Guideline Sentencing Update

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Departures

Mitigating Circumstances

D.C. Circuit holds that "criminal history" in § 5K2.13 has "broader meaning" than "criminal history" calculated in § 4A1.1. Defendant pled guilty to one count of being a felon in possession of a firearm and faced a sentencing range of 37–46 months. His criminal history included four other firearms offenses, some of which involved assaultive or threatening behavior. The district court found that defendant suffered from post-traumatic stress disorder (from service in the Vietnam War) and departed under § 5K2.13 to a sentence of five years' probation. In concluding that "defendant's criminal history does not indicate a need for incarceration to protect the public," § 5K2.13, the court noted that defendant's mental condition was treatable, he would not be released from prison on another, uncompleted sentence until his middle fifties, his criminal history score was erroneous, and he had never actually injured any law enforcement officers during his previous criminal conduct despite repeated opportunities to do so. On appeal, the government argued that "criminal history" as defined in Chapter 4, Part A of the Guidelines was the only relevant factor in assessing whether defendant should be incarcerated to protect the public.

The appellate court disagreed, holding "that the 'criminal history' referred to in section 5K2.13 is not limited to the meaning Chapter 4, Part A gives it." The circuit previously held that "non-violent offense" in § 5K2.13 should not be equated with "crime of violence" in § 4B1.2. "The different purposes behind section 5K2.13 and Chapter 4, Part A likewise suggest that the latter," designed to impose greater punishment on repeat offenders, "should not control the meaning of 'criminal history' as used in the former," whose purpose is lenity. "Moreover, the [Sentencing] Commission could have provided that certain repeat offenders are ineligible for a departure under section 5K2.13. That it chose not to reinforces the view that 'criminal history' means something more in section 5K2.13 than it does in Chapter 4, Part A."

"This is not to say, however, that anything is fair game. Rather, the sentencing court may consider only those factors that bear on whether 'the defendant's criminal history . . . indicate[s] a need for incarceration to protect the public.' U.S.S.G. § 5K2.13. The Ninth Circuit identified four factors: psychiatric or other medical treatment the defendant is receiving and its likelihood of success, the defendant's likely circumstances upon release, the defendant's overall criminal record and the 'nature and circumstances' of the current offense." *See U.S. v. Cantu,* 12 F.3d 1506, 1516 (9th Cir. 1993).

In this case, the court agreed with the government's alternative claim and concluded that "[t]he sentencing court here strayed far from these factors." For example, although defendant's stress disorder is treatable, the court made no findings that defendant would, in fact, receive treatment. Also, although an individual in his fifties may be less inclined to commit some forms of crime, reliance on that supposition "is undermined by the central role of reduced mental capacity, which suggests that the normally beneficent effects of aging may be ineffective" and the fact that "defendant's criminal history involves the use and abuse of firearms, whose exercise requires no youthful vigor." The appellate court found that the other factors relied on by the district court were also inappropriate and remanded for resentencing in accord with its opinion.

U.S. v. Atkins, 116 F.3d 1566, 1569–71 (D.C. Cir. 1997) (per curiam) (Henderson, J., dissented). *Note:* Although a proposed Nov. 1998 amendment would substantially revise § 5K2.13, the language at issue here would remain with only slight modification.

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

Aggravating Circumstances

Fifth Circuit holds that non-criminal conduct may be considered for upward departure. Defendant pled guilty to several counts related to possessing, transferring, and manufacturing illegal weapons, including three machine guns and two silencers. As part of one sale, defendant agreed to show an undercover agent how to construct a silencer and videotaped that construction so that others could learn his method. In that tape, he falsely stated that he was properly licensed to manufacture the silencer. At another point, defendant was notified by the manufacturer of some of his weapons (which he had illegally converted to fully automatic) that they were about to become illegal and he should return them; defendant wrote back and falsely claimed that he had sold them. The district court departed upward on several grounds and used the videotape and the letter to support the ground that defendant had attempted to conceal his illegal conduct and to facilitate manufacture and concealment by others. Defendant argued on appeal that "lying in the letter and on the video and participating in the video were not, in themselves, criminal activities and

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thus cannot be used as the basis of an upward departure."

"We are not persuaded that the district court, in contemplating an upward departure, is limited to considering only acts that are criminal or illegal." Although the Fifth Circuit had previously held that non-criminal conduct should not be included in relevant conduct when setting the offense level, *see U.S. v. Peterson,* 101 F.3d 375, 385 (5th Cir. 1996), that case "is distinguishable from the present case because *Peterson* involves calculation of the *base offense level* while Arce complains of the district court's *upward departure.* A sentencing court is not limited to 'relevant conduct' when considering an upward departure. The Sentencing Guidelines provide in § 1B1.4: 'In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation, any* information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.' (emphasis added) . . . . The Guidelines also specifically provide that conduct which does not constitute an element of the offense may be considered in determining a departure, even when that conduct cannot be considered in determining the base offense level under § 1B1.3. USSG § 1B1.2 comment. note 3 . . . . We conclude that a district court can consider conduct that is not itself criminal or 'relevant conduct' under § 1B1.3 in determining whether an upward departure is warranted."

Although the court remanded for resentencing because one of the other grounds of departure was invalid, it upheld the conclusion that the actions evidenced by the videotape and letter "make this case unusual and outside the heartland of cases governed by the Guidelines."

U.S. v. Arce, 118 F.3d 335, 340–43 (5th Cir. 1997).

See *Outline* at I.A.4; generally at I.A.3; I.C; VI.B.1.a; VI.B.1.l

Supervised Release

Revocation

Circuits differ on whether retroactive application of § 3583(h), allowing reimposition of supervised release, is ex post facto violation. Effective Sept. 13, 1994, 18 U.S.C. § 3583(h) authorizes imposition of a new term of supervised release after a previous term is revoked. "The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Before § 3583(h), most circuits had held that supervised release could not be reimposed once it was revoked. Some of those circuits have now considered whether applying § 3583(h) to defendants whose original offenses occurred before Sept. 13, 1994, violates the Ex Post Facto Clause of the Constitution.

The Third Circuit has held that applying § 3583(h) may or may not be an ex post facto violation depending on the type of felony in defendant's original offense. The court found that for a class A felony the maximum penalty was the same under the old and new law. *See U.S. v. Brady,* 88 F.3d 225, 228–29 (3d Cir. 1996) ("The only difference is that now [defendant's] liberty can be restrained with a mix of imprisonment and supervised release. In either event, the legal consequences of his criminal conduct are identical, . . . and we find no ex post facto violation.") [8 *GSU* #9].

Later, however, the court held that § 3583(h) could not be applied retroactively when the original offense was a class B, C, or D felony because the new maximum penalty is greater. "For class B, C, and D felonies, there is a discrepancy between the amount of supervised release authorized and the amount of incarceration that can be imposed" under § 3583(e)(3). All allow a longer period of supervised release than of imprisonment. "Since § 3583(h) ties the length of the total package to the length of supervised release permitted under §3583(b), and since this length exceeds the length of imprisonment authorized under § 3583(e), application of § 3583(h) allows imposition of a sentence two years longer than before for class B felonies (five years rather than three) and one year longer for class C and D felonies (three years as opposed to two). These lengthier periods of restricted liberty authorized under § 3583(h) mean that application of this provision impermissibly increases the punishment for those who commit class B, C, or D felonies. *Brady* in no way bars us from recognizing this fact."

To the government's argument that defendant's could receive more lenient treatment under § 3583(h) because district courts may give shorter prison terms when a new supervised release term is available, the court responded: "Retrospective application of § 3583(h) violates the ex post facto prohibition if there is the potential that such application may even once result in a harsher sentence than previously authorized. The possibility that post § 3583(h) sentences may frequently be less onerous than otherwise is insufficient to redeem the statute."

U.S. v. Dozier, 119 F.3d 239, 243–44 (3d Cir. 1997) (also stating that "[a] sentence imposed upon revocation of supervised release is most properly viewed as a consequence of the original criminal conviction").

The Fourth Circuit agreed that § 3583(h) should not be applied retroactively when the original offense was a class C or D felony. The court also agreed that punishment for violating supervised release is punishment for the original offense, and that it did not matter whether defendants might be treated more leniently under the new law. "'[A]n increase in the *possible* penalty is *ex post facto* regardless of the length of the sentence actually imposed.'" (Emphasis added by court.)

After reviewing what defendant could receive under the old law, the court determined that "§ 3583(h) empowers a court to do much more. In addition to allowing a court to sentence a defendant to virtually the same term

of imprisonment as above, it provides that a new term of supervised release may also be imposed. . . . The length of this new supervised release term is capped at the maximum term of supervised release allowed by § 3583(b) for the original crime with credit given for any prison time imposed under § 3583(e)(3). . . . Therefore, the maximum penalty for violating the terms of one's release under § 3583(e)(3) and (h) is, for Class C and D felonies, two years (less one day) in prison and an additional year and a day of supervised release. . . . This potential punishment is greater than that under § 3583(e) alone." Following *Dozier*, the court noted that the same result holds when the original offense was a class B felony, but for class A or E felonies, or misdemeanors, there is no disparity in the maximum terms of release versus imprisonment "and the application of § 3583(h) cannot disadvantage defendants guilty of these crimes by increasing the possible sanction imposed after a *single* revocation of supervised release."

U.S. v. Lominac, 144 F.3d 308, 312–15 & n.9 (4th Cir. 1998).

Without specifically discussing the effect of the class of the original felony, the Ninth Circuit reached the same result for a pair of class C or D defendants. Both had been given the maximum three-year term of supervised release, and after revocation were given a combination of imprisonment and release equal to three years. After finding that "punishment that follows . . . a violation [of release] is imposed on the authority of conviction for the underlying offense," the court held that "section 3583(h) subjected [defendants] to greater punishment than did the prior law," which for defendants was two years' imprisonment (the terms of release could not be extended because they were already serving the maximum).

"Under the later-enacted section 3583(h), however, the district courts could, and did, impose three years of restriction . . . [which] may reasonably be viewed on its face as a more onerous penalty than two years of restriction. More important, section 3583(h) exposes [defendants] to the possibility of further incarceration (up to their two year maximum) followed by more supervised release if they violate the conditions of the second supervised releases. This is a penalty that . . . [they] could not face in our circuit at the time they committed their offenses." The court also agreed with the Seventh Circuit's later-overruled decision in *Beals*, below, that, even if a more severe punishment is not initially given under § 3583(h), an ex post facto problem arises "from the possibility of repeated violations of the conditions of successive supervised releases" that could lead to greater total punishment.

U.S. v. Collins, 118 F.3d 1394, 1397–98 (9th Cir. 1997).

The Seventh Circuit originally held that retroactive application of § 3583(h) was improper because it could result in greater total punishment. *See U.S. v. Beals,* 87 F.3d 854, 858–60 (7th Cir. 1996) (also holding that punishment for supervised release violation arises from original offense) [8 *GSU* #9]. However, the court later overruled *Beals* and determined that the "speculative nature" of a potentially greater punishment was insufficient to preclude retroactive application of § 3583(h). Defendant had her five-year term of release revoked and was sentenced to seven months' imprisonment and a new term of release under § 3583(h). The court cited Supreme Court precedent for the proposition that "the *Ex Post Facto* Clause does not 'forbid[] any legislative change that has any conceivable risk of affecting a prisoner's punishment' . . . . Retroactive application of new legislation violates the *Ex Post Facto* Clause only when the statute produces a sufficient risk of increasing a defendant's punishment." Considering the "'practical, as opposed to purely theoretical' effect of § 3583(h)'s application" to defendant, the court concluded that defendant "has not suffered increased punishment as a result of this application because under both the old and the new law, the district court could have imposed a prison term for the entire term of supervised release authorized for her original offense. The mere possibility" that defendant might face greater punishment after future violations of release "does not produce a sufficient risk of increasing her punishment."

U.S. v. Withers, 128 F.3d 1167, 1170–72 (7th Cir. 1997).

The Sixth Circuit held that § 3583(h) could be applied to two defendants originally sentenced before Sept. 13, 1994. The court cited an earlier case for the proposition that punishment for a violation of supervised release "impose[s] a new sentence for the later misconduct" and does not add punishment for the original offense. *See U.S. v. Reese,* 71 F.3d 582, 590–91 (6th Cir. 1995) (holding that § 3583(g) can be applied retroactively). Following the reasoning of that case, "section 3583(h) may be applied to defendants . . . without violating the Ex Post Facto Clause because section 3583(h) was passed before they violated the terms of their supervised release . . . . [S]ection 3583(h) does not alter the punishment for defendants' original offenses; section 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release—offenses they committed after section 3583(h) was passed." The court acknowledged that the courts in *Beals* and *Collins, supra,* had reached a different result, but held it was "bound by the holding of this court in *Reese*."

U.S. v. Page, 131 F.3d 1173, 1175–76 (6th Cir. 1997). *See also U.S. v. Evans,* 87 F.3d 1009, 1010–11 (8th Cir. 1996) (same: § 3583(h) "applied to [defendant's] case in 1995 because the district court did not increase the sentence for his original [1992] crime but merely punished him for violating his supervised release" in 1995).

See *Outline* at VII.B.1

Offense Conduct

Calculating Weight of Drugs

Eighth Circuit holds that sentence may be based on *type* of drugs agreed to, even if different drug is actually sold. After several purchases of cocaine from defendant, an undercover officer (Deist) asked about buying methamphetamine. The first attempted buy failed, but another was set up by an informant (Rush). Defendant did not make the sale himself, but arranged for Rush to buy from his source, Pimentel, who agreed to sell three pounds of methamphetamine to Rush in two stages. Pimentel was arrested after selling the first pound. Later analysis showed that the substance sold was actually amphetamine. Defendant was charged with several drug counts, and pled guilty to one count of possession with the intent to distribute cocaine. His sentence was based in part on the three pounds of methamphetamine.

On appeal, defendant challenged the use of the methamphetamine guideline in calculating the drugs attributable to him as a result of the transaction between Pimentel and Rush. He did not contest that the agreement was for methamphetamine or that his act of aiding and abetting the agreement was relevant conduct, but argued that his sentence should be based on amphetamine, the substance that was actually distributed.

"The Sentencing Guidelines call for the inclusion of 'types and quantities of drugs not specified in the count of conviction,' U.S.S.G. § 2D1.1, comment n. 12, that were 'part of the same course of conduct or common scheme or plan as the offense of conviction.' U.S.S.G. § 1B1.3(a)(2). Where a defendant negotiated for or attempted to receive a specific substance but that substance was, unanticipated by and unbeknownst to the defendant, replaced with a different substance, the defendant's culpable conduct is most accurately evaluated by ascribing to the defendant the intended rather than the unintended substance. *See U.S. v. Steward,* 16 F.3d 317, 321 (9th Cir. 1994)" (sentence correctly based on methamphetamine even though substance defendant sold as methamphetamine was actually ephedrine he had been duped into purchasing earlier). "The negotiation itself constitutes the defendant's relevant conduct, and '[t]he nature and seriousness of [the defendant's] conduct is the same no matter' what substance was actually delivered."

"There is no doubt . . . that [Lopez] intended to aid and abet a transaction involving methamphetamine. . . . The fact that the substance Pimentel delivered was amphetamine and not methamphetamine was merely fortuitous. . . . Lopez had previously sold methamphetamine to Rush and had attempted several times to arrange methamphetamine transactions with Deist. Amphetamine was never part of Lopez's scheme or plan. The district court therefore properly concluded that Lopez's sentence should be based on the methamphetamine guideline."

U.S. v. Lopez, 125 F.3d 597, 599–600 (8th Cir. 1997).

See *Outline* generally at II.B.3; II.B.4.a

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General Application Principles

Relevant Conduct

Sixth Circuit vacates adjustment and departure based on conduct that did not have sufficient nexus to offense of conviction. Defendant was part of a cocaine-selling operation. On one occasion, he participated with others in the torture of an acquaintance they thought had stolen some crack cocaine from the group. Defendant and the others were initially charged with conspiracy and other drug offenses, but he pled guilty to only one count of distributing crack. Based on the torture incident, the district court increased the offense level under § 3A1.3 for restraint of victim, and also departed upward under § 5K2.2 (physical injury to victim) and 5K2.8 (extreme conduct). Defendant argued on appeal, and the appellate court agreed, that his participation in the torture, which occurred on Feb. 8, 1995, could not be used at sentencing because it was not sufficiently connected to his Dec. 28, 1994, offense of conviction.

"U.S.S.G. § 1B1.3(a) defines relevant conduct for the purposes of calculating the base offense level, offender characteristics, and adjustments such as the one at issue here under § 3A1.3 for restraint of victim. Section 1B1.3(a) states in relevant part that these levels shall be determined on the basis of [defendant's conduct] '. . . *that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."* U.S.S.G. § 1B1.3(a)(1)(A) (emphasis added). The February 8 torture could not have occurred during or in preparation for the offense of conviction, which took place six weeks earlier. . . . The court never found, or even suggested, that the torture was an attempt to hide Cross's December 28 offense. . . . We therefore cannot affirm the sentence under § 1B1.3(a)(1)(A). . . . For this same reason, § 1B1.3(a)(1)(B), which applies 'in the case of a jointly undertaken criminal activity,' is also inapplicable."

"The next portion of the relevant conduct provision, U.S.S.G. § 1B1.3(a)(2), allows the use of acts that are 'part of the same course of conduct or common scheme,' but applies only to offenses which should be grouped under § 3D1.2(d). . . . Although the offense of conviction was a drug offense, and is thus groupable under this provision, torture clearly falls outside the scope. . . . Section 1B1.3(a)(2) does not apply to this case."

"Nor does the conduct fall within the bounds of § 1B1.3(a)(3), which includes as relevant conduct 'all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions.' . . . As noted above, (a)(2) does not apply at all. The acts and omissions in (a)(1) are those taken in the course of, or in the avoidance of, the offense of conviction, and the court made no findings linking the events of February 8 with Cross's crack cocaine sale on December 28 of the previous year. . . . Finally, although § 1B1.3(a)(4) allows the consideration of 'any other information specified in the applicable guideline,' § 3A1.3 (the applicable guideline for restraint of victim) by its terms applies only when the restraint occurred 'in the course of the offense.'" The court therefore concluded that "the torture was not 'relevant conduct' as to Cross's offense of conviction, and we must vacate Cross's sentence and remand for the district court either to resentence Cross without the enhancement for restraint of victim under § 3A1.3 or to develop a factual record to justify the inclusion of the torture as relevant conduct."

As for the departure, "district courts may consider more than just 'relevant conduct,' as defined in § 1B1.3." However, "[s]ection 1B1.3's detailed definition of 'relevant conduct' demonstrates that the Commission has considered and rejected the notion that conduct completely unrelated to the offense of conviction should factor into the calculation of the Guideline range . . . . Although the Commission has left open the possibility that some conduct that does not fall within the technical definition of 'relevant conduct' (because it relates to the offense of conviction in an unusual way that the Commission did not foresee) may nonetheless be related to the offense of conviction and may therefore be used in departing from the guidelines, there is nothing in the record before us to suggest that this is such an unusual case. We therefore vacate Cross's four-level upward departure and remand to the district court for further factual findings concerning this issue and resentencing."

The court rejected defendant's contention that district courts cannot depart based on conduct in a dismissed count, that the torture was part of the dismissed conspiracy count, and therefore the torture could not be used. "[U]nder § 1B1.4 and its commentary, a district court may depart upwards based on conduct that is covered by a dismissed count."

U.S. v. Cross, 121 F.3d 234, 238–44 (6th Cir. 1997).

See *Outline* generally at I.A and II.A; III.A.3; and IX.A.1

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Adjustments

Obstruction of Justice

Ninth Circuit rejects § 3C1.1 enhancement for giving false name and documents at arrest, distinguishes Application Notes 3(c) and 4(a). Defendant was stopped by INS agents as he attempted to enter the U.S. He told a customs officer that he was a U.S. citizen and produced several identification documents bearing a false name. For approximately ten hours defendant maintained the ruse, admitting his real name only after a computer check and several phone calls revealed his true identity, which was verified by a fingerprint check. The district court imposed an obstruction of justice enhancement under Note 3(c) of § 3C1.1, "producing . . . a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." Defendant argued on appeal that his conduct fell under Note 4(a), which states that enhancement is not warranted for "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense."

The appellate court agreed. "Although these application notes appear to conflict, [we have held that] application note 3(c) 'anticipate[s] lack of candor toward the *court*—including lack of candor in respect to a[n] . . . investigation for the court,' while application note 4(a) anticipates lack of candor toward law enforcement officers. . . . We have explained that 'application note 3(c) provides that attempting to produce a false document "during an official investigation or judicial proceeding" qualifies for the enhancement, even without a showing of actual obstruction. We must interpret this application note's reference to an "official investigation" narrowly, as reaching only official investigations closely associated with judicial proceedings. A broader reading would conflict with application note 4(a), which provides that giving a false identification document "at arrest" only qualifies for the enhancement if it significantly impedes an investigation.' . . . Thus, the application notes distinguish between false statements and documents presented to judges, magistrates, probation officers and pretrial services officers, which need not impede an investigation or prosecution to constitute an obstruction of justice, and those presented to law enforcement officers, in which circumstance some significant hindrance to an investigation or prosecution must be established."

Before determining whether defendant's actions posed a "significant hindrance," the court noted that his lies could also fall under Note 3(g), "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." The court concluded, however, that the facts did not show that defendant's conduct sufficiently hindered or obstructed the investigation of his offense so as to warrant enhancement. The actions taken by INS officials were either routine or minimal, and the investigation may have taken much less time if the FBI had not lost defendant's fingerprints the first time they were sent.

U.S. v. Solano-Godines, 120 F.3d 957, 962–65 (9th Cir. 1997).

Please note: Because the Nov. 1, 1998, guideline amendments added new Application Note 1, Notes 3 and 4 are now Notes 4 and 5, respectively.

See *Outline* at III.C.1 and 2.b

Departures

Criminal History

Eleventh Circuit holds that district court's belief that defendant was not actually guilty of prior offense cannot warrant departure. Defendant's criminal history warranted sentencing as a career offender, partly because of a prior state conviction for aggravated assault. Because defendant had received an unusually light sentence of probation for that conviction, the district court concluded that, under the charging practices of the county court in which defendant was convicted (with which the district court was familiar), defendant had likely committed a less serious offense and only pled guilty to the aggravated assault charge to avoid lengthy judicial proceedings. Therefore, the court held that the career offender category overrepresented defendant's criminal history, *see* USSG § 4A1.3, and sentenced him to the lower guideline range that otherwise applied.

On the government's appeal, the appellate court remanded. "For all intents and purposes, the district court engaged in a collateral attack on Phillips' aggravated assault conviction. The court essentially utilized the downward departure to nullify that conviction . . . . It was error for the district court to do that. Collateral attacks on prior convictions are allowed in federal sentencing proceedings in one narrow circumstance only: when the conviction was obtained in violation of the defendant's right to counsel." Because defendant was represented by an attorney in the prior proceeding at issue here, the sentencing court "was not free to ignore or discount the aggravated assault conviction based upon its concerns about the Fulton County criminal justice system . . . . Just as a district court may not directly negate a prior conviction because of doubts about the verity of the result, it also may not do that indirectly by departing downward because of those same doubts."

The court further held that § 4A1.3 "is concerned with the pattern or timing of prior convictions, not with doubts about their validity. . . . When § 4A1.3 is applied, the validity of the convictions is assumed. . . . Section 4A1.3 does not permit what [prior cases] prohibit: a lower sentencing range resulting from the judge's doubts about

whether the defendant was truly guilty or fairly convicted of a prior crime."

U.S. v. Phillips, 120 F.3d 227, 231–32 (11th Cir. 1997).

See *Outline* generally at IV.A.3 and VI.A.2

Mitigating Circumstances

Ninth Circuit holds that lack of knowledge of high purity of drugs cannot be categorically proscribed as basis for departure. Defendant, who was acting as a middleman in a drug sale, pled guilty to possession of methamphetamine with intent to distribute. Because the drug was unusually pure (over 80%), he was sentenced on the basis of the weight of the actual methamphetamine rather than the weight of the entire mixture. *See* USSG § 2D1.1(c), n.(B). The district court rejected defendant's claim that, because he was just the middleman in the deal, he did not know that the methamphetamine was so pure and thus could receive a downward departure.

The appellate court remanded, reiterating that under *Koon v. U.S.,* 116 S. Ct. 2035 (1996), there are relatively few factors that may not be considered as potential grounds for departure. *Koon* held "that 'a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, *as a categorical matter*, consideration of the factor.' *Id.* at 2051 (emphasis added). . . . Applying the *Koon* analysis, we conclude that the district court did have legal authority under the Guidelines to consider a downward departure on the ground that Mendoza had no control over, or knowledge of, the purity of the methamphetamine that he delivered. That ground does not involve one of the few factors categorically proscribed by the Sentencing Commission. . . . We are not at liberty, after *Koon,* to create additional categories of factors that we deem inappropriate as grounds for departure in every circumstance."

Following the same reasoning, the court rejected the government's argument that Application Notes 9 and 14 of § 2D1.1 necessarily precluded departure. "Note 9 provides only that a district court cannot depart *upward* on the basis of unusually high purity of methamphetamine; it says nothing about whether a district court can depart *downward* on the ground that the defendant had no control over, or knowledge of, the purity of the methamphetamine that he was transporting." Note 14 restricts the possibility of departing for a defendant who did not reasonably foresee a high *quantity* of drugs. "Whether application note 14 represents a consideration by the Commission of the degree and kind of circumstances presented by Mendoza's case is for the district court in its discretion to decide on remand," not for the appellate court to decide "in the first instance."

U.S. v. Mendoza, 121 F.3d 510, 513–15 (9th Cir. 1997).

See *Outline* at II.A.3.e and X.A.1, generally at VI.B.1.a

Seventh Circuit determines when status as deportable alien may allow possibility of departure. In two cases decided a week apart, the Seventh Circuit distinguished when a defendant's status as a deportable alien may be used for downward departure. In the first case, defendants were all convicted under 8 U.S.C. § 1326, which prohibits deported aliens from returning to the U.S. without first gaining permission of the Attorney General. Requesting downward departures, "[t]he defendants argued that their status as deportable aliens would lead to harsher conditions of confinement . . . . In addition, they will face deportation upon completion of their sentences." The district court rejected the use of their status as deportable aliens as a proper ground, and the appellate court affirmed.

"Here, defendants were sentenced under Guidelines section 2L1.2 . . . . [A]s noted by the Sixth Circuit, '[a]ll of the[ ] crimes [to which section 2L1.2 applies] may be committed only by aliens, and most, if not all, of those aliens are deportable. . . .' *U.S. v. Ebolum,* 72 F.3d 35, 38 (6th Cir. 1995). Because deportable alien status is an inherent element of the crimes to which the guideline applies, this factor was clearly 'taken into consideration by the Sentencing Commission in formulating the guideline[ ]' . . . . Like the Sixth Circuit, 'we must assume that the Sentencing Commission took deportable alien status into account when formulating a guideline that applies almost invariably to crimes, such as 8 U.S.C. § 1326, that may be committed only by aliens whose conduct makes them deportable.' *Ebolum,* 72 F.3d at 38. . . . The district court did not err in deeming deportable alien status an inappropriate basis for departure in these cases."

U.S. v. Gonzalez-Portillo, 121 F.3d 1122, 1124–25 (7th Cir. 1997).

In the later case, a deportable alien defendant was convicted of importing heroin into the U.S. He requested a downward departure on several grounds related to his alien status. The district court did not directly address each specific claim but, following *U.S. v. Restrepo,* 999 F.2d 640 (2d Cir. 1993), and other cases, ruled that conditions of incarceration that result from a defendant's status as a deportable alien do not warrant departure.

The appellate court remanded. *Koon v. U.S.,* 116 S. Ct. 2035 (1996), "allows the court to take into consideration any 'unusual or exceptional' factor present in the case that has not already been taken into consideration by the Guidelines. . . . [W]hen the offense for which the defendant is being sentenced encompasses being present in the United States after having been deported, we ruled [in *Gonzalez-Portillo*] that the Guidelines already took into consideration the defendant's status as a deportable alien. But here, Farouil was charged with importing heroin into the United States, and we have no reason to believe that the Guidelines have accounted for a

defendant's status as a deportable alien in setting the level for that offense. The district court is thus free to consider whether Farouil's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement."

U.S. v. Farouil, 124 F.3d 838, 846–47 (7th Cir. 1997).

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

Guideline Amendments

Several of the Nov. 1, 1998, amendments to the Sentencing Guidelines will affect sections of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues.* Those sections of the *Outline* are listed below, along with a brief summary of the relevant amendments.

III.A.1: Amendment 587 changes the language and structure of § 3A1.1(b) and Application Note 2 while adding an additional two-level increase if the offense "involved a large number of vulnerable victims."

III.B.8.a (Victim's perspective): Amendment 580 clarifies that an imposter may be given the § 3B1.3 adjustment for abuse of a position of trust.

III.C.2.c: Amendment 582 adds new Application Note 5(e) "to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under § 3C1.1."

III.C.4.a: Amendment 581 adds new Application Note 1 "to clarify what the term 'instant offense' means" in § 3C1.1. Note that the original Application Notes 1 to 7 are now renumbered 2 to 8, which will affect references to the notes in the rest of *Outline* section III.C.

V.C.3: Amendment 584 adds new subdivision (6) to § 5D1.3(d) to authorize an order of deportation as a condition of supervised release in certain circumstances. (A similar provision was added for probation in § 5B1.3(d)(6).)

VI.B, VI.C, and X.A.1: Amendment 585 amends § 5K2.0 and its Commentary "to reference specifically in the general departure policy statement the United States Supreme Court's decision in *United States v. Koon,* 116 S. Ct. 2035 (1996)."

VI.C.1.b: Amendment 583 replaces § 5K2.13 entirely and removes the "non-violent offense" language that has caused a split in the circuits. A new Application Note provides a definition of "significantly reduced mental capacity."

Note to readers: The new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 1998), has been mailed to all recipients of *GSU.* If you have not received your copy by now, or would like to request additional copies, please contact the FJC's Information Services Office by fax at 202-273-4025.

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Departures

Mitigating Circumstances

Tenth Circuit affirms downward departure under *Koon* for career offender based on overstated criminal history and effect of age and infirmity. Defendant, age 64, pled guilty to a drug felony. With two prior drug convictions, one almost ten years old, he qualified as a career offender subject to 151–180 months in prison (instead of 37–46 months). The district court granted a downward departure, to 42 months, finding that defendant's age, "in addition to his various infirmities, . . . warrant a downward departure from the career offender category" because those factors made it less likely defendant would commit future crimes. The court relied on two other grounds: had defendant's oldest drug conviction been handled in a more timely fashion it would have been more than ten years prior to the instant offense and he would not be a career offender; and, the previous drug convictions were "minor offenses" for which he received "relatively lenient" sentences. USSG § 4A1.3.

The appellate court affirmed, after an extensive overview of *Koon v. U.S.,* 116 S. Ct. 2035 (1996). The court noted that "circumstances making up a defendant's criminal history cannot be used as a basis for an offense-level departure and circumstances surrounding the instant offense cannot be used as a basis for a criminal history category departure." However, "in considering a departure under section 4A1.3, a district court may rely on offender characteristics such as age and infirmity [USSG § 5H1.1] that are logically relevant to a defendant's criminal history or likelihood for recidivism, but only in combination with other circumstances of a defendant's criminal history. . . . Although the terms 'elderly' and 'infirm' are difficult to define, and more difficult to measure in degree, we cannot say that the district court abused its discretion in concluding that the factors of age and infirmity are present in this case to an exceptional degree."

"Similarly, we conclude that the district court properly relied upon the circumstances surrounding Collins's 1986 conviction. . . . [T]he Guidelines recognize that a prior conviction close to the ten-year time limit may be relevant in determining whether a departure is appropriate under section 4A1.3. . . . Thus, a district court properly could conclude that a defendant with a predicate conviction close to ten years prior to the instant offense is not as likely to recidivate as a career offender whose predicate convictions occurred closer to the instant offense. . . . A district court also could conclude that a defendant who received a 'relatively lenient' sentence for a predicate conviction has a less serious criminal history than a career offender whose predicate convictions resulted in lengthy periods of incarceration. . . . Finally, a district court could conclude that delay in the prosecution of a defendant who committed the conduct underlying a predicate conviction more than ten years prior to the instant offense, under some circumstances, may warrant a departure."

"[W]e now move to the second inquiry in our departure analysis: whether the combination of factors identified by the district court warrants a downward departure from the career offender guideline. . . . The district court's ultimate determination that Collins's age, infirmity, and the circumstances surrounding his 1986 conviction remove him from the career offender heartland is 'just the sort of determination that must be accorded deference by the appellate courts.' *Koon,* . . . 116 S. Ct. at 2053. Accordingly, we conclude that the district court did not abuse its discretion in concluding that the various departure factors it relied upon warranted a departure." The court also found the degree of departure reasonable, holding that sentencing within the non-career offender range was justified in this situation.

U.S. v. Collins, 122 F.3d 1297, 1300–09 (10th Cir. 1997).

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

Third Circuit holds that "significantly reduced mental capacity" includes inability to control conduct defendant knows is wrong. Defendant pled guilty to one count of possession of child pornography. While defendant admitted that he knew his conduct was wrong, he requested a departure under § 5K2.13 based on his inability to control his urges to view pornography because of childhood sexual abuse (and presented extensive expert opinion on this issue). However, the district court denied the departure, concluding that defendant's mental capacity was not "significantly reduced," as required by §5K2.13, because he was "able to absorb information in the usual way and to exercise the power of reason."

The appellate court concluded that was too narrow a reading of "significantly reduced mental capacity," and held that "a defendant's ability to control his or her own conduct is a relevant consideration when determining the defendant's eligibility for a downward departure pursuant to section 5K2.13." Reviewing case law, the Model Penal Code, and the Insanity Defense Reform Act of 1984, the court concluded "that the Sentencing Commission

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intended to include those with cognitive impairments *and* those with volitional impairments within the definition of 'reduced mental capacity.'" The court set forth a two-part test. "A person may be suffering from a 'reduced mental capacity' [under] section 5K2.13 if either:

"(1) the person is unable to absorb information in the usual way or to exercise the power of reason; or

"(2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law.

"The first prong permits sentencing courts to consider defects of cognition. The second prong permits sentencing courts to consider defects of volition. Sentencing courts must consider both prongs before making a determination about a defendant's 'reduced mental capacity.'"

The court emphasized that "a mere reduction in mental capacity is not sufficient to warrant a departure . . . . Taken together, the requirements of section 5K2.13 are not easily met. In addition, the district courts retain their discretion to deny a downward departure even when a defendant does satisfy his burden. We therefore believe that our decision will not open the floodgates to every defendant who 'felt compelled' to commit a crime."

The court added that, "although a defendant must be suffering from something greater than mere 'emotional problems' to obtain a downward departure, . . . certain emotional conditions may be the cause of a defendant's significantly reduced mental capacity." The court agreed with *U.S. v. Cantu,* 12 F.3d 1506, 1512 (9th Cir. 1993), that § 5K2.13 "applies to both mental defects and emotional disorders . . . . As the court concluded in *Cantu,* '[t]he focus of the guideline provision is reduced mental *capacity,* not the cause—organic, behavioral, or both—of the reduction.' *Id.* (emphasis in original)."

Along these lines, the court noted that the district court here properly refused to consider defendant's "troubled childhood" as a reason for departure in and of itself. *See* USSG § 5K2.12. "On remand, however, the sentencing court may look to that childhood to inform its determination regarding whether McBroom suffered from a significantly reduced mental capacity at the time of the offense."

U.S. v. McBroom, 124 F.3d 533, 540–51 (3d Cir. 1997).

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

Note: Effective Nov. 1, 1998, USSG § 5K2.13 and its commentary were significantly amended. New Application Note 1 defines "significantly reduced mental capacity" to mean that "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) *control behavior that the defendant knows is wrongful.*" (Emphasis added.) The "Reason for Amendment" explains that the new definition is "in accord with the decision in *United States v. McBroom,* 124 F.3d 533 (3d Cir. 1997)."

Eighth Circuit holds that low purity of methamphetamine cannot warrant downward departure. Defendants, convicted of methamphetamine distribution, requested downward departure based on the low purity of their mixture, which was less than one percent pure methamphetamine. The district court held that it did not have the authority to depart on this basis. The appellate court agreed, concluding that "the Sentencing Commission adequately took into consideration the purity level of methamphetamine in formulating the Guidelines."

"'In the case of a mixture or substance containing . . . methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the . . . methamphetamine (actual), *whichever is greater.*' [§ 2D1.1(c), Note (B)] (emphasis added). The Sentencing Guidelines further provide that trafficking in drug mixtures with unusually high purity levels may warrant an upward departure, '*except* in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity.' USSG § 2D1.1, comment. (n.9) (emphasis added)." Thus, district courts may consider purity only "in instances where the purity of the methamphetamine results in a *greater* offense level than the offense level resulting from the weight of the entire substance or mixture. A departure below this 'greater' offense level solely on the basis of a mixture's low methamphetamine purity would directly contradict and effectively eviscerate the Commission's explicit formula directing courts to sentence methamphetamine violations by the method yielding the greatest base offense level." Low purity of a methamphetamine mixture "is a 'forbidden factor' under *Koon,* . . . 116 S. Ct. at 2045, which cannot be used as a basis for a downward departure."

U.S. v. Beltran, 122 F.3d 1156, 1159 (8th Cir. 1997).

See *Outline* at II.A.3.e

General Application Principles

Relevant Conduct

Seventh Circuit holds that rejected drug shipment should not be included in relevant conduct. Defendants arranged a marijuana purchase from a confidential informant. However, defendants deemed the quality of the marijuana unsatisfactory and declined to take delivery of the 500-pound load. A few months later the parties reached agreement on another deal, and this time defendants accepted 700 pounds of marijuana. The district court included the rejected load as relevant conduct when sentencing defendants, a decision they appealed.

The appellate court reversed. "Here, the defendants were charged with, and pleaded guilty to, a single count of conspiracy to possess with intent to distribute marijuana. The evidence established that Mr. Mankiewicz negotiated . . . for the delivery of a single load of marijuana. As the

government points out in its brief, there is no question that, throughout the charged conspiracy, his intent, and that of Mr. Zawadzki, was to acquire only that load. No other quantity was foreseeable to them."

The court held that "this result is the one most compatible with the intent of the Guidelines. . . . [T]he commentary to U.S.S.G. § 2D1.1 states that, 'in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant.' U.S.S.G. § 2D1.1 comment. (n.12). As counsel pointed out at oral argument, this section is intended to ensure that unscrupulous law enforcement officials do not increase the amount delivered to the defendant and therefore increase the amount of the defendant's sentence. Although there is absolutely no evidence that such a motivation actually existed in this case, the facts demonstrate the danger. At oral argument, we were informed that the marijuana that was supplied was the government's. It would have been possible for the confidential informant to supply low-grade marijuana in the expectation of its being rejected and in that way to increase the amount received, but never retained for distribution, by the defendants."

U.S. v. Mankiewicz, 122 F.3d 399, 402 (7th Cir. 1997).

See *Outline* at II.B.4.a, generally at I.A and II.A

Sentencing Procedure

Waiver of Appeal

Second Circuit holds that broad waivers of right to appeal require careful, fact-specific scrutiny. Defendant's plea agreement stated: "The defendant agrees not to file an appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range *as determined by the Court.*" (Emphasis added.) The agreement estimated that defendant's sentencing range would be 15–21 months. However, as the appellate court noted, defendant "retains no right of appeal unless the court upwardly departs from the range which it determines to be proper, a range which could bear little to no resemblance to the predicted range. No provision for appeal exists simply because the ultimate sentence proves to be beyond, or even considerably beyond, the anticipated range." In fact, the sentencing court determined that the proper range was 27–33 months, and imposed a 27-month term.

The appellate court noted that "[a]n ordinary appeal waiver provision waives the defendant's right to appeal a sentence falling within a range explicitly stipulated within the agreement itself." Because this waiver agreement contained no such stipulation, "the defendant assumes a virtually unbounded risk of error or abuse by the sentencing court," leading the court to determine that such agreements require careful scrutiny. "A request for appeal arising from such a plea bargain will not be summarily denied, as are many such requests arising from standard plea agreements. Instead, such a request will cause us to examine carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it merits our review. In particular, . . . we will focus upon 1) the extent to which the defendant actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range, and 2) the extent of actual discrepancy between the predicted range and the ultimate sentence."

Despite its "serious concerns with the plea bargain waiver provision," the court found that under the facts of the case there was "nothing unconstitutional and nothing so unfair or erroneous as to warrant our refusal to uphold the agreement." Defendant "secured considerable benefits" from the agreement, the final sentence was only six months above the top end of the predicted range, and, "although it is possible that Rosa did not foresee what actually occurred at sentencing, we can see no fundamental unfairness in that result."

U.S. v. Rosa, 123 F.3d 94, 99–102 (2d Cir. 1997). *See also U.S. v. Martinez-Rios,* 143 F.3d 662, 668–69 (2d Cir. 1998) (following *Rosa*, rejecting similar waiver and allowing appeal where there was no colloquy concerning waiver at plea allocution and sentencing judge indicated at least some issues would not be covered by waiver). *Cf. U.S. v. Goodman,* 165 F.3d 169, 174–75 (2d Cir. 1999) (same, for "even broader" waiver that only limited sentence to statutory maximum—defendant "received very little benefit in exchange for her plea of guilty" and during plea allocution judge suggested she would retain right to appeal in some circumstances, contrary to language of agreement). *But cf. U.S. v. Atterberry,* 144 F.3d 1299, 1301 (10th Cir. 1998) (upholding waiver of "right to appeal any sentence that does not exceed the maximum penalty provided by the statute of conviction on any ground"; although district court made passing, "routine" reference to defendant's general right to appeal sentence, that "could not have affected Mr. Atterberry's waiver decision" and nothing indicated waiver was not knowing and voluntary).

See *Outline* at IX.A.5

Probation and Supervised Release

Revocation of Probation

Fourth Circuit holds that, although substantial assistance departure was granted at original sentencing, such departure may not be considered at revocation sentencing unless government makes new § 5K1.1 motion. Defendant was sentenced for fraud offenses in 1993. Although his guideline range was 46–57 months, he was sentenced to five years of probation after a substantial

assistance departure, § 5K1.1. His probation was revoked in 1995 and he was sentenced to 46 months. Between the time of his original sentencing and revocation, 18 U.S.C. § 3565(a)(2) was amended. Courts had held that the earlier version of § 3565(a)(2) limited a revocation sentence to the sentence available at the time of original sentencing, and that departures could not be based on post-sentencing conduct. The amended version allows sentencing under the usual statutory and guideline factors without being limited by the original guideline range. Here, the district court used the earlier version of § 3565(a)(2). Defendant argued that the later version should have been used and, alternatively, that the court could have departed downward under the earlier version.

The first claim failed under the "savings clause," 1 U.S.C. § 109, which provides in pertinent part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty . . . ." "Following the amendment to § 3565(a)(2), the district court was permitted to consider post-sentencing factors as a basis for departure, a situation that Schaefer acknowledges may lead to a less severe sentence than the one that otherwise would be required. Accordingly, § 109 prevents the district court from applying the amended provisions of § 3565(a)(2) to impose a sentence lower than that allowed under the former version of § 3565(a)(2)."

The court also rejected defendant's second claim. Although the prior version of § 3565(a)(2) would normally allow a court to consider departure at a revocation sentencing for a ground that was present at the original sentencing, "a departure under § 5K1.1, p.s. is different from the typical basis for departure, and this difference dictates a different result. Unlike all other grounds for departure, in order for a district court to base a departure upon a defendant's substantial assistance . . . , the Government must first move the district court to do so. . . . Thus, although a sentence based on substantial assistance may have been available at the initial sentencing based on the Government's motion, it cannot be considered to be available at resentencing following a probation revocation absent a renewed motion by the Government. . . . Accordingly, at the sentencing hearing following the probation revocation, because the Government did not move for a departure based on substantial assistance, and because the parties agree that there was no other proper basis for departure brought to the attention of the court during the initial sentencing hearing, the district court properly concluded that it was constrained to sentence Schaefer within the applicable guideline range."

U.S. v. Schaefer, 120 F.3d 505, 507–09 (4th Cir. 1997).

See *Outline* at VII.A.1

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Sentencing Procedure

Supreme Court holds that defendant retained Fifth Amendment rights at sentencing and that adverse inference may not be drawn from silence. Defendant pled guilty to four drug counts, but reserved the right to contest the amount of drugs at sentencing. At the plea hearing, the district court warned her that by pleading guilty she would waive various rights, including "the right to remain silent under the Fifth Amendment." At sentencing, the government presented evidence on the amount of drugs defendant sold. Defendant challenged the adequacy of that evidence, but did not testify or present any evidence of her own. The district court found the government's evidence on quantity credible, partly by drawing an adverse inference from defendant's silence, and sentenced her to a ten-year mandatory minimum term. The court held that defendant, after pleading guilty, had no right to remain silent on the details of her offenses.

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

The Supreme Court remanded, rejecting the government's argument that defendant's guilty plea waived her privilege against compelled self-incrimination and ruling "that petitioner retained the privilege at her sentencing hearing. . . . There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, . . . the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute . . . . Under these circumstances, there is little danger that the court will be misled by selective disclosure."

The Court further reasoned that nothing in a colloquy under Fed. R. Crim. P. 11 "indicates that the defendant consents to take the stand in the sentencing phase or to suffer adverse consequences from declining to do so. Both the Rule and the District Court's admonition were to the effect that by entry of the plea petitioner would surrender the right 'at trial' to invoke the [Fifth Amendment] privilege. As there was to be no trial, the warning would not have brought home to petitioner that she was also waiving the right to self-incrimination at sentencing. The purpose of Rule 11 is to inform the defendant of what she loses by forgoing the trial, not to elicit a waiver of the privilege for proceedings still to follow. A waiver of a right to trial with its attendant privileges is not a waiver of the privileges which exist beyond the confines of the trial."

The Court also rejected the idea that the district court could draw an adverse inference from defendant's silence. "The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. . . . [A] sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case."

The Court added that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it."

Four justices dissented from the adverse inferences holding, but they agreed that defendant "had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case."

Mitchell v. U.S., 119 S. Ct. 1307, 1311–16 (1999).

See *Outline* generally at III.E.2; IX.B and D.3

Departures

Mitigating Circumstances

D.C., Second, and Ninth Circuits hold that rehabilitation following original sentencing may be considered for downward departure at resentencing after remand; Eighth Circuit disagrees. In the first two circuits, defendants were convicted on drug charges and also received a consecutive sentence under 18 U.S.C. § 924(c). After beginning their sentences, each filed a successful motion to have the § 924(c) conviction overturned in light of *Bailey v. U.S.,* 516 U.S. 137 (1995). Both defendants were resentenced, and both requested a downward departure to account for their rehabilitative efforts while serving their original sentences. Both district courts concluded they did not have authority to depart for post-conviction rehabilitation, and both defendants appealed.

The appellate courts remanded, concluding that under *Koon v. U.S.,* 116 S. Ct. 2035 (1996), such a departure could not be categorically excluded. The D.C. Circuit found that "postconviction rehabilitation is not one of the

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[listed] prohibited factors [in the Sentencing Guidelines], nor have we found any other provision of the Guidelines, policy statements, or official commentary of the Sentencing Commission prohibiting its consideration. We therefore hold . . . that sentencing courts may consider post-conviction rehabilitation at resentencing." However, the court also found that because "'post-offense rehabilitative efforts,' . . . a concept linguistically broad enough to cover post-conviction rehabilitation," are covered in § 3E1.1's commentary, post-conviction rehabilitation should be treated as "already taken into account" by the Guidelines. Therefore, it "must be present 'to such an exceptional degree that the situation cannot be considered typical of those circumstances in which the acceptance of responsibility adjustment is granted.'"

The Second Circuit had already held that post-*offense* drug rehabilitation could be considered for departure because it was not adequately considered in the Guidelines. *See U.S. v. Maier,* 975 F.2d 944, 948 (2d Cir. 1992). "We see no significant difference between the post-offense rehabilitation that we [approved] in *Maier* . . . and rehabilitation achieved in prison between imposition of the original sentence and resentencing. When the trial court undertook to resentence Reyes after vacating his §924(c)(1) conviction, it was required to consider him as he stood before the court at that time. . . . [I]f the defendant achieved a rehabilitation sufficiently impressive to be considered 'atypical' and to take his case out of the heartland, we see no reason why this should not be considered, as in *Maier*, a basis for departure."

In the Ninth Circuit case, the district court had departed downward at resentencing after a remand caused by an improper departure. The appellate court concluded that, after *Koon*, "post-sentencing rehabilitative efforts may be a basis for a downward departure. . . . Like the Second Circuit, we cannot ascertain any meaningful distinction between post-offense and post-sentencing rehabilitation. Nor is there support in the Guidelines for the proposition that a court is forbidden from looking at a defendant's rehabilitative efforts upon resentencing. Given the intervening Supreme Court decision in *Koon*," post-sentencing rehabilitation cannot be categorically precluded as a basis for departure. The court went on to affirm the departure for defendant's rehabilitative efforts.

U.S. v. Green, 152 F.3d 1202, 1207–08 (9th Cir. 1998) (per curiam); *U.S. v. Rhodes,* 145 F.3d 1375, 1379–84 (D.C. Cir. 1998) (Silberman, J., dissented); *U.S. v. Core,* 125 F.3d 74, 77–79 (2d Cir. 1997). *Accord U.S. v. Sally,* 116 F.3d 76, 79–82 (3d Cir. 1997). *Cf. U.S. v. Whitaker,* 152 F.3d 1238, 1239 (10th Cir. 1998) (holding that *Koon* effectively overruled circuit precedent that precluded using post-offense/presentencing rehabilitation efforts as basis for departure).

The Eighth Circuit—also in a *Bailey* resentencing case—reached the opposite conclusion. The court reasoned, first, that "*Koon* addressed the matters that a district court may properly consider in departing from the guideline at an original sentencing . . . , [not] whether post-sentencing events might support a departure at a resentencing because that matter was not before it. We therefore do not think that *Koon* should be read to require district courts to consider a defendant's post-sentencing rehabilitative conduct as a basis for downward departure at resentencing." Second, allowing such a departure would increase sentencing disparity by providing a "windfall" for "a few lucky defendants, simply because of a legal error in their original sentencing," that is not available to other prisoners. The court was also concerned that rewarding "exemplary conduct in prison . . . may interfere with the Bureau of Prisons's statutory power to award good-time credits to prisoners."

Finally, the court noted it had previously limited matters that may be considered for departure at resentencing after remand to "any relevant evidence on that issue that it could have heard at the first hearing." Thus, rehabilitative efforts before the original sentencing may be considered, *see U.S. v. Kapitzke,* 130 F.3d 820, 823–24 (8th Cir. 1997), but "[r]ehabilitation that takes place behind the prison walls after the original sentencing . . . is not relevant, since the sentencing court obviously could not have considered it at the time of the original sentencing."

U.S. v. Sims, No. 98-2287 (8th Cir. Apr. 9, 1999) (Arnold, J.).

See *Outline* at VI.C.2.a

Sixth Circuit holds that disparity built into guidelines did not provide basis for downward departure. Defendant pled guilty to mail theft and credit card fraud charges. The amount of loss for sentencing purposes was over $13,000, and she faced a sentence of 12–18 months. The district court departed, however, after finding that the sentence for defendant's "relatively minor white-collar" crime was "disproportionate" compared to the sentence that could result from a more serious white-collar crime, using the example of thirty months for a bank fraud that resulted in a $360,000 loss. The court concluded that the Sentencing Commission had not considered this type of disparity in formulating the Guidelines. The government appealed and the appellate court reversed, holding that defendant's situation is not unusual under the Guidelines and was, in fact, deliberate.

"For theft and fraud offenses, the Commission reasoned that severity would be based, in part, on the amount of loss due to the theft or fraud . . . . In ordinary circumstances, a person who steals credit cards from the mail and makes eleven-thousand dollars of unauthorized charges should receive a sentence below, but not necessarily far below, that of a person who cheats a bank out of hundreds of thousands of dollars. . . . [T]he Commission did not establish a uniform margin of increase. . . . This progressive margin of increase results in fraud offenders at the low end receiving sentences that appear harsh

when compared with high-level fraud offenders. The Commission, however, explicitly classified as 'serious' low-level fraud and other white-collar offenders . . . [and] deliberately prescribed a relatively high sentencing level for low-level white-collar offenders. . . . That this arrangement produces disproportionate results between high and low-level offenders cannot serve as the legal basis for a downward departure absent unusual circumstances in the particular situation." Finding no unusual circumstances here, the court reversed.

U.S. v. Weaver, 126 F.3d 789, 792–94 (6th Cir. 1997).

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

Criminal History

First Circuit allows departure for serious uncharged conduct that was dissimilar to offense of conviction. After defendant was arrested on a domestic violence charge, police discovered firearms in his house. Defendant was then charged in federal court with three firearms offenses and pled guilty to all three. Although he faced a sentence of 33–41 months, the district court departed under § 4A1.3 by increasing defendant's criminal history category from III to V and imposed a 63-month prison term. The court based the departure on two grounds: seven prior convictions that were not counted because they were too old; and a 17-year "history of persistent and vicious domestic violence," for which there was ample evidence but no criminal convictions. Together, these facts indicated that defendant's criminal history score "does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes," USSG § 4A1.3.

On appeal, defendant argued that, because § 4A1.3(e) expressly invites courts to consider "prior *similar* conduct not resulting in a criminal conviction" (emphasis added), courts should not consider dissimilar, uncharged conduct. The appellate court disagreed, finding that, because § 4A1.3(e) was merely part of a nonexhaustive list of possible departure grounds, "to infer that the guideline's explicit authorization to consider similar misconduct as a basis for departure precludes any consideration of dissimilar misconduct for that purpose not only would frustrate the 'included, but not limited to' caveat that the Sentencing Commission deliberately inserted in the text of section 4A1.3, but also would run counter to a fundamental principle of departure jurisprudence: that, in the absence of an explicit proscription, courts generally should not reject categorically any factor as a potential departure predicate. . . . Accordingly, we hold that, in an appropriate case, a criminal history departure can be based upon prior dissimilar conduct that was neither charged nor the subject of a conviction." Finding this "an appropriate case," the court affirmed the departure.

U.S. v. Brewster, 127 F.3d 22, 25–28 (1st Cir. 1997). *But cf. U.S. v. Chunza-Plazas,* 45 F.3d 51, 56 (2d Cir. 1995) (vacating upward departure based on dissimilar foreign criminal conduct that had not resulted in conviction: "Even assuming that [§ 4A1.3(e)] might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is 'similar' to the crime of conviction.").

See *Outline* generally at VI.A.1.c

Criminal History

Career Offenders

Eleventh Circuit finds that "guilty but mentally ill" plea can count toward career offender status. Defendant was convicted of bank robbery. He had three previous felony convictions, two of which were based on pleas of "guilty but mentally ill" (GBMI) under Georgia law. The sentencing court held that the GBMI plea was analogous to a plea of nolo contendere, which made it a conviction under § 4A1.2(a)(4) that could be used under § 4B1.1 as a "prior felony conviction." *See* § 4B1.2(c) & comment. (n.3). Defendant was sentenced as a career offender and appealed, arguing that § 4B1.1 should be strictly interpreted to exclude consideration of the GBMI pleas.

The appellate court affirmed, concluding that, under Georgia law, "a conviction based on the GBMI plea has the same operation at law as a conviction based on a plea of guilty. . . . The sole substantive distinction between a conviction based on a GBMI plea and one based on a guilty plea relates to the incarceration and treatment of the defendant after sentencing." As the Georgia Supreme Court held, a verdict based on a GBMI plea "has *the same force and effect as any other guilty verdicts*, with [the] additional provision that the Department of Corrections or other incarcerating authority provide mental health treatment for a person found guilty but mentally ill." (Emphasis added by Eleventh Circuit.) "We therefore hold that a plea of 'guilty but mentally ill' is a 'guilty plea' within the meaning of section 4A1.2(a)(4) of the sentencing guidelines, and that the convictions at issue qualify as 'prior felony convictions' under section 4B1.1."

U.S. v. Bankston, 121 F.3d 1411, 1414–16 (11th Cir. 1997).

See *Outline* generally at IV.B.3

Determining the Sentence

Restitution

Most circuits to decide issue hold that Mandatory Victims Restitution Act cannot be applied retroactively; two disagree. The Mandatory Victims Restitution Act of 1996 (MVRA), effective Apr. 24, 1996, added 18 U.S.C. § 3663A and substantially amended the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663–3664. Among other things, the MVRA mandates an order of full restitution for certain offenses regardless of the defen-

dant's ability to pay (which is only to be considered in setting up a schedule of payments). *See* § 3664(f)(1)(A) and (f)(2). Under former § 3664(a), a defendant's financial circumstances were considered in determining the amount of restitution to be paid, if any.

Most circuits to rule on the issue have held that applying the MVRA's mandatory restitution requirement to defendants who committed their crimes before Apr. 24, 1996, would violate the Ex Post Facto Clause of the Constitution. *See U.S. v. Edwards,* 162 F.3d 87, 89–92 (3d Cir. 1998) (remanded: specifically disagreeing with *Newman*, *infra*, and holding that "retrospective application of the MVRA violates the Ex Post Facto Clause because restitution imposed as part of a defendant's sentence is criminal punishment, not a civil sanction, and the shift from discretionary to mandatory restitution increases the punishment meted out to a particular defendant"); *U.S. v. Siegel,* 153 F.3d 1256, 1259–60 (11th Cir. 1998) (same); *U.S. v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997) (remanded: "amended VWPA . . . had the potential to increase the amount of restitution [defendants] would have to pay"); *U.S. v. Thompson,* 113 F.3d 13, 14 n.1 (2d Cir. 1997) (agreeing with parties' conclusion that applying MVRA retroactively would be ex post facto violation). *See also U.S. v. Bapack,* 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997) (without discussion, applying pre-MVRA provisions on review).

The Eighth Circuit agreed that the MVRA cannot be applied retroactively, but concluded that, because defendant's offense of conviction occurred May 30, 1996, applying the MVRA to order restitution for related conduct that occurred before the MVRA's effective date was not an ex post facto violation. *U.S. v. Williams,* 128 F.3d 1239, 1241–42 (8th Cir. 1997) (affirmed: defendant "had fair warning his criminal conduct could trigger mandatory restitution under § 3663A(a)(3) to persons other than the victims of his May 30 offense").

However, the Seventh Circuit held that the MVRA can be applied retroactively because "we do not believe that restitution qualifies as a criminal punishment. . . . It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense." Thus, because defendant's criminal punishment was not increased, applying the MVRA to his pre-MVRA offense did not violate the Ex Post Facto Clause. *U.S. v. Newman,* 144 F.3d 531, 538–42 (7th Cir. 1998).

Most recently, the Tenth Circuit agreed with the Seventh while "reject[ing] the views of the Second, Third, Eighth, Ninth, Eleventh and D.C. circuits to the contrary." The court reasoned that earlier circuit decisions had held that a restitution order under a previously amended version of the VWPA did not implicate the Ex Post Facto Clause because it "does not inflict punishment," and "the logic of these cases is patently applicable to the MVRA." *U.S. v. Nichols,* 169 F.3d 1255, 1279–80 & nn.8–9 (10th Cir. 1999).

See *Outline* generally at section V.D

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Departures

Substantial Assistance

Third Circuit holds that, even though plea agreement did not specify it, government retained sole discretion to decide whether to file § 5K1.1 motion. Defendant entered into a plea agreement whereby the government agreed to make a § 5K1.1 departure motion if defendant "fully complies with this agreement prior to his sentencing, [and] provides substantial assistance in the investigation or prosecution of one or more persons who have committed offenses." The government did not move for departure, claiming that defendant did not meet his obligations under the agreement. The district court denied defendant's motion to require the government to move for departure or, alternatively, to withdraw his plea.

"On appeal, the central question that concerns us is whether the district court erred in its interpretation that the plea agreement required the defendant to satisfy the Government that he complied with its terms and provided substantial assistance to the Government . . . . [The district court] examined the law pertaining to plea agreements and focused on the absence in this plea agreement of any provision in which the Government expressly reserved the sole discretion to determine whether the defendant is entitled to a motion for a section 5K1.1 departure. The Government [argues] . . . that the plea agreement should be interpreted similarly to those agreements which expressly reserve to the Government 'sole discretion' in the matters of 5K1.1 motions and the exercise of that discretion by the Government on a subjective basis. We are constrained to agree."

The plea agreement "must be interpreted in the context of the circumstances under which it was formulated and general principles of the interpretation of contracts. . . . [A]lthough the agreement did not specifically reserve to the Government the sole discretion to evaluate whether the defendant has rendered substantial assistance, it 'contemplate[d] that any downward departure motion must be made "pursuant to" 18 U.S.C. §3553(e) and Guidelines 5K1.1.' . . . Thus, the plea agreement was implicitly subject to the statute and the Sentencing Guidelines and both expressly lodge the decision to make the motion in the Government's discretion, regardless of whether the Government expressly reserved such decision in the plea agreement. . . . The negotiations between the parties to the agreement are consistent with this conclusion. The district court found that it was undisputed that during the plea negotiations, the defendant's counsel demanded that if the Government decided not to move for a downward departure, it would have to justify that decision in court under an objective standard. The Government rejected that proposal."

"Thus, the district court had a very limited role in reviewing the Government's refusal to move for a downward departure. . . . We, therefore, agree with the district court and hold that the Government's decision not to move for a departure is reviewable only for bad faith or an unconstitutional motive." Defendant did not allege either, so the decision was affirmed.

U.S. v. Huang, 178 F.3d 184, 187–89 (3d Cir. 1998).

See *Outline* at VI.F.1.b.ii

Second and Eighth Circuits hold that wording of plea agreement may limit government's ability to withhold § 5K1.1 motion for reasons unrelated to substantial assistance. In the Second Circuit case, the government had filed motions for downward departure under § 5K1.1 and 18 U.S.C. § 3553(e), advising the district court that defendant had provided substantial assistance. However, defendant failed to appear at his original sentencing hearing and later was arrested for and pled guilty in state court to selling crack cocaine. After this the government successfully moved to withdraw its earlier motions and defendant was sentenced without benefit of a departure. He argued on appeal that he had cooperated as promised in his plea agreement and the district court had the power to depart without a government motion.

The appellate court remanded for resentencing. "The district judge's ruling that the motion could be withdrawn gave no consideration to the plea agreement, which was the basis on which the Government filed the motion." The agreement provides that the government is released from its obligation to file a motion if defendant "has not provided substantial assistance" or "has violated any provision of this Agreement," and included a provision obligating defendant to refrain from committing further crimes. "The agreement, however, is silent with regard to the withdrawal of a Section 5K1.1 and 18 U.S.C. § 3553(e) motion. Further, it specifically recites the consequences if Padilla committed further crimes or otherwise violated the agreement, but the right to withdraw the Section 5K1.1 and 18 U.S.C. § 3553(e) motion is not enumerated as one of such consequences."

"Reading the agreement strictly against the Government, as our precedent requires, we conclude that it prohibits the Government from withdrawing the Section 5K1.1 and 18 U.S.C. § 3553(e) motion because it failed to enumerate specifically the right to withdraw the motion in the several specific and serious consequences that

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would follow if Padilla committed further crimes or otherwise violated the agreement. . . . 'The Government [is] responsible for imprecisions or ambiguities in the agreement.' . . . We therefore hold that allowing the Government to withdraw the motion violated the plea agreement and was erroneous." The court noted that its holding "is necessarily a narrow one because of the limited nature of the issue raised by the attempted withdrawal of the motion."

U.S. v. Padilla, No. 98-1411 (2d Cir. July 14, 1999) (Gibson, J.).

In the Eighth Circuit, the plea agreement provided that "[a]ny cooperation provided by [defendant] will be considered by the government under . . . § 5K1.1." Defendant did provide assistance, but the government refused to file a motion and defendant moved to compel its filing. Although the government agreed that defendant could make a substantial threshold showing that he had provided substantial assistance, the government argued that defendant had recently used and possessed controlled substances, which violated his agreement to "not commit any additional crimes whatsoever." The district court agreed and denied the motion.

The appellate court found a "fundamental defect in the government's position. Its refusal to file a substantial assistance motion was based entirely upon a reason unrelated to the quality of Anzalone's assistance in investigating and prosecuting other offenders. But § 5K1.1 and the related statute . . . 18 U.S.C. § 3553(e), do not grant prosecutors a general power to control the length of sentences. Because sentencing is 'primarily a judicial function,' . . . the prosecutor's virtually unfettered discretion under § 5K1.1 is limited to the substantial assistance issue, which is a question best left to the discretion of the law enforcement officials receiving that assistance. 'The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial assistance is not a permissible basis for exercising the government's power under § 3553(e) [or § 5K1.1].' *U.S. v. Stockdall,* 45 F.3d 1257, 1261 (8th Cir. 1995)."

"Therefore, 'the government cannot base its [§ 5K1.1 motion] decision on factors other than the substantial assistance provided by the defendant.' *U.S. v. Rounsavall,* 128 F.3d 665, 669 (8th Cir. 1997). Once the government concludes that a defendant has provided substantial assistance, and has positively assessed in that regard 'the cost and benefit that would flow from moving,' . . . it should make the downward departure motion and then advise the sentencing court if there are unrelated factors . . . that in the government's view should preclude or severely restrict any downward departure relief. The district court may of course weigh such alleged conduct in exercising its downward departure discretion."

Although the plea agreement provided that the government could refuse to make a motion "which it is otherwise bound by this agreement to make" if defendant violated the agreement, that did not change the result. That provision "by its plain language does not apply to a substantial assistance downward departure motion, because the government was never 'bound' to make such a motion," having agreed to merely "consider" any cooperation by defendant.

U.S. v. Anzalone, 148 F.3d 940, 941–42 (8th Cir. 1998) (note: the decision was vacated and rehearing en banc granted, but was then reinstated and rehearing en banc denied, 161 F.3d 1125; Murphy, J., dissented from the original opinion, and five judges would have granted rehearing en banc).

The Eighth Circuit later distinguished *Anzalone* in a case involving a defendant who claimed to be in the same position. He had provided information to the government and agreed to testify as part of his plea agreement, but before sentencing he failed to appear for drug testing and on four occasions tested positive for cocaine. The government declined to file a § 5K1.1/§ 3553(e) motion and the district court denied defendant's motion to compel the government to do so.

The appellate court affirmed, based on the plea agreement and the district court's finding that the refusal to file was related to defendant's assistance. "The [plea] agreement gave the government the sole right to judge whether Wilkerson continued to provide substantial assistance. The record of the sentencing hearing supports the court's finding that the decision not to make the motion was based on the prosecutor's judgment that Wilkerson had not continued to provide substantial assistance because he did not keep the government apprised of his ongoing drug involvement or his sources and because he had undermined his usefulness as a potential witness, a role he had agreed to play. The government's decision here was based on its evaluation of the quality of Wilkerson's assistance, in contrast to *Anzalone* where it raised no criticism of the assistance provided. The plea agreements are also different, and Wilkerson's created a *continuing* duty to provide substantial assistance. . . . On this record Wilkerson has not shown that the government's reason for not filing a § 5K1.1 motion was irrational or based on bad faith or unconstitutional motive."

U.S. v. Wilkerson, 179 F.3d 1083, 1086 (8th Cir. 1999).

See *Outline* at VI.F.1.b.ii and iii

Aggravating Circumstances

Fourth Circuit holds that § 5K2.3 departure may be based on injury to indirect victims of offense, but only if they have "some nexus or proximity to the offense." Defendant was convicted of involuntary manslaughter, the result of a reckless driving incident in which three people died. The district court departed upward under § 5K2.3 for extreme psychological injury to the families of

two of the deceased, concluding that they were "victims" within the meaning of that term in § 5K2.3. Defendant appealed, arguing that § 5K2.3 is limited to direct victims of the offense of conviction.

The appellate court held that, although the families in this case do not qualify as victims, § 5K2.3 can cover indirect victims. The court reasoned that "the context in which the term 'victim' is used in § 5K2.3 is nearly identical to the context in which it is used in §§ 3A1.1 and 3A1.3," under which the court has upheld enhancements for indirect victims.

"Although a victim need not be the direct victim of the offense of conviction, we do not believe, as the Government contends, that every individual adversely affected by the offense of conviction is an indirect victim. Rather, an indirect victim must have some nexus or proximity to the offense. Put simply, an individual is an indirect victim because of his relationship to the offense, not because of his relationship to the direct victim. Bank tellers and patrons are indirect victims in a bank robbery, *see* U.S.S.G. § 3A1.1, comment. (n.2), credit card holders are indirect victims in a scheme to defraud their credit card issuers . . . , and patients are indirect victims in a plan to defraud their insurance carrier . . . , because of their nexus or proximity to the offense of conviction. Here, however, there is no evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims. Because we conclude that the families of [the deceased] are not victims of the offense of conviction, the district court abused its discretion in departing upward by three levels under § 5K2.3, p.s."

U.S. v. Terry, 142 F.3d 702, 711–12 (4th Cir. 1998). *See also U.S. v. Morrison,* 153 F.3d 34, 35 (2d Cir. 1998) (affirming § 5K2.3 departure of 14 offense levels based in part on injury to "secondary victims" who had direct contact with defendant, although they were not direct victims of offenses of conviction); *U.S. v. Haggard,* 41 F.3d 1320, 1327–28 (9th Cir. 1994) (where defendant deliberately lied to authorities about having information on long-missing child's whereabouts and directed some comments to child's family, "family was a direct victim of [the] criminal conduct" and § 5K2.3 departure was proper). *Cf. U.S. v. Hoyungawa,* 930 F.2d 744, 747 (9th Cir. 1991) (remanded: "§ 5K2.3 applies only to direct victims of the charged offense," and does not apply to family of police officer who was killed on duty by defendant).

See *Outline* at VI.B.1.d; see also cases in III.A.1.b

Tenth and Sixth Circuits hold that vulnerable victim enhancement does not preclude departure under SCAMS Act. In both cases, defendants were convicted of telemarketing fraud against elderly victims. Both received enhancements under § 3A1.1(b) for harming vulnerable victims, plus an upward departure based on the Senior Citizens Against Marketing Scams Act of 1994 (SCAMS Act). Both defendants appealed, claiming that § 3A1.1 adequately accounted for their conduct and that a departure was improper double counting. The appellate courts rejected that argument.

The Tenth Circuit found that "the vulnerable victim enhancement and the SCAMS Act differ on two key dimensions. The SCAMS Act is directed toward criminal telemarketing conduct targeted at or actually victimizing a certain class of individuals, statutorily defined as those over the age of fifty-five. . . . The Act requires the offense target the elderly as a class. In contrast, [§ 3A1.1(b)] does not require a finding the defendant targeted the victim because of his vulnerability. . . . Moreover, the vulnerable victim enhancement cannot be based solely on the victim's membership in a certain class; the sentencing court is required to make particularized findings of vulnerability, focusing on the individual victim and not the class of persons to which the victim belonged. . . . A single vulnerable victim is sufficient to support application of the enhancement. . . . Thus, the focus of the SCAMS Act and that of the vulnerable victim enhancement differ in key respects and are sufficiently distinct to avoid double counting the same offense conduct."

The Sixth Circuit "agree[d] with the analysis of the Tenth Circuit. The SCAMS Act is specifically designed to combat and punish severely the conduct in which Brown engaged, conduct which falls outside of the 'heartland' of cases addressed by the vulnerable victim guideline, U.S.S.G. § 3A1.1(b). In this case, the SCAMS Act authorized the district court to impose an additional ten-year sentence upon Brown. Instead of imposing a ten-year sentence under the SCAMS Act, the district court noted that the SCAMS Act signaled Congress's view that U.S.S.G. § 3A1.1(b) did not adequately address Brown's conduct. . . . We conclude that the district court could properly depart upward based on the SCAMS Act even though Brown also received a two-level enhancement for vulnerable victims under § 3A1.1(b)."

U.S. v. Brown, 147 F.3d 477, 487–88 (6th Cir. 1998); *U.S. v. Smith,* 133 F.3d 737, 749 (10th Cir. 1998). *Accord U.S. v. Scrivener,* No. 98-50513 (9th Cir. Aug. 30, 1999) (Wardlaw, J.) (agreeing with *Brown* and *Smith* in affirming § 3A1.1(b) enhancement and two-level upward departure under §5K2.0 for fraud defendant who targeted elderly victims).

See *Outline* generally at III.A.1.a and c and VI.B.1.a

Mitigating Circumstances

Tenth Circuit holds that extreme remorse may be ground for departure. Defendant pled guilty to three unarmed bank robberies and was sentenced to 41 months, the bottom of the guideline range. The district court denied his request for a downward departure on account of his exceptional remorse, specifically ruling that it did not have discretion to consider that factor so that defendant could appeal. [Note: The specifics of

defendant's remorse are not mentioned in the appellate court's opinion, but it notes that "[t]he record contains evidence supporting Fagan's claim that his remorsefulness was extreme and the government conceded as much during the sentencing hearing."]

The appellate court remanded, concluding that "[b]ecause remorse is not one of the factors specifically forbidden by the Sentencing Guidelines, it may be a permissible departure factor in certain circumstances. . . . The government argues that even if remorse is a permissible factor, Fagan is not entitled to an additional downward departure because remorse is an element of acceptance of responsibility," and defendant already received a § 3E1.1 reduction. Although the court agreed that remorse is taken into account by the Guidelines, an accounted for factor can still be "a permissible factor for departure if it is present to some exceptional degree." Therefore, "a sentencing court may depart downward if it finds that remorse is present to an exceptional degree."

U.S. v. Fagan, 162 F.3d 1280, 1284–85 (10th Cir. 1998). *Accord U.S. v. Jaroszenko,* 92 F.3d 486, 490–91 (7th Cir. 1996) (remanded: "Although the guidelines may discourage the consideration of a defendant's remorse in most decisions about downward departures, they do not contain an absolute ban on a district court's indulging in such a consideration.").

See *Outline* generally at VI.C.5.c

Determining the Sentence

Safety Valve Provision

Sixth Circuit holds that safety valve may not be denied for defendant's refusal to testify at coconspirators' proceedings. The government did not contend that defendant failed to truthfully provide all information he had concerning the offense of conviction and related conduct, and he otherwise met the requirements of 18 U.S.C. § 3553(f) and USSG § 5C1.2. However, defendant told the government that he would refuse to testify before a grand jury or at a trial concerning his coconspirators. The government claimed, and the sentencing court agreed, that "defendant's refusal to testify mean[t] that he has not provided the government with 'all information and evidence' as required by 18 U.S.C. § 3553(f)(5)."

The appellate court reversed, concluding that "[t]he government's position is contradicted by the clear language of the statute—the defendant's obligation is to provide information and evidence to the government, not to a court. . . . Given the phrase 'to the Government,' it is our view that a common-sense reading of the statute leads to the conclusion that evidence is limited to those things in the possession of the defendant prior to his sentencing, excluding testimony, that are of potential evidentiary use to the government."

U.S. v. Carpenter, 142 F.3d 333, 335–36 (6th Cir. 1998).

See *Outline* at V.F.2.c and e

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General Application Principles

Sentencing Factors

Several circuits examine scope of resentencing after remand. When an appellate court remands a guidelines case for resentencing and does not expressly delineate the issues to be examined on remand, should resentencing be conducted de novo or be limited to the issues the appellate court found needed correction? The circuits have split on this question, and recent cases have added to that split.

The Sixth Circuit concluded that, given the nature of the sentencing guidelines, a presumption of de novo resentencing is preferable in order to "give the district judge discretion to consider and balance all of the competing elements of the sentencing calculus." Sentencing under the guidelines "requires a balancing of many related variables. These variables do not always become fixed independently of one another."

To determine whether a remand is limited, a district court must first determine "what part of this court's mandate is intended to define the scope of any subsequent proceedings. The relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language. . . . The key is to consider the specific language used in the context of the entire opinion or order. However, '[i]n the absence of an explicit limitation, the remand order is presumptively a general one.'" The court added that an appellate court "should leave no doubt in the district judge's or parties' minds as to the scope of the remand. The language used to limit the remand should be, in effect, unmistakable."

U.S. v. Campbell, 168 F.3d 263, 265–68 (6th Cir. 1999).

The Fifth Circuit joined those rejecting the de novo resentencing presumption. The court had remanded a case "for sentencing consistent with this opinion." At the resentencing, defendant wanted to present evidence relating to his previous enhancement for obstruction of justice, an issue he had not appealed. The district court declined to hear evidence on that issue.

The appellate court affirmed. "This court specifically rejects the proposition that all resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand. This case was remanded for resentencing. The fact that the appellate court did not expressly limit the scope of the remand order did not imply that a full blown sentencing hearing was permissible for a second time, allowing evidence on all issues that would affect the sentencing guidelines. . . . The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less. All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court."

U.S. v. Marmolejo, 139 F.3d 528, 530–31 (5th Cir. 1998). *Accord U.S. v. Parker,* 101 F.3d 527, 528 (7th Cir. 1996) (same, adding that "the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error.").

The Eighth Circuit similarly rejected attempts by both defendant and government to open a resentencing to additional issues. "Although the [appellate] court's opinion in its conclusion recited that we 'vacate his sentence and remand his case to the district court for resentencing,' that statement must be read with the analysis offered in the opinion," which focused on two particular drug matters. Other issues should not have been in contention at resentencing or in another appeal. The court acknowledged, however, that "an appeals court can avoid the problem of multiple appeals by issuing specifically limited remands . . . , leaving open for resolution only the issue found to be in error on the initial sentencing."

U.S. v. Santonelli, 128 F.3d 1233, 1237–39 (8th Cir. 1997).

The First Circuit also held that resentencing should not be presumed to be de novo, but agreed with a D.C. Circuit decision that new matters may be raised if they are "made newly relevant" by the appellate court's decision. Defendant challenged several issues on appeal, but not drug quantity because the alleged difference would not have affected his sentence. After winning a related issue on his appeal, however, the difference could have reduced his offense level and he tried to challenge the quantity at resentencing. The district court ruled that defendant had waived the issue and declined to hear evidence.

The appellate court had not specified the issues to be considered on remand, so it had to determine whether resentencing should be de novo or limited. It was "persuaded by the reasoning of" *U.S. v. Whren,* 111 F.3d 956,

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959–60 (D.C. Cir. 1997), and held, "as it did, that 'upon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result.' . . . In addition, we hold, along with *Whren*, that: 'A defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing; but neither should a defendant be able to raise an issue for the first time upon resentencing if he did have reason but failed nonetheless to raise it in the earlier proceeding.'"

"Whether there is a waiver depends . . . on whether the party had sufficient incentive to raise the issue in the prior proceedings. . . . This approach requires a fact-intensive, case-by-case analysis. Using such an analysis, we conclude there was no waiver and it was error not to consider the proffer as to the weight issue on remand. . . . Our waiver doctrine does not require that a defendant, in order to preserve his rights on appeal, raise every objection that *might* have been relevant if the district court had not already rejected the defendant's arguments."

U.S. v. Ticchiarelli, 171 F.3d 24, 30–33 (1st Cir. 1999).

See *Outline* at I.C.

Adjustments

Role in the Offense

Third and Eleventh Circuits differ on scope of conduct that may be considered in mitigating role determination for drug courier. The Third Circuit defendant transported to the United States 800 grams of heroin, which had been given to him by two men in Colombia. He was arrested at the airport on arrival, and he unsuccessfully tried to call his U.S. contact in an attempt to cooperate with customs officials. The government agreed with defendant that he was entitled to a reduction under §3B1.2(b), but the district court denied it, stating that "I find that his role is essential for the commission of the crime and that he is not a minor participant." The appellate court remanded for a clearer statement of the basis of the district court's ruling, and set out standards for considering a §3B1.2 reduction for drug couriers.

The court first noted that, because this determination "is highly dependent on the facts of particular cases, . . . a mechanical application of the guidelines by which a court always denies minor role adjustments to couriers because they are 'essential,' regardless of the particular facts or circumstances, would be inconsistent with this guidance." And because §3B1.2 "is ultimately concerned with the defendant's relative culpability, a district court should consider the defendant's conduct . . . in relation to the other participants," examining such factors as "the defendant's relationship to the other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise. . . . [T]he other participants must be criminally responsible[, but] need not have been charged with any offense."

In the same vein, the adjustment "must be made on the basis of all relevant conduct—namely, all conduct within the scope of §1B1.3—and not simply on the basis of the elements and acts referenced in the count of conviction." Thus, a courier who is not charged with conspiracy can still play a minor role in the charged importation if other participants were involved in the relevant conduct. "It is the nature of the relevant conduct shown, and all the participants' roles in it, that is determinative—not the nature or name of the offense charged as such."

The court also rejected the argument that §3B1.2 should not be applied to a defendant who is charged with only the amount of drugs that was actually carried, as in this case. "The scope of the relevant conduct that a court should consider . . . is broader than merely the conduct required by the elements of the offense of conviction. Even if a courier is charged with importing only the quantity of drugs that he actually carried, there may still be other participants involved in the conduct relevant to that small amount or that one transaction. . . . Accordingly, although the amount of drugs with which the defendant is charged may be an important factor which weighs heavily in the court's view of the defendant's relative culpability, it does not necessarily preclude a minor role adjustment with one exception," that being where a defendant "received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct." *See* USSG §3B1.2, comment. (n.4).

"A courier's role can vary widely, and we reject any per se rule regarding the applicability of the minor role adjustment. Rather, there is no limit to the extent of a court's factual inquiry and assessment of the defendant's relative culpability."

U.S. v. Isaza-Zapata, 148 F.3d 236, 238–42 (3d Cir. 1998).

The Eleventh Circuit, sitting en banc, reversed a panel opinion that the Third Circuit had cited as support for its holding that the minor participant reduction is not automatically excluded when defendant is only charged with the amount of drugs actually carried. In that case, defendant was arrested upon arrival in the United States with 512.4 grams of heroin she had ingested. The district court denied a §3B1.2 reduction, but the original appellate panel remanded, holding that the district court had not undertaken a broad enough inquiry into the relevant conduct surrounding the importation scheme—including the roles of other participants who supplied the heroin, who would receive it, and who would distribute it. The panel was also concerned that the district court's stated belief that couriers play an "essential role" would

supersede the required fact-specific inquiry and deny the reduction for any courier. *U.S. v. De Varon,* 136 F.3d 740, 744–46 (11th Cir. 1998).

The en banc court reversed the panel and affirmed the district court's decision. While the court agreed that the inquiry should focus on defendant's role "as compared to that of other participants in her relevant conduct," it emphasized that the relevant conduct is limited to that "attributed to the defendant in calculating her base offense level. . . . Otherwise, a defendant could argue that her relevant conduct was narrow for the purpose of calculating base offense level, but was broad for determining her role in the offense." While citing several other circuits that agree, the court cited *Isaza-Zapata* as "holding that a court must examine all relevant conduct even if defendant is sentenced only for his own acts."

The court held, therefore, that "when a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs. . . . We further note . . . that the amount of drugs imported is a material consideration in assessing a defendant's role in her relevant conduct. . . . Indeed, because the amount of drugs in a courier's possession—whether very large or very small—may be the best indication of the magnitude of the courier's participation in the criminal enterprise, we do not foreclose the possibility that amount of drugs may be dispositive—in and of itself—in the extreme case."

As for comparison to other participants, "the district court may consider only those participants who were involved in the relevant conduct attributed to the defendant. The conduct of participants in any larger criminal conspiracy is irrelevant." The court specifically rejected "defendant's alternate suggestion that the district court was obligated to investigate and make detailed findings concerning the relative roles of all who may participate in a far-flung narcotics enterprise—that may stretch from the grower, to the manufacturer in a foreign land, through the distribution mechanism, to the final street-level distributor in the United States."

Following the foregoing analysis, "[t]he record amply supports the district court's finding that De Varon did not play a minor role in her offense of heroin importation." Defendant "played an important or essential role in her relevant conduct of importing 512.4 grams of 85 percent pure heroin from Colombia into the United States . . . [and] knowingly and intentionally entered the United States with the entire amount of drugs in her possession." Although someone else supplied the heroin, "it was within the trial court's discretion to conclude that her participation was central to the importation scheme."

U.S. v. De Varon, 175 F.3d 930, 939–47 (11th Cir. 1999) (en banc) (one judge dissented).

See *Outline* at III.B.1, 2.d, and 5.

Departures

Substantial Assistance

Three circuits hold that *Koon* did not give district courts authority to depart for substantial assistance under §5K2.0 in absence of government motion. The Third Circuit, as most circuits, had already ruled that "district courts have no authority, in the absence of either a government motion or extraordinary circumstances, to depart downward on the basis of substantial assistance under either §5K1.1 or §5K2.0." However, "we must address this question anew because of the sea change in the departure area effected by *Koon*" *v. U.S.,* 518 U.S. 81 (1996).

The question in this case is "whether §5K2.0, as interpreted in *Koon*, gives a district court any additional authority to consider a downward departure for substantial assistance." Defendant argued that, because "the Guidelines do not mention substantial assistance without a government motion as a sentencing factor," it is an "unmentioned" factor under *Koon* and may provide a basis for departure. The court, however, concluded that "the existence *vel non* of a government motion concerning assistance . . . is not a sentencing factor. . . . The requirement of a government motion under §5K1.1 is a *condition* limiting a court's authority to grant a defendant a substantial assistance departure."

What defendant is actually "proposing the district court should take into account under §5K2.0 is his alleged substantial assistance to the government. But this proposed factor has already been taken into account in the Sentencing Guidelines." Under *Koon*, then, "a district court can consider substantial assistance outside of the explicit terms of §5K1.1 only if a case falls outside of the 'heartland' of cases implicating that provision."

"We believe that departures are permissible under §5K2.0 for substantial assistance without a government motion only in those cases in which a departure is already permitted in the absence of a government motion under §5K1.1. The heartland of §5K1.1 is where the defendant substantially assists the government. We think that the only cases falling outside this heartland are those in which the government improperly—either because it has an unconstitutional motive or because it has acted in bad faith with regard to a plea agreement—refuses to offer a motion, and possibly those in which the assistance is not of the sort covered by §5K1.1."

"We therefore conclude that the district courts have no more authority to grant substantial assistance departures under §5K2.0 in the absence of a government motion than they do under §5K1.1." The court also concluded that "the substantial practical and policy problems that would arise if we adopted the approach proposed by" defendant supported its holding.

U.S. v. Abuhouran, 161 F.3d 206, 210–17 (3d Cir. 1998).

The D.C. and Fifth Circuits joined the Third, but only after replacing earlier panel opinions to the contrary. A D.C. Circuit panel originally remanded a district court's decision that it had no authority to grant defendant's request for a §5K2.0 departure based on his substantial assistance when the government did not file a §5K1.1 motion. The panel concluded that a substantial assistance departure without a government motion is an unmentioned factor under *Koon* that could provide a proper basis for departure. *In re Sealed Case,* 149 F.3d 1198, 1203–04 (D.C. Cir. 1998).

The en banc court vacated the panel opinion and unanimously held that there is no authority to depart under §5K2.0 in this situation. The court agreed with the Third Circuit that substantial assistance with or without a government motion is not "the relevant departure factor here," but rather the substantial assistance itself is. "Once the factor actually at issue here is identified, its place in the *Koon* taxonomy becomes clear. Substantial assistance to authorities cannot be an unmentioned factor since it is specifically mentioned in section 5K1.1." And "it is clear that by authorizing departures with government motions, the Commission did intend to preclude departures without motions."

The court also rejected defendant's claim that §5K2.0 provides an independent source of departure authority. "[I]f we read section 5K1.1 as saying that a substantial assistance departure is permissible only upon motion of the government, then we cannot read section 5K2.0 as countermanding that injunction." As in *Abuhouran*, the court concluded that departure may only occur in the absence of a government motion if the refusal to file was based on an unconstitutional motive, was not rationally related to any legitimate government end, or was attributable to bad faith or other breach of a plea agreement.

In re Sealed Case, 181 F.3d 128, 131–42 (D.C. Cir. 1999) (en banc).

The Fifth Circuit also originally considered substantial assistance without a government motion to be an unmentioned factor under the *Koon* analysis and affirmed a district court's departure under §5K2.0 despite the lack of a §5K1.1 motion. *U.S. v. Solis,* 161 F.3d 281, 284 (5th Cir. 1998). Upon the government's motion for reconsideration, however, the court vacated its opinion and remanded for resentencing.

"We are persuaded by the Third Circuit's reasoning in *Abuhouran* and, therefore, hold that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion. Because the Government did not bargain away its discretion to refuse to offer a §5K1.1 motion and Solis has not alleged that the Government refused to offer the motion for unconstitutional reasons, the district court erred by granting a five-level downward departure."

U.S. v. Solis, 169 F.3d 224, 227 (5th Cir. 1999).

See *Outline* at VI.F.1.a and b.

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