOP's obligation to prepare prisoners for community re-entry by, inter alia, placing them in community confinement.

Prior to December 2002, the BOP regularly considered prisoners for CCC placement up to six months at the end of a sentence, regardless of the total sentence length. However, on December 13, 2002, the Department of Justice Office of Legal Counsel issued a memorandum concluding that the BOP's practice of placing some prisoners in CCCs for all or significant parts of their sentences was contrary to the BOP's statutory grant of authority.

The 2002 memo concluded that the BOP did not have "general authority" under 3621 to place an offender in community confinement from the outset of his sentence or at any time the BOP chooses. Instead, the memo reasoned that authority to transfer a prisoner to a CCC is derived solely form 3624, and that the statute limits residence in a CCC to the lesser of 10 percent of the total sentence or six months. On December 20, 2002, the BOP followed the OLC's advice and memorialized it.

The First and Eighth Circuits found this 2002 policy unlawful because it did not recognize the BOP's discretion to transfer an inmate to a CCC at any time, and therefore contrary to the plain meaning of 3621. See *Elwood v. Jeter*, 386 F. 3d 842 (8th Cir. 2004); *Goldings v. Winn*, 383 F. 3d 17 (1st Cir. 2004). The rationale of these decisions was that the time constraints of 3624(c) limited only the affirmative obligation of the BOP, not the agency's discretion to place a prisoner in a CCC for a longer period of time.

In response to decisions such as *Elwood* and *Goldings*, on August 18, 2004, the BOP proposed new regulations "announcing its categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment." While acknowledging the BOP's general discretion to place an inmate at a CCC at any time, the 2005 regulations limit CCC placement to the lesser of 10 percent of a prisoner's total sentence or six months, unless special statutory circumstances apply. The final rules were published on January 10, 2005, after the defendant's petition had been filed, and became effective on February 14, 2005. They applied to this case.

The Court of Appeals found the regulations unlawful. The BOP may not categorically remove its ability to consider the five explicit factors set forth by Congress in 3621(b), including a sentencing judge's recommendation, for making placement and transfer determinations. After considering these factors, the BOP may designate the place of imprisonment in an appropriate type of facility, or may transfer the offender to another appropriate facility. The BOP may transfer an inmate to a CCC or like facility prior to the last six months or ten percent of his sentence. In exercising its discretion in this matter, the BOP must consider the factors set forth in 3621(b). However, that the BOP may assign a prisoner to a CCC does not mean that it must. The 2005 regulations removed the BOP's ability to fully consider those factors by categorically precluding community placement prior to the lesser of the last 10 percent or six months of the prisoner's sentence.

United States v. Serrano, 2006 WL 868985 (3rd Cir.(Pa.))). In this case, the Court of Appeals held that the District Court was not required to notify the defendant of its intent to impose a sentence that exceeded the range recommended under U.S.S.G. § 7B1.4(a).

United Statesv. Bellamy, 2004 WL 103409 (3rd Cir.(N.J.))). The defendant violated the terms of his supervised release and was sentenced to 26 months imprisonment. He appealed his sentence, arguing that it exceeded the upper end of the recommended range without the district court’s giving notice of its intent to do so or sufficiently explaining its sentencing decision.

Chapter 7 of the guidelines, which lists policy statements related to sentencing following the revocation of supervised release, provided for a recommended range of 7 to 13 months. The Court of Appeals concluded that the district court was not required to notify Bellamy of its intent to impose a sentence that exceeded the range recommended in § 7B1.4. Although notice would be required if this case involved a departure from an actual guideline range for purposes of initial sentencing under Chapter 5 of the Guidelines Manual, *Burns v. United States*, 501 U.S. 129, 138 (1991), this is not such a departure. Unlike the ranges called for by Chapter 5, the ranges listed in Chapter 7 are not binding on the district court. A decision to exceed that range cannot be equated to an "upward departure." No notice requirement was violated by Bellamy's learning immediately prior to his sentencing hearing that the Probation Office was recommending a sentence above the Chapter 7 range.

United States v. Wall, 2003 WL 1879215 (3rd Cir.(Pa.))). The defendant admitted to violating three conditions of supervised release and was sentenced to 24 months imprisonment. This sentence was well beyond the range of 8 to 14 months established in the policy statement contained in U.S.S.G. § 7B1.4. The defendant claimed on appeal that imposition of the statutory maximum sentence was "plainly unreasonable" under 18 U.S.C. § 3742(a)(4). The Court of Appeals affirmed the judgment and sentence. The ranges set forth in the policy statement at issue are not binding but are advisory. *See Schwegel*, 126 F.3d at 552. It is proper for a court to exercise its discretion in imposing a longer sentence that that recommended by a policy statement. Here, the court considered the recommended range but decided to impose a longer sentence, in part so that the defendant would abstain from cocaine use for the two years of his imprisonment. As in *Schwegel*, the district court properly exercised its discretion following proper consideration of the policy statement sentencing range.

United States v. Brady, 88 F. 3d 225 (3d Cir. 1996). The district court did not err in revoking the defendant's supervised release and sentencing him to 12 months imprisonment to be followed by a three-year supervised release term. The defendant was indicted for knowingly, intentionally, and unlawfully possessing cocaine with intent to distribute and he argued that the district court applied 18 U.S.C. §§3551-86, which was not in effect when he was originally sentenced. He claimed that this additional punishment for his crime could not have been imposed when he committed that crime, and therefore violated the ex post facto clause of the Constitution. However, the circuit court rejected the defendant's contention on the grounds that he was not prejudiced by the enactment because the amended subsection (h) did not change the amount of time his liberty would have been restrained. Therefore, the circuit court did not find an ex post facto violation and affirmed the decision of the lower court.

United States v. Boyd, 961 F. 2d 434 (3d Cir. 1992). Sentence imposed upon revocation of probation cannot exceed sentencing range available at time of initial sentencing for underlying crime (18 U.S.C. §3565(a)(2)). Statute providing that violation of condition of probation may lead to the imposition of "any other sentence that was available at the time of the initial sentencing" must prevail where it conflicts with probation revocation table contained in Sentencing Guidelines. See 18 U.S.C. §3565(a)(2); USSG §7B1.4(a).

ACQUITTED, DISMISSED, UNCHARGED CONDUCT

United States v. Carrozza, 4 F. 3d 70 (3d Cir. 1993). The Third Circuit held that relevant conduct in a RICO case includes all conduct reasonably foreseeable to a particular defendant in furtherance of the RICO enterprise to which he belongs. The term "underlying racketeering activity" in §2E1.1(a)(2) means any act, whether or not charged against defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. §1961(a) and is otherwise relevant conduct under §1B1.3. The district court erred when it limited relevant conduct to conduct in furtherance of the predicate acts charged against defendant. However, such relevant conduct could not be used to increase the statutory maximum from 20 years to a term of life imprisonment. The statutory maximum sentence must be determined by the conduct alleged in the indictment.

United States v. Pollard, 986 F. 2d 44 (3d Cir. 1993). Defendant was convicted of kidnaping and related counts for abducting young boys or luring them back to his apartment, where he drugged them and then sexually abused them. The kidnapping guideline, §2A4.1, states that if the victim was kidnapped to facilitate the commission of another offense, the guideline for such offense should be used if it results in a higher offense level. The Third Circuit affirmed that it was proper to sentence defendant under the guideline for criminal sexual abuse, §2A3.1, even though he was never charged with that offense, and the federal court lacked jurisdiction to try him for it. There is no requirement that a defendant be convicted of conduct before the conduct may be considered in sentencing. A district court may consider uncharged, relevant state conduct as well as federal conduct. Once a jurisdictional basis existed over the kidnappings, then all relevant conduct could properly be considered in defendant's sentence.

United States v. Frierson, 945 F. 2d 650 (3d Cir. 1991). Pursuant to a plea agreement, defendant pled guilty to unarmed robbery, while armed robbery and car theft counts were dismissed. Nonetheless, the district court increased defendant's base offense level by three under §2B3.1 because defendant possessed a firearm during the robbery. The Third Circuit upheld the enhancement, finding the guidelines require relevant conduct to be considered in determining specific offense characteristics, even though such conduct underlies a count dismissed in a plea bargain. Following the 11th Circuit's decision in *U.S. v. Scroggins*, 880 F. 2d 1204 (11th Cir. 1989), the court rejected defendant's claim that this rendered his plea bargain meaningless. Prior to his plea, the government gave defendant a copy of a case describing a sentence enhancement for possession of a weapon during a robbery, so any expectation that the district court would not rely on the weapon was unfounded.

United States v. Cianscewksi, 894 F. 2d 74 (3d Cir. 1990). Defendant contended that the district court could not calculate amount of loss by looking at the face value of stolen treasury checks. The Third Circuit held that the court properly determined the amount of loss by looking at the face value of the checks and not the amount defendant received for them. The court also found the amount of loss schedule entirely neutral as to socioeconomic status of offenders as required by 28 U.S.C. §944(d). Finally, the district court properly considered, under the relevant conduct section 1B1.3, checks (sold by an acquitted co-defendant) for which defendant was not

charged. This allows a sentencing court to consider unadjudicated conduct.

United States v. Ryan, 866 F. 2d 604 (3d Cir. 1989). The Third Circuit affirmed a 10-month upward departure from the suggested guidelines range for simple possession of "crack" cocaine. The departure was based upon the quantity (10 grams), purity (90%) and packaging (small plastic bags) of the drug. The Third Circuit held the district court was free to consider the packaging of the drug when determining sentence even though the jury had acquitted the defendant of the distribution count. There was no indication that the Sentencing Commission had intended to preclude consideration of this factor, nor was there any indication that they had considered it in formulating the guidelines. Furthermore, prior case law permitted a sentencing court to consider evidence relating to counts on which a defendant was acquitted.

CONSTITUTIONAL CHALLENGES

Doctrine of Separation of Powers

Mistretta v. United States, 109 S. Ct. 647 (1989). The Supreme Court upheld the new federal sentencing and forfeiture guidelines against a claim that they violate the doctrine of separation of powers. The Supreme Court upheld Congress' placement of the Sentencing Commission in the judicial branch, and found no flaw in the requirement that federal judges serve on the Commission and share their authority with non-judges, nor in the fact that the President appoints members of the Commission and may remove them for cause. The court also rejected the argument that Congress delegated excessive legislative power to establish sentences to the Commission.

Due Process

United States v. Fisher, 2007 WL 2580632 (3rd Cir.(Del.))). In this case, the issue before the Court of Appeals was: Does the Due Process Clause of the Fifth Amendment require a district court to find facts supporting sentencing enhancements by more than a preponderance of the evidence?

In *United States v. Kikumura*, 918 F. 2d 1084 (3d Cir. 1990), the Court of Appeals recognized that the preponderance standard is generally appropriate, but held that when the enhancements are so substantial as to constitute "the tail that wags the dog" of the defendant's sentence, the facts underlying those enhancements must be established by clear and convincing evidence. Relying on *Kikumura*, the defendant maintained that the district court violated his constitutional right to due process of law when it trebled his sentence based on sentencing factors found by a preponderance of the evidence, namely a four level enhancement for possession of a firearm in relation to another felony (§ 2K2.1(b)(5)), and a six level enhancement for creating a substantial risk of bodily injury by assaulting a law enforcement officer (§ 2K2.1(b)(4)).

The Court of Appeals held that *Kikumura* was no longer good law by concluding that the district court did not err when it found facts relevant to sentencing by a preponderance of the evidence. It noted that a defendant sentenced under a mandatory regime- such as the guidelines scheme at issue in *Kikumura* - may be entitled to additional or different process than that due a defendant sentenced under the post-Booker advisory guidelines. After Booker, however, it is clear that sentencing on facts found by a preponderance of the evidence does not infringe upon a defendant's rights, whether those rights are derived from the guidelines or the constitution.

United States v. Ausburn, 2007 WL 2580640 (3rd Cir.(Pa.))). The defendant, a police detective, pled guilty to using a telephone and a computer to persuade a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b). He was sentenced to 144 months imprisonment or more than double the top end of the advisory guidelines. The guideline range was 57 to 71 months. Defense counsel immediately objected "to the lack of notice of the Court's intention to deviate from the advisory range," arguing that "the amount of deviation was unreasonable, in light of the facts of the case."

The defendant appealed, arguing that (1) the District Court's failure to provide advance notice of its intent to sentence him above the advisory guidelines range violated the Due Process Clause; and (2) the District Court's sentence was unreasonable. The defendant asserted that "a defendant should receive prior notice of any deviation from the applicable guideline range, regardless of the reason for it." Specifically, he claimed that he was subject to unfair surprise because he "had no idea that the district court intended to double his sentence based upon victim statements," and that "had he received prior notice, he could have taken action to mitigate the victim statements, with evidence believed to exist."

Notably, the defendant did not specify the nature of the rebuttal evidence that he would have offered if he "had received prior notice." More importantly, he did receive prior notice of the substance of the expected statements. The PSR's "victim impact" section provided notice of the material facts alleged in the victim impact statements, as well as the claimed emotional impact on the victim and her family.

In a precedential opinion, the Court of Appeals found that the District Court's failure to provide advance notice before imposing a sentence above the advisory sentencing guidelines range, based on its consideration of the sentencing factors prescribed by 18 U.S.C. § 3553(a), did not violate the Due Process Clause. However, the Court of Appeals did find that the District Court's imposition of a 144-month term of imprisonment was unreasonable, because the District Court did not provide sufficient reasons on the record to justify its sentence.

In rendering its decision, the Court of Appeals noted that the Supreme Court's discussion in *Burns* was without application here. The point of *Burns* was precisely that, under the mandatory guidelines, defendants were entitled to assume that the range of potential punishment was bounded by the guidelines range, as modified by any requested departures, not yet ruled on. See *Burns*, 501 U.S. at 134-35. After *Booker*, the element of unfair surprise arising from a non-guidelines sentence that *Burns* sought to eliminate is not present. *Vampire Nation*, 451 F. 3d at

196. The proposed requirement of advance notice for sentencing variances is unnecessary after *Booker*: "Because defendants are aware prior to sentencing that District Courts will consider the factors set forth in § 3553(a), the element of unfair surprise that *Burns* sought to eliminate is not present....After *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the District Court must consider the factors expressly set out in § 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum."

The Court of Appeals, however, did not foreclose the possibility that, in a particular case, a district court's failure to provide notice before imposing a sentencing variance may present due process concerns. For example, a witness or victim representative might allege unrevealed facts at the sentencing hearing which would, if unrebutted, clearly affect the sentencing court's thinking, and to which the defendant could not effectively respond on short notice. However, the Court of Appeals indicated that such a scenario was not before them.

In summary, the Court of Appeals declined to adopt a constitutional rule requiring a sentencing court to give advance notice before imposing any sentence outside of the advisory guideline range. Further, because the specific facts of this case did not show that the defendant was subjected to any unfair surprise at sentencing, his due process challenge must fail.

The Court of Appeals did, however, conclude that the statement of reasons provided by the District Court did not address the defendant's argument that two cases recently decided in the same district - both of which concerned sexual offenses involving minors - provided bench marks for determining a proper sentence, and that the court should hew close to the sentences in those cases (30 months and 40 months) in order to avoid unwarranted sentence disparities among similarly situated defendants. Due to this failure, the Court of Appeals was not satisfied that the District Court gave meaningful consideration to the § 3553(a) factors. For this reason the sentence was vacated and the case remanded for further proceedings.

United States v. Simmonds, III, 235 F.3d 826 (3d Cir. 2000). The Court of Appeals concluded that the district court's decision to consult the presentence reports of co-defendants did not constitute plain error.

United States v. Sciarrino, 884 F.2d 95 (3d Cir.1989) Use of hearsay evidence in making findings for purposes of sentencing under the guidelines violates neither the Sentencing Reform Act of 1984 nor due process. Affirmed. -- Here, district court relied on defendant's prior inconsistent statement to DEA agent to establish amount of drugs involved for purposes of calculating guidelines sentence.

United States v. Frank, 864 F.2d 992 (3d Cir. 1988). Reversed district court decision invalidating guidelines on due process grounds (among others). Promulgation of sentencing guidelines pursuant to Sentencing Reform Act is not an unlawful delegation of legislative power.

Fifth Amendment

United States v. Mitchell, 122 F. 3d 185 (3d Cir. 1997). The Third Circuit ruled that although defendant faced the possibility of a harsher sentence for this drug offense because of her failure to testify at the sentencing hearing to counter the credibility of witnesses, in light of the fact that she does not claim that she exposed herself to future federal or state prosecution, the Fifth Amendment privilege no longer was available to her.

United States v. Garcia, 919 F.2d 881 (3d Cir. 1990). The district court erred in dismissing two counts of a criminal indictment (distribution and possession with intent to distribute cocaine) and holding that consideration of those offenses at a prior sentencing hearing created a double jeopardy bar to their prosecution. Citing North Carolina v. Pearce, 395 U.S. 711 (1968) (the double jeopardy clause protects not only against multiple prosecutions for the same offense, but also "against multiple punishments for the same offense"), the circuit court concluded that the defendant had not been previously "punished" for those offenses. According to the circuit court, "the offenses with which defendant is charged in this case were considered at sentencing in the same manner as other misconduct traditionally has been considered at sentencing." The record discloses that the "alleged crimes at issue . . . were considered by the original sentencing judge for the purpose of the suggested Chapter 3 adjustments and probably in the course of deciding to sentence at the high end of the guideline range; it is virtually certain that they were not considered in calculating the base offense level." In the instant case the defendant did not meet his burden of proving that the use at sentencing of information about unadjudicated criminal conduct implicated double jeopardy values. The circuit court did not reach the issue concerning any "fundamental" change that may be effected by the guidelines.

Fifth Amendment - Double Jeopardy

United States v. Various Computers and Computer Equipment, Paris Francis Lundis, 82 F. 3d 582 (3d Cir. 1996). Defendant pled guilty to use and possession of stolen credit cards. The primary issue in this appeal was whether civil forfeiture, pursuant to 18 U.S.C. §981(a)(1)(C), constitutes punishment for double jeopardy purposes, when a court has already sentenced a defendant to imprisonment and the payment of restitution. The Court of Appeals held that the forfeiture of the computer equipment did not constitute punishment for purposes of the Double Jeopardy Clause.

United States v. Baird, 63 F. 3d 1213 (3d Cir. 1995). The district court did not err in denying defendant's motion to dismiss an indictment on double jeopardy grounds when the indictment followed an administrative forfeiture hearing. The circuit court identified the differences between administrative and civil forfeitures for double jeopardy purposes, noting that administrative forfeitures are allowed only when the value of the property seized is less than a jurisdictional amount and no claim is filed within 20 days of the first publication of a notice of seizure. The circuit court ruled that an administrative forfeiture of unclaimed alleged drug proceeds did not constitute "punishment," especially since an administrative forfeiture cannot, by definition, "entail a determination of ownership of the property to be forfeited."

Sixth Amendment

United States v. Leekins, 493 F. 3d 143 (3d Cir. 2007). Defendant was convicted of being a felon in possession of a firearm. The district court found that defendant had used or possessed the firearm in connection with a crime of violence, and which resulted in an increased offense level under § 4B1.4(b)(3)(A). Defendant argued that the court failed to apply *Booker* correctly and that it erred in sentencing him based on its finding that he was responsible for the attempted murder and assault on a police officer. The Third Circuit found no Sixth Amendment violation. *Booker* did not prohibit a court from sentencing a defendant based on factors not admitted by the defendant or proved to a jury beyond a reasonable doubt. Defendant's argument had previously been rejected by the en banc court in *U.S. v. Grier*, 475 F. 3d 556 (3d Cir. 2006)(en banc). Defendant did not argue that the district court mistakenly treated the Guidelines as mandatory, and nothing in the record suggested such an error.

United States v. Vega, 2006 WL 1674155 (3rd Cir. (Virgin Islands))). One of the issues raised on appeal by the defendant in this case was that the District Court erred in finding facts relevant to the sentencing guidelines by a preponderance of the evidence, rather than beyond a reasonable doubt. The Court of Appeals quickly rejected this objection on the basis of their earlier decisions in *United States v. Cooper*, 437 F. 3d 324 (3d Cir. 2006), and confirmed in *United States v. Grier*, No. 05-1698, 2006 WL 1530009 (3d Cir. June 6, 2006). The District Court did not err in making these findings by a preponderance of the evidence and the defendant suffered no infringement of his rights under the Fifth and Sixth Amendments, as construed in *Booker*.

United States v. Shusterman, 2006 WL 1626144(3rd Cir.(Pa.))). The defendant argued on appeal that the District Court erred for engaging in fact finding to enhance her prison sentence, which she asserts should have been made by a jury beyond a reasonable doubt, viz., the amount of loss caused by the fraud, whether she engaged in more than minimal planning, and whether she abused a position of trust. The Court of Appeals held that a sentencing court, given that the court recognized that the sentencing guidelines are advisory, may make factual findings supported by a preponderance of the evidence relevant to sentencing enhancements.

United States v. Null, 2006 WL 1648603 (3rd Cir.(Pa.))). On appeal, the defendant argued that the District Court violated her Sixth Amendment right to trial by jury by increasing her sentence based on judge-found facts, i.e. the amount of the monetary loss resulting from her fraudulent scheme. The Court of Appeals ruled that "A district judge is free to make any findings relevant to the sentencing guidelines calculation.

United States v. Clarke, 2006 WL 1506860 (3rd Cir.(Pa.))). The defendant appealed his sentence contending that the District Court engaged in impermissible judicial fact-finding contrary to United States v. Booker, 543 U.S. 220 (2005), in applying a two-point enhancement pursuant to U.S.S.G. § 2D1.1(b)(1). He argued that the enhancement contravened the Sixth Amendment, inasmuch as he never admitted or conceded that the firearms were possessed in connection with drug trafficking. In so arguing, he relied on *Booker*. The Court of Appeals

concluded that the defendant misread *Booker*. In other words, the Sixth Amendment is not violated simply because a judge finds sentencing facts under the guidelines; rather, to trigger constitutional error, the judge must do so pursuant to a mandatory guidelines system.

The U.S. Supreme Court decided the consolidated case of *United States v.* ***Booker***, No. 04-104 and *United States v. Fanfan,* No. 04-105. This landmark decision will usher in a new era infederal sentencing practice and provides new opportunities in sentencing advocacy. Below are highlights of the decision. The majority decision is in two parts. The first part, written by Justice Stevens for a 5-4 majority (Scalia, Souter, Thomas and Ginsburg) finds the **Guidelines** violate the Sixth Amendment and are thus unconstitutional. The second part, written by Justice Breyer for a different 5-4 majority (Rehnquist, Connor, Kennedy and Ginsburg) remedies this finding by making the **Guidelines** advisory, mandating that the courts must consider the **Guidelines** (among other traditional factors) when rendering a sentence, and finding that appellate courts can review sentences for reasonableness. The full opinion can be accessed at the Supreme Court's website a t www.supremecourtus.gov/opinions/04pdf/04-104.pdf. Below are the highlights of the decision:

First Holding: Current Administration of the **Guidelines** Violates Defendants' Sixth Amendment Rights - - Pursuant to 18 U.S.C. Section 3553(b), the **Guidelines** are mandatory, and thus create a statutory maximum for the purpose of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court applied the reasoning in *Blakely v. Washington,* and finds that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Under the current administration of the **Guidelines**, judges find these facts, and thus they are unconstitutional.

Second Holding: The **Guidelines** are Advisory and Sentences are Reviewable for Unreasonableness - - Given the Court's first holding, the Court excises18 U.S.C. §§ 3553(b)(1) and 3742 (e) from the Sentencing Reform Act and declares the **Guidelines** are now advisory. Pursuant to § 3553(a), district judges need only to consider the Guideline range as one of many factors, including the need for the sentence...to provide just punishment for the offense § 3553(a)(2)(A), to afford adequate deterrence to criminal conduct § 3553(a)(2)(B), to protect the public from the further crimes of the defendant § 3553(a)(2)C). The Sentencing Reform Act, absent the mandate of § 3553(b)(1), authorizes the judge to apply his own perceptions of just punishment, deterrence and protection of the public even when these differ from the perceptions of the U.S. Sentencing Commission. The Sentencing Reform Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the **Guidelines** range) based on an a reasonableness standard.

Blakely V. Washington, ___ U.S. ___, 124 S.Ct. ___ (June 24, 2004). Washington state law sets maximum terms of imprisonment for various classes of felonies. Other statutes limit the range of sentences within the maximum that a judge can impose for each offense, but allow for sentences above those ranges in "exceptional cases." To impose an "exceptional sentence, a judge must find that the case involves factors not taken into account in setting the sentencing

range. Defendant, convicted of kidnapping, had a sentencing range of 49 to 53 months, but the court departed upward to a 90-month sentence because of the cruelty of defendant's offense. In a 5 - 4 opinion, the Supreme Court held that the defendant's sentence violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires that facts (other than the fact of a prior conviction) that increase the maximum penalty for a crime, be submitted to a jury and proved beyond a reasonable doubt. The Court held that the statutory maximum for purposes of this rule is the maximum sentence the judge may impose based on the facts found by the jury or admitted by the defendant. The majority expressed no opinion on the Federal Sentencing Guidelines, but Justice O'Connor, in a dissent joined by Justice Breyer on this point, said that "if the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would."

United States v. Kikumura, 947 F. 2d 72 (3d Cir. 1991). The Third Circuit originally remanded defendant's case for resentencing. Prior to resentencing, counsel withdrew. At the resentencing hearing, the public defender advised the court that defendant had been in touch with private counsel and wished a continuance so that his counsel of choice could represent him at the resentencing. Since defendant had already been granted two continuances, the district court denied a further continuance. The Third Circuit rejected defendant's claim that this violated his 6th Amendment right to counsel of his choice. Defendant was aware of the pending resentencing for four months prior to its occurrence. His attorney moved to withdraw on January 8, and the motion was granted on January 30. The resentencing took place on March 1. Defendant had a full month to find new counsel. Moreover, the federal defender who represented defendant at the resentencing had a month to prepare and ably represented defendant at the hearing.

Eighth Amendment

United States v. Frazier, 981 F. 2d 92 (3d Cir. 1992). Defendants challenged the harsher penalties for cocaine base than for cocaine on the grounds that (a) the term "cocaine base" is void for vagueness, (b) the penalty scheme violates equal protection because cocaine base offenders are predominantly black while cocaine offenders are predominantly white, and (c) the scheme violates the 8th amendment because the difference in penalties is disproportionate to the relative gravity of the offenses. The Third Circuit rejected all three constitutional challenges.

United States v. Salmon, 944 F. 2d 1106 (3d Cir. 1991). Defendant contended that classifying him as a career offender violated due process because at the time he committed the predicate offenses he was unaware of the effect that the convictions would have on future sentences. He further argued that the classification was cruel and unusual punishment because it did not consider his drug addiction and was not proportionate to the offenses. The Third Circuit upheld the career offender classification, finding defendant was essentially claiming that his prior pleas were involuntary because he was not informed of the effect they might have on his later sentencing. Due process only requires that defendant be informed of the direct consequences of his plea. The effect of a conviction on sentencing for a later offense is a collateral consequence. With regard to the 8th Amendment, the Supreme Court concluded in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) that the 8th Amendment only forbids sentences that are grossly

disproportionate to the crime. Defendant's three concurrent 210-month prison sentences were not grossly disproportionate to his three drug offenses.

Miscellaneous

United States v. Watson, 482 F. 3d 269 (3d Cir. 2007). Before his sentencing for bank robbery, defendant submitted evidence that he had AIDS and a long history of substance abuse. A psychological evaluation found that defendant was borderline mentally retarded, and noted that his diminished cognitive functioning could have been caused by developmental factors, alcohol and drug abuse, or AIDS. Defendant had an offense level of 29 and fell into criminal history category VI, for a sentencing range of 151 to 188 months. The district court sentenced defendant to 120 months. The Third Circuit rejected defendant's contention that the sentence was unreasonable because, in light of his condition, it amounted to a death sentence. The court held that the district court properly considered and applied the factors in 18 U.S.C. § 3553(a), and it found that "the mere fact that a defendant may not survive beyond his sentence does not provide a basis for a shorter sentence."

United States v. Johnson, 2003 WL 245735 (3rd Cir.(Pa.))). The defendant appealed the district court's failure to depart downward for post-rehabilitation efforts. Because the Court of Appeals found that the defendant waived her right to appeal, the Court of Appeals had no jurisdiction to consider the merits of her appeal.

United States v. Weaver, 267 F. 3d 231 (3d Cir. 2001). The defendant appealed his sentence, arguing that the government's notice of its intent to seek a sentence of life imprisonment under 18 U.S.C. § 3559(c)(1) was defective because it failed to properly inform him of the nature of the prior convictions relied upon, and thus provided him inadequate notice. The government gave notice, pursuant to 21 U.S.C. § 851, to Weaver of its intent to rely upon three prior convictions. Weaver contends that the government's notice was flawed in three ways. First, one of the previous convictions set forth in the notice contained an error, in that it indicated that his July 3, 1975 conviction was for "involuntary manslaughter," when it was actually for "voluntary manslaughter." Second, the original notice sent to Weaver indicated that one of the prior convictions that the government would rely upon was his November 21, 1977 conviction for armed robbery. In fact, there was no crime in Pennsylvania entitled "armed robbery" in 1977. Rather, on November 21, 1977, Weaver was found guilty of two separate robberies that were consolidated for trial and, with respect to one of the two robbery convictions, the jury also convicted Weaver of using a "prohibited offensive weapon." Finally, the reference to Weaver's third conviction improperly referred to an armed robbery conviction on June 19, 1989. Weaver was originally convicted on June 19, 1989, but the conviction was not for armed robbery. Instead, Weaver had been convicted of two separate charges of robbery and criminal conspiracy relating to the robbery of two banks on the same day, and both convictions were later vacated and re-entered on July 2, 1997. The Court of Appeals held that the district court did not err in finding Weaver received adequate notice as per 21 U.S.C. § 851.

Lopez v. Davis, _ U.S. _, 121 S.Ct._ (Jan. 10, 2001). Under 18 U.S.C. § 3621(e)(2)(B), a federal prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program "may" have his sentence reduced by the Bureau of Prisons (BOP). After a 1995 regulation was challenged in the courts, the BOP issued a 1997 regulation categorically excluding from early release any prisoner who possessed a firearm in connection with his offense. In a 6-3 opinion written by Justice Ginsburg, the Supreme Court held that Congress's use of the permissive "may" in the statute gave the BOP discretion to categorically deny early release to certain kinds of prisoners. The majority held that the BOP could rely on preconviction conduct, and could make categorical exclusions rather than case-by-case assessments of each prisoner. The rule of lenity did not apply.

United States v. Kirkpatrick, Nos. 98-7275 (3d Cir. 1999). Leonard Mitchell and Todd Kirkpatrick separately challenge the $100 special assessments imposed as part of their sentences following felony convictions. Both argue that, under the applicable law at the time their felony offenses were committed, the special assessment should have been $50 per conviction. The government conceded error. The Court of Appeals agreed and reversed.

Kapral v. U.S., 166 F. 3d 565 (3d Cir.1999). The Court of Appeals held that a "judgment of conviction becomes final" within the meaning of § 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires. If a defendant does not pursue a timely direct appeal to the Court of Appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired. In federal criminal practice, "judgment of conviction" refers to a formal document, signed by the trial judge and entered by the clerk of the district court, that sets forth "the plea, verdict or findings, the adjudication, and the sentence."

U.S. v. Berry, 164 F. 3d 844 (3rd Cir. 1999). The defendant argued that the federal prosecution was barred by his earlier plea and sentence in state court on charges arising from the same drug transactions as those charged in the federal indictment at issue here. Berry's prosecution by the federal government for the same acts that his state prosecution dealt with does not, standing alone, represent a violation of the Fifth Amendment's proscription against double jeopardy. Nonetheless, the defendant argued that when the evidence is viewed as a whole, it is clear that the state prosecution was heavily influenced and controlled from beginning to end by federal authorities, and, therefore, that his federal prosecution falls within the narrow "Bartkus exception" to the dual sovereignty rule. The Court of Appeals held that the district court correctly held that there was no merit to Berry's argument that his federal prosecution requires an exception to the dual sovereignty doctrine because it violates the Double Jeopardy Clause.

United States v. Evans, 155 F.3d 245 (3d Cir. 1998). The primary question presented, which arises out of Evans' judgment of sentence, is whether the district court erred in conditioning his supervised release on reimbursement of the cost of court-appointed counsel. Held: Reimbursement of counsel fees could not be effected in this case by making it a condition of supervised release. The district court clearly violated the first requirement of the supervised release statute when it imposed a condition that had no reasonable relationship to the factors identified in 18 U.S.C. §§ 3553(a)(1) and (a)(2)(B)-(D).

Royce v. Hahn, 151 F. 3d 116 (3d Cir. 1998). The issue in this case is whether mere possession of a firearm by a previously convicted felon is a "crime of violence" that triggers an obligation of federal prison authorities to notify local authorities upon an inmate's release. The appellate court held that possession of a firearm under 18 U.S.C. § 922(g) is not a crime of violence within the terms of 18 U.S.C. § 4042(b), and that Program Statement No. 5162.02(7) is an impermissible interpretation of 18 U.S.C. § 924(c)(3).

Stiver v. Meko, 130 F. 2d 574 (3d Cir. 1997). Defendant challenged a decision by the Bureau of Prisons denying him a one year sentence reduction because of his previous convictions for violent offenses. Under the 1994 Violent Crime Control and Law Enforcement Act, "prisoners convicted of a non-violent offense" are eligible for a one year sentence reduction upon successful completion of a drug treatment program. See 18 U.S.C. §3621(e)(2)(B). Defendant had been incarcerated since 1992 for possession of heroin with intent to distribute, a non-violent offense. Because he successfully completed a drug treatment program during this prison term, he contended he is eligible for early release under the statute. Nonetheless, the Bureau denied him a sentence reduction pursuant to its regulation that categorically excludes inmates previously convicted of a violent crime from eligibility for early release under §3621(e)(2)(B). Defendant previously was convicted of robbery and aggravated assault, both of which are violent offenses. The court of appeals held that: (1) Bureau regulation reasonably construed "convicted of a non-violent offense," as used in Act to mean all convictions, and not just conviction for which inmate is currently incarcerated; (2) regulation did not violate ex post facto clause; and (3) regulation did not violate double jeopardy.

United States v. Ward, 131 F.3d 335 (3d Cir. 1997). Defendant abducted a 24 year old woman and brutally sexually assaulted her over a period of three days. He was convicted of kidnaping in violation of 18 U.S.C. §1201. On appeal, the defendant argued that the district court erred when it ordered him to undergo a blood test for the presence of HIV. The court of appeals held that a district court may order such testing under the recently amended federal Violence Against Woman Act. However, the district court failed to make certain required findings under the Act before ordering the test.

Roussos v. Menifee, 122 F. 3d 159 (3d Cir. 1997). Defendant was serving a federal term of imprisonment for conspiracy to distribute a controlled substance. He completed a 500 hour drug program offered by the Federal Bureau of Prisons which he believed made him eligible for early release. The BOP, however, ruled him ineligible because one of the arresting officers found a gun in his vacation home, and the sentencing court enhanced defendant's sentence by

two levels. The enhancement, in turn, led the BOP, on the basis of a "Program Statement," to classify defendant's offense as a crime of violence, thereby disqualifying him for early release. The court of appeals held that the firearm enhancement under the sentencing guidelines did not, by itself, make defendant ineligible for a sentence reduction.

United States v. Jones, 979 F. 2d 317 (3d Cir. 1992). The Third Circuit rejected the argument that because the guidelines do not define "cocaine base," higher penalties for cocaine base than for cocaine are unconstitutional. Cocaine salt and cocaine base or crack are different substances with a different molecular structure and definition in organic chemistry. Simply because Congress has not provided a definition for the term cocaine base does not mean it has failed to establish minimal guidelines to govern law enforcement. There is a rational basis for distinguishing between cocaine base and cocaine salt. Cocaine base is far more addictive than cocaine in its salt form, and is more accessible due to its relatively low cost. Finally, defendant had no basis for arguing that the guidelines were vague as to him, since he never suggested that he misunderstood the difference between crack and cocaine.

REVIEW OF SENTENCES *(other than departures)*

Gall v. U.S., 551 U.S. ____ , 127 S.Ct. ____ (June 11, 2007) (granting certiorari). Last year, the Supreme Court granted certiorari in a case from the Eighth Circuit, *Clairborne v. U.S.*, to decide whether a court reviewing a sentence for reasonableness under *Booker* can require a sentence that constitutes a substantial variance from the sentencing guidelines to be justified by extraordinary circumstances. Before the Court could issue a decision, Clairborne died, and the Court dismissed the case as moot. On June 11, 2007, the Court granted review in a new case, also from the Eighth Circuit, that raises the same issue. Although the Solicitor General urged the Court to review a case raising the *Clairborne* issue on an expedited basis, the Court did not set the new case on an expedited schedule.

Rita v. U. S. , 551 U.S. ___ , 127 S.Ct. ___ (June 21, 2007). Under *U.S. v. Booker*, 543 U.S. 220 (2005), a court is to review a sentence under the advisory guidelines to determine whether it is unreasonable. The Supreme Court held that in reviewing for reasonableness, a court may apply a nonbinding presumption that a sentence within the advisory guidelines range is reasonable. The presumption applies only on appellate review; a district court may not presume that a sentence within the guidelines range should apply. Nor may a court of appeals adopt a presumption that sentences outside the guidelines are unreasonable. The court also held that applying a presumption of reasonableness to a within-guidelines sentence on appeal does not violate the Sixth Amendment.

Rita v. U. S. , 551 U.S. ___ , 127 S.Ct. ___ (June 21, 2007). At defendant's sentencing hearing, the district court heard defendant's argument for a sentence below the advisory guidelines range and noted that defendant could seek a lower sentence either through a departure or a variance from the guidelines based on factors in 18 U.S.C. 3553(a). After hearing argument, the court said that it was "unable to find" that s sentence within the guidelines range was

inappropriate. The Supreme Court held that the district court had provided an adequate justification for the sentence it imposed. The court held that in explaining its sentence, a court should say enough to satisfy the appellate court that it has considered the parties' arguments and has a reasoned basis for its decision. The court noted, however, that when the sentencing court simply applies the guidelines to a particular case, "doing so will not necessarily require lengthy explanation," unless one of the parties presents "nonfrivolous reasons for imposing a different sentence."

Double Jeopardy/Double Counting

United States v. Caden, 2003 WL 955474 (3rd Cir.(Pa.))). The defendant was convicted of possession of a precursor and attempt to manufacture a controlled substance. Imposing multiple punishments for possession of a precursor and attempting to manufacture a controlled substance comes close to constituting a double jeopardy violation. Indeed, two other Courts of Appeals have held that imposing multiple punishments for possession of a precursor and attempting to manufacture a controlled substance violates the Double Jeopardy Clause. *See United States v. Forester*, 836 F.2d 856, 860-61 (5th Cir. 1988); *United States v. Wilson*, 781 F.2d 1438 (9th Cir. 1986). However, in the present case, the Court of Appeals held that the defendant engaged in two criminal undertakings, rather than merely multiple steps in a single multi-step crime. The defendant possessed methylamine not only in an attempt to manufacture methamphetamine himself, but also to sell the methylamine to others.

United States v. Bishop, 66 F. 3d 569 (3d Cir. 1995). Imposing consecutive sentences for carjacking and use of a firearm during the commission of a violent felony did not violate double jeopardy.

United States v. Wong, 3 F. 3d 667 (3d Cir. 1993). The Third Circuit held that enhancements under §2B1.5(b)(5) for more than minimal planning and §3B1.1(c) for being an organizer or leader or criminal activity did not constitute double counting. These enhancements address different concerns, and the Sentencing Commission intended both enhancements to be applied, in tandem, when appropriate. The more than minimal planning enhancement was intended to distinguish between relatively simple crimes and more sophisticated ones. The adjustment for role in the offense addresses the relative responsibilities for those involved. It is possible for an offense to involve more than minimal planning, but not other people. Similarly, it is possible for someone to be an organizer or leader in a scheme that does not require a great deal of planning.

United States v. Georgiadis, 933 F. 2d 1219 (3d Cir. 1991). Defendant pled guilty to four counts of bank embezzlement. He contended that the enhancement for abuse of position of trust was improper because abuse of trust was implicitly reflected in the adjustments made by the district court under guideline §§2B1.1(b)(1) and (5), which increase a defendant's offense level based on the amount of loss and for more than minimal planning. The Third Circuit rejected this argument. The adjustment based on the amount of loss caused by defendant's embezzlement and the abuse of trust enhancement operate independently and respond to "different evils." "It is not

hard to imagine cases where the amount of money stolen by an embezzler will not depend on whether he abused any position of trust." Similarly, the enhancement for more than minimal planning and abuse of trust dealt with separate concerns.

United States v. Garcia, 919 F. 2d 881 (3d Cir. 1990). The district court dismissed counts related to defendant's earlier arrest on the ground that the defendant had already been punished for these offenses by a judge who considered them at a prior sentencing, and therefore double jeopardy barred prosecution. The Third Circuit reversed, finding that the sentencing judge's consideration of the prior arrest did not constitute "punishment." Information about the earlier arrest could not have been used to calculate defendant's base offense level, since the judge had no gram count for defendant's earlier transaction. Nor had the earlier arrest been used as the basis for an upward departure. On the other hand, the arrest did play a role in denying a reduction for acceptance of responsibility and assessing a penalty for obstruction of justice. In addition, it may have played a role in the judge's decision to sentence defendant at the top of the applicable guideline range. However, none of these uses constituted "punishment," and thus did not implicate the double jeopardy clause.

United States v. McMillen, 917 F. 2d 773 (3rd Cir. 1990). Even where a defendant has begun serving his sentence, the government may appeal an illegal sentence without violating the defendant's double jeopardy rights where Congress has provided that the sentence is subject to appeal.

United States v. Williams, 892 F. 2d 296 (3d Cir. 1989). The Third Circuit held that it did not violate the double jeopardy clause for the defendant to be convicted of being an Armed Career Criminal under 18 U.S.C. §924(e) and then to have his guideline sentence enhanced under USSG §4B1.1 for being a "career offender."

United States v. Medieros, 884 F. 2d 75 (3d Cir. 1989). Section 4A1.1(d) adds two points to a defendant's criminal history category score if the offense is committed while the "defendant is still serving any criminal sentence." Section 4A1.1(e) adds one point if the current offense is committed less than two years after release or if the defendant is still in confinement. Application of these sections is not double counting when the offense in question is escape from prison, even though an element of that offense is that the defendant be in custody. The court found only that "the guidelines give adequate consideration to the interplay among these sections."

Standard of Review -- 18 U.S.C. §§ 3553 (a) and 3742

United States v. Tomko, 498 F. 3d 157 (3d Cir. 2007). From 1996 through 1998, defendant had numerous subcontractors working on the construction of his luxurious new home falsify their billing invoices to make it appear their work had been done for his construction company. The company paid the construction costs of the home, illegally deducted the expenses, and defendant did not report the value of the construction costs as income on his personal income tax return. He pled guilty to income tax evasion. Although his advisory guideline range was 12-

18 months of incarceration, the district court sentenced him to 250 hours of community service, three years of probation (including one year of house arrest) and a fine of $250,000. The Third Circuit reversed, ruling that a sentence of probation did not reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, § 3553(a)(2)(A), or provide adequate deterrence. § 3553(a)(2)(B). A sentence of probation, including home confinement in the very mansion built through the fraudulent tax evasion scheme, would send the public and would-be violators a terrible message. In addition, the three mitigating factors relied on by the court (negligible criminal history, support and ties and charitable work, employment record) were insufficient to warrant the variance.

United States v. Richmond, 120 F. 3d 434 (3d Cir. 1997). Defendant argued that because he was only 18 years old at the time he committed his crime, the district court abused its discretion when it imposed the maximum guideline sentence. The Third Circuit held that it lacked jurisdiction to review the sentence because it was within the applicable guideline range and defendant did not allege a violation of law.

United States v. McDowell, 888 F.2d 285 (3d Cir. 1989). "The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." Mixed questions of fact and law which are predominantly factual are reviewed under clearly erroneous standard, however, questions of guideline application and calculation of sentence is plenary.

Custody Credits

United States v. Blair, 2002 WL 125584 (3rd Cir.(N.J.))). The defendant pleaded guilty to being a convicted felon in possession of a firearm that was in or affecting commerce in violation of 18 U.S.C. § 922(g)(1). The defendant argued that the district court erred when it found that it did not have the authority to give the defendant custodial credit back to the date of his initial appearance. The Court of Appeals upheld the sentencing court's decision. The date on which a defendant's sentence is deemed to commence is controlled by 18 U.S.C. § 3585(a), and the decision is committed, in the first instance, to the exclusive authority of the Bureau of Prisons. The district court simply did not have the authority to effectively "back date" a sentence to commence on the date his sentencing was arguably scheduled. That would effectively give him credit for presentence custody.

Reno v. Koray, 115 S. Ct. 2021 (1995). Under 18 U.S.C. §3685(b), a defendant must be given credit for time spent in "official detention" before the sentence commences. In this case, defendant was released on bail pending sentencing and ordered confined in a community treatment center without authorization to leave unless accompanied by a Government special agent. The Supreme Court held that, notwithstanding the "jail-type" conditions of defendant's release on bail, his time in the community treatment center was not "official detention" and therefore he was not entitled to credit against his sentence.

United States v. Brann, 990 F. 2d 98 (3d Cir. 1993). The district court denied defendant's motion for credit for time served under house arrest pending his appearance to enter a plea. The Third Circuit found that the issue of whether there was proper credit for the prior custody was not ripe. The Attorney General has the power to grant credit for pretrial custody in the first instance. A district court has no jurisdiction to grant credit for prior custody until a defendant exhausts his administrative remedies.

United States v. Wilson, 112 S. Ct. 1351 (1992). In rewriting the Custody Credits statute, 18 U.S.C. §3568, and changing it to its present form in §3585(b), Congress left out the formal reference to the Attorney General. Nevertheless, the Supreme Court held that "the Attorney General must continue to compute the credit under §3585(b) as he did under the former §3568." The court noted that at the time of sentencing, the district court often will not know how much credit the defendant will be entitled to. Thus, in light of the sentencing court's inability to compute credit, the Attorney General must continue to make the calculation even though §3585(b) no longer mentions him.

Waiver of Appeal

United States v. Khattak, 273 F.3d 557 (3d Cir. 2001). The defendant entered into a plea agreement whereby he agreed to waive his right to appeal the sentencing court's determination or imposition of the offense level. The Court of Appeals held that waivers of appeals are generally permissible if entered into knowingly and voluntarily, unless they work a miscarriage of justice. In determining whether a waiver of appeal is "knowing and voluntary," the role of the sentencing judge is critical.

Information Relied On/Hearsay

United States v. Brothers, 75 F. 3d 845 (3d Cir. 1996). Defendant's cousin negotiated to buy 10 kilograms of cocaine for $190,000. The cousin borrowed $6,000 from defendant to pay the balance of the purchase price. Defendant drove his cousin to the deal, and the two cousins were arrested. After the arrest, the cousin told an FBI agent that defendant was fully aware of the amount of drugs involved. However, at sentencing, under oath, the cousin said defendant never knew the amount of cocaine involved. The district court relied on the hearsay statement to hold defendant accountable for over five kilograms of cocaine. The Third Circuit reversed, holding that the hearsay did not meet the "sufficient indicia of reliability" standard. Defendant's past drug transactions with his cousin involved relatively small amounts of cocaine, and defendant only lent a relatively small amount of money to his cousin. Although the two bags of money were in the car, there was no evidence that defendant had a full view of the bags.

United States v. Dickler, 64 F. 3d 818 (3d Cir. 1995). Defendant ran a business that repossessed cars on behalf of financial institutions. They participated in a scheme to defraud the banks by submitting false bids on the cars based on falsified condition reports on the repossessed cars. The Third Circuit upheld the district court's refusal to admit evidence at sentencing tending to show that the condition reports were not falsified, since defendants admitted this fact at their

plea hearing. Contrary to defendants' contention, there was no ambiguity.

United States v. McGlory, 968 F. 2d 309 (3d Cir. 1992). The Third Circuit upheld the district court's reliance on a pretrial statement by one witness to determine drug quantity. The witness stated that prior to her arrest she and one of the defendants brought between two to four pounds of heroin per month from Los Angeles during the period of April 1986 through September 1987. Based on this statement, the district court attributed 15.5 kilograms of heroin to defendants. This calculation did not affect one defendant's mandatory life sentence under 21 U.S.C. §841(b)(1)(A)(i), since the jury found beyond a reasonable doubt that defendant conspired to possess in excess of one kilogram of heroin. The statement was not admitted into evidence at trial and the jury did not rely on it in any way. Although neither defendant had the opportunity to cross-examine the witness about her statement, reliable hearsay is generally admissible. The credibility of the witness was for the district court to determine.

United States v. Reyes, 930 F. 2d 310 (3d Cir. 1991). The district court found that defendant's conspiracy involved more than five kilograms of cocaine. Although the judge presided over the trial and thus had a detailed knowledge of the evidence, the judge made this finding based upon the testimony of a single prosecution witness. The Third Circuit remanded, finding that this testimony alone was insufficient to support the five kilogram finding. The only other evidence cited by the judge was the fact that the conspiracy lasted 13 months, but this fact alone also did not support the court's findings. On remand, there was nothing to prevent the district court from considering pertinent testimony given at a co-defendant's trial, so long as the testimony met standards of reliability.

Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, a man was convicted of possession of a prohibited weapon, which he fired into an African-American's home. The statute under which he was convicted called for a 10-year maximum sentence, but the judge increased the sentence to 18 years based on a separate statute which permitted an enhanced sentence for crimes driven by racial animus. The Supreme Court ruled: "The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."

DISTRICT COURT CASES/COURT OF APPEALS UNPUBLISHED DECISIONS

U.S. v. Fields, No. 01-1103 (3d Cir. July 13, 2001). After the district court denied his motion to suppress as evidence narcotics seized pursuant to a search warrant, the defendant pled "guilty" to interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952(a)(3). He reserved the right to appeal from the denial of his motion to suppress. The defendant was sentenced to 51 months imprisonment and three years supervised release. On appeal, he argued that the district court erred in denying his motion to suppress. The defendant contends that the narcotics were seized illegally because, in his view, the police violated the "knock and announce" rule prior to their seizure by failing to announce their purpose for wanting to enter the premises and by failing to give its occupants sufficient time to answer the door before they entered. The

district court rejected the argument in reliance, inter alia, on *United States v. Herrold*, 962 F.2d 1131, 1141-42 (3d Cir. 1992), which it found "dispositive," on the basis of its conclusion that the application for the search warrant contained adequate information to support the issuance of the warrant without regard for information obtained during the questioned entry. The court of appeals affirmed the district court's decision.

U.S. v. Simmons, No. 00-2273 (3d Cir. Feb. 21, 2001). On appeal, the defendant argued that the district court erred in denying his motion to withdraw his plea of guilty. The defendant had entered into a comprehensive written plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(C). The agreement recited that the parties agreed that the appropriate sentence was 63 months together with the minimum allowable fine. It further provided that if the district court refused to accept the agreement, the defendant would not be bound by his guilty plea. On February 16, 2000, the defendant pled guilty pursuant to the plea agreement. On May 11, 2000, the defendant filed a motion to withdraw his guilty plea. His motion included a letter he addressed to his attorney explaining that he wished to withdraw his guilty plea because he believed when he pleaded guilty that he "was getting a sentence of less than 63 months." On July 19, 2000, the district court held a hearing on the motion and filed a memorandum and order denying the motion. In its memorandum, the district court pointed out when the defendant pleaded guilty he indicated that he understood that he was entering the plea in exchange for a 63 month prison term and that he was pleading guilty because he was guilty. The district court indicated that at the hearing on his motion to withdraw the guilty plea, the defendant asserted that he was not guilty of the offense but that he nevertheless would plead guilty if he received a sentence of one and one-half years. The district court denied the motion because it believed that the defendant's "assertion of innocence is ambivalent, and his reason for withdrawal is essentially based upon the dissatisfaction with a sentence to which he agreed." The Court of Appeals affirmed, stating that "at bottom, by seeking to withdraw his plea, Simmons simply was attempting to negotiate for a reduced sentence."

U.S. v. Price, No. 00-2495 (3d Cir. Feb. 15, 2001). The defendant appealed an order entered in the district court for the Middle District of Pennsylvania denying his application under 28 U.S.C. § 2241 seeking habeas corpus relief relating to a conviction in the district court for the Eastern District of Pennsylvania. Inasmuch as the defendant brought the habeas corpus proceeding in the district of his confinement (MD/PA), the court dismissed his petition because it believed that the defendant could advance his claims only under 28 U.S.C. § 2255 in the district in which he had been convicted (ED/PA). The Court of Appeals affirmed, citing that all challenges to the validity of a conviction and sentence must be made in the district in which the petitioner was convicted.