FEDERAL SENTENCING

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FEDERAL SENTENCING

I. INTRODUCTION

The Sentencing Reform Act of 1984 transformed federal sentencing practice by creating guidelines that generally dictated the court’s sentencing decision. Twenty years later, the Supreme Court transformed federal sentencing again by declaring that the mandatory sentencing guidelines were unconstitutional, and that the guidelines should be saved by making them advisory. United States v. Booker, 543 U.S. 220 (2005). This paper offers a review of 1) federal sentencing practice before and after the guidelines, 2) Booker and the history that led to Supreme Court’s decision, and 3) the guidelines themselves, as they will continue to play a significant role in the post-Booker world. Traditional departures are also identified as they continue to have a significant impact in sentencing.

II. THE EVOLUTION OF FEDERAL SENTENCING

A. Before the Guidelines

The concept of individualized sentencing in criminal cases has long been accepted in this country. Lockett v. Ohio, 438 U.S. 586, 602 (1978). Judges and other sentencing authorities were given substantial discretion in determining the appropriate sentence. Wasman v. United States, 468 U.S. 559, 560 (1984). In exercising this discretion, judges were traditionally permitted to consider a wide range of factors. The courts agreed that the judge’s “possession of the fullest information possible concerning the defendant’s life and characteristics is highly relevant - if not essential - [to the] selection of an appropriate sentence.” Williams v. New York, 337 U.S. 241, 247 (1949).

This willingness to provide the sentencing judge with full information has not always worked to the defendant’s benefit. In Williams, the Supreme Court held that hearsay was admissible in a sentencing proceeding. 337 U.S. at 247. Likewise, the trial court may evaluate the credibility of a defendant who testifies and impose a lengthier sentence if the judge believes that the defendant has lied. United States v. Grayson, 438 U.S. 41, 55 (1978). Consideration of various factors, however, was not unlimited. The due process clause prohibits consideration of “materially untrue” information. Townsend v. Burke, 334 U.S. 736, 741 (1948). Likewise, the sentencing authority cannot rely on an uncounseled state conviction. United States v. Tucker, 404 U.S. 443 (1972).

Under the pre-guideline system, a defendant could be paroled after serving one-third of his sentence or after serving ten years of any sentence of at least thirty years. 18 U.S.C. § 4205(a)(1982) (repealed). The court could permit release on parole after service of a minimum sentence less than one-third of the maximum, 18 U.S.C. § 4205(b)(1), or parole could be permitted at any time. 18 U.S.C. § 4205(b)(2). A prisoner had to be released after serving two-thirds of his sentence or after serving thirty years of each consecutive term of more than forty years unless the Parole Commission determined that the prisoner had “generally or frequently violated institution orders and regulations or that there [was] a reasonable probability that he [would] commit any federal, state or local crime.” 18 U.S.C. § 4206(d); see also 4161, 4162 (good time credits) (repealed).

Indeterminate sentencing, supported by parole, was “based on concepts of the offender’s possible, indeed probable, rehabilitation...” Mistretta v. United States, 488 U.S. 361, 363 (1989). Both the courts and the parole authorities were given wide discretion to permit them to assess the offender’s amenability to rehabilitation. Id.

B. The Sentencing Reform Act

1. The Statutory Scheme

As a result of dissatisfaction with perceived uncertainties and disparities in federal sentencing, however, Congress enacted the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq. The Act increased certainty by, among other things, abolishing parole, substantially curtailing the availability of good time credits. 18 U.S.C. § 3624(a)(6). Disparity was minimized through the use of sentencing guidelines promulgated by the United States Sentencing Commission. 28 U.S.C. § 991. These guidelines severely limited the sentencing judge’s discretion. Under the Act, the court must impose a sentence within the
guidelines “unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or
to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the
guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b)(1).

Further, both the defendant and the government could appeal a sentence resulting from an incorrect
application of the guidelines, as well as a departure. 18 U.S.C. §§ 3742(a), (b). While the sentencing
court’s factual findings were reviewed under a clearly erroneous standard, guideline interpretations were
reviewed de novo. United States v. Alfaro, 919 F.2d 962, 965-66 (5th Cir. 1990). Traditionally,
departures were reviewed under an abuse of discretion standard. Koon v. United States, 518 U.S. 81, 98
decision to depart. 18 U.S.C.A. § 3742(e) (Supp. 2004).

The Act also classifies federal offenses based on potential imprisonment ranging from a Class A
felony, punishable by up to life in prison, to a Class E felony, punishable by no more than three years.
Misdemeanors are also classified. 18 U.S.C. § 3581. Probation is not authorized for Class A and B

Congress directed the courts to consider the factors set forth in 18 U.S.C. § 3553(a) in imposing
sentence as follows:

The court shall impose a sentence, sufficient, but not greater than necessary, to comply
with the purposes set forth in paragraph (2) of this subsection. The court, in determining
the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of
the defendant;

(2) the need for the sentence imposed -
   (A) to reflect the seriousness of the offense, to promote respect for the
      law, and to provide just punishment for the offense;
   (B) to afford adequate deterrence to criminal conduct;
   (C) to protect the public from further crimes of the defendant; and
   (D) to provide the defendant with needed educational or vocational
      training, medical care, or other correctional treatment in the most
effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for -
   (A) the applicable category of offense committed by the applicable
      category of defendant as set forth in the guidelines -
      (I) issued by the Sentencing Commission . . . ;
      (ii) that, except as provided in section 3742(g) are in effect on
           the date the defendant is sentenced; or
(B) in case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission...

(5) any pertinent policy statements [issued by the Sentencing Commission];

(6) the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.


2. The Sentencing Commission

The Sentencing Commission is an “independent commission in the judicial branch of the United States.” 28 U.S.C. § 991(a). The Commission has seven voting members appointed by the President, subject to Senate confirmation. Id. At least three members must be federal judges. Id. No more than four members can be from the same political party. 28 U.S.C. § 991(a). The Attorney General, or his designee, and, at least temporarily, the Chairman of the Parole Commission, are ex-officio, non-voting members. Id.

The Commission is tasked with promulgating the sentencing guidelines and reviewing and revising them periodically. 28 U.S.C. § 994(o). It must also monitor how the guidelines are working, 28 U.S.C. § 994(w), and report on other sentencing issues to Congress.

Congress has given a number of directives to the Commission to consider in formulating the guidelines. For example, the maximum guideline range cannot exceed the minimum by more than twenty-five percent or six months. 28 U.S.C. § 994(b)(2). The Commission is to insure that the guidelines “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense...” § 994(j). On the other hand, prison is deemed generally appropriate for crimes of violence resulting in serious bodily injury, Id. and sentences near the maximum should be authorized for violent offenders and drug traffickers with a record of similar behavior. § 994(h).

The Sentencing Commission is an entity like no other. Although not a branch of the legislature, it establishes sentencing ranges. It involves Article III judges working with non-judges to establish these ranges. In the first constitutional challenge to reach the Supreme Court, however, the Court held that, at least on its face, the statute was not an unconstitutional delegation of Congressional power or a violation of the separation of power doctrine. Mistretta v. United States, 488 U.S. 361 (1989).

3. The Guideline Scheme

The Sentencing Guideline Manual contains three types of text. First, are the guidelines themselves, which were binding on the courts. 18 U.S.C. § 3553(b); Mistretta, 488 U.S. at 391. Policy statements are designed to further the purposes of the Sentencing Reform Act. 28 U.S.C. § 994(a)(2). Where a “policy statement prohibits a district court from taking a specific action, the statement is an authoritative guide to the meaning of the applicable guideline.” Williams v. United States, 503 U.S. 193, 201 (1992). Failure to follow a policy statement is an incorrect application of the guidelines. Id. at 201. The third variety is the commentary, which interpret the guidelines and explain how they are to be applied. USSG § 1B1.7. As long as the commentary does not violate the Constitution or a federal statute, such commentary was to be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” Stinson v. United States, 508 U.S. 36 (1993) (citing cases involving agency’s interpretation of its own rules). See also United States v. LaBonte, 520 U.S. 751 (1997) (career offender commentary invalid because inconsistent with statute).
Sentencing under the guidelines is essentially based upon two factors - the offense and the defendant’s criminal history. United States v. Mejia-Orosco, 867 F.2d 216, 219 (5th Cir. 1989). The base offense level is adjusted upward or downward by specified offense characteristics. USSG § 1B1.1(b). Next, the level is adjusted in relation to the victim (vulnerable, official, restrained), the defendant’s role in the offense (organizer or pawn), and any obstruction of justice. §§ 1B1.1(c), 3A1.1-3C1.1. The offense level may be adjusted downward if the defendant accepts responsibility for his conduct. §§ 1B1.1(e); 3E1.1. If there are multiple counts of conviction, some offenses are “grouped” while others are treated separately. The final sentencing range is calculated from a table that cross-references the offense level with the criminal history category. Straight probation was available only if the minimum term of imprisonment specified in the table was zero. USSG §§ 5B1.1(a)(1), 5C1.1(b). Another table governs fines.

One of the “most important questions for the Commission to decide” in promulgating the guidelines was whether to base sentences on the defendant’s “actual conduct,” (“real offense sentencing”) or on her charged conduct. USSG, Ch. 1, Intro, pt. 4. The relevant conduct provision, USSG § 1B1.3, represents a compromise between the two systems. Because it is not based solely on the offense of conviction, however, it would become a centerpiece of the constitutional challenges under the Sixth Amendment. Further, guideline adjustments need only be proved by a preponderance of the evidence. USSG § 6A1.3, cmt.

III. THE CONSTITUTIONAL CHALLENGES

A. The Previous Challenges to the Guidelines

In the first case to reach the Supreme Court, the Court upheld the constitutionality of the sentencing guidelines against a facial challenge based on the delegation and separation of powers doctrines embodied in the United States Constitution. Mistretta v. United States, 488 U.S. 361 (1989). Until 2005, other constitutional challenges were equally unsuccessful. In United States v. Dunnigan, 507 U.S. 87 (1993), the Supreme Court upheld the court’s enhancement of a defendant’s sentence for his perjury at trial. The Court rejected a double jeopardy challenge to the filing of new charges based on conduct that had already been considered in determining a previous sentence. Witte v. United States, 515 U.S. 389 (1995). In United States v. Watts, 519 U.S. 148, 155 (1997), the Court found no due process violation in enhancing a sentence based on conduct for which the defendant had been acquitted. In Edwards v. United States, 523 U.S. 511 (1998), the Supreme Court permitted the sentencing court to base a sentence on the court’s finding that the offense involved both crack and cocaine, even though the jury verdict did not so specify.

B. The Road to Booker

In 1970, the Supreme Court held that the Due Process clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). Based on Winship, the Court struck down a statute that presumed that all murders were committed with malice and required the defendant that he had acted in the heat of passion. Mullaney v. Wilbur, 421 U.S. 684 (1975). Mullaney thus limited the State’s ability to define away elements, although the Court later ruled that a defendant could be required to prove an affirmative defense. Patterson v. New York, 432 U.S. 197 (1977) (extreme emotional disturbance, similar to insanity). In McMillan v. Pennsylvania, 477 U.S. 79 (1986), however, the Court held that judge could make the findings necessary to establish a mandatory minimum sentence (for use of firearm) as long as the jury made the finding necessary for the maximum sentence. Finally, in Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Court held that a statute defining prior convictions as sentencing enhancements, rather than elements of the offense, was constitutional. But see Dretke v. Haley, 541 U.S. 386, 395-96 (2004) (“difficult constitutional question” whether prior convictions must be presented to jury).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court was asked to address the constitutionality of a state statute that enhanced the defendant’s sentence based on a court finding that the defendant’s offense was a hate crime. Confirming what it had suggested in Jones v. United States, 526 U.S. 227 (1999) (car-jacking is an element to be proved to a jury), the Court struck down the New Jersey statute, holding that, in accordance with the Sixth Amendment’s guarantee of the right to a jury trial, “any fact [other than prior convictions] that increases the penalty for a crime beyond the prescribed statutory
maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490.

This year, the Court finally held that the jury must determine the facts necessary to support a mandatory minimum sentence as well.  *Alleyne v. United States*, 133 S.Ct. 2151 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002), and *McMillan*). The Court emphasized that a statutory minimum alters and aggravates the prescribed range of punishment. 133 S.Ct. at 2160-61. But see *Oregon v. Ice*, 555 U.S. 160 (2008) (imposition of consecutive sentence based on judicial findings does not violate Sixth Amendment).

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court applied the *Apprendi* analysis to sentencing guidelines. Blakely pled guilty to second-degree kidnapping involving domestic violence and a firearm, a class B felony with a statutory maximum of ten years. The statute, however, authorized a higher sentence if the court found “substantial and compelling reasons justifying an exception sentence.” 542 U.S. at 299. In *Blakely*, the trial court had imposed a sentence of ninety months, well above the standard range of forty-nine to fifty-three months. Id. at 300. The Supreme Court held that this enhancement was unconstitutional because the maximum statutory sentence must be based on what the jury found:

The “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant...In other words, the relevant “statutory maximum” is not the maximum sentence a jury may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to punishment”... and the judge exceeds his proper authority.

*Blakely*, 542 U.S. at 303 (Emphasis in opinion). Interestingly, the Court distinguished statutory enhancements from indeterminate sentencing schemes, which it deemed constitutional:

[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury’s traditional function of finding the facts essential to the lawful imposition of the penalty. Of course, indeterminate schemes involve judicial fact finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence....

Id. at 308-09 (Emphasis in original). The dissent warned that Blakely cast constitutional doubt on the federal sentencing guidelines. Id. at 323-25 (O’Connor, J., dissenting); see also id. at 344 (Breyer, J., dissenting).

C.  **Booker**

In *United States v. Booker*, 543 U.S. 220 (2005), a majority of the Supreme Court (the merits majority) held that judicial factfinding under the Sentencing Reform Act of 1984 violated the Sixth Amendment because it required judges to increase the guideline range above that authorized by the jury verdict or the defendant’s admission, and then, under § 3553(b)(1), to impose a sentence within that range unless there was a ground for departure of a kind or to a degree not taken into account by the Sentencing Commission in formulating the Guidelines. 543 U.S. at 233-35, 244. The Supreme Court noted that the departure authority contained in § 3553(b)(1) did “not avoid the constitutional issue, just as it did not in Blakely itself.” Id. at 234. The Court’s conclusion rested “on the premise, common to both [the Washington guidelines system at issue in Blakely and the Federal Sentencing Guidelines], that the relevant sentencing rules [were] mandatory and impose[d] binding requirements on all sentencing judges,” id. at 233, thereby creating “statutory maximums” within the meaning of *Apprendi*.  *Booker*, 543 U.S. at 233-34.

A separate majority of the Court (the remedy majority) chose to save what it could of the statute by stripping the Guidelines of their mandatory nature and rendering them purely advisory.  *Booker*, 543 U.S. at 245, 259-61. The Court excised § 3553(b)(1), as well as § 3742(e), the section allowing de novo appellate review of departures. *Booker*, 543 U.S. at 258-59. The Court directed sentencing judges to impose sentence pursuant to 18 U.S.C. § 3553(a), and held that the Courts of Appeal should review the
D. **Rita:** Reasonableness

Even after Booker, it seemed to be business as usual with the Courts of Appeals generally applying a presumption of reasonableness to within Guidelines sentences. See, e.g., United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006). In Rita v. United States, 551 U.S. 338 (2007), the Supreme Court held that an appellate court may presume that a within Guidelines sentence is reasonable based on the assumption that both the Sentencing Commission and the sentencing judge have analyzed the Section 3553(a) factors and determined that the guideline sentence is appropriate. 551 U.S. at 347-52. The Court emphasized, however, that “the presumption is not binding. It does not, like a trial related evidentiary presumption, insist that one side of the other, should a particular burden of persuasion of proof lest they lose their case.” Id. at 347. Moreover, reasonable review is not the “touchstone of Sixth Amendment analysis. The reasonableness requirement Booker anticipated for the federal system operates within the Sixth Amendment constraints... not as a substitute for those constraints.” Cunningham v. California, 549 U.S. 270, 292-93 (2007) (emphasis in original) (invalidating California sentencing levels based on judicial findings).

While Rita is about appellate review, or, in the view of Justices Stevens and Ginsburg, deference to the sentencing judge, the opinion did offer some guidance to district courts. First, the guidelines are not to be presumed reasonable in the sentencing court. 551 U.S. at 351. The sentencing judge must consider the factors enumerated in § 3553(a) and impose a sentence sufficient but not greater than necessary. Rita, 551 U.S. at 348. The judge should subject the sentence to the “thorough adversarial testing contemplated by federal sentencing procedure.” Id. at 351 (citing Rule 32(f) (objection process) and 32(h) (notice of departure)). The court should also address all “nonfrivolous reasons” proffered by the parties for a non-Guidelines sentence and should explain its reasons for rejecting them. Rita, 551 U.S. at 357.

The concurring opinions also offer some useful insights on sentencing practice. Justices Stevens and Ginsberg emphasized the ability to impose a non-Guidelines sentence based on formerly discouraged factors. 551 U.S. at 364-67. Justices Scalia and Thomas believe that the new hybrid system may allow Sixth Amendment as applied challenges, at least, where the sentence is reasonable only because it is based on judicial findings. Id. at 370. Justice Souter was the lone dissenter believing that a presumption of reasonableness is essentially a return to mandatory guideline sentencing. Id. at 389-91.

E. **Gall and Kimbrough:** We Meant What We Said

In Gall v. United States, 552 U.S. 38 (2007), the Supreme Court made it “pellucidly clear” that the abuse of discretion standard applies to appellate review of all sentencing decisions, 552 U.S. at 41, 46, that the guidelines are not mandatory and that the “range of choice dictated by the facts of the case is significantly broadened.” Id. at 59. While the extent of the difference between a particular sentence and the recommended guideline is relevant, all sentences are subject to the same deferential abuse of discretion standard of review. Id. at 41, 47. The Court explicitly rejected any mathematical formula and any requirement of “extraordinary circumstances” to justify a sentence outside the Guidelines range. Id. at 47-49.

Gall directs review of district court sentences for both procedural and substantive reasonableness. The sentencing court must begin all sentencing proceedings by correctly calculating the applicable Guidelines range, using the Guidelines as the “starting point” and “initial benchmark”. 552 U.S. at 49. The Guidelines, however, “are not the only consideration.” Id. The court must give the parties “the opportunity to argue for whatever sentence they deem appropriate,” and “consider all of the 3553(a) factors to determine whether they support the sentence requested.” In doing so, the court “may not presume that the Guidelines range is reasonable,” and must make an “individualized assessment based on the facts presented.” Id. at 50-52. If the court decides that a sentence outside the Guidelines is warranted, the court must “consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance.” Id. at 50. The court must adequately explain the sentence to allow for meaningful appellate review and to “promote the perception of fair sentencing.” Id. As long as the district court’s decision is procedurally sound, the appellate court will review the substantive decision under a deferential abuse of “discretion standard.” Id. As it did in Koon v. United States, 518 U.S. 81, 88 (1996), the Court acknowledged that the sentencing courts are uniquely qualified to determine the appropriate sentence in an
individual case. Gall, 552 U.S. at 50. This year, the Court clarified that all sentences, not just Guideline sentences, are reviewed under the same standard. The appellate court cannot conduct greater review or apply a presumption of unreasonableness to non-Guidelines sentences. See Peugh v. United States, 133 S. Ct. 2072, 2080 (2013).

The Court also took the opportunity in Gall to remind us that sentencing continues to be an individualized process, emphasizing that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensure.” (quoting Koon, 518 U.S. at 113). 552 U.S. at 52. Turning to the individual factors in Gall, the Court deemed each of the sentencing court’s considerations to be reasonable. The defendant’s youth and subsequent withdrawal from the conspiracy and his voluntary rehabilitation reduced the likelihood of recidivism. 552 U.S. at 55-56. While Gall received a lenient sentence, the harsher sentences imposed on the more culpable codefendants was sufficient to promote respect for the law and to deter others. Id. at 53-54. The Guidelines themselves took into account disparity but the sentencing court reasonably concluded that this particular disparity was warranted. Id. Finally, the Court noted that probation, with its restrictions on liberty, is itself a significant punishment. Id. at 48-49.

In Rita, the Court was willing to assume that most Guidelines were the result of careful study of the 3553(a) factors by the Sentencing Commission. 551 U.S. at 347-52. In Kimbrough v. United States, 552 U.S. 85 (2007), the Court recognized that not all guidelines are created equal. For example, the Commission established the base offense levels for drug offenses solely with respect to statutory mandatory minimums without any empirical analysis of the actual danger of each substance. 552 U.S. at96-98, 109-10; see also Gall, 552 U.S. at 46 n.2. The crack guidelines are particularly lacking in empirical support. The 100:1 crack powder ratio was based on Congressional assumptions when crack first appeared on the scene, assumptions that the Commission itself later reported to be inaccurate. Kimbrough, 552 U.S. at 94-100. Thus, a court can vary from a Guideline range where the court finds that the guideline itself creates unwarranted disparity, id. at 91, particularly when it results in a sentence greater than necessary. Id. at 101-02. In such circumstances, the appellate court may engage in closer review. Id. at 108-09. However, a district court is free to devise its own ratio after rejecting the non-empirically based 100:1 crack/powder cocaine ratio. Spears v. United States, 555 U.S. 261 (2009).

In Nelson v. United States, 555 U.S. 350 (2009), the Supreme Court summarily reversed a district court’s sentence where the sentencing judge considered the guidelines “presumptively reasonable.” The Fifth Circuit has recognized that a sentencing court is free to reject the Sentencing Commission’s policy decisions in a given case. United States v. Mondragon-Santiago, 564 F.3d 357, 365 (5th Cir. 2009). In recognition of the sentencing court’s increased discretion, the Fifth Circuit has announced the “death” of the “extraordinary circumstances” requirement for non-Guidelines sentences. United States v. Simmons, 568 F.3d 564, 568 (5th Cir. 2009). The Fifth Circuit has vacated sentences of life time supervised release because the district court had presumed that such a lengthy term should be imposed in all cases. See United States v. Alvarado, 691 F.3d 592 (5th Cir. 2012).

F. What’s a Court to Consider?

In Pepper v. United States, 562 U.S. 476 (2011), the Court once again struck down statutory and Guideline provisions that impermissibly limited a court’s ability to consider relevant factors in imposing sentence. The substantive issue in Pepper was whether a court could consider post sentencing rehabilitation, which was prohibited under both 18 U.S.C. § 3742(g)(2), and USSG § 5K2.19. Emphasizing that “no limitation shall be placed on the information “ considered by the sentencing court (subject to constitutional limitations), the Supreme Court rejected this categorical limitation. Pepper, 562 U.S. at 488-89. Indeed, the Court reiterated that there is a longstanding tradition for sentencing judges to “consider every convicted person as an individual,” 562 U.S. at 489 (citing Koon v. United States, 518 U.S. 81, 113 (1996)), and the principle that “the punishment should fit the offender and not merely the crime.” Id. (citing Williams v. New York, 337 U.S. 241, 247 (1949)). The Court excised § 3742(g)(2), deeming it inconsistent with an advisory Guideline regime, 562 U.S. at 496-97, and concluded that Guideline 5K2.19 was not worthy of deference because it rested on faulty assumptions. 562 U.S. at 500-02. The Court’s reliance on
Williams, which is a pre-Guidelines case, further opens the door to a wide consideration of the defendant’s circumstances in sentencing.

In Tapia v. United States, 564 U.S. 319 (2011), the Supreme Court upheld Congress’s efforts to insure that a particular kind of sentence actually furthers the particular sentencing goal. Specifically, Congress has specified that a court should consider the factors set forth in 18 U.S.C. § 3553(a) in determining whether to impose a term of imprisonment and in determining the length of the term. 18 U.S.C. § 3582(a). Congress recognized, however, that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” Id. at 327. Congress also directed the Sentencing Commission to ensure that the Guidelines reflect the inappropriateness of imposing a term of imprisonment for purposes of rehabilitation, education, or treatment. See 28 U.S.C. § 994(k). See also Tapia, 564 U.S. at 329.

Noting that lawmakers and treatment professionals have become increasingly skeptical about prison programs’ ability to rehabilitate individuals, Tapia, 564 U.S. at 324-25, the Court held that a sentencing court cannot impose a longer prison sentence for the purpose of providing drug treatment. Id. at 329-333. This is not to say that the court cannot recommend treatment while the defendant is incarcerated or as a condition of supervision. Id. at 334. The court cannot, however, increase the sentence to make certain treatment programs available. Id. at 334.

Tapia and § 3582 address the initial sentencing, not the revocation of supervised release, which is governed by 18 U.S.C.§ 3583. Although § 3583 is silent about rehabilitation and prison, the courts have applied Tapia to supervised release revocations. See e.g., United States v. Molognaro, 649 F.3d 1 (1st Cir. 2011).

G. Deconstructing the Guidelines

In Kimbrough, the Supreme Court recognized that some Guidelines are not empirically based and therefore may not be subject to the same deference. 552 U.S. at 98-99, 109-10. This was clearly true of the crack Guideline in Kimbrough, which was based on Congressional mandatory minimum sentences, which were themselves not empirically based, and which were the subject of criticism by the Commission itself. Id. at 94-100.

Courts and practitioners are finding that many other Guidelines are subject to a similar attack. In holding that the sentencing court properly declined to follow the Draconian child pornography Guidelines, the Third Circuit collected some of the decisions rejecting non-empirically based Guidelines. See United States v. Grober, 624 F.3d 592,600 n.2 (3d Cir. 2010); United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010) (en banc) (career offender); United States v. Engle, 592 F.3d 495, 502 (4th Cir. 2010); United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) (sentence above the Guidelines); United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008) (fast track disparity).

If there is one practice under the Guidelines that has evoked substantial criticism it is the use of acquitted and uncharged conduct in calculating the Guideline range. Significantly, the relevant conduct Guideline, USSG § 1B1.3, was not included in the original submission of the Guidelines, although a version was included in chapter two. 52 Fed. Reg. 18,046 (May 13, 1987). Numerous judges have complained that the use of acquitted conduct in particular creates disparity and disrespect for the law. See e.g., United States v. White, 551 F.3d 381, 392-97 (6th Cir. 2008) (en banc) (Merrit, J., dissenting); United States v. Canania, 532 F.3d 764, 776-78 (9th Cir. 2008) (Bright, J., concurring) (use of acquitted conduct is “uniquely malevolent”); United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008); United States v. Frias, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring); but see United States v. Jackson, 596 F.3d 236, 243 (5th Cir. 2010).

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1 Several articles deconstructing the guidelines are available at http://www.fd.org.
IV. SENTENCING AFTER BOOKER

A. The District Court

1. Role of the Guidelines

The primary sentencing mandate and organizing principle for all sentencing decisions after Booker is that the court “shall impose a sentence, sufficient, but not greater than necessary,” to achieve the purposes of sentencing. 18 U.S.C. § 3553(a) (emphasis added). Kimbrough, 552 U.S. at 101; Gall, 552 U.S. at 49; Rita, 551 U.S. at 348. Thus, the court must focus on the offender as well as the offense, keeping in mind that it is not “severe punishment that promotes respect for the law, it is appropriate punishment.” United States v. Olhovskv, 562 F.3d 530, 549-51 (3d Cir. 2009) (emphasis in original).

The sentencing court must still calculate the Guidelines correctly. Gall, 552 U.S. at 49; United States v. Villegas, 404 F.3d 355, 359 (5th Cir. 2005). As long as the court considers the properly calculated Guideline, however, the court can impose a non-Guidelines sentence based on other Section 3553(a) factors proved by a preponderance of the evidence. United States v. Tzep-Mejia, 461 F.3d 522 (5th Cir. 2006). On the other hand, the appellate court will not assume that a Guideline error was harmless merely because the district court imposed a non-Guidelines sentence. See United States v. Ibarra-Luna, 628 F.3d 712, 718-19 (5th Cir. 2011).

The Guideline determination is “not the end of the sentencing inquiry; rather, it is just the beginning.” United States v. Foreman, 436 F.3d 638, 643 (6th Cir. 2006) (quoting United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006)) The court must consider all nonfrivolous reasons proffered by the parties for a non-Guidelines sentence and should explain the reason for rejecting them. Rita, 551 U.S. at 357. At the very least, the sentencing court must acknowledge the parties’ arguments and devote a few words to rejecting them. United States v. Mondragon-Santiago, 564 F.3d 357, 362-64 (5th Cir. 2009) (explanation inadequate but reversal not warranted for plain error).

The Commission has set out a three-step procedure for computing the Guidelines, USSG § 1B1.1(a)(1)-(8), and to evaluate any Guideline departures. § 1B1.1(b). The court considers the §3553(a) factors “taken as a whole.” §1B1.1(c). The Commission explains that a variance is a “sentence outside the Guidelines framework.” USSG § 1B1.1, Background (citing Irizarry v. United States, 553 U.S. 708, 713-15 (2008)). See, e.g., United States v. Tzep-Mejia, 461 F.3d 522 (5th Cir. 2006).

2. Which Guideline?

Under the mandatory Guideline regime, the courts held that the ex post facto clause prohibited retroactive application of Guidelines that made punishment more onerous. Miller v. Florida, 482 U.S. 423 (1987); see also United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990). Favorable amendments, however, are effective immediately, United States v. Park, 951 F.2d 634 (5th Cir. 1992), as are clarifying amendments as long as they do not make a substantive change. United States v. Burgos, 137 F.3d 841, 843 (5th Cir. 1998). Recognizing that even the advisory Guidelines steer a district court’s decision, the Supreme Court has held that the ex post facto clause continues to apply to more onerous advisory Guidelines. See Peugh v. United States, 133 S.Ct. 2072 2082-85 (2013). Beware offenses that overlap a change in the Guidelines. See, e.g., United States v. Shakbazyv, 841 F.3d 286 (5th Cir. 2016).

3. The Presentence Report

A presentence investigation is normally required unless the court finds that the “information in the record enables it to meaningfully exercise its sentencing authority.” Fed. R. Crim. P. 32(c)(1)(A)(ii). The Rule sets forth a schedule for disclosure of the presentence report designed to insure that a sentence is imposed “without unnecessary delay.” Fed. R. Crim. P. 32(b)(1). The parties must file timely objections to the presentence report or risk plain error review on appeal. United States v. Wheeler, 322 F.3d 823 (5th Cir. 2003); United States v. Chung, 261 F.3d 536, 539 (5th Cir. 2001).

The Rule prohibits disclosure of diagnostic opinions, that, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other
persons, but the Rule requires that such information be summarized in writing for the parties. Rule 32(d)(3), Rule 32(i)(1)(B). If the court relies on a prior presentence report, it too must be disclosed. United States v. Nappi, 243 F.3d 758 (3d Cir. 2001). The court cannot rely on an ex parte conference with an expert. United States v. Craven, 239 F.3d 91 (1st Cir. 2001). Disclosure of the probation officer’s recommendation is subject to local rule. Rule 32(e)(3).

Upon request, defendant’s counsel is entitled to notice and a “reasonable opportunity to attend any interview of the defendant by the probation officer.” Fed. R. Crim. P. 32(c)(2); cf. United States v. Woods, 907 F.2d 1540, 1543 (5th Cir. 1990) (permitting uncounseled interview). But see United States v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990) (counsel cannot be barred); see also United States v. Tisdale, 952 F.2d 934 (6th Cir. 1992) (recommending that counsel be present). Lawyers themselves should not leave their clients to face the probation officer alone. In United States v. Fitzhugh, 984 F.2d 143 (5th Cir. 1993), the court departed up twenty-five years on the basis of information provided by the defendant during an uncounseled interview with the probation officer.

A party must disclose witness statements (as defined under the Jencks Act, 18 U.S.C. §3500), and the court cannot consider the affidavit or testimony of a witness if a party refuses to comply. Fed. R. Crim. P. 32(i)(2). The government must also disclose information that mitigates punishment. United States v. Severson, 3 F.3d 1005 (7th Cir. 1993) (remanded where government disclosed Brady information only on appeal).

Under the Guideline regime, the parties were entitled to notice of any proposed reasons for departure. Burns v. United States, 501 U.S. 129 (1991); Fed. R. Crim. P. 32(h). The Supreme Court has held, however, that neither Rule 32 nor the Due Process Clause require notice of a variance as there is no longer an expectation of a Guideline sentence. Irizarry v. United States, 553 U.S. 708 (2008). A continuance may be appropriate where the factual basis underlying a variance comes as a surprise. 553 U.S. at 715.

4. Sentencing

The sentencing court should subject the defendant’s sentence to the “thorough adversarial testing contemplated by federal sentencing procedure.” Rita, 551 U.S. at 351 (citing Rules 32(f),(h)).

At sentencing, the court must assure itself that the defendant and counsel have had an opportunity to review the presentence report. See Fed. R. Crim. P. 32(i)(1). The court must also insure that the parties have an adequate opportunity to comment on the report. See Fed. R. Crim. P. 32(i)(3); USSG § 6A1.3(a). “Reasonable notice” is the “touchstone” of Rule 32. See United States v. Angeles-Mendoza, 407 F.3d 742, 749 n.12 (5th Cir. 2005). The Fifth Circuit recently vacated a sentence where the court relied, without notice, on another defendant’s proceedings in imposing an enhancement. See United States v. Garcia, No. 1440520 (5th Cir. Aug. 14, 2015).

The court must afford counsel an opportunity to speak on the defendant’s behalf and must address the defendant personally, permitting him to present information in mitigation of punishment. Fed. R. Crim. P. 32(i)(4)(A)(I), (ii). United States v. Dickson, 712 F.2d 952, 955-56 (5th Cir. 1983). But see United States v. Reyna, 358 F.3d 344 (5th Cir. 2004) (en banc) (plain error review of denial of defendant’s right to allocution). The prosecutor must be given an “equivalent opportunity” to address the court. Fed. R. Crim. P. 32(c)(3)(D). If a sentence is to be imposed for a crime of violence or sex crime, the victim must also be given a chance to speak. Fed. R. Crim. P. 32(c)(3)(E); see also USSG § 6A1.5 (Nov. 1, 2006).

Because a defendant has a right to be present at sentencing, a video broadcast sentencing is not permitted over the defendant’s objection. United States v. Navarro, 169 F.3d 228 (5th Cir. 1999).

Allegations contained in the presentence report are frequently the source of friction at sentencing hearings, and the sentencing court must be meticulous in dealing with these disputes. Accordingly, the court must afford the parties the opportunity to comment on the report and must rule on any unresolved objection. Fed. R. Crim. P. 32(c)(1). For each matter controverted, the court “must make either a finding on the allegation, or a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.” Id. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons. Id. The sentencing court must also explain why it has chosen one hearsay version over another. United States v. Scroggins, 379 F.3d 233 (5th Cir. 2004), vacated on other grounds, 541
The Fifth Circuit has repeatedly emphasized the importance of resolving these disputes lest the challenged allegations impact not only upon the sentence, but upon parole, prison placement and a wide variety of concerns. United States v. Lawal, 810 F.2d 491, 494 (5th Cir. 1987); United States v. Velasquez, 748 F.2d 972 (5th Cir. 1984). The court must rule on challenged allegations made by the prosecutor, as well as allegations contained in the report. United States v. Manotas-Mejia, 824 F.2d 360, 368-69 (5th Cir. 1987). It is a violation of due process for the court to rely on materially inaccurate information.

United States v. Smith, 13 F.3d 860, 866-67 (5th Cir. 1994). The defense must, however, raise specific objections or risk extremely limited review on appeal. United States v. Sneed, 63 F.3d 381 (5th Cir. 1995) (reversing only for defendant who objected). Strict compliance with Rule 32 to ensure the accuracy of the presentence report is especially critical in the Guideline sentencing context.

United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989); United States v. Mejia-Orosco, 867 F.2d 216, 219-20 (5th Cir. 1989); see also USSG § 6A1.3, cmt. 5. Nature of Proof

The party who benefits from a Guideline adjustment normally bears the burden of proving the adjustment by a preponderance of the “relevant and sufficiently reliable evidence.” USSG § 6A1.3, cmt.; United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990); see generally McMillan v. Pennsylvania, 477 U.S. 79 (1986). If the “evidence appears to be equally balanced,” the government has not met its burden. See United States v. Hagman, 740 F.3d 1044, 1052 (5th Cir. 2013).

The district court may consider its confidence in the accuracy of its findings in determining whether to give a non-Guidelines sentence. Id. at 736 n.3 (leaving question open) (citing United States v. Wendelsdorf, 423 F.Supp.2d 927 (N.D. Iowa, 2006)); United States v. Maali, 2005 WL 2204982 (M.D. Fla. Sept. 8, 2005); United States v. Gray, 362 F.Supp.2d 714 (S.D. W. Va. 2005)); see also United States v. Reuter, 463 F.3d 792 (7th Cir. 2006) (court may consider whether sentence based almost entirely on preponderance standard would promote respect for the law or provide just punishment). Due process requires that the evidence be reliable, Townsend v. Burke, 334 U.S. 736, 741 (1949), and may require a higher standard of proof where the enhancement dramatically increases the sentence. See Blakely v. Washington, 542 U.S. 296, 306 (2004) (expressing concern that defendant could be convicted of felon in possession and sentenced for murder). A sentence deemed reasonable solely on the basis of judicial findings might violate the Sixth Amendment. Gall v. United States, 552 U.S. 38, 59-60 (2007) (Scalia, J., concurring); Rita, 551 U.S. at 370 (Scalia, J., concurring).

The court “may, in its discretion, permit the parties to introduce testimony or other evidence on the objections.” Fed. R. Crim. P. 32(c)(1). While the rule is discretionary, the Guidelines require the court to give the parties “a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute.” USSG § 6A1.3(a). In some instances, it may be an abuse of discretion not to permit introduction of additional evidence. Fed. R. Crim. P. 32(c)(1) advisory committee’s notes. But see United States v. Patten, 40 F.3d 774 (5th Cir. 1994) (evidentiary hearing not required if defendant fails to provide evidence of unreliability). Moreover, the defendant must have the opportunity to review the evidence. See United States v. Garcia, 797 F.3d 320 (5th Cir. 2015) (court should not have relied on codefendant’s trial testimony).

The sentencing court has not been limited to evidence that would be admissible at trial. USSG §§ 1B1.4, 6A1.3, cmt. Hearsay is admissible if sufficiently reliable. Id.; United States v. Thomas, 12 F.3d 1350, 1372 (5th Cir. 1994); United States v. Cuellar-Flores, 891 F.2d 92 (5th Cir. 1989). See generally Williams v. New York, 337 U.S. 241 (1949). However, the court cannot rely on a codefendant’s proceeding without notice to the defendant. See United States v. Garcia, 797 F.3d 320 (5th Cir. 2015). The Fifth Circuit has held that there is no Sixth Amendment right to confrontation at sentencing, United States v. Young, 981 F.2d 180, 187 (5th Cir. 1992). But see McBride v. Johnson, 118 F.3d 432 (5th Cir. 1997) (right to confrontation at revocation hearings). Thus far, the courts have also declined to apply Crawford v. Washington, 541 U.S. 38 (2004), to sentencing. See United States v. Martinez, 413 F.3d 239, 242-44 (2d Cir. 2005). The Fourth Amendment exclusionary rule does not apply to Guideline sentencing. United States v. Montoya-Ortiz, 7 F.3d 1171 (5th Cir. 1993); United States v. Robins, 978 F.2d 881 (5th Cir. 1992).
The sentencing judge can rely on the report absent rebuttal by the defense, see, e.g., United States v. Lowder, 148 F.3d 548 (5th Cir. 1998); United States v. Brito, 136 F.3d 397, 415-17 (5th Cir. 1998). For example, the Fifth Circuit recently upheld a district court’s rejection of a defendant’s challenge to eyewitness identifications described in the PSR. United States v. Olivares, 833 F.3d 450 (5th Cir. 2016). The court cannot, however, rely on information in the presentence report that is inconsistent with the trial testimony. See United States v. Flores, 640 F.3d 638, 644 (5th Cir. 2011). Other circuits have held that the court cannot simply adopt the presentence report’s factual recitations over the defendant’s objection if the prosecution fails to offer any evidence in support of the disputed facts. United States v. Hudson, 128 F.3d 994, 995 (8th Cir. 1997); United States v. Bernardine, 73 F.3d 1078, 1080 (11th Cir. 1996); United States v. Greene, 71 F.3d 232, 236 (6th Cir. 1995); United States v. Wise, 976 F.2d 393, 402-03 (8th Cir. 1992) (en banc); United States v. Gessa, 971 F.2d 1257, 1266 n.7 (6th Cir. 1992); United States v. O’Dell, 965 F.2d 937, 938 (10th Cir. 1992).

In Mitchell v. United States, 526 U.S. 314 (1999), the Supreme Court held that a defendant retains her Fifth Amendment right not to discuss conduct for which she has not been convicted at sentencing and that the court cannot draw an adverse inference from a defendant’s invocation of her Fifth Amendment rights concerning such conduct. The Court emphasized that the government bears the “burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.” 526 U.S. at 330. The Fifth Circuit’s reliance on the presentence report absent rebuttal by the defense is arguably inconsistent with Mitchell.

There are limitations on the type of information upon which the court may rely. The court cannot rely on the unsworn assertions of the government attorney, United States v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992); United States v. Johnson, 823 F.2d 840, 842 (5th Cir. 1987), or conclusory allegations made by the agent and contained in the presentence report. United States v. Elwood, 999 F.2d 814, 817 (5th Cir. 1993); see also United States v. Hearns, 845 F.3d 641, 650-51 (5th Cir. 2017); United States v. Jones, 475 F.3d 701 (5th Cir. 2007). Nor can the court rely on the allegations in the indictment. United States v. Williams, 22 F.3d 580, 582 (5th Cir. 1994). While the defendant has no constitutional right to present witnesses at sentencing, the court cannot simply ignore her factual proffer. United States v. Elwell, 984 F.2d 1289 (1st Cir. 1993).

B. Appeals

The Sentencing Reform Act authorizes both the defendant and the government to appeal a sentence: (1) imposed in violation of law; (2) imposed as a result of an incorrect application of the Guidelines; (3) a sentence greater or lower than the Guideline range, or a sentence specified in a plea agreement; or (4) where there is no applicable Guideline, and on the ground that the sentence is unreasonable. 18 U.S.C. § 3742(a), (b). The government must obtain personal approval from the Attorney General or the Solicitor General before filing a notice of appeal. Id. § 3742(b); United States v. Thibodeaux, 211 F.3d 910 (5th Cir. 2000).

The appellate court reviews federal sentences for reasonableness, guided by the sentencing factors listed in 18 U.S.C. § 3553(a). Booker, 543 U.S. at 261-62. All sentences are reviewed under a deferential abuse of discretion standard. Gall, 552 U.S. at 41, 46, 49. The district court’s factual determinations continue to be reviewed for clear error while its interpretation and application of the Guidelines is reviewed de novo. United States v. Villegas, 404 F.3d 355, 365 (5th Cir. 2005). An appellate court may presume that a properly calculated Guideline sentence is reasonable. Rita, 551 U.S. at 346; see also United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006). The presumption is not binding, however, and does not require a party to shoulder a particular burden of persuasion or proof lest they lose. Rita, supra. An appellate court, may not, however, presume a non-Guidelines sentence to be unreasonable or apply a heightened standard of review to non-Guidelines sentences. Peugh, 133 S. Ct. at 2080.

Normally, if the sentencing court makes a Guidelines application error, the court of appeals will vacate the sentence without reviewing the sentence’s ultimate reasonableness. See United States v. Lopez-Salas, 513 F.3d 174, 178-81 (5th Cir. 2008); United States v. Dentler, 492 F.3d 306 (5th Cir. 2007). But see United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008) (affirming where district court said would impose same sentence). In essence, the issue on appeal is whether the district court’s sentence was the result of the calculation error. If the defendant preserved the Guidelines challenge, the government must show that
the error was harmless, i.e., that the error did not affect the sentence. United States v. Delgado-Martinez, 564 F.3d 750, 753 (5th Cir. 2009). A mere overlap in the Guideline is not necessarily sufficient. Id. The doctrine applies

only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing. United States v. Ibarra-Luna, 628 F.3d 712, 713 (5th Cir. 2010) (emphasis added); See also United States v. Torres-Perez, 777 F.3d 764 (5th Cir. 2015). The government cannot clear this “high hurdle” merely because the court gave a sentence above the Guideline range, id. at 714-16, or because it is below the range. See United States v. Roussell, 705 F.3d 184, 202-03(5th Cir. 2013) (99-month downward variance did not render error harmless). Reversal may be required even if the district court indicated that it thought the sentence was appropriate. United States v. Hernandez-Montes, 831 F.3d 284, 295-96 (5th Cir. 2016); but see United States v. Sheperd, 848 F.3d 425 (5th Cir. 2017)(no harm where court said it was “mooting” objection with lower sentence).

On the other hand, a defendant who fails to preserve a Guideline objection must show plain error. Martinez-Molina v United States, 136 S.Ct. 1338 (2016). Reversible plain error must be obvious, affect the defendant’s substantial rights, and, failure to remedy the error must “seriously affect the fairness, integrity or public reputation of judicial proceedings.” Id. at 1343 (quoting United States v. Olano, 507 U.S. 725, 732-33 (1993)) A sentence above the correctly calculated range will normally be deemed to have affected the defendant’s substantial rights even if the Guidelines overlap. Id. at 1345-49 (reversing Fifth Circuit).

In Johnson v. United States, 520 U.S. 461, 468 (1997), the Supreme Court held that an error may be plain at the time of appellate consideration, even if the law was to the contrary during the trial. In Henderson v. United States, 133 S.Ct. 1121, 1130-31 (2013), the Supreme Court explicitly held that an error is plain if it is plain on appeal. See also United States v. Escalante-Reyes, 689 F.3d 415 (5th Cir. 2012).

In an opinion sharply criticized by the commentators, the Fifth Circuit has held that the defendant must specifically object that the sentence is unreasonable to preserve full appellate review. United States v. Peltier, 505 F.3d 389 (5th Cir. 2007); but see United States v. Vonner, 516 F.3d 382, 389 (6th Cir. 2008) (en banc). Plain error review is severely circumscribed. In general, the defendant must show a “probability 'sufficient to undermine confidence in the outcome.’” United States v. Mondragon-Santiago, 564 F.3d 357, 364 (5th Cir. 2009) (quoting United States v. Domínguez-Benitez, 542 U.S. 74, 83 (2004)). According to the Fifth Circuit, if there is uncertainty the defendant loses. Id. at 364 (quoting United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005)). Other circuits have a less exacting standard for sentencing errors. Id. at n.6 (citing In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008)); United States v. Lewis, 424 F.3d 239, 248 (2d Cir. 2005); United States v. Mendoza, 543 F.3d 1186, 1194 (10th Cir. 2008)).

While there are certain risks to an appeal, the Supreme Court has held that an appellate court cannot increase a sentence sua sponte. Greenlaw v. United States, 554 U.S. 237 (2008). The sentencing court, however, can still fix a “sentencing package” on remand. Id.

C. Resentencing

Where a defendant’s sentence has been vacated because it is illegal, the defendant has the right to be present at resentencing to make his allocution. Fed. R. Crim. P. 32(a)(1), 43(c); United States v. Moree, 928 F.2d 654 (5th Cir. 1991). If the case is remanded to correct an illegal sentence, the sentencing package itself has not been vacated, and the new sentence is less onerous, the defendant need not be present. United States v. Pineda, 988 F.2d 22 (5th Cir. 1993). Due process prohibits a trial judge from increasing the sentence in retaliation for a successful appeal. North Carolina v. Pearce, 395 U.S. 711, 725 (1969); United States v. Resendez-Mendez, 251 F.3d 514 (5th Cir. 2001); but see United States v. Teel, 691 F.3d 578, 586 (5th Cir. 2012) (court can reinstate sentencing package). Whenever a court imposes a more severe sentence upon retrial, the reasons for doing so must affirmatively appear in the record. Colten v. Kentucky, 407 U.S. 104, 116 (1972). A higher sentence imposed in light of Booker, however, is not necessarily

There was significant disagreement over the Court’s power to revisit issues on resentencing which were not the subject of appeal. The PROTECT Act of 2003 limited the court on remand where a departure had been reversed to consideration of the guidelines in affect at the time of the original sentencing and to the reasons previously identified by the court in its departure, which had been approved by the appellate court. 18 U.S.C.A. § 3742(g).

In Pepper v. United States, 562 U.S. 476 (2011), the Supreme Court excised 3742(g) because it is inconsistent with the advisory Guideline scheme. Pepper had actually been resentenced three times, the third time by a different judge who ruled that she was not bound to give the same downward departure. Rejecting Pepper’s law of the case argument, the Supreme Court held that a “general remand for resentencing” is a de novo sentencing. 562 U.S. at 507-08. The validity of Fifth Circuit precedent limiting consideration of new issues on remand, see, e.g., United States v. Marmolejo, 139 F.3d 528, 531 (5th Cir. 1998), may be called into question by Pepper. The Fifth Circuit has permitted resentencing to correct a Guideline calculation error. United States v. Olarte-Rojas, 820 F.3d 798 (5th Cir. 2016).

D. Retroactivity

When the Sentencing Commission reduces a guideline by amendment and declares the new guideline to be retroactive, pursuant to USSG § 1B1.10, a defendant may request a sentence reduction from the sentencing court. 18 U.S.C. § 3582(c). After declaring the November, 2007 crack reduction to be retroactive, the Sentencing Commission revised USSG § 1B1.10 in an effort to prevent full Booker resentencings. The 2007 policy statement indicated that the sentencing court shall consider only the potential two-level reduction, taking into account the 3553(a) factors. The 2011 revision further limits the availability of relief for defendants who previously received a downward departure. The new version authorizes reduction only if the departure was for substantial assistance. USSG § 1B1.10. The 2014 amendments resolve a circuit split and provide that if the district court previously had the authority to impose a sentence below a mandatory minimum (due to substantial assistance), then the range is determined without regard to the minimum. USSG § 1B1.10 (c).

In Dillon v. United States, 560 U.S. 817 (2010), the Supreme Court rejected a claim that Booker applies to proceedings under § 3582(c). The Court held that § 3582(c) does not authorize a full resentencing. Instead, it provides for modification of the prison sentence under the limited terms specified by the Sentencing Commission when it declares an amendment reducing the Guideline range to be retroactive. 560 U.S. at 826-27.

A sharply divided Supreme Court addressed the availability of a retroactive reduction for defendants sentenced under a binding plea agreement, pursuant to Fed. R. Crim. P. 11(c)(1)(C). See Freeman v. United States, 564 U.S. 522, 526 (2011). The four-justice plurality held that Freeman could obtain a reduction, reasoning that a sentencing court must consider the guideline range in deciding whether to accept an 11(c)(1)(C) agreement. 564 U.S. at 529. Justice Sotomayor, providing the fifth vote, concluded that Freeman’s sentence could be said to be based on the crack guideline range only because of the agreement’s specific reference to the range. 564 U.S. at 539.

The plurality emphasized that § 1B1.10 is designed to “isolate whatever marginal effect the since-rejected Guideline had on the defendant’s sentence. Working backwards from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.” Freeman, 564 U.S. at 530 (emphasis added). This emphasis on the guideline range’s being a “relevant part of the analytic framework” may provide § 3582(c) relief to defendants previously deemed ineligible. For example, as in the plea context, the sentencing court must determine the base offense level under the regular guideline range prior to determining whether the career offender guideline should apply. See United States v. Lynch, 378 F.3d 445, 447-48 (5th Cir. 2004) (relevant conduct determination is necessary first step in applying career offender guideline).
The court can consider the defendant’s prison disciplinary record in reviewing a request for reduction. United States v. Smith, 595 F.3d 1322 (5th Cir. 2010). A defendant is not eligible for the reduction if the sentence was not based on the revised range. See, e.g., United States v. Carter, 595 F.3d 575 (5th Cir. 2010)(not available though defendant subject to statutory minimum had received a 5K departure); United States v. Anderson, 591 F.3d 789 (5th Cir. 2009) (career offender). A waiver of the right to appeal the original sentence does not bar an appeal of the denial of a §3582(c) reduction. United States v. Cooley, 590 F.3d 293 (5th Cir. 2009). A defendant is entitled to appointed counsel in appealing disputes regarding a requested reduction. United States v. Robinson, 542 F.3d 1045 (5th Cir. 2008).

V. RELEVANT CONDUCT

The relevant conduct provision of the sentencing guidelines, USSG § 1B1.3, represents a compromise between a system of charged versus real offense sentencing. Because it may significantly expand the scope of criminal liability beyond the offense of conviction, it will be an important factor in the district court’s exercise of its discretion in deciding a just sentence. See, e.g., United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. 2005).

Relevant conduct generally provides that a defendant is responsible for his own acts, the reasonably foreseeable acts of others committed in furtherance of jointly undertaken activity, certain groupable offenses that were part of the same course of conduct, harms resulting from those acts and other specified information. See USSG § 1B1.3(a)(1)-(4). The Guideline directs a court to consider:

(1)(A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
(1)(B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy) all acts and omissions of others that were –
   (i) within the scope of the jointly undertaken criminal activity,
   (ii) in furtherance of that criminal activity, and
   (iii) reasonably foreseeable in connection with that criminal activity,
(2) solely with respect to offenses [that would be grouped] all acts and omissions described [above] that were part of the same course of conduct or common scheme or plan as the offense of conviction;
(3) all harm resulting from such acts and omissions; and
(4) other information specified in the guidelines.

USSG § 1B1.3(a) (Emphasis added); see also id. cmt. n. 3.

A. Joint Ventures/Conspiracy

Guideline 1B1.3(a)(1) holds a defendant responsible for all “reasonably foreseeable” acts of others in furtherance of the jointly undertaken activity. All three prongs of the test - 1) jointly undertaken, 2) in furtherance, and reasonable foreseeability – must be present before §1B1.3(a)(1) applies. USSG § 1B1.3, cmt. n.3(A).

The defendant may be held responsible for the actions of coconspirators even if there is no conspiracy charged, USSG §1B1.3 (a)(1)(B); United States v. Aguilera-Zapata, 901 F.2d 1209, 1213 (5th Cir. 1990). The relevant conduct provision, however, is not coextensive with federal conspiracy doctrine, USSG § 1B1.3, cmt. n.1, 2; United States v. Puma, 937 F.2d 151 (5th Cir. 1991), which permits a party to be held responsible for any substantive offense committed by a coconspirator in furtherance of the conspiracy regardless of whether the defendant participated in the substantive offense or even knew of it. Pinkerton v. United States, 328 U.S. 640, 646-67 (1946). The Commission has expressly recognized:

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the (“jointly undertaken criminal activity”) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.
Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant’s agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

USSG § 1B1.3 cmt. n.3(B). (emphasis added). The application notes makes it clear that “criminal liability and relevant conduct are two different concepts, regardless of whether the indictment includes a conspiracy allegation.” United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993).

Before a defendant can be held accountable for the conduct of others, the government must establish both that the conduct was reasonably foreseeable and that it was within the scope of jointly undertaken activity. United States v. Evbuomwan, 992 F.2d 70, 74 (5th Cir. 1993); see also Maseratti, 1 F.3d at 340. Mere knowledge of another’s criminal conduct is not sufficient to establish a defendant’s responsibility for that conduct. Evbuomwan, 992 F.2d at 74; see also United States v. Ekanem, 555 F.3d 172, 175-76 (5th Cir. 2009) (defendant not responsible for other person’s health care fraud where he was aware but did not participate).

As the Sentencing Commission intended, the scope of criminal liability may vary for each defendant. For example, in United States v. Smith, 13 F.3d 860 (5th Cir. 1994), the Fifth Circuit affirmed the district court’s determination that Smith was responsible for 5.9 grams of crack where there was evidence that she had agreed to participate jointly in drug sales with the others and the amount was reasonably foreseeable to her. 13 F.3d at 864-65. Codefendant Phillips’ sentence was reversed where evidence showed only his agreement with one other person to distribute two grams. Id. F.3d at 866-68.

In contrast to traditional conspiracy doctrine, the relevant conduct guideline does not normally hold a defendant responsible for conduct that occurred before he or she joined the conspiracy, as such conduct cannot be considered foreseeable. USSG § 1B1.3 cmt. n.3(B); United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994); see also United States v. Longstreet, 603 F.3d 273, 278 (5th Cir. 2010). In an “unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant’s culpability,” an upward departure may be warranted. USSG § 1B1.3, cmt. n.3(B). If a defendant is incarcerated before the termination of the conspiracy, continuing conduct by coconspirators may not be considered unless the government can establish that the defendant committed an overt act in furtherance after his incarceration. United States v. Puig-Infante, 19 F.3d 929, 944-45 (5th Cir. 1994). A defendant can also limit liability by establishing withdrawal from the conspiracy. United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000).

B. Course Of Conduct

Guideline 1B1.3(a)(2) permits the court to include offenses for which the defendant has not been convicted or even charged if the extraneous offenses were groupable and were part of the same or similar course of conduct. Compare United States v. Custodio, 39 F.3d 1121 (10th Cir. 1994) (delivery of medical services different from false claims); with United States v. Williams, 10 F.3d 910 (1st Cir. 1993) (mail fraud); United States v. Robins, 978 F.2d 881 (5th Cir. 1992) (drugs); United States v. Lokey, 945 F.2d 825, 839-40 (5th Cir. 1991) (drugs); United States v. Thomas, 932 F.2d 1085, 1091 (5th Cir. 1991); United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990). The Commission explains that offenses “that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree or ongoing series of offenses.” USSG § 1B1.3 cmt. n.11. The Commission recommends that the court consider the similarity of offenses, regularity (repetitions) and the time interval. Id. When one fact is absent, “a stronger presence of at least one of the other factors is required.” Id. Compare United States v. Booker, 334 F.3d 406, 414 (5th Cir. 2003) (marijuana and cocaine transactions not part of same scheme); United States v. Wall, 180 F.3d 641 (5th Cir. 1999) (insufficient connection with drug deals four years later); United States v. Miller, 179 F.3d 961 (5th Cir. 1999) (insufficient connection with drug deals more than two years earlier); United States v. Maxwell, 34 F.3d 1006, 1010-13 (11th Cir. 1994) (insufficient connection between drug deals); with United States v. Hinojosa, 484 F.3d 337 (5th Cir. 2007) (similar modus operandi and purpose though 4 years apart); United States v. Anderson, 174 F.3d 515
(5th Cir. 1999) (timber removal sufficiently similar to demonstrate same course of conduct). See generally United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992) (citing United States v. Hahn, 960 F.2d 903 (9th Cir. 1992)). Once the fraud is completed, subsequent conduct is not part of the same course of conduct. United States v. Willey, 57 F.3d 1374, 1393 (5th Cir. 1995).

The government bears the burden of proving that the defendant committed the additional conduct, United States v. Acosta, 972 F.2d 86 (5th Cir. 1992) (agent failed to link defendant to additional offense); see also United States v. Hagman, 740 F.3d 1044 (5th Cir. 2014) (government failed to prove defendant possessed the additional stolen firearms), but the offense level can be based on charges that resulted in acquittal as long as there is a preponderance of the evidence that the defendant engaged in the conduct, United States v. Watts, 519 U.S. 148 (1997); United States v. Mendez, 498 F.3d 423 (6th Cir. 2007); see also United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc), and on conduct in charges that have been dismissed. United States v. Vital, 68 F.3d 114, 118 (5th Cir. 1995); United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990). Only criminal conduct is counted lest the defendant be “punished for activity not prohibited by law merely because it was morally distasteful or viewed as wrong by the sentencing court.” United States v. Peterson, 101 F.3d 375, 385 (5th Cir. 1996); see also United States v. Benns, 740 F.3d 370, 374 (5th Cir. 2013); Anderson, 174 F.3d at 526-29. But see United States v. Arce, 118 F.3d 335 (5th Cir.1997) (can depart on basis of non-criminal conduct). The court can consider pre-indictment offenses. United States v. Woelford, 896 F.2d 99 (5th Cir. 1990), but only if the offenses were part of the same course of conduct for which the defendant was convicted. United States v. Register, 931 F.2d 308 (5th Cir. 1991). The court can also consider offenses that cannot be prosecuted under the statute of limitations. United States v. Lokey, 945 F.2d 825 (5th Cir. 1991). Conduct that violates state statutes may be considered if part of the same course of conduct. United States v. Powell, 124 F.3d 655 (5th Cir. 1997). Foreign crimes may be considered relevant conduct if groupable. United States v. Levario-Quiroz, 161 F.3d 903, 906 (5th Cir. 1998).

VI. ENHANCEMENTS BASED ON PRIOR CONVICTIONS

A. Element or Enhancement

In a 5-4 opinion, the Supreme Court held that, even where a prior conviction raises the applicable statutory maximum sentence, the Constitution does not require that the conviction be treated as an element of the offense, that is, charged in the indictment and proved to, and found by, a jury beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 239-47 (1998). In holding that a defendant generally is entitled under the Sixth Amendment to a jury determination of facts that raise the statutory maximum, the Supreme Court has carefully maintained an exception for prior convictions. See, e.g., Apprendi v. New Jersey, 530 U.S. 475, 488 (2000); see also United States v. Pineda-Arrellano, 492 F.3d 624 (5th Cir. 2007). Justice Thomas, however, who provided the crucial fifth vote in Almendarez-Torres, subsequently indicated that he has changed his mind and that a majority of the Court now believes that Almendarez-Torres was wrongly decided. Shepard v. United States, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and in judgment); see also Descamps v. United States, 133 S.Ct. 2276, 2294 (2013) (Thomas, J., concurring); Apprendi, 530 U.S. at 499-523 (Thomas, J., concurring).

Even if a prior conviction is not an element of the offense, careful analysis of the definition of the enhancing conviction, and an analysis of the elements of the prior conviction, may demonstrate that enhancement is not permitted. Nothing can substitute for review of the actual conviction records, statute of conviction, and relevant case law. In addition to determining that a prior conviction is not within the enhancement provision, there may be other procedural defects that undermine the validity of the conviction.

B. The Categorical Approach

A number of statutory provisions provide for substantial enhancements based on certain types of prior convictions. See, e.g., 21 U.S.C. § 851 (felony drug offense); 18 U.S.C. § 924(e) (“serious drug offense” and “violent felonies”); 8 U.S.C. § 1326(b) (“aggravated felony,” felony and certain misdemeanors. Similarly, the guidelines contain offense level enhancements based on prior convictions. See, e.g., USSG § 2K2.1(a) (firearms, enhancement for a controlled substance offense or crime of violence);
USSG § 2L1.2 (illegal reentry subject to enhancement for a variety of prior offenses including drug trafficking, aggravated felony, and crimes of violence); USSG § 4B1.1 (career offender based on two prior convictions for controlled substance offense or crime of violence). Each provision has a different definition of the enhancing offense. Some enumerate certain offenses as crimes of violence.

Four rules should guide any analysis of criminal conviction enhancements:

1. **Always** read the particular “crime of violence” or drug offense definition at issue carefully and narrowly to determine if the defendant’s prior conviction fits.
2. **Never** rely on the label of the offense.
3. **Always** look at the particular statute in the jurisdiction of conviction, as well as the case law interpreting and explaining that statute.
4. **Do not** rely on the underlying facts of the offense or the description of the offense in the presentence report.

This “categorical approach” to analyzing prior convictions originates with the Supreme Court’s decision in *Taylor v. United States*, 495 U.S. 575 (1990). The question in *Taylor* was whether a Missouri burglary conviction was a crime of violence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), which specifically lists burglary as a “violent felony.” There are two aspects of the categorical approach set forth in *Taylor*. First, the Court held that the enhancement only applied to convictions that met the “generic, contemporary meaning” of the enumerated offense, which in the case of burglary required “at least the following elements: an unlawful or unprivileged entry into, or remaining in a building or other structure, with intent to commit a crime.” *Taylor*, 495 U.S. at 602. Second, the Court addressed how to determine the nature of the defendant’s conviction. Normally, the trial court can look only to the fact of conviction and the statutory definition of the prior offense. **Id.** In *Taylor*, the Court recognized a limited exception, allowing the court to determine whether the offense of conviction had been narrowed by the jury charge.

In *Shepard v. United States*, 544 U.S. 13 (2005), the Court was presented with a conviction obtained through a guilty plea under the same statute. Again, the Court rejected any effort to determine the nature of the prior conviction based on a factual description of the underlying conduct, whether it be in a presentence report, a police report, or other such document. 544 U.S. at 21. Instead, the sentencing court is “generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” **Id.** It would appear that this categorical approach is constitutionally required, at least where the enhancement raises a statutory maximum. **Id.** at 27. (Thomas, J. specially concurring).

The “modified categorical approach” set forth in *Taylor* and *Shepard*, permitting analysis of a limited group of court documents, applies only to convictions under a “divisible” statute. See *Descamps v. United States*, 133 S.Ct. 2276, 2281-82 (2013). A statute is “divisible” if it sets out “one or more elements of the offense in the alternative - for example, stating that burglary involves entry into a building or an automobile.” If one alternative matches the elements of the generic offense, but the other does not, the court can consult a limited class of documents to determine which alternative formed the basis of conviction and can then compare the elements of the crime of conviction with the elements of the generic crime. *Descamps*, 133 S.Ct. at 2281, 2285. The “modified categorical approach” cannot be applied, however, to an “indivisible” statute, i.e. “one not containing alternative elements - that criminalizes a broader swath of conduct than the relevant generic offense.” **Id.** at 2281-82. This was the case in *Descamps*, where the California burglary statute proscribed both lawful and unlawful entry. Although Descamps’ plea revealed an unlawful entry, this fact was not necessary to the conviction because it was not an element of the offense. 133 S.Ct. at 2285.

In *Mathis v. United States*, 136 S.Ct. 2243 (2016), the Supreme Court reiterated that the modified categorical approach applies only to divisible statutes. **Id.** at 2253-54. The “threshold inquiry” is whether the statute sets forth alternative “elements or means” of committing the offense. Elements are “‘constituent parts’ of a crime’s legal definition,” to be found by a unanimous jury. **Id.** at 2248-50. “Means” are the real world facts of the offense. **Id.** at 2248. If the alternatives are elements, the modified categorical approach applies. If they are alternative “means,” this ends the inquiry. **Id.** at 2256.
The Court has identified three reasons for establishing its “elements-centric, ‘formal categorical approach.’”  Descamps, 133 S.Ct. at 2287 (citation omitted).  First, the federal statute, ACCA, increases the sentence on the basis of “previous convictions,” not the commission of certain offenses.  Id.  Second, allowing a court to make a finding about the factual basis for the previous conviction would raise “serious ‘Sixth Amendment concerns.”  Id. at 2288.  Third, analysis of the underlying facts of the conviction “creates the same ‘daunting’ difficulties and inequities that first encouraged [the Court] to adopt the categorical approach.”  Id. at 2289.  Indeed, the statement of facts supporting the plea might be “downright wrong,” but a defendant would have had little incentive at the time to contest facts that were not elements of the offense.  Id.

As discussed below, the categorical approach has generally been applied irrespective of the particular definition of the offense.  See, e.g., United States v. Dominguez-Ochoa, 386 F.3d 639 (5th Cir. 2004) (negligent homicide not crime of violence under § 2L1.2); United States v. Houston, 364 F.3d 243 (5th Cir. 2004) (statutory rape not crime of violence for felon in possession of firearm under § 2K2.1); United States v. Charles, 301 F.3d 309 (5th Cir. 2003) (en banc) (auto theft not crime of violence under USSG § 4B1.2).

Note that the Shepard-approved documents will not necessarily establish the predicate conviction.  For example, in many instances, the indictment will not establish the requisite predicate.  If an indictment does not specify the elements of the offense of conviction, the court must look at the “least culpable act” necessary to violate the statute.  See Moncrieffe v. Holder, 133 S.Ct. 1678, 1684 (2013); see also United States v. Insaulgarat, 378 F.3d 456, 467-71 (5th Cir. 2004); United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004).  A plea to a conjunctive indictment will establish the predicate only if the pleading practice in the convicting jurisdiction interprets such a plea as an admission to every allegation, compare United States v. Morales-Martinez, 496 F.3d 356 (5th Cir. 2007) (no admission under Texas pleading practice); with United States v. Gutierrez-Bautista, 507 F.3d 305 (5th Cir. 2007) (plea to conjunctive indictment admitted elements in Georgia), but the court can rely on a judicial confession that recites the different violations.  See United States v. Conde-Castaneda, 753 F.3d 172 (5th Cir. 2014). The court cannot rely on allegations in the indictment where the defendant pled guilty to a lesser offense.  United States v. Turner, 349 F.3d 833, 836 (5th Cir. 2003).

A document deemed sufficient by prison authorities may not have the necessary imprimatur of the court to prove the necessary predicate.  See, e.g., United States v. Garza-Lopez, 410 F.3d 268, 273 (5th Cir. 2005) (California abstract of judgment not sufficient to establish drug trafficking offense); see also United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005) (same); see also United States v. Lopez-Salas, 447 F.3d 1201, 1210 n.6 (9th Cir. 2006) (court minutes insufficient); United States v. Hernandez, 218 F.3d 272, 278-79 (3d Cir. 2000) (certificate of disposition insufficient).

C. Crime of Violence Definitions
There are generally four types of definitions of crimes of violence.

1. Enumerated Offenses
Some statutes and Guidelines contain a list of enumerated offenses that ipso facto qualify as “crimes of violence.”  For example, the term “aggravated felony” in the immigration statute includes murder, rape, sexual abuse of a minor, 8 U.S.C. § 1101(a)(43)(A), and burglary, if the term of imprisonment was at least one year.  8 U.S.C. § 1101(a)(43)(G).

In the firearms context, a felon in possession of a firearm who has three “prior” convictions for “violent felonies” or “serious drug offenses” is subject to a mandatory minimum sentence of fifteen years and a maximum term of life.  18 U.S.C. § 924(e).  A violent felony under this statute includes “burglary, arson, or extortion [or] involves use of explosives.”  18 U.S.C. § 924(e)(2)(B).

The “career offender,” who commits a “crime of violence” or “controlled substance offense,” and has two prior convictions for such offenses, and the felon who has only one or two prior convictions for a “crime of violence,” or a “controlled substance offense” is subject to dramatic Guideline enhancements.  See USSG §§ 2K2.1(a); 4B1.1.  Crimes of violence include murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery and extortion.”  USSG § 4B1.2(a)(Aug. 1, 2016).
To qualify for an enumerated enhancement, the elements of the offense of conviction must fit the generic, contemporary definition of the offense. See Descamps v. United States, 133 S.Ct. 2276, 2285-86 (2013); Taylor, 495 U.S. at 602; United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004). In determining the generic definition, labels are not controlling. United States v. Fierro-Reyna, 466 F.3d 324, 327 (5th Cir. 2006). The courts look to other sources of authority such as the Model Penal Code, Black’s Law Dictionary and W. LaFave & A. Scott, Substantive Criminal Law (1986). See, e.g., Fierro-Reyna, 466 F.3d at 327-28 (citing Dominguez-Ochoa, 386 F.3d at 643). When the statute of conviction “encompasses prohibited behavior that is not within the plain, ordinary meaning of the enumerated offense, the conviction does not qualify.” Fierro-Reyna, 466 F.3d at 327 (citation omitted). Further, where only a small minority of states support the viewpoint of the state statute at issue and the Model Penal Code supports a contrary position, the courts reject the position of the minority and adopt the Model Penal Code definition. See, e.g., id. at 329. To determine whether a state statute creates a crime outside the generic definition, the court may look to how the state courts have applied the statute to the defendant’s case or other cases but should not engage in fanciful hypotheses about how the statute might be applied. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). A sharply divided en banc court recently held that a defendant must cite case law, not just the text of the statute, to demonstrate that a statute is overly broad. See United States v. Castillo-Rivera, 853 F.3d 218 (5th Cir. 2017) (en banc).

The crime of burglary is a good example of how the categorial approach applies. As the Supreme Court noted in Taylor, the “generic, contemporary meaning of burglary,” contains “at least the following elements: an unlawful or unprivileged entry into, or remaining in a building or other structure, with intent to commit a crime.” Taylor, 495 U.S. at 602. Because the Missouri burglary statute included breaking into vehicles, which are not normally considered structures, the statute covered more than generic burglary. Id.; see also United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007) (curtilage not a “structure” within meaning of Taylor). Because the generic crime requires an “unlawful” entry, the California statute which includes law entries, does not proscribe the generic offense. Descamps, 133 S.Ct. at 2286. A Texas conviction for burglary of a habitation may not qualify as generic, contemporary “burglary” because Texas Penal Code 30.02(a)(3) permits conviction where the defendant did not enter with intent to commit a felony. United States v. Constante, 544 F.3d 584 (5th Cir. 2008); but see United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006) (burglary of habitation under Tex. Penal Code § 30.02(a)(1) crime of violence under § 2L1.2). The Fifth Circuit recently held that the Texas burglary statute is “divisible,” permitting use of the modified categorical approach. United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), cert. denied, 137 S.Ct. 1359(2017), but the full court will address this issue. See United States v. Herrold, 2017 WL 1326242 (5th Cir. July 7, 2017) (granting rehearing en banc).

Another enumerated offense is aggravated assault. In Fierro-Reyna, the Fifth Circuit held that an assault deemed aggravated solely because the victim was a law enforcement officer did not meet the generic definition of aggravated assault. 466 F.3d at 328. Using the categorical approach, the Ninth Circuit held that an Arizona “aggravated assault” did not meet the generic definition because the Model Penal Code and a majority of the states require a heightened standard of reckless, that is, “manifesting extreme indifference,” while Arizona does not. United States v. Esparza-Herrera, 557 F.3d 1019, 1022-25 (9th Cir. 2009) (per curiam). The Fifth Circuit, however, has held that the essential elements of the generic offense are 1) causation of serious bodily injury and use of a deadly weapon, and 2) reckless conduct. United States v. Muniga-Portillo, 484 F.3d 813, 815 (5th Cir. 2007); but see United States v. Duran, 696 F.3d 1089 (10th Cir. 2012). In United States v. Sanchez-Sanchez, 779 F.3d 300 (5th Cir. 2015), the Fifth Circuit held that the defendant’s conviction was aggravated assault even though there was no deadly weapon finding in the judgment, reasoning that such a finding pertains only to sentencing.

When an enumerated “offense” is not a specific one, but rather a genus of offenses, the analysis becomes even more complicated. “Sexual abuse of a minor” is an aggravated felony, 8 U.S.C. § 1101(a)(43)(A), and was a crime of violence under the immigration guideline. USSG § 2L1.2(b)(1)(A) & cmt. (n.1(B)(3)(2015). In Esquival-Quintana v. Sessions, 137 S.Ct. 1562 (2017), a unanimous Supreme Court held that the generic offense requires the age of the victim to be less than 16 (overruling United States v. Cabecera Rodriguez, 711 F.3d 541, 549-57 (5th Cir. 2013) (en banc)).
Inchoate offenses are also subject to a determination whether the offense of conviction meets the generic definition. For example, the generic definition of attempt requires a “substantial step” towards commission of the offense. See United States v. Hernandez-Galvan, 632 F.3d 192, 199 (5th Cir. 2011); United States v. Ellis, 564 F.3d 370, 373-76 (5th Cir. 2009). Even statutes that define attempt as a “slight act” beyond mere preparation, may qualify, however, if the actual application of the statute is similar to the substantial step requirements. Hernandez-Galvan, 632 F.3d at 200.

2. Force is an Element

Most provisions permit enhancement if the offense “has as an element the use, attempted use, or threatened use of physical force against the person [or property] of another.” Examples include 18 U.S.C. § 16(a) (person or property) (general U.S. Code definition of “crime of violence”); 18 U.S.C. § 924(c)(3)(A) (person or property) (possess/use/carry firearm during “crime of violence”); 18 U.S.C. § 924(e)(2)(B)(i) (person only) (ACCA); USSG § 2L1.2, Application Note 1(B)(iii) (person only) (illegal reentry guideline); USSG § 4B1.2(a)(1) & Application Note 1, ¶ 2 (career offender guideline). Again, the courts use the categorical approach, Leocal v. Ashcroft, 543 U.S. 1, 8-9 (2004), which limits the analysis to the Shepard-approved conclusive court documents. See United States v. Calderon-Pena, 383 F.3d 254, 257-59 (5th Cir. 2004) (en banc). Note that under the elements analysis, allegations in the indictment that do not establish elements cannot be used to narrow the offense of conviction. Id.

a. Physical Force

In Johnson v. United States, 555 U.S. 1169 (2010), the Supreme Court held that the meaning of the term “physical force” is a question of federal law, not state law. The federal court is not bound by a state court’s interpretation of a similar statute, but is bound by the state court’s interpretation of state law including the determination of the elements of the state offense. The Court also noted that while common law defined “force” required for a battery to include mere offensive touching, a term of art used to define a misdemeanor should not be imported into a definition of the term “violent felony.” Further, the focus is on the use of force not the result of injury. Leocal, 543 U.S. at 10 n.7. The use of force means the use of “violent or destructive force,” not mere physical contact. United States v. Garcia-Perez, 779 F.3d 278, 283 (5th Cir. 2015); United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995). The Fifth Circuit held that Texas assault does not necessarily involve the use of physical force because it can be based on poisoning. United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006). See also United States v. Hernandez-Hernandez, 788 F.3d 193, 195 (5th Cir. 2015).

The Supreme Court has distinguished the amount of force needed to sustain a conviction for a “misdemeanor crime of domestic violence,” which precludes possession of a firearm, 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). See United States v. Castleman, 134 S.Ct. 1405 (2014). The Court noted that § 922(g)(9) addresses domestic assault cases, which are often the type of misdemeanor batteries, distinguished in Johnson’s interpretation of the term “violent felony.” Castleman, 134 S.Ct. at 1411-12. In this context, the Court held that the conviction for a “crime of domestic violence” could be predicated on the slightest use of force, including mere touching. Id. at 1412-13. Of more general application in the felony context, however, Supreme Court assumed that “physical force” is used to commit a bodily injury, regardless of whether the injury occurs by traditional physical contact or poisoning. Castleman, 134 S.Ct. at 1414-15. On the other hand, nothing in the Court’s opinion undermines the holding in Johnson that a purposeful and destructive force is required under the definition of “violent felony.” Castleman, 134 S.Ct. at 1410. See United States v. Rico-Mejia, 859 F.3d 318 (5th Cir. 2017).

b. Mens rea

The “use” of force requires the “active employment” of physical force. Leocal, 543 U.S. at 7 (citing Bailey v. United States, 516 U.S. 137, 144 (1995)). Thus, the term requires a “higher degree of intent than negligent or merely accidental conduct.” Id. at 9. Although the Supreme Court left open the question whether reckless application of force could constitute use, id. at 13, the Fifth Circuit had held that the application of force must be intentional. United States v. Vargas-Duran, 356 F.3d 598, 602-05 (5th Cir. 2004) (en banc).
In Voisine v. United States, 136 S.Ct. 2272, 2280 (2016), the Supreme Court held that the prohibition on possession of a firearm by someone convicted of domestic violence applies to “reckless” assaults. Again, the Court emphasized that its decision did not address the mens rea required for a felony crime of violence, id. at 2280 n.4, but, the Court emphasized that Leocal held only that the active employment of force required some volitional, rather than negligent conduct. See Voisine, 136 S.Ct. at 2279-80. The Fifth Circuit has relied in Voisine to hold that a crime of violence includes the “reckless” use of force. See United States v. Howell, 838 F.3d 489 (5th Cir. Sept. 22, 2016), cert. denied, 137 S.Ct. 1108 (2017). Going one step further, the Fifth Circuit requires only volitional conduct that is reckless. United States v. Mendez-Henriquez, 847 F.3d 214 (5th Cir.), cert. denied, 137 S.Ct. 2177 (2017).

3. Offense By Its Nature Involves Substantial Risk of Physical Force

A number of statutes provide enhancement if the offense “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.” Examples include: 18 U.S.C. § 16(b) (general U.S. Code definition of “crime of violence”); 18 U.S.C. § 924(c)(3)(B) (possess/use/carry firearm during “crime of violence”). Again, the approach is categorical, that is, whether the offense necessarily involves the use of force. See Leocal, 543 U.S. at 8-9; United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002). A “substantial risk” requires a “strong probability that the conduct, in this case the application of physical force during the commission of the crime, will occur.” United States v. Rodriguez-Guzman, 56 F.3d 18, 20 (5th Cir. 2000); see also United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009)(unauthorized use of a motor vehicle is not an aggravated felony); United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc)(holding that auto theft did not constitute a crime of violence under USSG § 4B1.2).

As discussed below, the continued viability of §16(b) enhancements may be subject to constitutional attack after the Supreme Court’s recent decision in Johnson v. United States, 135 S.Ct. 2551 (2015), on the ground that the provision is unconstitutionally vague. Although the Fifth Circuit has rejected a constitutional challenge, United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016); see also United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009)(unauthorized use of a motor vehicle is not an aggravated felony); United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc)(holding that auto theft did not constitute a crime of violence under USSG § 4B1.2).

4. Conduct Presents Serious Potential Risk of Physical Injury

Finally, a few provisions allow enhancement if the offense otherwise involves conduct that, by its nature, presents a serious potential risk of physical injury to another. Examples include: 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA); USSG § 4B1.2(a)(2) & comment. (n.1, ¶ 2) (career offender Guideline). In contrast to the use of force provisions, this provision is focused on the potential for injury. See James v. United States, 550 U.S. 192 (2007). Still the crime is considered “generically,” that is, in terms of how the law defines the offense, not how the individual commits it on a particular occasion. Begay v. United States, 553 U.S. 137 (2008).

In Johnson v. United States, 135 S.Ct. 2551 (2015), the Supreme Court struck down this residual provision because it was unconstitutionally vague, thereby overruling Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009), and James. The Court held that the inquiry into the risk of injury into a generic predicate offense was so indeterminate that it deprived defendants of fair notice and resulted in arbitrary enforcement by judges in violation of due process. Johnson, 135 S.Ct. at 2558. The Johnson decision is retroactive. Welch v. United States, 136 S.Ct. 1257 (2016). As a result of Johnson, the Sentencing Commission has removed this residual prong from the career offender guideline. USSG § 4B1.2 (Aug. 1, 2016). However, in Beckles v. United States, 137 S.Ct. 896 (2017), the Supreme Court rejected the vagueness challenge to the guideline.

D. Drug Offenses

Enhancements based on prior drug offenses are also subject to different statutory definitions with sentencing implications. The broadest enhancement is contained in Title 21, which basically doubles the
statutory penalties, and in some instances requires a life sentence, if the defendant has prior convictions for a “felony drug offense.” See, e.g., 21 U.S.C. § 841(b). The enhancement applies to any prior offense punishable by more than one year, regardless of whether it is labeled as a felony in the convicting jurisdiction. Burgess v. United States, 553 U.S. 124 (2008). The statute covers any felony drug conviction, including mere possession, not just trafficking. United States v. Sandle, 123 F.3d 809, 810-12 (5th Cir. 1997). The conviction must be final, 21 U.S.C. § 841(b)(1)(A), that is, no longer subject to direct appeal. United States v. Puig-Infante, 19 F.3d 929, 947 (5th Cir. 1994). The statute applies to probation, United States v. Morales, 854 F.2d 65 (5th Cir. 1988), and deferred adjudication. United States v. Cisneros, 112 F.3d 1272 (5th Cir. 1997).

The aggravated felony provisions of the immigration statute include “drug trafficking,” 8 U.S.C. § 1101(a)(43)(B), which is defined in 18 U.S.C. § 924(c)(2) as any felony punishable under Title 21. In Lopez v. Gonzales, 549 U.S. 47 (2006), the Supreme Court held that a conviction for simple possession of a controlled substance was not an aggravated felony because the offense would not have been a felony under federal law. 549 U.S. at 60. In Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010), the Supreme Court rejected the government’s hypothetical federal felony approach (which had been adopted by the Fifth Circuit), holding instead that a second conviction for drug possession is not an aggravated felony if the defendant was not actually convicted of the enhanced offense (overruling United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008)). In Moncrieffe v. Holder, 133 S.Ct. 1678 (2013), the Supreme Court reaffirmed its commitment to adopting a single federal definition that applies to predicate offenses, and held that distribution of a small amount of marijuana without remuneration was not a drug trafficking offense and therefore not an aggravated felony.

The Guidelines limit the “drug trafficking” or “controlled substance offense” enhancements to an offense punishable by imprisonment for a term exceeding one year, that “prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance)” or possession with intent to do the same. USSG §§ 2L1.2, 4B1.2(b). Again, the categorical approach applies. For example, a California statute that proscribes both delivery, offer to sell and transportation of drugs was deemed broader than the guideline definition. United States v. Garza-Lopez, 410 F.3d 268 (5th Cir. 2005); United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005). Similarly, the Fifth Circuit held that the Texas delivery statute, which included offer to sell was overly broad under the immigration Guideline, United States v. Gonzalez, 484 F.3d 712 (5th Cir. 2007). The Texas drug delivery statute is not divisible. United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016). The Fifth Circuit also recently held that possession of a controlled substance is not divisible and therefore not categorically a drug trafficking offense. United States v. Tanksley, 848 F.3d 347 (5th Cir.), modified, 854 F.3d 284 (5th Cir. 2017) (overruling United States v. Ford, 509 F.3d 714 (5th Cir. 2007)).

The ACCA enhancements apply to convictions for a “serious drug offense,” defined as a drug offense for which the maximum punishment is at least ten years in prison and which is either a drug offense under Title 21 or Title 46 of the United States Code or is a state offense “involving manufacturing, distributing, or possessing with intent to distribute” as defined at 21 U.S.C. § 802. 18 U.S.C. § 924(e)(2)(A)(i), (ii). In contrast to other statutory and Guideline provisions, a “serious drug offense” is limited to offenses punishable by a maximum sentence of at least ten years. Where a prior conviction has been enhanced under a recidivist provision, the maximum sentence is the enhanced punishment. United States v. Rodriguez, 553 U.S. 377 (2008) (Note that the defendant had actually been enhanced). The statutory penalty at the time of conviction, not the federal sentencing, governs. McNeill v. United States, 563 U.S. 816 (2011); see also United States v. Allen, 282 F.3d 339 (5th Cir. 2002).

VII. OFFENSE LEVELS: CHAPTER II

A. Offenses Against the Person

The offense levels for crimes against the person - homicide, assault, kidnapping, sexual abuse, air piracy and threatening communications - are based on mental culpability, use of a dangerous weapon and the severity of injury. Chapter One contains a number of definitions that guide the enhancements.
1. Specific Offenses

The guidelines generally provide for offense levels based on traditional common law distinctions involving mens rea and bodily injury. For example, the base offense level for homicide ranges from a twelve for negligent manslaughter, USSG § 2A1.4(a)(1), to thirty-eight for second degree murder. § 2A1.2(a). First degree murder is “premeditated murder.” USSG § 2A1.1, cmt. n.1. A downward departure is encouraged if a defendant was convicted of felony murder and he did not cause the death intentionally or knowingly. Id. cmt. n. 2(B).

Assault includes specific offense characteristics based on the victim’s injuries, USSG §§ 2A2.2(b)(3), 2A2.3(b)(1), an enhancement for assault resulting in substantial bodily injury to a person under the age of sixteen, USSG § 2A2.3(b)(1)(B), and assault on a spouse, intimate partner, or dating partner (in addition to assault on a person younger than 16). USSG § 2A2.3(b)(1). Assault by strangulation or suffocation is treated as “aggravated assault.” USSG § 2A2.2. There is a three-level enhancement for trying to strangle one of these domestic partners but the cumulative enhancements are limited to 12. USSG § 2A2.2(b)(4).

The guidelines for kidnapping, and other offenses such as interstate domestic violence and stalking, provide cross-references if the offense involved another more serious offense. See, e.g., § 2A4.1(b)(7) (kidnapping); United States v. Lucas, 157 F.3d 998 (5th Cir. 1998) (sexual abuse of a ward); United States v. Anderson, 5 F.3d 795, 799-802 (5th Cir. 1993) (sexual abuse and restraint); United States v. Rocha, 916 F.2d 219 (5th Cir. 1990); USSG § 2A6.2(c) (interstate domestic violence and stalking); United States v. Hornsby, 88 F.3d 336 (5th Cir. 1996); see also United States v. Hicks, 389 F.3d 514 (5th Cir. 2004) (cross-reference to second degree murder); United States v. Melton, 883 F.2d 336 (5th Cir. 1989) (upward departure where kidnapping resulted in death).

The threat guidelines vary depending on whether the offense involves a traditional expression of anger or whether terrorist activity is implicated. The base offense level for making a threat is 12, USSG § 2A6.1(a)(1), or 6 if there was no threat to injure a person or property. USSG § 2A6.1(a)(2). There is a six-level increase for conduct evidencing an intent to carry out the threat. USSG § 2A6.1(b)(1)-(3). See, e.g., United States v. Jordan, 851 F.3d 393 (5th Cir. 2017). The court may look to prior conduct in considering this enhancement but the conduct must have a substantial and direct connection to the current victim. Id. cmt. n.1. This adjustment applies only if the defendant engaged in an overt act in furtherance of the threat. United States v. Goynes, 175 F.3d 350 (5th Cir. 1999); but see United States v. Pillault, 783 F.3d 282 (5th Cir. 2015). There is an increase for multiple threats and violation of a protection order, USSG § 2A6.1(b)(2), (3), and a four-level decrease for a one-time offense evidencing little or no deliberation. USSG § 2A6.1(b)(5). Multiple threats against a single victim are grouped, while threats against multiple victims are not. Id. cmt. n.2. The Commission encourages upward departure for multiple threats against the same victim, multiple victims or a prolonged period of harassment. Id. cmt. n.3(B). There is a two-level enhancement for a person convicted of threatening a federal official’s family, 18 U.S.C. § 115, if the defendant knew or should have known there was a substantial risk of inciting others to make such threats. USSG § 2A6.1(b)(5). And, there is an enhancement if the defendant’s threats resulted in substantial disruption of public, government or business functions or services or caused a substantial expenditure of funds to respond to such disruption. USSG § 2A6.1(b)(4). The Commission recognizes that a departure may be warranted (presumably upward or downward) by the particular circumstances of the case. Id. cmt. n.3(A).

2. Enhancement Definitions

a. Injury

“Bodily injury” means “any significant injury,” i.e. one that is “painful and obvious or of a type for which medical attention ordinarily would be sought.” USSG § 1B1.1, cmt. n.1(B). The focus is on the injury not the defendant’s conduct and the government must present some evidence of injury to obtain the enhancement. United States v. Guerrero, 169 F.3d 933 (5th Cir. 1999). Actual medical attention, however, is not required. Id. See also United States v. Zuniga, 720 F.3d 589 (5th Cir. 2013). “Serious bodily injury” is “injury involving extensive physical pain or impairment of a function of a body member, organ or mental faculty; or required medical intervention such as surgery, hospitalization or physical

b. Weapons
The dangerous weapon enhancement applies to any instrument that resembles a dangerous weapon. USSG § 1B1.1, cmt. n.1(D). It includes an inoperable firearm, United States v. Smith, 905 F.2d 1296 (9th Cir. 1990); United States v. Luster, 896 F.2d 1122 (8th Cir. 1990), and other dangerous instrumentalities; see, e.g., United States v. Woody, 55 F.3d 1257 (7th Cir. 1995) (automobile); United States v. Dukovich, 11 F.3d 140 (11th Cir. 1994) (tear gas). Like 18 U.S.C. § 924(c), the level depends on the manner in which the firearm is used. USSG § 2A2.2(b)(2). See, e.g., United States v. Jefferson, 258 F.3d 405, 413 (5th Cir. 2001); United States v. Nguyen, 190 F.3d 656 (5th Cir. 1999); United States v. McCarty, 36 F.3d 1349 (5th Cir. 1994); United States v. De La Rosa, 911 F.2d 985, 992 (5th Cir. 1990). The firearm enhancement is not applied if the defendant was convicted under 18 U.S.C. § 924(c), even if the defendant had two guns. USSG § 2K2.4, cmt. n.2; but see United States v. Dixon, 273 F.3d 636 (5th Cir. 2001) (enhancement applied to robbery where statutory offense related to kidnapping charge).

B. Offenses Involving Property

1. Loss 2015
In most economic crimes, the guidelines measure culpability according to the “pecuniary impact on victims.” United States v. Olis, 429 F.3d 540, 545 (5th Cir. 2006). The 2001 loss table generally provided a base offense level of seven, with no increase if the loss is $5000 or less. The table provides for two-level incremental enhancements for greater losses. USSG § 2B1.1(b)(1).

The 2015 amendments adjusted all of the economic tables for inflation using a multiplier derived from the Consumer Price Index, and then rounding the number. The multiplier depends on when the particular table was last adjusted. For example, the tables in 2B1.1(b)(1) use a multiplier of $1.34, resulting in a minimum loss of $6500, rather than $5000 to commence enhancements.

The court must be careful to use an accurate method for calculating loss. United States v. Klein, 543 F.3d 206, 209 (5th Cir. 2008) (failure to credit defendant with drugs actually dispensed). While it is incumbent on the government to establish the loss, the court can rely on the government’s factual evidence absent rebuttal by the defendant. United States v. Scher, 601 F.3d 408, 413-14 (5th Cir. 2010) (value of airplane tickets); see also United States v. Danhach, 815 F.3d 228 (5th Cir.), cert. denied, 137 S.Ct. 119 (2016). Scher also addressed the issue whether loss should be calculated on retail or discount value, with the court accepting retail value; see also United States v. Lige, 635 F.3d 668 (5th Cir. 2011).

In general, the loss is the “greater of actual loss or intended loss.” USSG § 2B1.1, cmt.n.2(A). In the typical theft case, actual loss and intended loss may be the same. See, e.g., United States v. Pennell, 409 F.3d 240 (5th Cir. 2005) (premature invoices put bank at risk); United States v. Onyiego, 286 F.3d 249 (5th Cir. 2002) (loss on blank tickets); United States v. Hill, 42 F.3d 914 (5th Cir. 1995) (face value of stolen securities); United States v. Wimbish, 980 F.2d 312 (5th Cir. 1992) (loss is face value of deposited checks). See also United States v. Lucas, 516 F.3d 316, 350 (5th Cir. 2008) (value of lots sold based on misrepresentation).

The court need only make a “reasonable estimate of the loss.” USSG § 2B1.1, cmt. n.1(C). See, e.g., United States v. Bazemore, 839 F.3d 379, 389-91 (5th Cir. 2016) (value of insurance policies); United States v. Minor, 831 F.3d 601 (5th Cir. 2016), cert. denied, 137 S.Ct. 661 (2017) (actual loss multiplied by number of victims). The Commission recommends that the court consider: 1) the fair market value of the property unlawfully taken, or, if this is not practical, the replacement cost, 2) the cost of repairs to damaged property, 3) the approximate number of victims multiplied by the average loss to each victim.
United States v. Chappell, 6 F.3d 1095, 1101 (5th Cir. 1993), and 4) the “scope and duration of the offenses and revenues generated by similar operations.” USSG § 2B1.1, cmt. n.1(C). The company’s business records are sufficient to establish loss. United States v. Stalnaker, 571 F.3d 428 (5th Cir. 2009). In securities fraud cases, the court must be particularly careful not to include losses attributable to external factors. Olis, 429 F.3d at 546-48.

Gain is to be used as an alternative measure of loss only if there is a loss but it reasonably cannot be determined. USSG § 2B1.1, cmt. n.2(B); see, e.g., United States v. McMillian, 600 F.3d 434, 459 (5th Cir. 2010) (limited to salary); United States v. Burns, 162 F.3d 840, 854 (5th Cir. 1998); see also United States v. Jones, 475 F.3d 701 (5th Cir. 2007) (reversing where government failed to prove actual loss and remanding for determination of gain).

Of course, relevant conduct principles apply to property offenses. The cumulative loss resulting from a common scheme or course of conduct is used in determining the offense level, regardless of the number of counts of conviction. USSG § 1B1.3. A defendant is responsible for losses that were a reasonably foreseeable result of jointly undertaken activity. Compare United States v. Gray, 105 F.3d 956, 970 (5th Cir. 1997) (all loss part of defendant’s agreement); United States v. Cihak, 137 F.3d 252 (5th Cir. 1998) (defendant convicted of obstruction responsible for losses attributable to fraud), with United States v. Hammond, 201 F.3d 346, 352 (5th Cir. 1999) (cannot assume defendant responsible for other union employee’s fraud); United States v. Morrow, 177 F.3d 272 (5th Cir. 1999) (only responsible for losses while employed), but mere knowledge is not enough. See United States v. Ekanem, 555 F.3d 172, 176 (5th Cir. 2009); United States v. Ebyomwan, 992 F.2d 70, 74 (5th Cir. 1993). Still the government must prove that the additional transactions were associated with criminal activity. United States v. Hearns, 845 F.3d 641, 650-51 (5th Cir. 2017).

The guidelines strictly limit the calculation of loss to direct economic harm. Thus, loss does not include interest, finance charges or similar costs. USSG § 2B1.1, cmt. n.3(D)(I), or the costs of prosecution and investigation. § 2B1.1, cmt. n.3(D)(ii). Nor does the calculation include non-economic harm such as emotional distress. § 2B1.1, cmt. n.3(A)(ii).

**a. Actual Loss**

“Actual loss” is the “reasonably foreseeable pecuniary harm that resulted from the offense.” USSG § 2B1.1, cmt. n.2(A)(i). “Pecuniary harm” is harm that is monetary or “readily measurable as money.” Pecuniary harm is reasonably foreseeable if the defendant knew or reasonably should have known that the harm was a potential result of the offense. § 2B1.1, cmt. n.2(A)(iv). See, e.g., United States v. Stedman, 69 F.3d 737, 740-41 (5th Cir. 1995). The loss must be attributable both factually and legally to the fraud. Olis, 429 F.3d at 545 (loss in stock market value may be attributable to other forces); United States v. Randall, 157 F.3d 328 (5th Cir. 1998) (foreclosure loss not caused by bankruptcy loss).

In some cases, the intended or potential intended loss may be greater than actual loss. See, e.g., United States v. Conroy, 567 F.3d 174 (5th Cir. 2009) (intended loss was full amount of FEMA request); United States v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992) (intended loss for submission of false insurance claims). In other fraud cases, however, there may be no intended loss. This may occur, for example, where a defendant makes a false statement to obtain a loan, which he intends to pay, or lies to obtain a contract for services. In such cases, the loss is the actual loss, that is, the contract minus the value provided to the victim. United States v. Henderson, 19 F.3d 917, 927-29 (5th Cir.1994); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991); see also United States v. Sanders, 343 F.3d 511, 524-25 (5th Cir. 2003); United States v. Sublett, 124 F.3d 693 (5th Cir. 1997). For example, the court should deduct the value of the collateral where a party fraudulently obtained a mortgage. See United States v. Goss, 549 F.3d 1013 (5th Cir. 2008) (deduct value of collateral even where third party obtained mortgage); but see United States v. Morrison, 713 F.3d 271, 281-84 (5th Cir. 2013) (no clear error in denying deduction where defendant did not intend to repay); cf. United States v. Murray, 648 F.3d 251 (5th Cir. 2011) (court properly deducted value of collateral even if it did not account for additional market forces).

The loss is reduced (or the defendant given credit) by any money returned or the fair market value of property returned or services rendered, before the offense was detected. USSG § 2B1.1, cmt. n.2(E)(i). See, e.g., United States v. Frydenlund, 990 F.2d 822, 826 & n. 5 (5th Cir. 1993) (check kiting loss is amount
taken, not total checks kited); cf. United States v. Austin, 479 F.3d 363 (5th Cir. 2007) (no reduction for repayment after fraud detected). The time of detection is the earlier of when the offense was discovered by the victim or the government, or the defendant knew or reasonably should have known of detection. USSG § 2B1.1, cmt. n.2(E)(i). Normally, the loss is reduced by the amount to which the defendant was entitled absent the fraud. United States v. Harris, 821 F.3d 589, 602-08 (5th Cir. 2016) (government contracts); United States v. Mahmood, 820 F.3d 177, 192-95 (5th Cir. 2016) (hospital billing); United States v. Harms, 442 F.3d 367 (5th Cir. 2006) (worker’s compensation). There is no credit, however, for services rendered by a sham professional. (n.2(F)(v)). United States v. Mauskar, 557 F.3d 219 (5th Cir. 2009).

In United States v. Hebron, 684 F.3d 554 (5th Cir. 2012), the Fifth Circuit held that the fraud was so extensive that the court’s loss determination was a reasonable estimate even though it include some legitimate FEMA claims. Virtually the entire town had been involved in the fraud, which involved false statements even on the legitimate disaster claims.

In determining loss, the guidelines provide a credit for the value of any collateral based upon the amount recovered through disposition, or, if there has been no disposition, the “fair market value” of the collateral at sentencing. USSG § 2B1.1, n. 3(E)(ii). In valuing real property, the collateral is valued as of the date of conviction, rather than sentencing. Further, there is a rebuttable presumption that the most recent tax assessment is a reasonable estimate of the fair market value. USSG § 2B1.1, n.3 (E)(iii) (Nov. 1, 2012). Recognizing that the reliability of such assessments may vary among jurisdictions, the Commission encourages the court to consider factors including the recency of the assessment and local factors that may reflect that the assessment is not relevant to fair market value. Id.

In a fraudulent investment scheme, such as a Ponzi scheme, the loss is not reduced by the money in excess of the investor’s principal investment. USSG § 2B1.1, cmt. n.2(E)(iv). Ill-gotten gains ploughed back into the venture are still considered to be part of the loss. United States v. Setser, 568 F.3d 482 (5th Cir. 2009) (loss includes reinvested funds); United States v. Gharbi, 510 F.3d 550 (5th Cir. 2007). In a case involving pledged collateral, the loss is reduced by the amount recovered by the victim. See United States v. Goss, 549 F.3d 1013, 1018 (5th Cir. 2008); but see United States v. Holbrook, 499 F.3d 46 (5th Cir. 2007) (collateral worthless).

b. Intended Loss

“Intended loss” means the pecuniary harm intended. § 2B1.1, cmt. n.3(A)(ii). It includes harm that would have been impossible or unlikely, for example, in a government sting or in a case of insurance fraud where the claim exceeded the insured value. Id. See, e.g., United States v. Messervey, 317 F.3d 457, 464 (5th Cir. 2002).

The 2015 amendments narrow the definition of “intended loss” as limited to the “pecuniary harm that the defendant purposely sought to inflict.” USSG § 2B1.1, cmt. n.3(A)(ii) (Nov. 1, 2015) (emphasis added). The revision makes it clear that the inquiry is subjective, not objective. See United States v. Manatau, 647 F.3d 1048, 1049-50 (10th Cir. 2011) (cited by the Commission). Thus, the intended loss is what the defendant sought, not what was possible. This amendment would appear to reject Fifth Circuit precedent basing loss on the value of property “recklessly jeopardized” by the crime. See, e.g. United States v. Harris, 597 F.3d 242, 260 (5th Cir. 2010).

2. Credit Cards and Identity Theft

There are special rules for calculating the loss in credit card fraud cases. The commentary presumes that the loss for an unauthorized access device is not less than $500.00. USSG § 2B1.1, cmt. (n.2(F)(i)). If the device is a means of telecommunications access the presumed loss is $100.00. Id.

The guidelines retain enhancements for “aggravated identity theft” or “breeding.” The offense level is increased by two points if the offense involved (1) possession of access device-making equipment, (2) production or trafficking in unauthorized access devices, (3) unauthorized transfer or use of unlawfully obtained identification to produce other identification, and (4) possession of five or more means of identification unlawfully obtained. USSG § 2B1.1(b)(11). See, e.g., United States v. Suchowski, 838 F.3d 530 (5th Cir. 2016). Means of identification is limited to identification of an actual individual. Id., cmt. n.7(A). See, e.g., United States v. Barson, 845 F.3d 159, 167 (5th Cir. 2016).
Identity theft, both because of its potential for massive fraud and misuse by terrorists, continues to be a focus of Congressional and Commission attention. The aggravated identity theft statute mandates an additional two-year term if the defendant unlawfully used the identity of another person during and in relation to a wide list of enumerated offenses. 18 U.S.C. §§ 1028A(a)(1), (c). Use of false identification to commit a terrorist offense carries a mandatory additional five years. 18 U.S.C. § 1028A(a)(2). These sentences are imposed consecutive to the guideline sentence for the underlying offense. USSG § 5G1.2, cmt. (n.2(B)). If the defendant is convicted of multiple violations of the statute, the court has discretion to run the sentences on those counts concurrently with each other in accordance with the guidelines. Id. The government must prove that the defendant knew that the means of identity belonged to another person. Flores-Figueroa v. United States, 556 U.S. 646 (2009).

3. Financial Institutions

The offense level is enhanced two points if the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense. USSG § 2B1.1(b)(16)(A). In general, this adjustment applies only if the gross receipts to the defendant individually exceeded $1,000,000. USSG § 2B1.1, cmt. n.9(A). While a defendant can be convicted of making a false statement to a bank regardless of whether the statement is material, this Guideline enhancement only applies if it caused the bank to loan the funds. United States v. Sandlin, 589 F.3d 749, 756-57 (5th Cir. 2009).

There is a four-level enhancement if the offense “substantially jeopardized the safety and soundness of a financial institution.” USSG § 2B1.1(b)(16)(B). Examples include where the institution (1) became insolvent, (2) paid substantially reduced benefits to pensioners or insureds, (3) could not fully refund deposits or investments on demands, or (4) the assets were so depleted the institution was forced to merge with another. USSG § 2B1.1, cmt. n.10. See, e.g., United States v. Krenning, 93 F.3d 1257, 1270 (5th Cir. 1996). The adjustment applies even if the institution was already insolvent. United States v. McDermot, 102 F.3d 1379, 1381-83 (5th Cir. 1996). The minimum offense level under either enhancement is 24. USSG § 2B1.1(b)(16). Investment companies, United States v. Dale, 374 F.3d 321 (5th Cir. 2004), vacated on other grounds, 374 F.3d 275 (5th Cir. 2004), vacated on other grounds, 374 U.S. 1110 (2005), and insurance companies are included, United States v. Hickman, 374 F.3d 275 (5th Cir. 2004), vacated on other grounds, 543 U.S. 1110 (2005), but not retirement plans. United States v. Skilling, 554 F.3d 529, 553-54 (5th Cir. 2009), vacated on other grounds, 561 U.S. 358 (2010).

As a result of the Enron debacle, the 2003 amendments expanded the four-level enhancement for substantially jeopardizing an institution to include a publicly traded company, a company that had at least 1000 employees, or an offense that substantially endangered the solvency or financial security of at least 100 victims. USSG § 2B1.1(b)(16)(B). The 2012 amendments add that this enhancement may apply if one of the listed potential harms did not happen because of federal government intervention, such as a bailout. USSG § 2B1.1, comment. (n. 12(A)(v)) & (B)(ii)(VII). Substantial harm includes a substantial reduction in the value of equity securities, employee retirement accounts, and a substantial reduction in the organization’s workforce or employee benefits. USSG § 2B1.1, cmt. (n.10). The cumulative enhancement for the number of victims and jeopardizing an institution are not to exceed eight levels. USSG § 2B1.1(b)(16)(C).

There is a four-level enhancement if the offense involved a violation of securities law and the defendant was an officer or director of a publicly traded company at the time of the offense. USSG § 2B1.1(b)(13). The abuse of trust enhancement, USSG § 3B1.3, does not apply if the defendant is subject to the new enhancement but the enhancement applies even if there is no securities conviction. USSG § 2B1.1, cmt. (n.11).

4. Securities Fraud (Revised 2015)

The problem with determining the actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity is that the loss calculation is complex and may be affected by forces other than the defendant’s conduct. The 2012 amendment established a special rule for these calculations, which the 2015 amendments already scuttle. The Commission now directs the court in calculating loss for a fraud on the market to “use any method that is appropriate and practicable under the
circumstances.” See USSG § 2B1.1, n.3(F)(ix).

There is a minimum offense level of 14 if the offense “involved an organized scheme to engage in insider trading.” USSG § 2B1.4(b)(2). The commentary delineates various factors to be considered in determining whether the trading is organized. Id. n.1. This amendment is designed to ensure that organized inside traders spend at least a minimum amount of time in jail. In most cases, the loss calculation will result in an offense level significantly above this minimum. See USSG § 2B1.4(b)(1)(referring to loss table for calculation of gain).

The Commission clarifies that the abuse-of-trust enhancement should be applied if the defendant’s employment in a position that involved regular trading was used to facilitate significantly the commission or concealment of the offense. USSG § 3B1.3, n.2. The enhancement would apply to hedge fund professionals and lawyers who regularly provide assistance in securities transactions but not to those whose position ordinarily does not involve special skill, such as a clerical worker. Id.

5. Health Care Fraud

The aggregate amount of fraudulent bills is the presumptive loss. USSG § 2B1.1, n. 3(F)(viii). This is the approach taken by the Fifth Circuit in United States v. Isiwele, 635 F.3d 196, 203 (5th Cir. 2011). The court recognized, however, that the defendant can rebut this presumption by introducing evidence that the amount billed exaggerates (or understates) the loss. Id. See also United States v. Valdez, 726 F.3d 684, 696 (5th Cir. 2013).

There are three-tiered enhancements that apply if losses are greater than $1,000,000, $7,000,000 and $20,000,000 for a government health care program. USSG § 2B1.1(b)(7) A “government health care program” is defined as a plan or program that provides health benefits, “whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government.” Examples include Medicare, Medicaid and CHIP. USSG § 2B1.1, n.1.

Recognizing that the loss enhancements, particularly in fraud offenses, may overrepresent the seriousness of a minor player’s offense, the Commission has added a provision to USSG § 3B1.2, comment. (n.3(A)), that “a defendant who is accountable under [relevant conduct principles] for a loss amount . . . that greatly exceeds the defendant’s personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from [a mitigating role] adjustment under this guideline.” The Commission offers as an example a nominee owner in a health care fraud scheme.

6. Other Enhancements

a. Sophistication 2015

There is a two-level enhancement if the offense involved (1) relocation to another jurisdiction to evade law enforcement or regulatory officials, (2) a substantial portion of the scheme was committed outside the United States, or (3) the offense involved “sophisticated means.” USSG § 2B1.1(b)(10). “Sophisticated means” is “especially complex or especially intricate offense conduct,” such as locating telemarketing solicitation outside the jurisdiction or use of fictitious entities, corporate shells, or offshore financial accounts. USSG § 2B1.1, cmt. n.6(B). If the conduct that forms the basis for this enhancement is the only conduct that would also be considered obstruction of justice, the obstruction adjustment, USSG § 3C1.1, does not apply. USSG § 2B1.1, cmt. n.6(C). The use of a computer or technology to conceal the perpetrator’s identity or location is sophisticated. USSG § 2B1.1, cmt. (n.8(B)).

The 2015 amendments narrow the scope of the “sophisticated means” enhancement and provide that it applies only if “the defendant intentionally engaged in or caused conduct constituting sophisticated means.” USSG § 2B1.1(b)(1)(10) (Nov. 1, 2015) (rejecting view that enhancement applied without determination whether defendant’s own conduct was sophisticated).
b. **Multiple victims 2015**

The 2015 amendments revise the victim enhancement to create a general two-level enhancement if there were more than 10 victims or the offense was committed through mass-marketing. USSG §§ 2B1.1(b)(2)(A)(i), (ii). There are then graduated enhancements if the offense resulted in “substantial financial hardship” to one, five or 25 victims. USSG § 2B1.1(b)(2)(A)(iii), (B), (C). The other multiple victim enhancement is deleted. The presumptive number of victims from mailbox theft is reduced to 10, resulting in a two-level enhancement. USSG § 2B1.1, cmt. n.4(C)(ii)(I). Beware that owners of stolen identity documents should be considered victims. USSG § 2B1.1, cmt. n.4(D).

The Commission provides a list of factors for consideration of financial hardship including: insolvency, bankruptcy, loss of retirement, education or other savings, substantial changes in employment and retirement plans, substantial changes in living arrangements and substantial harm to ability to obtain credit. USSG §2B1.1, cm.t n.8(F). Harm to credit is no longer listed as a basis for departure.

c. **Fraudulent Representation**

There are also enhancements for (1) misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization or government agency, USSG § 2B1.1 (b)(9)(A), United States v. Kennedy, 707 F.3d 558 (5th Cir. 2013); United States v. Reasor, 541 F.3d 366 (5th Cir. 2008), (2) misrepresentation or fraud during bankruptcy proceedings, USSG § 2B1.1(b)(7)(B); United States v. Izydore, 167 F.3d 213, 244 (5th Cir. 1999), (3) violation of a judicial or administrative order, decree or process, USSG § 2B1.1(b)(7)(C); United States v. Nash, 729 F.3d 400 (5th Cir. 2013), and (4) misrepresentations concerning financial assistance for institutions of higher education. USSG § 2B1.1(b)(7)(D). These adjustments are in the alternative but if more than one applies, an upward departure may be warranted. USSG § 2B1.1, cmt. n.5(A). If the conduct that forms the basis for misrepresentation on behalf of charitable or similar organizations would be the only basis for an adjustment for abuse of trust or skill, the adjustment under USSG § 3B1.3 is not applied. USSG § 2B1.1, cmt. (n.5(E)(i)). Similarly, conduct cannot be the basis for both an enhancement for violations of judicial orders and obstruction of justice. Id. at cmt. n.5(E)(ii).

d. **Disaster Relief**

Pursuant to Congressional directive, the Sentencing Commission promulgated a guideline requiring a two-level enhancement for theft or fraud committed in relation to disaster relief. USSG § 2B1.1(b)(16). The base offense level is 12 if the offense involved disaster fraud as described in 18 U.S.C. § 1050. USSG § 2B1.1(b)(11). Downward departure is encouraged if the defendant was a disaster victim and illegally obtained an extension of or overpayment of legitimate benefits. USSG § 2B1.1, cmt. (n.19(D)).

e. **Cross-references**

Guideline 2B1.1 provides cross-references for certain types of economic offenses such as theft of firearms. USSG § 2B1.1(c)(1). The Guideline also provides that if a defendant is convicted of a false statement offense (e.g. 18 U.S.C. § 1001), and “the conduct set forth in the count of conviction establishes an offense specifically covered by another [Chapter Two] Guideline,” apply that Guideline. For example, the court applied the perjury guideline in a bank fraud case. United States v. Grant, 850 F.3d 209 (5th Cir. 2017). In United States v. Griego, 837 F.3d 520 (5th Cir. 2016), however, the court determined that § 2B1.1, not the perjury guideline, should apply because the count of conviction did not involve the elements of obstruction of justice.

7. **Bribery**

The guidelines for bribery increase on the basis of the “greater of the value of the bribes or the improper benefit to be conferred.” USSG § 2B4.1. The value refers to the “net benefit” received. USSG § 2B4.1, cmt. n.2; USSG § 2C1.1, cmt. n.2. United States v. Nelson, 732 F.3d 504 (5th Cir. 2013). “Direct costs” are clearly deductible from the value of the benefit. United States v. Landers, 68 F.3d 882 (5th Cir. 1995). In United States v. Griffin, 324 F.3d 330 (5th Cir. 2003), the Fifth Circuit reversed the district court’s determination of value, which was based on the entire amount of profit rather than the value of the
benefit. See also United States v. Roussell, 705 F.3d 184, 200-01 (5th Cir. 2013). There is an enhancement if the defendant was a high level public official. See USSG § 2C1.1(b)(3); Roussell, 705 F.3d at 196-97.

8. Counterfeiting

The level for counterfeiting is likewise based on the value of fake funds, USSG § 2B5.1, and enhanced for the manufacture or production of counterfeit obligations. USSG § 2B5.1(b)(2). Normally, the relevant figure is the retail value of the infringing goods, rather than the infringed goods. United States v. Yi, 460 F.3d 623, 636-38 (5th Cir. 2006). Included in the “loss” is the amount produced and intended for sale. United States v. Beydoun, 469 F.3d 102 (5th Cir. 2006). The production enhancement does not apply to those who merely photocopy notes if the items are “so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny. Id. at cmt. n.4. The adjustment does apply, however, unless the photocopied obligations are truly of poor quality. United States v. Wyjack, 141 F.3d 181 (5th Cir. 1998); United States v. Bollman, 141 F.3d 184 (5th Cir. 1998).

There are specific enhancements for theft and related offenses regarding pre-retail medical products, USSG § 2B1.1(b) (8), and counterfeit military parts. USSG § 2B5.3 (b)(7).

9. Violent Property Crimes

The offense level is raised if the theft was from a person, see USSG § 2B1.1(b)(3); United States v. Nevels, 160 F.3d 226 (5th Cir. 1998), or if the offense involved a “conscious or reckless risk of death or serious bodily injury,” or possession of a dangerous weapon in connection with the offense. USSG § 2B1.1(b)(11). Theft from an airline security belt is not theft from a person. United States v. Londono, 285 F.3d 348 (5th Cir. 2002). The guidelines provide a cross-reference if a firearm, explosive device or controlled substance was stolen to the guidelines for drugs and weapons. USSG § 2B1.1(b)(1). If the offense involved arson or property damage with explosives, the arson guideline applies if it is greater. ‘ 2B1.1(c)(2). If the offense involved a false statement and the conduct establishes an offense covered by another guideline, the other guideline applies. USSG § 2B1.1(c)(3).

Like the assault guidelines, the robbery guidelines contain upward adjustments for use of a firearm, USSG § 2B3.1(b)(2), see United States v. Dunnigan, 555 F.3d 501, 504-07 (5th Cir. 2009) (otherwise used firearm); United States v. Fletcher, 121 F.3d 187 (5th Cir. 1997) (pointing firearm and threatening people including an express threat of death), § 2B3.1(b)(2)(F); see also United States v. Ashburn, 20 F.3d 1336 (5th Cir.), modified, 38 F.3d 803 (5th Cir. 1994) (en banc), making a death threat, USSG § 2B3.1(b)(2)(F), United States v. Soto-Martinez, 317 F.3d 477 (5th Cir. 2003) (includes “I have a gun”), and bodily injury. § 2B3.1(b)(3); United States v. Guerrero, 169 F.3d 933 (5th Cir. 1999). An accessory can be held responsible for the robber’s use of a gun. United States v. Burton, 126 F.3d 666, 678 (5th Cir. 1997). The offense is adjusted up two points if property was taken from a financial institution or a post office, § 2B3.1(b)(1)(A), or if the offense involved carjacking. § 2B3.1(b)(1)(B). See, e.g., United States v. Singleton, 16 F.3d 1419 (5th Cir. 1994).

10. Departure and Variance

The Commission has encouraged a number of departures where the loss calculation may not adequately capture the harm. The Commission encourages departure where the primary objective was non-monetary, for example, the primary objective was infliction of emotional harm or the offense caused or risked substantial non-monetary harm, USSG § 3B1.1, cmt. n.15(A)(i), (ii). Departure may be warranted if the offense involved a substantial loss of agreed upon interest or financial charges, id. at cmt. n.15(A)(iii), created a risk of substantial additional loss, (n.15(A)(iv)), or endangered the solvency or financial security of one of the victims. (n.15(A)(v)). The court may depart if the defendant sought information from a protected computer for a broader criminal purpose. Id. at cmt. n.15(A)(vi). In cases of credit card or identity theft, departure is warranted if the offense caused substantial harm to the victim’s reputation or credit record, resulted in the victim’s erroneous arrest or denial of employment, or the defendant essentially assumed the victim’s identity. Id. at cmt. n.15(A)(vii). Departure is available for disaster victims who obtained only part of their benefits illegally. USSG § 2B1.1, cmt. (n.19(D)).
The courts have departed downward where the loss overstated the seriousness of the offense, cmt. n.19(c). This is often the case when intended loss is not consistent with “economic reality.” See e.g., United States v. Stockheimer, 157 F.3d 1082, 1089-92 (7th Cir. 1998); United States v. Roen, 279 F.Supp.2d 986, 988 (E.D. Wis. 2003). See also United States v. Kushner, 305 F.3d 194 (3d Cir. 2002); United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000) (loss caused by independent third party); United States v. Rostoff, 53 F.3d 398 (1st Cir. 1995) (losses resulted from circumstances beyond defendant’s control); United States v. Badaracco, 954 F.2d 928 (3d Cir. 1992); United States v. Gregorio, 956 F.2d 341, 344-46 (1st Cir. 1992) (defendant actually appealed because he thought the court should have granted more of a departure); see also United States v. Stuart, 22 F.3d 76 (3d Cir. 1994) (loss is fair market value of stolen bonds but departure permitted where defendant made small profit and loss overstated seriousness of offense); United States v. Costello, 16 F. Supp.2d 36 (D. Mass. 1998); United States v. Brennick, 949 F. Supp. 32 (D. Mass. 1996). Post-Booker, a district court might reasonably conclude that loss is not an appropriate substitute for measuring culpability, particularly where there was no personal benefit to the defendant. See, e.g., United States v. Ranum, 353 F. Supp.2d 984 (E.D. Wis. 2005). See also United States v. Mueffelman, 400 F.Supp.2d 368, 378 (D. Mass. 2005); United States v. Emmenegger, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004) (Alternative sentence in anticipation of Booker). A court may also depart when overlapping guidelines unnecessarily increase the prison sentence. United States v. Lauersen, 362 F.3d 160 (2d Cir. 2004).

In recognition that the loss calculations in financial crimes often do not adequately address the harm, the encourages a downward departure where the offense level “substantially overstates the seriousness of the offense.” USSG § 2B1.1, n.19(C). The Commission has added to the list of examples security fraud where a large number of victims suffer a relatively small loss. In such instances, the loss table and the enhancement for multiple victims effectively double count the harm. With respect to upward departures, the Commission has added the risk of a “significant disruption of a national financial market” as an example warranting upward departure. USSG § 2B1.1, n.19(A)(iv).

C. Drugs

1. Statutory Range

In controlled substance cases, the guidelines play second fiddle to statutorily mandated minimum prison sentences. The controlled substance statutes establish minimum prison sentences for substantial quantities of substances containing “a detectable amount” of heroin, cocaine, cocaine base, phencyclidine (PCP), lysergic acid (LSD), P2P, methamphetamine and marijuana. 21 U.S.C.§§841(b)(1), 960(b)(1). Penalties are enhanced if death or serious bodily injury result from use of the substance or if the person has prior drug convictions, or if the offense occurred near a school. Id. The court cannot sentence below a statutory minimum unless the government moves for a lower sentence based on substantial assistance, Melendez v. United States, 518 U.S. 120 (1996); 18 U.S.C. § 3553(e), or the defendant qualifies for the safety valve. 18 U.S.C. § 3553(f); USSG § 5C1.2; United States v. Phillips, 382 F.3d 489 (5th Cir. 2004). Quantity is an element of the offense that must be alleged in the indictment and proved beyond a reasonable doubt. See United States v. Cotton, 535 U.S. 625 (2002). In Alleyne v. United States, 133 S.Ct. 2151 (2013), the Supreme Court held that mandatory minimums are also subject to Sixth Amendment protections (overruling Harris v. United States, 536 U.S. 545 (2002)). The Fifth Circuit recently held that the government had failed to establish that a conspiracy involved more than 5 kilograms of cocaine, the amount necessary for the higher penalty range. United States v. Daniels, 723 F.3d 562 (5th Cir. 2013). The Court has also held that the minimum applies to an individual defendant only if it was part of the agreement. United States v. Haines, 803 F.3d 713 (5th Cir. 2015).

A defendant is also subject to a 20-year minimum if he unlawfully distributes a Schedule 1 or 2 drug, when “death or serious bodily injury results from the use of such substance.” 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C). The minimum applies only if the drug supplied by the defendant was a “but-for” cause of the victim’s death or injury. Burrage v. United States, 134 S.Ct. 881 (2014).
2. Statutory Enhancement

Sentences may be doubled under the statutes if the defendant has a previous felony drug conviction. 21 U.S.C. § 841(b). The enhancement applies to any prior offense punishable by more than one year, that is the federal definition of a felony, regardless of the label applied by the convicting jurisdiction. Burgess v. United States, 553 U.S. 124 (2008). The statute covers any felony drug conviction, including mere possession, not just trafficking. United States v. Sandle, 123 F.3d 809, 810-12 (5th Cir. 1997). Use of a communication facility in furtherance of drug trafficking may be used to enhance, United States v. Mankins, 135 F.3d 946, 949 (5th Cir. 1998), but use of a communication facility to purchase drugs for personal use does not constitute a violation of 21 U.S.C. § 843(b). Abuelhawa v. United States, 556 U.S. 816 (2009). Enhancement applies only to final convictions, ‘841(b)(1)(A), that is, when the conviction is no longer subject to direct appeal. United States v. Puig-Infante, 19 F.3d 929, 947 (5th Cir. 1994) (holding that state conviction that was part of federal conspiracy could be used to enhance only if defendant committed overt act after state conviction); see also United States v. Haas, 150 F.3d 443, 449 (5th Cir. 1998). The enhancement does apply, however, to a sentence of probation, even if completed and successfully terminated. United States v. Morales, 854 F.2d 65 (5th Cir. 1988), and to deferred adjudication. United States v. Cisneros, 112 F.3d 1272 (5th Cir. 1997). The government must file pretrial notice of the prior convictions supporting the enhancement. 21 U.S.C. § 851(a). The notice must accurately inform the defendant of the penalty range. United States v. Arnold, 485 F.3d 290 (5th Cir. 2007).

3. Quantity

The level for trafficking is based on the type and quantity of drugs, contained in a table at § 2D1.1(c). If the offense involves a variety of substances or substances not listed in the table, the substances are converted into specified quantities of marijuana listed in a drug equivalency table. USSG § 2D1.1, cmt. n.6, 10. See United States v. Hoster, 988 F.2d 1374 (5th Cir. 1993) (precursor and controlled substances converted to table). Pursuant to Congressional directive, the Commission has periodically raised the offense levels for various controlled substances including: methamphetamine and amphetamine, USSG § 2D1.1(c) (Dec. 16, 2000), MDA, MDMA (Ecstasy), amphetamines and the precursors- ephedrine, pseudo-ephedrine and PPTA. USSG § 2D1.1, cmt. n.10 (May 1, 2001), oxycodone. USSG § 2D1.1, n. 10 (Nov. 1, 2003), GHB, USSG § 2D1.1(c) (Nov. 1, 2004) and its precursor, GBL. USSG § 2D1.11 (Nov. 1, 2004), and anabolic steroids. USSG § 2D1.1(c) (March 27, 2006), Ketamine, associated with date rape. USSG § 2D1.1(c) & comment. (n.10)(Nov. 1, 2007). In 2009, the Commission increased the offense level cap for hydrocodone. USSG § 2D1.1(c)(5).

Under both statutory and guideline provisions, the offense level is computed on the basis of the total weight, including adulterants and packaging. 21 U.S.C.§841(b)(1), 960 (b)(1); Chapman v. United States, 500 U.S. 453 (1991) (penalty for trafficking in LSD based on weight of LSD and carrier); United States v. Villarreal, 723 F.3d 609 (5th Cir. 2013) (drug weight includes mixture even if very low purity); United States v. Baker, 883 F.2d 13, 15 (5th Cir. 1989) (offense level properly determined on basis of methamphetamine wash). Some courts have recognized, however, that the waste product should not be included. United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Rolande-Gabriele, 938 F.2d 1231 (11th Cir. 1991). But see United States v. Walker, 960 F.2d 409 (5th Cir. 1992); United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991). An application note explains that “mixture or substance’ as used in the guidelines has the same meaning as in 21 U.S.C. § 841,” but that the term “does not include uningestable, unmarketable portions of drug mixtures.” USSG § 2D1.1, cmt. n.1; United States v. Palacios-Molina, 7 F.3d 49 (5th Cir. 1993) (waste product in cocaine case not considered under guidelines); see also United States v. Stricklin, 290 F.3d 748 (5th Cir. 2002) (should exclude waste from P2P); United States v. Mimms, 43 F.3d 217 (5th Cir. 1995) (district court clearly erred in calculating quantity). Under the guidelines, the offense level for pills and LSD is generally based on the number of dosage units rather than total weight. USSG § 2D1.1, cmt. n. 11, 16, 21. But see United States v. Morgan, 292 F.3d 460 (5th Cir. 2002) (liquid LSD without carrier medium). The statutory definition, which is based on the adulterated mixture, controls, however, with reference to mandatory minimums.Neal v.
United States, 516 U.S. 284, 285 (1996); United States v. Treft, 447 F.3d 421 (5th Cir. 2006) (market approach does not apply to statute but issue should be revisited). The guideline definition, which excludes waste products, applies otherwise. United States v. Levay, 76 F.3d 671 (5th Cir. 1996).

If the amount seized “does not reflect the scale of the offense,” the judge may “approximate the quantity of the controlled substance,” by considering other factors including price, financial records, similar transactions by the defendant and size or capability of the laboratory. USSG § 2D1.1, cmt. n.12. United States v. Betencourt, 422 F.3d 240 (5th Cir. 2005) (no clear error in multiplying number of people defendant claimed to have sold to by amount sold); United States v. Arnold, 148 F.3d 515 (5th Cir. 1998) (2 vials of List II chemical); United States v. Shugart, 117 F.3d 838 (5th Cir. 1997) (ephedrine to make methamphetamine); United States v. Smallwood, 920 F.2d 1231 (5th Cir. 1991) (lab capacity); see also United States v. Dickey, 102 F.3d 157 (5th Cir. 1996); United States v. Fitzgerald, 89 F.3d 218, 223 (5th Cir. 1996); United States v. Bellazerius, 24 F.3d 698, 703-04 (5th Cir. 1994) (court properly determined quantity based on chemist’s estimate of amount that would be produced). But see United States v. Hamilton, 81 F. 3d 652 (6th Cir. 1996) (court must tailor findings to defendant’s manufacturing capability). Appointed counsel are entitled to the services of an expert to challenge a quantity determination. United States v. Hardin, 437 F.3d 463 (5th Cir. 2006).

In estimating the quantity, the court should err on the side of caution. United States v. Sims, 975 F.2d 1225, 1243 (6th Cir. 1992); compare United States v. Medina, 161 F.3d 867 (5th Cir. 1998) (multiplied trips by amount smuggled during smaller trip); United States v. Webster, 54 F.3d 1 (1st. Cir. 1995) (estimate averages); United States v. Rogers, 1 F.3d 341 (5th Cir. 1993) (quantity estimate sufficient even though some informants’ reports were inaccurate); with United States v. Howard, 80 F.3d 1194 (7th Cir. 1996) (probation officer’s estimate overly speculative); United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993) (court could not base quantity estimate on unsupported averages, i.e. number of trips multiplied by amount carried on one trip); United States v. Shonubi, 103 F.3d 1085 (2d Cir. 1997) (same); United States v. Roberts, 14 F.3d 502 (10th Cir. 1993) (informant’s summary insufficient). The indictment is not itself sufficient to establish the quantity involved. United States v. Williams, 22 F.3d 580, 582 (5th Cir. 1994). The court should only estimate additional quantities if the actual seizure does not reflect the scale of the offense. United States v. Henderson, 254 F.3d 543 (5th Cir. 2001).

The Sentencing Commission chose to tie the base offense levels to the statutory mandatory minimums. So, for example, trafficking in at least 500 grams of cocaine results in a base offense level of 26. USSG § 2D1.1(c)(7). The justification for this has been questioned, for example in Kimbrough v. United States, 552 U.S. 85 (2007).

a. The Drug Table 2014

During the 2014 amendment cycle, the Commission provided a two-level reduction in offense level for most drug offenses. The Commission recognizes that with the addition of multiple enhancements, the base offense level should not be set at the mandatory minimum. Instead, the amended table sets the base offense levels at 24 and 30 for quantities triggering the statutory minimums. The Commission has retained the six-level floor and the 38-level cap, resulting in no relief for defendants at the low or high ranges of drug quantities. See USSG § 2D1.1(c). The amendment is retroactive.

4. Specific Substances
a. Crack


There have long been concerns that the 100:1 cocaine:crack ratio was irrational and had a disparate impact on African-Americans. See Kimbrough v. United States, 552 U.S. 85, 94-100 (2007). In light of the absence of any empirical support for the Guidelines based on the ratio, the courts are free to disregard the unduly harsh crack guidelines. Id. at 91, 101-02; see also Spears v. United States, 555 U.S. 261 (2009).
i. The Fair Sentencing Act

On August 3, 2010, the President signed the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (hereinafter the “FSA”), into law. In an effort to “restore fairness to Federal cocaine sentencing,” Preamble, FSA, the Act substantially reduced the statutory penalties for possession and trafficking in crack cocaine. The amount of crack necessary to trigger the ten-year mandatory minimum is raised from 50 grams to 280 grams, and the amount necessary to trigger the five-year mandatory minimum is raised from 5 grams to 28 grams. FSA § 2. The Act also eliminated the mandatory minimum sentence for simple possession of crack. Id.

No Congressional action comes without tradeoffs. The FSA also increased the fine ranges and directed the Sentencing Commission to promulgate a variety of amendments addressing drug sentencing in general. The Commission’s emergency amendments reducing the crack Guidelines and addressing the Congressional directives went into effect November 1, 2010, along with the previously scheduled Guideline amendments for 2010.

The Sentencing Commission chose to continue its tradition of tying the base offense level to the statutory minimums. Thus, the new guideline for trafficking in 28 grams of crack is 26 (63-78 months without adjustments) and for trafficking in 280 grams it is 32 (121-151 months). USSG § 2D1.1(c)(4),(7). The marijuana equivalency for 1 gram of crack is 3571 grams of marijuana. Id. n.10(D).

ii. Retroactivity

The Supreme Court held in Dorsey v. United States, 567 U.S. 260, 132 S.Ct. 2321 (2012), that the FSA applies retroactively to all defendants sentenced on or after the effective date of the act, regardless of when they committed the federal offense. The Supreme Court drew the retroactive line at defendants facing sentencing on the effective date of the FSA. Dorsey, 132 S.Ct. at 2335.

b. Methamphetamine

The penalties for the manufacture and trafficking in methamphetamine have been the focus of a number of enhancements in recent years. Of particular concern is the increasing importation of the drug from Mexico and the dangers associated with the manufacturing process.

The case of United States v. Ortega, 2010 WL 1994870 (D. Neb. May 17, 2010), is one in a long line of cases from Nebraska declining to follow the methamphetamine Guideline. As the court outlined in Ortega, there was no mandatory minimum sentence for methamphetamine until the Anti-Drug Abuse Act of 1988, which set two alternative measures for mandatory minimums triggered either by the quantity of the pure drug or a mixture containing the drug. The weight of the mixture that triggered the minimum was ten times the weight of pure methamphetamine. See Ortega, 2010 WL 1994870 at *4. In 1996, Congress changed the ratio to 5:1 and directed the Commission to increase the punishment for methamphetamine offenses. Id. at *5. These ratios were based on the assumption that the higher purity would apply to distributors higher in the chain. Id. at *6-7. The court found in Ortega that this assumption no longer reflected the market where the standard purity for retail methamphetamine is now 40-50%. Thus, the alternative purity calculation was automatically trumping the mixture Guideline and significantly increasing the Guideline range regardless of a defendant’s role in the distribution of the drug. This was true of Ortega who was a user selling small quantities of methamphetamine on the street. Accordingly, the court imposed a sentence of forty-two months, which was fifteen months below the 57-71 month Guideline range. Note that the court did not minimize the serious nature of methamphetamine, emphasizing that the drug is highly addictive, associated with gangs, violence and guns, as well as the risks of toxic exposure and explosion associated with its manufacture. Id. at *6.

There is a two-level enhancement if the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully unless the defendant is subject to a mitigating role adjustment. USSG § 2D1.1(b)(5); see United States v. Rodriguez, 666 F.3d 944 (5th Cir. 2012)(applied even though defendant was not directly the importer). The Fifth Circuit held in United States v. Serfass, 684 F.3d 548 (5th Cir. 2012), that the defendant need not know that the methamphetamine was imported, in other words, scienter applies only to precursors.
There is also a three-level enhancement, and a minimum offense level of twenty-seven, if the offense involved a substantial risk of harm to human life or the environment, USSG § 2D1.1(b)(13)(C) & cmt. n.21, and a two-level enhancement for discharge of toxic substances. § 2D1.1(b)(13)(A). The discharge must violate one of the specifically enumerated statutes. United States v. Sauseda, 596 F.3d 279, 282 (5th Cir. 2010).

A 2007 statute requires a mandatory consecutive sentence of fifteen years for smuggling methamphetamine or its precursors through dedicated commuter lanes or other facilitated entry programs administered by the federal government for entry into the United States. 21 U.S.C. § 865. Viewing this as an abuse of trust, the Sentencing Commission has created a two-level enhancement for defendants “convicted” of the offense. USSG § 2D1.1(b)(6). A second new offense requires a consecutive sentence of up to twenty years for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside. 21 U.S.C. § 860a. The guidelines provide a two-level enhancement, and a minimum offense level of fourteen, for possession of methamphetamine around children and the three-level enhancement, with a minimum level of twenty-seven, for manufacture and distribution. USSG § 2D1.1(b)(13) (C), (D). The Commission directs the sentence to be divided between the counts of conviction to obey the consecutive commands. USSG § 2D1.1, cmt. (n.22).

c. Ecstasy (aka Methyldioximethamphetamine aka MDMA)

The ACLU recently scored a big victory after demonstrating in an evidentiary hearing that the MDMA guideline is not empirically based. See United States v. McCarthy, 2011 WL 1991146 (S.D.N.Y. May 19, 2011). Ecstasy was not even a controlled substance in the early 1980’s. Prior to 2001, the Guidelines treated one gram of MDMA as the equivalent of 35 grams of marijuana. See McCarthy, 2011 WL 1991146 at *1 (citing United States Sentencing Commission, Report to Congress; MDMA Drug Offenses, Explanation of Recent Guideline Amendments (the Ecstasy Report) 6 (2001)). In 2001, however, Congress directed the Commission to review and increase the penalties for ecstasy offenses. Id. The Commission determined that the penalties for MDMA offenses should be more severe than powder cocaine, which had a 200:1 ratio, but less severe than heroin. Id. Distinguishing heroin, the Commission reasoned that there were more heroin cases, more heroin related deaths and hospital visits, heroin was more addictive, it was associated with more violence and injecting heroin had secondary health risks such as the risk of HIV and hepatitis. The Commission justified imposing higher sentences for MDMA than cocaine because 1) it is neurotoxic, 2) it is aggressively marketed to young people, and 3) it is both a stimulant and a hallucinogen. Id.

After holding an evidentiary hearing in McCarthy, the district court concluded that there was evidence that MDMA is neurotoxic and marketed to young people but no evidence that it is hallucinogenic. 2011 WL 1991146 at *2-3. The Commission ignored, however, “several effects of cocaine that render it significantly more harmful than MDMA.” Id. at 3. For example, cocaine is responsible for more emergency room visits, it is more addictive, it causes serious adverse health effects not implicated by MDMA such as cardiac arrest, strokes and seizures, and, unlike MDMA, cocaine trafficking is associated with substantial violence. McCarthy, 2011 WL 1991146 at *3-4. The court concluded that an MDMA-to-marijuana ratio of 200:1, equal to cocaine, was more appropriate. Id. at 4.

5. Relevant Conduct/Conspiracy

Consistent with the relevant conduct provisions of the guidelines, drug offense levels are based on the total quantity of drugs involved in the transaction. 2D1.1, cmt. n.12. United States v. Taplette, 872 F.2d 101 (5th Cir. 1989). Drug transactions that occur before the precise time frame of the indictment may be considered if those transactions “otherwise satisfy the criteria for relevant conduct prescribed by the guidelines.” United States v. McCaskey, 9 F.3d 368, 375 (5th Cir. 1993). It is also permissible to include transactions involving a different type of drug as long as the other criteria for relevant conduct are satisfied. Id. The court can even treat the substance as crack although the indictment failed to so describe the cocaine. McCaskey, 9 F.3d at 376-79. The court must find, however, that the defendant agreed to possess the substance, e.g. crack, rather than powder. Compare United States v. Valdez, 453 F.3d 25 (5th Cir.
2006) (insufficient evidence marijuana conspirator agreed to transport cocaine); United States v. Fike, 82 F.3d 1315, 1326 (5th Cir. 1996) (no agreement to possess crack); with United States v. Alix, 86 F.3d 429, 436 (5th Cir. 1996) (defendants knew of crack). Relevant conduct can even include offenses which occur after conviction. United States v. Ocana, 204 F.3d 585, 589-91 (5th Cir. 2000).

The government must present reliable evidence that the additional drug transaction is part of the same course of conduct. Compare United States v. Ortiz, 613 F.3d 550 (5th Cir. 2010) (cocaine in suitcase not same course of conduct as marijuana conspiracy); United States v. Rhine, 583 F.3d 878 (5th Cir. 2009) (defendant’s participation in earlier drug ring not relevant conduct); United States v. Booker, 334 F.3d 406, 414 (5th Cir. 2003) (marijuana and cocaine transactions separate); United States v. Wall, 180 F.3d 641 (5th Cir. 1999) (deliveries by girlfriend four years later excluded); United States v. Miller, 179 F.3d 961 (5th Cir. 1999) (deliveries two years earlier excluded); United States v. Perulena, 146 F.3d 1332 (11th Cir. 1998) (importation a year earlier excluded); United States v. Hill, 79 F.3d 1477 (6th Cir. 1996) (nineteen month separation); United States v. Maxwell, 34 F.3d 1006, 1010-13 (11th Cir. 1994) (cocaine deal separate from dilaudid deal); United States v. Beier, 20 F.3d 1428 (7th Cir. 1994) (evidence of additional sale inconsistent and unreliable, break in transactions); United States v. Castellone, 985 F.2d 21, 25-26 (1st Cir. 1993) (defendant excluded from third transaction); United States v. Duarte, 950 F.2d 1255, 1263 (7th Cir. 1991); with United States v. Bryant, 991 F.2d 171, 176-77 (5th Cir. 1993) (evidence sufficient to establish defendant’s connection); United States v. Register, 931 F.2d 308 (5th Cir. 1991). Drugs kept for personal use may be included if the defendant was convicted of conspiracy. United States v. Clark, 389 F.3d 141 (5th Cir. 2004). But see United States v. Wyss, 147 F.3d 631 (7th Cir. 1998) (personal use amount not included where defendant convicted of substantive offense); United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993).

In the joint venture context, the government must establish and the court must find that the acts of the co-defendant(s) were both reasonably foreseeable and undertaken jointly. United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993). Compare United States v. Dean, 59 F.3d 1479 (5th Cir. 1995) (court failed to find distribution undertaken jointly); United States v. Mitchell, 964 F.2d 454 (5th Cir. 1992) (no evidence 20 kilograms of cocaine was reasonably foreseeable to defendant); United States v. Webster, 960 F.2d 1301 (5th Cir. 1992) (remanding where court made no finding on foreseeability); United States v. Puma, 937 F.2d 151, 157 (5th Cir. 1991) (co-defendant’s possession of substantial quantity of methamphetamine not foreseeable); see also United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000) (no error in holding each defendant responsible only for drugs in individual knapsack); with United States v. Duncan, 191 F.3d 569 (5th Cir. 1999) (police officer responsible for all drugs); United States v. Ogbonna, 184 F.3d 447 (5th Cir. 1999) (joined conspiracy to distribute more than one kilo); United States v. Wilson, 116 F.3d 1066, 1076 (5th Cir. 1997) (responsible for all drugs sold in open air market); United States v. Buchanan, 70 F.3d 818 (5th Cir. 1995) (defendant’s long term involvement made quantity foreseeable); United States v. Smith, 13 F.3d 860 (5th Cir. 1994); see also United States v. Alix, 86 F.3d 429 (5th Cir. 1996) (different defendants responsible for different quantities). In an interesting twist, the Fifth Circuit held in United States v. Leal, 74 F.3d 600, 607-08 (5th Cir. 1996), that the defendants were responsible only for the 700-1500 kilograms of marijuana they had agreed to transport, rather than the 3000 kilograms seized at the ranch.

Conspiracies and attempts to traffic in drugs are generally treated like the substantive offense, USSG § 2D1.1, and the quantity involved is aggregated. Id. at cmt. n.12. The weight under negotiation in an uncompleted distribution is generally used to calculate the applicable amount. United States v. Farrell, 893 F.2d 690 (5th Cir. 1990); United States v. Garcia, 889 F.2d 1454 (5th Cir. 1989). In a reverse sting, the agreed upon amount will more accurately reflect the scale because the amount actually delivered is controlled by the government. USSG 2D1.1, cmt. n.12. See, e.g., United States v. Markiewicz, 122 F.3d 399, 402 (7th Cir. 1997); United States v. Felix, 87 F.3d 1057 (9th Cir. 1996). Finally, if the defendant establishes that he did not intend to provide or was not reasonably capable of providing the agreed upon amount, the level will be reduced by the amount the defendant could not provide. USSG 2D1.1, cmt. n.12; United States v. Davis, 478 F.3d 266 (5th Cir. 2007) (holding defendant not responsible for non-controlled substance if he did not intend to produce controlled substance even if he was capable of it). The level does not include amounts that were merely discussed in conversation. United States v. Gessa, 971 F.2d 1257, 1265 (6th Cir. 1992) (en banc) (and cases cited therein); see also United States v. Tillman, 8 F.3d 17 (11th
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Cir. 1993) (remanding where court failed to determine if defendant capable of producing amount); United States v. Robinson (Walter), 22 F.3d 195 (8th Cir. 1994) (reversing sentence based on negotiated amount where defendant did not have money to pay). In United States v. Mergerson, 4 F.3d 337, 345-46 (5th Cir. 1993), the Fifth Circuit held that the statutory enhancement based on amount applies only if the government proves by a preponderance of the evidence that the defendant possessed or conspired to possess the requisite amount. Mere negotiation is not sufficient for this enhancement. Mergerson, 4 F.3d at 345-46.

6. Firearms

The offense level is raised two points for possession of a firearm in connection with a drug trafficking offense unless the defendant was also convicted of using the firearm in the transaction under 21 U.S.C. § 924(c). USSG § 2D1.1(b)(1). The Commission has explained that this enhancement “reflects the increased danger of violence when drug traffickers possess weapons.” Id. at cmt. n.3. The adjustment applies if the weapon was present unless it is “clearly improbable that the weapon was connected to the offense.” Id. This does not, however, relieve the government of the burden of connecting the firearm to the drug transaction and establishing that the gun was foreseeable to the defendant. United States v. Zapata-Lara, 615 F.3d 388 (5th Cir. 2010). The adjustment may be applied if the gun was inoperable, United States v. Franklin, 148 F.3d 451 (5th Cir. 1998); United States v. Mitchell, 31 F.3d 271, 277-78 (5th Cir. 1994), and if the possession of the firearm was not itself unlawful, United States v. Otero, 868 F.2d 1412, 1414-15 (5th Cir. 1989). There is to be only one gun adjustment for the offense. USSG § 2K2.4, cmt. n.2.

The firearm must actually be possessed during the transaction. Compare United States v. Romans, 823 F.3d 299 (5th Cir. 2016) (reversing gun near hydroponic grow area but affirming for gun in stash house); United States v. Cooper, 274 F.3d 230 (5th Cir. 2001) (gun possessed during arrest not connected); United States v. Siebe, 58 F.3d 161 (5th Cir. 1995) (court could not presume police officer possessed firearms located in his home during drug transaction occurring elsewhere); United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991) (court failed to find defendant exercised control over firearm); United States v. Vasquez, 874 F.2d 250 (5th Cir. 1989) (firearm in apartment but drug transaction occurred in shopping center lot); with United States v. Rodriguez-Guerrero, 805 F.3d 192 (5th Cir. 2015) (firearms in stash house); United States v. Partida, 385 F.3d 546 (5th Cir. 2004) (officer carried firearm during transaction); United States v. Hare, 150 F.3d 419 (5th Cir. 1998) (guns on nightstand with drugs); United States v. Marmolejo, 106 F.3d 1213 (5th Cir. 1997) (INS agent carried firearm during drug transaction); United States v. Flucas, 99 F.3d 177 (5th Cir. 1996). The enhancement can be based on statements made by an informant or during a wiretap even if no gun is recovered. See United States v. Marquez, 685 F.3d 501 (5th Cir. 2012).

A defendant may be assessed a § 2D1.1(b)(1) increase for a coconspirator’s possession of a firearm during the drug conspiracy as long as use of the weapon was a reasonably foreseeable part of the jointly undertaken activity. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997); United States v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993). The government must establish a sufficient nexus between the weapons and the defendant to justify the enhancement. United States v. Ramos, 71 F.3d 1150 (5th Cir. 1995) (citing United States v. Aguilera-Zapata, 901 F.2d 1209 (5th Cir. 1990)). In Ramos, the court affirmed the enhancement with respect to a defendant who had stored narcotics where the guns were found but reversed with respect to the defendant who had merely expressed an interest in buying firearms. 71 F.3d at 1157; see also United States v. Gaytan, 74 F.3d 545 (5th Cir. 1996) (defendant knew codefendant had gun); United States v. Fierro, 38 F.3d 761 (5th Cir. 1994) (defendant had access to house where cocaine and pistol located); United States v. Sparks, 2 F.3d 574 (5th Cir. 1993) (codefendant brandished the gun).

7. Safety Valve

The safety valve permits a defendant to be sentenced to the applicable guideline level without regard to any mandatory minimum if the defendant: (1) does not have more than one criminal history point, (2) did not use violence, threaten violence, or possess a firearm or other dangerous weapon in connection with the offense, (3) the offense did not result in death or bodily injury, (4) the defendant was not an organizer or engaged in a continuing criminal enterprise, and (5) the defendant truthfully provides
to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct. 18 U.S.C. § 3553(f); USSG § 5C1.2; United States v. Flanagan, 87 F.3d 121, 124-25 (5th Cir. 1996). Booker has no effect on the availability of a safety valve sentence below a statutory minimum. United States v. Brehm, 442 F.3d 1291, 1300 (11th Cir. 2006); see also United States v. McKoy, 452 F.3d 234, 239 (3d Cir. 2006) (collecting cases).

The sentencing guidelines provide an additional two-level reduction for those eligible for the safety valve, USSG § 2D1.1(b)(6), without regard to whether they were originally subject to a mandatory minimum sentence. USSG § 2D1.1, cmt. n.21; see United States v. Leonard, 157 F.3d 343, 345-46 (5th Cir. 1998). If a defendant is eligible for the safety valve, the more lenient guideline rule for calculating quantity controls, for example, in an LSD case where the guidelines exclude the carrier medium. United States v. Powers, 194 F.3d 700 (6th Cir. 1999). Once a defendant is deemed eligible for the safety valve, the court is free to sentence him below the mandatory minimum sentence. United States v. Lopez, 264 F.3d 527 (5th Cir. 2001). A defendant is not eligible for the safety valve if a gun was possessed in connection with the offense. United States v. Flucas, 99 F.3d 177 (5th Cir. 1996). While a codefendant’s possession of the firearm does not preclude the adjustment, United States v. Wilson, 105 F.3d 219, 222 (5th Cir. 1997), a defendant cannot receive the reduction if he constructively possessed the firearm. United States v. Matias, 465 F.3d 169 (5th Cir. 2006).

To qualify for the safety valve, the defendant must be truthful, United States v. Edwards, 65 F.3d 430 (5th Cir. 1995); see also United States v. Ridgeway, 321 F.3d 512 (5th Cir. 2003) (defendant’s claimed lack of memory not credible), and must give information to the government not just the probation officer. United States v. Rodriguez, 60 F.3d 193 (5th Cir. 1995). Deceit about immaterial matters will not disqualify the defendant. United States v. Miller, 179 F.3d 961 (5th Cir. 1999). The defendant bears the burden of making contact with the government and of demonstrating eligibility for the safety valve. United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996). While the defendant must provide all information within her knowledge concerning relevant conduct, the defendant need not provide information concerning conduct that is not related to the offense of conviction. Miller, 179 F.3d at 964-65. Moreover, where a defendant “credibly demonstrates that she has provided the government with all the information she reasonably was expected to possess, in order to defeat the [safety valve] claim, the government must at least come forward with some sound reason to suggest otherwise.” Id. at 968 (quoting United States v. Miranda-Santiago, 96 F.3d 517, 529 n.25 (1st Cir. 1996)). The government’s effort to defeat the safety valve claim cannot be based on mere speculation and conjecture. Id. The court must make an independent determination whether the defendant provided all truthful information to the government and qualifies for the safety valve. Miranda-Santiago, 96 F.3d at 529; see also United States v. Espinosa, 172 F.3d 795 (11th Cir. 1999); United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997); United States v. Maduka, 104 F.3d 891, 895 (6th Cir. 1997).

A defendant who qualifies for acceptance of responsibility does not automatically qualify for the safety valve because he must admit relevant conduct to benefit from the safety valve. United States v. Sabir, 117 F.3d 750 (3d Cir. 1997). While a defendant must truthfully disclose what she knows, she need not testify to qualify for the safety valve. United States v. Carpenter, 142 F.3d 333 (6th Cir. 1998). The requirement that the defendant admit all relevant conduct is not unconstitutional. United States v. Torres, 114 F.3d 520, 527 (5th Cir. 1997); United States v. Stewart, 93 F.3d 189, 196 (5th Cir. 1996). The Second Circuit has held that the government need not offer immunity to a defendant seeking to qualify under the safety valve. United States v. Cruz, 156 F.3d 366, 371 (2d Cir. 1998). On the other hand, the First Circuit held that the government cannot preclude application of the safety valve by stipulating which adjustments apply. United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The court noted that the safety valve, which is contained in chapter five of the guidelines, is not really an adjustment and is mandatory if the defendant qualifies. Id.

To qualify for the safety valve, a defendant must fully debrief prior to sentencing. United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). Nothing in the safety valve provisions precludes a defendant from receiving the reduction if he goes to trial. See United States v. Treft, 447 F.3d 421, 426 (5th Cir. 2006) (“Although it may be the case... that a court may not deny safety valve relief simply because a defendant pleads not guilty, that is not what the district court did in this case.”). In United States v. Moreno-Gonzalez,
662 F.3d 369, 375 (5th Cir. 2011), however, the Fifth Circuit affirmed the denial of safety valve relief where the defendant continued to maintain both at sentencing and on appeal that the evidence was insufficient to convict him. The Court of Appeals failed even to mention Treft. Moreno-Gonzalez is also directly contrary to United States v. Sherpa, 110 F.3d 656, 660-62 (9th Cir. 1996), where the Ninth Circuit approved safety valve relief for a defendant who continued to deny knowledge of the drugs but could have been convicted based on deliberate ignorance. See also United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000); United States v. Schreiber, 191 F.3d 103, 106-09 (2d Cir. 1999) (eligible as long as tell truth before sentencing even if previous deception); United States v. Gama-Bastidas, 142 F.3d 1233, 1243 (10th Cir. 1998). But see United States v. Marin, 144 F.3d 1085, 1091-95 (7th Cir. 1998); United States v. Long, 77 F.3d 1060, 1062-63 (8th Cir. 1996).

The safety valve only applies to specific drug trafficking offenses. Thus, a defendant convicted of drug trafficking near a school under 21 U.S.C. § 960 is not eligible for the safety valve. United States v. Phillips, 382 F.3d 489 (5th Cir. 2004); but see United States v. Warnick, 287 F.3d 299 (4th Cir. 2002).

The Commission has created a safety valve provision in the guidelines for chemical precursors that parallels the safety valve provision in the drug guideline. A defendant convicted of a precursor offense who meets the safety valve criteria is eligible for a two-level reduction. USSG § 2D1.11(b)(6) & n. 9.

8. FSA Adjustments

a. Enhancements for Drug Defendants

Pursuant to Congressional directive, the Commission added three new specific offense characteristics for drug defendants. Note that in each case the enhancement applies only to the defendant’s conduct, not to all offenses involving such conduct.

i. Violence

There is a two-level increase if the defendant “used violence, made a credible threat to use violence, or directed the use of violence,” USSG § 2D1.1(b)(2). The enhancements for use of a firearm and threats of violence may be applied cumulatively unless the defendant merely possessed the dangerous weapon, in which case the violence enhancement does not apply. USSG § 2D1.1, n.3(B).

ii. Obstruction

There is a two-level increase if the defendant “bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense.” § 2D1.1(b)(11). This enhancement does not apply if covered by the general obstruction of justice enhancement, USSG § 3C1.1, or the super-aggravated enhancement discussed infra, USSG § 2D1.1(b)(15)(D). See USSG § 2D1.1, n.27.

iii. Drug premises

There is a two-level increase if the defendant “maintained a premises for the purpose of manufacturing or distributing a controlled substance.” § 2D1.1(b)(12). Factors to be considered include (A) whether the defendant held a possessory interest in the property, and (B) the extent to which he controlled access to or activities at the premises. Trafficking “need not be the sole purpose for which the premises was maintained,” but must be one of the “primary or principal uses,” rather than an “incidental or collateral use.” USSG § 2D1.1, n.28. Presumably, this commentary excludes a person’s residence used occasionally to store drugs. The enhancement applies to storage of a controlled substance for purposes of distribution. See, e.g., United States v. Guzman-Reyes, 853 F.3d 260 (5th Cir. 2017).

b. Super-Aggravators

The FSA Guidelines provide a single two-level enhancement if the defendant receives an aggravating role adjustment, see United States v. Martinez-Rodriguez, 821 F.3d 659 (5th Cir. 2016) (reversed because no aggravating role) and the offense involved one or more of the following:
i. Fear and affection
The defendant used “fear, impulse, friendship, affection, or some combination thereof” to involve another individual in trafficking, the individual received little or no compensation, and the individual had minimal knowledge of the scope and structure of the enterprise. USSG § 2D1.1(b)(15)(A).

ii. Vulnerability
The defendant distributed a controlled substance to or involved in the offense an individual who is (i) younger than 18, (ii) 65 or older, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or was particularly susceptible to criminal conduct. § 2D1.1(b)(15)(B). The vulnerable victim enhancement, USSG § 3A1.1, does not apply if the defendant is covered by this Guideline. USSG § 2D1.1 n.29(A).

iii. Importation
The defendant was “directly involved” in the importation of a controlled substance. § 2D1.1(b)(15)(C). This enhancement applies if the defendant “is accountable for the importation,” that is, he committed it, or committed aiding and abetting type conduct. § 2D1.1, n. 29(B). The enhancement does not apply if the enhancements under § 2D1.1(b)(3)(non-commercial aircraft, submersible vessels, pilot of aircraft or vessel) or § (b)(5) (importation of amphetamine and methamphetamine) apply. § 2D1.1, n. 29(C).

iv. Obstruction
The defendant engaged in witness intimidation, destruction of evidence or otherwise obstructed justice in connection with the investigation or prosecution of the offense. § 2D1.1(b)(15)(D).

v. Criminal Livelihood
The defendant committed the offense as “part of a pattern of criminal conduct engaged in as a livelihood.” § 2D1.1(b)(15)(E). These terms are defined in § 4B1.3. USSG § 2D1.1, n. 29(C). A “pattern” means “planned criminal acts occurring over a substantial period of time.” The term “livelihood” means the defendant derived income through a pattern of criminal activity within a 12-month period, which exceeded 2000 times the existing federal hourly wage, and the “totality of the circumstances” shows the criminal conduct was the defendant’s “primary occupation” during that period. USSG § 4B1.3, n.2.

c. Super-mitigator
The reduction contained in USSG § 2D1.1(b)(16) is the converse of § 2D1.1(b)(15)(A). A defendant who receives a minimal role reduction, USSG § 3B1.2(a), was motivated by fear or an intimate relationship, received no monetary compensation, and had minimal knowledge, receives an additional two-level reduction. The base offense level for all minimal participants in drug cases is also capped at level 32. USSG § 2D1.1(a)(5). The 2011 amendments would extend this cap to all minimal participants.

9. Drug Disposal Act
Certain people, i.e. ultimate users and long-term care facilities, are authorized to possess certain controlled substances and to deliver them for disposal. If such a person is convicted of a drug offense resulting from this authorization, the two-level enhancement for abuse of trust will normally apply. See USSG § 3B1.3, n.8 (Nov. 1, 2011).

10. Other Enhancements
With respect to steroids, there are enhancements for distribution of steroids along with a masking agent, USSG § 2D1.1(b)(8), and distribution to an athlete. USSG § 2D1.1(b)(9). Coaches who are responsible for steroid use are presumed to have abused a position of trust. Id. n.8

An offense level is adjusted up if distribution occurred in a prison or correctional detention facility, USSG § 2D1.1 (b)(4), and for distribution of drugs through mass-marketing on the Internet. USSG § 2D1.1(b)(7). A defendant is also subject to an enhancement if he is convicted of a sex offense and distributed a controlled substance to the victim with or without her knowledge. USSG § 2D1.1(e)(1).
Enhancements for distribution near a schoolhouse, United States v. Chandler, 125 F.3d 892 (5th Cir. 1997), and use of a juvenile in a drug transaction normally do not apply if the defendant was not convicted under these statutes. United States v. Lombardi, 138 F.3d 559 (5th Cir. 1998). See USSG § 2D1.2, cmt. n.1. Beware, however, that there is a general adjustment for use of a juvenile in chapter three. USSG § 3B1.4. Further, the FSA enhancements apply to defendants who played an aggravating role, regardless of the offense of conviction.

The offense is adjusted up two points if the defendant unlawfully exported or imported the controlled substance in a submersible vessel, in other than a regularly scheduled commercial carrier or acted as a pilot or other type of flight officer aboard an aircraft or vessel carrying the substance. USSG § 2D1.1(b)(3). This adjustment applies only if a private aircraft was actually used. United States v. Joelson, 7 F.3d 174 (9th Cir. 1993). The defendant need only be piloting the boat to receive the enhancement, he need not have any special skill. United States v. Bautista-Montelongo, 618 F.3d 464 (5th Cir. 2010).

If the defendant is convicted of a drug distribution offense resulting in death or serious bodily injury, the minimum guideline is 38. USSG § 2D1.1(a)(2). Conviction is required. United States v. Greenough, 669 F.3d 567 (5th Cir. 2012), but this is a strict liability enhancement. United States v. Carbajal, 290 F.3d 277 (5th Cir. 2002). To obtain a six-level enhancement for potential injury to a minor, the government must prove that the defendant was aware of the minor. United States v. Simpson, 334 F.3d 453 (5th Cir. 2003).

11. When Quantity Overrepresents Culpability

A sentence based on quantity may have an inappropriate impact on the bit players in a drug case. There is a graduated offense level cap based on quantity if the defendant receives a mitigating role reduction. USSG § 2D1.1(a)(3).


12. Variance and Other Departures

There have been a number of recognized departures in drug cases. For example, trafficking in controlled substances of unusually high purity may warrant an upward departure. USSG § 2D1.1, cmt. n.9. There must, however, be evidence in the record that the purity is unusually high. United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989) (no evidence that 93% pure cocaine was unusually high). Low purity does not require a downward departure, although such a departure would be permissible. United States v. Baker, 883 F.2d 13 (5th Cir. 1989); United States v. Davis, 868 F.2d 1390 (5th Cir. 1989) (methamphetamine lab). A court may depart down where a defendant does not know of or control the purity of the controlled substance. United States v. Mendoza, 121 F.3d 510 (9th Cir. 1997); United States v. Chalarca, 95 F.3d 239, 245 (2d Cir. 1996). But see United States v. Valencia-Gonzalez, 172 F.3d 344 (5th Cir. 1999) (court’s refusal to depart not reviewable).

Where the government controls the quantity of drugs to be produced, due process may require consideration of a lower sentence. United States v. Tobias, 662 F.2d 381, 387-89 (5th Cir. 1981); see also United States v. Searey, 233 F.3d 1096 (8th Cir. 2000); United States v. Foley, 906 F.2d 1261 (8th Cir. 1990); United States v. Connell, 960 F.2d 191 (1st Cir. 1992) (recognizing sentencing entrapment could exist but finding defendant agreed to amount); United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991) (same); United States v. Richardson, 925 F.2d 112 (5th Cir. 1991) (court could refuse to consider amount created by government as relevant conduct but in instant case defendant readily entered into agreement). Compare United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994) (defendant previously sold only small quantities to friends); with United States v. Tremelling, 43 F.3d 148 (5th Cir. 1995) (no entrapment where defendant agreed to accept extra). A departure in such cases may be appropriate where the government

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sells the substance substantially below the market value, thereby inducing the defendant to purchase more than his resources would normally permit. USSG § 2D1.1, cmt. n.15; see also United States v. Panduro, 152 F. Supp. 2d 398 (S.D.N.Y. 2001), aff’d, 2002 WL 432679 (2d Cir. 2002) (downward departure where agent extended unusually generous credit).

Reliance on quantity often results in a sentence that is greater than necessary in a drug case. The Commission has provided some relief, capping the offense level for defendants who played a mitigating role in the offense. USSG § 2D1.1(a)(5). As the following examples reveal, the offense level cap may not be enough.

In United States v. Jaber, 362 F.Supp.2d 365 (D. Mass, 2005), Jaber was convicted of setting up a fake pharmaceutical wholesale business to divert pseudoephedrine for use in a methamphetamine manufacturing and trafficking operation. His codefendant, Momoh, was an employee or “functionary.” 362 F.Supp.2d at 377. They were discovered when the ringleader of a huge illegal operation in Florida cooperated, reducing his own sentence from 135 to fifty-one months. By the time Jaber and Momoh were arrested, their efforts to cooperate were futile. Id, at 378-80.

The court recognized that quantity may be an appropriate proxy for culpability in some cases, but concluded that it was not in the defendant’s case. Citing a fraud case, Emmenegger, 329 F.Supp.2d at 427, the court noted: “Drug quantity may well be a kind of accident, depending on the fortuities of law enforcement or even the market, as much as it reflects the defendant’s culpability.” Jaber, 362 F.Supp. at 380. Finding that Jaber’s acceptance was extraordinary, the court imposed the same fifty-one month sentence received by the cooperating ringleader. Id, at 381. Momoh, the employee, who did not even know at first that the activity was illegal, received a sentence of probation conditioned on home detention. In addition to his minor role, during the two years following the crime, Momoh had held a steady job and cared for a severely ill wife and their three small children. Id, at 381-83.

In United States v. Garrison, 560 F.Supp.2d 83 (D. Mass. May 20, 2008), the court again found quantity to be an inaccurate proxy for culpability, this time because it was based on the fortuitous choice of law enforcement to delay arrest until the defendant had engaged in three crack transactions. 560 F.Supp.2d at 86-87. Although charged separately, further investigation revealed that he was a street-level dealer in a much larger organization. Id, at 84. The crack guidelines and the government’s decision to charge only some of the defendants in federal court created its own unwarranted disparity. Id, at 87. In addition to Garrison’s relatively minor role in the overall offense, the court based its below Guideline sentence on the fact that he had grown up without benefit of parental guidance, had no high school diploma and found himself addicted to marijuana and alcohol. In spite of this background, he had “steered clear of the violence that had afflicted his neighborhood,” and was a supportive presence in his children’s lives. Id, at 86. See also United States v. Cabrera, 567 F.Supp.2d 271 (D. Mass. 2008) (forty-six-month variance for homeless “delivery man”).

An individual’s ability to demonstrate that he has left behind his criminal ways is often a critical component in these cases. In Gall, the defendant withdrew from the conspiracy, obtained a degree and education and established a stable family relationship. 552 U.S. at 56-59. Similarly in United States v. Roque, 536 F.Supp.2d 987 (E.D.Wis. 2008), the defendant joined a street gang and became involved in drug trafficking. Prior to his arrest, he quit the gang, developed a “solid employment record,” supported his girlfriend and their children and made efforts to obtain a GED. 536 F.Supp.2d at 989-90. The court sentenced Roque to probation.

D. Sex Offenses

1. Sexual Assault

Sex offenses, particularly offenses against children, have been the focus of frequent Congressional and Commission action. With the exception of statutory rape, USSG § 2A3.2(a), the base offense levels for most sex offenses insure a significant prison sentence. The base offense level for a conviction under 18 U.S.C. § 2241(c) (sexual assault of a child younger than 12 or a child younger than 16 by someone 4 years older), is 38, while other criminal sexual abuse if 30. USSG § 2A3.1(a). A defendant subject to the lower offense level gets an enhancement based upon the age of a minor victim. USSG § 2A3.1(b). If the
offense involved other conduct described in § 2241 (force, rendering victim unconscious, drugged or impaired, or a sexual act), there is a four-level enhancement. **USSG § 2A3.1(b)(1).** The general sexual abuse Guideline includes enhancements based on the extent of any injuries, USSG § 2A3.1(b)(4), and for abduction. **USSG § 2A3.1(b)(5).** See United States v. Heffron, 314 F.3d 211 (5th Cir. 2002) (force includes psychological manipulation).

Both sexual abuse guidelines have a specific enhancement if the victim was in the “custody, care, or supervisory control” of the defendant. **USSG § § 2A3.1(b)(2), 2A3.2(b)(1),** see, e.g., United States v. Alfaro, 555 F.3d 496 (5th Cir. 2009) (brother-in-law), and for the misrepresentation of identity or the use of a computer to induce or coerce the victim to engage in prohibited sexual conduct or to facilitate transportation for such conduct. **USSG §§2A3.1(b)(6),2A3.2(b)(2)(A), 2A3.2(b)(3).** The misrepresentation enhancement applies only if the misrepresentation was made directly to the victim and only if made with intent to induce the victim. Accordingly, the mere use of a computer screen name does not justify the enhancement. **Id. USSG § 2A3.1, cmt. n.4.** The term “victim” includes an undercover law enforcement officer. **USSG § 2A3.1, cmt. n.1.**

The child sexual abuse rape guideline includes an enhancement if a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct. § 2A3.2(b)(2)(B)(ii). See United States v. Pringler, 765 F.3d 445, 451 (5th Cir. 2014), cert. denied, 135 S.Ct. 1000 (2015)(undue influence for prostitution), with United States v. Myers, 481 F.3d 1107 (8th Cir. 2007) (affirming denial of enhancement where minor sought adults). The undue influence enhancement applies only if the victim was actually a minor, i.e. not an undercover officer. **USSG § 2A3.2, comment. (n.3(B).** If a guilty participant is at least ten years older than the victim, there is a rebuttable presumption of undue influence. **Id. See United States v. Watkins, 667 F.3d 254, 268-69 (2d Cir. 2012) (Pooler, J. concurring in part and dissenting in part) (emphasizing presumption is rebuttable). Finally, there is a downward adjustment if the base offense level was 18 but none of the aggravating adjustments in § (b) apply. § 2A3.2(b)(4). An upward departure may be warranted if the defendant committed the offense to further a commercial scheme, id. at cmt. n.2, or has a prior sentence for similar conduct. **Id. at cmt. n.8.**

The statutory rape guideline contains a cross-reference if the offense involved forcible rape. ‘2A3.2(c); United States v. Garcia-Lopez, 234 F.3d 217 (5th Cir. 2000). The court cannot cross-reference to statutory rape and then impose an additional enhancement based on the age of the victim. **United States v. John, 309 F.3d 298 (5th Cir. 2002).**

2. Exploitation

The 2004 amendments rewrote and reorganized the commercial sex acts and pornography guidelines. First, a separate guideline provides a relatively low base offense level of 14 for commercial sex acts with anyone not a minor, USSG § 2G1.1(a), with an enhancement if the offense involved fraud or coercion. **USSG § 2G1.1(b)(1).** Promotion of sex with a minor has a base offense level of 24, USSG § 2G1.3(a), with enhancements for a minor under the defendant’s care, misrepresentation of identity, undue influence and use of a computer. **USSG § 2G1.3(b)(1)-(3).** See Pringler, 765 F.3d at 445-51 (enhancement applies to use of computer for communication). Again, the undue influence enhancement requires an actual minor. **USSG § 2G1.3, comment. (n.3(B)); Pringler, 765 F.3d at 451; United States v. Anderson, 560 F.3d 275, 283 (5th Cir. 2009). There are enhancements if the offense involved commission of a sex act or contact or a commercial sex act. **USSG § 2G1.3(b)(4).** If the offense involved a minor under twelve, there is an eight-level increase. **USSG § 2G1.3(b)(5).** The enhancement does not apply to a fictitious minor. **United States v. Vasquez, 839 F.3d 409 (5th Cir. 2016).** Also beware the cross-reference in these guidelines to sexual assault. **See USSG §§2G1.1(c)(1), 2G1.3(c)(3).**

If the offense involved more than one minor, the grouping rules apply to each victim as if they were in separate counts of the indictment. **USSG § 2G1.3(d).** This enhancement applies to fictitious minors. **United States v. Billups, 850 F.3d 762 (5th Cir. 2017).**
The “PROTECT Act,” Pub. L. 108-21 (April 30, 2003), significantly enhanced the statutory penalties for child sex crimes. The Act increased the maximum penalty for interstate travel to have sex with a child but created a defense if the defendant did not know that the victim was under eighteen. The Act mandates a life sentence for a defendant convicted of a federal sex offense against a minor with exceptions for consensual non-pecuniary sex, state misdemeanors and if there was no actual sexual activity.

The Adam Walsh Act mandates a fifteen-year minimum for sex trafficking of an adult by force, fraud or coercion. 18 U.S.C. § 1591(b)(1). In response, the guideline for conviction under this statute was raised to 34, but remains fourteen for other sex trafficking offenses. USSG § 2G1.1(a). To avoid double counting, the use of force enhancement does not apply to those convicted under § 1591(b)(1). USSG § 2G1.1(b)(1). The mandatory minimum for sex trafficking of children under fourteen is also fifteen years, and there is a new ten-year minimum if the child is under eighteen. 18 U.S.C. § 1951(b)(1), (2). In response, the guideline sets the offense level at thirty-four for conviction of the more serious offense and at thirty for conviction of the less serious one. USSG § 2G1.3(a). The Act also adds mandatory minimum sentences for enticing or transporting a person under eighteen to engage in sex, 18 U.S.C. §§ 2422(b), 2423(a), and the guideline contains corresponding increased base offense levels. USSG § 2G1.3(a)(3). Again, to avoid double counting, guideline enhancements for age and commercial sex do not apply because they are already considered in setting the base offense level. USSG § 2G1.3(b). The Act increased the penalties for use of a misleading domain name to deceive a minor into viewing harmful material and added an offense for embedding words or digital images into the source code of a website with intent to deceive a person into viewing obscenity. 18 U.S.C. §§ 2252B, 2252C. The guidelines include an enhancement for use of these imbedded materials. USSG § 2G3.1(b)(2).

The PROTECT Act authorizes supervised release for life for kidnapping and other felony child sex offenses. The Adam Walsh Act includes additional offenses subject to lifetime supervised release. The Fifth Circuit has upheld a lifetime supervised release sentence, United States v. Allison, 447 F.3d 402 (5th Cir. 2006), while reversing a sentence that did not include any supervised release. United States v. Armendariz, 451 F.3d 352 (5th Cir. 2006) (mandatory sex offender registration not a sufficient substitute). The court cannot, however, presume that lifetime supervise release is warranted. United States v. Alvarado, 691 F.3d 592 (5th Cir. 2012).

3. Pornography

The guidelines for possession, receipt and trafficking in child pornography are consolidated, with a base offense level of 18 for possession, USSG § 2G2.2(a)(1), and 22 for receipt and trafficking. USSG § 2G2.2(a)(2). If the defendant’s conduct was limited to receipt and he did not intend to traffic or distribute the materials, a level 22 is reduced by two. USSG § 2G2.2(b)(1).

There are graduated enhancements based on the number of pornographic images. USSG § 2G2.2(b)(7). Each picture is considered to be one image. USSG § 2G2.2, cmt. n. 4(B). Each video is considered to have 75 images. Id. An upward departure is warranted if the number of images substantially underrepresents the number of minors depicted or the video is more than five minutes long. USSG § 2G2.2, cmt. (n.4(B)); see, e.g., United States v. Jones, 444 F.3d 430 (5th Cir. 2006); United States v. Froman, 355 F.3d 882 (5th Cir. 2004). The enhancement for multiple depictions must be tied to the offense of conviction. In United States v. Teuschler, 689 F.3d 397 (5th Cir. 2012), the Fifth Circuit held that images on the defendant’s computer were not conduct relevant to his distribution of photos to an undercover officer.

Use of a computer to distribute or access child pornography results in a two-level enhancement. USSG § 2G2.2(b)(6). This includes use of a computer with intent to view such material and to viewing
the material live. USSG § 2G2.2(c)(1).

There are enhancements if the pornography involved prepubescent minors, USSG § 2G2.2(b)(2); United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.1994), and if the material portrays sadistic or masochistic conduct or other depictions of violence. USSG § 2G2.2(b)(4). Virtually any act of intercourse with a young child will result in an enhancement for sadistic conduct. United States v. Lyckman, 235 F.3d 234 (5th Cir. 2000). This enhancement applies regardless of whether the defendant intended to receive such material. USSG § 2G2.2, cmt. (n.2). See United States v. Perez, 484 F.3d 735 (5th Cir. 2007) (sufficient evidence of reckless disregard).

Multiple possession counts involving different children are to be grouped. USSG § 3D1.2(d). Because exploitation is a specific offense characteristic, conviction for this offense is grouped with possession and receipt of child pornography. United States v. Runyan, 290 F.3d 223 (5th Cir. 2002). The enhancements for possession, however, are not be applied in calculating the offense level for production. See United States v. Dickson, 632 F.3d 186, 190-91 (5th Cir. 2011) (not plain error).

a. 2016 Amendments

The 2016 amendments address circuit conflicts in two areas: 1) pornography involving very young children, and 2) the application of distribution enhancements to peer-to-peer file sharing.

In spite of the fact that the child pornography guideline already increases the offense level if the offense involved a minor younger than 12, USSG § 2G2.1(b)(1), or a prepubescent minor, USSG § 2G2.2(b)(2), the Fifth Circuit has authorized an additional vulnerable-victim enhancement, pursuant to USSG § 3A1.1(b), where the victim’s extreme youth (an infant or toddler), or their small physical size, made them especially vulnerable. See United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); but see United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The 2016 amendments provide a 4-level enhancement if the materials depict an infant or toddler as an alternative to the current 4-level enhancement for depictions of sado-masochism. USSG §§ 2G2.1 (b)(4) (B), 2G2.2(b)(4) (B) (Nov. 1, 2016). Contrary to the Fifth Circuit’s decisions, the vulnerable victim enhancement is not to be applied under these circumstances. USSG §§ 2G2.1, cmt. n.3, 2G2.1, cmt. n.4.

The guidelines contain tiered enhancements for distribution of child pornography depending on the nature of the exchange. USSG § 2G2.2(b)(3). The enhancements differ depending on whether the distribution was for pecuniary or other gain. USSG § 2G2.2(b)(3)(A)-(F). There is also an enhancement for distribution of child pornography to a minor. Id.§§2G2.2(b)(2)(C) - (E). The distribution enhancement applies even if it was purely gratuitous. United States v. Hill, 258 F.3d 355 (5th Cir. 2001); see also United States v. Simmonds, 262 F.3d 468 (5th Cir. 2001). The Fifth Circuit has interpreted these guidelines broadly, permitting the 2-level distribution enhancement if the defendant used a file-sharing program regardless of whether he did so purposely, knowingly or negligently, see United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014), and permitting the five-level enhancement for an exchange for value as long as the defendant knowingly used a file-sharing program. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015).

The Sentencing Commission has rejected the Fifth Circuit’s approach in both instances. The 2016 amendments provide that the 2-level enhancement applies only if the defendant “knowingly engaged in distribution.” USSG §§ 2G2.1(b)(3) (emphasis added) (adopting the approach set forth in United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013)).

The 5-level distribution enhancement if the “defendant distributed in exchange for any valuable consideration.” USSG § 2G2.2(b)(3)(B) (Nov. 1, 2016) (emphasis added). This provision requires an intentional exchange with a specific person, not mere file sharing: The defendant must have “agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.” USSG § 2G2.2, cmt. n.1. See United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013). The 5-level enhancement also applies if the trafficking offense “involved distribution” for pecuniary gain or to a minor. USSG § 2G2.2(b)(3)(A), (C).
4. **Pattern of Sexual Abuse**

Multiple acts of sexual exploitation significantly increase the offense level because they involve separate “victims” and thus must be computed separately. USSG § 2G1.1, cmt. n.4. Sexual exploitation of children is treated more severely than other acts which relate to child pornography. 18 U.S.C. §§ 2G2.4, 2G2.1, 2G.2. Sexual exploitation or abuse occurs only if the defendant personally participated in the conduct. USSG § 2G2.2, cmt. n.1.

The level is increased five points if the defendant engaged in a “pattern of activity involving the sexual abuse or exploitation of a minor.” USSG § 2G2.2(b)(5). This adjustment applies even if the prior activity was not committed during the offense of conviction. Id. at cmt. n.5. Indeed, traditional relevant conduct principles do not apply and the court can consider remote conduct. See United States v. Bacon, 646 F.3d 218 (5th Cir. 2011) (defendant molested daughters 30 years earlier). Indecent exposure constitutes sexual abuse, United States v. Groce, 784 F.3d 291 (5th Cir. 2015), but possession and receipt of child pornography do not United States v. Woodward, 277 F.3d 87, 91 (1st Cir. 2002).

5. **SORNA**

The guideline for failure to register as a sex offender, 18 U.S.C. § 2250(a), establishes base offense levels based on the severity of the underlying offense ranging from 16 for the most serious to 12 for the least. USSG § 2A3.5(a). There are also graduated enhancements for offenses committed while in a failure to register status, USSG § 2A3.5(b)(1), and a reduction if the defendant voluntarily registered or tried to register but was prevented from doing so by uncontrollable circumstances unless the defendant knew or should have known that his failure had been detected. USSG § 2A3.5(b)(2) & cmt. (n.2). For “aggravated” failure to register offenses, a defendant convicted of committing a crime of violence while out of status is subject to a 5-30 year sentence. 18 U.S.C. § 2250(c). The guideline sentence is the mandatory minimum. USSG § 2A3.6(a)). Of course, there is an upward departure for sex offenses against a minor. Id. cmt. (n.4). A defendant convicted of committing certain enumerated offenses must receive a ten-year consecutive sentence under both the statute, 18 U.S.C. § 2260A and the guideline. USSG § 2A3.6(b). Other guideline enhancements under chapters two, three and four do not apply to these aggravated offenses. USSG § 2A3.6, cmt. (n.2, 3).

6. **Nonguideline Sentences**

The Guideline enhancements with respect to child pornography tend to apply in virtually every case, even a case where the defendant merely viewed the photographs on his computer in his home without ever acting out his fantasies. See United States v. Grober, 595 F.Supp.2d 382 (D. N.J. 2008), aff’d 624 F.3d 592 (3d Cir. 2010). In United States v. Dorvee, 604 F.3d 84 (2d Cir. 2010), the Second Circuit recognized that there is no empirical basis for the child pornography guideline and reversed the district court for failing to conduct an independent review of the § 3553(a) factors. Dorvee, 604 F.3d at 95. The Court of Appeals noted that the Guideline had been amended based on Congressional directive rather than empirical study, that the enhancements were based on factors present in virtually all cases, and the enhancements resulted in sentences near the statutory maximum in virtually all cases. Id. at 95-96. As an example of the Guideline’s irrationality, the court noted that had the defendant actually engaged in sex with a minor his sentence would have been considerably lower. Id. at 97. See also United States v. Henderson, 649 F.3d 955 (9th Cir. 2011).

Many other courts have recognized that the draconian guidelines do not accurately reflect the seriousness of the particular offense, the likelihood of recidivism or the defendant’s individual characteristics. See, e.g., United States v. Stall, 581 F.3d 276, 279 (6th Cir. 2009); United States v. Duhon, 541 F.3d 391 (5th Cir. 2008); United States v. Rowan, 530 F.3d 379 (5th Cir. 2008); United States v. Pauley, 511 F.3d 408 (4th Cir. 2007); United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007); United States v. Gellaty, 2009 WL 35166 (D. Neb. Jan. 8, 2009); United States v. Adelman, 599 F. Supp. 2d 1037 (D. Wis. 2009); United States v. Baird, 580 F. Supp. 2d 889 (D. Neb. 2008). In United States v. Olhovskvy, 562 F.3d 530 (3d Cir. 2009), the Third Circuit held that even the court’s downward variance was too harsh given the tragic circumstances and psychological profile of the defendant. Affirming the district court, the Third Circuit added the Sentencing Commission’s recent report on child pornography as a basis for
disagreeing with the guideline. United States v. Grober, 624 F.3d 592, 604-07 (3d Cir. 2010). In United States v. Johnson, 588 F. Supp. 2d 997 (S.D. Iowa, 2008), the court rejected the government’s study conducted at FCI Butner purporting to demonstrate recidivism among viewers of child pornography. Of course, not all judges are willing to be lenient in these cases. See, e.g., United States v. Diehl, 775 F.3d 714 (5th Cir. 2015); United States v. Vowell, 516 F.3d 503 (6th Cir. 2008) (upward variance where mother coerced minor into making child pornography); United States v. Cunningham, 680 F.3d 844 (N.D. Ohio, 2010).

Be aware that the Fifth Circuit has rejected the Second Circuit’s refusal to presume a within-Guidelines child pornography sentence to be reasonable. See United States v. Miller, 665 F.3d 114, 120-21 (5th Cir. 2011). The appellate court was satisfied in Miller that there is a reasonable basis for enhancements such as those based upon the nature of the photograph, which depicts varying degrees of child abuse. Id. at 122-23. Miller cannot be read, however, as a rejection of arguments in an individual case that the Guideline range is greater than necessary. Instead, the Circuit’s opinion relies on its traditional deference to the sentencing court. Id. at 125 (citing Rowan, 530 F.3d at 380, in which the appellate court affirmed a downward variance to probation). Moreover, there was evidence in Miller that the defendant was not a mere voyeur. 665 F.3d at 117-18.

7. Restitution

The Crime Victims’ Rights Act (“CVRA”) affords crime victims the “right to full and timely restitution as provided by law.” 18 U.S.C. § 3771(a)(6). Courts are required to award victims of child sex abuse “the full amount of the victim’s losses.” 18 U.S.C. § 2259(b)(1). This includes: medical and psychological care, physical therapy, transportation, temporary housing and child care expenses, lost income, attorneys fees, 18 U.S.C.§§2259(b)(3)(A)-(E), and “any other losses suffered by the victim as a proximate result of the offense.” § 2259(b)(3)(F). Victims of child pornography offenses have been seeking restitution for all of their injuries, including medical expenses, psychological expenses, and lost wages, from defendants convicted of possessing their photographs regardless of the extent of the individual defendant’s culpability. In Paroline v. United States, 134 S.Ct. 1710 (2014), the Supreme Court rejected this approach and held that a victim of child pornography must show that the defendant’s offense of conviction proximately caused her injuries, although the defendant’s conduct need not be a “but for” cause. Paroline, 134 S.Ct. at 1719-22. Recognizing the difficulty of a precise measure, the Court’s five-member majority left it to the district court to apportion restitution based on the defendant’s conduct when measured against the overall offense. Id. at 1722-29. Paroline possessed two photographs long after the victim had been sexually abused and photographed. In contrast to the Fifth Circuit’s en banc decision holding him responsible for all losses, he will presumably be facing a small restitution order. On the other hand, the majority rejected the view of Paroline and the district court that there should be no recovery whatsoever.

E. Public Safety (Firearms) & National Defense

1. Firearms - Statutory Minimum

Firearms are another focus of mandatory sentencing provisions. Title 18, United States Code, Section 924(c), provides that an individual who possesses, uses or carries a firearm during the commission of a felony crime of violence or drug trafficking offense shall be sentenced to at least five years in prison without parole consecutive to any other sentence except to the extent a “greater minimum sentence” is otherwise provided by law. 18 U.S.C. § 924(c). The alternative minimum provision applies only to provisions that embody all of the elements of § 924(c), and thus not to other statutes such as 18 U.S.C. § 924(e) or 21 U.S.C. § 841. Abbott v. United States, 562 U.S. 8 (2010).

In the case of a “second or subsequent conviction,” a twenty-year sentence is mandated. 18 U.S.C. § 924(c). The enhancement applies to convictions on multiple counts charging separate incidents in the same indictment, Deal v. United States, 508 U.S. 129 (1993), but not to possession of multiple firearms in a single conspiracy, United States v. Tolliver, 61 F.3d 1189 (5th Cir. 1995) (citing United States v. Privette, 947 F.2d 1259 (5th Cir. 1991)), or possession of a single gun during multiple related offenses. United

The sentence under § 924(c) is enhanced based on the nature or use of the firearm, for example, if the firearm is an automatic weapon. The penalty is not less than seven years for brandishing a firearm, ten years for discharging a firearm and not less than five years in other instances. 18 U.S.C. § 924(c)(1)(A)(i), (iii). The penalty for possession of a semiautomatic assault weapon during one of these offenses is not less than ten years and it is not less than thirty years for an automatic weapon, destructive device or silencer. 18 U.S.C. § 924(c)(1)(B). The nature of the firearm is an element of the offense, which must be alleged in the indictment and proved beyond a reasonable doubt to a jury. O’Brien v. United States, 560 U.S. 218 (2010); Castillo v. United States, 530 U.S. 120 (2000). In Alleyne v. United States, 133 S.Ct. 2151 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)), the Supreme Court held that any fact that raises the mandatory minimum is subject to Sixth Amendment protection.

“Using” a firearm during a drug trafficking offense under 18 U.S.C. § 924(c)(1) requires evidence sufficient to show “active employment” of the firearm by the defendant. Bailey v. United States, 516 U.S. 137, 145 (1995). Examples of “use” include brandishing, displaying, firing the firearm, id. at 508, and trading the gun for drugs. Smith v. United States, 508 U.S. 223 (1993), but not drugs for guns. Watson v. United States, 552 U.S. 74 (2007). The statute now proscribes possession, however, and permits conviction if the gun was in plain view in close proximity to a significant quantity of contraband. United States v. Ceballos-Torres, 226 F.3d 651 (5th Cir. 2000). A conviction may be sustained under the carrying prong if the government shows that the firearm was “transported by the defendant - or was within his reach - during and in relation to the predicate crime.” United States v. Hall, 110 F.3d 1155 (5th Cir. 1997). Transportation in a locked glove compartment is sufficient to establish carrying. Muscarello v. United States, 524 U.S. 125 (1998). In the non-vehicular context, the gun must be moved in some fashion and be accessible, that is, within reach. United States v. Wainuskin, 138 F.3d 183 (5th Cir. 1998) (affirming conviction for gun under mattress). See, e.g., United States v. Logan, 135 F.3d 353, 356 (5th Cir. 1998) (gun in jacket in back seat of automobile).

Unless the defendant is a career offender, the guideline sentence for these offenses is the minimum term of imprisonment. USSG § 2K2.4(a)(1), (2). See United States v. Juarez, 812 F.3d 432 (5th Cir. 2016). An upward departure may be warranted if the defendant has two previous sentences for a crime of violence or drug trafficking. USSG 2K2.4, cmt. n.1. The Fifth Circuit has held that federal bank robbery is a crime of violence. United States v. Brewer, 848 F.3d 711 (5th Cir. 2017).

Title 18, United States Code, Section 924(e), provides that a person with three prior violent felony or serious drug convictions shall be sentenced to at least fifteen years and no more than life without parole. The three-felony provision is an enhancement provision rather than an element of the offense. United States v. Affleck, 861 F.2d 97, 98 (5th Cir. 1988); but see Shepard v. United States, 544 U.S. 13 (2005) (Thomas, J., concurring) (suggesting that § 924(e) is “constitutionally infirm”). A felon in possession of a firearm is subject to the ACCA enhancements if the prior offenses were “committed on occasions different from one another,” 18 U.S.C. § 924(e)(1), even if he was convicted in a single proceeding. See, e.g., United States v. Herbert, 860 F.2d 620 (5th Cir. 1988) (and cases cited therein). The ACCA test is whether the first offense was completed when the second commenced. United States v. Fuller, 453 F.3d 274, 278 (5th Cir. 2006); compare United States v. Brady, 988 F.2d 664, 668-70 (6th Cir. 1993) (en banc) (two robberies an hour apart counted separate); United States v. Washington, 898 F.2d 439 (5th Cir. 1990) (two robberies of same convenience store separate); United States v. Pope, 132 F.3d 684, 692 (11th Cir. 1998) (two drug buys 200 yards apart separate), with United States v. Towne, 870 F.2d 880, 889 (2d Cir. 1989) (rape and kidnapping of single victim part of single continuous criminal episode); United States v. Montgomery, 819 F.2d 847, 850 n.2 (8th Cir. 1987) (simultaneous robberies). The court is permitted to examine only the Shepard-approved documents in determining whether two offenses were sequential or simultaneous. See Fuller, 453 F.3d at 279. Because the indictment in Fuller did not rule out the possibility that he had been convicted as an aider and abettor, which could have involved simultaneous offenses, the Fifth Circuit held that ACCA did not apply. Id., see also United States v. McElvea, 158 F.3d
A serious drug offense is an offense for which the maximum punishment is at least ten years in prison. 18 U.S.C. § 924(e)(2)(A). Where a prior conviction was enhanced under a recidivist provision, the maximum is the enhanced punishment. United States v. Rodriguez, 553 U.S. 377 (2008). The penalty range at the time of the previous offense applies. See McNell v. United States, 563 U.S. 816 (2011); see also United States v. Allen, 282 F.3d 339 (5th Cir. 2002) (offense was felony at time of conviction). Attempted possession of drugs with intent to distribute them is a serious drug offense, United States v. Wimbush, 407 F.3d 703 (5th Cir. 2005).

Under the statute, a violent felony means any felony, including an act of juvenile delinquency, involving the use or carrying of a firearm, knife or destructive device that “has as an element the use, attempted use, or threatened use of physical force against the person of another;” or is “burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(i),(ii). Under the physical force prong of the definition, § 924(e)(2)(B)(i), the use of force means at least “violent force - that is, force capable of causing physical pain or injury to another.” It is a “degree of power that would not be satisfied by the merest touching.” Johnson v. United States, 559 U.S. 137, 141 (2008) (holding that Florida misdemeanor battery is not a violent felony). See also United States v. Montgomery, 402 F.3d 282 (5th Cir. 2005) (retaliation not a violent felony); United States v. Houston, 364 F.3d 243 (5th Cir. 2004) (sexual assault not necessarily violent felony).

The statute defines a violent felony to include offenses that pose a serious risk of physical injury. See 18 U.S.C. § 924(e)(1). The Supreme Court requires a court to examine the offense “generically,” that is, how the law defines it not how the defendant committed it. Begay v. United States, 553 U.S. 137, 141 (2008). In Johnson v. United States, 135 S.Ct. 2552 (2015), the Supreme Court held that this residual provision of the statute was unconstitutionally vague. The Johnson decision is retroactive. Welch v. United States, 136 S. Ct. 1257 (2016).

The categorical approach applies to the determination of the predicate offense. Taylor v. United States, 495 U.S. 575, 599 (1990). In determining the character of a predicate, the court is “generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” Shepard v. United States, 544 U.S. 13 (2005) (explaining Taylor, 495 U.S. at 599). Shepard allows only these strict standards of proof. A police report or complaint will not suffice. Id. This modified categorical approach may be used only if the statute is divisible, Descamps v. United States, 133 S.Ct. 2276, 2285 (2013), that is, to determine the elements, not the means, of committing the offense. Mathis v. United States, 136 S.Ct. 2254, 2253 (2016). Note that a Texas conviction for burglary of a habitation may not fit the generic definition of burglary because Texas Penal Code § 30.02(a)(3) permits conviction where the defendant did not enter with the intent to commit a felony. United States v. Constante, 544 F.3d 584 (5th Cir. 2008). Note that the Texas burglary statute is deemed to be divisible. United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), cert. denied, 137 S.Ct. 1359 (2017), but see United States v. Herrold, 2017 WL 1326242 (5th Cir. July 7, 2017) (granting rehearing en banc).

2. Firearms - Guidelines

Weapons offenses generally involve: (1) possession of a firearm by a prohibited person, for example a felon, an illegal alien, an insane person, 18 U.S.C. § 922 (g); (2) possession or storage in an improper place, for example, on an airplane, 49 U.S.C. § 1472(l); and (3) weapons deemed particularly dangerous and therefore subject to strict regulation or prohibition, for example, automatic weapons, explosive devices and silencers, 26 U.S.C. § 5861. See, e.g., United States v. Carmouche, 138 F.3d 101 (5th Cir. 1998) (short-barreled shotgun). Under the guidelines, the more dangerous weapons are given a higher offense level than mere unauthorized possession of common firearms. USSG§§2K2.1(a)(5), (6), 2K2.1(b)(3). Although the ban on possession of assault weapons was permitted by Congress to expire, the Guidelines retain an enhancement for possession of such weapons. USSG § 2K2.1(a) & cmt. (n.2).

A “prohibited person” includes a felon, a drug addict, an alien unlawfully in the United States, and a person convicted of a misdemeanor crime of domestic violence. 18 U.S.C. §§922(g)(1), (3), (5), (8), (9);
USSG § 2K2.1(a)(6). See, e.g., United States v. McCowan, 469 F.3d 386, 391-92 (5th Cir. 2006) (drug user). The offense level for selling a firearm to a prohibited person has been raised, but only if the defendant was convicted of this offense. USSG § 2K2.1. See United States v. Shelton, 325 F.3d 553 (5th Cir. 2003).

The level is adjusted upward if the defendant possessed multiple firearms, USSG § 2K2.1(b)(1). But see United States v. Houston, 364 F.3d 243, 248 (5th Cir. 2004) (defendant did not know of guns); United States v. Rome, 207 F.3d 251 (5th Cir. 2000) (defendant not responsible for all firearms displayed in store he tried to burglarize); United States v. Ahmad, 202 F.3d 588, 590 (2d Cir. 2000) (possession of the additional firearms must be illegal). The government must prove that the defendant possessed the additional firearms. See United States v. Hagman, 740 F.3d 1044 (5th Cir. 2014).

There is a four-level enhancement for “firearms traffickers,” that is, people who transfer two or more firearms knowing that the recipient’s possession is unlawful or the intended disposition is unlawful. USSG § 2K2.1(b)(5) & cmt. (n.13). In United States v. Juarez, 626 F.3d 246, 252-53 (5th Cir. 2010), the Fifth Circuit upheld the enhancement based on the defendant’s clandestine purchase of some twenty-five assault weapons on behalf of a man known only by a nickname who paid more than retail value. See also United States v. Longstreet, 603 F.3d 273, 277 (5th Cir. 2010) (defendant knew firearms to be distributed to Chicago drug gang). In contrast, a woman’s purchase of five handguns for her husband and another man and transportation of the guns to Mexico was not deemed sufficient. United States v. Green, 360 F. App’x 521, 523-24 (5th Cir. 2010) (distinguished in Juarez). An upward departure is available if the defendant trafficked in more than twenty-five firearms. Id. cmt. (n.13(C)).

There is a two-level enhancement if the weapon was stolen, and a four-level enhancement for an altered serial number. USSG § 2K2.1(b)(4). The defendant need not know that the firearm was stolen or bore an obliterated number. USSG § 2K2.1, cmt. (n.8(b)). See United States v. Singleton, 946 F.2d 23 (5th Cir. 1991). Under Title 26 the government must prove that the defendant knew that the weapon was automatic, United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989) (en banc), but the court has rejected this scienct requirement under the guidelines. United States v. Fry, 51 F.3d 543, 545-46 (5th Cir. 1995).

The offense level for a firearms offense is adjusted upward four points to a minimum of eighteen points if the firearm was used or possessed in connection with another felony offense or transferred with knowledge or intent or reason to believe that it would be used or possessed in connection with such an offense, USSG § 2K2.1(b)(6) (formerly (b)(5)), See, e.g., United States v. Armstead, 114 F.3d 504, 511-13 (5th Cir. 1997) (firearms stolen in burglary connected with burglary); United States v. Kuban, 94 F.3d 971 (5th Cir. 1996) (aggravated assault); United States v. Chapman, 7 F.3d 66 (5th Cir. 1993) (assault and drug trafficking). The Fifth Circuit has traditionally read guideline § 2K2.1(b)(6) expansively, applying the guideline when the firearm is present during another felony. United States v. Luna, 165 F.3d 316, 322 (5th Cir. 1999) (firearm stolen in burglary was possessed during felony, i.e. burglary, and was stolen firearm); United States v. Condren, 18 F.3d 1190, 1195-98 (5th Cir. 1994) (possession of controlled substance and firearm); see also United States v. Coleman, 609 F.3d 695 (5th Cir. 2010) (stalking); United States v. Perez, 585 F.3d 880 (5th Cir.2009) (discharge of firearm downtown was felony deadly conduct); United States v. Jackson, 453 F.3d 302 (5th Cir. 2006) (threatened girlfriend with gun).

The government must, however, establish some nexus between the firearm and the felony. United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995) (no nexus between bank fraud and gun found in house when defendant arrested); see also United States v. Villegas, 404 F.3d 355 (5th Cir. 2005) (no nexus between firearm and immigration fraud); United States v. Houston, 364 F.3d 243, 249 (5th Cir. 2004).

The Sentencing Commission amended the guidelines to explain that the firearm must have facilitated or had the potential to facilitate the felony, except that close proximity is sufficient in burglary and drug trafficking offenses. USSG § 2K2.1, cmt. (n.14(A),(B)). In light of this amendment, the Fifth Circuit has held that Guideline § 2K2.1(b)(6) does not apply where the gun-toting defendant merely possesses the drugs but there is no evidence of trafficking. United States v. Jeffries, 587 F.3d 690 (5th Cir. 2009). But see United States v. Alcantar, 733 F.3d 143 (5th Cir. 2013) (applying cross-reference when disassembled firearm was present during manufacturing).
A straw purchaser need only have reason to believe that the firearm will be used in a felony. United States v. Caldwell, 448 F.3d 287 (5th Cir. 2006). The enhancement applies even if the other felony is a firearms offense as long as it is not the offense of conviction, compare United States v. Juarez, 626 F.3d 246, 254-56 (5th Cir. 2010) (other firearm felony not offense of conviction), with United States v. Velasquez, 825 F.3d 257 (5th Cir. 2016) (reversing where firearm was the basis for offense of conviction).

There is also a cross-reference to the underlying felony if the firearm was possessed in connection with the “commission of another offense,” or transferred with intent that it be used in the commission of a felony. USSG § 2K2.1(c). See, e.g., United States v. Le, 512 F.3d 128 (5th Cir. 2007) (aggravated assault). For the cross-reference, there must be proof of a closer relationship between the weapon and the offense. United States v. Mitchell, 166 F.3d 748, 755-56 (5th Cir. 1999) (firearm for which defendant convicted not related to drugs and second gun in house). Acquittal of the underlying offense does not preclude consideration of that conduct to enhance the sentence. United States v. Branch, 91 F.3d 699, 742 (5th Cir. 1996) (murder). But see United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) (court could depart down where slim proof of murder for which defendant was acquitted resulted in guideline sentence of life).

The § 2K2.1(c)(1) cross-reference applies only to a firearm or ammunition “cited in the offense of conviction,” not to any weapon considered relevant conduct. USSG § 2K2.1(c)(1) (rejecting United States v. Outley, 348 F.3d 476 (5th Cir. 2003); United States v. Gonzales, 996 F.2d 88, 92 n.6 (5th Cir.1999)). The cross-reference may be applied for a codefendant’s commission of a felony that was reasonably foreseeable. United States v. Phipps, 319 F.3d 177 (5th Cir. 2003) (sexual abuse). Impossibility does not preclude a cross-reference for an attempted offense. United States v. Rankin, 487 F.3d 229 (5th Cir. 2007) (attempted murder, government sting). The cross-reference does not apply, however, if the defendant did not expect the codefendant to use the firearm to commit the more serious offense. United States v. Johnston, 559 F.3d 292 (5th Cir. 2009) (attempted murder during escape).

The guidelines provide for significant upward adjustments if the defendant has multiple convictions for violent or controlled substance offenses. USSG § 2K2.1(c)(1)-(4). These enhanced base offense levels apply only if the offender had the convictions before he committed the federal offense. USSG§§2K1.3(a)(3), 2K2.1(a). Only adult convictions are counted. USSG § 2K2.1, cmt. n.1. The more narrow guideline definition of crime of violence applies to this enhancement. United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc) (auto theft not violent).

Note that as a result of Johnson, the Sentencing Commission has eliminated the residual prong of the definition of a crime of violence in § 4B1.2, which mirrored the unconstitutionally vague definition in § 924(e). The Commission has also deleted burglary from the list of enumerated offenses and has modified the definition of extortion and forcible sex offense. USSG § 4B1.2 (Aug. 1, 2016).

A defendant convicted under the Armed Career Criminal Act is subject to the Armed Career Criminal guideline which provides that the offense level is the greatest of (1) the offense level from chapters two and three; and (2) the career offender level if applicable or 34 if the defendant used or possessed the firearm in connection with a crime of violence or controlled substance offense or possessed a firearm described in 26 U.S.C. § 5845(c), or 33 otherwise. USSG § 4B1.4(b). Offenses deemed not to be crimes of violence include theft of a motor vehicle, United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc), and statutory rape. United States v. Houston, 364 F.3d 243, 246-47 (5th Cir. 2004). Be aware that a deferred adjudication for aggravated robbery also counts as a “conviction” under this Guideline, United States v. Stauder, 73 F.3d 56 (5th Cir. 1996). The armed career criminal guideline does not apply if the defendant was convicted of making a false statement, rather than possession by a convicted felon. United States v. Williams, 198 F.3d 988 (7th Cir. 1999).

There is a downward adjustment if the firearms were possessed solely for sporting purposes or collections, as long as the defendant has no previous conviction for violent felonies or drug trafficking. USSG § 2K2.1(b)(2). The felon in possession of a firearm can be awarded the sporting adjustment but bears the burden of proving his entitlement. United States v. Montano-Silva, 15 F.3d 52 (5th Cir. 1994); United States v. Keller, 947 F.2d 739 (5th Cir. 1991); United States v. Buss, 928 F.2d 150 (5th Cir. 1991). The critical determination is the defendant’s intended use of the firearm. United States v. Shell, 972 F.2d 548 (5th Cir. 1992). The collection adjustment was not available to felons with a history of violent or drug
trafficking convictions. USSG § 2K2.1(b)(2).

3. Firearms Trafficking

The spate of violence in Mexico resulted in a number of amendments in 2011 directed at firearms offenses. First, the Commission increased penalties for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) based on uncharged conduct where the defendant “committed the offense with knowledge, intent or reason to believe that the offense would result in the transfer of a firearm to a prohibited person.” The purchaser now receives the same base offense level, fourteen, as the prohibited person, USSG § 2K2.1(a)(6)(C), and twenty if the firearm is a Title 26 weapon or large capacity semi-automatic. USSG § 2K2.1(a)(4)(B). The Commission also added a four-level enhancement (minimum offense level eighteen) if the defendant possessed a firearm or ammunition while leaving or attempting to leave the United States or possessed or transferred it with knowledge, intent, or reason to believe it would be transported out of the United States. USSG § 2K2.1(b)(6)(A). Recognizing, however, that straw purchasers are sometimes the least culpable individuals, the Commission encourages departure where the subsection (b) enhancements do not apply, the defendant was “motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense,” and the defendant received no monetary compensation for the offense. USSG § 2K2.1, comment. (n.15). The Commission also amended the Guideline governing export of weapons. The Guideline currently sets the base offense level at 26 unless the offense involved only non-fully automatic small arms and the number of weapons did not exceed ten, in which case the offense level is fourteen. USSG § 2M5.2(a)(1) & (2). The amended Guideline establishes the lower base offense level of fourteen only if there were no more than two weapons. The Commission did address an anomaly under the previous Guideline, which did not provide a lower offense level for possession of ammunition. See United States v. Diaz-Gomez, 680 F.3d 477 (5th Cir. 2012) (ammunition received higher level). The lower level of fourteen will apply to possession of 500 rounds of ammunition or less, and may apply to possession of both the weapon and the ammunition. See USSG § 2M5.2(a)(1) & (2). In United States v. Gonzalez, 792 F.3d 534 (5th Cir. 2015), the Fifth Circuit held that empty magazines are firearm components and upheld a base offense level of 26 because the defendant had 1000’s of rounds of ammunition. The lower attempt guideline applies if the defendant had not completed the steps needed for export. United States v. Soto, 819 F.3d 213 (5th Cir. 2016).

4. Non-Guideline Sentence

The munitions export guideline governs a wide range of materials ranging from military aircraft, missiles, and explosives to certain firearms. The base offense level for these cases assumes that the offense conduct had the potential for harming the security or foreign policy objectives of the United States. A downward departure may be warranted where the offense conduct posed no such risk. USSG § 2M5.2, comment. (n.1). Not surprisingly, upward departure may also be warranted during a time of armed conflict or in other extreme cases. Id. comment. (n.1 & 2).

A conviction under 18 U.S.C. § 924(c) can result in a Draconian sentence. See United States v. Ramos, 537 F.3d 439, 458 (5th Cir. 2008); United States v. Looney, 532 F.3d 392, 398 (5th Cir. 2008). While the court cannot avoid the mandatory consecutive penalty, it can impose a non-Guidelines sentence on the other counts of conviction to achieve a just result. United States v. Krumnow, 476 F.3d 294, 298 (5th Cir. 2007) (DeMoss, J., concurring).

Guideline 5K2.1 is a classic example where the cross-reference can result in the guidelines being the tail that wags the dog. The district court found this to be the case in United States v. Smith, 621 F. Supp. 2d 1202 (M.D. Ala. 2009), where the court granted a downward variance for a defendant convicted of being a felon in possession with a cross-reference to attempted murder. On the other hand, sometimes the reductions in the Guideline just do not fit the offense but the court can use them to grant a variance. In United States v. Hadash, 408 F.3d 1080 (8th Cir. 2005), a postal service employee stole six firearms, keeping four for target practice and giving away two of them. The appellate court held that he was not entitled to a reduction for having a collection but approved a downward variance because the defendant had no prior record and had done an “incredibly dumb thing.” Id. at 1084. Finally, this Guideline, like the
illegal reentry Guideline, can result in unwarranted double counting of prior convictions. See United States v. Robertson, 309 F. App’x 918 (6th Cir. Feb. 4, 2009) (unpublished).

A court may also conclude that the firearm guideline is inadequate, particularly where there is evidence of large scale trafficking. In United States v. Hernandez, 633 F.3d 370 (5th Cir. 2011), the Fifth Circuit affirmed the district court’s sentence above the guidelines, which was based on the defendant’s purchase of military style assault weapons which he knew were destined for drug cartels.

5. National Security

In the wake of the events of September 11, the 2002 amendments expanded the arson enhancement for substantial risk of death or serious bodily injury or destruction to include airports, aircraft, and mass transportation vehicles. USSG § 2K1.4(a)(1), (2). A substantial risk includes risk to firefighters and other emergency and law enforcement personnel who respond to or investigate the offense. USSG § 2K1.2, cmt. n.2. An upward departure is encouraged if there were injuries. Id. cmt. n.3.

Needless to say, treason constituting waging war against the United States is given the highest possible offense level of 43. USSG § 2M1.1(a)(1). In other cases, the analogous guideline is used. USSG § 2M1.1(a)(2). The base level for evasion of export controls involving national security or proliferation of nuclear, biological or chemical weapons is 26. USSG § 2M5.1(a)(1). See, e.g., United States v. Elashyi, 554 F.3d 480 (5th Cir. 2008). This provision includes a financial transaction with a country supporting international terrorism. USSG § 2M5.1(a)(1). The base offense level for providing material or support to “designated foreign terrorist organizations” is 26. USSG § 2M5.3(a). There is a two-level enhancement for providing dangerous weapons, explosives or funds to be used to purchase such weapons. USSG § 2M5.3(b)(1). If the offense involved death caused intentionally or knowingly, was tantamount to attempted murder or involved nuclear, chemical, biological or weapons of mass destruction, the analogous guideline applies. USSG § 2M5.3(c)(1), (2), (3). If the offense involved a threat to national security, extensive planning or multiple occurrences present in an “extreme form,” the court can depart upward. USSG § 2M5.3, cmt. n.2(A).

F. Public Officials

While the base offense level for commercial bribery is 12, the level is increased to 14 for public officials to reflect their greater culpability, USSG § 2C1.1(a)(1), (2). The level is increased based on the value of the bribe, USSG § 2C1.1(b)(2), and if there are multiple bribes. USSG § 2C1.1(b)(1). See, e.g., United States v. Ruiz, 621 F.3d 390 (5th Cir. 2010); United States v. Mann, 493 F.3d 484 (5th Cir. 2007). If the offense involved payment for the purpose of influencing an elected official or any official holding a high level of decision making authority or a sensitive position, the level is increased four points. USSG § 2C1.1(b)(3); Mann, supra. A juror is deemed to have high level decision-making authority. United States v. Snell, 152 F.3d 345 (5th Cir. 1998); see also United States v. Richard, 775 F.3d 287 (5th Cir. 2014) (school board); United States v. Holmes, 406 F.3d 337 (5th Cir. 2005) (court clerk); United States v. Villafranca, 260 F.3d 374, 381-82 (5th Cir. 2001) (covers official’s receipt of funds as well as payment). There is also an increase if the official facilitated entry into the United States, obtaining a passport or other immigration and identification documents. USSG § 2C1.1(b)(4). If the offense was committed for the purpose of facilitating another offense, the court cross-references to the underlying offense if it is higher. USSG § 2C1.1(c)(1); Ruiz, supra (drug trafficking).

G. Individual Rights

Civil rights offenses generally carry the same level as the underlying offense, USSG § 2H1.1(a)(1), with a minimum of 12 if two or more participants were involved, USSG § 2H1.1(a)(2), see, e.g., United States v. Gonzalez, 436 F.3d 560 (5th Cir. 2006), and 10 if there were any threats of violence. USSG § 2H1.1(a)(3). The level is increased six points if the defendant is a public official or the offense was committed under color of law. USSG § 2H1.1(b)(1). The guidelines also cover slavery, USSG § 2H4.1(a)(1), and willful violations concerning migrant farmworkers. USSG § 2H4.2. A defendant subject to the six-level public official enhancement, will not also receive a hate crime enhancement under USSG § 3A1.1(a). USSG § 2H1.1, cmt. (n.4). The minimum base offense level for slavery is 15, USSG
§ 2H4.1(a)(1), and there are enhancements for injuries to the victims as well as use of deadly weapons. USSG § 2H4.1(b). There is also a guideline for willful violations concerning migrant workers. USSG § 2H4.2.

In response to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevent Act, the Commission added the new hate crime offense, 18 U.S.C. § 249, to the Guideline covering Offenses Involving Individual Rights. USSG § 2H1.1. The Commission has added “gender identity” to the list of motivating factors that result in a three-level vulnerable victim enhancement. USSG § 3A1.1. The Commission declined to allow enhancement for both the targeting of the victim pursuant to § 3A1.1(a) and the enhancement under § 2H1.1 for a public official’s commission of a civil rights violation. USSG § 2H1.1(b) & cmt. (n.4).

Normally, the base offense level for criminal violations of privacy such as eavesdropping or unauthorized disclosure of confidential material is 9. USSG § 2H3.1(a). The 2008 amendments add eight levels if the victim is a protected individual, 18 U.S.C. § 119, and an additional two levels if a computer is involved. USSG § 2H3.1(b)(2)(A), (B).

There is a two-level enhancement for a person convicted of computer fraud, 18 U.S.C. § 1030, who uses the computer with intent to obtain or disseminate without lawful authority “personal information.” USSG § 2B1.1(B)(15). Information is “personal” only if it involves information of an identifiable individual. Id. comment. (n. 1). There is also an encouraged upward departure for defendants convicted of interception or disclosure of private or protected information if the offense involved information about a substantial number of individuals. USSG § 2H3.1, comment. (n.4).

H. Prisons and Correctional Officials

The base level for escape depends on whether the offense is a misdemeanor or a felony. USSG § 2P1.1. The level is increased if force is used, USSG § 2P1.1(b)(1), or if the defendant was a Department of Justice employee. USSG § 2P1.1(b)(3). The level is lowered by seven points if the defendant escaped from “non-secure custody and returned voluntarily within ninety-six hours,” USSG § 2P1.1(b)(2), and by four points for any escape from non-secure custody, as long as the defendant did not commit a new offense punishable by more than one year while on release. ‘2P1.1(b)(3). See United States v. Mendiola, 42 F.3d 259 (5th Cir. 1994) (commission of DWI, punishable by two years in Texas, precludes a 4-point adjustment). A federal prison camp is not deemed to be a non-secure facility similar to a community treatment facility. United States v. Ruiz, 180 F.3d 675 (5th Cir. 1999); United States v. Shaw, 979 F.2d 41 (5th Cir. 1992); United States v. McGann, 960 F.2d 846 (9th Cir. 1992). But see United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993) (fact specific determination).

There is a guideline governing election campaign violations. USSG § 2C1.8. The base offense level of eight is enhanced according to the value of the illegal transaction. USSG § 2C1.8(a), (b). There are enhancements if a foreign national or government was involved, USSG § 2C1.8(b)(2), if the offense involved government funds or benefits, USSG § 2C1.8(b)(3), if the defendant engaged in more than thirty such transactions, USSG § 2C1.8(b)(4), and if the offense involved intimidation or coercion. USSG § 2C1.8(b)(5). There is also a cross-reference to the bribery guidelines. USSG § 2C1.8(c).

I. Administration of Justice

1. Obstruction

Obstruction of justice and perjury has a base level of 14. USSG§§2J1.2, 2J1.3. Increases are provided if threats are involved and if there has been substantial interference with the administration of justice. Id.; compare United States v. Norris, 217 F.3d 262 (5th Cir. 2000) (lies to bankruptcy court substantially interfered); United States v. Harrington, 82 F.3d 83, 86 (5th Cir. 1996) (attorney attempted to pay for affidavits pending sentencing); with United States v. Jones, 900 F.2d 512 (2d Cir. 1990) (insufficient evidence of substantial interference). There is a two-level enhancement if the offense involved destruction, alteration or fabrication of a substantial number of records, especially probative records or was otherwise extensive. USSG § 2J1.2(b)(3)). There are also enhancements for false statements relating to terrorism, USSG § 2J2.1(b)(1)(B), and convictions for false statements relating to sex offenses. USSG § 2J1.2(b)(1)(A).
If the defendant obstructed the investigation or prosecution of a criminal offense, the accessory after the fact guideline (§ 2X3.1) applies if the resulting offense level is greater. USSG § 2J1.2(c). See, e.g., United States v. Kimbrough, 536 F.3d 463 (5th Cir. 2008) (drug offenses reasonably foreseeable); United States v. Walker, 148 F.3d 518 (5th Cir. 1998) (underlying felony in possession guideline used in perjury conviction); United States v. Cihak, 137 F.3d 252 (5th Cir. 1998) (underlying fraud guideline used in obstruction conviction). Similarly, if corporate audit records are not properly maintained to facilitate or conceal theft or fraud, the guideline for the underlying offense applies. USSG § 2E5.1(a)(2).

The levels for failure to appear and commission of an offense while on release vary in accordance with the underlying offense. USSG §§ 2J1.6, 2J1.7. Failure to appear for service of sentence is treated more harshly than other failures to appear. Id. There are reductions in the offense level for failure to report to a non-secure facility, and voluntary surrender within ninety-six hours.

Normally, a failure to appear charge is treated as obstruction of the underlying offense and considered as an adjustment under guideline § 3C1.1, USSG § 2J1.6, cmt. n.3; USSG § 3C1.1, cmt. n.6. Because the statute, 18 U.S.C. § 3146(b)(2), requires a consecutive sentence, the Commission recommends that the total sentence be split between the two counts of conviction. USSG § 2J1.6, cmt. n.3.

Guideline § 2J1.1 directs the sentencing court to apply guideline § 2X5.1 when imposing a sentence for criminal contempt, which in turn directs the court to apply the most analogous offense guideline, or if there is none, to proceed in accordance with 18 U.S.C. § 3553(b). The Commission has declined to establish a specific guideline because of the wide variety of conduct that may constitute contempt. USSG § 2J1.1, app. n. 1. This has engendered some apparently inconsistent results. In United States v. Versaglio, 85 F.3d 943, 949 (2d Cir. 1996), the Second Circuit held that obstruction of justice was the most analogous guideline to refusal to testify. Another panel however, upheld application of the misprision guideline to such a refusal. United States v. Cefalu, 85 F.3d 914, 969 (2d Cir. 1996). Finding that a defendant did not intend to obstruct justice, the Seventh Circuit held that the failure to appear guideline applied to a witness’ refusal to testify. United States v. Ortiz, 84 F.3d 971 (7th Cir. 1996). Normally, a defendant convicted of obstruction does not also receive a Chapter Three obstruction enhancement. The 2013 amendments specify that this exclusion applies only to the general obstruction covered in USSG § 3C1.1.

J. Immigration

1. Smuggling

The offense levels for smuggling aliens and producing false documents are based in large part on the number of aliens or documents. USSG §§ 2L1.1(b); 2L2.1(b). See United States v. Cabrera, 288 F.3d 163 (5th Cir. 2002) (approving estimate of number of aliens); see also United States v. Angeles-Mendoza, 407 F.3d 742 (5th Cir. 2005). An upward departure is suggested if the offense involved more than 100 aliens. USSG 2L1.1, cmt. (n.4).

This focus on the number of aliens is an effort to punish more severely those who engage in the business of alien smuggling. The statute increases the punishment range for smuggling for financial gain, 8 U.S.C. § 1324, but only if the defendant is convicted as a principal. United States v. DeJesus Batres, 410 F.3d 154(5th Cir. 2006). There is an enhancement for smuggling connected with a commercial organization, involving groups of more than ten immigrants and for endangering the lives of the immigrants. USSG § 2L1.1(b)(9). The offense level is decreased if the activity was not done for profit, or the defendant was smuggling his spouse or children. USSG § 2L1.1(b)(1).

In some instances, the sentence may depend on who is smuggled. There is an enhancement if the defendant was convicted under 8 U.S.C. § 1327 for smuggling an aggravated felon, USSG § 2L1.1(a)(1), or for smuggling an otherwise inadmissible alien. USSG 2L1.1(a)(1). There is also an enhancement for smuggling an unaccompanied minor. USSG § 2L1.1(b)(4). The 2016 amendments increase this enhancement to 4 levels and define a “minor” as a person under 18, rather than 16, and expand the list of individuals who may accompany a minor to include a legal guardian, as well as parents and grandparents. Id., cmt. (n.1). The Commission also encourages upward departure for smuggling an inadmissible alien. Id. (n.3).
Another significant focus is the risk of or actual harm to the aliens. There is an enhancement and minimum offense level of 18 if the offense “involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.” USSG § 2L1.1(b)(5). See, e.g., United States v. Rodriguez, 553 F.3d 380 (5th Cir. 2008). This enhancement is extremely fact specific and includes aliens riding in the back of a pickup truck, United States v. Cuyler, 298 F.3d 387 (5th Cir. 2002); see also United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002) (death in the desert), but does not include mere negligent transportation of aliens lying in the back of a minivan. United States v. Solis-Garcia, 420 F.3d 511 (5th Cir. 2005); see also United States v. Maldonado-Ochoa, 844 F.3d 534 (5th Cir. 2016) (aliens in back of pick up for mere feet); United States v. Rodriguez, 630 F.3d 371 (5th Cir. 2011) (aliens in back of Explorer); United States v. Torres, 601 F.3d 303 (5th Cir. 2010) (child under bed in back not reckless); but see United States v. Mata, 624 F.3d 170 (5th Cir.) (alien under stroller in back of SUV); United States v. Zuniga-Amezquita, 468 F.3d 886 (5th Cir. 2006) (aliens under boxes reckless); United States v. Rodriguez-Mesa, 443 F.3d 892 (5th Cir. 2006) (reckless endangerment where alien squished in center console). Walking through the South Texas brush is not per se reckless endangerment, United States v. Garza, 541 F.3d 290 (5th Cir. 2008); but see United States v. DeJesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) (walked through brush with insufficient water with fatal consequences). However, the 2014 amendments list as an example of reckless endangerment guiding or abandoning people in “a dangerous or remote geographic area without adequate” supplies or protection from the elements. USSG § 2L1.1 n.5 (Nov. 1, 2014). A single act of endangerment should not result in enhancements under both this provision and the obstruction enhancement. United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). The Fifth Circuit has upheld the enhancement for subjecting an underage girl to prostitution. See United States v. Garcia-Gonzalez, 714 F.3d 306, 314 (5th Cir. 2013).

The offense level is increased if a dangerous weapon was possessed, USSG § 2L1.1(b)(4)(C), or brandished, United States v. Reyna-Esparza, 777 F.3d 291 (5th Cir. 2015), and there are graduated enhancements based on any injury to the aliens or death. USSG § 2L1.1(b)(6). See United States v. Muniz, 805 F.3d 709 (5th Cir. 2015). The Fifth Circuit upheld a10-level enhancement for causing death even though the alien died months after the offense and there was no proof of cause of death. See United States v. Ramos-Delgado, 763 F.3d 398 (5th Cir. 2014). There is a cross-reference if the circumstances of the offense constitute homicide. USSG § 2L1.1(c)(1). See, e.g., United States v. Lemus-Gonzalez, 563 F.3d 88 (5th Cir. 2009).

Guideline 2L1.1(b)(8)(B) provides a two-level enhancement if a harbored alien was involuntarily detained. There is an alternative two-level enhancement if the defendant was convicted of harboring, the harboring was for the purpose of prostitution, and the defendant received an aggravating role adjustment. USSG’ 2L1.1(b)(1)(B). See e.g., United States v. Garcia-Gonzalez, 714 F.3d 306, 314-15 (5th Cir. 2013). The enhancement is six levels if the alien was younger than 18. If the defendant receives an enhancement for coercion under § 2L1.1(b)(1)(B), the victim restraint adjustment, USSG’ 3A1.3, does not apply, but it may apply if the defendant receives the enhancement for harboring prostitutes. USSG’ 2L1.1, comment (n.6).

The guideline also contains an enhancement if the defendant has a prior conviction(s) for a felony immigration or naturalization offense. USSG § 2L1.1(b)(3). A guilty plea before a magistrate judge not yet accepted by the district court is not a final conviction. United States v. Jimenez-Elvirez, 862 F.3d 527 (5th Cir. 2017).

2. Documents

If multiple documents are part of a set of documents intended for use by a single person, they are treated as one document. USSG § 2L2.1, cmt. n.2. Each blank form is a set. United States v. Salazar, 70 F.3d 351 (5th Cir. 1995). There is a four-level adjustment if the defendant has reason to believe a passport or visa will be used to commit another felony, other than a violation of immigration law. USSG § 2L2.1(b)(3). There is also an enhancement for a defendant who fraudulently obtains or uses any passport. USSG § 2L2.2(b)(3), (5).

A defendant convicted of procuring her own fraudulent documents cannot be sentenced for trafficking even if she had additional documents in her possession. United States v. Principe, 203 F.3d 849
Fraudulent use of entry or citizenship documents is assigned a level of 9, USSG §§ 2L2.2, 2L2.4. False representation of citizenship is deemed to be an immigration offense, not a fraud offense. United States v. Castaneda-Gallardo, 951 F.2d 1451 (5th Cir. 1992); USSG § 2B1.1, cmt. n.7(B). The Fifth Circuit recently approved, however, a cross-reference to the smuggling guidelines where the defendant used the false document to help another enter illegally. United States v. Garcia, 590 F.3d 308 (5th Cir. 2009).

a. Human rights

Sometimes the government does not have the evidence to obtain a conviction for a human rights offense but can prove an immigration offense. The amendments come to the government’s aid. The base offense level for immigration fraud is 8. USSG § 2L1.2(a). Under the new amendments, if the defendant committed the charged fraud “to conceal” participation in a human rights offense, the level is increased by 6-10 levels, depending on the offense, and has a floor of level 25. USSG § 2L1.2(b)(4)(B)(Nov. 1, 2012). A two-level increase and a floor of 13 applies if the defendant committed the fraud “to conceal the defendant’s membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense.” USSG § 2L1.2(b)(4)(A).

These enhancements to immigration fraud sentences for alleged “serious human rights offenses” threaten to be even more problematic than other enhancements based on uncharged or acquitted conduct. As Justice Scalia has noted: “[T]hat a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing a firearm,” or of committing a traffic offense, would be an “absurd result.” Blakely v. Washington, 542 U.S. 296, 306 (2004). This new enhancement does just that. Moreover, the enhancement is based on conduct that is far removed in time, location and kind from the charged offense of immigration fraud. The evidence, if any, may literally be decades old and a continent away. See Testimony of Melanie Morgan on Behalf of the Federal Public and Community Defenders, U.S. Sentencing Commission Hearing (Mar. 14, 2012) (available at www.fd.org). Keep in mind Justice Scalia’s admonishment that a sentence deemed “reasonable” only because it is within a guideline based on judicially found facts may run afoul of the Sixth Amendment. See Rita v. United States, 551 U.S. 338, 370-75 (2005) (Scalia & Thomas, JJ, concurring).

3. Illegal Re-Entry

Aliens who re-enter the United States illegally after deportation are subject to a possible two-year penalty, 8 U.S.C. § 1326(a), with a statutory maximum of ten years for a prior felony, and twenty years for a prior “aggravated felony.” 8 U.S.C. § 1326(b). There is also an enhancement for persons deported subsequent to conviction for three misdemeanors involving drugs or crimes against the person. Id. A defendant’s felony conviction is a sentencing enhancement factor not an element of the offense. Almendarez-Torres v. United States, 523 U.S. 224 (1998); United States v. Pineda-Arrellano, 492 F.3d 624 (5th Cir. 2007); see also United States v. Rosas-Pulido, 526 F.3d 829 (5th Cir. 2008). To obtain the statutory enhancement, pursuant to 8 U.S.C. § 1326(b), the government must prove that the defendant was deported after conviction for the requisite felony. United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008).

The aggravated felony enhancement applies without regard to the date of the prior conviction. United States v. Garcia-Rico, 46 F.3d 8 (5th Cir. 1995); United States v. Saenz-Forero, 27 F.3d 1016 (5th Cir. 1994). Further, the aggravated penalty applies even if the defendant’s deportation notice erroneously indicated that he was subject to a lower penalty. United States v. Perez-Torres, 15 F.3d 403 (5th Cir. 1994).

Remaining in the United States illegally is a continuing offense, United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996), but it is completed once the defendant is found in the United States. United States v. Alvarado-Santillano, 434 F.3d 794 (5th Cir. 2005). Normally, the date the defendant is found in the United States controls the applicability of the guidelines. United States v. Gonzales, 988 F.2d 16 (5th Cir. 1993); see also United States v. Corro-Balbuena, 187 F.3d 483 (5th Cir. 1999); United States v. Reves-Nava, 169 F.3d 278, 280 (5th Cir. 1998) (defendant was in U.S. illegally when sentenced on previous DWI). The Guideline enhancements apply, however, to an alien who remains unlawfully in the
United States after conviction for certain offenses. USSG § 2L1.2(b). A defendant who remains only because he is incarcerated (and has not been released) has not remained subsequent to the enhancement provision. United States v. Bustillos-Pena, 612 F.3d 863, 869 n.3 (5th Cir. 2010); see also United States v. Neveres-Bustamante, 669 F.3d 209 (5th Cir. 2012).

Because a defendant’s prior conviction may drastically increase his sentence, there has been a lot of litigation about the meaning of the term aggravated felony. In general, the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990), and its progeny, applies to the determination whether a conviction is an aggravated felony. Moncrieffe v. Holder, 133 S.Ct. 1678 (2013); Leocal v. Ashcroft, 543 U.S. 1, 8-9 (2004).

Unfortunately, the immigration statute, 8 U.S.C. § 1101(a)(43), contains a number of ambiguities. First of all, the nature of the sentence determines whether certain offenses are counted. For example, passport fraud, bribery, counterfeiting, forgery, trafficking in altered vehicle numbers, obstruction of justice, and perjury are deemed aggravated felonies only if the “term of imprisonment is at least one year.” 8 U.S.C. §§ 1101(a)(43)(P), (R), (S). On the other hand, certain racketeering and gambling offenses are aggravated if a sentence of one year “may be imposed.” 8 U.S.C. § 1101(a)(43)(J). In a nightmare of typographical error, the statute provides that crimes of violence, theft and burglary are aggravated if “the term of imprisonment at least one year.” §§ 1101(a)(43)(F), (G). Section 1101(a)(48)(B) provides that any reference to a term of imprisonment includes a period of “incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment.” In other words, the sentence is considered a prison sentence if execution of the sentence was suspended and the defendant was placed on probation. United States v. Vasquez-Balandran, 76 F.3d 648 (5th Cir. 1996); see also United States v. Quinonez-Terrazas, 86 F.3d 382 (5th Cir. 1996) (indeterminate sentence of 4-10 years counts as sentence of at least five years). If the court imposed a probated sentence without pronouncing a specific prison term, however, no prison sentence is imposed. United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999); see also United States v. Herrera-Solorzano, 114 F.3d 48 (5th Cir. 1997) (previous statute). Section 1101(a)(48)(B) requires that a sentence of at least a year be ordered by the court, excluding, for example, a sentence of 364 days. Even a misdemeanor may be considered an aggravated felony if the sentence to be served was one year. United States v. Graham, 169 F.3d 787 (3d Cir. 1999).

The Guideline provided graduated enhancements if the defendant “previously was deported, or unlawfully remained in the United States, after” conviction for certain offenses. USSG § 2L1.2(b)(1) (emphasis added). Although the 2016 amendments completely rewrite the illegal reentry Guideline, many defendants will continue to be subject to the older Guideline. Therefore, the graduated enhancements are discussed here.

The sixteen level enhancement applies to felony convictions for (1) drug trafficking where the sentence exceeded thirteen months, (2) crimes of violence, (3) firearms offenses, (4) child pornography, (5) national security and terrorism offenses, (6) human trafficking, or (7) alien smuggling committed for profit. USSG § 2L1.2(b)(1)(A). A “terrorist offense” is a “federal crime of terrorism.” USSG § 2L1.2, cmt. n. (1)(B)(iv). If the sentenced imposed for a drug trafficking offense was less than thirteen months, there is a twelve-level enhancement, while other aggravated felonies receive eight levels. USSG § 2L1.2(b)(1)(B), (C). If the defendant had any other felony or three or more convictions for misdemeanor crimes of violence or drug trafficking, the four-level enhancement applies. USSG § 2L1.2(b)(1)(D), (E). With respect to firearms offenses, the sixteen-level enhancement is limited to trafficking type offenses and possession of particularly dangerous weapons, such as Title 26 weapons and explosives. USSG § 2L1.2, cmt. n.1 (B)(v). See, e.g., United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir.2003). Alien smuggling includes transporting undocumented aliens. United States v. Solis-Campuzano, 312 F.3d 164 (5th Cir. 2002).

The term “felony” includes only offenses punishable by prison terms exceeding one year. USSG § 2L1.2, cmt. n.1(B)(iv). A juvenile adjudication cannot be used to enhance the offense level. USSG § 2L1.2, cmt. (n. 1(A)(iv)). The Commission explains that the “sentence imposed” does not include any portion of the sentence that was probated, suspended, deferred or stayed. USSG § 2L1.2, cmt. n.1(A)(iv). However, the term “sentence imposed” includes any sentence imposed upon revocation, regardless of early release through parole. USSG § 2L1.2, cmt. (n.1(B)(vii) (citing USSG § 4A1.2). Thus, a defendant who was deported after his probation for drug trafficking was revoked is subject to the enhancement based on
the ultimate prison sentence imposed. See United States v. Compian-Torres, 320 F.3d 514 (5th Cir. 2003).
A defendant who “remains” in the United States after revocation, however, only because he is still incarcerated is not subject to the higher enhancement for a sentence greater than thirteen months. United States v. Bustillos-Pena, 612 F.3d 863, 869 n.3 (5th Cir. 2010). This is because the defendant cannot be said to have remained voluntarily after imposition of the prison sentence. USSG § 2L1.2, cmt. n. (1)(B)(vii). A defendant whose drug trafficking sentence was entirely suspended is not subject to even the twelve-level enhancement because no prison sentence was imposed. United States v. Rodriguez-Parra, 581 F.3d 227, 229-30 (5th Cir. 2009). A California work release sentence is a sentence of imprisonment. United States v. Enrique-Ascencio, 857 F.3d 668 (5th Cir. 2017).

a. Drug trafficking

The term “aggravated felony” includes “illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18),” 8 U.S.C. § 1101(a)(43)(B). Under section 924(c), the term “drug trafficking crime” means “any felony punishable under the Controlled Substance Act (21 U.S.C. § 801 et seq.),” 18 U.S.C. § 924(c)(2). In Lopez v. Gonzales, 549 U.S. 47 (2006), the Supreme Court held that a conviction for simple possession of a controlled substance is not an aggravated felony if the offense would not be a felony under federal law. 549 U.S. at 60. The categorical approach applies to the determination whether a prior offense is a drug trafficking one. Moncrieffe v. Holder, 133 S.Ct. 1678, 1691 (2013). In Moncrieffe, the Supreme Court held that giving away a small amount of marijuana was not drug trafficking because it was not a felony offense under Title 21. But see United States v. Martinez-Lugo, 782 F.3d 198 (5th Cir.)(giving away drug receives 16-level Guideline enhancement), cert. denied, 136 S. Ct. 533 (2015). Similarly a second possession conviction, which could have been enhanced to a felony under federal law, is not a “drug trafficking” offense if it was not actually enhanced. Carachuri-Rosendo v. Holder, 560 U.S.563 (2010). Use of a communication device to facilitate a drug offense is not categorically a drug trafficking offense as the statute may cover the mere purchase of drugs. Abuelhawa v. United States, 556 U.S. 816 (2009)(not aggravated felony); United States v. Henao-Melo, 591 F.3d 798 (5th Cir. 2009)(not trafficking under § 2L1.2). Texas delivery is not an “aggravated felony” because it includes an offer to sell, United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2011), and it cannot be narrowed because the statute in indivisible. United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016).

The categorical approach also determines whether a prior conviction is subject to a Guideline drug trafficking enhancement. See United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005)(California statute is too broad because it proscribes both sale and transportation.). A Florida trafficking conviction is not subject to the 16-level enhancement because the offense includes possession. United States v. Sarabia-Martinez, 779 F.3d 274(5th Cir. 2015), and may not require proof of knowledge. Sarmientos v. Holder, 742 F.3d 124 (5th Cir. 2014) (not an aggravated felony). Under the Guidelines, drug trafficking includes trafficking an offer to sell, but not mere transportation, Id. cmt. (n. 1(B)(iv)), see United States v. Marban-Calderon, 631 F.3d 210 (5th Cir. 2011), but the delivery conviction still would not be an aggravated felony. United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2011). The Commission also encourages an upward departure if the drug trafficking guideline does not apply but the defendant possessed a quantity of controlled substance inconsistent with personal use. Id. cmt. (n.7).

b. Crime of violence

A defendant may be subject to a statutory or guideline enhancement for a prior conviction for a “crime of violence.” To complicate matters, the statute and the guideline contain a different list of enumerated offenses and slightly different definitions of the term “crime of violence.” An “aggravated felony” in the immigration statute includes murder, rape and sexual abuse of a minor, 8 U.S.C. § 1101(a)(43)(A). The illegal reentry guideline contains its own enumerated list of violent offenses: “murder, manslaughter, kidnapping, aggravated assault, forcible sex offense (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling.” USSG § 2L1.2 comment. (n.1(B)(iii)). Again, to qualify for an enumerated
enhancement, the elements of the offense of conviction must fit the generic, contemporary definition of the offense. United States v. Fierro-Reyna, 466 F.3d 324, 327 (5th Cir. 2006); United States v. Dominguez-Ochoa, 386 F.3d 639, 643 (5th Cir. 2004) (Texas negligent homicide not manslaughter); United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004).

i. Enumerated offenses

The offense of burglary is often a source of litigation. Burglary of a dwelling requires an unlawful entry, of a structure, fit for human habitation. United States v. Mendoza-Sanchez, 456 F.3d 479 (5th Cir. 2006) (Arkansas provision not limited to inhabitable structures but defendant admitted burglary of a home); see also United States v. Ortega-Gonzaga, 490 F.3d 393 (5th Cir. 2007) (California burglary of dwelling not crime of violence); United States v. Herrera-Montez, 490 F.3d 390 (5th Cir. 2007) (Tn. aggravated burglary not crime of violence) United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007) (Florida burglary not crime of violence because curtilage not a dwelling) (citing James v. United States, 127 S. Ct. 1586 (2007)); but see United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006) (Texas burglary of habitation crime of violence); United States v. Garcia-Mendez, 420 F.3d 454 (5th Cir. 2005) (same). But see United States v. Constante, 544 F.3d 1584 (5th Cir. 2008) (Texas burglary may not be violent felony under ACCA where defendant might have entered without unlawful intent); see also United States v. Castaneda, 740 F.3d 169 (5th Cir. 2013). The aggravated felony provision includes burglary of a building. United States v. Rodriguez-Guzman, 56 F.3d 18 (5th Cir. 1995) (burglary of non-residential building is aggravated felony).

An assault is deemed “aggravated” merely on the basis of the status of the victim is not deemed an aggravated assault. Fierro-Reyna, 466 F.3d at 327. The court has held that the standard Texas aggravated assault statute establishes the generic offense. See United States v. Guillen-Alvarez, 489 F.3d 197 (5th Cir. 2007); United States v. Mungia-Portillo, 484 F.3d 813 (5th Cir. 2007) (Tennessee aggravated assault). The Arkansas statute does not establish the generic offense because it does not require an assault, see United States v. Esparza-Perez, 681 F.3d 228 (5th Cir. 2012), and the New Jersey statute fails to require serious injury. See United States v. Martinez-Flores, 720 F.3d 293 (5th Cir. 2013). The Louisiana aggravated assault statute is broader than the generic offense because there is no requirement of intentional use of physical force. See United States v. Hernandez-Rodriguez, 788 F.3d 193, 195 (5th Cir. 2015).

In the same vein, New York sets forth generic kidnapping, United States v. Iniguez-Barba, 485 F.3d 790 (5th Cir. 2007), as does Texas, United States v. Gonzalez-Ramirez, 477 F.3d 310 (5th Cir. 2007) (kidnapping), but Oklahoma does not. United States v. Najera-Mendoza, 683 F.3d 627 (5th Cir. 2012). The Fifth Circuit has also held that Texas arson is generic, United States v. Velez-Alderete, 569 F.3d 541 (5th Cir. 2009), as is robbery. United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir. 2006).

There has also been much confusion with how to categorize sex offenses, particularly against children. The immigration statute considers “sexual abuse of a minor” to be an aggravated felony, 8 U.S.C. § 1101(a)(43)(A), and the Guidelines give it a 16-level enhancement as a crime of violence. See USSG § 2L1.2(b)(1)(A)(ii). In Esquivel-Quintana v. Sessions, 137 S.Ct. 1562 (2017), the Supreme Court held that the generic offenses requires the age of the victim to be less than 16 (overruling United States v. Cabecera Rodriquez, 711 F.3d 541, 549-57 (5th Cir.) (en banc)) The essence of sexual abuse is sexual activity in the presence of a minor. See United States v. Izaguirre-Flores, 405 F.3d 270, 275 & n.25 (5th Cir. 2005); United States v. Zavala-Sustaita, 215 F.3d 601, 603-06 (5th Cir. 2000). In an unpublished decision, the Fifth Circuit reversed an abuse enhancement based on a statute that did not require the actual presence of a minor. See United States v. Martinez, 595 Fed.Appx.330, 334-35 (5th Cir. 2014)(unpublished).

The Guidelines also define a crime of violence to include a “forcible sex offense.” USSG § 2L1.2, cmt. n. (1)(B)(ii). The Fifth Circuit held in United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004), that a Missouri sexual assault was not necessarily a “forcible sex offense” because the offense included actions that were “consensual” but consent was legally invalid. See also United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2005). Both the Sentencing Commission and the Fifth Circuit have redefined “forcible sex offense” to include consented to conduct when consent was invalid. USSG § 2L1.2, cmt. n. (1)(B)(ii) (Nov. 1, 2008); United States v. Gomez-Gomez, 547 F.3d 242 (5th Cir. 2008) (en banc). A broad range of offenses is deemed to be a forcible sex offense. See, e.g., United States v. Diaz-Corrado, 648 F.3d 290 (5th Cir. 2011); United States v. Herrera, 647 F.3d 172 (5th Cir. 2011), including sexual
offenses against a minor, United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005) (indecent liberties with child).

ii. Use of Force

Both the statute and the guideline include a more general “use of force” provision in the definition of crime of violence. The categorical approach is also applied to the determination whether an offense is a crime of violence under the use of force provisions. In determining whether an offense is a crime of violence, the court must look to the “elements and the nature of the offense of conviction, rather than to the particular facts relating” to the crime. Leocal v. Ashcroft, 543 U.S. 1, 8-9 (2004). See also United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) (injury to child not categorically aggravated felony crime of violence), and United States v. Vargas-Duran, 356 F.3d 598, 602-05 (5th Cir. 2004) (en banc) (injury to child not subject to guideline enhancement). The government can only rely on documents conclusively establishing that the defendant was convicted of a crime of violence. United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc) (child endangerment not crime of violence). The record must also contain the documents supporting the prior conviction. United States v. Gonzalez-Chavez, 432 F.3d 334 (5th Cir. 2005).

The aggravated felony, 8 U.S.C. § 1101(a)(43)(F), is defined in 18 U.S.C. § 16 to include an offense that “has as an element of the use, attempted use or threatened use of force against a person or the property of another,” U.S.C. § 16(a), or any other felony 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.” § 16(b). The guideline applies only if there was a use of force against a person, not property, and does not include the substantial risk prong. USSG § 2L1.2, cmt. n. (1B)(iii). The enhancement is also limited to the use of “physical” force. See United States v. Herrera-Alvarez, 753 F.3d 132 (5th Cir. 2014) (holding Louisiana aggravated battery may constitute enumerated offense of aggravated assault but noting that it would not qualify under the elements prong because offense can be committed with poison); see also United States v. Rico-Mejia, 853 F.3d 731 (5th Cir. 2017). Although the Fifth Circuit previously held that the use of force must be intentional, Vargas-Duran, 356 F.3d at 602-05, the court has recently held that reckless is enough. United States v. Mendez-Henriquez, 847 F.3d 214 (5th Cir. 2017).

Cases holding that an offense was not an aggravated felony crime of violence include: United States v. Armendarez-Moreno, 571 F.3d 490 (5th Cir. 2009) (unauthorized use of motor vehicle); United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015) (Florida manslaughter); United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003) (possession of dagger); United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001) (firearm on liquor licensed premises); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (DWI); United States v. Reyna-Espinosa, 117 F.3d 826 (5th Cir. 1997) (felon in possession). Offenses held not to be crimes under the guidelines include: Vargas-Duran, supra (injury to a child); Calderon-Pena, supra (child endangerment); Fierro-Reyna, 466 F.3d at 327 (aggravated assault of police officer not crime of violence under either prong); United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) (assault not crime of violence). See also Gomez-Perez v. Lynch, 829 F.3d 323 (5th Cir. 2016) (Texas assault statute does not include the requisite intentional use of force for crime of moral turpitude).

Cases addressing convictions for injury to a child reveal the difference between the aggravated felony and guideline crime of violence provisions. As previously discussed, if a defendant could have been convicted for committing an omission, the offense is not a crime of violence because there is no use of force. Gracia-Cantu, 302 F.3d at 312; see also Calderon-Pena. If the Shepard approved documents show that a defendant was convicted of injuring a child by intentional act, however, rather than an omission, the Fifth Circuit has held that the injury is a crime of violence under the substantial risk prong of 18 U.S.C. § 16(b) and therefore may constitute an aggravated felony. Perez-Munoz v. Keisler, 507 F.3d 357, 361-63 (5th Cir. 2007). It is important to keep in mind that the Guideline does not contain this prong and therefore Perez-Munoz will not justify a sixteen-level enhancement. See United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010). The Fifth Circuit has also held that burglary was an aggravated felony because of the risk of force, United States v. Echeverria-Gomez, 627 F.3d 971 (5th Cir. 2010), and that evading arrest with a motor vehicle was an aggravated felony because of the potential use of force. See United States v. Sanchez-Ledesma, 630 F.3d 447 (5th Cir. 2011), but this would not apply to the Guideline crime of
violence.

The continued viability of §16(b) enhancements may be subject to constitutional attack after the Supreme Court’s recent decision in Johnson v. United States, 135 S.Ct. 2551 (2015), on the ground that the provision is unconstitutionally vague. Although the Fifth Circuit has rejected a constitutional challenge, United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. Aug. 2016) (en banc), other circuits have held that the statute is subject to the same constitutional infirmities as the ACCA provision. Shuti v. Lynch, 2016 WL 3632539 (6th Cir. July 7, 2016); United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015). The Supreme Court will decide the issue next term in Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), cert. granted, 2016 WL 3232911 (U.S. Sept. 29, 2016).

Both the statute and the Guidelines may apply to inchoate crimes. An attempt to commit a crime of violence will be considered a crime of violence as long as the attempt statute meets the generic definition including a requirement of a substantial step or its equivalent. See United States v. Hernandez-Galvan, 632 F.3d 192 (5th Cir. 2011). Solicitation may also be covered. See United States v. Mendez-Casarez, 624 F.3d 233 (5th Cir. 2010). The Fifth Circuit has held that a conspiracy to commit murder was a crime of violence even though the state provision did not require an overt act. See United States v. Pascacio-Rodriguez, 749 F.3d 357 (5th Cir. 2014).

The aggravated felony provision applies only to crimes of violence resulting a sentence of at least one year, 8 U.S.C. § 1101(a)(48)(B), which can include a misdemeanor, see United States v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002), but not deferred adjudication where no sentence is imposed. United States v. Mondragon-Santiago, 564 F.3d 357, 368-69 (5th Cir. 2009). The sixteen-level enhancement, however, applies only to “felony” crimes of violence. USSG § 2L1.2(b)(1)(B). Under the guideline, any felony crime of violence results in the sixteen-level enhancement regardless of whether it is an aggravated felony under the statute. United States v. Ramirez, 367 F.3d 274 (5th Cir. 2004). Downward departure is recommended if the defendant receives a sixteen-level crime of violence enhancement for a conviction that would not be considered an aggravated felony. Id.

c. Other offenses

A “theft” offense is an aggravated felony if a prison sentence of at least one year was imposed. 8 U.S.C. § 1101(a)(43)(F). United States v. Graham, 169 F.3d 787 (3d Cir.1999). Generic theft does not include theft by appropriation. United States v. Medina-Torres, 703 F.3d 700, 775 (5th Cir. 2012) (Florida theft statute overly broad). The Fifth Circuit has held that a theft by deception could qualify. See United States v. Rodriguez-Salazar, 768 F.3d 437 (5th Cir. 2014) (distinguishing Martinez v. Mukasey, 519 F.3d 532, 540 (5th Cir. 2008)). Aiding and abetting theft is an aggravated felony as well. Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007). Generic theft, however, requires an intent to deprive the owner permanently of property. United States v. Sanchez-Rodriguez, 830 F.3d 168 (5th Cir. 2016) (Florida receiving stolen property was not theft).

The definition of “aggravated felony” also includes some offenses that are covered only if they involved a minimum loss. See, e.g., 8 U.S.C. § 1101(a)(43)(M)(i)(fraud with loss exceeding $10,000). In the context of civil immigration proceedings, the Supreme Court declined to use the categorical approach to this type of offense because few crimes are defined in such terms. Nijhawan v. Holder, 557 U.S. 29 (2009). The government conceded, however, that the Sixth Amendment would require proof beyond a reasonable doubt to a jury to obtain the criminal statutory enhancement for an aggravated felony in 8 U.S.C. § 1326(b)(2). Nijhawan, 557 U.S. at 40. In Kawashima v. Holder, 565 U.S. 478 (2012), the Supreme Court held that tax evasion is an offense involving “fraud” or “deceit.” In a disturbing opinion, the Fifth Circuit declined to find plain error in treatment of a money laundering conviction as an aggravated felony based on allegations of the amount in the presentence report. See United States v. Mendoza, 783 F.3d 278 (5th Cir. 2015).

“Arson” as defined under federal law is an aggravated felony. 8 U.S.C. § 1101(a)(43)(E), (I). The state predicate need not include the federal jurisdictional element. Luna Torres v. Lynch, 136 S.Ct. 1619 (2016).
The Fifth Circuit recently held that exporting magazines is not an aggravated felony under either 8 U.S.C. § 1101(a)(43)(C) (illicit trafficking firearms) or § 1101(a)(43)(E)(ii) (offenses involving firearms). See United States v. Guillen-Cruz, 853 F.3d 768 (5th Cir. 2017).

A conviction for reentry after deportation subsequent to an aggravated felony is itself an aggravated felony, 8 U.S.C. § 1101(a)(43)(O), even if the underlying conviction is later determined not to be aggravated. United States v. Piedra-Morales, 843 F.3d 623 (5th Cir. 2016), cert. denied, 2017 WL 715089 (U.S. Mar. 20, 2017); see also United States v. Gamboa-Garcia, 620 F.3d 546, 549 (5th Cir. 2010).

d. Other Guideline enhancements

A defendant receives a four-level enhancement if he had three or more convictions for misdemeanor crimes of violence or drug trafficking. USSG § 2L1.2(b)(1)(E). The term “three or more convictions” refers to unrelated convictions, that is, convictions separated by an intervening arrest, that did not occur on the same occasion, were not part of a common scheme and were not consolidated. USSG § 2L1.2, cmt. n.3 & cmt. n.3(B).

The current guideline includes convictions in the offense level regardless of whether they count for criminal history purposes. In United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009), the Ninth Circuit held that the age of a defendant’s prior conviction could be the basis for a sentence below the Guidelines. The Commission has taken to heart the Ninth Circuit’s reasoning in Amezcua-Vasquez. A 16-level enhancement that does not count for criminal history receives only 12 levels, while a remote twelve-level conviction should receive eight levels. USSG § 2L1.2(b)(1)(A), (B). The Commission emphasizes that with the exception of this amendment, convictions count in determining the offense level regardless of whether they receive criminal history points. USSG § 2L1.2, cmt. n. 1(C).

e. 2016 Amendments

The Commission has entirely rewritten the guideline for illegal reentry offenses. While the Guideline continues to base enhancements on a defendant’s criminal record, the focus has shifted with respect to the nature and timing of the offenses. With one exception, misdemeanor convictions for crimes of violence and drug offenses, the Commission has moved away from analysis of the nature of the offense, which generally required resort to the categorical approach set forth in Taylor v. United States, 495 U.S. 598 (1990), and its progeny, to an analysis of the sentence imposed as a proxy for the severity of the prior offense.

There are now three groups of enhancements: 1) for prior convictions for illegal entry and reentry; 2) for certain other convictions prior to the defendant’s first order of deportation (or removal or exclusion); and 3) for certain convictions subsequent to the defendant’s first order of deportation. In each instance, the court applies the greatest enhancement. Under the new Guideline, convictions result in enhancement only if they would receive criminal history points. USSG § 2L1.2, cmt. n.3.

i. Prior illegal entry offenses

The amended Guideline retains a base offense level of 8, USSG § 2L1.2(a), but it adds a new enhancement of 4 levels for a prior felony conviction for illegal reentry, and 2 levels for 2 or more prior misdemeanor convictions under 8 U.S.C. § 1325(a) (most frequently entry without inspection). USSG § 2L1.2 (b)(1). This is a single enhancement based on whichever is greater, the felony conviction or the 2 misdemeanor convictions.

ii. Convictions Prior to First Order of Deportation

Applying the greatest enhancement, the offense level is increased if prior to his first order of deportation, the defendant sustained a conviction and sentence was imposed for an offense other than an illegal reentry offense as follows: (A) 10 levels for a felony offense for which the sentence imposed was 5 years or more; (B) 8 levels for a felony offense for which the sentence imposed was 2 years or more; (C) 6 levels for a felony offense for which the sentence imposed exceeded one year and one month; (D) 4 levels for a conviction for any other felony offense; and (E) 2 levels for 3 or more convictions for misdemeanor crimes of violence or drug trafficking offense. USSG § 2L1.2(b)(2). The definition of crime of violence...
and drug trafficking offense tracks the definition in the career offender guideline. USSG § 2L1.2, cmt. n.2 (USSG § 4B1.2(a)(2) & cmt. n.1).

iii. Conviction After First Order of Deportation

The new Guideline sets forth the same gradation of enhancements if the defendant sustained a conviction after the first order of deportation: (A) 10 levels if sentence imposed was 5 years or more; (B) 8 levels if sentence imposed was 2 years or more; (C) 6 levels if sentence imposed exceeded one year and one month; (D) 4 levels for other felony convictions, and (E) 2 levels for 3 misdemeanor crimes of violence or drug trafficking offenses. USSG § 2L1.2(b)(3). Note that this is a single enhancement, not multiple enhancements for multiple convictions.

iv. How to Count

The term “sentence imposed” has the meaning given the term “sentence of imprisonment” in Chapter 4. USSG § 2L1.2, cmt. n.2. Therefore, any portion of the sentence that was suspended is not counted (unless there was additional prison time imposed after revocation). See USSG § 4A1.2(b)(2) & (k). For purposes of USSG § 2L1.2(b)(2), the court should look at the sentence imposed prior to the first deportation. See United States v. Franco-Galvan, 864 F.3d 338 (5th Cir. 2017) (citing United States v. Bustillos-Peña, 612 F.3d 863, 869 (5th Cir. 2010)).

The Commission continues to define a “felony” as an offense punishable by imprisonment of more than one year. USSG § 2L1.2, cmt. n.2. Counsel may want to request a downward variance for convictions for such offenses where the offense is considered a misdemeanor in the conviction jurisdiction. Cf. USSG § 4B1.1. cmt. n. 4 (career offender guideline).

In determining the court’s otherwise law abiding behavior. In an important change, the Commission directs the court to consider only those convictions that receive criminal history points under chapter 4. USSG § 2L1.2, cmt. n.3. Unfortunately, this revision will not benefit the individuals who return shortly after their conviction and then stay out of trouble for a decade or so because an illegal reentry offense commences when the alien returns unlawfully. See United States v. Reyes-Nava, 169 F.3d 278, 280 (5th Cir. 1998). In these instances, counsel should request a downward variance reflecting the defendant’s otherwise law abiding behavior.

In determining whether a defendant has multiple misdemeanor convictions, the court is to use only those convictions that are counted separately under USSG § 4A1.2(a)(2) (intervening arrest or sentenced on different days). See USSG § 2L1.2, cmt. n.3. The Commission also notes that a defendant’s conviction for illegal reentry and another felony may have been imposed at the same time and therefore would be treated as a single sentence. The two offenses would be counted under both enhancements only if the sentences would have “independently” received criminal history points. USSG § 2L1.2, cmt. n.4. Presumably, if treated as a single sentence, they would not be counted “independently.”

Some defendants will have been convicted previously of both an immigration offense and another offense even in the same proceeding. A defendant may be subject to both a (b)(1) enhancement and a(b)(2) or (3) enhancement if the two convictions would be counted independently. USSG § 2L1.2, cmt. (n.4).

f. Departures

i. Seriousness of Predicate Offense

The Sentencing Commission encourages departure where the offense level “substantially overstates or understates the seriousness of the prior conviction.” USSG § 2L1.2, comment. (n.5) (renumbered Nov. 1, 2016). The examples are revised in light of the new enhancements. Under the new version, the court can consider a departure (presumably up or down) where the sentence length does not reflect the seriousness of the offense and where the prior conviction is too remote to receive criminal history points. Id. The court can also look at whether the time actually served was substantially less than the length of sentence imposed. Id. Again, this could be an argument that the offense was less serious.
ii. **Cultural Assimilation**

Many aliens return because they grew up here and their family resides here. The Sentencing Commission encourages departure from the § 2L1.2 Guideline for illegal reentry where (A) the defendant formed cultural ties primarily in the United States having resided continuously in the United States since childhood, (B) those ties were the primary motivation for the defendant’s return or illegal presence, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant. The Commission recommends consideration of the following factors “among other things”: 1) the age when the defendant began residing in the United States continuously, 2) how long the defendant attended school in the United States, 3) the duration of continuous residence, 4) the duration of the defendant’s presence outside the United States, 5) the nature of the defendant’s familial and cultural ties both in and outside of the United States, 6) the seriousness of the defendant’s criminal history, and 7) whether the defendant engaged in additional criminal activity upon his return. USSG § 2L1.2, cmt. (n.7). See United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001).

iii. **Time Served**

The Commission retains the encouraged departure for time served in state custody, directing the court to consider factors involving violence and community safety. USSG § 2L1.2, cmt. n.6. This departure may be particularly appropriate where the defendant’s offense level has been significantly enhanced pursuant to USSG § 2L1.2(b)(3) on the basis of the same conviction. See United States v. Barrera-Saucedo, 385 F.3d 1533 (5th Cir. 2004).

g. **Other Non-Guideline Sentences**

In addition to cultural assimilation, the Guidelines authorize a downward departure of up to four levels at the government’s request under an authorized early disposition or “fast track” program. USSG § 5K3.1. While some district courts have expressed concern about the unwarranted disparity resulting from the government’s fast track program, because the program is statutorily authorized, appellate courts have upheld the district court’s refusal to depart on this basis. United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008); United States v. Rodriguez, 523 F.3d 519 (5th Cir. 2008).

Some have questioned the empirical basis of the drastic sentencing enhancements in Guideline 2L1.2. See United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005) (citing Robert J. McWhirter & Jon M. Sands, A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases, 8 Fed. Sen. Rep. 275 (Mar./Apr.1996)). While the Fifth Circuit has presumed the illegal reentry guideline reasonable on appeal, United States v. Mondragon-Santiago, 564 F.3d 357, 366 (5th Cir. 2009) (citing United States v. Campos-Maldonado, 531 F.3d 337, 338 (5th Cir. 2008)), the sentencing court is free to disagree with the guideline for policy reasons in an individual case. 564 F.3d at 367. The Ninth Circuit’s decision in United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009), holding that the Guideline range was too harsh is a good example of the interplay of the mitigating factors in an illegal reentry case. Mr. Amezcua had been a permanent resident of the United States for fifty years. In 1981, he stabbed someone with a knife in a “gang-related bar fight,” and was convicted of attempted bodily injury and attempted voluntary manslaughter. 567 F.3d at 1052. His probated sentence was revoked in 1982 and he was sentenced to prison. He was not deported, however, until 2006. Id. The sixteen-level enhancement was so old that it did not count in Mr. Amezcua’s criminal history, although he received criminal history points for a drug conviction in 1999. Id. at 1052-53. In determining that the district court’s fifty-two-month sentence was unreasonable, the Ninth Circuit emphasized Mr. Amezcua’s extensive family ties to the United States, his good work history and his struggles with alcohol and drug addiction. Id. at 1053. While recognizing that the aggravated felony was a serious offense, the appellate court noted that there was no indication that Mr. Amezcua had “harmed or attempted to harm another person or property of another for the past twenty years.” Because the 1984 conviction was “very old and unrepresentative of Amezcua’s characteristics during the past many years,” the appellate court concluded that the Guideline range was too high.” Id. Rejecting the reasoning of Amezcua-Vasquez, however, the Fifth Circuit has held that the staleness of a prior conviction used in the “proper calculation of a guideline-range sentence” does not render the sentence substantively unreasonable; nor does it destroy the
presumption of reasonableness on appeal. See United States v. Rodriguez, 660 F.3d 231, 234 (5th Cir. 2011).

K. Money Laundering and Monetary Transactions

The base offense level for money laundering is the level for the underlying offense if the defendant committed or would be held accountable for the offense and the level for the underlying offense can be determined. USSG § 2S1.1(a)(1). The “underlying offense” includes relevant conduct. United States v. Charon, 442 F.3d 881, 887 (5th Cir. 2006). In other cases, the level is 8 plus the level from the table in USSG § 2B1.1 corresponding to the value of the funds. Id. at § 2S1.1(a)(2). In these cases, the level is increased six points if the defendant knew or believed the funds were proceeds or intended to promote drug trafficking, a crime of violence, or an offense involving firearms, explosives, national security, or sexual exploitation of a minor. USSG § 2S1.1(b)(1).

In money laundering cases, the level is increased four more points if the defendant was “in the business of laundering funds.” Id. at § 2S1.1(b)(2)(C). This enhancement is based on the totality of the circumstances. Id. at cmt. n.4. In all cases, if the defendant is convicted under 18 U.S.C. § 1957, the level is increased one point and two points if she is convicted under 18 U.S.C. § 1956. USSG § 2S1.1(b)(2). Further, if the defendant is convicted under § 1956 and the offense involved “sophisticated laundering,” the level is increased two points. Id. at § 2S1.1(b)(3). Sophisticated laundering is “complex or intricate offense conduct,” such as use of fictitious entities, shell corporations, multiple layers of transactions or offshore accounts. Id. at cmt. n.5. See, e.g., United States v. Miles, 360 F.3d 472, 481 (5th Cir. 2004); see also United States v. Alaniz, 726 F.3d 586 (5th Cir. 2013); United States v. Chon, 713 F.3d 812 (5th Cir.), cert. denied, 134 S.Ct. 255 (2013); United States v. Fernandez, 559 F.3d 303, 320 (5th Cir. 2009) (layers of transactions); Charon, 442 F.3d at 889; but see United States v. Valdez, 726 F.3d 684 (5th Cir. 2013) (deposit in bank account is not sophisticated).

Like other financial offenses, the guiding force behind the offense levels with respect to currency offenses is the amount of money involved. See, e.g., USSG §§ 2S1.1(b)(2), 2S1.2(b)(2). The government must prove that the funds were laundered, not just that they were earned. United States v. Pratt, 728 F.3d 463, 481 (5th Cir. 2013); United States v. Rodriguez, 278 F.3d 486 (5th Cir. 2002). The court considers the total amount laundered and deposited in the bank, not the amount remaining in the account, United States v. Landerman, 167 F.3d 895 (5th Cir. 1999) (all fraud proceeds laundered); United States v. Tansley, 986 F.2d 880 (5th Cir. 1993); see also United States v. Fernandez, 559 F.3d at 320 (value of race horses purchased with drug money); United States v. Leahy, 82 F.3d 624 (5th Cir. 1996) (court properly considered total payment as laundered funds, but the legitimate funds which may have been commingled are not included, unless the court cannot determine which funds are legitimate. USSG § 2S1.1, cmt. n.3(B); United States v. Tencer, 107 F.3d 1120, 1136 (5th Cir. 1997). The guideline includes funds that the defendant attempted to launder. United States v. Ogle, 328 F.3d 182 (5th Cir. 2003). If funds are used in more than one laundering transaction, both transactions may be counted. United States v. Allen, 76 F.3d 1348, 1369 (5th Cir. 1996). The court should not include post-offense conduct. United States v. Willey, 57 F.3d 1374 (5th Cir. 1995). Money laundering is grouped with the underlying offense. USSG § 2S1.1, cmt. n.6; United States v. Landerman, 167 F.3d 895 (5th Cir. 1999); United States v. Leonard, 61 F.3d 1181, 1185 (5th Cir. 1995).

The offense level for currency reporting violations is six if the transaction was structured to evade the reporting requirements, Id. at § 2S1.3(a)(1)(A). See United States v. Morales-Vasquez, 919 F.2d 258 (5th Cir. 1990), or if the defendant filed or caused to be filed a false report. USSG § 2S1.3(a)(1) (1993). The offense level is subject to an increase if the defendant knew or had reason to believe the funds were proceeds of unlawful activity or intended to promote unlawful activity, USSG § 2S1.3(b)(1); United States v. Packer, 70 F.3d 351, 361 (5th Cir. 1995) (funds used to hide fugitive), and the level is increased in accordance with the fraud table corresponding to the value of the funds. USSG § 2S1.3(a). The 2002 amendments include an enhancement for structured transactions related to financial institution reporting requirements. USSG § 2S1.3(a)(1). There are also two-level enhancements for “bulk cash smuggling,” USSG § 2S1.3(a)(2), and where the defendant commits the offense as part of a pattern of unlawful activity involving more than $100,000 within a twelve-month period. USSG § 2S1.3(b)(2) (Nov. 1, 2002). The level is reduced if the funds used were proceeds of lawful activity or used for a lawful purpose. United States
v. Bove, 155 F.3d 44, 48 (2d Cir. 1998).

L. Taxes

The offense levels for tax offenses, like the levels for other financial crimes, are governed by tables based on the funds involved. See, e.g., USSG § 2T1.1(a). The tax table is similar to the table for other property crimes. USSG § 2T4.1. The “tax loss” is generally 28% of the unreported income plus 100% of the total amount of false credits claimed.” Id. at § 2T1.1(c)(1). The rate for corporations is 34%. Id. Note that the tax table has been revised for inflation effective November 1, 2015.

If the defendant diverts corporate income for personal use and fails to pay corporate and individual taxes, the loss is the sum of taxes due from both the corporation and the individual. Id. at § 2T1.1(c)(1)(D). The loss is the intended loss, not actual loss, United States v. Moore, 997 F.2d 55 (5th Cir. 1993); see also United States v. Phelps, 478 F.3d 680 (5th Cir. 2007)(no credit for excess social security payments). But see United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) (defendant had reported and paid tax on some income, loss is actual loss), and may include uncharged years. United States v. Meek, 998 F.2d 776 (10th Cir. 1993). The loss may also include evasion of state taxes as part of the federal evasion scheme. United States v. Powell, 124 F.3d 655 (5th Cir. 1997). The loss is the tax deficiency not the amount hidden, United States v. Clements, 73 F.3d 1330 (5th Cir. 1996), but does not include any civil deficiency such as penalties and interest. USSG § 2T1.1, cmt. n.1; United States v. Daniel, 956 F.2d 540, 544 (6th Cir. 1992). The evasion must be willful. United States v. Olbres, 99 F.3d 28 (1st Cir. 1996). Where the taxpayer has willfully failed to file, the offense level is based on the amount owed and not paid. USSG § 2T1.1(a)(2). If there is no loss, the level is six. Id. In United States v. Charroux, 3 F.3d 827 (5th Cir. 1993), the Fifth Circuit held each participant responsible for the co-participants’ tax evasion. See also United States v. Clark, 139 F.3d 485 (5th Cir. 1998).

In calculating the loss, the court may subtract legitimate and unclaimed deductions but only if the deduction was related to the offense and could have been claimed at the time, it is reasonably and practicably ascertainable, and the defendant submits information in support of the deduction sufficiently in advance of sentence to provide an adequate opportunity to evaluate it. USSG § 2T1.1, comment. n.1-3 (Nov. 1, 2013). The court should also account for standard deductions and exemptions. Id. The Fifth Circuit has held that a tax-payer cannot claim expenses not included in the original fraudulent return. See United States v. Montgomery, 747 F.3d 303 (5th Cir. 2014).

If the tax loss is “uncertain,” the court may make a “reasonable estimate based on the available facts.” USSG § 2T1.1, n.1. For example, the agent could estimate the false return rate for returns filed by a tax payer by examining the typical filings in the area and extrapolating from a sample of the false returns. See United States v. Johnson, 841 F.3d 299 (5th Cir. 2016).

There is an upward adjustment of two points if the offense involved “sophisticated means.” USSG § 2T1.1(b)(2). Like the enhancement for property crimes, “sophisticated means” is “especially complex or intricate offense conduct . . .” Id. at cmt. n.4. in which deliberate steps are taken to make the offense or its extent, difficult to detect.” Id. at cmt. n.4. Compare United States v. Clements, 73 F.3d 1330 (5th Cir. 1996) (offshore bank accounts); United States v. Jagim, 978 F.2d 1032 (8th Cir. 1992) (carefully orchestrated group of false claims); United States v. Becker, 965 F.2d 383 (7th Cir. 1992) (assets hidden in account identified only by number); with United States v. Rice, 52 F.3d 843 (10th Cir. 1995) (false claims for payment not sophisticated). The concealment must be tied to the tax scheme. United States v. Stokes, 998 F.2d 279 (5th Cir. 1993). There is also an upward adjustment for failure to report or correctly identify the source of income exceeding $10,000 in any one year from criminal activity, USSG §§ 2T1.1(b)(1); compare United States v. Heard, 709 F.3d 413, 423 (5th Cir. 2013)(employee withholding was embezzled from employees), with United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (no proof of $10,000 loss in one year); United States v. Hagedorn, 38 F.3d 520 (10th Cir. 1994) (government failed to prove criminal source), and for defendants in the business of preparing returns or who derive a substantial part of their income from such activity. USSG § 2T1.4(b)(1); United States v. Welch, 19 F.3d 192, 194-96 (5th Cir. 1994). A defendant who receives this enhancement is not subject to the abuse of skill or trust enhancement under USSG § 3B1.3. See United States v. Mudekunye, 646 F.3d 381 (5th Cir. 2011).
M. Public Welfare

With respect to hazardous substances, the severity of the guidelines depends on the mens rea, See, e.g., USSG § 2Q1.1, and the degree of hazard, compare USSG § 2Q1.2, with USSG § 2Q1.3. There are upward adjustments for (1) ongoing, continuous or repetitive conduct, See, e.g., USSG § 2Q1.2(b)(1)(A), United States v. Ho, 311 F.3d 589 (5th Cir. 2002); United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992), (2) risk of death or serious bodily injury, USSG §§ 2Q1.2(b)(2), 2Q1.3(b)(2), (3) danger of disrupting the community, USSG §§ 2Q1.2(b)(3), 2Q1.3(b)(3), United States v. Rutana, 18 F.3d 363 (6th Cir. 1994), and where the offense was committed without a permit. USSG §§ 2Q1.2(b)(4), 2Q1.3(b)(4); see also Goldfaden, supra. Each discharge is a separate group. United States v. Gist, 101 F.3d 32 (5th Cir. 1996). The 2004 amendments contain an enhancement for altering labels and unlawful transportation of hazardous chemicals. USSG § 2Q1.2(b)(7).

The base offense level of six for wildlife offenses, USSG § 2Q2.1(a), is increased if the offense involved a commercial purpose, Id. at § 2Q2.1(b)(12), if the wildlife was unquarantined, Id. at § 2Q2.1(b)(2), and if the value was more than $2000, Id. at § 2Q2.1(b)(3)(A), or involved a quantity that was “substantial in relation to the overall population.” Id. at § 2Q2.1(b)(3)(B); compare United States v. Hung Van Tran, 955 F.2d 288 (5th Cir. 1992) (adjustment applied to one Rigley’s sea turtle); with United States v. Stubbs, 11 F.3d 632 (6th Cir. 1993) (no evidence showing substantial number of crocodiles affected or commercial purpose).

Michael Vick brought amendments in 2008. The base offense level for running a gambling enterprise is 12. USSG § 2E3.1(a)(1). Offenses related to animal fighting ventures have a base offense level of 10, USSG § 2E3.1(a)(2)(Nov. 1, 2008), and an upward departure for animal cruelty. Id. cmt. (n.2).

N. Inchoate Offenses

1. Conspiracy, Attempt, Aiding and Abetting

Racketeering offenses are generally governed by the underlying crime or racketeering activity. USSG §§ 2E1.1, 2E1.2, 2E1.3. The court looks at the substance of the underlying offense to determine the most analogous federal offense. United States v. Tolliver, 61 F.3d 1189, 1221 (5th Cir. 1995) (state second degree murder was equivalent to federal murder).

The base level for conspiracy, attempt and solicitation is generally the same as the base level for the substantive offense, plus any adjustments for “intended offense conduct that can be established to a reasonable certainty.” USSG § 2X1.1(a). The requirement of proof to a reasonable certainty is limited to “intended conduct.” United States v. Cabrera, 288 F.3d 163 (5th Cir. 2002).

In United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996), the Fifth Circuit held that it was plain error to sentence a defendant under the conspiracy to commit murder guideline when he was charged and convicted solely of conspiracy to commit mail fraud. The defendants had killed their colleague and sought to collect life insurance after his death. The government argued that the offense level could be based on murder because the killing was relevant conduct. The Fifth Circuit disagreed, holding that both guideline § 3D1.2 (grouping) and § 1B1.2(d) limit the court’s consideration to the offense charged as an object of the conspiracy, not the relevant conduct.

If the defendant is convicted of a multiple purpose conspiracy and the jury is not required to determine the purpose, the court must sentence in accordance with the less severe offense unless it determines beyond a reasonable doubt that the defendant conspired to commit the greater offense. USSG § 1B1.2(d), cmt. n.5; United States v. Fisher, 22 F.3d 574 (5th Cir. 1994); see also, United States v. Green, 180 F.3d 216 (5th Cir. 1999); United States v. Manges, 110 F.3d 1162 (5th Cir. 1998). The Fifth Circuit has held that the maximum sentence for a conspiracy conviction is governed by the statutory range for the object of the conspiracy. United States v. Coscarelli, 105 F. 3d 985 (5th Cir. 1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc).

Aiding and abetting is treated like the substantive offense. USSG § 2X3.1. Accessory after the fact is rated six levels lower than the underlying offense with a maximum level of 20. USSG § 2X3.1(a)(1), (2). The maximum level is thirty for terrorism related offenses. USSG § 2X3.1(a)(3) (Nov. 1, 2003). Where a defendant has harbored a fugitive who failed to appear, the “underlying offense” is the offense from which...
the fugitive fled, not failure to appear. United States v. Dilworth, 50 F.3d 318 (5th Cir. 1995). The accessory’s offense level, however, is based on the principal’s offense level absent enhancements for prior convictions. United States v. Godwin, 253 F.3d 784 (4th Cir. 2001). Misprision of a felony is similarly rated nine levels lower than the underlying offense but no higher than 19. USSG § 2X4.1. United States v. Warters, 885 F.2d 1266 (5th Cir. 1989). Normally, a defendant sentenced under this guideline will not be entitled to a minor role adjustment. USSG § 2X3.1, cmt. n.2 (Nov. 1, 2002); see United States v. Godbolt, 54 F.3d 232 (5th Cir. 1995).

2. Incomplete Offenses
If the inchoate offense was unsuccessful, the level decreases three points unless the defendant or his confederates completed or were about to complete all the acts necessary for success but for their apprehension or interruption by some similar event beyond their control. USSG § 2X1.1(b)(2) & cmt. backg’d; United States v. Waskom, 179 F.3d 303 (5th Cir. 1999). In determining whether the reduction applies, the Fifth Circuit set forth the following considerations: (1) the substantive offense and the defendant’s conduct in relation to that offense; (2) the reduction is not required merely because significant steps remain before commission of the substantive offense is inevitable; (3) the balance of significant acts completed and the remaining acts, not simply their relative quantities; (4) the time frame of the scheme and the time needed to complete it; and 5) the degree of preparedness to accomplish the remaining acts believed necessary for completion. Waskom, 179 F.3d at 305; see also United States v. Soto, 819 F.3d 213 (5th Cir. 2016); United States v. Rome, 207 F.3d 251 (5th Cir. 2000). The inchoate offense guideline applies only if there is no specific guideline. United States v. Toles, 867 F.2d 222 (5th Cir. 1989) (attempt to rob bank covered by specific guideline); see also United States v. Oates, 122 F.3d 222 (5th Cir. 1997) (attempted bank fraud was completed offense); United States v. Rothman, 914 F.2d 708 (5th Cir. 1990). The three-level reduction is not available if the offense involved or was intended to promote terrorism. USSG § 2X1.1(d). The reduction may be applied to attempted laundering. United States v. Ogle, 328 F.3d 182 (5th Cir. 2003).

3. Border Tunnels & Submersible Vessels
Amendments to the Homeland Security Act created an offense regarding construction of border tunnels across international boundaries, with graduated penalties depending on the defendant’s relationship to the tunnel. 18 U.S.C. § 554. If a defendant is convicted under 18 U.S.C. § 554(c) for using a tunnel to smuggle contraband, e.g. aliens, drugs, weapons, the offense level is four plus the level for the underlying offense, with a minimum of sixteen. USSG § 2X7.4(a)(1). The base offense level for constructing or financing a tunnel is sixteen. USSG § 2X7.4(a)(2). A defendant convicted for knowing or reckless disregard of the construction of a tunnel on their land receives a base offense level of eight. USSG § 2X7.4(a)(3).

A person convicted of the offense or operating a submersible vessel to evade detection, 18 U.S.C. § 2285, receives a minimum offense level of 26. USSG § 2X7.2(a). There are graduated enhancements for failure to follow the directives of law enforcement ranging from two levels for failure to heave to eight levels for sinking the vessel. USSG § 2X7.2(b).

VIII. ADJUSTMENTS: CHAPTER III
After computing the base offense level, the court must determine whether adjustments concerning the victim, the defendant’s role and any obstruction of justice should apply. Further adjustments may be necessary for multiple counts. Finally, the level may be reduced if the defendant accepts responsibility.

A. Victims

1. Vulnerable Victims
The guidelines provide an upward adjustment of two points if the defendant “knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct.” USSG § 3A1.1; see, e.g., United States
v. Bell, 367 F.3d 452 (5th Cir. 2004) (alcoholic); United States v. Sidhu, 130 F.3d 644 (5th Cir. 1997) (patients were victims of unnecessary procedures); United States v. Leonard, 61 F.3d 1181, 1188 (5th Cir. 1995) (elderly); United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991) (en banc) (weight loss patients). But see United States v. Robinson, 119 F.3d 1205 (5th Cir. 1997) (Asian shopkeepers not unusually vulnerable). While the focus is on the choice of victim, not who happened to be in the group, Leonard, 61 F.3d at 1188 (citing United States v. Wilson, 913 F.2d 136, 138 (4th Cir. 1990)), the government need only show that the defendant knew or should have known of the victim’s vulnerability. United States v. Burgos, 137 F.3d 841 (5th Cir. 1998); United States v. Brown, 7 F.3d 1155 (5th Cir. 1993) (targeting older people). If the offense involved a large number of vulnerable victims, the level is increased two more points, USSG § 3A1.1(b)(2), but not if the defendant already receive an enhancement for the number of victims. See United States v. Coe, 2013 WL 6407650 (5th Cir. Dec. 9, 2013) (unpublished).

The victim’s vulnerability need not have played a part in the offense of conviction. United States v. Roberson, 872 F.2d 597, 608-09 (5th Cir. 1989) (defendant stole credit cards from corpse and burned the corpse); see also United States v. Kuban, 94 F.3d 971 (5th Cir. 1996) (felon in possession pointed gun at juvenile victim). The adjustment applies to any victim of the defendant’s relevant conduct. USSG § 3A1.1, cmt. n.2. The vulnerable person must, however, be a victim. United States v. Gieger, 190 F.3d 661, 664 (5th Cir. 1999) (patients were not victims of ambulance service false claims). The Fifth Circuit has allowed the adjustment where the offense itself rendered the victim vulnerable. United States v. Gonzalez, 436 F.3d 560 (5th Cir. 2006) (officers beat victim until he was quadriplegic prior to further abuse). The 2016 amendments clarify that the vulnerable victim enhancement does not apply to child pornography offenses based on the victim’s tender age. USSG §2G2.1, cmt. (n.2) (Nov. 1, 2016).

The victim’s status must be reasonably foreseeable to the defendant. United States v. Harris, 104 F.3d 1465 (5th Cir. 1997) (accessory after fact had no intent to harm elderly woman). If the victim’s status merely makes the offense possible, the adjustment does not apply. United States v. Box, 50 F.3d 345, 358 (5th Cir. 1995); United States v. Moree, 897 F.2d 1329 (5th Cir. 1990) (adjustment did not apply where defendant urged indicted person to obstruct justice). A bank teller is not usually a vulnerable victim. USSG § 3A1.1, cmt. n.1. Aliens are not normally deemed vulnerable victims of a smuggling offense, United States v. Angeles-Mendoza, 407 F.3d 742 (5th Cir. 2005), unless their particular circumstances create a special vulnerability. United States v. Dock, 426 F.3d 269 (5th Cir. 2005)(aliens isolated for two weeks, held in cramped quarters); see also United States v. Garza, 429 F.3d 165 (5th Cir. 2005)(poverty stricken, illiterate aliens vulnerable to defendants posing as ICE agents who committed fraud). In a similar vein, the Fifth Circuit held that kidnapping victims were vulnerable due to their age, even though the offense could only be committed against someone younger than eighteen. See United States v. Wilcox, 631 F.3d 740 (5th Cir. 2011). The defendant had taken advantage of the victims’ youth by enticing them to an amusement park along with his young son. Id.

There is a three-point adjustment if the trier of fact or sentencing court finds “beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person,” USSG § 3A1.1(a), or “gender identity,” USSG § 3A1.1(a)(Nov. 1, 2010). See United States v. Greer, 939 F.2d 1076 (5th Cir. 1991) (targeting for religion). In other instances of targeting persons who are “unusually vulnerable,” the adjustment is two points. USSG § 3A1.1(b). The gender adjustment does not apply to sex crimes, Id. at cmt. n.1, and the general adjustment does not apply if already incorporated by specific guideline. Id. at cmt. n.2. Adjustments (a) and (b) are cumulative if the hate crime victim was also unusually vulnerable for other reasons. Id. at cmt. n.3. If the defendant has a prior sentence for an offense involving selection of a vulnerable victim, an upward departure is warranted. Id. at § 3A1.1, cmt. n.4.

2. Official Victims

The guidelines provide an upward adjustment if the victim was a government official, a former government official, or a member of the immediate family thereof, and the “crime was motivated by such status.” USSG § 3A1.2. See, e.g., United States v. Polk, 118 F.3d 286, 297 (5th Cir. 1997); United States v. Branch, 91 F.3d 699 (5th Cir. 1996); United States v. Hooker, 997 F.2d 67 (5th Cir. 1993). This guideline
applies only to individuals who are victims, not organizations. USSG § 3A1.2, cmt. n.1. See United States v. Schroeder, 902 F.2d 1469 (10th Cir. 1990) (does not apply if not directed personally at official). The guideline applies to state, as well as federal, officials. United States v. Stewart, 20 F.3d 911, 918 (8th Cir. 1994), foreign officials. United States v. Levario-Quiroz, 161 F.3d 903, 908 (5th Cir. 1998), and prison officials assaulted while the defendant was in their custody. USSG § 3A1.2(b)(2). The guidelines provide a six-level enhancement if the defendant committed an offense against the person. USSG § 3A1.2(b). The government must prove that the defendant knew or had reason to know that the victim was an official. United States v. Gonzales, 65 F.3d 814 (10th Cir. 1995); United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991).

The guideline does not apply if included in the offense. USSG § 3A1.2, cmt. n.3. The Fifth Circuit has held, however, that application of the adjustment is not double counting where the defendant is convicted of assaulting a federal officer because the assault guideline does not account for the victim’s status. United States v. Kings, 981 F.2d 790 (5th Cir. 1993); United States v. Kleinebreil, 966 F.2d 945, 955 (5th Cir. 1992). Application of this adjustment and the reckless flight adjustment infra is not double counting if there were incidents separated by time and location. Compare United States v. Gillyard, 261 F.3d 506, 512 (5th Cir. 2001) (threatened officers then endangered civilians), with United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) (single high speed chase).

The adjustment applies if the official was a victim of the offense itself, compare Hooker, supra, with United States v. Cherry, 10 F.3d 1003, 1010 (3d Cir. 1993) (murder victim and family not victims of unlawful flight), or was assaulted in a manner creating a substantial risk of serious bodily injury in the course of, or in the immediate flight following the offense. United States v. Ortiz-Granados, 12 F.3d 39, 42-43 (5th Cir. 1994) (holding that application note 1’s limitation was clearly erroneous). But see United States v. Iron Cloud, 75 F.3d 386 (8th Cir. 1996) (passenger in vehicle not responsible for assault). The government must establish a nexus between the reckless endangerment and the offense of conviction. United States v. Southerland, 405 F.3d 263 (5th Cir. 2005). Further, the guideline does not apply to attacks on officers prior to commission of the offense. Levario-Quiroz, 161 F.3d at 908.

3. **Physical Restraint**

If the victim was physically restrained, the level is increased by two points. USSG § 3A1.3. United States v. Roberts, 898 F.2d 1465 (10th Cir. 1990). This adjustment does not apply if restraint is an element of the offense or listed as a specific offense characteristic. USSG § 3A1.3, cmt. n.2. The adjustment applies even if the victim was lawfully restrained; for example, where the defendant was convicted of violating an individual’s civil rights, United States v. Clayton, 172 F.3d 347 (5th Cir. 1999), but the mere use of a firearm does not constitute restraint. United States v. Garcia, 857 F.3d 708 (5th Cir. 2017). In United States v. Gaytan, 74 F.3d 545 (5th Cir. 1996), the Fifth Circuit held that the person restrained need not be a victim of the offense and upheld an adjustment as applied to restraint of a coconspirator.

4. **International Terrorism**

If a felony offense involved or was intended to promote international terrorism, the level is increased 12 levels, with a minimum level of 32. USSG § 3A1.4(a). In such cases, the criminal history category is VI. Id. at § 3A1.4(b). This adjustment also applies to any “federal crime of terrorism,” USSG § 3A1.4(a), which is defined as an offense “calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct; and” is one of certain enumerated offenses such as attacks on airports, government officials, government property, and use of nuclear, biological and chemical weapons. 18 U.S.C. § 2332b(g)(5); see, e.g., United States v. El-Mezain, 664 F.3d 467, 570-71 (5th Cir. 2011)(money to Holy Land Foundation to disrupt Israeli government); United States v. Harris, 434 F.3d 767, 771-72 (5th Cir. 2005)(Molotov cocktail thrown at municipal building). The court must make a specific finding that the false statement furthered terrorism, United States v. Fidse, 778 F.3d447 (5th Cir. 2015); United States v. Fidse, 862 F.3d 516 (5th Cir. 2017) (made the finding on remand). Harboring terrorists is included in this guideline. USSG § 3A1.4, cmt. n.2. While this adjustment applies only to the enumerated offenses, upward departure may be warranted where the conduct is not such an offense but it was designed to intimidate a government or civilian population. USSG § 3A1.4, cmt. n.4.
5. Human Rights 2012

The guidelines have generally addressed “human rights” offenses by referencing the underlying conduct, such as homicide, kidnapping and assault. The 2012 amendments establish a new Chapter Three adjustment for defendants convicted of a “serious human rights offense.”

This human rights enhancement creates two tiers of enhancements (2 and 4 levels) for a person convicted of a “serious human rights offense,” depending on the statutory penalties for the underlying offense, and sets a floor of 37 for the most serious offenses. USSG § 3A1.5. A “serious human rights offense” means “violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers…” USSG § 3A1.5, n.1.

B. Role in the Offense

1. Aggravating Role

The offense level is increased if the defendant played a leadership role. If the defendant was an “organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive,” the level increases four levels. USSG § 3B1.1(a). See, e.g., United States v. Ocana, 204 F.3d 585, 591 (5th Cir. 2000) (defendant recruited people and paid fees); United States v. Smith, 203 F.3d 884 (5th Cir. 2000) (bank teller organized robbery); United States v. Lowder, 148 F.3d 548 (5th Cir. 1998) (no clear error where defendant supervised others); United States v. Sidhu, 130 F.3d 644 (5th Cir. 1997) (managed people at clinic). A manager or supervisor of such an activity suffers a three-point increase. USSG § 3B1.1(b). See, e.g., United States v. Gray, 105 F.3d 956 (5th Cir. 1997). Two points are added if the defendant was an organizer, leader, manager, or supervisor of the criminal activity. USSG § 3B1.1(c).

In determining leadership role, titles are not controlling. Factors to be considered include:

(1) the exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense. USSG § 3B1.1, cmt. n.4. See, e.g., United States v. Powell, 124 F.3d 65 (5th Cir. 1997). The government bears the burden of establishing that the defendant is an organizer. United States v. Barbontin, 907 F.2d 1494, 1497 (5th Cir. 1990). Defendants can be given the upward adjustment even if they are equally culpable, United States v. Peters, 978 F.2d 166 (5th Cir. 1992), or if there are others above them in the chain of command. United States v. Gaytan, 74 F.3d 545 (5th Cir. 1996). The government must, however, prove that the defendant was a leader of the offense of conviction. Compare United States v. Lewis, 476 F.3d 369 (5th Cir. 2007) (defendant was Aryan Brotherhood leader but played minor role in methamphetamine distribution); United States v. Rodriguez-Lopez, 756 F.3d 422 (5th Cir. 2014) (no evidence defendant exercised control or recruited others), with United States v. Nava, 624 F.3d 226, 232 (5th Cir. 2010) (gang leader directed drug trafficking operation); see also United States v. Flores, 640 F.3d 638, 644 (5th Cir. 2011) (court should have relied on trial testimony, which did not show leadership, rather than PSR).

In order to obtain the three or four-level enhancement, the government must prove the requisite number of participants in the offense of conviction, United States v. Mourning, 914 F.2d 699 (5th Cir. 1990); United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990), but the participants need not be named in the indictment. United States v. Manthei, 913 F.2d 1130 (5th Cir. 1990); see also United States v. Narvaez, 38 F.3d 162 (5th Cir. 1994). While the court is not limited to consideration of the conduct that resulted in the actual count of conviction, the adjustment must be “anchored to the transaction leading to the conviction.” United States v. Mir, 919 F.2d 940, 944 (5th Cir. 1990) (citing United States v. Barbontin, 907 F.2d at 1497). Participants are considered if they were involved in the relevant conduct of the offense of conviction, United States v. Ismoila, 100 F.3d 380, 394-95 (5th Cir. 1996), but the conduct must be criminal. United States v. Degiovanni, 104 F.3d 43 (3d Cir. 1997).
Only criminally responsible individuals are counted as participants. USSG § 3B1.1, cmt. n.1. It is not enough to show that five people knew of the offense, the five must be criminally responsible. United States v. Maloof, 205 F.3d 819 (5th Cir. 2000); United States v. Mann, 161 F.3d 840, 866-67 (5th Cir. 1998). Customers are not to be considered in determining the number of participants. United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir. 1989). But see United States v. West, 58 F.3d 133 (5th Cir. 1995) (defendant who concealed tax evasion with more than 100 retailers was organizer); United States v. Liu, 960 F.2d 449 (5th Cir. 1992) (adjustment applied because defendant found green card customers who were themselves engaging in illegal conduct).

While the circuits generally agree that the defendant may be counted as one of the participants, United States v. Barbontin, 907 F.2d 1494, 1497 (5th Cir. 1990); see also United States v. Schweih, 971 F.2d 1302, 1318 (7th Cir. 1992), there is a split over whether the government must establish that the defendant actually supervised the requisite number of people. United States v. Okoli, 20 F.3d 615 (5th Cir. 1994) (noting split but holding defendant need only supervise one). But see United States v. Roach, 978 F.2d 573, 576 (10th Cir. 1992) (government must prove defendant controlled the others); Schweih, 971 F.2d at 1318 (same).

The commentary to the Guidelines provides that the adjustment applies only to defendants who supervise people, United States v. Giraldo, 111 F.3d 21 (5th Cir. 1997); United States v. Ronning, 47 F.3d 710 (5th Cir. 1995), but an upward departure may be warranted if the defendant exercised management responsibility over property, assets or activities of a criminal organization. USSG § 3B1.1, cmt. n.2; United States v. Perkins, 105 F.3d 976, 980-81 (5th Cir. 1997); United States v. Jobe, 101 F.3d 1046, 1065, 1068 (5th Cir. 1996). The Fifth Circuit, however, has apparently inadvertently overruled this doctrine and now permits the role adjustment to be based on management of assets, thereby improperly conflating the adjustment and the departure. See United States v. Ochoa-Gomez, 777 F.3d 278, 282-84 (5th Cir. 2015) (citing United States v. Delgado, 672 F.3d 320, 345 (5th Cir. 20120 (en banc)). The Fifth Circuit’s rule is in conflict with the plain text of the commentary, as well as the other circuits. Ochoa-Gomez, 777 F.3d at 284-86 (Prado & Elrod, JJ concurring).

The role adjustment applies only to organizers or leaders, not to “important or essential figures.” United States v. Litchfield, 959 F.2d 1514 (10th Cir. 1992); see also United States v. Moeller, 80 F.3d 1053, 1062-63 (5th Cir. 1996). Mere distribution of a large quantity of contraband does not signify management status. United States v. Betencourt, 422 F.3d 240 (5th Cir. 2005) (agreeing that buyer-seller relationship not sufficient but finding additional evidence to support adjustment); See also United States v. Sayles, 296 F.3d 219 (5th Cir. 2002); United States v. Brown, 944 F.2d 1377 (7th Cir. 1991); see also United States v. Castellone, 985 F.2d 21 (1st Cir. 1993) (street dealer was not an organizer); United States v. Sostre, 967 F.2d 728 (1st Cir. 1992) (“steerer” who finds buyers is not an organizer).

The four-level enhancement applies even if there is not the requisite number of guilty participants, if the activity was otherwise extensive. See, e.g., United States v. Mergerson, 4 F.3d 337, 347-48 (5th Cir. 1993) (defendant admitted controlling several distributors, case involved a lot of high purity heroin); United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991) (three year money laundering activity involving $1 million and two countries was otherwise extensive). In assessing whether the offense is otherwise extensive, all participants are considered regardless of culpability. USSG § 3B1.1, cmt. n.3; United States v. Davis, 226 F.3d 346 (5th Cir. 2000); United States v. Glincesy, 209 F.3d 386 (5th Cir. 2000). The government, however, must still establish that the defendant exercised a leadership role. United States v. Yates, 990 F.2d 1179, 1181 (11th Cir. 1993). Some courts have held that the court must determine the extensiveness is the functional equivalent of an organization involving at least five participants. United States v. Hesbíng, 209 F.3d 226 (3d Cir. 2000); see also United States v. Anthony, 280 F.3d 694 (6th Cir. 2002); United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001); United States v. Carrozzella, 105 F.3d 796 (2d Cir. 1997); United States v. Tai, 41 F.3d 1170 (7th Cir. 1994).
2. Mitigating Role

The Sentencing Commission continues to try to increase the use of the minor role adjustment, and revised the Guideline again during the 2015 amendment cycle. The offense level may be decreased from two points for a minor participant, USSG § 3B1.2(b), to four points for a minimal participant, USSG § 3B1.2(a). This guideline provides a range of adjustments for a defendant who plays a part in the offense that makes him “substantially less culpable than the average participant.” USSG § 3B1.2, cmt. n.3(A). See, e.g., United States v. Garcia, 242 F.3d 593, 597 (5th Cir. 2001); United States v. Zuniga, 18 F.3d 1254 (5th Cir. 1994); United States v. Thomas, 12 F.3d 1350 (5th Cir. 1994). The 2015 commentary clarifies that the court must compare the defendant to the “average participant in that criminal activity,” not to participants in generic activity. USSG § 3B1.2, cmt. n. 3(A) (Nov. 1, 2015) (emphasis added). Unfortunately, the Fifth Circuit has used this language to affirm the denial of a reduction to one of several drug backpackers. United States v. Torres-Hernandez, 843 F.3d 203 (5th Cir. 2016).

The guideline is not applicable unless there is more than one participant in the offense. USSG § 3B1.2, cmt. n.2. Therefore, the adjustment does not apply if the defendant is the only person convicted unless the offense involved other participants in addition to the defendant. Id.; see also United States v. Rodriguez de Varon, 175 F.3d 930 (11th Cir. 1999) (en banc). A defendant who is accountable, however, only for the conduct in which he personally was involved “may receive” an adjustment under this Guideline. USSG § 3B1.2, cmt.n.3(A) (Nov. 1, 2015) (emphasis added). Thus, a drug courier “may receive” the reduction. But see Torres-Hernandez, 843 F.3d at 208. On the other hand, a defendant who received a lower offense level because she was convicted of a lesser offense normally will not receive a role reduction. Id. at cmt. n.3(B).

The four-level minimal participant reduction is intended to cover defendants who are “plainly among the least culpable of those involved in the conduct of the group.” USSG § 3B1.2, cmt. n.4. A defendant’s “lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.” Id.; see, e.g., United States v. Giraldi, 86 F.3d 1368, 1378 (5th Cir. 1996) (a banker who derived no financial benefit from the money laundering scheme was a minimal participant). A minor participant is someone who is “less culpable than most other participants, but whose role could not be described as minimal.” Id. at § 3B1.2, cmt. n.5. Recognizing that courts have been unduly reluctant to grant a mitigating role adjustments, the Commission deleted the provision that the minimal participant reduction should be “used infrequently.” See USSG § 3B1.2, cmt. n.4.

The Commission notes that the decision whether to apply the mitigating role adjustment is “heavily dependent upon the facts of the particular case.” USSG § 3B1.2, cmt. n.3(C). The determination should be “based on the totality of the circumstances.” § 3B1.2, cmt. n.3(C)(Nov. 1, 2011).

The 2015 amendments offer a non-exhaustive list of factors for consideration of a mitigating role reduction that mirror the aggravating factors:

(i) The degree to which the defendant understood the scope and structure of the criminal activity;
(ii) The degree to which the defendant participated in planning or organizing the criminal activity;
(iii) The degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
(iv) The nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
(v) The degree to which the defendant stood to benefit from the criminal activity.

USSG 3B1.2, cmt. n. 3(C) (Nov. 1, 2015). As an example, a defendant who has no “proprietary interest” in the activity and is “simply being paid to perform certain tasks” should be considered the adjustment. Id. Also, the fact that a defendant performs an “essential or indispensable role in the criminal activity is not determinative.” Id. See United States v. Sanchez-Villarreal, 857 F.3d 714 (5th Cir. 2017); but see United States v. Escobar, 2017 WL 3276552 (5th Cir. Aug. 2, 2017) (essential role not only factor); United States v. Castro, 843 F.3d 608 (5th Cir. 2016) (same).
The defendant bears the burden of establishing that she is eligible for the role reduction. United States v. Castro, 843 F.3d 608 (5th Cir. 2016). The court must make a determination whether the role adjustment applies. United States v. Melton, 930 F.2d 1096, 1099 (5th Cir. 1991) (remanding where court failed to make findings); see also United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996); United States v. Stuart, 22 F.3d 76 (3d Cir. 1994). The appellate courts generally sustain the sentencing court’s role determination under the clearly erroneous standard of review. For example, the courts have generally sustained district court’s determinations of minor role, See, e.g., United States v. Becerra, 155 F.3d 740, 757 (5th Cir. 1998) (affirming minor but not minimal role); United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989) (same); see also United States v. Olson, 76 F.3d 393 (10th Cir. 1995) (conspirators kept information from defendant); United States v. LaValley, 999 F.2d 663 (2d Cir. 1993) (steerer can play minor role); United States v. Ivery, 999 F.2d 1043 (6th Cir. 1993). On the other hand, the courts have been equally deferential towards district court determinations that the defendant did not play a mitigating role. See, e.g., United States v. Villanueva, 408 F.3d 193 (5th Cir. 2005) (alien smuggler not peripherally involved); United States v. Luzan-Sauceda, 187 F.3d 451 (5th Cir. 1999); United States v. Edwards, 65 F.3d 430 (5th Cir. 1995) (defendant weighed, hid and sold drugs); United States v. Martinez-Moncivais, 14 F.3d 1030, 1039 (5th Cir. 1994) (defendant negotiated and profited from sale of several hundred pounds of marijuana), even following the 2015 amendment. See United States v. Gomez-Valle, 828 F.3d 324, 33 (5th Cir. 2016).

Two decisions from the Fifth Circuit threaten to undercut the Commission’s efforts to broaden the reach of the minor role adjustment. In United States v. Torres-Hernandez, 843 F.3d 203 (5th Cir. 2016), the appellate court upheld the denial of the reduction for a backpacker at the Mexican border. The court emphasized that the defendant has the burden of proving that he is less culpable than the average participant in his case and the defendant had not identified more culpable conspirators. Id. at 209. The court also completely misunderstood the commentary as requiring a defendant to be held responsible only for his own conduct in order to be eligible for the reduction. Id. at 208 (citing USSG § 3B1.2, n.3(A)). This commentary was designed to permit the reduction in such cases not to limit it. Similarly, in United States v. Castro, 843 F.3d 608 (5th Cir. 2016), the Fifth Circuit upheld the district court’s determination that the defendant had failed to prove that he was less culpable than the average participant in his case. But see id. at 615-16 (Graves, J. dissenting). The court also interpreted the district court’s references to the defendant’s “integral” role in the offenses as a mere factor in the court’s decision not an improper blanket exclusion. Id. at 612-13.

Over the years, the Commission has recognized that loss and quantity calculations may overstate the seriousness of a minor player’s culpability. Thus, a defendant who receives a mitigating role adjustment is also subject to a cap on her base offense level. USSG § 2D1.1(a)(3).

Recognizing that the loss enhancements in property, particularly fraud, offenses may overrepresent the seriousness of a minor player’s offense, the Commission’s added a provision to USSG § 3B1.2, comment. (n.3(A)) (Nov. 1, 2011), that “[a] defendant who is accountable under [relevant conduct principles] for a loss amount that greatly exceeds the defendant’s personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from [a mitigating role] adjustment under this guideline. The Commission offers as an example a nominee owner in a health care fraud scheme.

C. Abuse of Position or Skill

The offense level is raised two points if the defendant abused a position of trust or used a special skill. USSG § 3B1.3. This adjustment may not be applied if already included in the offense level or specific offense characteristics. Id. But see United States v. Buck, 324 F.3d 786 (5th Cir. 2003) (applied in fraud cases); see also United States v. McElroy, 910 F.2d 1016 (2d Cir. 1990). The abuse of trust adjustment can be applied in addition to the role adjustment, but the abuse of skill cannot. USSG § 3B1.3; United States v. Harrington, 82 F.3d 83 (5th Cir. 1996).

The defendant must have abused a “special” trust or skill, USSG § 3B1.3, and the individual must have unusual discretionary authority. Id. at cmt. n.1. The commentary emphasizes that the “position of trust must have contributed in some substantial way to facilitate the abuse and not merely have provided an opportunity that could as easily have been afforded to other persons.” Id. at § 3B1.3, cmt. n.1. The Fifth
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Circuit uses a two-part test (1) whether the defendant occupied a superior position relative to others, and (2) whether he or she abused that position in a manner that significantly facilitated the offense. United States v. Brown, 941 F.2d 1300 (5th Cir. 1991) (applied to prison guard who helped smuggle heroin). Ordinary bank tellers, hotel clerks and postal clerks are normally excluded. Id. The adjustment applies if the defendant provides “sufficient indicia to the victim that they legitimately hold a position of public or private trust, when, in fact, they do not.” Id. at § 3B1.3, cmt. n.2. The enhancement applies to someone who used their position to unlawfully obtain or use another’s identification. USSG § 3B1.3, cmt. n.2(B).

Examples where the courts have found an abuse of trust include: United States v. Churchwell, 807 F.3d 107 (5th Cir. 2015) (passport employee who intimidated applicants); United States v. Pruett, 681 F.3d 232 (5th Cir. 2012) (President of waste treatment facility in CWA case); United States v. Hale, 685 F.3d 522 (5th Cir. 2012) (police officer guiding the drugs); United States v. Miller, 607 F.3d 144 (5th Cir. 2010) (DME supplier); United States v. Deville, 278 F.3d 500 (5th Cir. 2002) (police chief dealt drugs); United States v. Reeves, 255 F.3d 208 (5th Cir. 2001) (financial planner); United States v. Smith, 203 F.3d 884 (5th Cir. 2000) (bank teller who knew security protocol); United States v. Gieger, 190 F.3d 661, 664 (5th Cir. 1999) (ambulance service); United States v. Iloani, 143 F.3d 921 (5th Cir. 1998) (doctor abused insurance company trust); United States v. Harrington, 114 F.3d 517 (5th Cir. 1997) (lawyer); United States v. Fisher, 7 F.3d 69 (5th Cir. 1993) (head cashier); United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (good discussion of the adjustment). But see United States v. Ollison, 555 F.3d 152 (5th Cir. 2009) (school district secretary did not abuse trust in misusing credit card); United States v. Ikechukwu, 492 F.3d 331 (5th Cir. 2007) (no enhancement for non-postal employee); United States v. Tribble, 206 F.3d 634 (6th Cir. 2000) (postal clerk did not hold position of trust); United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (armed car messenger did not hold position of trust); United States v. Long, 122 F.3d 1360 (11th Cir. 1997) (prison food contractor did not have position of trust); United States v. Ragland, 72 F.3d 500 (6th Cir. 1996) (customer service representative like secretary, not position of trust); United States v. Broderson, 67 F.3d 452 (2d Cir. 1995) (data systems vice-president did not hold position of trust vis-a-vis government); United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994) (defendant did not abuse marital trust in traveling interstate to hire someone to kill wife). The Fifth Circuit has upheld the enhancement where defendant held a position of trust vis-a-vis a third party. United States v. Kay, 513 F.3d 432 (5th Cir. 2007) (company president and foreign government); but see United States v. Jolly, 102 F.3d 546 (2d Cir. 1996).

The “special skill” refers to a “skill not possessed by members of the general public and usually requiring substantial education, training or licensing . . . .” USSG § 3B1.3, cmt. n.3. A defendant’s education may not otherwise be considered. United States v. Burch, 873 F.2d 765 (5th Cir. 1989). The skill must have been used to facilitate the offense of conviction. Compare United States v. Hemmingsson, 157 F.3d 347, 359-60 (5th Cir. 1998) (attorney did not use skill to draft engagement letter); and United States v. Foster, 876 F.2d 377 (5th Cir. 1989) (adjustment did not apply to printer who photographed materials) with United States v. Sharpsteen, 913 F.2d 59 (2d Cir. 1990) (printer used skill in counterfeiting offense); see also United States v. Rojas, 812 F.3d 382 (5th Cir. 2016); United States v. White, 972 F.2d 590 (5th Cir. 1992) (lawyer and former prosecutor used skill to facilitate drug offense and to avoid surveillance). But see United States v. Hickman, 991 F.2d 1110 (3d Cir. 1993) (building contractor did not use special skill to commit mail fraud).

The Commission clarifies that the abuse-of-trust enhancement should be applied if the defendant’s employment in a position that involved regular trading was used to facilitate significantly the commission or concealment of the offense. USSG § 3B1.3, n.2. The enhancement would apply to hedge fund professionals and lawyers who regularly provide assistance in securities transactions but not to those whose position ordinarily does not involve special skill, such as a clerical worker. Id.

D. Use of Minors

There is a two-level increase if the defendant used a minor to commit the crime. USSG § 3B1.4. Mere presence of a minor does not warrant the enhancement. United States v. Molina, 469 F.3d 408, 415 (5th Cir. 2006)(reversing enhancement where defendant’s minor girlfriend knowingly accompanied him on drug deals). The government must prove that the defendant “took some affirmative action” to involve the
minor in the offense. See United States v. Alarcon, 261 F.3d 416, 422 (5th Cir. 2001) (interpreting similar statutory provision); see also United States v. Jimenez, 300 F.3d 1166, 1169 (9th Cir. 2002) (child merely accompanied defendant on family trip) (quoting United States v. Parker, 241 F.3d 1114, 1120 (9th Cir. 2001)); cf. United States v. Castro-Hernandez, 258 F.3d 1057 (9th Cir. 2001) (no plausible explanation for child’s presence other than avoid detection). A defendant who decides to “bring a minor along during the commission of a previously planned crime as a diversionary tactic or in an effort to reduce suspicion” is subject to this enhancement. United States v. Mata, 624 F.3d 170, 175-76 (5th Cir. 2010); see also United States v. Benitez, 809 F.3d 243 (5th Cir. 2015) (use of teenagers); United States v. Robinson, 654 F.3d 558 (5th Cir. 2011) (minor stepdaughter bought cell phone used to make threats); United States v. Girod, 646 F.3d 304, 320 (5th Cir. 2011) (used minor children to fill out false claims). The Eleventh Circuit has held that the defendant need not know a participant is a minor and the enhancement applies as long as use of the minor was reasonably foreseeable. United States v. McClain, 252 F.3d 1279 (11th Cir. 2001).

E. Obstruction of Justice

The guidelines provide a two-level enhancement if the defendant “willfully impeded or obstructed . . . the administration of justice during the investigation or prosecution of the instant offense . . . .” USSG § 3C1.1. The court “should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.” USSG § 3C1.1, cmt. n.2.

1. False Information

Obstruction includes testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding. Id. at § 3C1.1, cmt.n.4(b), (c), (d); United States v. Dunnigan, 507 U.S. 87 (1993); see generally United States v. Grayson, 438 U.S. 41 (1978). Not every accused who testifies at trial and is convicted, however, should be enhanced under 3C1.1.” Dunnigan, 507 U.S. at 95. In Dunnigan, the Court defined perjury as the giving of “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.” Id. at 95 (emphasis added); see also United States v. Cabral-Castillo, 35 F.3d 182, 185-88 (5th Cir. 1994) (reversed where court failed to find false statement was material); United States v. Catano-Alzate, 62 F.3d 41 (2d Cir. 1995) (defendant’s testimony about deliberate ignorance of drug conspiracy not necessarily perjury).

If the defendant objects to the obstruction enhancement, the court must review the evidence and make “independent findings necessary to establish willful impediment to or obstruction of justice, or an attempt to do the same.” Dunnigan, 507 U.S. at 95. The Fifth Circuit recommends that the trial court make a separate and clear finding on each element of the alleged perjury. United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993). It is sufficient if the court finds that the defendant was “untruthful at trial with respect to material matters in the case.” Dunnigan, 507 U.S. at 95; Laury, 985 F.2d at 1308 & n.19; see also United States v. Storm, 36 F.3d 1289 (5th Cir. 1994). But see United States v. Johnson, 352 F.3d 146 (5th Cir. 2003) (sister’s knowing falsehood insufficient); United States v. Phillips, 210 F.3d 345 (5th Cir. 2000) (court did not find defendant committed perjury at trial). The court may find perjury even if the defendant’s testimony about deliberate ignorance of drug conspiracy not necessarily perjury).

Other examples of perjury or presentation of false evidence include: United States v. Hale, 685 F.3d 522 (5th Cir. 2012) (police officer falsely claimed to be acting undercover); United States v. Trujillo, 502 F.3d 353 (5th Cir. 2007) (false claim of citizenship); United States v. Adams, 296 F.3d 327 (5th Cir. 2002) (lied at hearing on motion to withdraw plea); United States v. Odiodio, 244 F.3d 398 (5th Cir. 2001) (defendant denied mens rea); United States v. Smith, 203 F.3d 884 (5th Cir. 2000) (defendant lied about identity of other robbers); United States v. Lowder, 148 F.3d 548 (5th Cir. 1998) (convicted lawyer to call son who lied); United States v. Milton, 147 F.3d 414 (5th Cir. 1998) (got exonerating affidavit from codefendant); United States v. Bethley, 973 F.2d 396 (5th Cir. 1992) (defendant put bag of cocaine in another’s hands and tried to get witness to sign false affidavit); United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992) (defendant testified falsely); United States v. Rodriguez, 942 F.2d 899 (5th Cir. 1991)
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(d) Defendant presented false birth certificate. Feigning incompetence may be considered obstruction, United States v. Greer, 158 F.3d 228 (5th Cir. 1998), as well as falsely (and belatedly) claiming a need for an interpreter. United States v. Juarez-Duarte, 513 F.3d 204 (5th Cir. 2008).

Obstruction includes furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court, USSG § 3C1.1, cmt. n.4(h); compare United States v. Miller, 406 F.3d 323 (5th Cir. 2005) (concealed assets); United States v. Clements, 73 F.3d 1330, 1342 (5th Cir. 1996) (lied about financial information); United States v. Tello, 9 F.3d 1119 (5th Cir. 1993) (obstruction where defendant lied to probation officer), with United States v. Miller, 607 F.3d 144 (5th Cir. 2010) (omission may have been mistake); United States v. Porat, 17 F.3d 660 (3d Cir. 1994) (refusal to assess obstruction where defendant disguised handwriting but immaterial).

Giving a false name on arrest or false information is not obstruction unless the false information significantly interfered with the investigation. USSG § 3C1.1, cmt. n.5(a); United States v. Phillips, 210 F.3d 345 (5th Cir. 2000); United States v. Rodriguez, 942 F.2d 899 (5th Cir. 1991). But see United States v. Rickett, 89 F.3d 224, 226 (5th Cir. 1996) (false name resulted in arrest of innocent person); United States v. Montano-Silva, 15 F.3d 52 (5th Cir. 1994) (finding defendant gave false identity to avoid responsibility for offense). Similarly, destroying evidence contemporaneously with arrest may only be counted if the conduct was a material hindrance to the investigation or prosecution of the offense. USSG § 3C1.1, cmt. n.4(d).

The obstruction adjustment applies at pretrial as well as at trial proceedings. See, e.g., United States v. Vaquero, 997 F.2d 78 (5th Cir. 1993); see also United States v. McCauley, 253 F.3d 815 (5th Cir. 2001); United States v. Como, 53 F.3d 87 (5th Cir. 1995). In United States v. Bueno, 21 F.3d 120 (6th Cir. 1994), however, the Sixth Circuit held that viewed in the light most favorable to the defendant, his testimony at the suppression hearing about his limited English did not justify an obstruction adjustment even though the court had concluded that consent was knowing and voluntary.

The mere denial of guilt is not a basis for application of obstruction of justice. USSG § 3C1.1, cmt. n.2. See, e.g., United States v. Phillips, 210 F.3d 345 (5th Cir. 2000); United States v. Smith, 62 F.3d 641 (4th Cir. 1995); see also United States v. Ahmed, 324 F.3d 368 (5th Cir. 2003) (denial of knowledge of offense to investigators is not obstruction). The failure to admit to drug use while on pretrial release is not obstruction but may affect other adjustments such as acceptance of responsibility. USSG § 3C1.1, cmt. n.4.

2. Threats and Destruction of Evidence

Not surprisingly, the adjustment applies to threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly. USSG § 3C1.1, cmt. n.4(a), see, e.g., United States v. West, 58 F.3d 133 (5th Cir. 1995); United States v. Whitlow, 979 F.2d 1008 (5th Cir. 1992); United States v. Pierce, 893 F.2d 669 (5th Cir. 1990); see also United States v. Ismoilova, 100 F.3d 380, 397 (5th Cir. 1996) (hid codefendant in his attic). But see United States v. Hernandez, 83 F.3d 582 (2d Cir. 1996) (no evidence insults screamed at witness were made to obstruct justice as opposed to out of fury); United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993) (no obstruction where defendant’s threatening gestures not designed to avoid responsibility for offense). It also includes destroying or concealing material evidence, attempting to do so or directing another to do so. USSG § 3C1.1, cmt. n.4(d), United States v. Ainsworth, 932 F.2d 358 (5th Cir. 1991). But see United States v. Morales-Sánchez, 609 F.3d 637 (5th Cir. 2010) (telling friend to report car stolen did not materially impede investigation). A threat to the arresting officer may constitute obstruction. United States v. Chavarria, 377 F.3d 475 (5th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005).

3. Willful and Material

The defendant’s obstruction must not only be material to the prosecution or investigation, Cabral-Castillo, 35 F.3d at 185-88, it must be willful. United States v. O’Callaghan, 106 F.3d 1221, 1222 (5th Cir. 1997); United States v. Lister, 53 F.3d 66, 69 (5th Cir. 1995). The term “willful” requires evidence that the defendant acted “consciously and deliberately.” O’Callaghan, 106 F.3d at 1222; see also United States v. Monroe, 990 F.2d 1370 (D.C. Cir. 1993); United States v. Gardner, 988 F.2d 82, 84 (9th Cir. 1993).
1993); United States v. Shriver, 967 F.2d 572 (11th Cir. 1992); United States v. Altman, 901 F.2d 1161 (2d Cir. 1990); see also United States v. Brown, 321 F.3d 347 (2d Cir. 2003) (must determine if cooperating defendant fled to obstruct or for safety).

The obstruction adjustment applies only if there is in fact an investigation, although the conduct preceding the initiation a formal charge may be considered. Compare United States v. Luna, 909 F.2d 119 (5th Cir. 1990) (conduct not counted that preceded investigation); see also United States v. Clayton, 172 F.3d 347 (5th Cir. 1999) (did not apply to sheriff’s warning other officers at scene not to talk); United States v. Kirkland, 985 F.2d 535 (11th Cir. 1993) (does not apply to internal bank audit), with United States v. Galvan-Garcia, 872 F.2d 638 (5th Cir. 1989) (suspect threw marijuana out the window as he was being chased); see also United States v. Branch, 91 F.3d 699, 741 (5th Cir. 1996) (interference with execution of search warrant).

An alias used during the offense itself, as opposed to hide from investigators, is not obstruction. United States v. Wilson, 887 F.2d 576 (5th Cir. 1989), aff'd 904 F.2d 234 (5th Cir. 1990). The government must prove the defendant knew of the ongoing investigation to obtain the adjustment. United States v. Lister, 53 F.3d 66 (5th Cir. 1995). The obstruction enhancement includes conduct that occurred “with respect to” an investigation, even if the conduct preceded the actual investigation, if it was “purposeful, calculated, and looking to thwart the investigation or prosecution of the offense of conviction.” USSG § 3C1.1 & n.1. Examples include perjury during a related civil proceeding. Id., cmt. (n.4(b)).

The obstruction adjustment applies to conduct related to the defendant’s offense of conviction and any relevant conduct or to a “closely related offense” such as that of a codefendant. USSG § 3C1.1, cmt. n.1. See United States v. Kirk, 70 F.3d 791, 797-98 (5th Cir. 1995), aff'd, 105 F.3d 997 (5th Cir. 1997) (en banc); see also United States v. Upton, 91 F.3d 677, 687 (5th Cir. 1996). Obstruction may include failure to appear at a related state investigation or procedure. United States v. Alexander, 602 F.3d 639 (5th Cir. 2010).

4. Flight and Reckless Endangerment

Mere flight to avoid arrest does not constitute obstruction. USSG § 3C1.1, cmt. n.5(d). United States v. Stroud, 893 F.2d 504 (2d Cir. 1990); United States v. Pierce, 893 F.2d 669 (5th Cir. 1990) (leaving questions open). There is an upward adjustment of two points, however, if the defendant “recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.” USSG § 3C1.2. The government must prove that the defendant knew that he was fleeing from law enforcement officers. United States v. Hayes, 49 F.3d 178, 183 (6th Cir. 1995); see also United States v. Lipsey, 62 F.3d 1134 (9th Cir. 1995) (mere presence in vehicle is not reckless endangerment). A defendant who fled on foot from armed SWAT officers did not recklessly create a danger. United States v. Gould, 529 F.3d 1274 (5th Cir. 2008). The passenger may be held liable for reckless flight that was reasonably foreseeable. United States v. Lugman, 130 F.3d 113 (5th Cir. 1998). Application of this adjustment and the adjustment for assault on an officer is not double counting if the offense involved separate incidents. United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001); but see United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). An upward departure is warranted where death or bodily injury results or there is a substantial risk of such injury to more than one person. USSG § 3C1.2, cmt. n.5. The reckless flight adjustment does not apply if the other person is a “participant in the offense who willingly participated in the flight.” Id., cmt. n.3.

Flight to avoid arrest must be distinguished from flight from custody before trial or sentencing or willful failure to appear, which is considered obstruction. USSG § 3C1.1, cmt. n.4(e). See, e.g., United States v. Infante, 404 F.3d 376 (5th Cir. 2005); United States v. Cisneros, 112 F.3d 1272, 1279-80 (5th Cir. 1997); United States v. Valdiosera-Godinez, 932 F.2d 1093 (5th Cir. 1991) (attempted escape from prison).

While failure to appear for sentencing may constitute obstruction, United States v. Esqueda-Moreno, 56 F.3d 578 (5th Cir. 1995), the failure to appear must be willful. United States v. O’Callaghan, 106 F.3d 1221 (5th Cir. 1997). The Fifth Circuit has held that a defendant’s flight from arresting officers after he has been detained but before he is placed in formal custody constitutes obstruction. United States v. Huerta, 182 F.3d 361 (5th Cir. 1999); see also United States v. Williams, 152 F.3d 294, 302-04 (4th Cir. 1998) (defendant who cut through handcuffs and escaped from patrol car for a day obstructed justice). But see United States v. Draves, 103 F.3d 1328, 1336-38 (7th Cir.1997) (defendant’s attempted flight from
5. Obstruction and Other Offenses

The obstruction adjustment does not apply where the defendant is convicted only of such an offense. USSG § 3C1.1, cmt. n.7; United States v. Harris, 104 F.3d 1465 (5th Cir. 1997). The adjustment may apply, however, where the defendant also urges others to obstruct justice. United States v. Winn, 948 F.2d 145, 162 (5th Cir. 1991). There is a three-level enhancement if a defendant is convicted, pursuant to 18 U.S.C. § 3147, of committing a new crime while on release. Because the sentence must be consecutive, the guideline sentence is to be apportioned between the counts of conviction. USSG § 3C1.3.

F. Grouping

Counts involving substantially the same harm are grouped together. The Commission has identified four such categories:

a) Counts involving the same victim and the same act or transactions;

b) Counts involving the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common plan or scheme including but not limited to -- 1) conspiracy and the substantive offense that was the sole objective of the conspiracy; 28 U.S.C. § 994(l)(2); 2) attempt and completed offense, 18 U.S.C. § 3584(a); 3) counts under general and specific prohibition, 28 U.S.C. § 994(u);

c) One count embodies conduct treated as a specific offense characteristic in, or adjustment to, the guideline applicable to another count; and

d) Offenses based on total harm or loss or quantity of a substance, or other aggregate harm, if the offense is “on-going or continuous in nature” and the guideline is written to cover such behavior.

USSG § 3D1.2, cmt. n.1. Counts for which a statute mandates a consecutive sentence are not grouped, but any specific characteristic covering such offenses is not applied, e.g. 18 U.S.C. § 924(c); USSG § 3D1.2, cmt. n.1; United States v. Packer, 70 F.3d 357 (5th Cir. 1995) (failure to appear must be consecutive).

The Commission describes subsection (a) as incidents involving a single injury or episode involving the same victim. Examples include: (1) forging and uttering the same check, (2) kidnapping and assaulting a single victim, (3) two assaults for shooting one officer in a single episode, or (4) three counts of transporting three aliens in one incident. Examples not to be grouped include: (1) assaulting an officer on two separate days, and (2) bringing aliens into the United States on different occasions. USSG § 3D1.2, cmt. n.3. See, e.g., United States v. Simmons, 649 F.3d 301 (5th Cir. 2011)(multiple threats against employees of Naval Air Station); United States v. Gist, 101 F.3d 32 (5th Cir. 1996) (multiple RCRA violations); United States v. Hernandez-Coplin, 24 F.3d 312, 319 (1st Cir. 1994) (alien smuggling on different occasions). In United States v. Clark, 178 F.3d 290 (5th Cir. 1999), the Fifth Circuit agreed that two counts of assault on an officer arising out a single incident should not be grouped as each officer was a victim. If the conspiracy involves multiple objectives, the conspiracy is divided and grouped with each of the objectives. USSG § 3D1.1, cmt. n.8.

The Fifth Circuit has addressed two circumstances where the defendant was unlawfully in the United States while committing another offense. In United States v. Garcia-Figueroa, 753 F.3d 179, 190 (5th Cir. 2014), the appellate court held that the offenses of illegal reentry and bringing in undocumented aliens should have been grouped because the two offenses were part of the same transaction, and, the United States was the victim of both immigration offenses. In contrast, the court held illegal reentry and being an undocumented alien in possession of a firearm should not be grouped. See United States v. McCauling, 753 F.3d 557 (5th Cir. 2014).
Subsection (b) covers a “single course of conduct with a single criminal objective” representing “essentially one composite harm to the same victim” even if the offenses occur at different times, for example, two fraudulent mailings to further a single scheme. USSG § 3D1.2, cmt. n.4. Again, two rapes of the same victim, but on different days would not be grouped. Id.

Subsection (c) includes general adjustments as well as specific offense characteristics. So, for example, an obstruction of justice conviction is grouped with the underlying offense. USSG § 3d1.2, cmt. n.5; United States v. Winn, 948 F.2d 145, 162 (5th Cir. 1991). Money laundering and tax offenses are grouped with any underlying offense because the guidelines include enhancements based on the source of the funds. USSG § 3D1.2; United States v. Salter, 241 F.3d 392 (5th Cir. 2001); United States v. Rice, 185 F.3d 326 (5th Cir. 1999); United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (tax); United States v. Leonard, 118 F.3d 1181 (5th Cir. 1997) (money laundering and fraud). Sexual exploitation, which is an offense characteristic of receipt and possession of child pornography, must be grouped with those offenses. United States v. Runyan, 290 F.3d 223 (5th Cir. 2002).

Subsection (d) covers most property crimes and controlled substances. See, e.g., United States v. Tolbert, 306 F.3d 244 (5th Cir. 2002). If the property crime involves separate victims, however, (e.g. robbery, burglary, extortion, blackmail, etc.) then the offenses are not grouped together. USSG § 3D1.2, cmt. n.6. See United States v. Ballard, 919 F.2d 255 (5th Cir. 1990) (separate auto thefts not grouped). Separate counts involving child pornography are grouped together. USSG § 3D1.2.

Where a defendant is convicted of multiple counts involving separate harms, the offenses are not grouped. See, e.g., United States v. Goncalves, 613 F.3d 601 (5th Cir. 2010) (altering counterfeit obligations and use false military papers not grouped); United States v. Packer, 70 F.3d 357 (5th Cir. 1995) (separate groups for passport fraud, mail fraud, structuring and concealing fugitive); United States v. Barron-Rivera, 922 F.2d 549, 554-55 (9th Cir. 1991) (alien’s possession of firearm and illegal entry not grouped); United States v. Ballard, 919 F.2d 255 (5th Cir. 1990) (not error not to group theft of vehicles and alteration of VIN); United States v. Pope, 871 F.2d 506, 509-10 (5th Cir. 1989) (automatic weapon and silencer not grouped). But see United States v. Bruder, 945 F.2d 167 (7th Cir. 1991) (grouping felon in possession, and possession of unregistered automatic weapon); see also United States v. Gelzer, 50 F.3d 1133 (2d Cir. 1995). The Fifth Circuit held that a defendant’s conviction for conspiracy to use a firearm should have been grouped with his carjacking convictions, not his stolen vehicle convictions. United States v. Lopez-Urbina, 434 F.3d 750 (5th Cir. 2005).

The offense level for each group is the level for the most serious offense in the group. USSG § 3D1.3(a). In groupings under section 3D1.2(d), the level is based on the aggravated harm. USSG § 3D1.3(b). Where offenses are not grouped, adjustments applicable to only one group cannot be applied to the other. United States v. Kleinebreil, 966 F.2d 945 (5th Cir. 1992) (victim adjustment applied only to assault and role adjustment applied only to marijuana charge); see also United States v. Dickson, 632 F.3d 186 (5th Cir. 2011) (not plain error).

The combined offense level is determined by calculating the level for the group with the highest level and increasing the level in accordance with the table listed in USSG § 3D1.4. Offenses one to four levels less serious are assigned one “unit.” Offenses five to eight levels less serious are assigned one-half a “unit,” and offenses nine levels less serious will not increase the level, see United States v. Hernandez, 690 F.3d 613 (5th Cir. 2012); United States v. Franks, 46 F.3d 402, 405 (5th Cir. 1995); United States v. Shaw, 883 F.2d 10 (5th Cir. 1989), but may provide a justification for sentencing near the top of the range. USSG § 3D1.4(a)-(d). Assignment of one and one-half units begins a one level adjustment, with a maximum adjustment of five levels for five units. Id. The grouping rules may apply even if the defendant is convicted in separate proceedings. United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993); United States v. Lechuga, 975 F.2d 397 (7th Cir. 1992); United States v. Lincoln, 956 F.2d 1465 (8th Cir. 1992).

The Sentencing Commission has clarified that the grouping rules apply to multiple counts of conviction contained in the same charging instrument and to counts in different charging instruments for which sentences are to be imposed at the same time or in a consolidated proceeding. USSG § 3D1.1, cmt.
G. Acceptance of Responsibility

1. Admit the Elements

A defendant’s offense level is decreased if she “clearly demonstrates acceptance of responsibility for his offense.” USSG § 3E1.1 (emphasis added). The commentary to the guideline explains that it is sufficient if the defendant (1) admits the “conduct comprising the offense(s) of conviction,” and (2) admits or does not falsely deny relevant conduct.” USSG § 3E1.1, cmt. n.1(a). As long as the defendant adequately admits the conduct comprising the offense and either admits or does not falsely deny relevant conduct, he is entitled to the reduction. United States v. Patino-Cardenas, 85 F.3d 1133, 1136 (5th Cir. 1996); see also United States v. Salinas, 122 F.3d 5 (5th Cir. 1997).

In Mitchell v. United States, 526 U.S. 314 (1999), the Supreme Court held that a defendant could not be required to waive her Fifth Amendment right to silence concerning uncharged conduct and that no adverse inference could be drawn from her refusal to discuss such conduct. Mitchell, 526 U.S. at 325-30. This does not necessarily impact, however, on the previous Fifth Circuit cases holding that a defendant who invokes her Fifth Amendment right need not be rewarded with a downward adjustment for acceptance. Id. at 330. See, e.g., United States v. Mourning, 914 F.2d 699, 705-07 (5th Cir. 1990).

Entry of a guilty plea before trial “combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct” constitutes “significant evidence of acceptance of responsibility.” USSG § 3E1.1, cmt. n.3; United States v. Austin, 17 F.3d 27 (2d Cir. 1994) (reversing denial of acceptance merely because defendant would not admit uncharged firearms); United States v. McKinney, 15 F.3d 849 (9th Cir. 1994) (reversing denial where defendant pled and confessed). A defendant who falsely denies relevant conduct, however, may be denied the adjustment. United States v. Galan, 82 F.3d 639 (5th Cir. 1996) (defendant contradicted facts and minimized role); United States v. Dean, 59 F.3d 1479 (5th Cir. 1995) (defendant contested relevant conduct); United States v. Smith, 13 F.3d 860, 865-66 (5th Cir. 1994) (defendant falsely denied relevant conduct).

To be eligible for the adjustment, the defendant must admit all of the elements of the offense, United States v. Robichaux, 995 F.2d 565-70 (5th Cir. 1993) (defendant who denied criminal intent not entitled to adjustment); see also United States v. Pierce, 237 F.3d 693 (5th Cir. 2001) (defendant denied knowing children in photos were minors); United States v. Cano-Guel, 167 F.3d 900 (5th Cir. 1999) (defendant denied knowing there were drugs in truck, and must express “sincere contrition.” United States v. Thomas, 12 F.3d 1350, 1372 (5th Cir. 1994). The court can deny acceptance based on the fact that the defendant insisted on entering an “Alford” plea. United States v. Harlan, 35 F.3d 176, 181 (5th Cir. 1994). The defendant, not his lawyer, must admit guilt. United States v. Helmstetter, 56 F.3d 21 (5th Cir. 1995). In United States v. Douglas, 569 F.3d 523 (5th Cir. 2009), the Fifth Circuit affirmed a district court’s decision to grant acceptance but depart upward based on the defendant’s lack of remorse.

In determining whether a defendant has accepted responsibility, the court may consider a number of factors including:

a) voluntary termination or withdrawal from criminal conduct or association;
b) voluntary payment of restitution prior to adjudication of guilt;
c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;
d) voluntary surrender to authorities promptly after commission of the offense;
e) voluntary assistance to authorities in their recovery of the fruits and instrumentalities of the offense;
f) voluntary resignation from the office or position held during the commission of the offense; and
g) the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.

USSG § 3E1.1, cmt. n.1.

Evidence of a plea may also be outweighed by conduct that is “inconsistent with such acceptance of responsibility.” Id. See, e.g., United States v. Flucas, 99 F.3d 177, 179 (5th Cir. 1996) (drug use on bond may but does not have to result in denial of reduction); United States v. Rickett, 89 F.3d 224, 227 (5th Cir. 1996) (continued drug use); United States v. Chapa-Garza, 62 F.3d 118 (5th Cir. 1995) (former fugitive made no sentencing statement); United States v. Kleinbeil, 966 F.2d 945 (5th Cir. 1992) (defendant admitted one offense but not the other); United States v. Lara, 975 F.2d 1120 (5th Cir. 1992) (defendant minimized involvement where facts contradicted him); United States v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992) (defendant transferred money to avoid paying restitution).

2. Timely Acceptance
A defendant may receive an additional one level reduction if the offense level is at least 16 and he “timely provide(s) complete information to the government concerning his own involvement in the offense;” or timely notifies authorities of his intent to plead guilty, thereby saving the time and resources of the government. USSG § 3E1.1(b). The defendant need not forego all discovery or pretrial motions to be entitled to the extra point. United States v. Kimple, 27 F.3d 1409 (9th Cir. 1994); United States v. McConaghy, 23 F.3d 351 (11th Cir. 1994). Moreover, the extra point was automatic for defendants who saved time and had to be granted if the defendant qualified. United States v. Tello, 9 F.3d 1119 (5th Cir. 1993).

The additional one-level reduction requires a government motion. USSG § 3E1.1(b) & cmt. n.6. The “government should not withhold such a motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal.” USSG § 3E1.1, comment. n. 6 (abrogating United States v. Newson, 515 F.3d 374, 477-79 (5th Cir. 2008), see United States v. Torres-Perez, 777 F.3d 764 (5th Cir. 2015); United States v. Palacios, 726 F.3d 325 (5th Cir. 2014). See also United States v. Lee, 653 F.3d 170 (2d Cir. 2011) (cannot deny based on sentencing litigation); United States v. Divens, 650 F.3d 343 (4th Cir. 2011) (cannot deny for refusal to waive appeal). If the government files a motion for timely acceptance, the court “should grant the motion.” USSG §3E1.1(b) & cmt.n.6. (emphasis added) (rejecting United States v. Williams, 74 F.3d 654 (5th Cir. 1996).

The Fifth Circuit recently muddied the water in United States v. Castillo, 779 F.3d 318 (5th Cir. 2015). The government refused to move for the third point because the defendant had contested the loss. The Court reversed, holding that the government could not deny the third level “simply because the defendant requests a hearing to litigate the dispute.” Id at 325. The court warned, however, that the third level could be withheld if the defendant’s dispute was not in “good faith,” which is an interest identified in § 3E1.1(a). Castillo, 779 F.3d at 326. See also United States v. Silva, 865 F.3d 238 (5th Cir. 2017) (denied third point where defendant falsely challenged facts at suppression hearing).

3. Acceptance After Litigation
There is a tension in the guidelines resulting from the desire to reward the guilty, who admit their crimes without penalizing the defendants who exercise their constitutional right to trial. A defendant may in “rare situations” demonstrate acceptance after trial. USSG § 3E1.1, cmt. n.2. United States v. Thomas, 870 F.2d 174, 176-77 (5th Cir. 1989) (acceptance not barred by law but defendant may have “difficult time persuading the trial judge that her position is sincere rather than merely convenient.). See also United States v. Raghalde, 426 F.3d 765, 783 (5th Cir. 2005); United States v. Spires, 79 F.3d 462, 476 (5th Cir. 1996). The Fifth Circuit has upheld the denial of acceptance where a defendant pled to some counts but went to trial and lost on the more serious counts. United States v. Crow, 164 F.3d 229 (5th Cir. 1999). The court also upheld a trial court’s denial of acceptance to a defendant who went to trial only because the government would not accept a plea unless all defendants pled, reasoning that a defendant does not have a right to plead guilty. United States v. Crain, 33 F.3d 480 (5th Cir. 1994). On the other hand, the Fifth Circuit’s holding precluding the reduction to a defendant who went to trial, United States v. Brenes, 250 F.3d 290 (5th Cir. 2001), presumably does not survive the Booker advisory scheme.

A defendant may receive the acceptance reduction following a suppression hearing if he does not contest factual guilt. United States v. Washington, 340 F.3d 222 (5th Cir. 2003) (distinguishing United States v. Maldonado, 42 F.3d 906 (5th Cir. 1995)); but see United States v. Cordero, 465 F.3d 626 (5th Cir. 2006).
2006)(denied where defendant contested element of offense). Further, the court cannot deny acceptance because the defendant intends to appeal the denial of his suppression motion. Washington, supra.

The courts have recognized that the acceptance adjustment may be available where the defendant admits the conduct but asserts an apparently imperfect defense. United States v. Fells, 78 F.3d 168, 171-72 (5th Cir. 1996) (venue challenge); United States v. Barris, 46 F.3d 33 (8th Cir. 1995) (insanity); United States v. Hoenscheidt, 7 F.3d 1528 (10th Cir. 1993) (entrapment); United States v. Johnson, 956 F.2d 894 (9th Cir. 1992) (battered spouse defense); United States v. Fleener, 900 F.2d 914 (6th Cir. 1990) (entrapment). But see United States v. Rudzavice, 586 F.3d 310, 316 (5th Cir. 2009) (defendant challenged factual guilt as well as constitutionality of statute); United States v. Brace, 145 F.3d 247 (5th Cir. 1998) (not available for entrapment defense); United States v. Kirkland, 104 F.3d 1403 (D.C. Cir. 1997).

4. Miscellaneous

The acceptance of responsibility adjustment is applied after computation of the combined offense level for groups of multiple counts, not to each individual group. Kleinbreil, 966 F.2d at 953. Not surprisingly, a defendant who has obstructed justice may be granted acceptance of responsibility only in “extraordinary cases.” USSG § 3E1.1, cmt. n.4. The Commission believes that conduct resulting in an enhancement for obstruction of justice ordinarily indicates that a defendant has not accepted responsibility. Id. See, e.g., United States v. Lujan-Sauceda, 187 F.3d 451, 452 (5th Cir. 1999) (court not clearly erroneous in denying acceptance to defendant who failed to appear for sentencing but later surrendered).

Rehabilitation is not required for awarding the reduction for acceptance of responsibility. United States v. Braxton, 903 F.2d 292, 294-96 (4th Cir. 1990), rev’d on other grounds, 500 U.S. 344 (1991). An individual’s rehabilitative potential may be considered in determining the appropriate sentence within the guideline range, United States v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990), but not in determining whether prison is appropriate. United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994).

Some courts have awarded a downward departure for extraordinary acceptance of responsibility. United States v. Evans, 49 F.3d 109 (3d Cir. 1995) (defendant admitted identity resulting in higher criminal history category); United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (extra restitution before criminal investigation); United States v. Rogers, 972 F.2d 489 (2d Cir. 1992) (reversed where district court thought it could not depart), and for post-arrest rehabilitation. United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998); United States v. Core, 125 F.3d 74 (2d Cir. 1997); United States v. Sally, 116 F.3d 76 (3d Cir. 1997); United States v. Brock, 108 F.3d 31 (4th Cir. 1997).

IX. CRIMINAL HISTORY: CHAPTER IV

As an initial matter, the government must establish that it was the defendant, who was previously convicted. United States v. Floyd, 343 F.3d 360, 372-73 (5th Cir. 2003).

A. Computation

Computation of the criminal history category is based on the length of the sentence, the date of imposition or release, and whether the current offense was committed while the defendant was under and/or had recently completed another sentence. Guideline 4A1.1 provides as follows:

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.
(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.
(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence.
that did not receive any points under (a),(b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points.

USSG § 4A1.1. In 2010, the Sentencing Commission eliminated the recency points, i.e. points for committing the offense within two years of release. The Commission noted that under the previous Guideline, a single conviction could count up to three times in calculating criminal history, USSG §§ (a)-(b), (d)(criminal justice sentence), (e) (recency). In some cases the conviction also raised the offense level. See, e.g., USSG §§ 2K2.1, 2L1.2.

B. Definition of a Sentence

1. What is a “prior” Sentence?

A “prior sentence” is “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.” USSG § 4A1.2(a)(1). A conviction counts as a sentence even if it was for conduct that occurred after the offense of conviction, United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992), see also United States v. Flowers, 995 F.2d 315, 317-18 (1st Cir. 1993); United States v. Lopez, 349 F.3d 39, 41 (2d Cir. 2003); United States v. Tabaka, 982 F.2d 100, 102 (3d Cir. 1992). The courts are divided over whether to consider a sentence imposed after the original sentence but before resentencing. Compare United States v. Klump, 57 F.3d 801 (9th Cir. 1995) (can consider); United States v. Bleike, 950 F.2d 214, 291-21(5th Cir. 1991) (not plain error to consider), with United States v. Tichiarrelli, 171 F.3d 24, 35-37 (1st Cir. 1999) (improper to consider intervening sentence under law of the case doctrine).

A sentence is not counted for conduct that is considered “part of the instant offense” if it would be relevant conduct under guideline 1B1.3. USSG § 4A1.2, comment. (n.1). Compare United States v. Henry, 288 F.3d 657 (5th Cir. 2002) (firearms and trespass); United States v. Salter, 241 F.3d 392 (5th Cir. 2001) (tax evasion related to money laundering and drug offenses), and United States v. Thomas, 54 F.3d 73 (2d. Cir. 1995) (state larceny related to federal forgery), with United States v. Yerena-Magana, 478 F.3d 683 (5th Cir. 2007) (illegal reentry not part of drug offense); United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995) (state cocaine conviction not relevant conduct and therefore not related to federal drug case). If the defendant continues the offense after arrest, however, conviction for the earlier offense may be counted as a prior sentence. United States v. Moody, 564 F.3d 754 (5th Cir. 2009). A prior conviction may be counted even if it is also an element of the offense. United States v. Hawkins, 69 F.3d 11, 15 (5th Cir. 1995) (felon in possession).

Related sentences are treated as a single sentence. The longest sentence is used if concurrent sentences were imposed and the aggregate sentence is used if the sentences were consecutive. USSG § 4A1.2(a)(2). Revocation of probation, parole or supervised release is counted with the original sentence, but the ultimate prison sentence is the sentence to be counted. USSG § 4A1.2(k)(1).

Where a defendant has multiple prior sentences, the court must determine whether to count them separately or as a single sentence. See USSG § 4A1.2(a)(2). Prior sentences are always counted separately if the offenses were separated by an intervening arrest. The “intervening arrest” is an arrest that precedes commission of the second offense. Compare United States v. Espinoza, 677 F.3d 730 (5th Cir. 2012) (no intervening arrest where defendant arrested on first case after commission of second); United States v. Williams, 533 F.3d 673, 676 (8th Cir. 2008) (defendant arrested on first offense after commission of second), with United States v. Akins, 746 F.3d 590 (5th Cir. 2014) (drug cases sentenced same day but intervening arrest counted separately for career offender); United States v. Smith, 549 F.3d 355, 361 (6th Cir. 2008) (count second offense committed while on bond for the first).

If there is no intervening arrest, prior sentences are counted separately “unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day.” USSG § 4A1.2(a) (emphasis added). Convictions for violent offenses considered as a single sentence will still result in some additional points. USSG § 4A1.1(f). The Commission also suggests an upward departure if treating serious non-violent offenses committed on different occasions as a single sentence fails adequately to capture the nature of the defendant’s criminal history. USSG § 4A1.2, cmt. n.3.

The 2015 amendments add an application note providing that a sentence not normally counted under this rule can serve as a career offender predicate if it would have received points “independently” but only one such sentence can serve as a predicate. USSG §4A1.2, cmt.n.3(A)(Nov. 1, 2015).
2. Minor Offenses

 Certain misdemeanors, -- gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing -- are counted only if they resulted in a prison sentence of at least thirty days or more than one year of probation, or they are similar to the instant offense. USSG § 4A1.2(c)(1). Other petty offenses -- fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy -- are never counted. USSG § 4A1.2(c)(2). In determining whether an offense is “similar” to uncounted offenses, the court should consider “all possible factors of similarity, including punishment, elements of the offense, level of culpability and the likelihood of recidivism.” Compare United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991) (holding that failure to maintain auto insurance should not be counted), United States v. Reyes-Maya, 305 F.3d 362 (5th Cir. 2002) (criminal mischief similar to disorderly conduct), and United States v. Gadison, 8 F.3d 186, 193 (5th Cir. 1993) (theft by check not counted), with United States v. Hernandez, 634 F.3d 317 (5th Cir. 2011) (obstructing highway not similar to loitering); United States v. Sanchez-Cortez, 530 F.3d 357 (5th Cir. 2008) (military AWOL counts, not similar to truancy); United States v. McDonald, 106 F.3d 1218 (5th Cir. 1997) (lying to police officer counted); United States v. West, 58 F.3d 133 (5th Cir. 1995) (possession of gambling paraphernalia counted). The circuits are split over whether petty theft is countable. Compare United States v. Lopez-Pastraña, 244 F.3d 1025 (9th Cir. 2001) ( petty theft is like hot check not countable unless 30 day sentence), with United States v. Lamm, 392 F.3d 130 (5th Cir. 2004)(shoplifting should be counted); see also United States v. Ubiera, 486 F.3d 71 (2d Cir. 2007) (same); United States v. Spaulding, 339 F.3d 20 (1st Cir. 2003); United States v. Harris, 325 F.3d 865 (7th Cir. 2003). All convictions for driving while intoxicated are counted. In an unpublished opinion, the Fifth Circuit recently applied the categorical approach to hold that a conviction for disorderly conduct involving domestic abuse was still subject to the limitations on counting convictions for disorderly conduct. See United States v. Gonzalez-Mancilla, 2014 WL 31394 (5th Cir. 2014) (unpublished).

3. Non-traditional Sentences

 A sentence of diversion is counted if there was a finding of guilt regardless of whether the conviction was set aside. USSG § 4A1.2(f). Compare United States v. Giraldo-Lara, 919 F.2d 19, 23 (5th Cir. 1990) (defendant on deferred adjudication admitted guilt); see also United States v. Daniels, 588 F.3d 835 (5th Cir. 2009), with United States v. Kozinski, 16 F.3d 85 (7th Cir. 1994) (no points if no adjudication of guilt). An expunged conviction is not counted, USSG § 4A1.2(j); United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991) (deferred not counted where expungement was automatic); see also United States v. Cerverizzo, 74 F.3d 629 (5th Cir. 1996). The court will count a conviction that has merely been set aside for reasons other than innocence or the validity of the conviction. USSG § 4A1.2, comment. (n.10); see, e.g., United States v. Ashburn, 20 F.3d 1336, 1341-43 (5th Cir.) (counting Youth Corrections Act sentence that had been set aside), aff'd in relevant part, 38 F.3d 803 (5th Cir. 1994) (en banc). A conviction and sentence counts even if the case is on appeal, unless the execution of sentence has been suspended pending appeal. USSG § 4A1.2(l).

4. Other Jurisdictions

 Military sentences count only if imposed by general or special court martial. USSG § 4A1.2(g). Foreign convictions and tribal convictions are not counted. USSG § 4A1.3(h), (l).

5. Unconstitutional Sentences

 Sentences resulting from convictions that have been vacated or reversed because of “errors of law, -- because of subsequently-discovered evidence exonerating the defendant,” or convictions that the defendant shows to have been previously ruled constitutionally invalid, are not counted. USSG § 4A1.2, comment. (n.6). The court can consider even constitutionally invalid convictions if they are “reliable evidence of past criminal activity.” Id.

 There is no constitutional violation in requiring the defendant to prove the invalidity of prior convictions by a preponderance of the evidence. Parke v. Raley, 506 U.S. 20 (1992); see also United States v. Guerrero-Robledo, 565 F.3d 940, 944-45 (5th Cir. 2009) (court could rely on state presumption of regularity); United States v. Barlow, 17 F.3d 85, 89 (5th Cir. 1994) (prior conviction presumptively valid, and defendant has burden of proving unconstitutional); see also United States v. Osborne, 68 F.3d 94 (5th Cir. 1995) (defendant failed to prove conviction was uncounted). The Commission does “not intend to confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” USSG § 4A1.2, comment. (n.6).
In Custis v. United States, 511 U.S. 485 (1994), the Supreme Court held that defendants could challenge prior convictions used for enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), only if those convictions were obtained in violation of the right to counsel. See also United States v. Longstreet, 603 F.3d 273, 277 (5th Cir. 2010). The Court left open the possibility, however, that a defendant could reopen the federal case if he subsequently invalidated his convictions. See Maleng v. Cook, 490 U.S. 488 (1989). The circuit courts have concluded that a defendant is entitled to habeas corpus relief if a prior conviction used to enhance his sentence is subsequently invalidated. United States v. Nichols, 30 F.3d 35 (5th Cir. 1994). A defendant cannot, however, obtain federal habeas corpus relief for an expired state conviction even if relief is no longer available to him in state court. Daniels v. United States, 532 U.S. 374 (2001).

Normally, a conviction obtained in violation of the right to counsel cannot be used to enhance a defendant’s sentence. United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967). In Nichols v. United States, 511 U.S. 738 (1994), the Supreme Court held that a previous unconvicted conviction that did not expose the defendant to a jail sentence could be used to enhance a prison sentence. (overruling Baldasar v. Illinois, 446 U.S. 222 (1980)); see also United States v. Haymer, 995 F.2d 550 (5th Cir. 1993). In Alabama v. Shelton, 535 U.S. 654 (2002), the Court held for the first time that a defendant is entitled under the Sixth Amendment to counsel even if he receives probation if he could subsequently be sent to prison. Many prior misdemeanor convictions may prove to be invalid if the defendant did not have counsel and there was no valid waiver. But see United States v. Perez-Macias, 335 F.3d 421 (5th Cir. 2003) (holding attorney not needed for misdemeanor federal probation). The court need only advise a defendant of his right to counsel during the plea and obtain a waiver but the validity of the waiver is case specific. Iowa v. Tovar, 541 U.S. 987 (2004). The Fifth Circuit has held that the defendant has the burden of proving the waiver invalid. United States v. Guerrero-Robledo, 565 F.3d 940, 942-45 (5th Cir. 2009); see also United States v. Rubio, 629 F.3d 490 (5th Cir. 2010).

C. Imprisonment

A “sentence of imprisonment” means the maximum sentence imposed, USSG § 4A1.2(b)(1), that is, the sentence pronounced by the court, not the time actually served. An indeterminate sentence is treated as the maximum sentence. USSG § 4A1.2, comment. (n.2); See, e.g., United States v. Levenite, 277 F.3d 454 (4th Cir. 2002) (counting indeterminate sentence of two days to twenty-three months under § 4A1.1(a)(1) even though defendant actually served two days). If the court reduces the prison sentence, however, the reduced sentence controls. United States v. Jasso, 587 F.3d 706 (5th Cir. 2009) (defendant granted shock probation after revocation); United States v. Kristl, 437 F.3d 1050, 1056-57 (10th Cir. 2006).

If part of the sentence was suspended, the “sentence of imprisonment” includes only the portion that was not suspended. USSG § 4A1.2(b)(2); see, e.g., United States v. Tabaka, 982 F.2d 100, 102 (3d Cir. 1992)(all but two days suspended). If a defendant receives a “time served” sentence, the actual time spent in custody will be counted. Compare United States v. Rodriguez-Lopez, 170 F.3d 1244, 1246 (9th Cir. 1999) (adding two points for sixty-two days served), with United States v. Dixon, 230 F.3d 109 (4th Cir. 2000) (58-days spent in custody did not warrant two points). The Sixth Circuit has held that a conviction for which no additional time was served because it was credited against a sentence on another case should not receive criminal history points. United States v. Hall, 531 F.3d 414 (6th Cir. 2008).

In determining whether a defendant has been sentenced to a term of imprisonment, the court looks to the nature of the facility, rather than its purpose. United States v. Brooks, 166 F.3d 723 (5th Cir. 1999); United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993). For example, the Fifth Circuit held in Brooks, that incarceration boot camp was a prison sentence. 166 F.3d at 725-26. The court distinguished between facilities like the boot camp “requiring 24 hours a day physical confinement” and other dispositions such as “probation, fines and residency in a halfway house.” Id. See also United States v. Enrique-Accencio, 857 F.3d 668 (5th Cir. 2017) (holding work release was imprisonment under § 2L1.1). Indeed, the Commission generally considers community type confinement to be a substitute for imprisonment. USSG §§ 5B1.3(c)(1), (2), 5C1.1(c), (d); see United States v. Phipps, 68 F.3d 159, 162 (7th Cir. 1995); Latimer, 991 F.2d at 1512-13. A six-month sentence of home detention is not considered a sentence of imprisonment. United States v. Gordon, 346 F.3d 135 (5th Cir. 2003); see also United States v. Jones, 107 F.3d 1147, 1161-65 (6th Cir. 1997) (home detention is not imprisonment); United States v. Compton, 82 F.3d 179, 183 (7th Cir. 1996). The courts have also held that community treatment centers or halfway houses are not imprisonment. United States v. Pielago, 135 F.3d 703, 711-14 (11th Cir. 1998); Latimer, 991 F.2d at 1511. But see United States v. Rasco, 963 F.2d 132 (6th Cir. 1992) (community treatment center upon revocation of parole is incarceration).
D. Timing

Under USSG § 4A1.1(a), three points are assigned to each adult sentence of imprisonment exceeding one year and one month imposed within fifteen years of the instant offense or resulting in incarceration during the fifteen-year period. USSG § 4A1.2(c)(1). This provision can result in the counting of remote convictions, especially where a defendant was on parole or supervised release and keeps getting revoked because he may have been incarcerated during the fifteen-year period. USSG § 4A1.2(k)(2)(B). See, e.g., United States v. Semsak, 336 F.3d 1123, 1128 (9th Cir. 2003) (revocation of parole). The court will count a conviction of a defendant whose parole is revoked during the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation. United States v. Ybarra, 70 F.3d 362, 365-66 (5th Cir. 1995). A defendant on escape status is deemed incarcerated. United States v. Radziercz, 7 F.3d 1193 (5th Cir. 1993).

With the exception of prison sentences in excess of thirteen months, the time limitation normally runs from the date sentence is imposed, not when it is served. USSG § 4A1.2(c)(2). The time limit runs from the original imposition date, not the revocation date, unless the defendant received more than one year and one month on revocation. USSG §§ 4A1.2(a)(1), (c)(2), (k)(2)(B); United States v. Arviso-Mata, 442 F.3d 382 (5th Cir. 2006) (sentence imposed when defendant found guilty and sentence was suspended); United States v. Arnold, 213 F.3d 894, 895-96 (5th Cir. 2000).

Two points are added if the instant offense was committed while the defendant was under a criminal justice sentence. USSG § 4A1.1(d). This provisions covers virtually all forms of suspended sentences at least where there is a possibility of a custodial sentence, see, e.g., United States v. Giraldo-Lara, 919 F.2d 19 (5th Cir. 1990) (diversion); see also United States v. Perales, 487 F.3d 588 (8th Cir. 2007) (same), even if there is no active supervision. See, e.g., United States v. Miller, 56 F.3d 719 (6th Cir. 1995) (conditional discharge similar to unsupervised probation). On the other hand, a suspended sentence where a fine is the only sanction is not considered to be a criminal justice sentence. USSG § 4A1.1, comment.(n.4); United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993). A defendant is deemed to be on probation even if the State did not use diligence to arrest him. United States v. Anderson, 184 F.3d 479 (5th Cir. 1999); see also United States v. McCowan, 469 F.3d 386, 393 (5th Cir. 2006). A defendant who escapes while awaiting sentencing is deemed to be under a criminal justice sentence, United States v. Arellano-Rocha, 946 F.2d 1105 (5th Cir. 1991), as is a defendant who has yet to surrender. See, e.g., United States v. Fisher, 137 F.3d 1158, 1167 (9th Cir. 1998). The defendant must actually be serving the sentence at the time she commits the federal offense. Thus, a defendant whose probation was imposed following indictment is not under a criminal justice sentence. United States v. Brazell, 489 F.3d 666, 668-69 (5th Cir. 2007); see also United States v. Caldwell, 585 F.3d 1347 (7th Cir. 2009).

Continuing offenses create particularly complex calculation scenarios. Compare United States v. Stephenson, 887 F.2d 57, 62 (5th Cir. 1989) (government failed to establish defendant was in conspiracy within requisite 15 years); United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996) (reversing relevant conduct finding and resulting criminal history points), with Trevino, 141 F.3d at 114 (conspiracy occurred within two years of release). A defendant who admitted that he obtained the firearm within ten years of his previous sentence received criminal history points. United States v. Mcgee, 494 F.3d 551, 555-56 (6th Cir. 2007). A defendant “found” unlawfully in the United States while serving a prison sentence is deemed to have committed the offense while serving another sentence. United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996). On the other hand, the illegal reentry offense is complete once the defendant is found. United States v. Alvarado-Santillano, 434 F.3d 794 (5th Cir. 2006), and therefore, subsequent sentences should not be counted.

E. Youthful Convictions

There are certain limitations on consideration of convictions prior to the defendant’s eighteenth birthday. Adult convictions, where a prison sentence of more than thirteen months was imposed, are counted within the standard fifteen-year period, even if the defendant was not yet eighteen at the time of the offense. USSG § 4A1.2(d)(1); United States v. Gipson, 46 F.3d 472 (5th Cir. 1994). Other convictions prior to the defendant’s eighteenth birthday are counted only if the sentence was imposed within five years of the federal offense. USSG § 4A1.2(d)(2); United States v. Green, 46 F.3d 461, 467 (5th Cir. 1995). Juvenile adjudications are counted even though not considered “convictions” in state court. United States v. Holland, 26 F.3d 26 (5th Cir. 1994). A juvenile sentence is deemed to be a sentence of confinement if the defendant was sent to the state agency responsible for confining juveniles. See, e.g., United States v. Birch, 39 F.3d 1089, 1095 (10th Cir. 1994) (and cases cited therein). The juvenile’s age at the time of a revocation resulting in confinement, rather than the time of the offense, controls. United States v. Female Juvenile, 103 F.3d 14, 17 (5th Cir. 1996). Juvenile detention that does not result in an adjudication does not count. United States v. Johnson, 205 F.3d 1197, 1200 (9th Cir. 2000).
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F. Revocations

Where a defendant’s supervision (probation, parole, etc.) has been revoked, the court assesses criminal history points based on the entire length of the term of imprisonment imposed both before and after the revocation. USSG § 4A1.2(k)(1). As discussed above, however, different timing rules will affect the criminal calculation. For example, a defendant who is sentenced to 180 days in prison, all but thirty days suspended, would normally receive only one criminal history point. USSG § 4A1.1(c). If his suspended sentence is then revoked and he is sentenced to serve sixty days in custody, he would instead receive two criminal history points for a ninety-day sentence, pursuant to USSG § 4A1.1(b). Even the sentence upon revocation would only count, however, if the original sentence was imposed within ten years of the federal offense. United States v. Arviso-Mata, 442 F.3d 382, 385 (5th Cir. 2006).

On the other hand, a defendant sentenced to serve ten years in prison suspended for ten years would likewise initially receive only a single criminal history point. USSG § 4A1.1(c). If his sentence is revoked, however, and he is sentenced to serve two years in prison, he will receive three criminal history points, USSG § 4A1.1(a), as long as he is incarcerated within fifteen years of the federal offense. USSG § 4A1.2(k)(2)(B). Had the same defendant originally received a ten-year sentence that was not suspended and had he then been paroled and revoked, he would still receive only the original three points and he will continue to receive those points as long as he is incarcerated within the fifteen-year period preceding the instant offense.

Another complication arises when multiple terms of supervision, arising from separate sentences under USSG § 4A1.2(a)(2), are revoked. In this case, the court adds the term of imprisonment imposed upon revocation to the sentence “that will result in the greatest increase in criminal history points.” USSG § 4A1.2, comment. (n.11). This addition applies, however, only to one of the convictions and the other retains the original criminal history point, pursuant to USSG § 4A1.1(c). For example, a defendant is serving three probated sentences for separate offenses. Based on a single violation, all three probated sentences are revoked and the defendant is sentenced to serve three concurrent two-year prison terms. Under this rule, the defendant receives three criminal history points for one of the prison terms, but only one point for each of the two remaining terms of supervision that were simultaneously revoked. United States v. Streat, 22 F.3d 109, 111-12 (6th Cir. 1994); United States v. Flores, 93 F.3d 587, 592 (9th Cir. 1996).

G. Career Offenders

1. General Application

An individual is a “career offender” if (1) he or she was at least eighteen at the time of the instant offense, (2) the offense of conviction is a felony crime of violence or felony controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1. The guidelines provide significantly enhanced offense levels for career offenders and mandate that such individuals receive a criminal history category of VI. The enhancements increase depending on the statutory maximum for the offense of conviction. Id. The statutory maximum is the enhanced maximum. Id., comment. (n.2). United States v. LaBonte, 520 U.S. 751, 762 (1997). The career offender criminal history category of VI applies even if the defendant’s offense level was not raised under the guideline. United States v. Gordon, 838 F.3d 597 (5th Cir. 2016). A career offender is not eligible for a minor role reduction. United States v. Cashaw, 625 F.3d 271(5th Cir. 2010).

In contrast to other criminal history provisions, only adult convictions can serve as a predicate under the career offender guideline. USSG § 4B1.2, comment. (n.1). A defendant who was convicted as an adult, however, but who was only seventeen can be considered a career offender. See, e.g., United States v. Moorer, 383 F.3d 164 (3d Cir. 2004); United States v. Otero, 495 F.3d 393, 400-01 (7th Cir. 2007); United States v. Hazelett, 32 F.3d 1313, 1320 (8th Cir. 1994) but see United States v. Mason, 284 F.3d 555, 558-62 (4th Cir. 2002) (holding that adult conviction could not count because defendant sentenced as juvenile). Second, the enhancement applies to criminal “convictions,” not sentences. To count as a prior conviction, the defendant must have been convicted of the offense before he committed the federal offense, USSG § 4B1.2(c); United States v. Gooden, 116 F.3d 721 (5th Cir. 1997), but need not have been sentenced. United States v. Guerrero, 768 F.3d 351, 366 (5th Cir. 2014). The date that guilt is established is the date of conviction. USSG § 4B1.2(c).

2. Crimes of Violence

The criminal history Guideline defined “crimes of violence” as follows:

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2(a). The commentary listed additional offenses that are crimes of violence including “murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” USSG § 4B1.1, comment. (n.1). It also explained that the “conduct” referenced in the residual clause must be expressly charged in the count of conviction and must “by its nature” present a “serious potential risk of physical injury to another.” Id., see also United States v. Charles, 301 F.3d 309, 311-12 (5th Cir. 2002) (en banc). As discussed earlier, the categorical approach generally applies to both the list of enumerated offenses and the residual offenses. See, e.g., Houston, 364 F.3d at 245-48 (statutory rape neither forcible sex offense nor otherwise crime of violence); United States v. Butler, 207 F.3d 83 (6th Cir. 2000).

Numerous courts have limited the application of the Guidelines crime of violence definition. See, e.g. United States v. Stoker, 706 F.3d 643 (5th Cir. 2013) (threat and retaliation not crime of violence); United States v. Garcia, 470 F.3d 1143 (5th Cir. 2006) (Colorado assault not crime of violence); United States v. Piccolo, 441 F.3d 1084 (9th Cir. 2006) (walkaway from halfway house not violent); United States v. Kelly, 422 F.3d 889 (9th Cir. 2005) (eluding police not crime of violence); United States v. Insaulgarat, 378 F.3d 456 (5th Cir. 2004) (aggravated stalking not crime of violence); Charles, 301 F.3d at 313 (holding auto theft was not a crime of violence); United States v. Jones, 235 F.3d 342 (7th Cir. 2000) assault and battery not necessarily crime of violence). The Fifth Circuit has held, however, that a reckless use of physical force may constitute a crime of violence under the elements clause. United States v. Howell, 838 F.3d 489 (5th Cir. 2016), cert. denied, 137 S.Ct. 1108 (2017).

The Supreme Court recently held that the Guidelines are not subject to a constitutional vagueness challenge. Beckles v. United States, 137 S.Ct. 886 (2017).

a. August 2016 Amendments

As a result of a multi-year study of predicate offenses, as well as the Supreme Court’s decision in Johnson v. United States, 135 S.Ct. 2551 (2015) (holding that the residual clause in the ACCA definition of “violent felony” is unconstitutionally vague), the Sentencing Commission promulgated a special amendment to the career offender Guidelines. Effective August 1, 2016, the Commission has eliminated the residual potential risk clause and burglary is no longer included in the definition. The enumerated offenses of murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, and robbery, are added to the Guideline definition. USSG § 4B1.2(a) (Aug. 1, 2016). “Forcible sex offense” is expanded to include offenses where consent was not given or legally valid, such as where it is involuntary, incompetent, or coerced, but sexual abuse of a minor and statutory rape are included only if they would constitute an offense under federal statutes setting the age of consent at 16 and requiring an age differential. USSG § 4B1.2, cmt. n.1. “Extortion” is defined narrowly as obtaining something of value from another by wrongful use of force, fear of physical injury or threat of physical injury. Upward departure is encouraged for a burglary involving violence. USSG § 4B1.2, cmt. n.4. A downward departure is encouraged where a defendant’s convictions are considered felonies under federal law but misdemeanors in the convicting jurisdiction. USSG §4B1.1, cmt. n.4 (Aug. 1, 2016).

3. Controlled Substance Offense

The Guideline defines a “controlled substance offense” as follows:

[A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2 (b).

Note that this Guideline covers trafficking offenses punishable by just more than a year and therefore applies to a number of minor drug offenses not covered by ACCA, which limits “serious drug offenses” to offenses punishable by at least ten years. 18 U.S.C. § 924(e)(2)(A). On the other hand, in contrast to the statutory drug enhancements, e.g., 21 U.S.C. § 841(b), this provision is limited to trafficking-

Again, the categorical approach applies to the determination whether an offense is a "controlled substance offense." United States v. Price, 516 F.3d 285, 287-89 (5th Cir. 2008) (Texas delivery not controlled substance offense because includes offer to sell); United States v. Rivera-Sanchez, 247 F.3d 905, 908-09 (9th Cir. 2001) (en banc) (holding that violation of California Health and Safety Code § 11360(a) was not categorically an aggravated felony because it also proscribes transportation); see also United States v. Martinez, 232 F.3d 728, 732-35 (9th Cir. 2000) (‘11360(a) not controlled substance offense for career offender Guideline). Moreover, the Fifth Circuit has held that Texas delivery is not divisible, United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016); nor is possession with intent to deliver. United States v. Tanksley, 848 F.3d 347 (5th Cir.), modified, 854 F.3d 284 (5th Cir. 2017).


4. Firearm Offenses

Unlawful possession of a firearm by a felon is not a crime of violence, USSG § 4B1.2, comment. (n. 1); United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992); see generally Stinson v. United States, 508 U.S. 36 (1993), unless the possession was of a firearm described in 26 U.S.C. § 5845(a), such as a sawed-off shotgun, silencer, bomb, or machine gun. USSG § 4B1.1, comment. (n.1); see United States v. Serna, 309 F.3d 859 (5th Cir. 2002). In a sharply divided opinion, the Fifth Circuit held that a defendant’s conviction for being a felon in possession of a firearm was a crime of violence as long as the weapon was described as a § 5845(a) firearm in the indictment. See United States v. Lipcomb, 619 F.3d 474 (5th Cir. 2010). A prior conviction for using (carrying or possessing) a firearm during a violent felony or drug trafficking offense is counted under the career offender provision. USSG § 4B1.2, comment. (n.1). This case may not survive Johnson’s invalidation of the residual clause.

While being a felon in possession of a firearm is not itself a crime of violence, USSG § 4B1.2, comment. (n.2), a defendant subject to an enhanced sentence under 18 U.S.C. § 924(c) as an armed career criminal is likewise subject to a significantly enhanced sentence of a level 34 if he used or possessed the firearm, or ammunition, in connection with a crime of violence, or a controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845 (a), USSG § 4B1.4(a) & (b)(3), or a level 33 in other circumstances. The criminal history category is likewise raised to a minimum level of IV or VI if the prior convictions are for crimes of violence or drug trafficking. USSG § 4B1.4(c). For example, a defendant who used the firearm to kill someone is subject to the enhancement for a crime of violence. United States v. Ford, 996 F.2d 83, 87 (5th Cir. 1993). A defendant is not subject to the armed career criminal enhancement if he is convicted of making a false statement rather than being a felon in possession of a firearm. United States v. Williams, 198 F.3d 988, 991 (7th Cir. 1999).

Certain serious firearms offenses have special provisions. The guideline sentence for a section 924(c) violation is the statutory minimum if the career offender provisions do not apply. USSG § 2K2.4. The sentence for arson is the statutory term. USSG § 2K2.4(a). In both of these cases, the adjustments in Chapters Three and Four do not apply. Id.

There is a specific provision for defendants convicted of these firearms offenses who qualify as career offenders. USSG § 4B1.1(c). If the defendant is only convicted of the firearms offense, the guideline range is 360 months to life, although the reduction for acceptance of responsibility is still available. USSG § 4B1.1(c)(1)-(3). If there are multiple counts of conviction, the range is the mandatory minimum consecutive sentence plus the range for the underlying offense and an addition from a special firearms table, whichever is greater. USSG § 4B1.1(c)(2). The sentence is apportioned among the counts to meet any mandatory minimum requirements. USSG § 5G1.2(e). If the defendant is not a career offender but has multiple convictions, pursuant to 18 U.S.C. § 924(c), the court can depart upward. USSG § 2K2.4, comment. (n.2(B)). The court can also depart if the defendant’s guideline range is lower than if he did not have a section 924(c) conviction. USSG § 2K2.4, comment. (n.4).
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5. Inchoate Crimes

The career offender guideline includes convictions for inchoate offenses such as aiding and abetting, conspiracy and attempt. USSG § 4B1.2, comment. (n.1). See, e.g., United States v. Walker, 181 F.3d 774, 781 (6th Cir. 1999) (solicitation of crime of violence); see also United States v. Shumate, 341 F.3d 852 (9th Cir. 2003) (solicitation of controlled substance offense); United States v. Lightbourn, 115 F.3d 291 (5th Cir. 1997) (conspiracy). This provision is limited, however, to circumstances where the defendant intended to commit or facilitate the substantive offense. Accordingly, the Ninth Circuit has held that accessory after the fact does not constitute a predicate offense, United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under USSG § 2L1.2), and the Second Circuit held that a New York facilitation conviction did not count because there was no requirement that the defendant intend to commit the offense. United States v. Liranzo, 944 F.2d 73, 78 (2d Cir. 1991).

H. Three Strikes

The “Three Strikes” statute imposes mandatory life imprisonment on a person convicted of a “serious violent felony” in federal court if the person has two previous final convictions on separate prior occasions for two or more serious violent felonies, or one or more serious violent felony and one or more serious drug offense. 18 U.S.C. § 3559(c)(1). Each prior offense used as a basis for enhancement must have been committed after the previous conviction. 18 U.S.C. § 3559 (c)(1)(B). A serious violent felony includes the enumerated offense and any offense punishable by a maximum of ten years or more and that has as an element the use, attempted use, or threatened use, of physical force against another person or involves a substantial risk of such force. USSG § 3559(c)(2)(F). The term serious drug offense means offenses punishable under 21 U.S.C. §§ 841(b)(1)(A), 848 and 960(b)(1)(A), or similar state offenses. USSG § 3559(2)(H). The government must file notice of its intent to seek mandatory life under this provision before trial. § 3559(c)(4). The Fifth Circuit has upheld the constitutionality of this law. United States v. Rasco, 123 F.3d 222 (5th Cir. 1997).

I. Criminal Livelihood

The guidelines establish minimum offense levels for individuals who commit an offense “as part of a pattern of criminal conduct engaged in as a livelihood.” USSG § 4B1.3. The commentary explains that “engaged in a livelihood,” applies if the defendant derived income from a pattern of criminal conduct within a twelve-month period which was more than 2000 times the hourly federal minimum wage, and the “totality of the circumstances shows that such criminal conduct was the defendant’s primary occupation in that twelve month period.” See, e.g., United States v. Hawkins, 2017 WL 3299298 (5th Cir. Aug. 3, 2017). The adjustment can be applied to activity occurring in less than a twelve month period. United States v. Irvin, 906 F.2d 1424, 1426 (10th Cir. 1990). The court is entitled to include the face value of stolen instruments, even if unnegotiated, in determining income. United States v. Quertermous, 946 F.2d 375 (5th Cir. 1991). The Sixth Circuit rejected a livelihood enhancement where the defendant obtained his job through fraud but the job itself was legitimate. United States v. Greene, 71 F.3d 232, 237 (6th Cir. 1995).

J. Repeat Child Sex Offenders

The guideline for “repeat and dangerous sex offender[s] against minors” has two tiers. See USSG § 4B1.5. The first and highest tier is for defendants with previous sexual assault convictions against children and it is designed to incapacitate these individuals. The second tier is for defendants who have engaged in a pattern of sexual activity against minors.

In any case in which the defendant is convicted of a “covered sex crime,” the career offender guideline does not apply and the defendant committed the federal crime “subsequent to sustaining at least one sex offense conviction,” the offense level is the greater of the standard offense level, or of the level according to a table with levels similar to the career offender table. USSG § 4B1.5(a)(1). The criminal history category must be at least a V. USSG § 4B1.5(a)(2). In other cases where the defendant is convicted of a covered sex crime and “engaged in a pattern of activity involving prohibited sexual conduct,” the level is increased five points, with a minimum level of twenty-two. USSG § 4B1.5(b). “Minor” means an individual under eighteen or any undercover officer posing as minor. Id. at cmt. n.1. For purposes of subsection (a), the terms “covered sex crime” and “sex offense conviction” do not include trafficking in, receipt of, or possession of child pornography or a record keeping offense. USSG § 4B1.5, cmt. n.2, 3(A)(i). Under the subsection (b) enhancement, the term “prohibited sexual conduct” applies to production of child pornography, and trafficking in child pornography if the defendant had a previous felony trafficking conviction. USSG § 4B1.5, cmt. n.4(A). The term does not cover receipt or possession of child pornography. Id. The defendant has engaged in a pattern of activity if he engaged in prohibited sexual conduct with a minor on at least two separate occasions. There need not be multiple victims. USSG § USSG § 4B1.5, cmt. n.4(B)(i). See United States v. Brattain, 589 F.3d 445, 448-49 (6th Cir. 93
2008) (holding enhancement applied to single victim but urging district court to consider downward variance). Occasions may be considered without regard to whether they occurred during the course of the offense of conviction or whether they resulted in conviction. United States v. Mills, 843 F.3d 210 (5th Cir. 2016). The Commission recommends that these individuals be sentenced to the maximum term of supervised release and be required to undergo treatment and monitoring. Id. at n.5.

K. Criminal History Departure and Variance

1. Inadequate Criminal History

The Sentencing Commission encourages upward and downward departures where the criminal history overstates or understates the seriousness of a defendant’s criminal record or the likelihood of recidivism. USSG § 4A1.3.

An upward departure may be warranted if “reliable information indicates that the criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” USSG § 4A1.3(a)(1) (Emphasis added). Examples include: (1) a sentence not used in computing criminal history, e.g., tribal or foreign convictions, USSG § 4A1.3(a)(2)(A); United States v. Barakett, 994 F.2d 1107 (5th Cir. 1993); (2) prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions, § 4A1.3(a)(2)(B); see United States v. Taylor, 868 F.2d 125, 127 (5th Cir. 1989); (3) similar misconduct adjudicated in a civil proceeding, § 4A1.3(a)(2)(C); (4) an offense committed while the defendant was pending trial or sentencing, 4A1.3(a)(2)(D); United States v. Ravitch, 128 F.3d 865, 871 (5th Cir. 1997); or (5) similar adult conduct not resulting in conviction. USSG § 4A1.3(a)(2)(E); United States v. Luna-Trujillo, 868 F.2d 122, 124-25 (5th Cir. 1989); see also United States v. Heffron, 314 F.3d 211 (5th Cir. 2002). Note that the offenses must be similar, United States v. Leake, 908 F.2d 550 (9th Cir. 1990); see also United States v. Allen, 488 F.3d 1244 (10th Cir. 2007), and significant. United States v. Martinez-Perez, 916 F.2d 1020, 1025-26 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction). The nature, rather than the number, of prior convictions is more indicative of the seriousness of a defendant’s criminal record. USSG § 4A1.3, comment. (n.2(B)). See, e.g., United States v. Carillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (reversing upward departure where criminal history not egregious). The court may also depart because the defendant previously received “extreme leniency” for a serious offense. USSG § 4A1.3, backd’g. United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002).

In United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009), the district court departed above the guideline range 1) because a misdemeanor state firearm conviction could have been prosecuted as a more serious federal felony, and 2) the police report suggested that a drug conviction was actually trafficking even though the categorical approach prohibited treating it as such. The Fifth Circuit reversed, holding first that the court could not adjust the offense level based upon a hypothetical federal crime. Second, the court could not escape the requirement of the categorical approach by relying on a police report that the enhancement should have applied. 581 F.3d at 255-56. The court is not limited to the § 4A1.3 procedure, however, when it grants a variance. United States v. Gutierrez, 635 F.3d 148 (5th Cir. 2011).

The court cannot depart on the basis of prior cases not counted because they were included in relevant conduct. United States v. Cade, 279 F.3d 265 (5th Cir. 2002) (citing United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001)). Nor can the court depart based on arrests not resulting in convictions without proof the defendant committed the offense. USSG § 4A1.3(a)(3) & comment. (n.3); Williams v. United States, 503 U.S. 193 (1992); United States v. Johnson, 648 F.3d 273 (5th Cir. 2011); United States v. Jones, 444 F.3d 430 (5th Cir. 2006)(cannot depart based on arrest but error harmless); United States v. Cantu-Dominguez, 898 F.2d 968 (5th Cir. 1990); see also United States v. Windless, 719 F.3d 415 (5th Cir. 2013); United States v. Wright, 24 F.3d 732 (5th Cir. 1994) (insufficient evidence defendant possessed firearm where he was passenger in car); but see United States v. Harris, 702 F.3d 226 (5th Cir. 2012) (can consider reliable information such as police report of what he observed).

Commission’s recent Symposium on Alternatives to Incarceration revealed that lengthy prison sentences may actually increase recidivism, while alternatives including intensive supervision and training might reduce it.

The criminal history departures were procedurally regulated as well. In considering an upward departure based on inadequacy of the criminal history, the court used “as a reference, [the] criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles the defendant’s.” USSG § 4A1.3(a)(4)(A). If a defendant was already at the highest criminal history category, the court moved incrementally along the offense levels. USSG § 4A1.3(a)(4)(B). United States v. Pennington, 9 F.3d 1116, 1118 (5th Cir. 1993). The courts had previously held that the sentencing court must consider adjacent categories, determine on the record whether each category is inadequate and must provide reasons for these findings. United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc); see also USSG § 4A1.3(c)(1). The same findings should be made for downward departures. USSG § 4A1.3(c)(2). In a post-Booker world, strict compliance with this procedure may no longer be required. See United States v. Zuniga-Peralta, 442 F.3d 345, 348 & n.2 (5th Cir. 2006).

While a defendant’s criminal history has traditionally been a basis for both upward and downward departures, USSG § 4A1.3, the court now has additional discretion to consider the nature of the prior criminal conduct in determining whether the guideline range is appropriate. See, e.g., United States v. Foreman, 436 F.3d 638, 643 (6th Cir. 2006) (sentencing court must determine whether Guideline range places “over- or under-inflated significance” on prior conviction for crime of violence); see also United States v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006).

2. Career Offender

Sentences under the career offender guideline are among the most severe and the Commission itself has recognized that the sentences do not necessarily promote the statutory sentencing purposes. See USSC, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (Nov. 2004) (hereinafter “Fifteen Year Review”) at 133-34; available at http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm.

One problem is that, by Congressional directive, 28 U.S.C. § 994(h), the Guideline is keyed to statutory maximums, including maximums themselves based on recidivist provisions. See United States v. LaBonte, 520 U.S. 751 (1997). Thus, the career offender guideline, like the crack guideline criticized in Kimbrough, is more the result of political directives than of empirical study.

The Commission, however, has also compounded the problem by defining “crimes of violence” and “controlled substance offenses” more broadly than required by statute. For example, as early as 1992, the Third Circuit noted that a “defendant could be deemed a career violent offender . . .even when he or she never intended harm, nor was there a substantial risk that he or she would have to use intentional force. United States v. Parson, 955 F.2d 858, 874 (3d Cir. 1992). Because some states impose sentences of more than one year on misdemeanors, minor drug offenses can be swept up into the career offender paradigm. See United States v. Colon, 2007 WL 4246470 (D. Vt. Nov. 29, 2007) (departing down where two Massachusetts misdemeanors were considered).

Significantly, while Congress directed the Sentencing Commission to set the guideline at or near the statutory maximum, this directive is addressed to the Commission and does not limit the court’s ability to impose a lower sentence in an individual case. United States v. Martin, 520 F.3d 87, 88-96 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 662-65 (2d Cir. 2008); see also United States v. Corner, 598 F.3d 411, 414 (7th Cir. 2010) (noting that the Solicitor General had conceded this in United States v. Vasquez, 558 F.3d. 1224 (11th Cir. 2009), cert. granted, vacated and remanded, 130 S.Ct. 1135 (2010)).

As the courts have recognized, the career offender guideline creates both unwarranted disparity and unwarranted similarity by treating alike the three-time convicted felons regardless of the severity of their predicate offenses. For example, in United States v. Moreland, 568 F. Supp.2d 674 (S.D.W.Va. 2008), the defendant was facing a career offender sentence of thirty years to life based on his federal conviction for two sales of crack cocaine totaling 7.85 grams and two prior drug convictions involving delivery of a single marijuana cigarette to a prison inmate and delivery of 6.92 grams of crack. He was a relatively young man, a father and a high school graduate with the “ability and potential to become a productive member of society.” 568 F. Supp.2d at 685. The sentencing court noted that the Guidelines had “moved beyond the elimination of unwarranted sentencing disparities and toward the goal of eliminating all disparities,” which is both “impractical” and “undesirable.” Id. at 688 (emphasis in original). The court found this to be particularly true of the career offender guideline.

The career offender provisions of the Guidelines, as applied to this case, perfectly exhibit the limits of a Guideline-centric approach. Two relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this
defendant into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence. The career offender guideline provision provides no mechanism for evaluating the relative seriousness of the underlying prior convictions. Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs courts to substitute an artificial offense level and criminal history in place of each individual defendant’s precise characteristics. This substitution ignores the severity and character of the predicate offenses.

Id. In light of Mr. Moreland’s non-violent and relatively minor criminal history, the court decided to impose the statutory ten-year minimum rather than the career offender sentence.


X. THE SENTENCE: CHAPTERS V, VII

The final sentencing range is determined from a table, Chapter 5, that cross-references the offense level with the criminal history category. The maximum of each range cannot be greater than the minimum by more than six months or twenty-five percent, whichever is greater. 28 U.S.C. § 994(b)(2). After Booker, however, these ranges are advisory.

A. Probation

In general, the guidelines authorize straight probation if the minimum term of imprisonment in the range specified by the sentencing table is zero. USSG §§ 5B1.1(a)(1), 5C1.1(b). If the minimum term is one month but not more than six months, the court may impose a sentence of probation as long as it also imposes a condition of intermittent or community confinement. USSG §§ 5B1.1(a)(2), 5C1.1(c). Probation is prohibited by statute if (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1), (2) the offense of conviction precludes probation, 18 U.S.C. § 3561(a)(2), or (3) the defendant is sentenced at the same time to prison for the same or a different offense. 18 U.S.C. § 3561(a)(3); USSG § 5B1.1(b). In Gall v. United States, 552 U.S. 38, 60 (2007), the Supreme Court recognized that probation is itself a significant form of punishment.

In 2010, the Sentencing Commission expanded Zones B and C by one offense level. In other words, Zone B, authorizing a sentence of community confinement, now includes offense level 11, Criminal History Category I. Zone C, authorizing split sentences, includes offense level 13. The Commission clarifies that a departure from Zone C to the community confinement options in Zone B is authorized if appropriate to accomplish a treatment purpose. The Commission explains that the departure should be considered only if the defendant is a controlled substance or alcohol abuser or suffers from a significant mental illness and the “defendant’s criminality is related to the treatment problem to be addressed.” USSG § 5C1.1, cmt. (n.6).

When probation is imposed, the Guidelines recommend a term of at least one year but not more than five years if the offense level is six or greater. USSG § 5B1.2(a)(1). In any other sentence, the term shall not be more than three years. USSG § 5B1.2(a)(2). If the offense of conviction is a felony, the court must impose at least one of the following conditions: (1) restitution, (2) fine, or (3) community service. 18 U.S.C. § 3563(a)(2); USSG § 5B1.3(a). A defendant convicted of a sex offense must participate in a treatment and monitoring program, USSG § 5B1.3(d)(7), and is subject to special registration and reporting requirements. USSG § 5B1.3(a)(9). The court need not elaborate on a prohibition on possession of a dangerous weapon because it is a standard condition. United States v. Torres-Aguilar, 352 F.3d 934 (5th Cir. 2003). A defendant may be required to give a DNA sample. 18 U.S.C. § 3563(a); USSG § 5B1.3(10).
The court may (1) impose other conditions that “are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, and (2) involve only such deprivation of liberty or property as are reasonably necessary to affect the purposes of sentencing.” 18 U.S.C. § 3563(b); USSG § 5B1.3(b). For example, the court can limit employment. United States v. Mills, 959 F.2d 516 (5th Cir. 1992). Id. USSG § 5B1.4 sets forth standard recommended conditions. The court can limit computer use if a computer was used to commit the offense. USSG § 5B1.3(d)(7)(B), see United States v. Paul, 274 F.3d 155  (5th Cir. 2001), and can require sex offenders to undergo treatment. USSG § 5B1.3(d)(7)(A). Virtually unlimited search authority is recommended for sex offenders under supervision. USSG § 5B1.3(d)(7)(C).

The 2016 amendments reorganize and renumber the standard conditions and reword them to make them less vague and arbitrary, especially with respect to the probation officer’s instructions, exercise of the Fifth amendment right to remain silent, and knowledge of certain violations such as associating with felons. USSG § 5B1.3.

B. Imprisonment

A federal prison sentence commences on the date that the defendant is received into federal custody. 18 U.S.C. § 3585(a). The defendant must be given credit for time spent in official detention prior to sentencing (1) “as a result of the offense for which sentence was imposed, or (2) as a result of other charges for which the defendant was arrested after commission of the offense that have not been credited against another sentence.” 18 U.S.C. ‘3585(b). See Reno v. Koray, 515 U.S. 550 (1995). Only the Attorney General, not the courts, has the authority to determine presentence prison credit. United States v. Wilson, 503 U.S. 329 (1992). Time spent on bond in a halfway house is not credited. Reno v. Koray, supra. See United States v. Smith, 869 F.2d 835 (5th Cir. 1989).

Multiple terms of imprisonment run concurrently unless the court orders, or the statute requires, a consecutive sentence. Terms imposed at different times run consecutively unless the court orders them to run concurrently. 18 U.S.C. § 3584(a). Prison terms for attempt and for another offense that was the “sole objective” of the attempt must be concurrent. Id. A federal court can order a sentence to run consecutively to an unimposed state sentence, Setser v. United States, 566 U.S 231 (2012), but a federal court cannot require its sentence to be served consecutive to an unimposed federal sentence. United States v. Quintana-Gómez, 521 F.3d 495 (5th Cir. 2008). Relying on Setser, the Commission explains that courts generally have discretion whether to impose sentences concurrently or consecutively with respect to other proceedings, including state proceedings. See USSG § 5G1.3, background.

The Guideline sentencing table provides the ranges for advisory guideline prison terms. If the statutory maximum sentence is less than the minimum guideline range, the statutory maximum is the guideline sentence. USSG § 5C1.1(a). Similarly, if the statutory minimum is greater than the guideline range, then the statutory minimum shall be the sentence. USSG § 5G1.1(b). If the count with the highest maximum is less than the required punishment, the sentences run consecutive to the extent necessary to achieve the total punishment. USSG § 5G1.2(d); United States v. Garcia, 322 F.3d 842 (5th Cir. 2003); United States v. Stewart, 190 F.3d 389 (5th Cir. 1999). The court cannot consider a defendant’s refusal to cooperate as a reason for sentencing at the top of the range. United States v. Burgess, 276 F.3d 1284 (11th Cir. 2001).

If the guideline minimum is at least six months, but no more than ten months, the minimum term may be satisfied by imposing a sentence that includes community confinement of at least one month in prison. USSG § 5C1.1(d). Such a sentence is also available if the minimum guideline is one to six months. USSG § 5C1.1(d). Thirty days intermittent confinement (e.g. weekends) equals one month in prison, and one month in community confinement (e.g. half-way house) equals one month in prison. USSG § 5C2.1(e). Intermittent confinement is credited toward a guideline term of imprisonment. USSG § 5C2.1(e). Home detention may also substitute for imprisonment. USSG § 5C1.1(d). The court has discretion to order a “split” sentence including community confinement for an undocumented alien. United States v. Garcia-Ortiz, 310 F.3d 792 (5th Cir. 2002).

The commentary notes that there may be a few cases where a longer term of community confinement is warranted as a substitute for imprisonment, for example, residence in an “approved” drug treatment program. Such a substitution should be considered “only where the defendant’s criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate the problem.” USSG § 5G1.1, cmt. n.6. This substitute is not recommended if the criminal history category is III or above. Id. at n.7. A court cannot, however, impose a longer prison sentence to insure treatment. See Tapia v. United States, 564 U.S. 319 (2011)(citing 18 U.S.C. § 3582(a)).

When a defendant is convicted of multiple counts, the court determines the “total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.”
USSG § 5G1.2(b). In other words, even a non-minimum count will receive a mandatory minimum sentence unless such a sentence is above the statutory maximum for that count. See USSG § 5G1.2, n. 3(B). On the other hand, if the mandatory minimum no longer applies on resentencing, the court must recalculate the guideline range on the remaining counts. USSG § 5G1.2, n. 3(D).

Where the defendant is subject to an undischarged term of imprisonment, the guidelines recommend consecutive sentences if the instant offense was committed while the defendant was serving a term of imprisonment. USSG § 5G1.3(a); see, e.g., United States v. Hill, 42 F.3d 914 (5th Cir. 1995)(consecutive sentence for conspiracy where the conspiracy continued after the undischarged sentence). A consecutive sentence is also recommended, but not required, for an offense committed while on probation or parole if the probation or parole has been revoked. USSG § 5G1.3, cmt. n.3(C).

If the undischarged term resulted from an offense already “fully taken into account in the determination of the offense level for the instant offense,” the sentences are to run concurrently. USSG § 5G1.3(b). United States v. Rangel, 319 F.3d 710 (5th Cir. 2003); United States v. Bell, 46 F.3d 442 (5th Cir. 1995). The concurrent requirement applies if the prior offense was relevant conduct and was considered in determining the offense level. United States v. Lynch, 378 F.3d 445 (5th Cir. 2004) (concurrent even though armed criminal guideline trumped offense level). It does not apply if the prior offense increased the offense level but was not relevant conduct, for example, a prior offense may increase the illegal re-entry offense level or the firearm offense level. USSG § 5G1.3, cmt. n.2(A), (B); see United States v. Reyes-Lugo, 238 F.3d 305 (5th Cir. 2001); United States v. Izaguirre-Losoya, 219 F.3d 437 (5th Cir. 2000). A downward departure is encouraged if the defendant has already discharged a portion or all of a sentence that should have been concurrent. USSG § 5G1.3, cmt. n.4 & USSG § 5K2.23. The judgment should clearly reflect this credit. USSG § 5G1.3, n.2(C). A federal sentence should run concurrent to an anticipated state sentence for relevant conduct. USSG § 5G1.3(b).

In other cases, the Commission recommends that the sentence be consecutive, concurrent or partially concurrent to “achieve a reasonable punishment for the instant offense.” USSG § 5G1.3(c). See United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) (abuse of discretion to impose 262 month sentence consecutive to state life sentence). The courts have permitted downward departures to award credit for time spent in state custody, United States v. Barrera-Sucedo, 385 F.3d 533 (5th Cir. 2004), and INS custody. United States v. Montez-Gaviria, 163 F.3d 697 (2d Cir. 1998); see also United States v. Sanchez-Rodriguez, 161 F.3d 556, 563-64 (9th Cir. 1998) (en banc); USSG § 5G1.3, cmt. n.7. While a downward departure is not expressly authorized for multiple sentences covered by USSG § 5G1.3(c), departure may be appropriate in an “extraordinary case,” for example, where a defendant has served a substantial period of imprisonment for conduct that was only partially relevant conduct. USSG § 5G1.3, cmt. n.3(E).

Defendants serve a substantial portion of their prison sentence because the Sentencing Reform Act reduced the availability of good time credits. A defendant sentenced to serve one year or less will serve a flat year. 18 U.S.C. § 3624(b). After an individual serves one year, he or she may earn up to fifty-four days per year good time credits. Id. The Bureau does not actually award the full fifty-four days because it calculates the credit based on time actually served, a practice recently approved by the Supreme Court. See Barber v. Thomas, 560 U.S. 474 (2010). The Bureau of Prisons is directed “to the extent practicable to assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community.” 18 U.S.C. § 3624(c).

The Bureau of Prisons also has some programs available, which may help reduce a defendant’s sentence. Defendants convicted of a non-violent offense sentenced to serve twelve to thirty months in prison could be sent to an intensive confinement center (aka boot camp) where they served six months in a military style program, and then were released to a halfway house and home detention. 18 U.S.C. § 4046. Unfortunately, the Bureau has decided to discontinue this program. But see Castellini v. Lappin, 365 F.Supp.2d 197 (D. Mass. 2005) (enjoining boot camp closure).

The Bureau’s substance abuse treatment program may also result in up to a year reduction of sentence. 18 U.S.C. § 3621(e). The bureau will not give this reduction, however, to defendants who have previous violent convictions or where firearms were involved in the offense of conviction. The Supreme Court has upheld this limitation on the availability of the program. Lopez v. Davis, 531 U.S. 230 (2001); see also Rublee v. Fleming, 160 F.3d 213 (5th Cir. 1998).

A federal court, upon motion of the Director of the Bureau of Prisons, may reduce a defendant’s term of imprisonment for “extraordinary and compelling reasons,” if the defendant is not a danger to the safety of the community. 18 U.S.C. § 3582(c)(1); USSG § 1B1.13(1)(A). Unfortunately, few individuals have been released under this program.
The Commission has expanded its recommendations concerning compassionate release if the defendant is 1) suffering from a terminal illness, defined as a “serious and advanced illness with an end of life trajectory;” 2) is suffering from a serious physical or medical condition or functional or cognitive impairment, or is experiencing deteriorating physical or mental health due to aging, diminishing the individual’s ability for self-care and from which he or she is not expected to recover. USSG § 1B1.3, cmt. n.1(a)(i), (ii). The minimum age is reduced to 65 and the minimum sentence reduced to 10 years or 75% of the term of imprisonment, whichever is less. Id. cmt. n.1(b). Release is available due to the death or incapacitation of the caregiver of the defendant’s minor children. Id. cmt. n.1(c). Compassionate release is available even if the circumstances were foreseeable at the time of sentencing. Id. cmt. n.2.

C. Supervised Release

1. Term Length

Supervised release begins when the defendant is released from prison. A defendant cannot be given credit on his supervised release for a prison sentence unlawfully served. United States v. Johnson, 529 U.S. 53 (2000). He cannot be revoked for conduct that occurred after the term of release expired. United States v. Lynch, 114 F.3d 61 (5th Cir. 1997).

Statutorily authorized terms of supervised release are (1) three to five years for a Class A or B felony, (2) two to three years for a Class C or D felony, and (3) no more than one year for a Class E felony or a Class A misdemeanor. 18 U.S.C. § 3583(b), USSG § 5D3.2(b). The supervised release term for a person convicted of a federal crime of terrorism involving actual or foreseeable risk of serious bodily injury must be no less than the minimum for the underlying offense and may be up to life. USSG § 5D1.2. A life term of supervised release is also mandated for a person convicted of kidnapping a minor or of a child sex crime. A SORNA conviction is not a sex offense. United States v. Putnam, 806 F.3d 853 (5th Cir. 2015). Even if prison terms are consecutive, supervised release must be concurrent with any supervised release term, USSG. § 5G1.2, cmt. (citing 18 U.S.C. § 3642(c); United States v. Hernandez-Guevara, 162 F.3d 863, 877-78 (5th Cir. 1998); United States v. Myers, 104 F.3d 76 (5th Cir. 1997).

The Commission encourages the exercise of discretion in the imposition of supervised release where a term is not statutorily required. The advisory minimum term of supervised release to two years for Class A and B felonies and one year for Class C and D felonies. USSG § 5D1.2(a). In addition to the statutory factors set forth in 18 U.S.C. § 3583, the Commission recommends that the court consider a defendant’s criminal history and substance abuse in deciding whether and for how long to impose supervised release. USSG § 5D1.1, cmt. n.3. The Commission also encourages early termination where appropriate. USSG § 5D1.2, cmt. n.5.

Where there is a statutory minimum term of supervised release, the Guideline range is the minimum up to the Guideline maximum, not the statutory maximum. For example, if the Guideline range is two to five years, and the statutory range is three years to life, the Guideline range is three to five years. USSG § 5D1.2 n.6. The amendments also clarify that a SORNA conviction is not a “sex offense” subject to the recommended Guideline supervision range of up to life. See USSG § 5D1.2(b)(2) &n.1.

The Commission discourages imposition of supervised release for non-citizen defendants who will be deported. See USSG. 5D1.1(c). This provision is designed to “help courts and probation offices focus limited supervision resources on offenders who need supervision.” Id. (citing Johnson v. United States, 529 U.S. 694, 709 (2000)). Consideration of the factors set forth in 18 U.S.C. § 3553(a) supports elimination of a supervised release term for a non-citizen. Supervised release does not benefit a non-citizen subject to deportation because he cannot be supervised. Nor is it necessary as a deterrent to an alien already facing a potential twenty-year sentence should he return illegally. See 8 U.S.C. § 1326(b)(2).

2. Conditions

A condition of supervision must be “reasonably related” to 1) the nature and circumstances of the offense and the history and characteristics of the defendant, 2) the need for adequate deterrence, 3) the need to protect the public, and 4) effective treatment and training. See 18 U.S.C. § 3583(d)(1). The 2016 amendments revise and clarify some of the recommended conditions in an effort to address concerns raised primarily by the Seventh Circuit that several of the standard conditions are unduly vague, overbroad or inappropriately applied. See e.g., United States v. Siegel, 753 F.3d 705 (7th Cir. 2014); United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); see also United States v. Thompson, 777 F.3d 368 (7th Cir. 2015).
The amendment revises and rearranges many of the standard conditions. Significantly, the revisions add a knowledge requirement to some of those conditions, specifying that a defendant shall not “knowingly” leave the district, USSG §§ 5B1.3(c)(3), 5D1.3(c)(3), or associate with felons. USSG §§ 5B1.3(c)(8), 5D1.3(c)(8). A defendant shall truthfully answer a probation officer’s questions, USSG §§ 5B1.3(c)(4), 5D1.3(c)(4), but a defendant’s “legitimate invocation of the Fifth Amendment privilege against self-incrimination” is not a violation. Id. cmt. n.1. The defendant is directed to follow the probation officer’s instructions “related to the conditions of supervision.” USSG §§ 5B1.3(c)(13), 5D1.3(c)(13).

Thus, the probation officer’s instructions should be limited by those conditions.

The Commission has added recommended special conditions, including the defendant’s support of his or her dependents, USSG §§ 5B1.3(d)(1), 5D1.3(d)(1), and permitting a prohibition on the defendant’s use or possession of alcohol. USSG §§ 5B1.3(d)(4), 5D1.3(d)(4).

Not surprisingly, supervised release can be conditioned upon payment of a fine, restitution and/or the special assessment. United States v. Payan, 992 F.2d 1387 (5th Cir. 1993). But the court cannot condition supervised release on deportation, United States v. Quaye, 57 F.3d 447 (5th Cir. 1995), or repayment of personal debts. United States v. Abrar, 58 F.3d 43 (2d. Cir. 1995). The Fifth Circuit has authorized the court to delegate to the probation officer responsibility for determining a defendant’s ability to pay for treatment. United States v. Warden, 291 F.3d 363 (5th Cir. 2002). Defendants on supervised release may be required to give DNA samples. 18 U.S.C. § 3583(d); USSG § 5D1.3(8). The Guidelines authorize limitations on computer use, USSG § 5D1.3(d)(7)(B), and permit virtually unlimited search authority. USSG § 5D1.3(d)(7)(C).

The court can require a sex offender to notify the community of his conviction. United States v. Coenen, 135 F.3d 938 (5th Cir. 1998). Treatment and monitoring is required for sex offenders. USSG § 5D1.2(c). In United States v. Locke, 482 F.3d 764 (5th Cir. 2007), the Fifth Circuit rejected constitutional challenges under the First and Fifth Amendments to conditions requiring a sex offender to submit to a polygraph and that prohibited possession of a computer or use of the Internet. The court can require a defendant convicted of a sex offense to obtain prior approval for a variety of activities including residence, association with minors and use of the Internet. See e.g., United States v. Rodriguez, 558 F.3d 408, 414-16 (5th Cir. 2011). In United States v. Fernandez, 776 F.3d 344 (5th Cir. 2015), the Fifth Circuit struck down a computer restriction where there was no evidence the computer was used to commit the SORNA offense. See also United States v. Duke, 788 F.3d 392 (5th Cir. 2015) (no evidence defendant used computer to commit sex offense).

The Fifth Circuit recently issued two important decisions regarding mental health treatment. First, the court cannot delegate to the probation office the decision whether such treatment will be required. United States v. Franklin, 838 F.3d 564 (5th Cir. 2016). Second, such treatment can be ordered only if the record shows it is needed. United States v. Gordon, 838 F.3d 597 (5th Cir. 2016).

D. Revocation of Probation and Supervised Release

Revocation proceedings must comport with due process of law. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). At a minimum, due process requires that the defendant be afforded:

a) Written notice of the claim violation of [probation or] parole;
b) disclosure to the [probationer or] parolee of evidence against him;
c) opportunity to be heard in person and to present witnesses and documentary evidence;
d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
e) a “neutral and detached” hearing body . . . ; and
f) a written statement by the fact finders as to the evidence relied on and reasons for revoking probation or parole.

Scarpelli, 411 U.S. 786 (quoting Morrissey, 408 U.S. at 489). Proof beyond a reasonable doubt is not required but the court cannot rely solely on hearsay. McBride v. Johnson, 118 F.3d 432 (5th Cir. 1997); accord United States v. Jimison, 825 F.3d 260 (5th Cir. 2016). The court need only be “reasonably satisfied” that the defendant has committed the violation. United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981). Probation can be revoked on the basis of an offense committed prior to the commencement of probation. United States v. Cartwright, 696 F.2d 344 (5th Cir. 1983).

The guidelines require the probation officer promptly to report any violation of probation or supervised release that constitutes new criminal conduct other than conduct that constitutes a petty offense.
U.S.S.C. § 3583(h); United States v. McCullough, 46 F.3d 400 (5th Cir. 1995); see also USSG § 7B1.3, cmt. n.2. In Johnson v. United States, 529 U.S. 694 (2000), the Supreme Court held that the earlier version also permitted reimposition of supervised release after a term of imprisonment. Upon revocation of supervised release, the court can impose consecutive prison terms. United States v. Gonzalez, 250 F.3d 923 (5th Cir. 2001). Prison terms on revocation, however, are limited by the statutory maximum prison sentence. For example, a defendant subject to a two-year prison sentence upon revocation cannot receive a two-second-year sentence if he is revoked again. United States v. Jackson, 329 F.3d 406 (5th Cir. 2003). Supervised release cannot be imposed on a juvenile whose probation is revoked. United States v. Sealed Appellant, 123 F.3d 232 (5th Cir. 1997).

Revocation is mandatory if the defendant possesses a controlled substance, a firearm in violation of law, or refuses to comply with drug testing. 18 U.S.C. §§ 3565(b), 3583(g). An unspecified prison term is required, id., but the court can consider the availability of drug treatment programs as an alternative if the defendant has failed a drug test. 18 U.S.C. §§ 3563(a), 3583(d); USSG § 7B1.4, cmt. n.6. A lab report of drugs found in the urine may be sufficient to establish drug possession, United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993), but the due process clause requires that the defendant be given the opportunity to challenge the report. United States v. Martin, 984 F.2d 308 (9th Cir. 1993).

The Sentencing Commission has promulgated policy statements establishing a table which sets forth the range of punishment for revocations of probation. USSG § 7B1.4. The severity of the new sentence depends on the severity of the violation. Id. These policy statements are not binding and the sentencing court’s decision will be reversed only if imposition of the sentence was in violation of law or plainly unreasonable. See United States v. Hernandez-Martinez, 485 F.3d 270 (5th Cir. 2007); United States v. Pena, 125 F.3d 285 (5th Cir. 1997); United States v. Escamilla, 70 F.3d 835 (5th Cir. 1995); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994). A consecutive sentence upon revocation is recommended by not mandated. USSG § 7B1.3(f). The Commission recommends that in revoking probation or supervised release, the court should increase the prison term above the amount that the defendant would normally be credited for the time spent in custody, other than time pending a decision on the revocation. USSG § 7B1.3(3).

The courts have applied the prohibition on increasing a prison sentence to provide treatment, see 18 U.S.C. § 3582; Tapia v. United States, 564 U.S. 319 (2012), to revocation of supervised release. See, e.g., United States v. Molignaro, 649 F.3d 1 (1st Cir. 2011). Note that in contrast to the imposition of the original sentence, punishment is not an appropriate consideration on revocation. See United States v. Miller, 634 F.3d 841, 844 (5th Cir. 2011) (distinguishing § 3583(e) from § 3553(a)(2)). See also United States v. Culbertson, 712 F.3d 235 (5th Cir. 2013).

E. Restitution

With respect to restitution, the guidelines essentially rely on the Victim Witness Protection Act (“VWPA”), which provides that the court may order a defendant convicted under Title 18 or under the Federal Aviation Act of 1958 (49 U.S.C. § 1472) to make restitution in lieu of, or in addition to, any other penalty. 18 U.S.C. § 3663(a). The court need not order restitution if the court determines that fashioning an order of restitution would unduly complicate and prolong the sentencing process. USSG § 3663(d).

In determining whether to order restitution, the court shall consider the “loss sustained by any victim as a result of the offense,” the financial resources of the defendant, and the defendant’s financial needs, earning ability and dependents. 18 U.S.C. § 614(a). Only actual losses caused by the offense are reimbursable. United States v. Holley, 23 F.3d 902 (5th Cir. 1994); see also United States v. St. Junius, 739 F.3d 193, 214-15 (5th Cir. 2013); United States v. Espinoza, 677 F.3d 730 (5th Cir. 2012) (no restitution to pawnshop owner in felon in possession case); United States v. Hinojosa, 484 F.3d 337 (5th Cir. 2007); United States v. Schinnell, 80 F.3d 1064 (5th Cir. 1996). But see United States v. Lewis, 104 F.3d 690 (5th Cir. 1996) (loss was face value of food stamps). While gain to a defendant may be considered in establishing a defendant’s offense level under the guidelines, it is not sufficient alone to order restitution.
under the VWPA, which requires a real or actual loss to the victim. United States v. Jimenez, 77 F.3d 95, 99-100 (5th Cir. 1996). Restitution may include attorneys’ fees associated with civil recovery if it was part of the fraud. United States v. Mikolacezyk, 144 F.3d 53 (5th Cir. 1998), but not foreclosure expenses, as such would occur regardless of the fraudulent scheme. United States v. Blackburn, 9 F.3d 353, 355 (5th Cir. 1993). A defendant’s inability to pay at the time of the restitution order does not bar a requirement of restitution. United States v. Ryan, 874 F.2d 1052, 1054 (5th Cir. 1989).

Any dispute concerning the amount or type of restitution is resolved by a preponderance of the evidence. 18 U.S.C. § 3664(d). The government bears the burden of demonstrating the loss, while the defendant bears the burden of demonstrating his or her financial resources and needs. Id. The Sixth Amendment right to jury trial does not apply to restitution awards. United States v. Garza, 429 F.3d 165 (5th Cir. 2005). A victim is not entitled to collect twice but the defendant bears the burden of establishing that he has already made payment in a civil proceeding. United States v. Mmahat, 106 F.3d 89 (5th Cir. 1997). Similarly, a defendant must show that the victim received value in consideration for a civil release. United States v. Scheinbaum, 136 F.3d 443 (5th Cir. 1998).

Prior to November 1990, the VWPA provided that “a defendant convicted of an offense” could be ordered to “make restitution to any victim of such offense.” 18 U.S.C. § 3663(a)(1). In Hughey v. United States, 495 U.S. 411 (1990), the Supreme Court held that a court could order restitution under this statute only for losses resulting from the offense of conviction. There is a split in the circuits over whether conviction for conspiracy or an offense involving a scheme permits an order of restitution for all losses resulting from the criminal scheme. Compare United States v. Sharp, 941 F.2d 811, 815 (9th Cir. 1991) (restitution on losses limited to specific mailings); with United States v. Stouffer, 986 F.2d 916, 928 (5th Cir. 1993) (conviction for participation in scheme may allow broader restitution order); United States v. Chaney, 964 F.2d 437 (5th Cir. 1992) (same).

In response to Hughey, Congress enacted the Crime Control Act of 1990 which amended the VWPA to provide for an order of restitution “in any criminal case to the extent agreed to by the parties in a plea agreement,” 18 U.S.C. § 3663(a)(3), and to expand the definition of victim of an offense to include “any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.” 18 U.S.C. § 3663(a)(2). The amended provision concerning plea agreements applies whether or not the offense was committed prior to enactment of the amended version. United States v. Arnold, 947 F.2d 1236, 1238 (5th Cir. 1991). In United States v. Hughey (Hughey II), 147 F.3d 423 (5th Cir. 1998), the Fifth Circuit held that even the new statute limits restitution to harm caused by conduct resulting in conviction. See also United States v. Mancillas, 172 F.3d 341 (5th Cir. 1999).

The Mandatory Victim Restitution Act of 1996 requires restitution for any victim who has suffered a physical injury or pecuniary loss as a result of 1) a crime of violence, 2) an offense against property under Title 18, including fraud or deceit, or 3) offenses relating to tampering with consumer products. 18 U.S.C. § 3663A(c)(1). The section does not apply if the “number of identifiable victims is so large as to make restitution impracticable,” or “determining the complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentence process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” § 3663A(c)(3). The court must order restitution in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(D)(1)(A); USSG § 5E1.2. The Fifth Circuit has held that the MVRA does not violate the Eighth Amendment or the constitutional doctrine of separation of powers and that any claim that potential imprisonment violated the due process and equal protection rights of the indigent was speculative because there had been no effort to imprison the defendant. United States v. Butler, 137 F.3d 1371 (5th Cir. 1998). The court cannot, however, order immediate payment of restitution in full if the defendant does not have the money to pay. United States v. Myers, 198 F.3d 160 (5th Cir. 1999). Nor can the court delegate to the probation officer the authority to set a payment schedule. United States v. Albro, 32 F.3d 173 (5th Cir. 1994).

As long as the sentencing court expresses its intent to impose a restitution order within ninety days, it need not finalize the amount within that period. Dolan v. United States, 560 U.S. 605 (2010). The court can order both forfeiture of ill-gotten gains and restitution. United States v. Taylor, 582 F.3d 1558 (5th Cir. 2009).

F. Fines

In general, the maximum fine permitted by law is $250,000 for an individual convicted of a felony or a misdemeanor resulting in death, $100,000 for a Class A misdemeanor, and $5,000 for other offenses. 18 U.S.C. § 3571(a). The maximum penalty for an organization is double the maximum penalty for individuals. Id. § 3571(c)(1) - (7). Certain statutes, for example, Title 21 and Title 26, provide their own maximum fines, which are controlling for offenses covered by those statutes. In the alternative,
if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under the subsection would unduly complicate or prolong the sentencing process.


Although the statute merely authorizes the court to impose a fine, 18 U.S.C. § 3571(c), the guidelines require imposition of a fine unless “the defendant establishes that (1) he is not able, and even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant’s dependents.” USSG § 5E4.2(f). In these circumstances, the court may consider alternatives but must still impose a “punitive” sanction. Id. Community service is the generally preferred alternative. Id.

Guideline 5E4.2(c)(3) provides a table of minimum fines and maximum fines tied to the guideline offense level. The minimum fine is the greater of (1) the minimum fine in the table, or (2) the “pecuniary gain to the defendant, less restitution made or ordered.” USSG § 5E4.2(c)(1). The maximum fine is the greater of (1) the maximum fine in the table, (2) twice the “gross pecuniary loss caused by the offense,” or (3) three times the “gross pecuniary gain to all participants in the offense.” Id. § 5E4.2(c)(2). Guideline (c)(2) does not limit the maximum fine if the statute authorizes a fine greater than $250,000 or daily fines. Id. § 5E4.2(d). A defendant can be sentenced to pay just a fine if his guideline punishment range is 0-6, but if he has not paid in full at sentencing, payment should be conditioned on probation. USSG § 5E1.1, cmt. n.1. Fines are intended to be punitive. 5E4.2(e). In determining the appropriate fine, the court can consider the costs of imprisonment and supervision. USSG § 5E1.2(d)(7).

The appellate court will review the legality of a fine under the same standards as it reviews guideline prison sentences. United States v. Wilder, 15 F.3d 1292, 1301-02 (5th Cir. 1994) (departure unreasonable); see also United States v. Painter, 375 F.3d 336 (5th Cir. 2004) (reversing upward departure based on defendant’s assets and cost to government). The Fifth Circuit has held that a fine for a Class B felony cannot be probated because probation is not available for such a felony, United States v. Altamirano, 11 F.3d 52 (5th Cir. 1993), while the Eighth Circuit held that the guidelines do not authorize committed fines. United States v. Bauer, 19 F.3d 409 (8th Cir. 1994).

The court must determine that the defendant does have the ability to pay before imposing a fine, United States v. Pattan, 931 F.2d 1035 (5th Cir. 1991), but the court can consider the resources of the defendant’s family in assessing a fine, United States v. Fabregat, 902 F.2d 331 (5th Cir. 1990); and can assess a fine even if the defendant is unable to pay. United States v. Altamirano, 11 F.3d 52, 53 (5th Cir. 1993). The defendant bears the burden of proving inability to pay a fine, United States v. Leal, 74 F.3d 600, 608 (5th Cir. 1996); United States v. Matovsky, 935 F.2d 719, 722 (5th Cir. 1991), but can rely on the presentence report to meet his burden. United States v. Fair, 979 F.2d 1037 (5th Cir. 1992). The court cannot impose a fine above the guideline range merely because a defendant is affluent. United States v. Painter, 375 F.3d 336 (5th Cir. 2004).

A defendant is subject to resentencing if he or she “knowingly fails to pay a delinquent fine.” 18 U.S.C. § 3614(a); USSG § 5E4.2(h). The defendant may be sentenced to prison under this statute, only if the court finds:

(1) the defendant willfully refused to pay the delinquent fine or had failed to make sufficient bona fide efforts to pay the fine; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

18 U.S.C. § 3614(b). Willful failure to pay a fine is itself an offense punishable by up to one year in jail and/or twice the amount of the unpaid balance of the fine or $10,000. 18 U.S.C. § 3615.

G. Special Assessment

Title 18, United States Code, Section 3013, requires an assessment of $100 for each felony conviction and $5 to $25 for misdemeanor convictions. The Supreme Court has held that section 3013 was not passed in violation of the origination clause of the United States Constitution. United States v. Munoz-Flores, 495 U.S. 385 (1990). There is a $5000 assessment on non-indigent defendants convicted of sex offenses. 18 U.S.C. § 3014.

XI. PLEA AGREEMENTS

A. Charge and Sentence Agreements

Federal Rule of Criminal Procedure 11 permits a prosecutor to agree to: (1) dismiss other charges,
Fed. R. Crim. P. 11(c)(1)(A); (2) make a non-binding sentencing recommendation, Fed. R. Crim. P. 11(c)(1)(B); or (3) make a sentencing recommendation that the court must accept or permit the defendant to withdraw his or her plea. Fed. R. Crim. P. 11(c)(1)(C). Before accepting a guideline plea, the court must admonish the defendant of any statutory minimum or maximum sentence, including special parole or supervised release, and the fact that the court must consider the sentencing guidelines but can depart from those guidelines. Fed. R. Crim. P. 11(c)(1); United States v. Reyes, 300 F.3d 555 (5th Cir. 2002). Any failure to give these admonishments is subject to a harmless error analysis, or plain error if there was no objection. United States v. Vonn, 535 U.S. 55 (2002). The court need not advise the defendant of the applicable guideline range, United States v. DeFusco, 930 F.2d 413 (5th Cir. 1991), and a miscalculation of the guideline range is not normally a basis for withdrawal of the plea. United States v. Gaitan, 954 F.2d 1005 (5th Cir. 1992). But see United States v. Castano, 211 F.3d 871 (5th Cir. 2000) (plea may be involuntary if attorney gave erroneous advice about guidelines).

The Sentencing Commission has issued a number of policy statements designed to ensure that plea bargaining practices (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a) and (2) do not perpetuate unwarranted sentencing disparity. USSG § 6.5. The Commission’s standards for acceptance of plea agreements direct the courts to make certain that the agreement does not violate the spirit of the guidelines. USSG § 6B1.2. The court has discretion to reject a plea agreement to dismiss charges. United States v. Jeter, 315 F.3d 44 (5th Cir. 2002).

A plea agreement can be accompanied by a written stipulation of facts relevant to sentencing, USSG § 6B1.4(a), but the court is not bound by the stipulation. USSG § 6B1.4(d); United States v. Rodriguez, 62 F.3d 723 (5th Cir. 1995); United States v. Garcia, 902 F.2d 324 (5th Cir. 1990). The court must ascertain whether there is a factual basis for the stipulation, United States v. Martin, 893 F.2d 73 (5th Cir. 1990), and the stipulation must be made in writing or on the record. USSG § 1B1.2(a), cmt. n.1. The parties’ stipulation to facts that would support an offense level higher than the count of conviction will result in a guideline sentence based on the higher level only if the stipulation is expressly included in the plea agreement. USSG § 1B1.2(a) cmt. n.1. See generally Braxton v. United States, 500 U.S. 344 (1991). The Commission recommends that the government disclose to the defendant factors relevant to sentencing. USSG § 6B1.2, cmt.

In federal plea bargaining, the defendant can obtain some benefit by (1) pleading to a charge that does not include a mandatory minimum sentence, See, e.g., 21 U.S.C. § 841(b)(1)(C), not 21 U.S.C. §§ 841(b)(1)(A), (B); (2) agreeing that there will be no statutory enhancement, See, e.g., 18 U.S.C. § 924(e); (3) pleading to an inchoate offense which may limit the statutory maximum, e.g., 18 U.S.C. § 3 (misprision); 21 U.S.C. § 843 (use of communication facility to further a drug transaction), and may also reduce the guideline, See, e.g., USSG § 2X3.1, as long as the defendant did not commit the underlying offense. See United States v. Warters, 885 F.2d 1266 (5th Cir. 1989). The parties can also agree on guideline adjustments, United States v. Valencia, 985 F.2d 758 (5th Cir. 1993) (government breached agreement to recommend acceptance of responsibility), see also United States v. Roberts, 624 F.3d 241 (5th Cir. 2010) (government breached by advocating for career offender enhancement), to recommend bottom of the guidelines, United States v. Williams, 821 F.3d 656 (5th Cir. 2016), or that the government will not make any sentencing recommendation. See United States v. Saling, 205 F.3d 764 (5th Cir. 2000) (government breached agreement not to recommend consecutive sentence); United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992) (agreement to make no recommendation is agreement not to take a position on guideline application). The judgment must specify if a non-Guidelines sentence was granted pursuant to a plea agreement. USSG § 6B1.2.

The government often requires a waiver of appeal as a condition of a plea, sometimes even reserving its right to appeal. The Fifth Circuit has reluctantly upheld such waivers, United States v. Melancon, 972 F.2d 566 (5th Cir. 1992); see also United States v. Kelly, 974 F.2d 22 (5th Cir. 1992); United States v. Wilkes, 20 F.3d 651 (5th Cir. 1994) (waiver of appeal waived § 2255 relief), but requires the district court to pay special attention in explaining the waiver to the defendant. United States v. Baty, 980 F.2d 977 (5th Cir. 1992). “Implicit in any waiver is the assumption that the sentence imposed will be consistent with the statute and sentencing guidelines. A waiver of that assumption must be explicit; it will not be deemed implicit in a general waiver.” United States v. Capaldi, 134 F.3d 307, 308 (5th Cir. 1998); see also United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998) (reversing waiver of appeal outside of guidelines absent indication of what guideline applied). In upholding the waiver, the Fourth Circuit held the government to the waiver as well. United States v. Guevara, 949 F.2d 706 (4th Cir. 1991). Appeal waivers are strictly construed against the government. See, e.g., United States v. Palmer, 456 F.3d 484 (5th Cir. 2006); United States v. Harris, 434 F.3d 767 (5th Cir. 2005). A waiver of the manner of imposing sentence waives a Booker appeal. United States v. Burns, 433 F.3d 442 (5th Cir. 2005). It is up to the government to seek enforcement of the waiver. United States v. Lang, 440 F.3d 212 (5th Cir. 2006); United States v. Story, 439 F.3d 226 (5th Cir. 2006). Where the prosecutor chooses to abandon the
plea agreement, the defendant is likewise released from the waiver. United States v. Keresztrur, 293 F.3d 750 (5th Cir. 2002). An attorney who prosecutes an appeal in the face of an appellate waiver is subject to sanction. United States v. Gaitan, 171 F.3d 222 (5th Cir. 1999).

B. Cooperation

1. Power To Depart

Both Congress and the Commission have expressly recognized the propriety of a departure for a defendant who offers “substantial assistance” in the investigation or prosecution of a crime. 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n); USSG § 5K1.1. In evaluating a request for departure under this section, the court’s considerations may include: (1) the court’s “evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered,” (2) the truthfulness, completeness and reliability of the defendant’s information, (3) the nature and extent of assistance, (4) any injury suffered or risk of injury to the defendant or his family resulting from assistance, and (5) the timeliness of the assistance. USSG § 5K1.1(a)(1)-(5).

The application of section 5K1.1, and its statutory companion, 18 U.S.C. § 3553(e), is predicated upon the filing of a motion by the government. Wade v. United States, 504 U.S. 181 (1992). In theory at least, a defendant can challenge a refusal to request a substantial assistance departure if the refusal was “based on an unconstitutional motive . . . say, because of the defendant’s race or religion.” Id. at 185 (citing Wayte v. United States, 470 U.S. 598 (1985)). A unanimous Court held, however, that the defendant had not made a showing of invidious purpose sufficient to justify an inquiry into the prosecutor’s motives. Id. at 186-87.

The Fifth Circuit recently joined the other circuits, however, in holding that the sentencing court has the authority to grant a variance for cooperation even without a government motion, pursuant to 18 U.S.C. § 3553(a). United States v. Robinson, 741 F.3d 588, 599-601 (5th Cir. 2014). Citing United States v. Fernandez, 443 F.3d 19, 33-34 & n.10 (2d Cir. 2006), the court recognized that such cooperation bears upon the history and characteristics of the defendant including her remorse and rehabilitation. Robinson, 741 F.3d at 600.

A prosecutor cannot renege on written assurances that he will move for downward departure even if those assurances are not contained in the written plea agreement itself. United States v. Melton, 930 F.2d 1096 (5th Cir. 1991); see also United States v. Watson, 988 F.2d 544 (5th Cir. 1993) (reaffirming Melton post-Wade). In United States v. Hernandez, 17 F.3d 78 (5th Cir. 1994), the government argued that the use of the word “may” gave it discretion not to request a departure where the defendant did not testify. At the plea, however, the government said that the motion would be made on the basis of information or testimony and that the government was aware that the defendant had been in jail for six months and thus could only hope to provide what he did, that is, “jail house scuttlebutt.” 17 F.3d at 81. The appellate court held that the government’s interpretation would create an “illusory bargain” and that the government must file where the defendant does everything he can while the government simply decides that it does not need or does not wish to use the assistance. 17 F.3d at 82 & n.5 (citing Watson & Melton). Moreover, the government must give the defendant the opportunity to cooperate. United States v. Laday, 56 F.3d 24 (5th Cir. 1995). The court has the authority to review for bad faith the government’s refusal to move for downward departure even if the plea agreement gives the government “sole discretion” whether to file such a motion. United States v. Isaac, 141 F.3d 477 (3d Cir. 1998). A guilty plea based on the court’s erroneous assurance that it can enforce a substantial assistance bargain is invalid. United States v. Amaya, 111 F.3d 386 (5th Cir. 1997).

The court must rule on a government motion for downward departure before imposing sentence. United States v. Mitchell, 964 F.2d 454 (5th Cir. 1992). In United States v. Hashimoto, 193 F.3d 840 (5th Cir. 1999), the Fifth Circuit reversed where the court said it was granting a downward departure but then sentenced within the guideline range. The Fifth Circuit held that the court should deny the request for departure or sentence below the range. In rare instances, the court may be able to depart down to prevent inequity occurring from leniency afforded a codefendant who cooperated. Melton, 930 F.2d at 1099. But see United States v. Brown, 29 F.3d 953, 959 (5th Cir. 1994); Madison, 990 F.2d at 183.

The court can depart below a statutory minimum based on substantial assistance only if the government requests pursuant to 18 U.S.C. § 3553(e). Melendez v. United States, 518 U.S. 120 (1996). A motion for downward departure includes authority to depart in a Section 924(c) case. United States v. James, 468 F.3d 245 (5th Cir. 2006). Once the government makes the requisite motion, the court has an independent duty to evaluate the extent of departure, if any, United States v. Johnson, 33 F.3d 8 (5th Cir. 1994); see also United States v. Damer, 910 F.2d 1239 (5th Cir. 1990). The Eighth Circuit upheld the government’s right to request a reduction on only some counts as long as the government does not attempt to dictate the sentence. United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). Normally, the extent of the departure is not reviewable. United States v. Alvarez, 51 F.3d 36 (5th Cir. 1995).
The government also has a year to file a motion to reduce the sentence based on the defendant’s post-sentence assistance. Fed. R. Crim. P. 35(b). This time period may be extended if the defendant provides assistance that could not have been provided earlier, or if the information was not useful within the year. Fed. R. Crim. P. 35(b). A court should not limit the initial reduction in the hope of a second chance pursuant to Rule 35(b). United States v. Bureau, 52 F.3d 584 (6th Cir. 1995). A Rule 35(b) motion is available even after one year to a defendant who knew the information from the beginning but was not asked about it by the government. United States v. Morales, 52 F.3d 327 (1st. Cir. 1995).

2. Use Of Information

Guideline 1B1.8 provides:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in agreement.

USSG § 1B1.8(a). Guideline 1B1.8 prohibits consideration of information presented by a cooperating defendant to the probation officer. United States v. Marsh, 963 F.2d 72 (5th Cir. 1992); United States v. Shortee, 887 F.2d 253 (10th Cir. 1989); see also United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994) (cannot consider information about concealed document obtained during plea discussion); but see United States v. Miller, 406 F.3d 323 (5th Cir. 2005). The government has the burden of proving that any additional conduct included in the presentence report was discovered from an independent source. United States v. Taylor, 277 F.3d 721 (5th Cir. 2001). The court may consider immunized information, however, in deciding whether to depart for assistance. USSG § 1B1.8(b). But see United States v. Conway, 81 F.3d 15 (1st Cir. 1996) (consideration of immunized information violates due process).

The Fifth Circuit held that the government violated its agreement when it argued to the sentencing court that the defendant should be held responsible for additional relevant conduct based solely on immunized statements. See United States v. Harper, 643 F.3d 135 (5th Cir. 2011). The court of appeals rejected the government’s argument that its information was necessary to prevent a “fraud” on the court. The defendant had not denied the conduct but had merely objected that it had not been proved by reliable evidence. Id. at 141-42.

Not surprisingly, the limitation on the use of information does not apply if the government was aware of the information before entering into the agreement. USSG § 1B1.8(b)(1). See United States v. Kinsey, 917 F.2d 181, 184 (5th Cir. 1990) (remanding for determination whether government was previously aware of information). Similarly, the limitation does not apply to statements made to law enforcement officers prior to any agreement with the prosecutors. United States v. Rutledge, 900 F.2d 1127 (7th Cir. 1990). Information obtained through cooperation may be used in determining criminal history and career offender status. USSG § 1B1.8(b)(2). The court can also consider information from a codefendant that was merely corroborated through the defendant’s cooperation. United States v. Gibson, 48 F.3d 876 (5th Cir. 1995).

XII. NON GUIDELINE SENTENCES AND DEPARTURES

A. General

The Sentencing Reform Act of 1984 permitted the court to depart from the guideline range if it found “that there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b). To determine whether a circumstance was adequately taken into consideration, the court considered the sentencing guidelines, policy statements, and commentary. Id. In Koon v. United States, 518 U.S. 81 (1996), the Supreme Court directed the sentencing court to determine, whether a factor was a permissible basis for departure and whether it was outside the “heartland” of the existing guidelines. 518 U.S. at 95.

In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court declared that the federal guidelines should be advisory, and excised the limitations contained in 18 U.S.C. § 3553(b). 543 U.S. at 245, 259-60. The sentencing court’s discretion is now significantly broadened and the court must make an individualized assessment of the facts of each case. Gall v. United States, 552 U.S. 38, 46 (2007).

Before Booker, a sentencing court’s authority to depart depended on whether a factor was prohibited, encouraged, discouraged, or not mentioned by the Sentencing Commission. Koon, 518 U.S. at 93-96. Encouraged departures were permitted if not already adequately considered and “warranted.”
USSG' 2K2.0 (a)(2)(A); Koon, 518 U.S. at 96. Discouraged and unmentioned departures were permissible only if present "to an exceptional degree," USSG’ 2K2.0(a)(4); Koon, 518 U.S. at 95-96, in other words, if the circumstances were “extraordinary.” See, e.g., United States v. Simmons (Simmons I), 470 F.3d 1115, 1130 (5th Cir. 2006).

In rendering the Guidelines advisory, the Supreme Court authorized sentencing courts, not only to depart from the Guidelines, but also to vary from the recommended ranges in accordance with 18 U.S.C. § 3553(a). After Booker, it should be “pellucidly clear” that the particular factors in any given case need not be “extraordinary” to warrant a variance from the Guidelines. Gall, 552 U.S. at 41.

Indeed, the Fifth Circuit has held unequivocally that after Gall and Kimbrough, “[w]ithout a doubt, the requirement of ‘extraordinary circumstances’ is no longer the law.” United States v. Simmons (Simmons II), 568 F.3d 564, 568 (5th Cir. 2009) (citing United States v. Rodriguez-Rodriguez, 530 F.3d 381, 384 n.4 (5th Cir. 2008)). In Simmons II, the court of appeals announced the “death of the ‘extraordinary circumstances’ language from Simmons I,” and remanded the case to allow the district court to consider whether a downward variance based on age, a discouraged factor under USSG’ 5H1.1, was warranted. Simmons II, 568 F.3d at 568, 570.

Other circuit courts have likewise made it clear that a defendant’s individual circumstances need not be extraordinary to justify a non-Guidelines sentence. The Seventh Circuit deems “[t]he concept of departures . . . obsolete in post-Booker sentencing . . .[although] the district court may apply those departure guidelines by way of analogy in analyzing the section 3553(a) factors.” United States v. Schroeder, 536 F.3d 746, 755-56 (7th Cir. 2008) (emphasis added) (agreeing with district court that defendant’s family circumstances including adopted daughter with immune deficiency were extraordinary).

In United States v. Chase, 560 F.3d 828 (8th Cir. 2009), the Eighth Circuit vacated a sentence where the district court erroneously equated variances and departures. The court of appeals emphasized:

Variances do differ from departures. . . . Factors ordinarily considered irrelevant in calculating the advisory guideline range, or in determining whether a guideline departure is warranted, can be relevant in deciding whether to grant a variance. . . .

560 F.3d at 830 (citations omitted). The Eighth Circuit went on to address not only the propriety but the necessity of addressing the types of personal circumstances in a given case:

In fashioning a “sentence sufficient, but not greater than necessary,” 18 U.S.C. § 3553(a), “district courts are not only permitted, but required to consider the history and characteristics of the defendant.” . . . As a consequence, factors such as a defendant’s age, medical condition, prior military service, family obligations, entrepreneurial spirit, etc. can form the bases for a variance even though they would not justify a departure. Chase, 560 F.3d at 830-31 (emphasis added) (citing, inter alia, United States v. Lamoreaux, 422 F.3d 750, 756 (8th Cir. 2005) (approving consideration of military service, pregnancy of defendant’s wife and his need to care for his children, and his “entrepreneurial spirit”)). Rejecting the government’s reliance on pre-Booker case law, the Eighth Circuit clarified that “departure precedent does not bind district courts with respect to variance decisions, it is merely persuasive authority.” Id. at 832 (emphasis in original).

Similarly in United States v. Jones, 460 F.3d 191 (2d Cir. 2008), the Second Circuit affirmed a district court’s variance from a thirty-to-thirty-seven-month Guideline range to a sentence of fifteen months for a defendant convicted of being a felon in possession of a firearm and possession of five bags of marijuana based on the defendant’s “consistent work ethic,” his family obligations and support, his father’s recent death and his efforts at rehabilitation. Jones, 460 F.3d at 194. The government argued that the sentence was not permissible because the Sentencing Commission had discouraged departures based on a defendant’s education, emotional condition, employment record, family ties and good works. Jones, 460 F.3d at 194 (citing USSG’ 5H1.2, 5H1.3, 5H1.5, 5H1.6, 5H1.11). As the Second Circuit recognized, the government’s reliance on pre-Booker policy statements and court decisions revealed a fundamental "misconception" concerning today’s non-Guideline sentences. 460 F.3d at 194-95. The court explained:

By citing the Guidelines’ departure standards, however, the Government fails to appreciate that Jones’s post-Booker sentence is not a Guidelines departure; it is a non-Guidelines sentence. . . . With the entire Guidelines scheme rendered advisory by the Supreme Court’s decision in Booker, the Guidelines limitations on the use of factors to permit departures are no more binding on sentencing judges than the calculated Guidelines ranges themselves. Of course, a sentencing judge’s obligation to “consider” the Guidelines . . . includes the obligation to consider the Commission’s relevant policy statements as well as the calculated Guideline range. But “consideration” does not mean mandatory adherence.

Id. at 194 (emphasis added, citations omitted).
In United States v. Martin, 520 F.3d 87, 93-95 (1st Cir. 2008), the First Circuit approved a district court’s ninety-one-month variance, which was based in part on the defendant’s family circumstances and support. The court of appeals indicated that the Sentencing Commission’s policy statements were still pertinent but “normally not decisive as to what may constitute a permissible ground for a variant sentence in a given case.” 520 F.3d at 93. The appellate court added that a district court may take “idiosyncratic family circumstances into account, at least to some extent, in fashioning a variance sentence.” Id. (citations omitted).

The Sixth Circuit anticipated the Supreme Court’s rejection in Gall of mathematical ratios in upholding a sixty-eight-month variance to the mandatory 120-month minimum for a defendant convicted of possession of 203 grams of crack with intent to distribute it, who also possessed four firearms including a loaded machine gun, and a pipe bomb. United States v. Collington, 461 F.3d 805, 807 (6th Cir. 2006). The variance was based on the defendant’s age, his minimal criminal record and family circumstances including the fact that his father had been murdered when he was nine and his mother died of cancer two years later. Id. at 809.

In summary, the sentencing court has an obligation to consider all “nonfrivolous reasons” proffered by the parties for a non-Guideline sentence. Rita, 551 U.S. at 357. In doing so, the court must not focus solely on the offense to the exclusion of consideration of the circumstances of the offender. United States v. Olhovsky, 562 F.3d 530, 549-50 (3d Cir. 2009). It is not “severe punishment that promotes respect for the law, it is appropriate punishment,” id. at 551 (emphasis in original), that is, punishment that is “sufficient, but not greater than necessary,” to comply with the purposes set forth in the statute. 18 U.S.C. § 3553(a).

The body of departure law that has developed under the Guidelines may still be useful in informing the sentencing court of factors that may reasonably be considered. A court can presumably assume that an encouraged factor will be considered a reasonable basis for a non-Guidelines sentence, although the extent of deviation may be subject to review. See, e.g., United States v. Rajwani, 476 F.3d 243, 248 (5th Cir. 2007) (Guideline departure reviewed within guideline framework). Certain factors - race, sex, national origin, creed, and socio-economic status - are presumably still prohibited. See 28 U.S.C. § 994(d); see also U.S. Const. amend. I, V. Other factors prohibited by the Commission -lack of youthful guidance, USSG § 5H1.12, post-sentencing rehabilitation undertaken after imposition of a term of imprisonment, USSG § 5K2.17, gambling addiction, USSG § 5K2.0(d)(1), extraordinary acceptance, USSG § 5K2.0(d)(2), role in the offense, USSG § 5K2.0(d)(3), and fulfillment of restitution obligations required by law. USSG § 5K2.0(d)(5) (Nov. 1, 2003), are presumably again available for consideration. In Pepper v. United States, 131 S.Ct. 1229 (2011), the Supreme Court struck down the prohibition on consideration of post-sentencing rehabilitation. In the 2012 amendment cycle, the Commission has deleted the prohibition set forth at USSG § 5K2.19.

B. Specific Offense Characteristics (Previously Discouraged Factors)

The Guidelines Manual previously provided that most specific offense characteristics were “not ordinarily relevant” except in “exceptional circumstances.” These are (1) age, § 5H1; (2) education, § 5H1.2; (3) mental and emotional condition, § 5H1.3, (4) physical condition including drug dependence and gambling addiction, § 5H1.2; (5) employment, § 5H5, (6) family and community ties and responsibility, § 5H2.6, and military service and charitable or civil service. § 5H1.11.

The Commission has identified three tiers of offense characteristics based on Congressional directives to the Sentencing Reform Act, which have governed and continue to govern the Commission’s approach. See USSG, Chap. 5H, Introductory Commentary. First, the Act directs the Commission to ensure that the guidelines and policy statements “are entirely neutral” as to race, sex, national origin, creed, and socio-economic status. 28 U.S.C. § 994(d). These are the prohibited factors identified in Koon v. United States, 518 U.S. 81, 95-96 (1996); see also USSG § 5H1.10. Second, the Act directs the Commission to consider whether eleven characteristics - age, education, vocational skills, mental and emotional condition, physical condition, including drug dependence, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood - are relevant. 28 U.S.C. § 994(d). The Guidelines specifically account for role in the offense, USSG § 3B1.1-3B1.3, criminal history, USSG Chap. 4, and criminal livelihood. § 4B1.3. Third, the Act directs the Commission to assure that the guidelines “in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering” education, vocational skills, employment record, family ties and responsibilities, and community ties. 28 U.S.C. § 994(e).

In 2010, the Commission declared that some of these factors “may be relevant in determining whether a departure is warranted, if considerations based on [the factor] individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical
case covered by the guidelines.” Those factors are age, USSG § 5H1.1; mental and emotional condition, § 5H1.3, physical condition, including drug or alcohol dependence or abuse (but not gambling addiction), § 5H1.4, military service (but not other good works). § 5H.11. The Commission expressly notes that a downward departure based on mental or emotional condition, substance abuse and physical condition “may be appropriate to accomplish a specific treatment purpose.” USSG §§ 5H1.3, 5H1.4 (citing § 5C1.1, n. (6)). A conforming amendment to the general departure provision, USSG § 5K2.0, removes these factors from the prohibited list.

As discussed infra, the courts have considered a number of additional 5H factors in varying below the Guidelines. The Commission recognizes that the 5H policy statements “are evolving in nature”. USSG Chap. 5, Introductory Commentary (citing USSG, Chap. One, Part A, Subpart 2, 28 U.S.C. § 994(o)). In other words, defense counsel should continue to urge these factors as a basis for departure and variance and courts are still free to consider them.

1. **Age, USSG § 5H1.1**

A defendant’s age, either youth or seniority, may justify a non-Guidelines sentence. As the Supreme Court has recognized, the young are less culpable than the average offender and have a high likelihood of reforming in a short period of time. Roper v. Simmons, 543 U.S. 551, 567, 569-70 (2005) (holding death penalty for individuals who committed offense prior to age eighteen unconstitutional). “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.” Id. at 570 (internal quotation marks and citation omitted). The defendant’s youth was a factor in the district court’s decision to grant Mr. Gall probation, a factor approved by the Supreme Court. The Court noted that when Mr. Gall committed his offense, he had been young and impetuous. In the intervening years he had turned his life around, getting an education and a job and developing stability in his life. Gall, 552 U.S. at 57-58; see also United States v. Collington, 461 F.3d 805 (6th Cir. 2006) (variance for defendant convicted of possessing loaded machine gun and pipe bomb based on age, minimal criminal record and family circumstances); United States v. K., 160 F.Supp.2d 421 (E.D.N.Y. 2001).

A defendant’s advanced age may also support a non-Guidelines sentence. See, e.g., United States v. Powell, 576 F.3d 482, 499 (7th Cir. 2009); Simmons II, 568 F.3d at 570. Recidivism rates for older offenders decline dramatically. See Measuring recidivism, Exhibit 9. The elderly suffer an increased likelihood of chronic and terminal illness not readily treatable in the prison system, and imposing substantial costs on their incarceration. See, e.g., U.S. Dept. of Justice, National Institute of Corrections, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates 11 (2004), http://www.nicic.org/pubs/2004/018735.pdf. In Simmons II, 568 F.3d at 570, the Fifth Circuit recognized that the defendant’s advanced age could support a variance.

2. **Education and Vocational Skills, USSG § 5H1.2**

Courts have granted variances based on a defendant’s post-offense efforts to obtain an education, generally in combination with other factors. See, e.g., Gall, 552 U.S. at 57-58; United States v. Roque, 536 F.Supp.2d 987, 989-90 (E.D. Wis. 2008).

3. **Mental Illness, Mental and Emotional Condition, USSG §§ 5K1.13, 5H1.3**

The Commission has authorized departure for diminished capacity if (1) a defendant is convicted of a non-violent offense, (2) he or she committed the offense while suffering from a “substantially reduced mental capacity,” not resulting from voluntary use of intoxicants, which contributed substantially to the crime, and (3) the criminal history does not show a need for incarceration. USSG § 5K2.13. See, e.g., United States v. Risse, 83 F.3d 212 (8th Cir. 1996); United States v. Gifford, 17 F.3d 462 (1st Cir. 1994); United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993) (post-traumatic stress syndrome); United States v. Lewinson, 988 F.2d 1005 (9th Cir. 1993) (psychological departure available where government failed to establish defendant used drugs during offense). The diminished capacity departure is broader than the insanity defense as the departure is available if the defendant was unable to understand the wrongfulness of his behavior or exercise his power of reason or control behavior he knew was wrongful. USSG § 5K2.13, cmt. n.1. See, e.g., United States v. McBroom, 124 F.3d 533 (3d Cir. 1997).

4. Coercion and Duress, USSG § 5K1.12
The court can depart based on coercion or duress, even if insufficient to constitute a complete defense, USSG § 5K2.12: United States v. Hall, 71 F.2d 569 (6th Cir. 1995); United States v. Amor, 24 F.3d 432, 437-40 (2d Cir. 1994); United States v. Whitetail, 956 F.2d 857, 862-64 (8th Cir. 1992); United States v. Johnson, 956 F.2d 894 (9th Cir. 1992); United States v. Cheape, 889 F.2d 477 (3d Cir. 1989), but should evaluate the proportionality of the defendant’s actions to the seriousness of the harm avoided. USSG § 5K2.12.

5. Greater Harm, USSG § 5K1.11
Departure is authorized if the offense was committed to avoid perceived greater harm, USSG § 5K2.11, United States v. Lewis, 249 F.3d 793 (8th Cir. 2001) (firearm pawned for financial necessity and redeemed to preserve family heirloom); United States v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996) (illegal re-entry to help girlfriend get surgery); United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993) (defendant had unloaded gun on deserted reservation). The court should consider whether the circumstances significantly diminish society’s interest in punishment. USSG § 5K2.11.

6. Victim’s Wrongful Conduct, USSG § 5K2.10
Departure is authorized where the victim’s wrongful conduct significantly provoked the offense, § 5K2.10, see Koon, 518 U.S. at 102-05; United States v. Harris, 293 F.3d 863 (5th Cir. 2002); United States v. Woods, 159 F.3d 1132 (8th Cir. 1998); United States v. Dailey, 24 F.3d 1327-28 (11th Cir. 1994) (victim stole defendant’s money); United States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994); United States v. Whitehorse, 909 F.2d 316, 319 (8th Cir. 1990) (prison officials gave defendant furlough knowing she had an alcohol problem); but see United States v. Shortt, 915 F.2d 1325 (8th Cir. 1990) (wife’s adultery did not provoke pipe bombing), but the Commission recommends that the court evaluate the proportionality and reasonableness of the defendant’s response. USSG § 5K2.10(b).

7. Physical Condition, Including Drug or Alcohol Dependence or Abuse, USSG § 5H1.4
The Supreme Court approved Gall’s efforts to overcome his addiction to drugs and alcohol as a basis for the non-Guidelines sentence. Gall, 552 U.S. at 57. An alternative to incarceration is recommended if it would more effectively treat a defendant’s condition.

8. Employment Record, USSG § 5H1.5
Like education, employment has served as a basis for variance in combination with other factors. See, e.g., Gall, 552 U.S. at 57-58; United States v. Jones, 460 F.3d 191, 193 (2d Cir. 2008); United States v. Jaber, 362 F.Supp.2d 365, 381-83 (D. Mass. 2005); Roque, 536 F.Supp.2d at 989-90. See also United States v. One Star, 9 F.3d 60 (8th Cir. 1993)(work record and community contribution on reservation).

9. Family Ties and Responsibilities, USSG § 5H1.6
In spite of Commission discouragement, numerous courts have recognized family ties and responsibilities as a basis for a non-Guidelines sentence. See, e.g., United States v. Bueno, 549 F.3d 1176 (8th Cir. 2008) (approving variance to probation to allow defendant convicted of distribution of five kilograms of cocaine to care for wife suffering from lupus and rheumatoid arthritis); United States v. Schroeder, 536 F.3d 746, 755 (7th Cir. 2008) (court could vary to allow defendant to look after daughter with compromised immune system); United States v. Hussein, 478 F.3d 318 (6th Cir. 2007) (270 days home confinement followed by supervised release to allow defendant convicted of distributing Ecstasy to care for father incapacitated by strokes); Collington, 461 F.3d at 808 (approving variance based in part on fact defendant’s father was murdered and mother died of cancer); Jones, 460 F.3d at 194 (approving variance

10. Military Service, USSG § 5H1.11

In Rita, Justices Stevens and Ginsburg specifically recognized that a court could consider a defendant’s military service as a basis for a sentence below the guidelines. 551 U.S. at 364-67. Prior to the promulgation of § 5H1.11, a number of courts had recognized military service as a basis for departure. See, e.g., United States v. McCaleb, 908 F.2d 176, 179 (7th Cir. 1990); United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990); United States v. Pipich, 688 F.Supp. 191, 193 (D. Md. 1988). With numerous veterans returning from service suffering from severe physical and mental disabilities, see, e.g., RAND Center for Military Health Policy Research, Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequence, and Services to Assist Recovery xxi (Tanielian & Jaycox, eds. 2008), military service may increasingly be a basis for a lower sentence.

11. Civic, Charitable, or Public Service; Employment Related contributions; Record of Prior Good Works, USSG § 5H1.11

There is some concern that consideration of what can loosely be labeled good works will result in disparity based on socioeconomic circumstances. This concern is based on its own stereotyping, that this civic conduct is unavailable to the poor. This is belied by the experience of all of us with clients who have contributed sweat and hard earned funds to help their communities. In United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc), the Third Circuit approved a non-Guidelines sentence based in part on the defendant’s charitable works and the fact that workers would lose their jobs if the defendant was incarcerated. See also United States v. Serfini, 233 F.3d 758 (3d Cir. 2000) (charitable activities); United States v. Tocco, 200 F.3d 401 (6th Cir. 2000) (personal charity, not just financial).

12. Aberrant Behavior, USSG § 5K2.20

The Commission has outlined an encouraged departure for an “extraordinary case if the defendant’s criminal conduct constituted aberrant behavior.” USSG § 5K2.20. The Commission prohibits the departure if (1) the offense involved serious bodily injury or death, (2) the defendant discharged or used a firearm or dangerous weapon, (3) the offense was a “serious drug trafficking offense,” (4) the defendant had more than one criminal history point, or (5) the defendant had a prior felony conviction, regardless of whether it is countable. Id. The Commission explained that “aberrant behavior” means a “single criminal occurrence or single criminal transaction” committed without “significant planning,” of “limited duration,” that represents a “marked deviation by the defendant from an otherwise law-abiding life.” Id. at cmt. n.1. Courts had previously looked at the totality of the circumstances of the offender and the offense. See, e.g., United States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994); United States v. Morales, 972 F.2d 1007, 1011 (9th Cir. 1992); United States v. Takai, 941 F.2d 738 (9th Cir. 1991). After Booker, the court may want to take a more all-inclusive approach to determine whether the character of the defendant and circumstances of the offense indicate that the guideline sentence is “greater than necessary” to meet the purposes of punishment. 18 U.S.C. § 3553(a)(1).

13. Voluntary Disclosure, USSG § 5K2.16.

The Commission encourages departure for voluntary disclosure of other crimes, USSG § 5K2.16, but see United States v. Thames, 214 F.3d 608 (5th Cir. 2000) (denied where government would have discovered anyway). Upon motion by the government, the court may depart down not more than four levels pursuant to an early disposition program authorized by the Attorney General. USSG § 5K3.1. In non-fast track districts, courts have sentenced below the guidelines to avoid unwarranted disparity. United States v. Rodriguez, 527 F.3d 221, 227-30 (1st Cir. 2008); United States v. Galvez-Barrios, 355 F. Supp.2d 958 (E. D. Wis. 2005); but see United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008).
14. Alien Status

Deportation is a collateral consequence like no other. It is equivalent to banishment and may be a more important penalty than the sentence. See Padilla v. Kentucky, 559 U.S. 356, 365, 373 (2010). Often it uproots a defendant from his or her family and from the only home that he or she has known. An incarcerated alien is subject to harsher prison conditions. His ability to participate in employment, vocational training and treatment is severely circumscribed. He is not eligible for early release because he cannot be supervised in the community and he faces additional incarceration in an immigration facility awaiting his removal. A defendant’s alien status, at least if he has committed an offense not based on that status, is a basis for a sentence below the Guidelines. See, e.g., United States v. DeBeir, 186 F.3d 561, 569 (4th Cir. 1999) (collecting cases); United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997).

C. Upward Departures

The Commission’s policy statements list a number of factors that may justify an upward departure including: (1) death or physical injury resulting from the offense, USSG §§ 5K2.1, 5K2.2; United States v. Williams, 51 F.3d 1004 (11th Cir. 1995); United States v. Hegwood, 959 F.2d 26 (5th Cir. 1992) (death from heroin overdose); United States v. Melton, 883 F.2d 336 (5th Cir. 1989); United States v. Salazar-Villarreal, 872 F.2d 121 (5th Cir. 1989); but see United States v. Billingsley, 978 F.2d 861 (5th Cir. 1992) (can depart only if nexus between victim’s death and offense); United States v. Rivalta, 892 F.2d 223 (2d Cir. 1989) (defendants must have intended or knowingly risked death); (2) extensive psychological injury, USSG § 5K2.3; see United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002); United States v. Sample, 213 F.3d 1029 (8th Cir. 2000) (identity theft); United States v. Gary, 18 F.3d 1123 (4th Cir. 1994); United States v. Anderson, 5 F.3d 795, 804 (5th Cir. 1994); but see United States v. Jacobs, 167 F.3d 792 (3d Cir. 1999) (psychological injury must be more serious than normal); United States v. Lara, 975 F.2d 1120 (5th Cir. 1992) (no evidence of significant psychological harm to smuggled aliens); United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991) (counseling for sex abuse victims is not extreme psychological injury); (3) extreme conduct, e.g., torture, USSG § 5K2.8; United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998) (extreme brutality, foreign murders); United States v. Roberson, 872 F.2d 597, 602-03 (5th Cir. 1989) (mutilation of corpse); (4) offense committed to facilitate or conceal another offense, USSG § 5K2.9, United States v. Osbide, 911 F.2d 793 (D.C. Cir. 1990) (only applies if not considered in calculation); see also United States v. Cherry, 10 F.3d 1003, 101 (3d Cir. 1993) (flight did not facilitate or conceal offense); and (5) significant danger to public welfare. USSG § 5K2.14. United States v. Murillo, 902 F.2d 1169 (5th Cir. 1990) (disruption of government); see also United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) (cannot apply to attempt to change government policy). There are also specific encouraged upward departures for possession of a high capacity semi-automatic firearm in connection with a violent or controlled substance offense, USSG § 5K2.17, and if the defendant is enhanced for being in an armed street gang, unless there was no actual violence. USSG § 5K2.18. Departure is encouraged if needed to reflect the actual seriousness of the offense if the dismissal of counts or if other plea bargaining resulted in certain conduct not being considered in the offense level. USSG § 2K2.21; United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (en banc); but see United States v. Angle, 315 F.3d 810 (7th Cir. 2003) (evidence of other conduct unreliable). There must be some relationship between the offense of conviction and the other misconduct but the relationship can be “remote.” United States v. Newsome, 508 F.3d 731 (5th Cir. 2007).

An above-guideline sentence may also be warranted where a factor is not adequately considered under the facts of a particular case. See, e.g., United States v. Sanchez-Ramirez, 497 F.3d 531 (5th Cir. 2007) (mistreatment of aliens, number injured and dead); United States v. Reyes, 239 F.3d 722, 744 (5th Cir. 2001); United States v. Yeaman, 194 F.3d 442 (3d Cir. 1999) (loss of confidence in institution); United States v. Kay, 83 F.3d 98 (5th Cir. 1996) (intricacy of scheme and abuse of position); United States v. Siciliano, 953 F.2d 939 (5th Cir. 1992) (abuse of trust inadequate to cover prison guard’s actions); United States v. Wade, 931 F.2d 300 (5th Cir. 1991) (postal supervisor convicted of theft of mail destroyed substantial quantities of mail; unusual facts of case support finding that defendant disrupted government function); United States v. Pridgen, 898 F.2d 1003 (5th Cir. 1990) (holding bank executive hostage for lengthy period and defendant was a former law enforcement officer); United States v. Bates, 896 F.2d 912 (5th Cir. 1990) (bank robber shot at police officers and terrorized persons during escape); see also United States v. Saldana, 427 F.3d 298 (5th Cir. 2005) (guidelines did not capture extent of abuse of legal process); United States v. Leahy, 169 F.3d 433 (7th Cir. 1999) (toxin was unusually dangerous weapon, but departure to terrorism guideline too high); United States v. Wells, 163 F.3d 889, 899-900 (4th Cir. 1998) (crimes committed to further domestic terrorism); United States v. Blackley, 167 F.3d 543 (D.C. Cir. 1998) (fraud by high level official); United States v. Nevols, 160 F.3d 226 (5th Cir. 1998) (old people rely on social security checks, violence).
D.  Factors Not Adequately Considered

Courts have granted downward departures in a wide variety of cases on the basis of factors not adequately taken into consideration or not considered at all. For example, the courts have found that the defendant’s offense was less serious than the run of the mill crimes. United States v. Threadgill, 172 F.3d 357 (5th Cir. 1999) (de minimis money laundering); United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998) (same); United States v. Walters, 87 F.3d 663 (5th Cir. 1996) (no financial benefit from money laundering). Another common basis has been extraordinary acceptance of responsibility, United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (extraordinary acceptance); see also United States v. Oligmueller, 198 F.3d 669 (8th Cir. 1999); United States v. Bennett, 60 F.3d 902 (1st Cir. 1995); United States v. Rogers, 972 F.2d 489 (2d Cir. 1992) (reversed because district court thought it could not recognize extraordinary acceptance); and post-offense or post-sentencing rehabilitation. United States v. Core, 125 F.3d 74 (2d Cir. 1997) (post-offense rehabilitation); see also United States v. Newlon, 212 F.3d 423 (8th Cir. 2000) (same); United States v. Bryson, 163 F.3d 742 (2d Cir. 1998) (extraordinary rehabilitation); United States v. Kapiske, 130 F.3d 820 (8th Cir. 1997) (same); United States v. Sally, 116 F.3d 76 (3d Cir. 1997) (same); United States v. Brock, 108 F.3d 3 (4th Cir. 1997) (same); United States v. McClelland 72 F.3d 717 (9th Cir. 1995) (voluntary drug rehabilitation). United States v. Smith, 311 F. Supp.2d 801 (E.D. Wis. 2004) (voluntary withdrawal from drug conspiracy and post-offense rehabilitation); United States v. Hancock, 95 F. Supp. 280 (E.D. Pa. 2000) (family, rehabilitation and aberrant behavior). Variances are limited only by the lawyer’s creativity. See, e.g., United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007) (remorse, less serious, kiddie porn); United States v. Lauersen, 362 F.3d 160 (2d Cir. 2004) (overlapping guidelines); United States v. Gregory, 322 F.3d 1157 (9th Cir. 2003) (delay in prosecution); United States v. Carty, 264 F.3d 191 (2d Cir. 2001) (harsh pretrial prison conditions); United States v. Wright, 211 U.S. 233 (5th Cir. 2000) (unwarranted sentencing disparity); United States v. Working, 175 F.3d 1150 (9th Cir. 1999) (imperfect battered spouse defense); United States v. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999) (agreed to deportation when had basis to contest it); United States v. Van Dyke, 895 F.2d 984 (4th Cir. 1990) (extraordinarily tragic personal history); United States v. Deigert, 916 F.2d 916 (4th Cir. 1990) (the dependence of a paraplegic defendant on his family); United States v. Francis, 129 F.Supp.2d 612 (S.D.N.Y. 2001) (intolerable pretrial prison conditions); United States v. Lacy, 99 F. Supp.2d 108 (D. Mass. 2000) (bullet in the brain); United States v. Swapp, 719 F. Supp. 1015 (D. Utah 1989) (a minor participant’s inability to control the quantity of contraband); United States v. Bautista-Segura, S-890-377 (S.D.N.Y. Oct. 19, 1989) (defendant’s escape for a conjugal visit); United States v. Condelee, 961 F.2d 1351 (8th Cir. 1992) (the payment of extraordinary restitution).

A government agent’s or an informant’s misconduct which was similar to coercion or duress may justify a downward departure. United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993). But see United States v. Dickey, 924 F.2d 836 (9th Cir. 1991). The courts have departed down where the government appeared to bring charges to manipulate the sentence. United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (tax evasion added to mail fraud), and where the unique features of the sentencing guidelines result in unwarranted harsh sentences. See, e.g., United States v. Lara, 47 F.3d 60 (2d Cir. 1995) (aggregating small time distributions created overly harsh sentence).

E.  Deconstruction

In Kimbrough v. United States, 552 U.S. 85, 98-99, 109-10 (2007), the Supreme Court recognized that some guidelines are not empirically based and therefore may not be subject to the same deference. See also Gall, 552 U.S. at 46 n.2. This was clearly true of the crack guideline in Kimbrough, which was based on Congressional mandatory minimum sentences, which were themselves not empirically based, and which were the subject of criticism by the Commission itself. Id. at 94-100. The district court is free to disregard a Guideline that it finds unduly harsh in an individual case. Spears v. United States, 129 S.Ct. 972 F.2d 489 (2d Cir. 1992) (reversed because district court thought it could not recognize extraordinary acceptance); and post-offense or post-sentencing rehabilitation. United States v. Core, 125 F.3d 74 (2d Cir. 1997) (post-offense rehabilitation); see also United States v. Newlon, 212 F.3d 423 (8th Cir. 2000) (same); United States v. Bryson, 163 F.3d 742 (2d Cir. 1998) (extraordinary rehabilitation); United States v. Kapiske, 130 F.3d 820 (8th Cir. 1997) (same); United States v. Sally, 116 F.3d 76 (3d Cir. 1997) (same); United States v. Brock, 108 F.3d 3 (4th Cir. 1997) (same); United States v. McClelland 72 F.3d 717 (9th Cir. 1995) (voluntary drug rehabilitation). United States v. Smith, 311 F. Supp.2d 801 (E.D. Wis. 2004) (voluntary withdrawal from drug conspiracy and post-offense rehabilitation); United States v. Hancock, 95 F. Supp. 280 (E.D. Pa. 2000) (family, rehabilitation and aberrant behavior). Variances are limited only by the lawyer’s creativity. See, e.g., United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2007) (remorse, less serious, kiddie porn); United States v. Lauersen, 362 F.3d 160 (2d Cir. 2004) (overlapping guidelines); United States v. Gregory, 322 F.3d 1157 (9th Cir. 2003) (delay in prosecution); United States v. Carty, 264 F.3d 191 (2d Cir. 2001) (harsh pretrial prison conditions); United States v. Wright, 211 U.S. 233 (5th Cir. 2000) (unwarranted sentencing disparity); United States v. Working, 175 F.3d 1150 (9th Cir. 1999) (imperfect battered spouse defense); United States v. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999) (agreed to deportation when had basis to contest it); United States v. Van Dyke, 895 F.2d 984 (4th Cir. 1990) (extraordinarily tragic personal history); United States v. Deigert, 916 F.2d 916 (4th Cir. 1990) (the dependence of a paraplegic defendant on his family); United States v. Francis, 129 F.Supp.2d 612 (S.D.N.Y. 2001) (intolerable pretrial prison conditions); United States v. Lacy, 99 F. Supp.2d 108 (D. Mass. 2000) (bullet in the brain); United States v. Swapp, 719 F. Supp. 1015 (D. Utah 1989) (a minor participant’s inability to control the quantity of contraband); United States v. Bautista-Segura, S-890-377 (S.D.N.Y. Oct. 19, 1989) (defendant’s escape for a conjugal visit); United States v. Condelee, 961 F.2d 1351 (8th Cir. 1992) (the payment of extraordinary restitution).

Courts and practitioners are finding that many other guidelines are subject to a similar attack. For example, the career offender guideline is purportedly based on 28 U.S.C. § 994(h), in which Congress directed the Commission to specify a guideline sentence near the statutory maximum for defendants convicted of crimes of violence or drug trafficking who had two prior similar convictions. The guideline itself, however, has expanded the scope of crimes of violence and drug trafficking to include in some instances, even misdemeanor offenses. United States v. Colon, 2007 WL 4246470 (D. Vt. Nov. 29, 2007). Even before Booker, numerous courts had granted downward departures where the career offender guideline resulted in an unduly harsh sentence. United States v. Pruitt, 502 F.3d 1154, 1167-70 (10th Cir. 2007) (McConnell, J., concurring)(collecting cases); United States v. Parson, 955 F.2d 858, 874 (3d Cir. 1992). Post-Booker, the courts have again recognized that in many instances the career offender Guideline creates an artificially high sentence. United States v. Sanchez, 517 F.3d 651 (2d Cir. 2008). See also...
Similarly, the child pornography guidelines, which the Sentencing Commission originally set at relatively low levels, have been dramatically increased in recent years based on Congressional directives unsupported by evidence of the need for such lengthy sentences. In United States v. Dorvee, 604 F.3d 84 (2d Cir. 2010), the Second Circuit recognized that there is no empirical basis for the child pornography guideline and reversed the district court for failing to conduct an independent review of the § 3553(a) factors. 604 F.3d at 95. See also United States v. Grober, 595 F.Supp.2d 382 (D.N.J. 2008); United States v. Baird, 580 F.Supp.2d 889 (D. Neb. 2008).

XIII. CONCLUSION

As Judge Gertner has noted, the post-Booker advisory guidelines “do not mean a regime without rules, or a return to “standardless discretion.” Nor does it permit “slavish application of the Guidelines.” United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. 2005). The litigants have a duty to bring to the court the full range of information about the individual and the offense. The sentencing court must start from the body of law that constitute the Sentencing Guidelines, but the court must take the moral measure of the man or woman before it. Only in this manner, can the court impose what is required, that is, a just sentence.

XIV. BIBLIOGRAPHY


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