Reported and Unreported Sentencing Decisions of the United States Court of Appeals for the Second Circuit for the year 2000

James E. Neuman, Esq.
100 Lafayette St, Suite 501
New York, New York 10013
(212) 966-5612
www.jamesneuman.com

NOTE ABOUT THIS PUBLICATION

The following review is a summary of all reported and unreported sentencing decisions of the United States Court of Appeals for the Second Circuit, issued from January 1, 2000 to December 31, 2000. The decisions are arranged by topic, primarily to correspond with the chapters in the order set forth in the Sentencing Guidelines. Within each topic, the decisions are arranged alphabetically, with the reported decisions appearing first. Official citations are included whenever possible. All decisions are followed by the westlaw citations.

Second Circuit Sentencing Decisions, 2000
Prepared by James E. Neuman, Esq.
Updated March 12, 2001

TABLE OF CONTENTS

Second Circuit Sentencing Decisions, 2000
Prepared by James E. Neuman, Esq.
Updated March 12, 2001

OFFENSE CONDUCT

§ 1B1.3: Relevant Conduct

United States v. Akosa, 205 F.3d 1325 [2000 WL 227819; Jan. 21, 2000]
(Summary Order; Meskill, Jacobs, Leval)

Defendant argued that the district court erred by attributing uncharged quantities of heroin to him as part of his relevant conduct. The Second Circuit affirmed the district court's determination, which was said to be based upon clear and convincing evidence.

United States v. Giles, 210 F.3d 356 [2000 WL 424142; April 13, 2000]
(Summary Order; Winter, Leval, Magill)

The Second Circuit acknowledged "that there is some tension" between its decisions in *United States v. Jones*, 30 F.3d 276 (2d Cir. 1994) and *United States v. Studley*, 47 F.3d 569 (2d Cir. 1995) in that *Studley* requires "particularized" findings as to the scope of a defendant's agreement to criminal conduct, but *Jones* allows a sentencing court to attribute all conspiracy crime to a conspirator if it finds that he was a "trusted" member. The court found it unnecessary to resolve those cases, however, since the district court buttressed its "centrality" finding with facts indicating that defendant had agreed to the entire scope of the conspiracy's criminal activity. With regard to another defendant, the Second Circuit also found that his extensive contact with members of the conspiracy and deliveries of crack sufficiently demonstrated that he had agreed to the distribution prong of the conspiracy. That the defendant may not have agreed to the "purchasing" prong of the conspiracy was "inconsequential."

United States v. Matera, 234 F.3d 1263 [2000 WL 1549715; Oct. 18, 2000]
(Summary Order; McLaughlin, Calabresi, Sotomayor)

The government appealed the district court's finding that defendants were liable only for laundering money through the purchase and sale of particular cars specified in the indictment and in various documents. The government argued that both defendants should be liable for the total amount of money involved in the conspiracy. The Second Circuit affirmed the court's findings.

United States v. Yeung, 205 F.3d 1327 [2000 WL 232654; Feb. 29, 2000]
(Summary Order; Kearse, Parker, Pooler)

The district court's decision to include as relevant conduct the defendant's purchase of a vehicle using false identification was error absent evidence that he acquired the vehicle for the purpose of furthering his credit card scheme for which he was convicted. Because the district court did not explain why the loss related to the purchase of the vehicle should be included in the offense

level loss calculation, the Second Circuit vacated remanded for resentencing and clarification.

§ 2A1.1: First Degree Murder

United States v. Kan, 210 F.3d 356 [2000 WL 426197; April 14, 2000]
(Summary Order; Oakes, Walker, Keith)

The district court did not violate 18 U.S.C. § 3553(c) by failing to rule on the defendant's objection that the offense level should be 31, rather than 43, under 2A1.1 for first degree murder (or 40 after the acceptance of responsibility adjustment). By applying the adjusted offense level of 40, the district court implicitly rejected the defendant's argument, which actually amounted to a downward departure request, not an objection to the factual findings of the presentence report.

§ 2A3.1: Criminal Sexual Abuse

United States v. Volpe, 224 F.3d 72 [Aug. 16, 2000]
(Walker opinion; joined by Pooler, Sotomayor)

Pursuant to U.S.S.G. § 2A3.1(b)(1), a four-level increase in the offense level is required if the sexual abuse "was committed by the means set forth in 18 U.S.C. § 2241(a) or (b)" [i.e., by physical force, threats of force, or other means that render the victim unconscious or unable to resist]. The district court imposed the use-of-force adjustment on the grounds that: (1) the defendant had committed sexual abuse through use of force by pushing, kicking and punching the victim immediately prior to the sexual assault; and (2) that the defendant's act of sodomy, which was forceful enough force to puncture the victim's rectum and bladder, "was certainly enough to trigger" the adjustment. The Second Circuit held that adjustment was properly imposed on the first ground, but not the second ground. Section 2A3.1(b)(1) is aimed at used of force to compel the victim's submission to a sexual assault, not at more forceful assaults, especially since the degree of injury to the victim is taken into account separately in § 2A3.1(b)(4).

Further, the Court held that it was not impermissible to enhance defendant's sentence both because the sexual abuse victim was in the custody of the defendant, pursuant to § 2A3.1(b)(3)(A), and because the offense was committed under color of law, pursuant to § 2H1.1(b)(1)(B). "The color-of-law adjustment punishes abuse of authority, either actual or apparent, by an officer of the state. The in-custody adjustment, by contrast, punishes abuse of power over an individual in the officer's physical and legal control."

§ 2A4.1: Kidnaping

United States v. Legette, 205 F.3d 1326 [2000 WL 232283; Feb. 24, 2000]
(Summary Order; Kearse, Jacobs, Pooler)

The district court did not err in refusing to reduce the defendant's offense level pursuant to U.S.S.G. § 2A4.1(b)(4)(C), which allows for a reduction if the kidnaping victim was released before twenty-four hours had elapsed. The district court found that the victim was held captive for 27 hours and that the defendant took no steps to release him, allow him to escape, or turn him over to law enforcement officials.

The Second Circuit also found that the district court properly increased the defendant's offense level by two levels pursuant to U.S.S.G. § 2A4.1(b)(1) based on its finding that a ransom demand had been made. The defendants had forced the defendant to call a third person and tell him to meet with one of the defendants, and told the victim that he would be killed if the third person did not pay.

Further, it was also proper for the district court to increase the defendant's offense level pursuant to U.S.S.G. § 2A4.1(b)(3) for use of a dangerous weapon during a kidnaping. The district court found that it was foreseeable to the defendant that such a weapon would be used, as he had discussed with others the fact that they would be carrying at least one gun.

United States v. Young, 213 F.3d 627 [2000 WL 687750; May 25, 2000]
(Summary Order; Oakes, Miner, Sotomayor)

The Court held that the district court properly declined to decrease defendant's base offense level under U.S.S.G. 2A4.1(b)(4)(C). The district court found that the defendant could not have intended to release the victim and, in fact, did not do so. The Second Circuit emphasized that Section 2A4.1 explicitly requires that "the victim was released" in order to qualify for an offense-level reduction.

§ 2A6.1: Threatening or Harassing Communications

United States v. Atkins, 205 F.3d 1325 [2000 WL 236476; Feb. 16, 2000]
(Summary Order; Sotomayor, Meskill, Keenan)

Defendant argued that the district court erred in imposing a six-level upward adjustment pursuant to U.S.S.G. § 2A6.1(b)(1) for taking steps in furtherance of a threatening communication. Defendant had sent a letter to a corrections officer threatening to direct purported fellow gang members to injure or kill her and her family. After searching defendant's cell, prison authorities found a second letter directing an unknown individual to injure to kill the corrections officer and her family, as well as two other corrections officers. Defendant argued that because he took no action to mail the second letter, that letter should not be considered conduct sufficient to apply the adjustment. The Second Circuit found that the district court did not err in inferring from the defendant's drafting of the letter that he intended to send it.

United States v. Docimo, 205 F.3d 1325 [2000 WL 232076; Feb. 8, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The Second Circuit found that the district court did not abuse its discretion in applying U.S.S.G. § 2A6.1(b)(1), which allows a six-level increase in offense level if the threatening conduct "involved any conduct evidencing an intent to carry out such a threat." The district court determined that the letters written by the defendant threatened humiliation and embarrassment and that subsequent letters sent were acts intended to humiliate the recipient and thus evidenced the defendant's intent to carry out the initial threat.

United States v. Montague, 234 F.3d 1263 [2000 WL 1617975; Oct. 27, 2000]
(Summary Order; Cardamone, Sotomayor, Katzmann)

The district court increased defendant's offense level pursuant to U.S.S.G. § 2A6.1 because his offense evidenced an intent to carry out a threat against a judge and involved more than two threats. The jury had acquitted the defendant of all charges except of threatening to assault the judge, for which the jury returned no verdict and a mistrial was declared. Prior to retrial, the defendant pled guilty to the remaining charge. Defendant argued that the district court erred in relying on acquitted conduct to support the increase of his sentencing level and also erroneously relied on the testimony of two informants. The Second Circuit rejected both arguments, stating a sentencing judge may rely on acquitted conduct for sentencing purposes and that particular deference must be given to the district court's assessment of witnesses. Accordingly, the Second Circuit also rejected defendant's argument that the district court erred in denying his request for a downward departure based on U.S.S.G. § 2A6.1(b)(4) for conduct involving a "single instance evidencing little or no deliberation."

§ 2B3.1: Robbery

Donato v. United States, 208 F.3d 202 [2000 WL 268593; March 7, 2000]
(Summary Order; Walker, Parker, Sotomayor)

On appeal of a denial of a habeas corpus petition, the Second Circuit found "possible merit" to defendant's *pro se* argument that the district court had improperly increased his offense level five levels pursuant to U.S.S.G. § 2B3.1(b)(2)(C) for possession of a firearm. The defendant argued that possession of a firearm was charged as an overt act in both counts of the indictment, the first conspiracy to commit armed carjacking, and the second, commission of armed carjacking. The Second Circuit stated: "there may have been improper double counting if the district court increased the offense level for the conspiracy count because of the firearm possession charged as an overt act in Count One, and then sentenced [defendant] to a five-year consecutive sentence under section 924(c) for the use and possession of a firearm during the commission of the carjacking charged in Court Two." The Court remanded to clarify if the weapons possession referred to in count two and as an overt act was the same conduct.

United States v. Li, 205 F.3d 1326 [2000 WL 233702; Feb. 10, 2000]
(Summary Order; Cabranes, Sack, Carman)

The Second Circuit found that the district court properly imposed a four-level enhancement for abduction pursuant to U.S.S.G. § 2B3.1(b)(4)(A), which provides for the enhancement if "any person was abducted to facilitate commission of the offense or to facilitate escape." Under § 1B1.1(b), application note 1(a), "abducted" is defined to mean that "a victim was forced to accompany an offender to a different location." The defendant commandeered at gunpoint a bus en route to a casino, robbed the riders, and forced them to accompany him to a highway rest area. This action facilitated both the commission of the robbery and the escape.

§ 2C1.1: Bribery

United States v. Middlemiss, 217 F.3d 112 [June 21, 2000]
(Pooler opinion; joined by Kearse, Parker)

It was not error for the district court to increase defendant's base offense level by two levels for an extortion scheme that involved more than one extortion, pursuant to U.S.S.G. § 2C1.1(b)(1), where it found that there were two separate schemes, one involving monthly payments and the other a buyout to end the extortionate demands.

United States v. Collis, 213 F.3d 627 [2000 WL 562435; May 5, 2000]
(Summary Order; Meskill, Cabranes, Katzmann)

The Court rejected the defendant's argument that a two-level enhancement based on her payment of more than one bribe, pursuant to U.S.S.G. § 2C1.1(b)(1), was improper since the separate payments were actually "installments" of a single bribe. This argument ignored that the district court legitimately considered acquitted conduct, representing separate bribes.

§ 2D1.1: Narcotics

United States v. Aponte, 235 F.3d 802 [Dec. 21, 2000]
(Per Curiam; Oakes, Jacobs, Parker)

The Second Circuit disregarded, without discussion, defendant's argument that the district court erred in upwardly adjusting for possession of a firearm pursuant to U.S.S.G. § 2D1.1(b)(1).

United States v. Carmichael, 216 F.3d 224 [June 15, 2000]
(Winter opinion; joined by Oakes, Katzmann)

The district court's misinterpretation of the plea agreement, in increasing defendant's period

of supervised release from four to five years at resentencing, amounted to plain error. The defendant pleaded guilty to one count of conspiracy to possess with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, which is subject to a statutory minimum sentence of 5 years imprisonment and 4 years supervised release, as the plea agreement indicated. The government argued that a separate stipulation in the plea agreement that the defendant trafficked in at least 5 but less than 50 kilograms of cocaine raised his minimum to 5 years supervised release under Section 841(b)(1)(A). However, the Court held that "this stipulation was expressly limited by its own terms as solely 'for the purposes of the U.S. Sentencing Guidelines and the calculation of the defendant's base offense level thereunder,' not to statutory minimums." Plea agreements must be construed strictly against the government and thus the Court held that the "less onerous statutory minimum of Section 841(b)(1)(B) apply, and the period of four years of supervised release should be restored."

United States v. Dallas, 229 F.3d 105 [Oct. 4, 2000]
(Newman opinion; joined by Winter, Sack)

The Second Circuit held that the amount of narcotics to be counted for sentencing purposes for a conspiracy offense should include a six ounce portion of the quantity defendant agreed to sell which was not narcotics. After making two sales, defendant agreed to sell an additional six ounces of cocaine, but later decided to substitute flour for the cocaine. The Second Circuit found that because defendant agreed to sell the six ounces of cocaine, and had the intent and capability to do so, the narcotics quantity should include those six ounces.

United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
(Straub opinion; joined by Feinberg, Jacobs)

The Second Circuit remanded for resentencing because the district court misapplied the Guidelines in excluding from the calculation of drug quantity 98% of the hashish found on boats near the Canadian border. The district court excluded this amount because it was intended for distribution in Canada and thus constituted "foreign drugs," and since the defendants had already been prosecuted in Canada for the importation of those drugs. The Second Circuit held that this was a misapplication of the Guidelines because § 1B1.3 is not limited to activity undertaken against the United States. The Second Circuit, however, did not express any opinion as to whether defendants' sentences were "adequate in light of their culpability," leaving open the possibility of a downward departure.

United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
(Straub opinion; joined by Feinberg, Jacobs)

Finding the district court's remarks at sentencing ambiguous, the Second Circuit remanded for clarification as to whether the district court sentenced the defendants within their applicable ranges or downwardly departed to arrive at their sentences. Since the sentencing ranges exceeded

24 months, the district court was obligated to articulate the reason for the imposition of the sentences, pursuant to 18 U.S.C. § 3553(c)(1). But the district court's remarks made it unclear whether it had granted a downward departure or had just failed to apply an upward adjustment under U.S.S.G. § 2D1.1(b)(2)(A) for use of an aircraft.

United States v. Smith, 215 F.3d 237 [May 25, 2000]
(Per Curiam; Meskill, Cabranes, Telesca)

The Second Circuit vacated defendant's sentence and remanded to the district court to determine whether an enhancement pursuant to U.S.S.G. § 2D1.1 was warranted. The government argued that a two level increase should have been applied for possession of a weapon in connection with a narcotics offense. The district court made findings at sentencing that it was unclear whether the defendant had resided in the apartment where the guns were found, despite the fact that the defendant had told DEA agents following his arrest that there were three guns inside his residence and that the defendant had not objected to findings in the PSR that he did indeed reside at that address and that on his first appeal, the brief filed on his behalf stated that he resided at that apartment with a co-defendant. The Second Circuit held that the district court's failure to find that the defendant actually lived at that address was clearly erroneous. Further, the Court found that the weapons enhancement was applicable unless "“it was clearly improbable that the weapon was connected with the offense," U.S.S.G. § 2D1.1, cmt. (n.3), and remanded for the district court to make that determination.

United States v. Thomas, 204 F.3d 381 [Feb. 14, 2000]
(Per Curiam; Cabranes, Pooler, Carman)

The Second Circuit, joining the Tenth, Eleventh, and District of Columbia circuits, held that notwithstanding the Supreme Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), the quantity of drugs involved in a 21 U.S.C. § 841 offense remains a sentencing factor to be determined by the district judge, rather than charged in the indictment, submitted to the jury, and found beyond a reasonable doubt. In *Jones*, the Supreme Court held that the existence of serious bodily injury or death are statutory elements of 18 U.S.C. § 2119 (car jacking) rather than mere sentencing factors, and thus must be found beyond a reasonable doubt by a jury.

United States v. Carmona, 205 F.3d 1325 [2000 WL 234473; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

The district court increased defendant's offense level by two levels pursuant to U.S.S.G. § 2D1.1(b)(1) for possessing a firearm for the purpose of protecting drug proceeds. Defendant argued that he did not "possess" the gun within the meaning of the Guidelines and that the gun was not related to the underlying offense. The Second Circuit noted that Application Note 3 indicates that "the adjustment should be applied if the weapon was present, unless it is clearly improbable that the

weapon was connected with the offense." The Court held that the district court's finding that the defendant possessed the gun for protection was not clearly erroneous.

United States v. Colon, 213 F.3d 627 [2000 WL 637079; May 17, 2000]
(Summary Order; Meskill, Parker, Straub)

The Court rejected the defendant's argument that the district court failed to make findings regarding the quantity of drugs attributable to him. Although the district court did not explicitly state that it was adopting the findings of the presentence report and made no findings on the record regarding the quantity of drugs, it was "apparent from the record that the district court intended to adopt the findings of the PSR, and that it adopted the PSR in its written judgment." Further, the record supported the conclusion that the drugs attributed to defendant were within the scope of the agreement and reasonably foreseeable by him.

United States v. Duggan, 208 F.3d 204 [2000 WL 246216; Feb. 22, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

Pursuant to Application Note 12 of U.S.S.G. § 2D1.1, where there has been no drug seizure that can serve as the basis for fixing the quantity of narcotics attributable to the defendant for the purposes of calculating his offense level, or when the amount seized does not accurately reflect the scale of the offense, the sentencing court "shall approximate the quantity of the controlled substance." Defendant argued the district court failed to make specific findings to support its conclusion that he was responsible for 5-15 kilograms of cocaine. The Second Circuit held that the district court's findings, which included the defendant's own tape recorded statements and that fact that three and a half kilograms of cocaine where delivered by him or seized from him, were sufficient.

United States v. Esquilin, 205 F.3d 1325 [2000 WL 232162; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Sotomayor)

The Second Circuit rejected without discussion, defendant's argument that the district court overestimated the amount of cocaine attributable to the defendant. The Court merely stated that the district court did not err "when he found, by a preponderance of the evidence, that the conspiracty involved at least 15 kilograms of cocaine."

United States v. Figueroa, ___ F.3d ___ [2000 WL 1862813; Dec. 18, 2000]
(Summary Order; Oakes, Kearse, Winter)

The Second Circuit found that the district court's adoption of the government's representations as to the quantity of narcotics dealt in by the defendant was sufficient to support the district court's calculation of the narcotics quantity for purposes of sentencing.

United States v. Garcia, 205 F3d 1325 [2000 WL 233549; Feb. 11, 2000]
(Summary Order; Leval, Cardamone, Parker)

The Second Circuit rejected, without discussion, defendant's argument that the district court erred in finding that the crime involved one kilogram or more of heroin.

United States v. Giles, 210 F.3d 356 [2000 WL 424142; April 13, 2000]
(Summary Order; Winter, Leval, Magill)

The Court found that defendant was erroneously subjected to a ten-year mandatory minimum pursuant to 21 U.S.C. § 841(b)(1)(B)(iii) because he was attributable with more than five grams of cocaine base and had a prior felony conviction. The district court and not the jury made the drug-type finding and the jury's verdict was a general one. Under *United States v. Barnes*, 158 F.3d 662, 671-72 (2d Cir. 1998), a statutory mandatory minimum sentence may be imposed pursuant to a general verdict only if it is clear that the jury found that the defendant committed or conspired to commit the acts that warrant the mandatory minimum sentence. In this case, because the indictment charged a cocaine-powder and crack-based conspiracy, "it is not clear from the jury's verdict that it attributed more than five grams of crack to the defendant." As to another defendant who was sentenced to the top of the Guidelines range, however, the Second Circuit found that he was sentenced without regard to the mandatory minimum sentence.

The Court found that the district court did not clearly err in attributing 7 grams of crack to defendant on the basis of a telephone conversation in which it was said that he thought that a co-defendant had "shorted" him by $50 worth of cocaine. Although the defendant contended that the conversation referred to only a 3.5 gram purchase, a government agent that the smallest amount of crack that the defendant could have bought without noticing a $50 deficiency in product was 7 grams. The district court noted that the defendant was a "sophisticated purchaser who would have noticed if the quantity of drugs that he thought he was purchasing was cut almost in half."

With regard to a second defendant, the district court properly attributed "crack" as opposed to some other form of "cocaine base" to the defendant based on the testimony of several witnesses that the defendant was "primarily a crack dealer." Further, the Court rejected defendant's argument that the district court's finding of 1.5 kilograms of crack attributable to him should be overturned because "the witnesses at trial who provided the most incriminating testimony against him were unworthy of belief."

With regard to a third defendant, the district court properly attributed "crack" as opposed to some other form of "cocaine base" to him based on the testimony of a government agent that he was told that he dealt in crack cocaine, which was supported by his own review of intercepted conversations. Even if defendant was a "cooker," and thus would not have actually purchased crack, he still would have possessed crack. The Second Circuit also found that the district court's findings

with regard to other defendants were not clearly erroneous.

United States v. Howard, 216 F.3d 1074 [2000 WL 772405; June 15, 2000]
(Summary Order; Winter, Cardamone, Straub)

"Although the district court estimated separate weights for each appellant rather than relying on the total volume seized from all conspirators, the fact that the weight of drugs seized from all the conspirators actually fell within the sentencing range for three of the conspirators precludes a determination that the court's estimates were clear error for those appellants." The Second Circuit also found that the district court's heightened estimate for one of the conspirators was justified by the central role he played in the drug conspiracy, the fact that approximately one-third of the total amount of drugs seized was taken from a car parked outside of that defendant's girlfriend's residence, and substantial testimony as to drug transactions apart from those in which crack was actually seized.

United States v. Rivera, 208 F.3d 204 [2000 WL 326365; March 28, 2000]
(Summary Order; Feinberg, Jacobs, Straub)

The district court's determination that the criminal activity involved at least one kilogram of heroin was supported by the record and thus was not clearly erroneous.

United States v. Rivera, 216 F.3d 1074 [2000 WL 823361; June 21, 2000]
(Summary Order; Walker, Parker, Buchwald)

Defendant argued that district court erred in attributing "Obsession" brand heroin to him in calculating his sentence, rather than just "Sledge Hammer" heroin, because the Obsession heroin was not within the scope of defendant's agreement with co-defendant. The Second Circuit held that the Obsession heroin was within the scope of the agreement and therefore the district court did not abuse its discretion in upwardly adjusting four levels based on that heroin.

United States v. Thomas, 205 F.3d 1326 [2000 WL 233648; Feb. 22, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

The Second Circuit found no clear error in the district court's finding that the defendant's offense conduct involved between 50 and 150 kilograms of cocaine. Pursuant to U.S.S.G. § 2D1.1, Application Note 12, in a reverse sting operation in which the quantity of narcotics available would be controlled by the government, the district court should consider the amount the defendant agreed to buy. This approach applies equally when the defendant sought to steal the narcotics, rather than purchase them.

United States v. Upshaw, 205 F.3d 1327 [2000 WL 232280; Feb. 28, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The Second Circuit, after review of the record and presentence report, concluded that there was ample evidence to support the district court's decision to hold the defendant responsible for 50 grams of cocaine.

United States v. Walker, 205 F.3d 1327 [2000 WL 233574; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Sotomayor)

The Second Circuit rejected, without discussion, the defendant's argument that the district court erred in finding that the defendant's conduct involved at least five kilograms of cocaine.

§ 2D1.5: Continuing Criminal Enterprise

United States v. Joyner, 201 F.3d 61 [Jan. 10, 2000]
(Winter opinion; joined by Cardamone, Parker)

The Second Circuit held that any error by the district court by attributing 32 kilograms of cocaine to the defendant was harmless. Under U.S.S.G. § 2D1.5, a defendant convicted of a continuing criminal enterprise will be assigned the greater of either four levels plus the offense level from § 2D1.1, or 38. Thus, even if the sentencing court erred in its drug quantity determination and the offense level under § 2D1.1 should have been deemed lower than 34, defendant's offense level would still be 38.

United States v. Rivera, 216 F.3d 1074 [2000 WL 823361; June 21, 2000]
(Summary Order; Walker, Parker, Buchwald)

The Court held that defendant's distribution of weapons to individuals within a drug organization "amount[ed] to an implied sanction of violence," and thus a two-point enhancement pursuant to U.S.S.G. § 2D1.5 was warranted.

United States v. Upshaw, 205 F.3d 1327 [2000 WL 232280; Feb. 28, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The district court did not err in imposing the statutory mandatory minimum sentence of life imprisonment based on the defendant's two prior felony convictions. Defendant argued that because his prior convictions stemmed from conduct having "the same or similar geographic or temporal proximity," were consolidated for sentencing, and for which defendant received concurrent time, they were in effect, one prior felony drug conviction for purposes of § 841(b)(1)(A)(iii). The district court found that the convictions were two distinct convictions.

§ 2E1.3: Violent Crimes in Aid of Racketeering Activity

United States v. Feliciano, 223 F.3d 102 [Aug. 16, 2000]
(Katzmann opinion; joined by Straub, Hodges)

The defendant argued that, by stating that "the law says that I must impose a sentence of life imprisonment upon you," the court failed to recognize that it was authorized to impose only a fine for a violation of 18 U.S.C. § 1959(a)(1), which prohibits violent crime in aid of racketeering ("VCAR"). The Second Circuit disagreed, noting that the record reflected that the district court had explicitly rejected the possibility of a fine because the defendant did not have adequate assets.

United States v. James, 239 F.3d 120 [Dec. 22, 2000]
(Haight opinion; joined by Cardamone, Calabresi)

Defendant was convicted of murder in aid of racketeering. At sentencing, defendant requested a downward departure based on "significant trauma" he experienced during childhood and "severe mental afflictions" which he suffered. The district court concluded that under 18 U.S.C. § 1959(a)(1), the defendant was subject to a mandatory minimum sentence of life in prison, and therefore, a downward departure was not permitted. The statute provides that those convicted of murder in aid of racketeering "shall be punished . . . by death or life imprisonment, or a fine under this title, or both." Defendant argued that this statute should be read to permit punishments of: 1) death; or 2) life imprisonment; or 3) a fine and no imprisonment; or 4) imprisonment and a fine. The Second Circuit disagreed with defendant's reading of the statute and held that Congress, considering the two other harsh punishments available, could not have meant to provide the option of the imposition of a fine without imprisonment.

§ 2F1.1(b)(1): Fraud: Loss

United States v. Carboni, 204 F.3d 39 [Feb. 18, 2000]
(Pooler opinion; joined by Leval, Cabranes)

Defendant claimed that the district court erred in imposing a seven-level adjustment on the basis of a loss of $195,840, reasoning that the court did not limit its calculation to the actual loss caused by his conduct. Defendant specified that the district court (1) had no basis for calculating the bank's loss because the bank had provided no written documentation; (2) erred by finding a loss greater than the amount of funds advanced after defendant's company submitted the first of the statements for which the defendant was convicted; (3) should have deducted $100,000 that the bank recovered or could have recovered; and (4) erred by combining actual loss with potential loss. The Second Circuit rejected all of defendant's arguments and upheld the district court's calculation of loss.

United States v. Moskowitz, 215 F.3d 265 [May 25, 2000]
(Per Curiam; Winter, Feinberg, Cabranes)

The district court did not err in calculating loss under U.S.S.G. § 2F1.1 by relying on a settlement of consolidated class action claims against defendant's corporation. The district court also relied on evidence that estimated the loss based on the decline of the corporation's share price when the fraud was revealed. The Court found the calculation to be supported by the evidence.

United States v. Zichettello, 208 F.3d 72 [March 20, 2000]
(Winter opinion; joined by Sack, dissent by Oakes)

Defendant argued that the district court erroneously included a $100,000 bribe in calculating the amount of loss attributable to defendant because the district court had previously struck the alleged predicate act based on this bribe. The Second Circuit disagreed, noting that even though the predicate act had been stricken, the jury found, according to its verdict sheet, that the government had proven its occurrence beyond a reasonable doubt. Further, even in the absence of such a finding, the district court could still include the bride in loss calculation. The Court also found that the district court did not err in finding the defendant was liable for the entire loss suffered by the victim because he was liable as a co-conspirator for "all reasonably foreseeable acts and omissions" in furtherance of the conspiracy, pursuant to U.S.S.G. § 1B1.3(a)(1)(B).

United States v. Bradbury, 213 F.3d 627 [2000 WL 562430; May 8, 2000]
(Summary Order; Winter, Feinberg, Cabranes)

The Second Circuit rejected the defendant's argument that the loss should have been deemed zero - even though the victims lost all of the money the defendant used to buy stock - since he gave some of his clients additional stock when it was discovered that he had overcharged them for the stock. Because the defendant misrepresented both the value of the stock and his ownership of the stock, it was entirely appropriate for the district court to determine that the "actual loss" was the total amount the victims invested. Further, since loss includes the amount taken, even if all or part has been returned, there was no merit to the argument that the alleged repayments should have been deducted from the amount of loss.

United States v. Bruno, 234 F.3d 1263 [2000 WL 1715254; Nov. 14, 2000]
(Summary Order; Kearse, Leval, Cabranes)

The defendant argued that the district court improperly calculated the loss caused by his assistance in the preparation of false tax returns. The Second Circuit found that the evidence presented by the government would have justified a higher base offense level, and therefore rejected the defendant's challenge to the level selected by the district court. The government's calculation included losses of $11,514 on returns at issue in the counts for which defendant was convicted and

$838,880 on returns for which he was not tried.

United States v. Collis, 213 F.3d 627 [2000 WL 562435; May 5, 2000]
(Summary Order; Meskill, Cabranes, Katzmann)

The Court observed that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge in sentencing on counts of which the defendant was convicted, so long as that conduct has been proven by a preponderance of the evidence. Thus, the district court was authorized to consider the acquitted conduct in determining the loss. Further, the district court was correct to base the loss calculations on the intended loss instead of the actual loss, pursuant to Application Note 8, U.S.S.G. § 2F1.1.

United States v. Cook, 234 F.3d 1263 [2000 WL 1644524; Nov. 1, 2000]
(Summary Order; Feinberg, Miner, Katzmann)

Defendant argued that the district court, in applying U.S.S.G. § 2F1.1, miscalculated the amount of loss by including checks that were not attributable to him. Defendant argued that one of these checks was handwritten, unlike almost all of the other checks attributed to the fraudulent scheme, and that it was simply returned for insufficient funds. The Second Circuit found the district court's findings not clearly erroneous in light of evidence that the check was written on an account opened by the defendant using a fake driver's license and insurance card.

The defendant also argued that the district court should have applied § 2X1.1 rather than § 2F1.1 because he and his co-defendants were arrested in the midst of the last of their check-cashing schemes, and thus it should be considered an attempt for sentencing purposes. The Second Circuit found that the scheme was substantially complete and that only his arrest stopped the defendant from uttering a few of the checks which were already prepared.

United States v. Ferrarini, 225 F.3d 647 [2000 WL 1015928; July 18, 2000]
(Summary Order; Cardamone, Calabresi, Parker)

There was no error in attributing to the defendant certain fraudulent loans where the district court explicitly found that he was a knowing participant in that loan scheme and served as the primary "go-between" on the subject of these loans. The Second Circuit pointed out that the fact that this defendant was acquitted of the substantive mail fraud court in connection with these loans did not foreclose the sentencing judge from making these findings, based on a preponderance of the evidence.

The Second Circuit refused to address a co-defendant's argument concerning the loss calculation because it was based on facts "upon information and belief" cited in his appellate brief, not upon facts from the record. That defendant also argued that the district court erred in sentencing

him based on loss to two insurance companies because there was a factual dispute over whether these companies had been repaid. The district court found that they had not been repaid. In any event, the Second Circuit noted that repayment would not reduce the applicable loss calculation. *See* U.S.S.G. § 2B1.1, comment (n.2), *United States v. Arjoon*, 964 F.2d 167, 172 (2d Cir. 1992). Finally, the defendant argued that the district court clearly erred in valuing the loss arising out of the securities fraud. The district court assessed the loss by multiplying the total number of outstanding shares held by the public by the difference between the share price on the date the AMEX froze trading and the share price on the date AMEX froze the stock. The Second Circuit had previously approved of this method for calculating a fraud loss. *See United States v. Stanley*, 54 F.3d 103, 105-107 (2d Cir. 1995).

United States v. Hughley, 216 F.3d 1074 [2000 WL 730384; June 2, 2000]
(Summary Order; Miner, Walker, Sotomayor)

The district court did not err in declining to reduce the amount of loss by the amount of disability benefits defendant would have received absent the fraud, pursuant to U.S.S.G. § 2F1.1. In support of its conclusion, the Court cited 5 U.S.C. § 8106(b)(2) which unambiguously requires the forfeiture of all benefits defendant collected. Further, "it would not have been clearly erroneous to conclude that benefit payments would likely have been eliminated altogether had [the defendant] supplied truthful information to the government."

United States v. Kaminski, 229 F.3d 1136 [2000 WL 1527932; Oct. 12, 2000]
(Summary Order; Walker, Miner, Pooler)

The district court increased defendant's offense level by nine levels pursuant to application notes 11 and 12 of U.S.S.G. § 2F1.1 because the guideline range did not fully capture the harmfulness and seriousness of the conduct underlying the fraud conviction. Defendant argued that his offense level should not have been increased, since his mere possession of false law enforcement identification did not result in any actual harm. The Second Circuit found the it reasonable for the district court to increase the offense level based upon the finding that the paraphernalia served no legitimate purpose. The Court also dismissed without discussion defendant's claim that the government's motion for the increase was "vindictive."

United States v. Kennedy, 234 F.3d 1263 [2000 WL 1720962; Nov. 17, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

The defendant was convicted of failing to disclose that he was an officer, director, and/or equity owner of two companies within the two years immediately preceding the filing of his bankruptcy petition, and of concealing his ownership of those companies from the bankruptcy trustee. Defendant argued the district court erred by including in its loss calculation $150,000 that he had received in a noncompetition agreement with one of the companies, which he said was

exempt from his bankruptcy estate under 11 U.S.C. § 541(a)(6) as "earnings from services performed by an individual debtor after the commencement of the case." The Second Circuit held that the money the defendant received under the noncompetition agreement was not exempt from the bankruptcy estate because the agreement was inextricably intertwined with an agreement for the sale of stock of the same company and should have been included in the defendant's bankruptcy estate.

United States v. Lapp, __ F.3d ___ [2000 WL 1804516; Dec. 7, 2000]
(Summary Order; Walker, Cabranes, Straub)

The Second Circuit upheld the district court's calculation of loss to be greater than $1.5 million, resulting in a 12 level enhancement. The district court concluded that the total loss amount should include (1) the dilution in value of shareholder's stock; (2) the defendant's withdrawals of money for himself and family members; (3) bribes paid to brokers to encourage investors to purchase a certain stock; and (4) the loss of $900,000 suffered by one victim.

United States v. Stevens, 210 F.3d 356 [2000 WL 419938; April 17, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

The district court properly calculated the amount of loss attributable to defendant after holding an extensive hearing. The district court relied on actual loss sustained by insurance providers, as measured by the difference between the amount of premiums that defendant's company should have paid but for the fraud and the amount it actually paid. The Court found that the district court did not summarily credit the government's calculations, and in fact resolved at least two factual issues in favor of the defendant that otherwise would have increased the total lost by $4 million.

§ 2F1.1(b)(2): Fraud: Minimal Planning

United States v. Allen, 201 F.3d 163 [Jan. 5, 2000]
(Per Curiam; Cardamone, Cabranes, Straub)

The Second Circuit rejected defendant's argument that the imposition of an upward adjustment for abuse of trust and the increase in offense level for more than minimal planning under § 2F1.1(b)(2) constituted impermissible double counting. The Court cited *United States v. Marsh*, 955 F.2d 170, 171 (2d Cir. 1992), which held that these two enhancements are not necessarily or inherently duplicative enhancements. Moreover, the Court found that the defendant failed to demonstrate that the enhancements were duplicative in this specific instance.

United States v. Hughley, 216 F.3d 1074 [2000 WL 730384; June 2, 2000]
(Summary Order; Miner, Walker, Sotomayor)

The district court properly imposed a two-level upward adjustment for "more than minimal

planning" under U.S.S.G. § 2F1.1(b)(2)(A). The district court found that false statements were made to the Department of Labor on at least three occasions, indicating "repeated acts over a period of time" (Application Note 1(f) of U.S.S.G. § 1B1.1). While the defendant argued that the second and third statements should be considered as one because they were essentially the same submission, though on different dates, the Second Circuit held that defendant's resubmission of the newly dated form was a "conscious effort to deceive the government." Further, contrary to defendant's argument, the adjustment may properly be imposed "even where the crime is not complex, provided it is repeated and deliberate." See *United States v. Barrett*, 178 F.3d 643, 649 (2d Cir. 1999).

United States v. Nwosu, 205 F.3d 1326 [2000 WL 241254; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

The Second Circuit found no error in the district court's decision to increase defendant's offence level by two point for more than minimal planning, where the defendant had selected the informant as the recipient of the checks and had several discussions with the informant about the plans the defendant and his accomplice had agreed to carry out.

§ 2F1.1(b)(2): Fraud: Multiple Victims

United States v. Lincecum, 225 F.3d 647 [2000 WL 1015927; July 20, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

The Court held that there was ample evidence to support the district court's finding that a married couple should be counted as two separate victims within the meaning of U.S.S.G. § 2F1.1(b)(2)(B). Each made a separate investment and wired money from separate accounts in his or her individual name. They also entered into an agreement with the defendant that each would "retain exclusive ownership of the principal funds which each contributed to the program."

§ 2F1.1(b)(4)(A): Fraud: Misrepresentation

United States v. Berger, 224 F.3d 107 [Aug. 25, 2000]
(Walker opinion; joined by Cardamone, Miner)

Defendants argued that a two-level increase in offense level for an offense involving a misrepresentation that the defendant was acting on behalf of an educational organization, pursuant to U.S.S.G. § 2F1.1(b)(4)(A), should not be applied to them because they defrauded government agencies, not private individuals, and the application notes refer only to private individuals. The Second Circuit disagreed, noting that the examples in the application notes are not intended to be exhaustive.

United States v. Kinney, 211 F.3d 13 [April 28, 2000]
(Oakes opinion; joined by Cabranes, Sack)

The Second Circuit affirmed the district court's enhancement of defendants' sentences for an offense which involves "a misrepresentation that the defendant was acting on behalf of a charitable, education, religious or political organization" pursuant to U.S.S.G. § 2F1.1(b)(4). Defendants argued that the enhancement is warranted only when a defendant either acts on behalf of a bogus organization or misrepresents that he has authority to act on behalf of a legitimate organization. The district court, adopting the reasoning of *United States v. Bennett*, 161 F.3d 171 (3d Cir. 1998), concluded that although defendants were authorized to solicit funds for a legitimate organization, their misrepresentations as to the use of donated funds, the publications of journals, and their identities were designed to enhance personal gain and thus came within the scope of Section 2F1.1(b)(4).

United States v. Cappellazzi, 213 F.3d 627 [2000 WL 562433; May 8, 2000]
(Summary Order; Winter, Leval, Magill)

The Court held that a two-level enhancement pursuant to U.S.S.G. 2F1.1(b)(4)(A) was appropriate where the defendant posed as a law enforcement agent when soliciting funds, misrepresented that he was soliciting funds on behalf of the federal Drug Enforcement Administration, and falsely promised victims that their contributions would help fund certain anti-drug programs.

§ 2F1.1(b)(4)(B): Fraud: Violation of Judicial Order

United States v. Kennedy, 233 F.3d 157 [Nov. 17, 2000]
(Sotomayor opinion; joined by Kearse, dissent by Sack)

The government appealed the district court's conclusion that, as a matter of law, U.S.S.G. § 2F1.1(b)(4)(B) did not apply to the defendant's concealment of assets in a bankruptcy proceeding because such concealment did not constitute a violation of judicial process. The Second Circuit vacated the sentence and adopted the majority view among the circuits [Sixth, Seventh, Eighth, Ninth, Tenth, but not Third] that the concealment of assets in a bankruptcy proceeding constitutes a violation of judicial process withing the meaning of U.S.S.G. § 2F1.1(b)(4)(B). In doing so, the Court rejected dicta in one of its own earlier opinions, *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997) and determined that the phrase "violation of judicial process" in § 2F1.1(b)(4)(B) includes"violations" of the bankruptcy "process." Justice Sack dissented for the reasons set forth in dicta in *Carrozzella*.

§ 2F1.1(b)(7): Fraud: Financial Institution

United States v. Ferrarini, 219 F.3d 145 [July 18, 2000]
(Calabresi opinion; joined by Cardamone, Parker)

The Second Circuit found that the district court proper enhanced each defendant's sentence four levels pursuant to U.S.S.G. § 2F1.1(b)(7)(A) for an offense involving fraud which "substantially jeopardized the safety and soundness of a financial institution." The defendants argued that the Sentencing Commission exceeded its statutory authority when it declined to limit the definition of "financial institution" to entities that are federally insured. The Second Circuit conceded that this argument "has some merit, but not enough to carry the day." The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which grants the Sentencing Commission the power to promulgate guidelines for offenses which substantially jeopardize the safety and soundness of "a federally insured financial institution," is not the only source of the Commission's authority to define a "financial institution." The Sentencing Reform Act of 1984, codified at 28 U.S.C. §§ 991-998 delegates to the Commission significant discretion in formulating guidelines for sentencing convicted federal offenders. The Second Circuit held that the broad definition found in § 2F1.1(b)(7) and in the Application Note was "promulgated not so much pursuant to FIRREA, but in the exercise of the Commission's general statutory powers under § 994(1) of the Sentencing Reform Act."

The defendant also argued that a "premium finance company" did not fall within the definition of "financial institution" in Application Note 16, including its catch-all provision covering "any similar entity, whether or not insured by the federal government." Defendants reasoned that the enhancement only applies when the demise of the institution causes financial loss to the public, which did not occur here. The Second Circuit held, however, that the "harm to the public" requirement was based on a reading of the Application Note in connection with FIRREA, while the Commission's authority stemmed from the Sentencing Reform Act. Further, the Court noted that, despite defendants' contentions, there was some financial harm to the public due to the demise of the premium finance company.

§ 2G2.2: Trafficking in Child Pornography

United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
(Winter opinion; joined by Jacobs, Katzmann)

It was not error for the district court to calculate defendant's sentence for trafficking or distribution of child pornography pursuant to U.S.S.G. § 2G2.2, which is cross-referenced in § 2G2.4. Pursuant to § 2G2.4, if the offense involves "trafficking in material involving the sexual exploitation of a minor," the court must apply the more severe punishment mandated by § 2G2.2. As the defendant admitted that he traded or exchanged child pornography, the increase in offense level for trafficking was warranted, notwithstanding that no money changed hands.

United States v. Jones, 210 F.3d 356 [2000 WL 357672; April 6, 2000]
(Summary Order; Feinberg, Calabresi, Keith)

A five-level enhancement for distribution of child pornography pursuant to U.S.S.G. § 2G2.2(b)(2) was proper where the district court explicitly adopted the factual findings of the presentence report, uncontested by the defendant, that he had sent pornographic pictures of minors via his computer. The Court also found that a four-level enhancement for offenses involving sadistic material was proper where the material depicted adult men inserting objects in the vaginas of prepubescent girls. The district court did not err in concluding that the acts depicted were very likely to cause pain and thus were sadistic within the meaning of U.S.S.G. § 2G2.2(b)(3).

United States v. Pasqua, 205 F.3d 1326 [2000 WL 232118; Feb. 8, 2000]
(Summary Order; Cabranes, Pooler, Carman)

Defendant argued that the district court abused its discretion in determining that one image he had transported portrayed sadistic conduct, warranting a four-level increase to his offense level pursuant to U.S.S.G. § 2G2.2(b)(3). The image depicted "a wide-eyed young girl positioned on her back, totally naked, legs agape. The girl has around her neck and wrists objects that could be construed to be restraints. Moreover, the girl's hands are in front of her face and her shoulders are slightly turned in a manner that could suggest an attempt to ward off an expected blow from off-camera." The Second Circuit "had no trouble" finding that the district court did not abuse its discretion in concluding that the image was sadistic.

§ 2G2.4: Possession of Child Pornography

United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
(Winter opinion; joined by Jacobs, Katzmann)

It was not impermissible to increase defendant's sentence both for trafficking in child pornography pursuant to U.S.S.G. § 2G2.4(c)(2) and also for the use of computers under § 2G2.4(b)(3). The use of computers was not accounted for in the trafficking increase.

§ 2H1.1: Individual Rights

United States v. Volpe, 224 F.3d 72 [Aug. 16, 2000]
(Walker opinion; joined by Pooler, Sotomayor)

The Second Circuit held that it was not impermissible to enhance defendant's sentence both because the sexual abuse victim was in the custody of the defendant, pursuant to U.S.S.G. § 2A3.1(b)(3)(A), and because the offense was committed under color of law, pursuant to U.S.S.G.

§ 2H1.1(b)(1)(B). "The color-of-law adjustment punishes abuse of authority, either actual or apparent, by an officer of the state. The in-custody adjustment, by contrast, punishes abuse of power over an individual in the officer's physical and legal control."

§ 2J1.2: Obstruction of Justice

United States v. Andrews, 229 F.3d 1136 [2000 WL 1429562; Sept. 27, 2000]
(Summary Order; Newman, Straub, Sack)

The Second Circuit held that the district court erred in rejecting a three-level enhancement for "substantial interference with the administration of justice" pursuant to U.S.S.G. § 2J1.2(b)(2) on the grounds of impermissible double counting with the guideline set forth in U.S.S.G. § 2J1.2 for "obstruction of justice." Thus, the Second Circuit remanded so that the district court could determine whether the adjustment should be applied.

§ 2J1.3: Perjury

United States v. McSherry, 226 F.3d 153 [Sept. 22, 2000]
(Jacobs opinion; joined by Leval, Sack)

The Second Circuit remanded for resentencing, holding that the district court erred in imposing a three-level enhancement pursuant to U.S.S.G. §§ 2J1.2(b)(2) and 2J1.3(b)(2) for offenses resulting in "substantial interference with the administration of justice." The Court stated that the conduct for which defendant had been convicted, denying before a grand jury that he, a parole officer, was improperly influenced or corrupt, did not substantially interfere with the administration of justice. The government argued that the defendant's corrupt behavior caused interference because numerous inmates who had been denied parole by the defendant had submitted petitions for new hearings. The Court pointed out that this argument was premised on his corrupt behavior, not his perjury which was the underlying offense, and thus did not support the enhancement.

United States v. Suleiman, 208 F.3d 32 [March 24, 2000]
(Newman opinion; joined by Walker, Sotomayor)

The Second Circuit found that the government's appeal of defendant's sentence was not moot even though the defendant had already served his sentence and been deported. The government argued that the district court erroneously found that none of the defendant's concededly false statements before the grand jury were uttered in respect to a criminal offense. The Second Circuit found that the district court appeared to have presumed that perjury can be "in respect to" a criminal offense only where the questions asked and the false statements given in response specifically refer to a criminal offense. The Second Circuit found the district court's interpretation erroneous, and thus an increase of defendant's offense level pursuant to U.S.S.G. § 2J1.3(c)(1) was warranted. Because

the defendant had already been deported, the case could not be remanded for resentencing. The Second Circuit affirmed the judgment without prejudice to an application by the government to the district court to vacate the judgment and resentence the defendant should he be in this county and be available for resentencing.

§ 2J1.7: Commission of Offense While on Release

United States v. Chaklader, 232 F.3d 343 [Nov. 17, 2000]
(Sack opinion; joined by Feinberg, Miner)

Defendant was sentenced to 51 months imprisonment, based in part upon a three level enhancement pursuant to U.S.S.G. § 2J1.7 because he had committed bank fraud while released on bail for mail fraud. Under 18 U.S.C. § 1347, a person convicted of an offense while on release must receive an additional sentence consecutive to any other sentence of imprisonment. The district court attributed 46 months to the underlying offenses and five months to the enhancement. Defendant moved to have his sentence corrected under Rule 35(c) because the apportionment violated the principle set forth in *United States v. Stevens*, 66 F.3d 431, 434-45 (2d Cir. 1995) that the term apportioned to the underlying offense must fall within the Guideline range for that offense irrespective of the 2J1.7 enhancement, which for the defendant was 30-37 months. During a hearing, the government argued that the court should maintain the 51 month total but modify the apportionment to satisfy *Stevens* so that the sentence for the underlying offenses was 37 months or less and the remaining months would be applied to the enhancement. The defendant argued that the sentence for the underlying offense should be reduced to fall within the 30-37 month range, but that the enhancement was required to remain at the original five months. Stating that its intent was for the total sentence to be 51 months, the district court attributed 37 months to the underlying offenses and 14 months to the enhancement.

The Second Circuit held that the error in the original sentence was not the total, but the district court's apportionment between the sentence for the underlying offenses and the enhancement. Because Rule 35(c) authorizes the correction of error by correcting the apportionment of the total, not the total itself, the court affirmed, relying on its decision in *Stevens.*

United States v. Holmes, 205 F.3d 1325 [2000 WL 232167; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Calabresi)

It was not error for the district court to impose a consecutive sentence for an offense committed while on release, pursuant to U.S.S.G. § 2J1.7. The guideline calls for a three-level increase in the offense level and refers to 18 U.S.C. § 3147, which, in turn, provides for an additional term of imprisonment if the defendant committed an offense while on release and that that term be consecutive to any other sentence. The commentary to the guideline directs the sentencing court to divide the sentence between the sentence attributable to the underlying offense and the sentence

attributable to the enhancement. Here, the district court divided the 55 month term into a 46 month term for the underlying offense conduct (not including the three-level enhancement) and a 9 month term for the additional punishment required by § 3147. The total punishment, 55 months, fell within the applicable guideline range (including the enhancement) of 51 to 63 months. "Although the same conduct formed the basis for both the enhancement and the imposition of a consecutive sentence, this did not amount to double counting because the consecutive sentence was imposed on top of the sentence for the underlying conduct excluding the enhancement."

§ 2K2.1: Possession of Firearms

United States v. Ahmad, 202 F.3d 588 [Jan. 26, 2000]
(Walker opinion; joined by Leval, Pooler)

The Second Circuit held that the district court erred in determining, for purposes of U.S.S.G. § 2K2.1(b)(1), that the number of firearms was 13, requiring a four-level enhancement, and not 6, requiring a two-level enhancement. Section 2K2.1(b)(1) directs that only the firearms involved in the offense be counted. Application Note 9 to § 2K2.1 specifies that "only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed" are to be included in calculating the number of firearms under subsection (b)(1). The defendant's possession of the seven additional, uncharged, firearms, which did not fall into the prohibited class of firearms, did not violate any federal law. The fact that the defendant's possession of the firearms violated state and local laws for possession of a firearms without a license was not relevant.

The defendant also argued that the district court erroneously double counted when applying a § 2K2.1(b)(4) enhancement for possession of a firearm with an obliterated serial number, because the underlying offense included such conduct. The Second Circuit disagreed. Section 2K2.1 specifies that if the base offense level is determined under subsection (a)(7), "do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or stolen ammunition." Here the base offense level was not determined under (a)(7), but under (a)(5) because one of the firearms was a sawed-off shotgun. Thus, because the base offense level does not included the obliterated serial number, the adjustment was proper.

The defendant also argued that there was no legal or factual support for the district court's conclusion that he had given his nephew a firearm with reason to know that it would be used or possessed in connection with another felony, and thus the four-level upward adjustment under § 2K2.1(b)(5) was improper. The Second Circuit found that based on the record, the district court's imposition of the adjustment was appropriate.

United States v. Grimes, 225 F.3d 254 [Aug. 21, 2000]
(Per Curiam; Calabresi, Cabranes, Pooler)

Although the district court "misspoke" once in stating the standard for application of a sentence calculation pursuant to U.S.S.G. § 2K2.1(b)(5), the district court correctly articulated the standard on two other occasions. "In any event, the evidence that a 4-level enhancement was required was so strong that any error would be harmless."

United States v. Pedragh, 225 F.3d 240 [Sept. 15, 2000]
(Parker opinion; joined by Calabresi, Straub)

The Second Circuit held that felony convictions which post-date the offense conduct at issue do not constitute "prior felony convictions" under U.S.S.G. § 2K2.1(a)(1). The Court agreed with the defendant that the use of the past tense in the provision and the placement of the provision in the offense conduct section, indicated that it applied only to convictions that he had committed by the time of the offense, not by the time of sentencing.

United States v. Carney, 225 F.3d 646 [2000 WL 1340550; Sept. 14, 2000]
(Summary Order; Meskill, Calabresi, Katzmann)

It was not clear error for the district court to apply a four level increase to defendant's offense level pursuant to U.S.S.G. § 2K2.1(b)(5) based on the district court's finding that "any reasonable person" would have believed that the firearms he sold would be used in connection with another felony. The Second Circuit rejected defendant's argument that the court incorrectly used an objective, rather than subjective, standard in judging his conduct. Based on the record, the Court found that the district court used the phrase "any reasonable person" merely for emphasis. The Court also found that there was adequate evidence that supported the district court's conclusion that the defendant reasonably believed the firearms he sold would be used in a future felony.

Defendant had requested remand to pursue his racially selective prosecution theory, based on the fact that he received a harsher sentence than his white co-defendant, and that he was the only defendant who received an enhancement pursuant to U.S.S.G. § 2K2.1(b)(5). The Second Circuit found, however, that the district court imposed a lesser sentence on the white co-defendant because he had cooperated with the government.

United States v. Jefferson, 229 F.3d 1136 [2000 WL 1459728; Sept. 29, 2000]
(Summary Order; McLaughlin, Cabranes, Katzmann)

It was not clear error for the district court to increase defendant's sentence 4 levels for use or possession of a firearm in connection with another felony offense, pursuant to U.S.S.G. § 2K2.1(b)(5), on the ground that he had possessed a handgun in connection with the offense of criminal contempt in the first degree (N.Y. P.L. § 215.51(b)(5)). The "use" of the handgun was based upon defendant's threat to shoot a person, even though there was no evidence that he in fact possessed or displayed this handgun. The Second Circuit also found that the imposition of the four-

level increase did not constitute double-counting.

United States v. Littles, 216 F.3d 1074 [2000 WL 730397; June 2, 2000]
(Summary Order; Miner, Walker, Buchwald)

The Court held that the district court properly included a four-level adjustment pursuant to U.S.S.G. § 2K2.1(b)(5) for possession of a firearm in connection with another felony offense. Rejecting defendant's argument that "the mere proximity" of the shotgun to the drugs was insufficient to find that it had some purpose or effect with respect to the drugs, the Second Circuit held that the district court was entitled to find that the shotgun at the least "facilitate[d] the offense by providing a means of protection or intimidation" where defendant had testified that he had left a loaded shotgun against the table in the living room where he was seated, that he kept the gun for protection, and that he knew there was cocaine in the house.

United States v. Praylor, 205 F.3d 1326 [2000 WL 253696; March 6, 2000]
(Summary Order; Walker, Sack, Katzmann)

Defendant contested a four level increase in his offense level pursuant to U.S.S.G. § 2K2.1(b)(5) for possessing a firearm with reason to believe it would be used in another felony. The Second Circuit found that the increase was proper despite the fact that the defendant had traded the gun for drugs to a drug dealer who was arrested later that day and, consequently, never had an opportunity to commit an offense. So long as the defendant had a reasonable belief that the gun would be used in connection with another felony, the increase was proper. The defendant admitted that he knew the person he gave the gun to was a drug dealer.

United States v. Proffit, 234 F.3d 1263 [2000 WL 1550514; Oct. 18, 2000]
(Summary Order; Meskill, Newman, Cabranes)

Defendant argued that the district court erred in imposing a four-level upward adjustment in his offense level pursuant to U.S.S.G. § 2K2.1(b)(5), for possessing a firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with the commission of a robbery. The evidence revealed that about one month before the defendant had purchased the gun, he had a conversation about guns and about "doing a robbery" with the man from whom he eventually bought the gun. After the defendant bought the gun, he and his cousin, rode around in a car looking for people to rob. The Second Circuit found, based on this evidence, that it was reasonable for the district court to infer that the gun and robberies were "connected by the defendant."

United States v. Stevenson, 205 F.3d 1326 [2000 WL 234460; Feb. 1, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

Defendant argued that the district court violated his right to due process by imposing a two-level enhancement under U.S.S.G. § 2K2.1(b)(4), based on the fact that he possessed a stolen firearm, because there was no proof that he was aware that the firearms were stolen. The Second Circuit rejected defendant's argument, stating that there is no scienter requirement in § 2K2.1(b)(4), *see United States v. Litchfield*, 986 F.2d 21 (2d Cir. 1993), and that such a requirement was not compelled by the due process clause of the Fifth Amendment, *see United States v. Griffiths*, 41 F.3d 844 (2d Cir. 1994).

United States v. Valencia, 229 F.3d 1136 [2000 WL 1370255; Sept. 19, 2000]
(Summary Order; Feinberg, Cabranes, Parker)

The Second Circuit affirmed defendant's life sentence without deciding whether a two-level increase for possession of a firearm was proper because the district court had indicated that, even in the absence of that increase, it would have imposed a life sentence by increasing defendant's base offense level to other adjustments, which were based on unchallenged factual findings.

§ 2K2.4: Use of Firearms

United States v. Khalil, 214 F.3d 111 [May 31, 2000]
(Kearse opinion; joined by Walker, Calabresi)

The Court held that the it was not a violation of the Double Jeopardy Clause to direct that a 30-year sentence for using and carrying a firearm in violation of 18 U.S.C. § 924(c) run consecutive to two concurrent terms of life imprisonment for conspiring and threatening to use a weapon of mass destruction in violation of 18 U.S.C. § 2332, notwithstanding that the "firearm" and "weapon of mass destruction" were the same weapon, a pipe bomb. The Court determined that the language in 924(c) expressly provides for a term of imprisonment of not less than thirty years which must run consecutive to any other sentence. Thus, because of Congress' explicit directive, "the imposition of cumulative punishment for conviction of 924(c) and 2332a offenses in a single prosecution does not violate the Double Jeopardy Clause." The Court also held that a § 924(c) offense is not a lesser included offense of § 2332a, since the latter does not require proof that the firearm was either used or carried.

United States v. Tran, 234 F.3d 798 [Nov. 15, 2000]
(Parker opinion; Van Graafeiland, Parker, Underhill)

Based on *United States v. Castillo*, 120 S.Ct. 2090 (2000), which held that the type of firearm used or carried in an 18 U.S.C. § 924(c) violation was an element of the offense, the Second Circuit remanded for resentencing. The indictments charged only a simple firearm offense under § 924(c), but the district court imposed a ten-year consecutive sentence for violating § 924(c), for using or carrying a short-barreled rifle in connection with the robbery. The court rejected the government's

argument that one of the defendants, who pled guilty to aiding and abetting the use of a short-barreled rifle, waived his right to challenge the indictment.

The Second Circuit also joined the First, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits in rejecting the defendant's argument that, under U.S.S.G. § 2K2.4 Application Note 2, it was double-counting to enhance his offense seven levels for a Florida robbery based upon the firearms and impose a consecutive sentence for violation of § 924(c) in connection with a New York robbery. Defendant argued that the "grouping" of the two robberies for the purpose of determining an adjusted offense level caused the Florida robbery to become an "underlying offense" for the purposes of Application Note 2, which would then make an enhancement improper under the Application Note.

§ 2L1.1: Transporting Aliens

United States v. Kang, 225 F.3d 260 [Aug. 21, 2000]
(Per Curiam; Calabresi, Cabranes, Pooler)

The Second Circuit found it was not an abuse of discretion for the district court to apply an upward adjustment pursuant to U.S.S.G. § 2L1.1(b)(5), for "recklessly creating a substantial risk of death or serious bodily injury to another person." Defendant had transported aliens on a shelf underneath a moving truck with at least half of their bodies exposed to the drive shaft, the road or outside elements. It was irrelevant that the women did not actually suffer any serious bodily injuries.

§ 2L1.2: Illegal Reentry

United States v. Acevedo, 229 F.3d 350 [Aug. 25, 2000]
(Sotomayor opinion; joined by McLaughlin, Restani)

The Second Circuit rejected defendant's argument that his trial counsel was ineffective because he failed to move for a downward departure based on defendant's claim that he was unaware he was committing a crime when he reentered the United States. As there is no defense of good faith or mistake under 8 U.S.C. § 1326, the defendant cannot prove that counsel's failure to request a departure on this ground altered defendant's sentence.

The Second Circuit also held that the district court did not err in applying the Guidelines for illegal reentry in effect at the time of defendant's sentencing, which were no more stringent than the provision in effect at the time of the commission of the offense.

United States v. Gitten, 231 F.3d 77 [Nov. 1, 2000]
(Kearse opinion; joined by Calabresi, Sotomayor)

Defendant argued that the district court committed plain error in sentencing him under the

1998 version of the Guidelines, rather than the 1995 version, since his prior convictions were aggravated felonies only under an expanded definition introduced by the 1998 version, thereby creating an *ex post facto* violation. The Second Circuit disagreed, holding that under both versions, at least one of defendant's prior convictions constituted an aggravated felony. The defendant argued that under the 1995 version of U.S.S.G. § 2L1.2, his prior conviction for robbery was not an aggravated felony because his imprisonment for that offense ended upon his parole in 1980 and thus had not been "completed within the previous 15 years." Application Note 7 to § 2L1.2 in the 1995 version stated: "[t]he term 'aggravated felony' applies to offenses described in the previous sentence whether in violation of federal or state law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years." The Second Circuit held that the phrase "completed with the previous 15 years" referred only to violations of foreign law, and not federal or state law.

United States v. Pacheco, 225 F.3d 148 [Aug. 29, 2000]
(Miner opinion; joined by McLaughlin, dissent by Straub)

Defendant was deported after two misdemeanor convictions for which he received suspended one-year sentences. About a year later, he illegally reentered the country. The district court applied a 16 level increase, rather than a 4 level increase, pursuant to U.S.S.G. § 2L1.2(b)(1)(A), because the defendant had been deported after a conviction for an "aggravated felony." Relying on *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999), the district court concluded that the definition of "aggravated felony " included misdemeanors in which the sentence imposed is one year, even thought it felt the resulting sentence was "incredibly harsh." Despite its misgivings, the Second Circuit held that the fact that Congress had "improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors" (quoting *Graham*, 169 F.3d at 787), and despite a scrivener's error in § 1101 - the omission of the word "is" - the intent of § 1101 was "clear enough" to affirm defendant's sentence. Nothing in the legislative history of the section indicated that Congress intended to exclude a conviction that otherwise meets the definition of "aggravated felony" merely because it is labeled under state law as a misdemeanor, and may, in another case, be punished by a term of less than one year.

In his dissent, Judge Straub stated that defendant's prior suspended sentences for misdemeanor convictions could not constitute "aggravated felonies" within the meaning of § 1101(a)(43)(f) and (G) without doing violence to the plain and settled meanings of both "aggravated" and "felony." He argued that the question was not whether Congress could make the word "misdemeanor" mean "felony," but rather whether it actually did. He concluded that since the definition of "aggravated felony" is facially ambiguous, the rule of lenity required that it be interpreted to exclude misdemeanor offenses.

United States v. Tappin, 205 F.3d 536 [March 9, 2000]
(Cabranes opinion; joined by Sack, dissent by Oakes)

Defendant's offense level for unlawful entry into the United States was increased by 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A) because the defendant had been previously deported after a criminal conviction for an aggravated felony. Defendant argued that the district court should have downwardly departed because his case fell outside the "heartland" of cases under U.S.S.G. § 2L1.2, and on the basis of U.S.S.G. § 2L1.2, Application Note 5. That note provides that, since aggravated felonies vary widely, if the defendant's sole prior felony conviction was not a crime of violence or one involving firearms, and carried a sentence that did not exceed one year, a downward departure may be warranted. Although the defendant had previously been convicted of two felonies, one of which involved a firearm, he argued that the district court should have departed in the interest of justice, because his first felony conviction occurred in 1973 for criminal possession of a weapon in the third degree, and the second conviction was for attempted criminal sale of a controlled substance in the third degree, based upon selling one envelope of heroin to an undercover office. The district court concluded that it did not have authority to depart since the defendant did not satisfy the criteria of Application Note 5. The Second Circuit agreed, noting that the Sentencing Commission explicitly stated that departure may be warranted when all of the conditions enumerated by the Note were met, and thus if a defendant's prior felony did not meet those criteria, departure was not warranted. To permit a sentencing court to depart absent satisfaction of all criteria in Note 5 would "render the Note effectively meaningless."

Justice Oakes, in dissent, state that he found the majority's literal reading of Application Note 5 to be "wooden and unsound." He also found that even if the district court could not depart pursuant to that Note, it still had the authority to depart because the defendant's case fell outside of the heartland of cases. He observed that (1) the defendant's prior felony was more than 26 years old and was for possession of a gun which was found in the defendant's glove compartment during a road checkpoint stop, and (2) the triggering felony was for the sale of 0.8 gram of heroin for $20. He also noted defendant's work in the community for which he received exceptionally high praise.

United States v. Felix-Diaz, 205 F.3d 1325 [2000 WL 232661; Feb. 23, 2000]
(Summary Order; Cabranes, Sack, Carman)

Defendant argued that he should not have been subject to the harsher sentences applicable for aliens who illegally reentered the country after having been deported subsequent to a conviction for an aggravated felony, because his indictment only charged him with reentry into the United States following his first deportation – which occurred as a result of misdemeanor offenses – but not his second deportation – which occurred as a result of a felony offense. The Second Circuit agreed that the language of the indictment was unclear as to whether it charged reentry after only the first or both deportations, but found that the record indicated that both parties understood the indictment to charge the defendant with two illegal reentries, following two deportations.

United States v. Gutierrez, 229 F.3d 1136 [2000 WL 1370326; Sept. 20, 2000]

(Summary Order; Winter, Newman, Sack)

Defendant's offense level for unlawful entry into the United States was increased by 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A) since the defendant had been previously deported after a criminal conviction for an "aggravated felony." Defendant argued that the district court should have considered the nature of the prior felony, which he contended warranted a downward departure. The Second Circuit, citing *United States v. Tappin*, 205 F.3d 536, 540-542 (2d Cir. 2000), stated that the district court was expressly prohibited from granting a departure based on the seriousness of the crime because the defendant failed to meet all three criterion set forth in Application Note 5 of § 2L1.2. The Second Circuit rejected defendant's further argument that the district court improperly considered a conviction for grand larceny in granting the 16 level increase, stating that the record reflected that the sole basis for the increase was the defendant's prior cocaine conviction.

United States v. Sandoval, 208 F.3d 204 [2000 WL 303202; March 22, 2000]
(Summary Order; Sack, Katzmann, Gibson)

Relying upon Application Note 5, Defendant argued that the district court should have downwardly departed because of the lack of seriousness of the aggravated felony, for which he was previously deported and for which he received a 16 point increase pursuant to U.S.S.G. § 2L1.2(b)(1)(A). Because the record reflected that the district court was aware of its authority, the Second Circuit found its decision not to depart was unreviewable.

United States v. Vasquez, ___ F.3d ___ [2000 WL 1836752; Dec. 13, 2000]
(Summary Order; McLaughlin, Pooler, Droney)

Defendant's offense level was increased pursuant to U.S.S.G. § 2L1.2 because he reentered the United States after deportation for an aggravated felony. Defendant argued that his 1986 burglary conviction was not an aggravated felony under the 1997 guidelines, which were in effect at the time he completed his offense. The district court, however, used the 1998 edition of the guidelines. Relying upon *United States v. Westcott*, 159 F.3d 107, 114-116 (2d Cir. 1998), *cert. denied* 525 U.S. 1084 (1999), the Second Circuit reaffirmed that the 1998 guidelines' definition of "aggravated felony" includes convictions for "crimes of violence" prior to November 1990. The Second Circuit declined to follow the different position adopted by the Ninth Circuit in *United States v. Fuentes Barahona*, 111 F.3d 651, 652-653 (9th Cir. 1997).

§ 2Q2.1: Offenses Involving Fish

United States v. McDougall, 216 F.3d 1074 [2000 WL 730387; June 2, 2000]
(Summary Order; Cardamone, Miner, Walker)

Defendants contested the 13-level enhancement based upon the quantity and retail price of

walleye and eel attributable to them, pursuant to U.S.S.G. § 2Q2.1(b)(3)(A). Finding the government's proof unpersuasive, the district court asked the Probation Office to prepare a PSR detailing the value of the fish. Defendants argued that the government's failure to prove demonstrate persuasively the value of the fish should have resulted in no increase to their base offense level and that the PSR was submitted untimely. The Court held that defendants waived this issue by failing to object to the submission of the PSR before the district court. While the "district court's findings were by no means perfect," U.S.S.G. § 2Q2.1 "contemplates such imperfections." It was not clearly erroneous for the district court to rely on the detailed findings contained in the PSR.

§ 2S1.1: Money Laundering

United States v. Finkelstein, 229 F.3d 90 [Oct. 2, 2000]
(Kearse opinion; joined by Newman, Katzmann)

The defendant argued that the district court erred in applying the doctrine of conscious avoidance ("willful blindness") in imposing a three-level upward adjustment pursuant to U.S.S.G. § 2S1.1(b)(1), for laundering money that "the defendant knew or believed" was narcotics proceeds. The defendant reasoned that because § 2S1.1(b)(1) used the language "knew," rather than "knew or should have known," the doctrine of conscious avoidance is inapplicable. The Second Circuit rejected defendant's argument, stating that the conscious avoidance doctrine had been applied in connection with statutes that use the language "knowing," and also in sentencing enhancements.

United States v. Hedges, 225 F.3d 647 [2000 WL 964767; July 12, 2000]
(Summary Order; Winter, Parker, Brieant)

Defendants argued that because their conduct fell outside the heartland of the money laundering guideline, U.S.S.G. § 2S1.1, the district court erred in failing to depart and sentence them in accordance with the more lenient fraud guideline, U.S.S.G. § 2F1.1. Since the record indicated that the district court understood its authority to depart, defendants' claim that the district failed to depart is unreviewable. The Second Circuit, however, construed defendants' claim that the district erred in not sentencing them pursuant to § 2F1.1, as a challenge to a sentence that was imposed as a result of an incorrect application of the guidelines, and thus reviewed it for clear error. The district court had made findings that the money laundering guidelines were appropriate because, *inter alia*, the defendants had engaged in "a series of financial transactions which were separate from the fraud." The Second Circuit found no error.

§ 2T1.1: Tax Evasion

United States v. Middlemiss, 217 F.3d 112 [June 21, 2000]
(Pooler opinion; joined by Kearse, Parker)

The district court properly increased defendant's base offense level by two levels pursuant to U.S.S.G. § 2T1.1(b)(2) for use of sophisticated means to impede discovery. The district found that the defendant created an extensive false paper trail of corporate documents and accepted only cash payments to evade detection and taxation.

United States v. Frederick, ___ F.3d ___ [20001 WL 10364; Dec. 28, 2000]
(Summary Order; McLaughlin, Pooler, Droney)

The Second Circuit found the district court's calculation of loss, based upon 28% of the business loss figure on each of the fraudulently filed tax returns, was not only reasonable, but required by U.S.S.G. § 2T1.1, Note B.

§ 2X1.1: Conspiracy

United States v. Legette, 205 F.3d 1326 [2000 WL 232283; Feb. 24, 2000]
(Summary Order; Kearse, Jacobs, Pooler)

Defendant argued that the district court should have reduced his offense level by three levels pursuant to U.S.S.G. § 2X1.1(b)(2), because the substantive offense of kidnaping had not been completed. The district court found that the kidnaping had been completed, in that the victim had been abducted, transported in interstate commerce, and held for ransom. The Second Circuit rejected defendant's argument that the crime was incomplete because the amount of ransom had not been fixed. Even if that were necessary for completion of the offense, it was clear that the defendant would have specified the amount had it not been for the intervention of the police, and thus, a reduction was inappropriate.

ADJUSTMENTS

§ 3A1.1: Vulnerable Victim

United States v. Ford, 205F.3d 1325 [2000 WL 127517; Jan. 14, 2000]
(Summary Order; Feinberg, Kearse, Sack)

The Second Circuit held that the defendant waived his contention that the district court failed to make sufficient findings as to the vulnerability of the victim of his offense pursuant to U.S.S.G. § 3A1.1(b)(1), by not raising that claim at sentencing.

United States v. Lincecum, 225 F.3d 647 [2000 WL 1015927; July 20, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

It was not clear err for the district court to increase the defendant's offense two levels based

on the vulnerability of the victims, pursuant to U.S.S.G. § 3A1.1(b). The victims in this case were 69 and 70 years old, had limited education and were not sophisticated investors. Noting that the victims wrote letters on behalf of the defendants in support of motions for a new trial and for downward departures in sentencing, the Second Circuit concluded that there was sufficient basis for the district court to conclude that the victims evinced no ability to protect themselves from fraudulent schemes.

§ 3B1.1: Aggravating Role

United States v. Aponte, 235 F.3d 802 [Dec. 21, 2000]
(Per Curiam; Oakes, Jacobs, Parker)

The Second Circuit disregarded, without discussion, defendant's argument that the district court erroneously made an upward adjustment for his role in the offense pursuant to U.S.S.G. § 3B1.1.

United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
(Straub opinion; joined by Feinberg, Jacobs)

It was not clearly erroneous for the district court to impose a 3-level, rather than 4-level upward role adjustment pursuant to U.S.S.G. § 3B1.1(b), since the defendants were deemed managers or supervisors of criminal activity rather than leaders or organizers. The district court found that "at trial and at sentencing it became clear that the real leaders or organizers of this conspiracy reside in Holland and Canada. The roles that [defendants] played in the overall drug conspiracy were those of couriers, offloaders or mid-level distributors."

United States v. Paccione, 202 F.3d 622 [Feb. 3, 2000]
(Per Curiam; Newman, Walker, Sotomayor)

In a case of first impression, the Second Circuit held that a defendant can be included among the "five or more participants" in a criminal activity for the purposes of a leadership role enhancement under U.S.S.G. § 3B1.1(a). The Court first held that the plain text of the Guideline supports its conclusion because the language does not in any way distinguish the defendant subject to the enhancement from the other individuals involved. Second, the Court relied on the language of Application Notes 1 and 2. Note 1 defines a "participant" as "a person who is criminally responsible for the commission of the offense," which definition the Court concluded "plainly includes the defendant." Note 2 speaks of a defendant's actions with respect to "other participants" or "another participant," which the Court interpreted as indicating that the defendant himself should be considered a "participant." Finally, the Court noted that the First, Fifth, Tenth, and Eleventh Circuits, the only ones to address this issue, have held that a defendant may be included when determining whether there were five or more participants.

United States v. Zichettello, 208 F.3d 72 [March 20, 2000]
(Winter opinion; joined by Sack, dissent by Oakes)

Defendant argued that he should not have received a two level upward adjustment for his role based on a finding that he was "an organizer, leader, manager, or supervisor in any criminal activity." because the people who benefitted from his activities were not "participants" in his offense, over whom he could supervise. The Second Circuit disagreed, noting that at least one of the people deemed to be a participant had received a benefit – the ability to purchase an automobile at a greatly reduced price – as the result of part of the ongoing criminal scheme to which the defendant pleaded guilty.

United States v. Akosa, 205 F.3d 1325 [2000 WL 227819; Jan. 21, 2000]
(Summary Order; Meskill, Jacobs, Leval)

The Second Circuit found no error in the imposition of an upward adjustment pursuant to U.S.S.G. § 3B1.1 for the defendant's role as a leader or organizer of the enterprise. The adjustment requires five or more participants; the defendant conceded the participation of four persons including himself and there was evidence of at least four other people.

United States v. Candela, 208 F.3d 204 [2000 WL 326411; March 28, 2000]
(Summary Order; Feinberg, Jacobs, Straub)

The Second Circuit found no error in the district court's four level increase in defendant's offense level for being an organizer or leader of a criminal activity pursuant to U.S.S.G. § 3B1.1. The record contained evidence that the defendant recruited and directed participants in his various criminal activities, including recordings of the defendant and others saying that he was "the boss" or "in charge."

United States v. Colon, 213 F.3d 627 [2000 WL 637079; May 17, 2000]
(Summary Order; Meskill, Parker, Straub)

The Second Circuit held that the district court erred by enhancing defendant's sentence four levels, pursuant to U.S.S.G. § 3B1.1, after finding that he had only a "supervisory" role in the drug conspiracy. The four-level increase is warranted only if the defendant is a "leader or organizer" of the conspiracy, where as a three-level enhancement is permitted for a "supervisory role." The Court vacated the sentence despite its belief that the district court may have simply used the wrong term.

United States v. Gangi, 213 F.3d 627 [2000 WL 639963; May 17, 2000]
(Summary Order; Feinberg, Parker, Straub)

The Second Circuit rejected the defendant's argument that the district court was required

to find that defendant led five participants, in order to impose a four-level enhancement under U.S.S.G. § 3B1.1(a). It was sufficient for the district court to find that defendant was involved in a criminal organization involving more than five participants, even if the defendant led only one.

United States v. Grajales, 234 F.3d 1263 [2000 WL 1591151; Oct. 24, 2000]
(Summary Order; Meskill, Cabranes, Pooler)

Defendant argued that the district court erred in imposed a four-level upward adjustment pursuant to U.S.S.G. § 3B1.1 for being a leader and organizer of criminal activity. Defendant argued that he was nothing more than "a worker in the drug organization and that his primary function was moving money." The Second Circuit found the district court's findings supported by evidence, *inter alia,* that the defendant had recruited others, supervised the arrival and distribution of narcotics, collected proceeds of narcotics sales and arranged for their delivery, benefitted from his participation, and supervised and paid workers. That others may have been higher up in the hierarchy than the defendant did not preclude the finding that this defendant was a leader or organizer. The court also noted that it was unnecessary to show that the defendant supervised at least five people, although the district court made such a finding as well.

United States v. Gutierrez, 216 F.3d 1073 [2000 WL 777968; June 15, 2000]
(Summary Order; Walker, Cabranes, Hodges)

Defendant argued that the district court's factual findings concerning his role in the conspiracy were erroneous because the district court credited the government's witnesses at a *Fatico* hearing over defendant's own testimony. The Second Circuit affirmed defendant's sentence, noting that credibility is an issue for the district court, and the record did not reflect that the district court was clearly erroneous in its findings.

United States v. Lincecum, 225 F.3d 647 [2000 WL 1015927; July 20, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

The district court's findings were sufficient to support a four level upward adjustment in the offense level for a leadership role in the offense pursuant to U.S.S.G. § 3B1.1(a). The district court found that the defendant was "an organizer and a leader" of a criminal activity that "involved five or more participants." The district court further found that the defendant "headed up" an operation that depended on "facilitators" to turn up victims for the defendant's investment schemes.

United States v. Louw-MacDonald, 210 F.3d 356 [2000 WL 426194; April 14, 2000]
(Summary Order; Oakes, Walker, Keith)

The government did not breach its plea agreement when it decided to support the Probation Department's recommendation of a three-level upward adjustment under U.S.S.G. § 3B1.1 even

though the agreement explicitly stated the prosecution would not make a motion for an upward departure. The Court found that the government promised only to "make no motion," and merely supporting the Probation Department's recommendation was not a violation of that provision. Further, the agreement prohibited only a motion for an upward departure, not an upward adjustment.

United States v. Muyet, 225 F.3d 647 [2000 WL 1275925; Sept. 8, 2000]
(Summary Order; Pooler, Sotomayor)

Defendant argued that the district court should not have increased his offense level by two levels pursuant to U.S.S.G. § 3B1.1(c) for his managerial role in the conspiracy because (1) there was no proof that he exercised authority over others, and (2) that the job of "manager" within the conspiracy was indistinguishable from non-managerial roles of "pitcher" and "lookout." The Second Circuit found that the district court's decision was adequately supported by the trial evidence that defendant oversaw the pitcher and the lookout, monitored drug sales, kept track of drug and gun supplies, collected money, and turned over supplies upon the change of shifts.

United States v. Okafor, 208 F.3d 204 [2000 WL 311064; March 24, 2000]
(Summary Order; Cardamone, McLaughlin, Parker)

The defendant argued that the district court improperly applied a role enhancement on the basis of his supervision of his wife in previous heroin transactions, which the district court had explicitly found did not constitute "relevant conduct." The Second Circuit found that the district court did not rely on the previous conduct, but only on the conduct charged in the offense.

United States v. Pagan, ___ F.3d ___ [2000 WL 1804559; Dec. 8, 2000]
(Summary Order; Newman, Cabranes, Straub)

The Second Circuit affirmed the district court's imposition of a three-level enhancement pursuant to U.S.S.G. § 3B1.1(b) for defendant's role as a supervisor or manager of criminal activity involving five or more participants. The uncontested presentence report indicated that the defendant organized drug runners' schedules, provided delivery locations to runners, and exercised some control over how the marijuana organization would operate during the absence of one of the operation's leaders.

United States v. Porterfield, 205 F.3d 1326 [2000 WL 232027; Jan. 26, 2000]
(Summary Order; Leval, Cardamone, Parker)

Defendant, convicted of wire fraud, argued that the district court improperly imposed a four-level upward adjustment pursuant to U.S.S.G. § 3B1.1 for his role in the offense as a organizer or leader. The Second Circuit found that there was ample evidence to support the district court's findings, including that the defendant wrote letters to the group in which he urged them to "stop

being so ... lazy" and to "act like a team" so that they could "make some serious money."

United States v. Runge, 205 F.3d 1326 [2000 WL 232768; Feb. 28, 2000]
(Summary Order; Kearse, Jacobs, Pooler)

The district court did not err in increasing defendant's offense level by two levels pursuant to U.S.S.G. § 3B1.1(c), upon finding that he was the "boss in the classical sense of that term." The defendant, convicted of tax fraud, ran the business and directed the fraud by directing his employees to seek cash payments from customers to facilitate their cash salaries.

United States v. Stevens, 210 F.3d 356 [2000 WL 419938; April 17, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

The district court did not plainly err in imposing a four-level, rather than two-level, upward adjustment for defendant's role in the offense on the ground that the tax conspiracy involved five or more participants. The evidence at trial "squarely refute[d] [defendant's] assertion," which was not even raised at sentencing.

§ 3B1.2: Mitigating Role

United States v. Castano, 234 F.3d 111 [Dec. 8, 2000]
(Sack opinion; joined by Oakes, Winter)

Defendant argued that she was both less culpable than the others involved in the murder and less culpable than the average participant in a murder-for-hire scheme, and thus was entitled to a two-level minor-role decrease, pursuant to U.S.S.G. § 3B1.2(b). The Second Circuit disagreed, pointing out that the defendant showed three men a photograph of the victim so that they could identify him; identified the victim on the night of the murder; coordinated payment to the three men; and received money for her participation in the murder. The Second Circuit also rejected defendant's argument that she was less culpable than the average participant in such a scheme, notwithstanding that she neither pulled the trigger nor conceived of the scheme.

United States v. Colon, 220 F.3d 48 [July 10, 2000]
(Hurd opinion; joined by Straub, Sotomayor)

The Court found that the district court did not err in declining to grant a three level downward adjustment, as reflecting her alleged less than minor but more than minimal participation in the offense, pursuant to U.S.S.G. § 3B1.2. The district court referred to specific facts supporting the determination, including the defendant's assistance in coordinating a smuggling scheme, housing smuggled aliens, and receiving payment for her participation. The defendant's plea agreement had included a three level adjustment pursuant to U.S.S.G. § 3B1.2, but the Presentence Report did not

include such an adjustment.

United States v. Finkelstein, 229 F.3d 90 [Oct. 2, 2000]
(Kearse opinion; joined by Newman, Katzmann)

Defendant argued that he was entitled to a two-level minor role reduction pursuant to U.S.S.G. § 3B1.2(b) because he laundered only $20-25 million of the more than $500 million that was laundering in the conspiracy. The Second Circuit, however, held that the defendant's focus on the $500 million figure was "misplaced" since his offense level was based upon the $20-25 million amount and there was no basis to find his role was minor with regard to that sum.

United States v. Carney, 225 F.3d 646 [2000 WL 1340550; Sept. 14, 2000]
(Summary Order; Meskill, Calabresi, Katzmann)

The Second Circuit agreed with the defendant that the district court mistakenly viewed his request for a two level downward adjustment for minor role, pursuant to U.S.S.G. § 3B1.2, as one for a minimal role reduction. Nevertheless, the Second Circuit affirmed the district court's denial because its factual findings that defendant was an active participant in many aspects of the conspiracy precluded a minor role reduction.

United States v. Caruso, 225 F.3d 646 [2000 WL 1134359; Aug. 9, 2000]
(Summary Order; Walker, Pooler, Sotomayor)

It was not error for the district court to refuse to grant a minor role adjustment pursuant to U.S.S.G. § 3B1.2(b), where the defendant who concocted a scheme to defraud customers of fraudulent investment firms, found a printer for the fraudulent marketing literature, and worked closely with co-conspirators to solicit investors.

United States v. Cox, ___ F.3d ___ [2000 WL 1761884; Nov. 27, 2000]
(Summary Order; Cardamone, Jacobs, Calabresi)

The district court did not commit clear error in denying defendant's request for a minor role adjustment pursuant to U.S.S.G. § 3B1.2, where the defendant engaged in several acts that were crucial to the success of the drug purchase, including introducing the buyer to the seller, allowing his restaurant and phones to be used for negotiations, and assuring the buyer that the deal would be satisfactory. The defendant also knew the seller's source and manner of business, and thus did not lack knowledge or understanding of the criminal activity for which he was convicted.

United States v. Edwards, 210 F.3d 356 [2000 WL 502054; April 25, 2000]
(Summary Order; Pooler, Sotomayor)

The district court's findings concerning defendant's role in the conspiracy were sufficient where the court adopted the factual findings of the presentence report. The court did not abuse its discretion by denying a downward adjustment for minor role pursuant to U.S.S.G. § 3B1.2(b), notwithstanding that defendant had been abused by her co-conspirator, since her first offense (which was not part of the charged conduct) occurred while the co-conspirator was in jail and defendant agreed to his initial request to work with him. Further, the defendant had conceded that she committed the offense so she "could pay rent."

United States v. Giles, 210 F.3d 356 [2000 WL 424142; April 13, 2000]
(Summary Order; Winter, Leval, Magill)

Based on evidence that the defendant had made more than one drug shipment for the conspiracy, the district court did not commit clear error in departing downward by only three levels pursuant to U.S.S.G. § 3B1.2, reasoning that his participation in the conspiracy was more than "minimal" but less than "minor."

United States v. Gomez, 208 F.3d 204 [2000 WL 280323; March 14, 2000]
(Summary Order; Oakes, Calabresi, Parker)

Because the defendant waived his right to appeal, he could not now argue on appeal that the district court erred in denying him a role reduction pursuant to U.S.S.G. § 3B1.2(b) for a minor role.

United States v. Legette, 205 F.3d 1326 [2000 WL 232283; Feb. 24, 2000]
(Summary Order; Kearse, Jacobs, Pooler)

The district court did not err in refusing to reduce the defendant's offense level by two steps for being a minor participant, pursuant to U.S.S.G. § 3B1.2(b). The district court found that the defendant was thoroughly involved in the organization, planning, and execution of the kidnaping.

United States v. Lutz, 205 F.3d 1326 [2000 WL 236478; Feb. 15, 2000]
(Summary Order; Sotomayor, Meskill, Keenan)

The defendant claimed he was a minor participant in the offense because he acted only at another's instructions and because he had neither conceived of nor initiated the crime. The Second Circuit found no error in the district court's denial of a reduction in sentence because the defendant committed acts crucial to further the fraud scheme, including soliciting a friend to act as the frontman of a dummy company and hiring an attorney to incorporate it, and because he planned to share equally in the proceeds.

United States v. Molina, 213 F.3d 627 [2000 WL 572911; May 11, 2000]
(Summary Order; Winter, Feinberg, Cabranes)

Where the defendant participated at a high level in one prong of the conspiracy, the Second Circuit held that the defendant was not entitled to a "minor" role adjustment under U.S.S.G. § 3B1.2. The Court also rejected the related argument that the district court misapprehended its authority to depart under U.S.S.G. § 2D1.1. Thus, the decision not to depart was unreviewable.

United States v. Rondon, 205 F.3d 1326 [2000 WL 232274; Feb. 28, 2000]
(Summary Order; Cabranes, Oakes, Sack)

The Second Circuit held that the district court properly denied adjustments for minor role pursuant. The district court had found that the defendants were instrumental to the conspiracy to import cocaine. They had arranged for the rental of a warehouse, actively planned several aspects of the scheme with another, purchased various tools used to remove cocaine from the beams of a shipping container, and worked with another to remove the cocaine-filled beams from the container.

United States v. Saavedra, 225 F.3d 647 [2000 WL 1185580; Aug. 17, 2000]
(Summary Order; Cardamone, Cabranes, Keenan)

Considering the evidence that the defendant attended a gang meeting and agreed to participate in the assault, the district court did not abuse its discretion in finding that the defendant was entitled to a 2-level reduction for having a "minor role," rather than a 4-level reduction for having a "minimal role."

United States v. Urena, 205 F.3d 1327 [2000 WL 224866; Jan. 14, 2000]
(Summary Order; Kearse, Sack, Underhill)

Defendant argued that the district court erred in not downwardly adjusting his offense level by two levels pursuant to U.S.S.G. § 3B1.2 for his minor role in the offense. Defendant claimed that he was a minor participant because his role was analogous to that of a "steerer" in a narcotics transaction, and that the district court did not make adequate findings, but instead rejected his request as a matter of law. The Second Circuit disagreed and noted that defendant had negotiated with an undercover federal agent on several occasions for the sale of $90,000 in counterfeit money, attempted to negotiate a cocaine sale, and passed counterfeit money at a casino.

United States v. Uribe, 205 F.3d 1327 [2000 WL 232073; Feb. 8, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

Defendant challenged the district court's denial of her request for a minor role adjustment pursuant to U.S.S.G. § 3B1.2(b). The Second Circuit found that although the defendant may not have been a supervisor, her role was clearly more than a minor one. She stored heroin and cocaine in her apartment, acted as a broker to facilitate narcotics transaction, and sold heroin supplied to her.

The Court also noted that the defendant declined a hearing offered by the district court to submit other evidence to support her request.

United States v. Zapata, 216 F.3d 1074 [2000 WL 730418; June 7, 2000]
(Summary Order; Feinberg, Cabranes, George)

The district court properly rejected defendant's argument that a minimal role adjustment was appropriate because defendant's role in the offense was limited to a single instance of carrying narcotics proceeds from a participant in the conspiracy to an undercover officer. As the Second Circuit has previously held, a defendant's courier status alone does not automatically entitle him to the benefit of minimal role adjustment. See *United States v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990).

Further, the Court held that district court made adequate findings regarding the defendant's role in the offense pursuant to Rule 32(c)(1). District courts should be given "latitude" with respect to the requirement that specific findings be made on controverted matters. *United States v. Persico*, 164 F.3d 796, 804 (2d Cir. 1997). Here, the district court judge found that the defendant: "(1) performed a "vital" and "essential" role in the narcotics conspiracy; (2) was entrusted with delivering a sizable sum of drug proceeds (over $500,000); (3) knew many details of the conspiracy's inner workings, as evinced by his ability to divulge such details pursuant to his cooperation agreement; and noted that (4) those entrusted with the money in a narcotics conspiracy may well be "more involved in the criminal conduct than those only allowed to carry the drugs."

§ 3B1.3: Abuse of Trust/Use of Special Skill

United States v. Allen, 201 F.3d 163 [Jan. 5, 2000]
(Per Curiam; Cardamone, Cabranes, Straub)

Defendant contended that the district court misapplied U.S.S.G. § 3B1.3 in her case because her employment responsibilities were at most "secretarial" or "ministerial," and thus devoid of the "professional or managerial discretion" necessary to constitute a position of trust. The Second Circuit disagreed, stating that an employee "need not have a fancy title or be a 'big shot' in an organization to qualify for an enhancement for abuse of a position of trust." The adjustment turns on the "extent to which the position provides the freedom to commit a difficult-to-detect wrong." *United States v. Viola*, 35 F.3d 37, 45 (2d Cir. 1994). The defendant possessed "broad responsibilities," which included having authority and control over the company's check book and credit card, and the defendant had no direct or regular supervision.

Further, the Second Circuit rejected defendant's argument that the imposition of an upward adjustment for abuse of trust and the increase in offense level for more than minimal planning under § 2F1.1(b)(2) constituted impermissible double counting. The Court cited *United States v. Marsh*,

955 F.2d 170, 171 (2d Cir. 1992), which held that these two enhancements are not necessarily or inherently duplicative enhancements. The Court found that the defendant failed to demonstrate that the enhancements were duplicative in this specific instance.

United States v. Cusack, 229 F.3d 344 [Oct. 13, 2000]
(Per Curiam; Walker, Pooler, Sotomayor)

Defendant argued that the district court improperly imposed a 2-level upward adjustment for abuse of trust pursuant to U.S.S.G. § 3B1.3. The Second Circuit disagreed, stating that "[w]hile this is not the paradigmatic case of abuse of trust, we believe that the ingredients for applying the enhancement are sufficiently present." The defendant was a representative of the law firm of the New York Archdiocese of the Catholic Church, and allegedly abused his position of trust by stealing documents from the Archdiocese's vault.

United States v. Moskowitz, 215 F.3d 265 [May 25, 2000]
(Per Curiam; Winter, Feinberg, Cabranes)

Defendants, CEO and CFO of a corporation, challenged the district court's upward adjustment of two levels for abuse of trust against the corporation's shareholders, pursuant to U.S.S.G. § 3B1.3. Because abuse of a position of trust was not a specific offense characteristic and was not included in the base offense level, the abuse of trust enhancement was properly applied.

United States v. Rosoff, ___ F.3d ___ [2000 WL 1847105; Dec. 15, 2000]
(Summary Order; Cardamone, Winter, Pooler)

The Second Circuit upheld the district court's upward adjustment of defendant's sentence for use of a special skill pursuant to U.S.S.G. § 3B1.3. The defendant argued that the district court failed to make a finding that he used his special skill as an attorney to assist in the underlying fraud as well as to obstruct justice. The Court found the district court's findings sufficient.

United States v. Young, 213 F.3d 627 [2000 WL 687750; May 25, 2000]
(Summary Order; Oakes, Miner, Sotomayor)

The Court held that evidence that the defendant used standard police investigative techniques and facilities that he had acquired during his thirty-one years as a police officer to commit the offense of kidnaping, as well as a police badge and other police items to "arrest" the individual was sufficient for the imposition of a two-level enhancement for abusing a position of trust and responsibility under U.S.S.G. § 3B1.3.

§ 3B1.4: Use of a Minor

United States v. Li, 205 F.3d 1326 [2000 WL 233702; Feb. 10, 2000]
(Summary Order; Cabranes, Sack, Carman)

Defendant argued that a two-level increase in his offense level pursuant to U.S.S.G. § 3B1.4 was error because he was unaware that he was using someone under the age of 18 to commit a crime. The Second Circuit noted that the Guideline does not appear to require such knowledge, but in any event, the district court explicitly found that the defendant know or had constructive knowledge at the time he committed the crime that a participant was a minor. Further the age of the participant was stated in the PSR and no objection to that fact was made.

§ 3C1.1: Obstruction of Justice

United States v. Ahmad, 202 F.3d 588 [Jan. 26, 2000]
(Walker opinion; joined by Leval, Pooler)

The Second Circuit found that the record supported the district court's imposition of an upward adjustment for obstruction of justice under U.S.S.G. § 3C1.1 based on a perjurious affidavit submitted by the defendant.

United States v. Cusack, 229 F.3d 344 [Oct. 13, 2000]
(Per Curiam; Walker, Pooler, Sotomayor)

The district court properly applied a two level increase in defendant's offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1 based on defendant's intentional disguising of his handwriting in exemplars he provided to the government.

United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
(Straub opinion; joined by Feinberg, Jacobs)

Finding that the district court had applied the wrong standard in deciding whether to apply an obstruction of justice adjustment, the Second Circuit remanded for resentencing. The district court had evaluated defendants' statements, about what should be said in the grand jury by co-conspirators, in the "light most favorable" to the defendants, as U.S.S.G. § 3C1.1 had previously instructed. An amendment to that section, however, eliminated that language, while directing courts to "be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice." *U.S.S.G. Manual App. C, amend. 566* (effective Nov. 1, 1997).

United States v. Grimes, 225 F.3d 254 [Aug. 21, 2000]
(Per Curiam; Calabresi, Cabranes, Pooler)

The Second Circuit held that the district court did not clearly err in upwardly adjusting defendant's sentence for obstruction of justice based upon his perjury.

United States v. Lincecum, 220 F.3d 77 [July 20, 2000]
(Per Curiam; Kearse, Sack, Sotomayor)

The district court did not err in increasing defendant's sentence pursuant to U.S.S.G. § 3C1.1 for obstruction of justice based on his false sworn affidavit submitted in support of a motion to suppress statements made at the time of his arrest. The Second Circuit found that the false representations were material within the meaning of U.S.S.G. § 3C1.1 despite the fact that the government ultimately chose not to offer defendant's post-arrest statements at trial, and despite the fact that the defendant had withdrawn his motion to suppress after the government had produced all of its witnesses. The Court also found that the district court's findings were sufficient even though they did not contain the specific word "material."

United States v. Akosa, 205 F.3d 1325 [2000 WL 227819; Jan. 21, 2000]
(Summary Order; Meskill, Jacobs, Leval)

Defendant argued that an adjustment for obstruction of justice based on perjury was erroneous because the district court failed to make adequate findings as to each element of perjury. The Second Circuit held the district court's findings to be sufficient.

United States v. Akwuba, 208 F.3d 204 [2000 WL 311051; March 27, 2000]
(Summary Order; Feinberg, Cardamone, Parker)

As the district court made appropriate findings that were supported by the evidence, it was not error to impose a two level upward adjustment for obstruction of justice.

United States v. Alcantara-Soler, 210 F.3d 356 [2000 WL 427068; April 20, 2000]
(Summary Order; Van Graafeiland, Parker, Underhill)

The Second Circuit affirmed the obstruction of justice adjustment, which was based partly on an affidavit submitted in support of a motion to suppress that contained statements in direct contradiction to defendant's admissions to counsel prior to the suppression hearing. The Court did not determine the veracity whether defendant's allegation of ineffective assistance of counsel in that his counsel knew that the affidavit contained false information, but merely affirmed the obstruction of justice adjustment and left the remaining issues open for habeas corpus review.

United States v. Bruno, 234 F.3d 1263 [2000 WL 1715254; Nov. 14, 2000]
(Summary Order; Kearse, Leval, Cabranes)

It was undisputed that people scheduled to testify at the defendant's trial received telephoned threats shortly before the start of the trial, warning them not to testify against him. The district court found that the defendant instigated those threats. The Second Circuit held that the district court's findings were supported by the record, which included evidence that the threatening calls had been made shortly after the government had provided defense counsel with its witness list and that when the defendant was arrested he had in his possession a copy of the witness list, with circles around the names of two witness who decided not to testify.

United States v. Campbell, 210 F.3d 356 [2000 WL 426196; April 18, 2000]
(Summary Order; Newman, Kearse, Cabranes)

Defendant, who was sentenced to 97 months imprisonment, argued on appeal that the district court erred in increasing his offense level for obstruction of justice. Since the range with the increase for obstruction of justice was 97 to 121 months and without the increase would have been 78 to 97, and the fact that the sentencing court indicated that it would have imposed the same sentence had it not imposed the increase, the Second Circuit found defendant's contention moot.

United States v. Carmona, 205 F.3d 1325 [2000 WL 234473; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

Defendant argued that a two-point increase for obstruction of justice based on defendant's attempt to flee from agents on his motorcycle was erroneous because he did not create a "substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." The Second Circuit pointed out that defendant's argument is applicable to an enhancement pursuant to U.S.S.G. § 3C1.2, not to § 3C1.1, the enhancement he actually received. The district court clearly noted that it was enhancing under § 3C1.1, not § 3C1.2. Section 3C1.1 does not require defendant's conduct to have posed a serious risk of bodily injury.

United States v. Collis, 213 F.3d 627 [2000 WL 562435; May 5, 2000]
(Summary Order; Meskill, Cabranes, Katzmann)

The Second Circuit held that the district court did not err in imposing an enhancement for obstruction of justice when it determined that the defendant testified in direct contradiction to other evidence presented at trial, including recorded conversations. An enhancement for obstruction of justice by committing perjury is proper when the sentencing court determines "by clear and convincing evidence that the defendant 'gave false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Kelly*, 147 F.3d 172, 178 (2d Cir. 1998).

United States v. Cover-It, Inc., 234 F.3d 1263 [2000 WL 1678781; Nov. 7, 2000]
(Summary Order; Walker, Oakes, Leval)

The Second Circuit found no error in the district court's imposition of an obstruction of justice enhancement. The district court found that the defendant provided false information to Environmental Protection Agency agents, obstructing their investigation. Further, the Court noted that the question was moot since the defendant had already served his prison sentence.

United States v. Finley, 205 F.3d 1325 [2000 WL 232166; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Sotomayor)

The Second Circuit found the district court's findings of obstruction of justice by perjury adequate. The district court listed specific elements of the defendant's testimony that it found both material and directly contrary to other evidence at trial. The district court also found that the defendant acted willfully in providing the false testimony and not out of any mistaken impression.

United States v. Ifeagwu, 210 F.3d 356 [2000 WL 426200; April 14, 2000]
(Summary Order; Oakes, Walker, Keith)

It was not clear error for the district court to adjust defendant's sentence for obstruction of justice where the court found that he "testified incredulously . . . about the most material factors in this case, clearly testifying falsely and willfully." The district court specifically pointed to two sets of statements that it found were intentionally falsely made by the defendant.

United States v. Kennedy, 234 F.3d 1263 [2000 WL 1720962; Nov. 17, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

Defendant argued that there was no clear and convincing evidence that he committed perjury during his trial and thus the district court should not have applied a two-level enhancement to his offense level pursuant to U.S.S.G. § 3C1.1 for obstruction of justice. The Second Circuit found that the district court applied the correct legal standard and made no factual error in concluding that the defendant committed perjury during trial.

United States v. Kortright, 205 F.3d 1326 [2000 WL 232291; Jan. 25, 2000]
(Summary Order; Sotomayor, Newman, Goldberg)

The Second Circuit found that the defendant waived his claim that the district court erred by enhancing his sentence for obstruction of justice under U.S.S.G. § 3C1.1. Although the defendant included the claim in the issues presented for appeal, he never discussed the basis for his objection or the relevant law. Further, even if he had not waived the claim, the record indicated that the district court acted properly.

United States v. McSherry, 229 F.3d 1136 [2000 WL 1399832; Sept. 22, 2000]
(Summary Order; Jacobs, Leval, Sack)

It was not an abuse of discretion for the district court to apply an upward adjustment for obstruction of justice pursuant to U.S.S.G. § 3C1.1, where the district court found that the defendant had perjured himself at trial concerning two material matters, that the perjury was willful and intentional and not the result of mistake, confusion, or faulty memory.

United States v. Novellano, 205 F.3d 1326 [2000 WL 236477; Feb. 15, 2000]
(Summary Order; Cabranes, Oakes, Sack)

The Second Circuit rejected defendant's argument that, had he been notified of the possibility of an enhancement under U.S.S.G. § 3C1.1 for obstruction of justice, he might not have pleaded guilty in 1995. The district court applied the enhancement for the defendant's false testimony in a hearing held in 1999. Thus, defendant could not have received notice at the time of his plea, since the conduct which served the basis for the enhancement did not occur until four years later.

United States v. Nwosu, 205 F.3d 1326 [2000 WL 241254; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

Defendant's offense level was increased by two points for obstruction of justice pursuant to U.S.S.G. § 3C1.1, for providing materially false information to a probation officer. Defendant argued that he lacked the requisite intent to deceive the probation officer and that he therefore should not have received a sentence enhancement. Defendant claimed that he did not understand a question about his prior arrest, or alternatively, that he was merely following the advice of his lawyer. The Second Circuit affirmed the district court's finding that the defendant deliberately withheld information to avoid a greater sentence.

United States v. Rivera, 208 F.3d 204 [2000 WL 326365; March 28, 2000]
(Summary Order; Feinberg, Jacobs, Straub)

The Second Circuit declared defendant's argument that the district court erred in finding that he attempted to obstruct justice moot, because even if the district court had erred, the sentence was determined by the career offender table. Pursuant to U.S.S.G. § 4B1.1, the sentence is calculated by that table if it results in a greater sentence than the offense level otherwise applicable.

United States v. Sanders, 208 F.3d 204 [2000 WL 268577; March 9, 2000]
(Summary Order; Oakes, Cabranes, Sack)

The district court did not err in imposing a two level upward adjustment for obstruction of justice where the district court made three separate findings of perjury based on contradictions both within the defendant's own testimony, and between defendant's and a detective's testimony.

United States v. Soto, 234 F.3d 1263 [2000 WL 1678782; Nov. 7, 2000]

(Summary Order; Kearse, Leval, Sotomayor)

Because the defendant failed to object to the PSR's recommendation of an increase in offense level for obstruction of justice based on perjury, to the government's assertion that the defendant had given perjured testimony, or to the district court's finding that he had perjured himself, his claim of error was reviewable only for plain error. Further, the Second Circuit found that there was ample evidence of the falsity of the defendant's trial testimony.

United States v. Stevens, 210 F.3d 356 [2000 WL 419938; April 17, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

A two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 was proper where the district court found that the defendant "has been stonewalling from the beginning and [has continued] to stonewall right up until . . . the day of sentencing" and "has failed to cooperate with both government and the probation officer in terms of preparing his presentence report and giving the court a basis upon which it can make a reasonable finding with respect to his assets" for purposes of formulating a restitution order.

United States v. Valencia, 234 F.3d 1263 [2000 WL 1689755; Nov. 9, 2000]
(Summary Order; Walker, Van Graafeiland, Marrero)

The district court increased the defendant's offense level by two points for obstruction of justice pursuant to U.S.S.G. § 3C1.1 for threatening to kill an informant. The defendant argued that the district court improperly relied on the defendant's admission made during a proffer session with the government. The Second Circuit declined to decide whether the district court relied on that admission because it found that the government had presented independent evidence to the district court regarding the threat.

United States v. Young, 213 F.3d 627 [2000 WL 687750; May 25, 2000]
(Summary Order; Oakes, Miner, Sotomayor)

The Second Circuit held that evidence that the defendant told his tenant to tell "anybody who asks" that he was at home on the day of the crime charged was sufficient, standing alone, to support a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1.

§ 3C1.2: Reckless Endangerment During Flight

United States v. Allison, 210 F.3d 355 [2000 WL 357673; April 6, 2000]
(Summary Order; Leval, Calabresi, Sack)

The Second Circuit agreed that the totality of the circumstances of defendant's flight

indicated that the "defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer," justifying an upward adjustment of two levels pursuant to U.S.S.G. § 3C1.2. Following a bank robbery, Defendant rode as a passenger in a get-away car driven at speeds exceeding 100 miles per hour. The car subsequently crashed and the defendant tried to flee on foot as a police officer fired shots after him. During his flight, defendant carried a loaded and cocked gun. The Court reasoned that the totality of the circumstances warranted the adjustment, but expressed "no view as to whether the sole fact that the defendant was a passenger in the recklessly driven get-away car would be sufficient to impose a sentence enhancement pursuant to U.S.S.G. § 3C1.2."

United States v. Littles, 216 F.3d 1074 [2000 WL 730397; June 2, 2000]
(Summary Order; Miner, Walker, Buchwald)

The district court properly imposed a two-level upward adjustment for reckless endangerment pursuant to U.S.S.G. § 3C1.2 where it was undisputed that defendant pointed a shotgun in the direction of a law enforcement officer. The defendant argued that he was unaware that the individuals breaking into the apartment were law enforcement officers. While acknowledging that defendant may be correct in stating that this departure only applies if one knowingly flees a law enforcement officer, see, e.g., *United States v. Hayes*, 49 F.3d 178, 183-184 (6th Cir. 1995), the Court found that there was sufficient evidence of such awareness.

United States v. Valencia, 234 F.3d 1263 [2000 WL 1689755; Nov. 9, 2000]
(Summary Order; Walker, Van Graafeiland, Marrero)

The Second Circuit held that defendant's forceful blow to a FBI agent resulting in a loss of consciousness, delivered in an attempt to flee, rose to the level of recklessly creating a substantial risk of serious injury, warranting a two level increase of defendant's offense level, pursuant to U.S.S.G. § 3C1.2.

§ 3D1.2: Grouping

United States v. Fitzgerald, 232 F.3d 315 [Nov. 15, 2000]
(Per Curiam; McLaughlin, Parker, Dorsey)

The Second Circuit held that, pursuant to U.S.S.G. § 3D1.2, tax evasion, fraud, and conversion should be grouped because they are offenses of the same general type. The district court grouped defendant's tax evasion as one group and fraud and conversion as a separate group, resulting in an offense level of 20 after an increase for the finding of two groups. The Second Circuit remanded for remanded for resentencing, finding that because the three offense should all be grouped together, the resulting offense level should have been 19. The Court declined to address the issue raised on appeal concerning the applicability and impact of *Apprendi v. New Jersey*, ___ U.S. ___,

120 S.Ct. 2348 (2000), leaving that up to the district court if the issue was raised again on remand.

United States v. Petrillo, 237 F.3d 119 [Dec. 29, 2000]
(Feinberg opinion; joined by Miner, Sack)

At sentencing, the district court rejected defendant's request to group his mail fraud and tax evasion counts in calculating his offense level. On appeal, the government consented to resentencing in response to the Second Circuit's decision in *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), which held that counts of money laundering and fraud offenses should be not be grouped because the offense level for money laundering is not based primarily on the amount of money involved. In this case, the Second Circuit held, in a case of first impression, that tax evasion and mail fraud should be grouped under U.S.S.G. § 3D1.2(d) because those offense do follow offense level schedules that are based primarily on the amount of monetary loss.

§ 3E1.1: Acceptance of Responsibility

United States v. Champion, 234 F.3d 106 [Dec. 8, 2000]
(Per Curiam; Calabresi, Parker, Trager)

Defendant argued that the district court's denial of a two-point reduction for acceptance of responsibility was based on the erroneous conclusion that a two-point enhancement for obstruction of justice was fundamentally inconsistent with an offense level reduction for acceptance of responsibility. Defendant noted Application Note 4 to U.S.S.G. § 3E1.1 which indicates that both adjustments may apply in "extraordinary cases." The Second Circuit held that the district court's findings that the defendant submitted a perjured affidavit and suborned perjury, provided a legitimate basis for the imposition of the obstruction of justice enhancement and the denial of the acceptance of responsibility reduction.

United States v. Ortiz, 218 F.3d 107 [June 30, 2000]
(Per Curiam; Sack, McLaughlin, Cedarbaum)

The Second Circuit declined to disturb the district court's refusal to adjust defendant's offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Despite the fact the defendant had pleaded guilty, the sentencing court found that he had "manipulated the system" by using marijuana on multiple occasions despite representations that he would not do so if continued on release. The Court rejected the argument that dictum in *United States v. Woods*, 927 F.2d 735 (2d Cir. 1991) indicated that the district court had abused its discretion. The court in *Woods* stated that "[w]e are doubtful whether [defendant's drug use] would, standing alone, provide an adequate ground for denying [defendant] a sentence reduction. Continued drug abuse may well signify addiction and dependence rather than lack of contrition."

United States v. Volpe, 224 F.3d 72 [Aug. 16, 2000]
(Walker opinion; joined by Pooler, Sotomayor)

The district court did not err in denying a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, where the defendant did not plead guilty until late in the trial, forcing the government to present most of its case against him. Moreover, the district court found that the defendant's statements before and after his plea evinced a lack of remorse and that he had failed to acknowledge fully the wrongfulness of his conduct.

United States v. Zichettello, 208 F.3d 72 [March 20, 2000]
(Winter opinion; joined by Sack, dissent by Oakes)

The Second Circuit found that the district court did not err in refusing to grant a three level reduction for acceptance of responsibility pursuant to U.S..G. § 3E1.1 based on defendant's failure to pay restitution as he had promised, despite the fact that he had pleaded guilty.

Califano v. United States, 216 F.3d 1071 [2000 WL 730398; June 6, 2000]
(Summary Order; Calabresi, Sack, Cedarbaum)

The Court held that the district court was correct in finding defendant's Rule 35(c) motion untimely because it was filed approximately four years after sentencing. Under Rule 35(c), a sentencing court "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The defendant had argued that the district had committed a clerical error in granting only a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, instead of a three-level reduction. The district court stated that it had made no such error. The Court also found that no relief was available under Rule 35(a), which authorizes a district court to correct a sentence on remand. This applies only to sentences that have been found on appeal to be erroneous, which was not the case here.

United States v. Alcantara-Soler, 210 F.3d 356 [2000 WL 427068; April 20, 2000]
(Summary Order; Van Graafeiland, Parker, Underhill)

The Second Circuit affirmed the district court's refusal to grant a downward adjustment for obstruction for acceptance of responsibility, which was based in part on a false affidavit submitted in support of a motion to suppress. The court added that the record was insufficient to determine defendant's allegation that his counsel was ineffective since he knew that the affidavit contained false information.

United States v. Cook, 234 F.3d 1263 [2000 WL 1644524; Nov. 1, 2000]
(Summary Order; Feinberg, Miner, Katzmann)

The district court properly denied defendant's request for acceptance of responsibility where it found that: he did not fully acknowledge his leadership role in the offense to the Probation Officer; he committed similar crimes while on pre-trial release to a degree the district court characterized as "outrageous"; and because he waited until the eve of trial to enter his guilty plea.

United States v. Delarosa, 234 F.3d 1263 [2000 WL 1549931; Oct. 16, 2000]
(Summary Order; Feinberg, Winter, Leval)

The Second Circuit affirmed, without explanation, the district court's denial of a two-level downward adjustment of his sentence for acceptance of responsibility "for the reasons stated orally by the district court on October 22, 1999 and February 2, 2000."

United States v. Grajales, 234 F.3d 1263 [2000 WL 1591151; Oct. 24, 2000]
(Summary Order; Meskill, Cabranes, Pooler)

Pursuant to Application Note 1(a) to U.S.S.G. § 3E1.1, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with the acceptance of responsibility." The district court denied defendant's request for a downward adjustment for acceptance of responsibility because the defendant, although he had provided information to the government and had promptly notified them of his intention to plead guilty, insisted that he did not play a leadership or organizational role in the conspiracy, despite testimony to the contrary. The Second Circuit found that the district court's decision was not "without foundation" and thus upheld the denial.

United States v. Green, 234 F.3d 1263 [2000 WL 1644069; Nov. 1, 2000]
(Summary Order; Cardamone, Pooler, Katzmann)

The Second Circuit upheld the district court's determination that the defendant's repeated denial of relevant conduct charged in the indictment outweighed his plea of guilty, warranting the denial of credit for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

United States v. Holmes, 205 F.3d 1325 [2000 WL 232167; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Calabresi)

The Second Circuit found no error in the district court's denial of credit for acceptance of responsibility, where the defendant had pleaded guilty, but thereafter had committed a second crime while awaiting sentence.

United States v. Howard, 216 F.3d 1074 [2000 WL 772405; June 15, 2000]
(Summary Order; Winter, Cardamone, Straub)

It was not error for the district court not to grant an adjustment for acceptance of responsibility where the defendant pleaded not guilty and maintained in his pro se brief that "he is not guilty of conspiracy to distribute cocaine."

United States v. Kennedy, 234 F.3d 1263 [2000 WL 1720962; Nov. 17, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

Defendant argued that he should have ben granted a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 because he "took all the responsibility he could." The Second Circuit affirmed the district court's finding that the defendant, who proceeded to trial and maintained his innocence even after the guilty verdict, had not accepted responsibility.

United States v. Kortright, 205 F.3d 1326 [2000 WL 232291; Jan. 25, 2000]
(Summary Order; Sotomayor, Newman, Goldberg)

As the record clearly indicated that the court understood its power to depart, and the defendant was unable to point to any error of law, defendant's claim that he should have been granted a downward departure for acceptance of responsibility was unappealable.

United States v. Lapp, ___ F.3d ___ [2000 WL 1804516; Dec. 7, 2000]
(Summary Order; Walker, Cabranes, Straub)

The Second Circuit upheld the district court's denial of an downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court denied the adjustment because the defendant failed to acknowledge the scope and seriousness of his criminal conduct, maintaining that he was entitled to the money he took, and because he testified falsely under oath.

United States v. Lutz, 205 F.3d 1326 [2000 WL 236478; Feb. 15, 2000]
(Summary Order; Sotomayor, Meskill, Keenan)

The defendant argued that he was entitled to a credit for acceptance of responsibility because he made efforts to pay restitution. The record reflected that the district court considered the defendant's restitutionary efforts, but rejected them as a basis for departure because they occurred only after the fraud was discovered and after the defendant had been sued by the victim. Thus, the decision not to depart was not appealable.

United States v. Nwosu, 205 F.3d 1326 [2000 WL 241254; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

The Second Circuit refused to disturb the district court's decision not to credit the defendant for acceptance of responsibility. The Court pointed to Application Note 4, which recognizes that a

defendant who obstructs justice usually is not entitled to a reduction for acceptance of responsibility.

United States v. Okafor, 208 F.3d 204 [2000 WL 311064; March 24, 2000]
(Summary Order; Cardamone, McLaughlin, Parker)

It was not clear error for the district court to deny defendant a downward adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, based on his past obstruction of justice, six months prior to his guilty plea. Further, the Second Circuit found that the district court did not commit clear err in determining that the defendant pleaded guilty not out of remorse, but out of the recognition that he would lose at trial.

United States v. Okoli, 210 F.3d 356 [2000 WL 426191; April 18, 2000]
(Summary Order; Newman, Kearse, Cabranes)

The Second Circuit held that defendant's argument that the district court erred in denying him a downward adjustment in offense level for acceptance of responsibility was moot. The imprisonment range without credit for acceptance of responsibility was 15 to 21 months, and with the credit it would have been 10 to 16. Further, the sentencing court indicated that even if it had granted the credit, it would have imposed the same sentence, i.e., 16 months.

United States v. Porterfield, 205 F.3d 1326 [2000 WL 232027; Jan. 26, 2000]
(Summary Order; Leval, Cardamone, Parker)

Because the defendant pled guilty on the morning of trial, his plea did not spare the government and the court form the time and expense of trial preparation, and thus, he was not entitled to the third level of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b)(2).

United States v. Valdera, 216 F.3d 1074 [2000 WL 949153; July 7, 2000]
(Summary Order; Leval, Parker, Katzman)

The Second Circuit rejected the defendant's argument that the district court mistakenly believed that it lacked authority to grant an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 given defendant's flight. Rather, the court simply found it "inapproproiate as a matter of discretion" to grant that departure.

United States v. Valencia, 234 F.3d 1263 [2000 WL 1689755; Nov. 9, 2000]
(Summary Order; Walker, Van Graafeiland, Marrero)

Defendant argued that his sentence should have been reduced for acceptance of responsibility because he admitted his guilt and his participation in threatening an informant, and he performed post-arrest rehabilitation. Because the district court did not misapply the Guidelines or fail to

understand its ability to downwardly depart, the Second Circuit held that defendant's claim was unreviewable.

United States v. Yeung, 205 F.3d 1327 [2000 WL 232654; Feb. 29, 2000]
(Summary Order; Kearse, Parker, Pooler)

Although defendant signed a plea agreement, the district court declined to grant defendant's request for credit for acceptance of responsibility pursuant because he had submitted copies of altered checks in an attempt to gain a downward departure, based on care and support he offered to his elderly parents. The checks had been altered by his brother to make it appear that the money was drawn from the defendant's account. The Second Circuit found that the district court's decision to deny the acceptance of responsibility request, and to impose an upward adjustment for obstruction of justice, was well supported by the defendant's admission of obstruction of justice.

United States v. Young, 213 F.3d 627 [2000 WL 687750; May 25, 2000]
(Summary Order; Oakes, Miner, Sotomayor)

The Second Circuit upheld the district court's denial of credit for acceptance of responsibility under U.S.S.G. § 3E1.1. Among other things, the district court found that the "defendant perjured himself at trial primarily for the purpose of showing that he was not mentally responsible for the crime committed."

CRIMINAL HISTORY

§ 4A1.1: Criminal History Category

United States v. Sanders, 205 F.3d 549 [March 9, 2000]
(Per Curiam; Oakes, Cabranes, Sack)

The Second Circuit vacated defendant's sentence because the district court erred in counting his prior conviction for fare-beating in calculating his criminal history score. Pursuant to U.S.S.G. § 4A1.1(c), a misdemeanor conviction that carries a fine or imprisonment of fewer than 60 days, results in a single criminal history point. However, a exception to this rule states that 15 specific offense and "offenses similar to them," should not be counted unless the sentence for the prior offense was for a term of probation of at least one year or term of imprisonment of at least thirty days, or the prior offense was similar to an instant offense. The defendant had received one day community service for his prior fare-beating conviction, and the prior conviction was not similar to the instant offense. The district court found that the fare-beating conviction was "categorically more serious" than the 15 listed offenses (which include disorderly conduct, prostitution, resisting arrest, trespassing, et al.). The Second Circuit disagreed, stating that fare-beating is less serious, and less culpable than several of the specified offenses.

United States v. Gutierrez, 229 F.3d 1136 [2000 WL 1370326; Sept. 20, 2000]
(Summary Order; Winter, Newman, Sack)

Defendant argued that the district court erred in applying a two-level upward departure for committing an offense while under a criminal justice sentence pursuant to U.S.S.G § 4A1.1(d) since he was on probation at the time of the offense and not actually in custody. The Second Circuit held that he did not have to be in physical custody and thus the departure was proper. Further, even if that departure had been error, it would not have effected his criminal history category, and thus would have been harmless.

§ 4A1.2: Computing Criminal History

United States v. Carter, 203 F.3d 187 [Feb. 16, 2000]
(Oakes opinion; Winter, Sotomayor)

The Second Circuit held that the district court erred in its application of U.S.S.G. § 4A1.2(c), and that defendant's prior conviction for harassment should not be counted in calculating his criminal history score. The Court relied on its decision in *United States v. Martinez-Santos,* 184 F.3d 196 (2d Cir. 1999), which was decided after the district court sentenced the defendant in this case. In *Martinez-Santos*, the Court adopted a multi-factor test for determining whether crimes are "similar" to those listed in § 4A1.2(c). The Court remanded to permit the district court to determine whether harassment is "similar" to any of the crimes listed in § 4A1.2(c) under the *Martinez-Santos* multi-factor test.

United States v. Joyner, 201 F.3d 61 [Jan. 10, 2000]
(Winter opinion; joined by Cardamone, Parker)

Defendant argued that the district court erred in including a 1994 state court sentence in his criminal history since that conviction was part of his continuing criminal enterprise (CCE) offense. Under U.S.S.G. § 4A1.2(a)(1), a sentencing court must consider "any sentence previously imposed ... for conduct not part of the instant offense." Under Application Note 3 to § 2D1.5, a sentence for a conviction sustained prior to the "last overt act of the instant offense" should be considered a prior sentence under § 4A1.2(a)(1) and not part of the CCE offense for criminal history purposes. Defendant argued that the district court erred by making no finding as to when the last overt act of the CCE occurred. The Second Circuit held that the district court's actions were proper because the jury convicted the defendant of an overt act committed in October 1994, which was after the state drug offense and conviction.

United States v. Matthews, 205 F.3d 544 [March 9, 2000]
(Sotomayor opinion; joined by Winter, Parker)

The Second Circuit found that defendant's prior youthful offender adjudication was not an "expunged" conviction under U.S.S.G. § 4A1.2(j), and thus the district court properly increased defendant's criminal history by three points. The Court noted that the youthful offender statute does not state that the offender's conviction be "expunged," as do other statutes.

United States v. Morales, 239 F.3d 113 [Dec. 13, 2000]

(Newman opinion; joined by Kearse, Chin)

The Second Circuit held that for a broad offense like harassment, the "similar to" determination pursuant to U.S.S.G. § 4A1.2(c)(1) requires a fact-specific inquiry. Pursuant to § 4A1.2(c)(1), all felonies and misdemeanors are counted in calculating a defendant's criminal history, except for certain listed offenses and those "similar to" the listed offenses, which does not include harassment. Thus, the determination of whether the defendant's prior harassment offense was similar to the listed offenses was critical, as it determined whether he was eligible for the "safety valve" adjustment. The Second Circuit found that the specific facts of defendant's harassment conviction indicated that his offense was not more serious than the listed offenses, and that the district court, therefore, should not have assessed a criminal history point for that conviction.

United States v. Amos, 216 F.3d 1073 [2000 WL 898881; June 29, 2000]

(Summary Order; Winter, Kearse, Pooler)

Defendant's criminal history category was properly enhanced because of his prior fine for possessing marijuana. The fine constituted a "prior sentence" under U.S.S.G. §§ 4A1.1(c) and 4A1.2(a)(1), and marijuana possession is not one of the petty offenses listed as exempt from criminal history point calculations under U.S.S.G. § 4A1.2(c).

United States v. Brenes, ___ F.3d ___ [2000 WL 1804520; Dec. 7, 2000]

(Summary Order; Oakes, Jacobs, Parker)

The district court took into consideration defendant's prior juvenile convictions in calculating defendant's criminal history, pursuant to U.S.S.G. § 4A1.2(d). Defendant argued that the juvenile convictions should not be considered, citing Connecticut case law that states that juvenile convictions should not be equated with adult convictions. The Second Circuit affirmed defendant's sentence, noting that the Guidelines specifically contemplate that law relating to juvenile offenses may differ among jurisdictions, and thus, to reduce disparities, the guideline provision applies to all offenses under the age of 18.

United States v. Howard, 216 F.3d 1074 [2000 WL 772405; June 15, 2000]

(Summary Order; Winter, Cardamone, Straub)

The district court properly calculated defendant's criminal history points when it included defendant's 1995 sentencing for petit larceny as a sentence which occurred "within five years of the

instant offense" under U.S.S.G. §§ 4A1.2(d)(2) and 4A1.2(e)(4).

§ 4A1.3: Adequacy of Criminal History Category

Markoneti v. United States, 216 F.3d 1072 [2000 WL 730400; June 7, 2000]
(Summary Order; Feinberg, Cabranes, George)

The Court held that it was proper for the district court to deny defendant's petition for habeas relief where the district court had departed upward pursuant to U.S.S.G. § 4A1.3(a) in light of the government's submission of a list of thirty crimes of which the defendant had been convicted in Israel. The defendant argued that sentencing him on the basis of a facsimile of his Interpol police record. violated his due process right to be sentenced on the basis of reliable, accurate, and complete information. The Court, however, noted that "despite the fact that six years have passed during which [the defendant] could have gathered evidence tending to show that he was not convicted of one or more of the crimes set forth in the facsimile copy of the criminal history on which Judge Weinstein relied, he has failed to offer any such evidence in support of the instant petition."

United States v. Allison, 210 F.3d 355 [2000 WL 357673; April 6, 2000]
(Summary Order; Leval, Calabresi, Sack)

The district court did not abuse its discretion by imposing an upward departure pursuant to U.S.S.G. § 4A1.3. The Second Circuit noted that the defendant did not dispute the district court's factual finding regarding his criminal history, and the findings were sufficient basis to conclude that his criminal history category "did not reflect the seriousness of his criminal history and the likelihood of his recidivism."

United States v. Camacho, 213 F.3d 627 [2000 WL 534231; May 2, 2000]
(Summary Order; Jacobs, Leval, Sack)

The Second Circuit found that the district court reasonably departed one level pursuant to U.S.S.G. § 4A1.3(d), on the ground that the defendant committed the crimes while he was awaiting trial on state grand larceny and forgery charges.

United States v. Lowe, 216 F.3d 1074 [2000 WL 900209; June 29, 2000]
(Summary Order; Winter, Katzmann, Hodges)

The Second Circuit granted the government's motion for limited remand to clarify the district court's reasoning in upwardly departing based on defendant's criminal history. In imposing the upward departure, the district court had stated several times on the record that it was departing because the defendant's criminal history category did not accurately reflect his pattern of continuous illegal entry and illegal reentry, particularly "the most recent illegal reentry which has not been

accounted for by either the offense level conduct or criminal history category and that is the illegal reentry after the 1992 deportation." However, the illegal reentry the district court referred to was precisely the conduct of the instant conviction. Because the district court's comments suggested some confusion, the Second Circuit agreed to remand.

United States v. Silva-Osuna, 225 F.3d 647 [2000 WL 1185795; Aug. 17, 2000]
(Summary Order; Leval, Parker, Katzmann)

The Second Circuit rejected defendant's argument that the district court should have declined to grant an upward departure on the basis of sentencing disparities among the circuits. Rather, an upward departure was warranted considering the defendant's extensive criminal history, three prior illegal entries, including two illegal reentries, and his record of weapon-related offenses. The Court also noted that, even if the sentencing judge improperly added a criminal history point for a subway fare-beating conviction, that error did not affect his decision to depart upward.

§ 4B1.1: Career Offender

United States v. Moree, 220 F.3d 65 [July 17, 2000]
(Leval opinion; joined by Cardamone, Parker)

The defendant argued that he should be resentenced on the ground that he was denied effective assistance of counsel due to a conflict of interest. Prior to his plea, defendant moved for new counsel, alleging his attorney was ineffective, and his attorney moved separately to be relieved. After a hearing, the district court denied both motions. The defendant accepted a plea agreement, which estimated a guideline sentencing of 188-235 months, based on the defendant's status as a career offender under U.S.S.G. § 4B1.1(B). Subsequently, however, the guideline range was determined to be 135-168 months. At sentencing, the defendant claimed that his attorney and the prosecutor had made the agreement "behind his back." The Second Circuit found that the defendant's allegations of ineffective assistance of counsel did not create a conflict of interest, relying on *United States v. White*, 174 F.3d 290 (2d Cir. 1999) and *Lopez v. Scully*, 58 F3d 38 (2d Cir. 1995). The Court also found that the defendant also failed to demonstrate that his lawyer was ineffective.

United States v. Gregory, 234 F.3d 1263 [2000 WL 1644071; Nov. 1, 2000]
(Summary Order; Cardamone, Pooler, Katzmann)

Defendant argued that the district court erred in sentencing him as a career offender pursuant to U.S.S.G. § 4B1.1 because his 1994 conviction for child abuse in Maryland was not a crime of violence. The guidelines define a crime of violence as a state or federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." The

Second Circuit affirmed, stating that the defendant's sexual abuse of an 11-year-old girl presented, at a minimum, a serious risk of physical injury to her.

§ 4B1.4: Armed Career Criminal

United States v. Moore, 208 F.3d 411 [March 27, 2000]
(Per Curiam; Walker, Calabresi, Katzmann)

Defendant argued that because he did not receive notice prior to trial that he had three predicate convictions instead of two, the court should not have upwardly departed on the ground that he was an armed career criminal pursuant to U.S.S.G. § 4B1.4(b)(3)(B). Prior to trial, the government provided defendant with a copy of a computer-generated criminal history which contained only two prior convictions. In the post-conviction presentence report, the probation office discovered a third prior conviction for assault. This additional conviction subjected the defendant to a higher sentencing range pursuant to § 4B1.4(b)(3)(B). The Second Circuit held that there is no constitutional requirement that a defendant be notified prior to trial that an upward adjustment may be sought, since it is independent of the determination of guilt of the underlying offense.

DETERMINING THE SENTENCE

§ 5C1.1: Imposition of a Term of Imprisonment

United States v. Calabria, 210 F.3d 356 [2000 WL 510249; April 26, 2000]
(Summary Order; Sotomayor, Katzmann)

The Second Circuit rejected defendant's argument that his sentence at the maximum of the guidelines range was based on material misinformation or a misunderstanding concerning his propensity for violence. He claimed that the sentencing court was misled by the government's reference to the defendant's "prior violent past" in its motion papers because defendant's prior criminal history consisted only of a conditional discharge for a harassment conviction. The Court, however, noted that the sentencing court need not set forth reasons for imposing a sentence less than 24 months and, in any event, added that the government's representations were not misleading.

United States v. Gufield, ___ F.3d ___ [2000 WL 1775506; Dec. 1, 2000]
(Summary Order; Walker, Pooler, Hall)

The Second Circuit rejected the defendant's argument that the district court violated 18 U.S.C. § 3553(c)(1) by not adequately stating the reasons for the term of imprisonment imposed. Section 3553(c)(1) only applies when a defendant "is sentenced within a Guidelines range that spans more than 24 months," not when the sentence imposed exceeds 24 months, as the defendant argued. The Court further noted that the district court had provided adequate reasons for the sentence

imposed.

United States v. Popovic, 216 F.3d 1074 [2000 WL 839975; June 27, 2000]
(Summary Order; Kearse, Pooler, Korman)

The Second Circuit affirmed that the trial judge had the discretion to sentence the defendant to the middle of the applicable range based upon his view that the seriousness of his offense and his perjury at trial overshadowed any other mitigating facts. Further, the Court found that it was not relevant that the defendant's sentence exceeded the sentence of her co-defendant.

United States v. Taylor, ___ F.3d ___ [2000 WL 1786338; Dec. 5, 2000]
(Summary Order; Van Graafeiland, Katzmann, Kaplan)

The Second Circuit rejected the defendant's argument that the district court violated 18 U.S.C. § 3553(c)(1) by not adequately stating the reasons for the term of imprisonment imposed. Section 3553(c)(1) only applies when a defendant "is sentenced within a Guidelines range that spans more than 24 months," not when the sentence imposed exceeds 24 months, as the defendant argued. The Guideline range in defendant's case was only ten months.

§ 5C1.2: "Safety Valve"

United States v. Champion, 234 F.3d 106 [Dec. 8, 2000]
(Per Curiam; Calabresi, Parker, Trager)

The Second Circuit held that the defendant's argument that the district court failed to state sufficient reasons for granting or denying safety valve consideration, was without merit. The record revealed that the district court concluded that the defendant was eligible for safety valve relief. In any event, his safety-valve eligibility was irrelevant since the district court departed downward pursuant to U.S.S.G. § 5K1.1.

United States v. DeJesus, 219 F.3d 117 [July 12, 2000]
(Per Curiam; Feinberg, Cabranes, George)

Defendant argued that he was denied effective assistance of counsel in entering a plea agreement, instead of pleading guilty without an agreement and then litigating the safety valve issue before the sentencing court. The Second Circuit found that the defendant was not eligible for the safety valve because he possessed a weapon "in connection with the offense." U.S.S.G. § 5C1.2(2). Thus, defense counsel's decision not to pursue the safety valve was not "outside the wide range of professionally competent assistance." *Strickland v. Washington,* 466 U.S. 668 (1984).

United States v. Reynoso, 239 F.3d 143 [Dec. 27, 2000]

(Cabranes opinion; joined by Pooler, dissent by Calabresi)

The Second Circuit, in a case of first impression, addressed the question of whether a defendant who provided objectively false information to the government satisfies the safety valve requirements of truthfulness if the defendant subjectively believed the information was true. The defendant argued that due to "organic memory impairment, secondary to cocaine intoxication," she did not "appreciate the fact that her information was untrue." The district court assumed arguendo that the defendant genuinely believed she was telling the truth, but found that because the information she provided was objectively false, she had not satisfied the safety valve requirements. The Second Circuit agreed. In dissent, Justice Calabresi concluded that, under the statute, it was the defendant's state of mind rather than the quality of the information that was at issue.

United States v. Tang, 214 F.3d 365 [May 11, 2000]
(Newman opinion; joined by Kearse, Katzmann)

The Second Circuit rejected the defendant's argument that he was entitled to "safety valve" treatment even though he refused to give information about a co-conspirator in Hong Kong, out of fear for the safety of his family there. The Court reasoned that the statute makes no exception for failure to furnish information because of feared consequences. "The Sentencing Commission evidently contemplates that risk of injury *** will not excuse withholding information, because such a risk is to be considered a factor in determining the extent of a cooperation departure."

United States v. Giles, 210 F.3d 356 [2000 WL 424142; April 13, 2000]
(Summary Order; Winter, Leval, Magill)

The district court's finding that the defendant's assertion that he purchased cocaine only for personal use was "simply not credible" was not clear error and thus the district court properly refused to grant the defendant the "safety valve" adjustment pursuant to U.S.S.G. § 5C1.2.

United States v. Rodriguez, 216 F.3d 1074 [2000 WL 898886; June 29, 2000]
(Summary Order; Miner, Straub, Trager)

It was not clearly erroneous for the district court to conclude that the defendant failed to truthfully provide the government with all information regarding the crime in order to be eligible for the safety valve adjustment provided in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. Further, the district court expressly specified the basis for her denial of the adjustment.

§ 5D1.3: Supervised Release

United States v. Chaklader, 232 F.3d 343 [Nov. 17, 2000]
(Sack opinion; joined by Feinberg, Miner)

The Second Circuit held that the district court did not abuse its discretion by imposing drug and alcohol treatment and tests as a condition of supervised release, as authorized by U.S.S.G. § 5D1.3(b). The Court rejected the defendant's contention that although he had a history of substance abuse, there was no evidence of current abuse.

United States v. Gufield, ___ F.3d ___ [2000 WL 1775506; Dec. 1, 2000]
(Summary Order; Walker, Pooler, Hall)

The Second Circuit, without discussion, rejected defendant's argument that the district court failed to consider the facts set forth in 18 U.S.C. § 3553(a) in imposing three concurrent three-year terms of supervised release.

§ 5E1.1: Restitution

United States v. Allen, 201 F.3d 163 [Jan. 5, 2000]
(Per Curiam; Cardamone, Cabranes, Straub)

Defendant argued that the restitution order exceeded her ability to pay. The plea agreement entered into by the parties provided that the defendant would pay "at least the sum of $260,854.00" and further stated that the sentencing court may set a greater amount depending on the proof available at sentencing. The district court ordered restitution in the amount of $268,212.33, to be paid within five years on a monthly payment schedule. The Second Circuit affirmed the imposition of the order, stating that the sentencing judge properly considered the defendant's financial resources as evidenced by the creating of a monthly payment schedule.

United States v. Boyd, 222 F.3d 47 [Aug. 9, 2000]
(Per Curiam; Feinberg, Jacobs, Hall)

It was not error for the district court to order the defendant to pay restitution pursuant to provisions of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, and 18 U.S.C. § 2327, based on the conduct of all defendants, even though he had been acquitted of the conspiracy counts. The Second Circuit further held it was not error to base restitution upon the damages suffered by the victims in terms of the whole conspiracy (included counts of which defendant was acquitted), while evaluating a minimal-participant reduction on the basis of her counts of conviction alone. The Second Circuit reasoned that the inconsistency was mandated by the statutes and Guidelines.

United States v. Carboni, 204 F.3d 39 [Feb. 18, 2000]
(Pooler opinion; joined by Leval, Cabranes)

The Second Circuit vacated the district court's order of restitution of $195,840 because the

district court based that amount on the amount of loss used to calculate defendant's offense level, and it included both actual and potential loss. An order of restitution must be limited to actual loss. The Court also noted that the presentence report suggested that, at least during the defendant's incarceration, his wife might not have sufficient funds to maintain her household. And since the record was unclear as to whether the district court considered the mandatory factors in imposing restitution, the district court was directed to clarify this on remand.

United States v. Ismail, 219 F.3d 76 [May 23, 2000]
(Per Curiam; Feinberg, Parker, Straub)

The Second Circuit rejected the defendant's argument that the district court misunderstood its obligations to consider the statutory factors in imposing restitution. Although the district court cited the wrong restitution provision, the statutory factors were the same in either case and the court indicated it had considered those factors. Moreover, in light of his earning potential, it was not an abuse of discretion to direct the defendant to pay the full amount of restitution (over $150,000) within the five years of defendant's supervised release in even monthly installments.

United States v. Joyner, 201 F.3d 61 [Jan. 10, 2000]
(Winter opinion; joined by Cardamone, Parker)

The Second Circuit set aside an order for restitution in the amount of $1,846,637.45 because the record did not reflect any indication that the sentencing court considered the mandatory factors under 18 U.S.C. § 3664(a). The fact that the district court chose not to impose a fine due to the defendant's financial condition did not shed any light on whether the district court considered the factors before imposing restitution.

United States v. Maurer, 226 F.3d 150 [Sept. 14, 2000]
(Per Curiam; Kearse, Jacobs, Straub)

The Second Circuit rejected defendant's argument that the district erred in not conducting an evidentiary hearing in order to determine the amount of restitution. The district court did hold a conference prior to sentencing at which each party presented their views and arguments concerning sentencing and restitution, and held another conference devoted solely to restitution. The record also reflected that the district court made adequate findings as to the amount of restitution to be paid. The Court also rejected defendant's argument that he was entitled to a reduction in the restitution in the amount he claimed to be owed to him by one of his victims, stating that it was a separate civil claim.

United States v. Stevens, 211 F.3d 1 [April 17, 2000]
(Katzmann opinion; joined by Kearse, Calabresi)

Defendant contented that his order of restitution was invalid because it was issued more than

90 days after sentencing. Title 18 U.S.C.§ 3664(d)(5) provides that if the amount of loss cannot be determined at least ten days before sentencing, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." The Second Circuit held that the restitution order was valid despite the fact that it was issued 117 days after sentencing because the defendant himself caused the delay. Defendant prevented the sentencing court from determining the amount of restitution by "stonewalling," refusing to cooperate with the probation department and concealing assets. Further, a restitution hearing that had been scheduled to take place within the 90 day period was rescheduled due to the defendant's illness. Defendant caused the bulk of the delay in bad faith and thus may not defeat his restitution order. It was unnecessary to remand to the district court to determine the number of days that should be tolled by the defendant's refusal to make financial disclosures because the defendant was unable to show that the delay caused prejudice to his defense and, consequently, was harmless. Further, the Second Circuit held that the district court adequately took into consideration defendant's financial circumstances and the needs of his dependants when assessing restitution. The Court noted that defendant's only dependant was his wife, whom he had married on the eve of his surrender date and who ran a successful business which she had purchased from the defendant.

United States v. Tran, 234 F.3d 798 [Nov. 15, 2000]
(Parker opinion; Van Graafeiland, Parker, Underhill)

The district court imposed mandatory restitution upon the defendant pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3664(f)(1)(A). Defendant did not challenge the imposition of restitution, but contended that the district court failed to consider the statutory factors before determining a payment schedule. The district court made no mention of its consideration of the statutory factors, or any factors, before ordering the restitution, nor did it mention or adopt the PSR's findings with respect to restitution. The Second Circuit found that the district court's mere imposition of restitution was insufficient to indicate that it considered the statutory factors, and thus vacated the restitution order and remanded to the district court.

United States v. Amsel, 208 F.3d 204 [2000 WL 286276; March 14, 2000]
(Summary Order; Straub, Sotomayoer, Hurd)

Defendant argued the amount of restitution imposed was too high. The Second Circuit found that he had waived his objections to the restitution order by stipulating to the amount prior to sentencing. The Court also rejected defendant's argument that the district court failed to consider the required factors prior to imposing the restitution order, noting that the district court made a specific finding that the defendant was able to pay.

United States v. Bruno, 234 F.3d 1263 [2000 WL 1715254; Nov. 14, 2000]
(Summary Order; Kearse, Leval, Cabranes)

Defendant argued that the district court was not authorized to order restitution pursuant to

18 U.S.C. § 3663(a) for losses caused by tax fraud because § 3663(a) does not authorize an order of restitution for a conviction of 26 U.S.C. § 7206(2), or any other offense under Title 26. The Second Circuit found that the district court did not order restitution pursuant to § 3663(a), but rather as a condition of the defendant's supervised release, which the district court is authorized to do pursuant to 18 U.S.C. § 3563(b)(3) [now § 3563(b)(2)].

United States v. Delpiano, 225 F.3d 646 [2000 WL 1186258; Aug. 21, 2000]
(Summary Order; Calabresi, Cabranes, Pooler)

After vacating the judgment for failure to advise the defendant at the time of his plea about restitution, the Second Circuit advised the district court that, should the defendant choose to plead guilty again, the district court should consider only the losses attributable to the offense of conviction and should also consider the defendant's ability to pay.

United States v. Gufield, ___ F.3d ___ [2000 WL 1775506; Dec. 1, 2000]
(Summary Order; Walker, Pooler, Hall)

The Second Circuit, without discussion, rejected defendant's argument that the district court abused its discretion in imposing restitution in the amount of $758,000 in the form of $50 monthly installments to begin after his release from prison.

United States v. Huang, 213 F.3d 627 [2000 WL 576076; May 12, 2000]
(Summary Order; Kearse, Katzmann, Korman)

The Second Circuit rejected the defendant's argument that the district court had failed to consider the needs of his dependents and his own ability to make restitution. In fact, the district court postponed sentencing after raising "serious concerns" about defendant's financial condition, and several written and oral submissions followed on this subject. Thus, the district court did not abuse its discretion in ordering full immediate restitution.

United States v. Koltun, 234 F.3d 1263 [2000 WL 1737809; Nov. 22, 2000]
(Summary Order; Cardamone, Calabresi, Katzmann)

The Second Circuit dismissed defendant's argument that his lack of financial resources rendered the district court's order of restitution improper. Restitution in this case is mandatory, regardless of the defendant's ability to pay. *See* Mandatory Victims Restitution Act, 18 U.S.C. § 3664(f)(1)(A).

United States v. Pastor, 229 F.3d 1136 [2000 WL 1506041; Oct. 10, 2000]
(Summary Order; Walker, Miner, Pooler)

Although the district court's "affirmative statements" on the record were "not as complete

as a reviewing court might hope," the Second Circuit found them to be "sufficient to raise the inference that the district court did indeed consider the mandatory factors prior to imposing restitution.

United States v. Polite, 216 F.3d 1074 [2000 WL 898895; June 29, 2000]
(Summary Order; Miner, Straub, Trager)

The Second Circuit vacated the order of restitution for this defendant because the district court had erroneously awarded restitution for losses not attributable to the conduct underlying the defendant's conviction. Although neither the defendant nor the government objected to the order of restitution, both agreed it was erroneous and it amounted to plain error. "Absent a stipulation in a plea agreement, a sentencing court may award restitution only for losses directly resulting from the 'conduct forming the basis for the offense of conviction.'" *United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998) (quoting *United States v. Silkowski*, 32 F.3d 682, 688 (2d Cir. 1994)).

United States v. Popovic, 216 F.3d 1074 [2000 WL 839975; June 27, 2000]
(Summary Order; Kearse, Pooler, Korman)

The Second Circuit vacated, without discussion, defendant's order of restitution because the record below did not reflect that the district judge considered several mandatory factors before imposing the order of restitution. The government had conceded this point.

United States v. Popson, 234 F.3d 1263 [2000 WL 1568252; Oct. 19, 2000]
(Summary Order; Jacobs, Straub, Sack)

The district court's order that defendant pay restitution to the stalking victim in the amount of $20,000 was not an abuse of discretion. The victim had submitted a request for itemized expenses in the amount of $12,470, and anticipated lost wages in the amount of $50,000. The Second Circuit agreed that restitution for relocation and lost wages was reasonable, given the defendant's pattern of pursuit and confrontation of the victim.

United States v. Rhames, 205 F.3d 1326 [2000 WL 234465; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

The Second Circuit held that the district court did not abuse its discretion by imposing restitution in the amount of $74,950. Defendant argued that he was $35,000 in debt and, due to poor health, unlikely to make money in the future. The district court, however, properly considered the amount of loss suffered by the victims, the defendant's financial resources and his future earning potential, and his and his dependents' financial needs.

United States v. Runge, 205 F.3d 1326 [2000 WL 232768; Feb. 28, 2000]

(Summary Order; Kearse, Jacobs, Pooler)

The Second Circuit found that the district court adequately considered the mandatory factors before ordering restitution. The district court adopted the PSR's factual findings and specifically found that the defendant had sufficient assets to pay. The court also granted the defendant's request that he be allowed to surrender after his son's term of incarceration to lessen the family's hardship.

United States v. Sarvis, 205 F.3d 1326 [2000 WL 19100; Jan. 5, 2000]
(Summary Order; Oakes, Cardamone, Cabranes)

Defendant was convicted of bank fraud and ordered to make restitution in the amount of $12,177,059.81 as part of his conditions of supervised release. Defendant moved to modify the conditions, stating that, due to changed circumstance, he was unable to pay. The district court denied his motion without making any findings or offering any explanation for its decision. Defendant appealed. The Second Circuit vacated the order of restitution and remanded, holding that there must be an affirmative act or statement allowing an inference that the district court considered the relevant factors. Since the defendant made a threshold showing of changed circumstances, the district court was required to consider defendant's motion.

§ 5E1.2: Fines

United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
(Straub opinion; joined by Feinberg, Jacobs)

Defendant argued that imposition of a $500,000 fine was improper because he did not receive adequate notice that material in the presentence report would be taken into account in determining the fine, and the evidence at sentencing did not support the finding that he had the ability to pay the fine. The Second Circuit rejected his argument, reasoning that notice of how the information in the PSR might be used is not required. Further, the court said that it was not unreasonable to conclude that the defendant could pay the fine based on evidence that, while the defendants were out on bail and during trial, they made approximately $1.7 million in profits from continued drug distribution.

United States v. Lowe, 216 F.3d 1074 [2000 WL 900209; June 29, 2000]
(Summary Order; Winter, Katzmann, Hodges)

It was not clearly erroneous for the district court to impose a $5,000 fine on defendant. The district court concluded that the defendant would be able to pay the fine from prison earnings and likely earnings after release from prison. Further, the Second Circuit noted that the district court imposed a fine below the guideline range of $7,500 to $75,000.

United States v. Perez-Gonzalez, 216 F.3d 1074 [2000 WL 821742; June 22, 2000]
(Summary Order; Miner, McLaughlin, Cabranes)

It was not clearly erroneous for the district court to impose a $5,000 fine on defendant. The district court concluded that the defendant would be able to pay the fine from prison earnings and likely earnings after release from prison. The Second Circuit noted, however, that if this proves not to be the case, the defendant may assert his continuing indigence as a defense to any effort by the government to collect the fine.

United States v. Thompson, 227 F.3d 43 [Sept. 25, 2000]
(Cabranes opinion; joined by Feinberg, Parker)

The district court did not clearly err in imposing a fine of $5,000, reasoning that the indigent defendant could pay it, first out of his prison earnings, and after his release, out of other earnings. The Court noted that the defendant had a GED and had held jobs as a cab driver, garment factory worker and a groom at a racetrack. The Court also noted that the defendant would have no other financial obligations that would make it difficult to pay the fine. If he finds himself unable to pay the fine, the defendant may assert his continuing indigence as a defense to any effort by the government to collect the fine. Moreover, the Second Circuit held that defendant's obligation to pay would continue even after his deportation.

§ 5E1.3: Special Assessments

United States v. Ford, 205 F.3d 1325 [2000 WL 127517; Jan. 14, 2000]
(Summary Order; Feinberg, Kearse, Sack)

Defendant argued, and the government conceded, that the imposition of a $100 special assessment, rather than the $50 assessment applicable at the time of his offense, violated the Ex Post Facto Clause of the Constitution. The Second Circuit vacated and remanded for entry of an amended judgment.

§ 5F1.7: Shock Incarceration Program

United States v. Caruso, 225 F.3d 646 [2000 WL 1134359; Aug. 9, 2000]
(Summary Order; Walker, Pooler, Sotomayor)

Because the district court recognized its authority to depart downward to permit the defendants to participate in the Bureau of Prisons' Shock Incarceration Program (*see* 18 U.S.C. § 4046), its discretionary decision not to grant that departure was not appealable.

§ 5G1.2: Multiple Counts

United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
(Winter opinion; joined by Jacobs, Katzmann)

Defendant argued that his sentence could not exceed 60 months because one of the counts (count nine) he pleaded guilty to had a statutory maximum sentence of 60 months. However, he also pleaded guilty to ten other counts that carried a maximum sentence of 120 or 180 months. The district court sentenced defendant to 60 months on count nine and 88 months on each of the remaining ten counts, and ordered that the sentences run concurrently. Pursuant to U.S.S.G. § 5G1.2(d), the 60 month term runs consecutively to the sentences imposed on the other counts to the extent necessary to achieve the total punishment of 88 months.

United States v. Lau, 216 F.3d 1074 [2000 WL 777921; June 2, 2000]
(Summary Order; Miner, Walker, Sotomayor)

The Second Circuit found that the district court did not clearly err in imposing consecutive sentences. The district judge "carefully assessed the three fraud counts and decided that they constituted two separate frauds warranting a departure and consecutive sentences."

§ 5G1.3: Undischarged Sentence

United States v. Brown, 232 F.3d 44 [Nov. 3, 2000]
(Per Curiam; McLaughlin, Leval, Sotomayor)

Defendant had two state convictions which were factually unrelated to each other, but which were consolidated for sentencing purposes, and for which he received two terms of incarceration to be served consecutively. The district court imposed a federal sentence to run concurrent to the undischarged state sentences, but without crediting the defendant for time already served. The defendant argued that the district court erred by applying U.S.S.G. § 5G1.3 subsection (c), rather than subsection (b), to calculate his subsequent federal sentence because one of the defendant's two state convictions was "arguably related" to the federal offense charged and thus should have been taken into account in determining the offense level, and because (c) applies only to situations in which the defendant is serving sentences that were imposed on different dates or are of varying durations. The Second Circuit held that because the defendant was serving two sentences, not one, subsection (c) applied and therefore the district court did not have to adjust for time previously served, as suggested under Application Note 2.

United States v. Garcia-Hernandez, 237 F.3d 105 [Dec. 26, 2000]
(Calabresi opinion; joined by Cardamone, Jacobs)

Defendant was convicted of illegal reentry and received a substantial enhancement for illegal reentry following a prior conviction for an aggravated felony, pursuant to U.S.S.G. § 2L1.2(b)(1)(A). Defendant argued that the district court was required, pursuant to § 5G1.3(b), to run his sentence concurrently with a state term of imprisonment. The Second Circuit held that the district court properly evaluated defendant's sentence under § 5G1.3(c), not, as defendant argued, § 5G1.3(b). The Court held that "when a defendant is imprisoned as a result of his violation of the terms of his parole, the "offense" that "results" in his imprisonment is, for the purposes of § 5G1.3(b), the underlying prior offense of conviction, not the conduct violative of his parole conditions, and that § 2L1.2(b)(1)(A) does not "fully take into account" prior aggravated felonies because the defendant is not sentenced as if those felonies were being prosecuted in the same proceeding as the instant offense."

Akinlade v. United States, 213 F.3d 625 [2000 WL 572913; May 11, 2000]
(Summary Order; Meskill, Cabranes, Telesca)

In a prior appeal, the Second Circuit affirmed the district court's refusal to order that defendant's sentence run concurrent to whatever sentence might be imposed on a pending state court charge, or that the district court recommend that the Bureau of Prisons (BOP) designate the state prison as the place where he should serve his federal sentence. Following the imposition of the state sentence, the defendant petitioned the court, arguing, inter alia, that the sentence should be modified to run concurrent with the state sentence. The Second Circuit held that the district court properly determined that only the BOP had the authority to issue such an order.

Delima v. United States, 213 F.3d 625 [2000 WL 534248; May 2, 2000]
(Summary Order; Jacobs, Leval, Sack)

The Second Circuit held that it was proper for the district court not to make a predetermination at the time of sentencing whether the defendant's federal sentence should run concurrently with or consecutively to any sentence he might receive on unresolved state court charges. The defendant, furthermore, made no request that the district court do so at the time of sentencing. However, defendant had and still has the right to petition the Bureau of Prisons to designate the facility in which he served his state sentence as the site of his federal sentence or to credit him with state time served.

United States v. Burgos-Rodriguez, 205 F.3d 1325 [2000 WL 254052; March 6, 2000]
(Summary Order; Straub, Sotomayor, Hurd)

The defendant argued that the district court abused its discretion when it failed to consider certain factors applicable to U.S.S.G. § 5G1.3(c) in determining that his sentence should run consecutive to a state term of imprisonment. The Second Circuit found that the district court adequately considered the length of the state sentence and the factors set forth in 18 U.S.C. § 3553.

Though the decision was severe, it fell within the district court's discretion.

United States v. De, 216 F.3d 1073 [2000 WL 777989; June 14, 2000]
(Summary Order; Oakes, Sotomayor, George)

Although defendant correctly claimed that he should have been sentenced under the 1994 rather than the 1995 version of U.S.S.G. § 5G1.3(c), the Second Circuit held that he waived that right by failing to raise the issue prior to sentencing. The Court also noted that the defendant could have received the exact same sentence had he been sentenced under the 1994 guidelines and therefore the district court did not commit plain error.

United States v. McElwain, 205 F.3d 1326 [2000 WL 234487; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

The district court imposed a 24-month sentence to run consecutively to defendant's 3-6 year state sentence and two 15-month consecutive federal sentences. Defendant argued that his total federal sentence of 54 months was unreasonable when compared with the 21-27 month range that would have applied had this prior federal offenses and the instant one been consolidated. The Second Circuit found the "disparity striking," but nevertheless held that the district court did not abuse its discretion in imposing a consecutive sentence within the range of 18 to 24 months, which had been agreed upon in the plea agreement. The Court found that the district court was aware of the defendant's other sentences and their duration, as required by U.S.S.G. § 5G1.3, and although "reaching a somewhat severe result, acted within its discretion."

United States v. Perez-Nunez, 216 F.3d 1074 [2000 WL 777987; June 14, 2000]
(Summary Order; Newman, Pooler, George)

The Second Circuit found that U.S.S.G. § 5G1.3 did not apply because defendant's state convictions did not affect the calculation of his offense level, and thus the district court was not required to sentence defendant concurrently with his undischarged state sentences.

United States v. Shkolir, 205 F.3d 1326 [2000 WL 232201; Jan. 27, 2000]
(Summary Order; Leval, Cardamone, Parker)

Defendant was sentenced to 24 months to run consecutively to a 30-month sentence he was already serving for an unrelated federal crime. Defendant argued that the crimes should have been grouped and that the district court, in rejecting the grouping analysis, improperly considered that the crimes were separate and that the second offense was committed while on bail pending sentencing after conviction for the first offense. The Second Circuit noted that, at the time the defendant was sentenced, neither U.S.S.G. § 5G1.3(c) nor its commentary mentioned or required that a sentencing judge consider the grouping method. Further, the factors that the district court considered were

appropriate to achieve a reasonable punishment for the offense.
United States v. Troches, 208 F.3d 204 [2000 WL 268580; March 8, 2000]
(Summary Order; Jacobs, Sotomayor, Michel)

The plea agreement provided that defendant would be sentenced to 120 months, which was to run concurrently with a state court sentence and was to be considered to have begun 19 months earlier, when the defendant had been arrested and incarcerated on the state charge. At sentencing, the district court sentenced the defendant in accordance with those terms. The written judgment, however, did not indicate that the sentence should run concurrently with the state sentence and the Bureau of Prisons did not credit the defendant for the 19 months of state time served. Defendant filed a § 2255 motion to correct his sentence, and the district court entered an amended judgment stating that the federal sentence would run concurrently with the state sentence, but declined to order that the federal sentence would begin retroactively, despite the government's concession on that point. The district court stated that it lacked the authority under 18 U.S.C. § 3585(b) to give the defendant credit for earlier time served on a state sentence. The Second Circuit noted that the district court seemingly ignored Application Note 2 in U.S.S.G. § 5G1.3, which grants the district court the authority to adjust a sentence for time served on a state sentence if the court determines that the Bureau of Prisons will not credit the time to the federal sentence. The Second Circuit found that the plea agreement had been breached by the district court and remanded the case to the district court to correct the sentence.

§ 5K1.1: Substantial Assistance of Authorities

United States v. El-Gheur, 201 F.3d 90 [Jan. 21, 2000]
(Cabranes opinion; joined by Walker, Parker)

Defendant appealed the district court's denial of his motion to compel the government to file a U.S.S.G. § 5K1.1 motion for substantial assistance. Even assuming that he would have been entitled to compel the government, the Second Circuit held that the defendant forfeited any such right when he jumped bail and became a fugitive in violation of the terms of his cooperation agreement. In so holding, the Court agreed with the Fourth Circuit's case *United States v. David*, 58 F.3d 113 (4th Cir. 1995). Further, the Court noted that the defendant's attempt to argue that he should have been granted a downward departure based on substantial assistance pursuant to § 5K2.0 was merely an attempt to get through that section what he was unable to get through § 5K1.1.

United States v. Percan, 233 F.3d 164 [Nov. 22, 2000]
(Per Curiam; Cardamone, Calabresi; Katzmann)

Defendant argued that the district court's failure to downwardly depart further than it did deprived him of due process. Defendant had entered into a cooperation agreement with the government which required him to plead guilty to counts relating to a stolen airbag conspiracy and

to an additional count arising out of his involvement in a separate crack cocaine conspiracy, and to assist the government in prosecuting the co-conspirators in the airbag scheme. As agreed, the government filed a motion pursuant to U.S.S.G. § 5K1.1. The PSR suggested that the defendant be sentenced to time served (19 months) because he had provided significant and useful information to the government, despite that the guideline range was 168 to 210 months. The court refused to adopt the PSR recommendation and sentenced the defendant to 60 months in prison. The defendant argued at sentencing and on appeal that he was being penalized for his cooperation because the government only learned of his involvement in the drug conspiracy through his cooperation. The defendant argued that the district court failed to understand that the 60 sentence would punish him more severely than the non-cooperating co-defendants, effectively penalizing him for being forthcoming with respect to his criminal conduct. The Second Circuit rejected defendant's arguments, stating that the record demonstrated that the district court neither misunderstood its authority to depart nor misapplied the guidelines, and thus his claim was unreviewable.

United States v. Ales, 205 F.3d 1325 [2000 WL 232030; Jan. 21, 2000]
(Summary Order; Winter, Jacobs, Calabresi)

Defendant argued that the district court erred in denying his motion for specific performance of the government's promise to file a downward departure motion pursuant to U.S.S.G. § 5K1.1. The Second Circuit found that the government's decision not to file the 5K1.1 motion was based on its belief that the defendant breached his promise by engaging in further criminal activity after he entered into the agreement.

United States v. Correa, 205 F.3d 1325 [2000 WL 232034; Jan. 21, 2000]
(Summary Order; Winter, Jacobs, Calabresi)

The Second Circuit dismissed defendant's appeal where the defendant argued that his sentence should be vacated because the district court failed to explain its sentence by specifically referring to the factors enumerated in U.S.S.G. § 5K1.1. The Court stated that the defendant had waived his right to appeal his sentence when he entered into a written plea agreement and that the failure to explain the extent of downward departure, without more, was unreviewable.

United States v. Hidalgo, 225 F.3d 647 [2000 WL 1051959; July 27, 2000]
(Summary Order; Winter, Walker, Jacobs)

Defendant argued that the government was obligated to move for a downward departure based on his cooperation agreement. Although he admitted that he had violated the terms of the agreement, he argued that because the government had continued to conduct proffer sessions with him after his violation, they were obligated to move for a downward departure. The Court noted that acts of dishonesty are a good faith basis for the government to deem a cooperating witness to have breeched his cooperation agreement, and found no basis to conclude that the government had acted

in bad faith.

United States v. Martinez, 210 F.3d 356 [2000 WL 510143; April 26, 2000]
(Summary Order; Pooler, Sotomayor)

The district court was not obligated to conduct an evidentiary hearing before determining that the government did not decline to move for a downward departure pursuant to U.S.S.G. § 5K1.1 for an unconstitutional reason. Defendant had no right to an evidentiary hearing absent a "substantial threshold showing" that the prosecutor in fact acted from an unconstitutional motive. *Wade v. United States*, 504 U.S. 181 (1992). Defendant's claim that he provided substantial assistance is not sufficient. Further the court reviewed an ex parte submission by the government to insure that the government had no unconstitutional motive for declining to move for a 5K1.1 departure.

United States v. Novellano, 205 F.3d 1326 [2000 WL 236477; Feb. 15, 2000]
(Summary Order; Cabranes, Oakes, Sack)

Defendant argued that the district court should have conducted a "more searching review" of his claim that the government acted in bad faith in refusing to file a § 5K1.1 letter on his behalf. During a two-day hearing, defendant testified that he had been promised no jail time if he provided substantial assistance, which he claimed he had done. The government witnesses testified that they had never promised no jail time, and that he had been a difficult witness in the trial of another defendant. The Second Circuit found that that the district court had sufficient evidence to show that the government did not act in bad faith in denying defendant the benefit of a § 5K1.1 letter. The Court also noted that there was reason to believe that the defendant had committed additional crimes in violation of his cooperation agreement, which allegation was not relied upon by the district court in denying defendant's motion to compel the government to issue a § 5K1.1 letter.

United States v. Pastor, 229 F.3d 1136 [2000 WL 1506041; Oct. 10, 2000]
(Summary Order; Walker, Miner, Pooler)

The Second Circuit found that the district court did not err in finding that the government had a "good faith" basis not to issue a letter under U.S.S.G. § 5K1.1. The district court's findings were based on acts by the defendant subsequent to his cooperation agreement that diminished his credibility, and on the government's inability to corroborate the information he had provided.

§ 5K2.0: Downward Departures

Aberrant Conduct

United States v. Martinez, 207 F.3d 133 [March 21, 2000]
(Katzmann opinion; joined by Winter, Jacobs)

The Second Circuit vacated defendant's sentence because the district court erroneously downwardly departed on the ground of aberrant conduct. The Court found that the prolonged, calculated and systematic nature of the defendant's activity (importation of cocaine of three occasions over a 13 month period) could not be considered aberrant. The Court also found that the district court improperly relied on defendant's claim that he was motivated to commit the offense by a desire to pay workers in his factory.

United States v. Middlemiss, 217 F.3d 112 [June 21, 2000]
(Pooler opinion; joined by Kearse, Parker)

The Second Circuit found that the district court had properly considered and rejected defendant's request for a downward departure based on aberrant criminal behavior pursuant to *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998). The Court rejected defendant's argument that the district court had been predisposed against the departure and had mechanically and rigidly applied the *Zecevic* factors, even thought that list is not exhaustive.

United States v. Garcia-Grueso, 213 F.3d 627 [2000 WL 528653; May 1, 2000]
(Summary Order; Pooler, Sotomayer)

The Second Circuit rejected the defendant's argument that the district court had misunderstood the totality of the circumstances test established by *Zecivic v. United States*, 163 F.3d 731 (2d Cir. 1998) for downward departure based on aberrant behavior. The record indicated that the parties fully briefed and argued the facts and that the district court considered all the relevant circumstances, not merely defendant's first-offender status.

United States v. Gotti, 205 F.3d 1325 [2000 WL 233647; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Calabresi)

The defendant argued that the district court misconstrued its authority to depart for conduct constituting more than a single act. The Second Circuit disagreed, noting that the district court specifically acknowledged its authority to depart. Thus, its decision not to depart was unreviewable.

United States v. Kennedy, 234 F.3d 1263 [2000 WL 1643975; Nov. 1, 2000]
(Summary Order; Feinberg, Miner, Katzmann)

Defendant argued that the record was ambiguous as to whether the district court understood that it had the discretion to depart downward on the ground that his offense constituted aberrant behavior under *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998). The district court stated during sentencing: "It's obvious that there is a basis for a departure under *Zecevic*, but I conclude that the test articulated in that particular decision of our Court of Appeals simply has not been met in this case .... I did not believe that under the law in this circuit that it

would have been an appropriate exercise [of] my discretion to depart from the guideline range that the Sentencing Commission indicated apply to your crime." The Second Circuit affirmed, stating the record does not provide "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority." *United States v. Tenzer*, 213 F.3d 34, 42 (2d Cir. 2000).

United States v. Kortright, 205 F.3d 1326 [2000 WL 232291; Jan. 25, 2000]
(Summary Order; Sotomayor, Newman, Goldberg)

As the record clearly indicated that the court understood its power to depart, and the defendant was unable to point to any error of law, defendant's claim that he should have been granted a downward departure under *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998) based on aberrant conduct, was unappealable.

United States v. McCoy, 210 F.3d 356 [2000 WL 349278; April 4, 2000]
(Summary Order; Leval, Calabresi, Sack)

As a general matter, failure to depart downward is unreviewable. See, e.g., *United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999). The record here clearly indicted that the district court understood that it had the authority to depart and considered and rejected defendant's request for downward departure for his rehabilitative acts and the fact that defendant's conduct constituted "aberrant behavior" when viewed in light of his entire record.

United States v. Molitor, 205 F.3d 1326 [2000 WL 241162; Feb. 1, 2000]
(Summary Order; Straub, Cardamone, Carman)

Defendant argued that the district court mistakenly believed that it lacked the authority to depart downward on the ground of aberrant conduct pursuant to U.S.S.G. §§ 1A(4)(d) and 5K2.0. The Second Circuit found that it lacked jurisdiction to review the district court's decision. Although the district court made several statements indicating that it felt it did not the authority to depart, the district court later stated that while it "may have ... discretion" it did not think "it's a proper use of discretion given [the government's] representations."

United States v. Saavedra, 225 F.3d 647 [2000 WL 1185580; Aug. 17, 2000]
(Summary Order; Cardamone, Cabranes, Keenan)

The Second Circuit found that the district court understood its authority to grant a downward departure based on aberrant criminal behavior pursuant to *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998), notwithstanding the judge's failure to state all of her reasons for refusing to depart. Thus, the refusal to depart was not appealable.

Age

United States v. Buell, 229 F.3d 1136 [2000 WL 1370830; Sept. 20, 2000]
(Summary Order; Calabresi, Katzmann)
United States v. Buell, 229 F.3d 1136 [2000 WL 1370930; Sept. 20, 2000]
(Summary Order; Calabresi, Katzmann)

The defendants in these cases were husband and wife, received identical sentences, and raised identical sentencing arguments on appeal. At sentencing, the magistrate judge stated that she was "going to downwardly depart" based on the defendants age and sentenced the defendants to two years probation and a $2,000 fine. Under the guidelines, the defendants could have received from zero to six months incarceration, a fine between $500 and $2,500, and one to five years probation. Thus, the magistrate judge did not actually "downwardly depart," but merely sentenced the defendants to the low end of the guideline range. The district court inferred that the magistrate judge had not meant to "depart downward" in the technical sense of the term, but intended only to sentence the defendants less harshly than was permitted under the guidelines. The Second Circuit affirmed that court's decision and rejected the defendants' claim that they were entitled to a downward departure.

United States v. Ferrarini, 225 F.3d 647 [2000 WL 1015928; July 18, 2000]
(Summary Order; Cardamone, Calabresi, Parker)

Defendant argued that the district court should have departed more than one-level for his age. The Second Circuit merely stated that "it is well-established," that they may not review the extent of any departure. *See United States v. Moe*, 65 F.3d 245, 251 (2d Cir. 1995).

AIDS virus

United States v. Rodriguez, 213 F.3d 627 [2000 WL 639954; May 17, 2000]
(Summary Order; Parker, Straub, Katzmann)

Without discussion, the Court rejected the defendant's contentions, inter alia, that he was entitled to a downward departure based on his affliction with the AIDS virus, that a life sentence violated his rights under the Eighth Amendment and that he was punished for exercising his right to go to trial because more culpable defendants who pleaded guilty received lesser sentences.

Charitable Work

United States v. Acevedo, 229 F.3d 350 [Aug. 25, 2000]
(Sotomayor opinion; joined by McLaughlin, Restani)

Defendant requested a downward departure at sentencing pursuant to U.S.S.G. § 5K2.0 on

the basis that he prevented the suicide of another inmate. The district court found that the defendant's action was a charitable "good work" pursuant to § 5H1.11, and thus was not an appropriate factor to consider in its decision to downwardly depart. Even if this were a proper factor, the district court explicitly stated that the defendant's act was not so exceptional as to warrant a departure. The Second Circuit found that the district court's alternative holding rendered moot the question of whether the district court misapprehended its authority to depart.

Child Abuse

United States v. Aponte, 235 F.3d 802 [Dec. 21, 2000]
(Per Curiam; Oakes, Jacobs, Parker)

As the defendant alleged neither that the district court erroneously interpreted the law or the extent of its departure authority, the Second Circuit found that it lacked jurisdiction to consider defendant's contention that he was entitled to a downward departure by reason of his diminished capacity and the abuse he suffered as a child.

United States v. Figueroa, ___ F.3d ___ [2000 WL 1862813; Dec. 18, 2000]
(Summary Order; Oakes, Kearse, Winter)

The Second Circuit found the district court's denial of a downward departure for child abuse unreviewable. The district court stated that the defendant's situation "is not so extraordinary from what I have seen as I've sat here listening to other Defendants. It is sad; it is horrible; but it is not extraordinary."

United States v. Martinez, 210 F.3d 356 [2000 WL 510143; April 26, 2000]
(Summary Order; Pooler, Sotomayor)

The district court did not err in requiring some showing of causation between childhood abuse suffered by the defendant and the offense conduct in question in order to grant a downward departure under either U.S.S.G. § 5H1.3 or § 5K2.0. As in *United States v. Rivera*, 192 F.3d 81 (2d Cir. 1999), departures for "extreme childhood abuse" are warranted only where it "caused mental and emotional conditions that contributed to the defendant's commission of the offense."

Consent to Deportation

United States v. Sentamu, 212 F.3d 127 [May 12, 2000]
(Kearse opinion; joined by Feinberg, Sack)

The Second Circuit held that it was error for the district court to grant a one-level downward departure in recognition of defendant's consent to deportation under U.S.S.G. § 5K2.0. The Court

reasoned that without a proffer of some colorable, nonfrivolous defense to deportation, defendant's consent to deportation following the completion of his term of imprisonment was not a permissible basis for departure. *United States v Galvez-Falconi*, 174 F.3d 255 (2d Cir. 1999).

United States v. Santana-Cruz, 216 F.3d 1074 [2000 WL 900207; July 5, 2000]
(Summary Order; Winter, Jacobs, Katzmann)

Defendant argued that the government's delay in indicting him deprived him of an opportunity to receive a one-level downward departure for consent to voluntary deportation, because the government had a policy of recommending such departures at the time he confessed, but had discontinued the policy by the time he was indicted. The Second Circuit rejected his argument because, regardless of the government's policy, without a proffer of some colorable, nonfrivolous defense to deportation, defendant's consent to deportation is not a permissible basis for departure. *United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999).

United States v. Lin, 225 F.3d 647 [2000 WL 1340361; Sept. 12, 2000]
(Summary Order; Kearse, Jacobs, Straub)

The Second Circuit rejected, without discussion, defendants' argument that the district court erred in refusing to grant them downward departures based on their offers to stipulate to deportation, citing to the Court's recent decision in *United States v. Sentamu*, 212 F.3d 127 (2d. Cir. 2000).

Credit for Time Served

United States v. Perez-Nunez, 216 F.3d 1074 [2000 WL 777987; June 14, 2000]
(Summary Order; Newman, Pooler, George)

The Second Circuit found that because defendant failed to request a downward departure based on state time served, he waived such an argument on appeal.

Disparities Among Circuits

United States v. Bonnet-Grullon, 212 F.3d 692 [May 12, 2000]
(Kearse opinion; joined by Feinberg, Sack)

The district court denied defendants' requests for downward departures on the ground that the failure to depart created disparity with the far lower sentences routinely imposed for the same conduct in another judicial district. The defendants argued that the prosecutorial practice in the Southern District of California, of declining to charge most illegally reentering previously-deported-aggravated felons under Section 1326, undermines the central goal of sentencing uniformity. The Second Circuit, however, concluded that the plea-bargaining practices

in other judicial districts cannot be deemed "features of the case." Further, the policy statements make clear that sentences resolved by plea agreements, in which prosecutors elect to forgo potential charges, should be calculated by application of the prescribed guidelines and not by departures. Thus, the Court agreed that the district court lacked the authority to depart on this basis.

United States v. Corniel, 216 F.3d 1073 [2000 WL 730391; June 7, 2000]
(Summary Order; Feinberg, Cabranes, George)

A district court lacks authority to depart based on the disparity between his sentence and the sentence he would have received had he been charged with the same crime in the United States District Court for the Southern District of California. See *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. May 12, 2000).

United States v. Dominguez-Garcia, 216 F.3d 1073 [2000 WL 900208; June 29, 2000]
(Summary Order; Newman, Sotomayor, Goldberg)

A district court lacks authority to depart based on the disparity between his sentence and the sentence he would have received had he been charged with the same crime in the United States District Court for the Southern District of California. See *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. May 12, 2000).

United States v. Galindo-Perez, 234 F.3d 1263 [2000 WL 1715238; Nov. 13, 2000]
(Summary Order; Straub, Sotomayor, Amon)

A district court lacks authority to depart based on the disparity between his sentence and the sentence he would have received had he been charged with the same crime in the United States District Court for the Southern District of California. *See, United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 261 (Oct. 2, 2000).

United States v. Santana-Cruz, 216 F.3d 1074 [2000 WL 900207; July 5, 2000]
(Summary Order; Winter, Jacobs, Katzmann)

A district court lacks authority to depart based on the disparity between his sentence and the sentence he would have received had he been charged with the same crime in the United States District Court for the Southern District of California. See *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. May 12, 2000).

<u>Disparity Between Co-Defendants</u>

United States v. Lutz, 205 F.3d 1326 [2000 WL 236478; Feb. 15, 2000]
(Summary Order; Sotomayor, Meskill, Keenan)

Defendant argued that the district court erred in refusing to grant a downward departure based on the disparity between the length of his 51 month sentence and the 16 month term which his co-defendant received. The defendant argued that, in denying his request, the district court had relied upon a case, *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991), which was questionable after *Koon v. United States*, 518 U.S. 81 [1996]. The Second Circuit declined to address this contention because it found that the district court cited *Joyner* only as supplemental, not controlling authority.

"Entrapment by Estoppel"

United States v. Santana-Cruz, 216 F.3d 1074 [2000 WL 900207; July 5, 2000]
(Summary Order; Winter, Jacobs, Katzmann)

A district court's refusal to downwardly depart is generally not appealable unless the court committed an error of law or was unaware of its power to depart. Here, the record reflected that the district court assumed it had the authority to downwardly depart on the basis of a criminal defendant's reasonable reliance on misinformation in an INS Notice Form I-294, but declined to exercise this assumed authority. "The district court found that appellant's surreptitious re-entry into the United States was not indicative of a person who thought his actions were legal, and therefore denied his motion for a downward departure on the so-called 'entrapment by estoppel' ground." Thus, the decision not to depart was not reviewable.

Extraordinary Family Circumstances

United States v. Middlemiss, 216 F.3d 112 [June 21, 2000]
(Pooler opinion; joined by Kearse, Parker)

The Second Circuit found that the district court did not misconstrue its authority to grant a downward departure pursuant to U.S.S.G. §§ 5H1.4 and 5H1.6 based on the defendant's age, chronic hepatitis, and ongoing responsibility to care for his disabled wife. Thus, the failure to depart was not appealable.

United States v. Calabria, 210 F.3d 356 [2000 WL 510249; April 26, 2000]
(Summary Order; Sotomayor, Katzmann)

A district court's refusal to downwardly depart "is not appealable unless the court committed an error of law or was unaware of its power to depart." *United States v. Fernandez*, 127 F.3d 277, 282 (2d Cir. 1997). Here, the record reflected that the district court acknowledged, and declined to exercise, its authority to downwardly depart for extraordinary family circumstances.

United States v. Famoti, 229 F.3d 1136 [2000 WL 1506189; Oct. 6, 2000]

(Summary Order; McLaughlin, Jacobs, Straub)

The Second Circuit refused to infer that the district court did not understand its authority to depart based on family circumstances from her the district court's statement that the defendant's family would by "severely impacted" by her sentence, but that "the family is widespread and has many members together who, I'm convinced, will be able to avoid some of the consequences of her imprisonment." Thus, the Second Circuit declined to review the court's refusal to depart.

United States v. Frederick, ___ F.3d ___ [20001 WL 10364; Dec. 28, 2000]
(Summary Order; McLaughlin, Pooler, Droney)

As the district court neither erroneously interpreted the law nor the extent of its departure authority, the Second Circuit found that it lacked jurisdiction to consider defendant's contention that he was entitled to a downward departure based on extraordinary family circumstances.

United States v. Hedges, 225 F.3d 647 [2000 WL 964767; July 12, 2000]
(Summary Order; Winter, Parker, Brieant)

Since the record indicated that the district court understood its authority to depart, defendants' claim that the district failed to depart on the basis of his extraordinary family circumstances was unreviewable.

United States v. Klepfer, 234 F.3d 1263 [2000 WL 1689775; Nov. 9, 2000]
(Summary Order; Walker, Oakes, Leval)

Defendant sought a downward departure for extraordinary family circumstances based on his wife's bi-polar illness. The district court held a series of hearings at which extensive testimony was presented on the defendant's wife's mental illness, her dependence on her husband, the ability of other relatives to provide assistance and the effects defendant's incarceration would have on the children in light of his wife's illness. The Second Circuit concluded that the district court had understood its authority to depart and had not misapplied the Guidelines and therefore its decision not to depart was unappealable.

United States v. Matera, 234 F.3d 1263 [2000 WL 1549715; Oct. 18, 2000]
(Summary Order; McLaughlin, Calabresi, Sotomayor)

Although the Second Circuit felt that it was a "close" case, it held that the district court did not abuse its discretion in granting downward departures for two defendants based on extraordinary family circumstances. The Second Circuit did not discuss the facts upon which the departure was based.

United States v. Polite, 216 F.3d. 1074 [2000 WL 898895; June 29, 2000]
(Summary Order; Miner, Straub, Trager)

The district court's decision not to depart pursuant to U.S.S.G. § 5K2.0 based on extraordinary family circumstances was unappealable, since the guidelines were not misapplied and the court did not misunderstand its authority to depart.

United States v. Zebrowski, 229 F.3d 1136 [2000 WL 1459727; Oct. 2, 2000]
(Summary Order; Feinberg, Miner, Pooler)

Since the defendant did not argue that the district court misapprehended its authority to depart, the district court's refusal to depart so was deemed not appealable. *See United States v. Matthews*, 106 F.3d 1092, 1095 (2d Cir. 1997).

Health Problems

United States v. Tisdale, 229 F.3d 1136 [2000 WL 1508875; Oct. 12, 2000]
(Summary Order; Kearse, Calabresi, Sotomayor)

Because there was no indication in the record that the district court committed an error of law or was unaware of its power to depart, defendant's claim that regarding the refusal to him a downward departure based on his health problems was unreviewable. The Second Circuit also pointed out that at sentencing the defendant withdrew his motion for a downward departure in accordance with his plea agreement.

Imperfect Entrapment

United States v. Bala, 236 F.3d 87 [Dec. 28, 2000]
(Pooler opinion; joined by Walker, Kearse)

At sentencing, the defendant argued for a downward departure based on "imperfect entrapment." The district court refused to consider defendant's argument because he believed that the Second Circuit did not authorize such a departure. The Second Circuit held that the district court was authorized to consider the imperfect entrapment argument, but that the court's misapprehension, under the circumstances, was harmless. In addition, the Second Circuit found that there was no factual basis to support Defendant's request for a departure on the ground that he was subjected to "sentencing entrapment" or "sentencing manipulation," which was based upon the claim that IRS agents had increased the value of the funds at issue after the indictment was filed.

Ineffective Assistance of Counsel

United States v. Carmichael, 216 F.3d 224 [June 15, 2000]
(Winter opinion; joined by Oakes, Katzmann)

The Court held that a two-level downward departure for ineffective assistance of counsel (for failing to accept a favorable plea agreement) is not an appropriate remedy. The appropriate remedy would be a resentencing specifically tailored to the constitutional error in question. In this case, the appropriate remedy would be resentencing appellant to the terms he would have received had he been given proper legal advice. The Court cautioned, though, that it did "not mean to suggest . . . that a defendant is necessarily entitled to specific performance of a previously spurned plea offer because his counsel had been constitutionally ineffective in failing to advise him whether to accept the offer."

Mitigating Factors

United States v. McNulty, 216 F.3d 1074 [2000 WL949166; July 7, 2000]
(Summary Order; Leval, Parker, Katzmann)

Defendant argued that she was entitled to a remand since the district court failed to address specifically each of the mitigating factors she alleged as a basis for departure. Absent special circumstances, which were not alleged, "a district court's refusal to grant a downward departure is generally not appealable." *United States v. Clark*, 128 F.3d 122, 124 (2d Cir. 1997).

United States v. Carney, 225 F.3d 646 [2000 WL 1340550; Sept. 14, 2000]
(Summary Order; Meskill, Calabresi, Katzmann)

Since the district court understood its authority to depart based on several personal characteristics of the defendant, the Second Circuit found its refusal to depart unreviewable. The defendant presented evidence of his Mohawk upbringing, young age, acts of valor in the armed services, and an incident in which he allegedly saved seven persons from drowning in the St. Lawrence River.

Negative Impact

United States v. Procino, 234 F.3d 1263 [2000 WL 1715276; Nov. 13, 2000]
(Summary Order; Straub, Sotomayor, Spatt)

The Second Circuit did not address defendant's argument that the district court had misperceived its power to depart based on potential negative impacts to the victims of the defendant's New York State offense because the Court believed that the same sentence would have

been imposed regardless of whether the sentencing judge believed he could depart on that ground. Further, the district court did depart two levels based on a number of other factors. The Second Circuit stated that if the district court would have in fact sentenced the defendant differently, the district court may advise counsel, in which case a motion to recall the Court's mandate would be appropriate.

Personal/Professional Hardship

United States v. Kennedy, 234 F.3d 1263 [2000 WL 1720962; Nov. 17, 2000]
(Summary Order; Kearse, Sack, Sotomayor)

Because the defendant did not argue that the district court denied his motion for a downward departure for personal and professional hardship based on a violation of law or a misapplication of the Guidelines, the Second Circuit lacked jurisdiction to review his claim.

Physical Impairment

United States v. Calabria, 210 F.3d 356 [2000 WL 510249; April 26, 2000]
(Summary Order; Sotomayor, Katzmann)

A district court's refusal to downwardly depart for "extraordinary physical impairment" pursuant to U.S.S.G. § 5H1.4 "is not appealable unless the court committed an error of law or was unaware of its power to depart." *United States v. Fernandez*, 127 F.3d 277, 282 (2d Cir. 1997). Here, the record reflected that the district court acknowledged its authority to depart and there was no error of law. Defendant had presented evidence of chronic asthma, kidney and prostate infections, multiple chemical sensitivities, and an injured right foot.

United States v. Kitchen, 213 F.3d 627 [2000 WL 553884; May 3, 2000]
(Summary Order; Van Graafeiland, Katzmann, Sotomayer)

The Second Circuit found that the district court did not abuse its discretion in denying defendant's request for appointment of a medical expert to evaluate his physical condition so that he could prepare a motion for a downward departure in sentencing. The Court noted that the defendant had declined to subpoena the prison physicians who were treating him, the government had not contested the defendant's claim of a physical ailment, and the district court had in fact granted a significant downward departure because of that ailment.

Pre-Indictment Delay

United States v. Acevedo, 229 F.3d 350 [Aug. 25, 2000]
(Sotomayor opinion; joined by McLaughlin, Restani)

The Second Circuit rejected defendant's claim that the district court erred in holding that the government's delay in commencing his prosecution and transferring him to federal custody did not warrant a downward departure. The district court found that the defendant was unable to show that the delay was either deliberate of nefarious. The Court also rejected defendant's ineffective assistance argument based upon counsel's alleged failure to invoke specific language from a prior Guideline provision, in effect at the time he was "found" in the United States, since there was no showing of any prejudice.

United States v. Santana-Cruz, 216 F.3d 1074 [2000 WL 900207; July 5, 2000]
(Summary Order; Winter, Jacobs, Katzmann)

A district court's refusal to depart downward is generally not appealable unless the court committed an error of law or was unaware of its power to depart. Here, the record reflected that the district court assumed it had the authority to downwardly depart on the basis of the government's nine-month delay in bringing the indictment. The district court, though, found that the government brought the indictment well within the applicable five-year statute of limitations period and that its nine-month delay was "not one that implicated bad faith on the [part of the] government."

Pretrial Confinement Conditions

United States v. Gutierrez, 229 F.3d 1136 [2000 WL 1370326; Sept. 20, 2000]
(Summary Order; Winter, Newman, Sack)

Defendant argued that the district court erred in not downwardly departing based on the conditions of his pretrial confinement pursuant to *United States v. Sutton*, 973 F.Supp. 488, 491-495 (D.N.J. 1997), *aff'd*, 156 F.3d 1226 (3d Cir. 1998). Because the district court expressly found that the conditions of defendant's pretrial confinement did not rise to the level necessary for a departure, the Second Circuit did not address the issue of whether *Sutton* reflects that law of this circuit.

Rehabilitation

United States v. Bryson, 229 F.3d 425 [Oct. 11, 2000]
(Per Curiam; Cardamone, Jacobs, Sack)

The district court initially sentenced defendant to 60 months imprisonment, departing from offense level 31 (135 to 168 months) to 23 due to defendant's "extraordinary rehabilitation." The Second Circuit remanded the case to the district court to "resentence Bryson according to his original offense level of 31." *United States v. Bryson*, 163 F.3d 742 (2d Cir. 1998). On remand, the district court interpreted the Second Circuit's mandate to mean that it did not have the power to depart and thus sentenced defendant to 135 months under offense level 31. The Second Circuit remanded again,

stating that a departure was not precluded. However, the Court restated its holding in the first *Bryson* case: absent specific factual findings demonstrating "extraordinary" rehabilitation consistent with case law of the Circuit, downward departure is an abuse of discretion.

United States v. Tenzer, 213 F.3d 34 [April 26, 2000]
(Feinberg opinion; joined by Sack and joined in part by Miner)

The Second Circuit held that the district court erred in concluding that the "mandate rule" precluded him from granting a downward departure on various grounds, including rehabilitation. The doctrine of "substantial deference" instead permitted the district court to consider defendant's requests for a downward departure. The district court had stated that although he believed that the defendant was entitled to departure based on various factors, he was unable to use these factors as a basis for a departure because "a court must honor the mandates and decisions of the Court of Appeals." The Second Circuit held that a downward departure was not ruled out by its mandate in defendant's prior appeal and remanded so that the district court could consider matters not expressly or implicitly part of the decision of the court of appeals. In dissent, Judge Miner concluded that the district court understood his authority to depart, indeed that it thought it had more authority than it actually did, and chose not to depart. He also stated that the Second Circuit's prior mandate, while it did not deal directly with sentencing issues, did consider and reject defendant's contentions which were the basis of his request for departure.

United States v. Ellison, 225 F.3d 646 [2000 WL 1186257; Aug. 21, 2000]
(Summary Order; Calabresi, Cabranes, Pooler)

The district court did not err in denying a downward departure for "extraordinary rehabilitation." The defendant argued that the district court based its denial on the erroneous belief that the defendant had a serious drug problem for which he had not sought treatment while in prison. The Second Circuit found that the record clearly indicated that the district court had not based its denial on that one factor, but had concluded that the defendant's prison commendations were insufficient to rise to the level of extraordinary rehabilitation.

United States v. Rhames, 205 F.3d 1326 [2000 WL 234465; Feb. 1, 2000]
(Summary Order; Walker, Newman, Sotomayor)

Defendant argued that the district court failed to consider his rehabilitation in denying his motion for a downward departure pursuant to U.S.S.G. § 5K2.0. The Second Circuit found that the district court understood its authority to depart from the Guidelines range, and thus its decision not to do so was unreviewable. The defendant had worked for the Suicide Prevention Program for five hundred hours.

United States v. Yu, 216 F.3d 1074 [2000 WL 821864; June 22, 2000]

(Summary Order; Miner, McLaughlin, Cabranes)

Defendant argued that the district court failed to consider his rehabilitation in denying his motion for a downward departure pursuant to U.S.S.G. § 5K2.0. The Second Circuit found that the district court "not only understood his authority to depart from the Guidelines range, but stated it unambiguously for the record." Further, the district court's "remarks even made clear that he understood rehabilitation was one factor he might consider in making his decision."

Successive Prosecution

United States v. Procino, 234 F.3d 1263 [2000 WL 1715276; Nov. 13, 2000]
(Summary Order; Straub, Sotomayor, Spatt)

Defendant argued that the district court misunderstood its power to grant a downward departure based on the fact that the prosecution resulted from conduct that was part of the same pattern or conduct as an earlier New York State prosecution. The Second Circuit found that it had no jurisdiction to hear this claim because the district court refused to depart based on the successive prosecution claim, having found that the facts underlying the federal prosecution were sufficiently separate from the New York State case as not to be part of the same conduct. Further, the district court did depart two levels based on a combination of factors, including this claim.

Wrongful Conduct

United States v. Calabria, 210 F.3d 356 [2000 WL 510249; April 26, 2000]
(Summary Order; Sotomayor, Katzmann)

The Second Circuit found that the district clearly understood its authority to depart downwardly based on the victim's wrongful conduct pursuant to U.S.S.G. § 5K2.10 for both violent and non-violent offenses, but decided the facts of defendant's case did not involve the type of conduct contemplated by the Guidelines.

Upward Departures

Aggravating Circumstances

United States v. Carter, 203 F.3d 187 [Feb. 16, 2000]
(Oakes opinion; Winter, Sotomayor)

The Second Circuit agreed that the district court did not provide adequate notice of its intention to grant an upward departure pursuant to U.S.S.G. § 5K2.0, where the defendant was notified for the first time on the day of the sentencing hearing. However, the Court found that the

error was cured in this case by the district court's grant of two opportunities to address the grounds for upward departure. The district court permitted defense counsel to submitted written opposition prior to entering judgment, and then reconvened the sentencing hearing three days later so that defense counsel could argue orally against the upward departure.

The defendant also argued that factor relied on by the district court for the upward departure, the repeated purchases and interstate transportation of guns and the added dangerousness to the community as a result of selling those guns in high crime areas, was already taken into consideration by the base sentencing level for his conviction under 18 U.S.C. § 922(a)(1). The Second Circuit agreed that reliance on the number of firearms would be impermissible because that had been taken into consideration by the base offense level. However, the Court found that the district court did not rely solely on the number of firearms involved. It was the repeated nature of the defendant's conduct that warranted the departure, and thus the Court upheld the upward departure.

United States v. Fei, 225 F.3d 167 [Sept. 13, 2000]
(Cardamone opinion; joined by Leval, Parker)

The Second Circuit rejected defendant's argument that the district court erred in sentencing him because it incorrectly found his testimony incredible and did not adequately consider lesser levels of punishment before sentencing him to the statutory maximum. The defendant had pleaded guilty to conspiracy, smuggling aliens and seaman's manslaughter, and the upper limit of the Sentencing Guidelines on the manslaughter count was 33 months. The district court upwardly departed, sentencing the defendant to 10 years on that count, to run consecutively to 5 year sentences on other counts, for an aggregate sentence of 20 years. The district court's reasons for upwardly departing included the death of at least six individuals, the smuggling of 298 aliens, and the possession of dangerous weapons by defendant's employees on the ship that smuggled the aliens into the United States. The district court was not required to list every possible sentence before imposing the statutory maximum.

United States v. Khalil, 214 F.3d 111 [May 31, 2000]
(Kearse opinion; joined by Walker, Calabresi)

The Court rejected the defendant's argument that an upward departure from 0-6 months to 36 months for violation of possessing a counterfeit green card, 18 U.S.C. § 1546, was error on the ground that the district court failed to state whether the departure was pursuant to U.S.S.G. § 4A1.3 or 5K2.0. Although the district court did not specify the section on which its departure was grounded, the factual findings made it sufficiently clear that the departure was premised on U.S.S.G. § 5K2.0. The Second Circuit further held that the departure was reasonable based on the district court's findings that defendant's possession of a counterfeit green card was only part of much larger pattern of serious frauds in connection with the United States immigration laws.

United States v. Camacho, 213 F.3d 627 [2000 WL 534231; May 2, 2000]
(Summary Order; Jacobs, Leval, Sack)

The Court found that a four-level upward departure pursuant to U.S.S.G. § 5K2.0, although admittedly steep, was reasonable based on the defendant's use of his young children to avoid suspicion while importing cocaine.

United States v. Ford, 205 F.3d 1325 [2000 WL 127517; Jan. 14, 2000]
(Summary Order; Feinberg, Kearse, Sack)

Defendant argued that the district court abused its discretion in departing upward from the guideline range and that the extent of the departure was unreasonable. The district court found that the defendant's conduct fell between two possible guidelines, neither of which adequately fit, and thus departed upward. The Second Circuit found that the departure was not an abuse of discretion and that the sentence (60 months for transporting a minor in interstate commerce for the purpose of engaging in criminal sexual activity, in violation of 18 U.S.C. § 2423(a)) was not unreasonable.

United States v. Hahn, 216 F.3d 1073 [2000 WL 777966; June 14, 2000]
(Summary Order; Meskill, Calabresi, Haden)

Defendant argued that the district court erred in upwardly departing, when sentencing him for a revocation of his supervised release, based on the fact that he had originally been granted a substantial downward departure on his original sentence. Defendant argued that his sentence is unreasonable because he originally provided the government with substantial assistance. Rejecting this claim, the Second Circuit reasoned that it was "precisely because he provided substantial assistance and was granted a significant downward departure on his original sentence that the district court properly concluded that the upward departure was warranted."

§ 5K2.3: Extreme Psychological Injury

United States v. Docimo, 205 F.3d 1325 [2000 WL 232076; Feb. 8, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The district court departed upward for extreme psychological injury pursuant to § 5K2.3, which allows for such a departure if the victim suffers "psychological injury much more serious than that normally resulting from the commission of the offense." The Second Circuit found that the district court made ample findings to support the enhancement, including that the defendant threatened one victim knowing that her husband was dying of cancer, which interfered with the entire family's bereavement process after the husband died and helped "tear a family apart."

§ 5K2.8: Extreme Conduct

United States v. Docimo, 205 F.3d 1325 [2000 WL 232076; Feb. 8, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The district court departed upward for extreme conduct pursuant to U.S.S.G. § 5K2.8, which allows for such a departure if the defendant's conduct was "unusually heinous, cruel, brutal, or degrading to the victim." The Second Circuit found that the district court made ample findings, including that: the defendant threatened the lives of children; attempted to force a mother to commit repeated acts of a sexual nature in public to avoid harm to her child; and that he attempted to have the mother and sister of his wife commit acts of a sexual nature with him in public places, which he and threatened to record and public.

§ 5K2.13: Diminished Capacity

United States v. Ventrilla, 233 F.3d 166 [Nov. 22, 2000]
(Per Curiam; Cardamone, Calabresi; Katzmann)

The Second Circuit held that defendant's sentence was imposed in violation of 18 U.S.C. § 3742(a)(1), as the district court "either refused to exercise its discretion or believed it lacked authority to exercise" discretion concerning the defendant's request for a diminished capacity downward departure pursuant to U.S.S.G. § 5K2.13. Following an evidentiary hearing, the district court stated that it "ha[d] trouble with that subsection," and that, the guidelines notwithstanding, it held a "firm belief" that a downward departure for diminished capacity is "a misplaced qualification or differentiation." Further, the district court also suggested that it thought that diminished capacity was a question of *mens rea* for the jury to decide at trial, rather than a question for the court at sentencing. The Second Circuit held that either the court did not understand its authority to depart or refused to exercise its discretion. Either way, the defendant's sentence was imposed in violation of law.

United States v. Koltun, 234 F.3d 1263 [2000 WL 1737809; Nov. 22, 2000]
(Summary Order; Cardamone, Calabresi, Katzmann)

The Second Circuit found no error in the district court's denial of defendant's request to downwardly depart on the basis of diminished mental capacity pursuant to U.S.S.G. § 5K2.13. The district court did not find that the defendant suffered from no mental illness, but that any such illness was insufficiently related to his criminal activity to warrant departure in this complex fraud case.

United States v. Montague, 234 F.3d 1263 [2000 WL 1617975; Oct. 27, 2000]
(Summary Order; Cardamone, Sotomayor, Katzmann)

The Second Circuit upheld the district court's refusal to grant a downward departure pursuant to U.S.S.G. § 5K2.13 based on his "significantly reduced mental capacity." The defendant argued that district court was required to accept the uncontradicted report of his expert, who concluded that his threatening behavior was "the product of a severe psychological disturbance, exacerbated by an extreme susceptibility to the confederates [sic] entreaties and manipulations." The Court held, however, that the district court was not required to accept a determination concerning a defendant's mental state offered by his own expert, and may rely instead on its own assessment of the defendant.

SENTENCING PROCEDURES

§ 6A1.2: Presentence Report

United States v. Maher, 210 F.3d 356 [2000 WL 419936; April 14, 2000]
(Summary Order; Walker, Parker, Buchwald)

The Court dismissed without discussion defendant's contention, *inter alia*, that the sentencing judge inappropriately considered facts in the presentence report.

§ 6A1.3: Resolution of Disputed Factors

United States v. Champion, 234 F.3d 106 [Dec. 8, 2000]
(Per Curiam; Calabresi, Parker, Trager)

The defendant argued that *Apprendi v. New Jersey*, 120 S.Ct.2348 (2000) requires that the determination of the quantity of drugs involved in his crime be made by a jury beyond a reasonable doubt, instead of by a sentencing judge by a preponderance of the evidence. *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Second Circuit held that because defendant's sentence of 120 months fell below the statutory maximum under 21 U.S.C. § 841, regardless of the quantity of drugs for which he was held responsible, it did not violate the Supreme Court's decision in *Apprendi*. Defendant argued further that the reasoning in *Apprendi* applied to his case because the determination of the quantity of drugs involved in his crime established the mandatory minimum sentence of ten years. The Second Circuit declined to address whether a judge's factual findings that create a higher mandatory minimum violate a defendant's right to a jury trial. The Court instead relied on the fact that the defendant stipulated to the quantity of drugs involved in his crime, and thus any determination of the quantity of drugs by the sentencing judge was harmless.

United States v. Cordoba-Murgas, ___ F.3d ___ [2000 WL 1775687; Dec. 5, 2000]
(Murtha opinion; Leval, Sotomayor)

The Second Circuit held that the district court erred in applying a "clear and convincing" standard in determining whether two alleged, but uncharged murders, could trigger an upward adjustment pursuant to U.S.S.G. §§ 2D1.1(d)(1) and 2A1.1. Both the Supreme Court, in *United States v. Watts*, 519 U.S. 148, 156-57 (1997), and the Sentencing Commission, in U.S.S.G. § 6A1.3, state that a "preponderance of the evidence" standard should be applied when deciding the weight of relevant, uncharged conduct at sentencing. The district court relied on *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997) to support its application of a higher standard. The Second Circuit found that the statement in *Shonubi* that a higher standard should be used if the uncharged conduct would significantly enhance a sentence, was merely dictum. The defendant's sentence was vacated and the case remanded for resentencing.

Still, the Second Circuit instructed the district court that if it found that the defendant had committed the murders by a preponderance of the evidence but did not wish to impose life imprisonment under U.S.S.G. § 2D1.1(d)(1), the district court could, under U.S.S.G. § 5K2.0, impose a sentence outside of the guideline range. The Second Circuit stated that it believed "that under the combination of circumstances that my be present here, including (i) an enormous upward adjustment (ii) for uncharged conduct (iii) not proved at trial and (iv) found by only a preponderance of the evidence, (v) where the court has substantial doubts as to the accuracy of the finding, the Court would e authorized to depart downward from the scheduled adjustment by reason of this extraordinary combination of circumstances." The Second Circuit applied similar reasoning with regard to another defendant, who was subject of an upward departure pursuant to § 5K2.1, on the ground that death had resulted.

United States v. Dean, 229 F.3d 1136 [2000 WL 1370262; Sept. 19, 2000]
(Summary Order; Cabranes, Parker, Cedarbaum)

Defendant argued that the district court erred in precluding from his sentencing hearing psychiatric testimony that would have indicated that his post-traumatic stress disorder significantly contributed to his offense conduct and to his post-arrest attempt to organize a prison escape. The Second Circuit found that it was not error to preclude this testimony because the defendant had failed to identify the subject matter of the psychiatrist's testimony until one week prior to the hearing, in violation of an earlier scheduling order. The Court noted that another witness who was allowed to testify at the sentencing hearing provided much of the same information that would have been offered in the precluded testimony, albeit without a psychiatric diagnosis.

United States v. Figueroa, ___ F.3d ___ [2000 WL 1862813; Dec. 18, 2000]
(Summary Order; Oakes, Kearse, Winter)

Defendant challenged the district court's admission of prejudicial evidence as to the conduct of the defendant's coconspirators at his sentencing hearing. The Second Circuit found the evidence to be relevant and noted that the district court may consider evidence that would have been

inadmissible at trial, so long as it is reliable, pursuant to U.S.S.G. § 6A1.3.

United States v. Mateo, 205 F.3d 1326 [2000 WL 241683; Feb. 1, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

Defendant argued that the district court failed to resolve disputed matters in the presentence report and erroneously relied on the Probation Department's improper application of a four-level enhancement for murder conspiracy predicates in determining the starting point for a departure pursuant to U.S.S.G. § 5K1.1. The Second Circuit held that because there was no factual basis established in the record for the enhancement and because it could not determine whether the district court would have imposed that same sentence absent the enhancement, defendant's sentence must be vacated and remanded. In imposing sentence, the district court stated, "Probation Department recommends 121 months, which is ten years. I think that the appropriate is half of that, and, accordingly, I sentence you to 60 months..." Although the district court did not explicitly adopt the Probation Department's recommendation, the Second Circuit found that the district court's language suggested that it did rely on the recommendation in determining the appropriate departure.

United States v. McDougall, 216 F.3d 1074 [2000 WL 730387; June 2, 2000]
(Summary Order; Cardamone, Miner, Walker)

The Court rejected defendants' argument that the government is required to prove facts supporting an upward adjustment by clear and convincing evidence, citing *United States v. Gigante*, 94 F.3d 53 (2d Cir. 1996) which held that "the preponderance test continues to govern."

United States v. Thomas, ___ F.3d ___ [2000 WL 236481; Feb. 14, 2000]
(Summary Order; Cabranes, Pooler, Carman)

The defendant argued it was error, under Federal Rule of Criminal Procedure 32(c)(1), U.S.S.G. § 6A1.3, and *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), for the district court not to hold a hearing to resolve a factual dispute concerning the amount of drugs attributable to him. The Second Circuit found that a full-blown hearing was not required to resolve all factual disputes.

§ 6B1.1: Plea Agreement Procedure

United States v. King, 234 F.3d 126 [Dec. 8, 2000]
(Per Curiam; Van Graafeiland, Katzmannk Jones)

Defendant argued that her plea was invalid because the district court failed to advise her that she would not permitted to withdraw her plea if the district court sentenced her to a prison term outside of the Sentencing Guidelines range estimated by the government in her plea agreement, as required by Federal Rule of Criminal Procedure 11(e)(2), and as set forth in U.S.S.G. § 6B1.1. The

Second Circuit agreed that the district court failed to comply with Rule 11(e)(2), but held that it was harmless error, as the defendant was sentenced to a more lenient sentence than that recommended by the government.

United States v. Romero-Tamayo, 212 F.3d 729 [May 22, 2000]
(Kearse opinion; joined by Walker, Calabresi)

The Second Circuit held that the district court did not err in refusing to accept a plea agreement which set the defendant's maximum prison term below the maximum set by Congress and barred the court from applying the applicable guideline. The plea agreement, citing 8 U.S.C. § 1326(a), stated that the maximum term of imprisonment imposed for illegal reentry following deportation was 24 months. Subsection (b) of § 1326, however, provides that an unlawfully reentering alien whose deportation followed his conviction of an aggravated felony may be imprisoned for up to 20 years. Following the issuance of a presentence report which stated that defendant's prior deportation followed a conviction of an aggravated felony, the district court refused to accept the plea agreement, despite the government's stated policy "to permit a re-entry after deportation defendant who has a criminal history category of III or less to plead to 1326 with a two year cap unless the defendant has a history of violent offenses or there are other aggravating circumstances in the case."

United States v. Beckford, 213 F.3d. 627 [2000 WL 576077; May 12, 2000]
(Summary Order; Kearse, Jacobs, Korman)

The Second Circuit Court held that the plea agreement, purporting to cap the defendant's sentence at 125 months, was contrary to law and unenforceable, since the applicable mandatory minimum penalty pursuant to 18 U.S.C. § 924(e)(1) was fifteen years. Since the defendant twice declined to withdraw his plea, which would have been an appropriate remedy, he could not show that the invalid plea agreement caused him any prejudice. The invalid plea agreement did not render the district court's imposition of the statutory minimum term of imprisonment a violation of the Eighth Amendment.

Miscellaneous Procedural Issues

Ability to Review Material

United States v. Docimo, 205 F.3d 1325 [2000 WL 232076; Feb. 8, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The Second Circuit rejected defendant’s contention that the district court, in sentencing the defendant, impermissibly relied on letters and other "victim material" not available to the defense or prosecution. The record revealed that the district court gave all parties an opportunity to view

additional materials that had been submitted by the victims.

Appeal

United States v. Colon, 220 F.3d 48 [July 10, 2000]
(Hurd opinion; joined by Straub, Sotomayor)

In a case of first impression, the Second Circuit held that the government may argue on appeal a position which the plea agreement prohibited it from arguing at sentencing. In the plea agreement, the defendant's offense level reflected a three level decrease for less than minor but more than minimal participation in the offense pursuant to U.S.S.G. § 3B1.2. The Presentence Report disagreed and the district court declined to grant the adjustment. On appeal, the government continued to argue that the facts warranted the adjustment, but added that the district court's judgment could be supported by the facts and the law. Since the plea agreement only discussed the circumstances under which either party could appeal, the Second Circuit, relying on *United States v. Griswold*, 57 F.3d 291, 298-99 (3d Cir. 1995), held that "the government did not act contrary to the plea agreement when, on appeal, it argued that the district court did not err" in calculating the offense level.

United States v. DeJesus, 219 F.3d 117 [July 12, 2000]
(Per Curiam; Feinberg, Cabranes, George)

The Court rejected defendant's argument that his waiver of right to appeal was invalid because the Rule 11 proceeding did not adequately demonstrate that the waiver was knowing and voluntary; rather, the record clearly indicated that the defendant understood the terms of his waiver.

United States v. Fisher, 232 F.3d 301 [Nov. 13, 2000]
(Newman opinion; joined by Kearse, Korman)

The Second Circuit issued this published opinion expressly to make clear that where a defendant has executed a valid waiver of the right to appeal as part of a plea agreement, a district court's statement after sentencing concerning a right to appeal does not alter the binding force of the waiver of appellate rights. The Court held that the waiver was valid and, joining the Fifth, Seventh, Eighth, and Tenth Circuits, that an otherwise enforceable waiver of appellate rights is not rendered ineffective by a district judge's post-sentencing advice suggesting or stating that the defendant may appeal. The Court suggested that prosecutors should alert district judges at sentencing to the existence of appellate waivers "to provide an opportunity to clarify any ambiguity as to the scope of such waivers, and to afford district judges an opportunity to fashion any advice concerning possible appellate rights in light of the terms of the waiver."

United States v. Tang, 214 F.3d 365 [May 11, 2000]
(Newman opinion; joined by Kearse, Katzmann)

Where the plea agreement stated that "absent relief from the statutory minimum sentence, the Guidelines range is 60 to 71 months," the Second Circuit concluded that the defendant did not waive his right to appeal the denial of the safety valve adjustment. Moreover, even if the waiver were that broad, it would be unenforceable since the district judge did not explicitly call it to the defendant's attention at either the plea allocution or at sentencing. To avoid recurring problems, the Second Circuit offered some "preliminary thoughts" on how a district court should instruct a defendant who has signed a plea agreement waiving his right to appeal.

United States v. Fulwiler, 210 F.3d 356 [2000 WL 385526; April 13, 2000]
(Summary Order; Winter, Oakes, Walker)

Even if appellant were not bound by the waiver provision of his plea agreement, the district court's decision not to downwardly depart was unappealable, since the guidelines were not misapplied and the court did not misunderstand its authority to depart. District judges are not required to utter "robotic incantations" to prove that they understand their discretion to depart.

United States v. Kinney, 205 F.3d 1325 [2000 WL 232284; Feb.24, 2000]
(Summary Order; Leval, Parker, Katzmann)

By failing to take a timely appeal when his sentence was imposed, the Second Circuit held that the defendant waived his right to appeal the terms of the sentence and could not resuscitate his right of appeal simply by moving to vacate the sentence and appealing the denial.

United States v. Latham, 213 F.3d 627 [2000 WL 562429; May 9, 2000]
(Summary Order; Meskill, Cabranes, Telesca)

In his plea agreement, the defendant stipulated that the sentencing range was 41-51 months, and agreed not to appeal any falling within that range, but reserved the right to seek a downward departure based upon his medical circumstances. Initially, the Second Circuit concluded that the waiver of the right to appeal was knowing and voluntary. Moreover, even if there had been no waiver, the district court's decision not to depart was unappealable, since the guidelines were not misapplied and the court did not misunderstand its authority to depart.

United States v. Polite, 216 F.3d. 1074 [2000 WL 898895; June 29, 2000]
(Summary Order; Miner, Straub, Trager)

The Second Circuit enforced defendant's waiver of her right to appeal her sentence if it fell within the agreed upon guideline range (4 to 10 months), which it did (10 months), despite the fact

that the district court upwardly adjusted her sentence pursuant to U.S.S.G. § 3B1.1(c) for her role as an "organizer" of a criminal activity.

United States v. Rodriguez-Berrios, 205 F.3d 1326 [2000 WL 232043; Jan. 26, 2000]
(Summary Order; Leval, Parker, Katzmann)

In his plea agreement, defendant agreed not to appeal any sentence that fell between 135 and 168 months. He was sentenced to 168 months and appealed his sentence, claiming that his waiver should not bar his appeal. The Second Circuit dismissed his appeal, finding that the waiver was valid. The defendant also argued that the government breached the agreement by opposing a downward adjustment for acceptance of responsibility and supporting an upward adjustment for obstruction of justice. The Court found that while the government did state in the agreement that it would not seek an upward departure, the recommendation for a upward adjustment for obstruction of justice committed after his plea was not a recommendation for upward departure.

United States v. Turner, 213 F.3d 627 [2000 WL 665561; May 18, 2000]
(Summary Order: Kearse, Walker, Pooler)

The Second Circuit held that defendant's challenge to the narcotics-quantity calculation was not properly preserved for review. Although defendant had initially objected to a higher quantity set forth in the presentence report, he failed to pursue this objection when responding to the district court's order to file a notice of request for a hearing to resolve any factual or guideline application disputes.

Burden of Proof

United States v. Lau, 216 F.3d 1074 [2000 WL 777921; June 2, 2000]
(Summary Order; Miner, Walker, Sotomayor)

The Second Circuit rejected defendant's argument that proof beyond a reasonable doubt was required in order for the district court to consider uncharged conduct in determining defendant's sentence. Further, without deciding whether the district court correctly applied a clear and convincing standard, the Second Circuit held that the court "did not clearly err when it found that the facts in the case satisfied that lesser standard."

Contribution

United States v. Sasso, 215 F.3d 283 [June 14, 2000]
(Kearse opinion; joined by Oakes, Cabranes)

The Second Circuit found that the district court had authority under RICO (18 U.S.C. § 1961

et seq.) to order defendant, a retired union officer, to contribute to the funding of a monitor of the operations of a defendant union. The Court relied on "Section 1964(a)'s expansive language, its legislative history, and the traditional power of the district courts to fashion equitable remedies" in making its decision. The Court rejected defendant's contention that the government lacked standing to seek contribution because it failed to allege that defendant's activities were the proximate cause of any injuries to the United States. Section 1964(b) authorizes the government to bring suit and § 1964(a) contains no requirement that the government show that it was injured. Nevertheless, the Court vacated the judgment and remanded because the district court failed to make findings as to how it arrived at the amount of contribution.

Credit for Time Served

United States v. Perez-Nunez, 216 F.3d 1074 [2000 WL 777987; June 14, 2000]
(Summary Order; Newman, Pooler, George)

Defendant argued that the district court erred because it did not give him credit under 18 U.S.C. § 3585(b) for time spent in federal custody prior to sentencing. The Second Circuit disagreed, noting that the Supreme Court has held that "3585(b) does not authorize a district court to compute the credit at sentencing." *United States v. Wilson*, 503 U.S. 329, 334 (1992).

Defendant's Statements at Sentencing

United States v. Rondon, 205 F.3d 1326 [2000 WL 232274; Feb. 28, 2000]
(Summary Order; Cabranes, Oakes, Sack)

The defendant argued that the district court erred in relying on his remarks at sentencing to determine where in the applicable sentencing guidelines range to sentence him. At sentencing, the defendant repeatedly asserted his innocence and insisted that he had been denied a fair trial. The district court then stated that although it had decided not to enhanced defendant's sentence based on his trial testimony, and would have sentenced defendant to the low end of the guideline range, "now he is going to be a little higher up in the guidelines because of his sentencing statement." The district court sentenced defendant to 169 months; the guideline range was 151 to 188 months. In upholding defendant's sentence, the Second Circuit relied on *United States v. Li*, 115 F.3d 125 (2d Cir. 1997), which held that the information a sentencing court may consider "surely includes consideration of the defendant's attitude and demeanor at sentencing" as well as a defendant's persistent "unwillingness to accept responsibility."

Denial of Request for Adjournment

United States v. Ferrarini, 225 F.3d 647 [2000 WL 1015928; July 18, 2000]
(Summary Order; Cardamone, Calabresi, Parker)

The defendant argued that the district court abused its discretion in denying his requests to adjourn sentencing. The district court denied defendant's request because (1) there was no showing that an extension of time would serve any purpose, (2) defendant's new counsel had already been given "more than ample time" to submit materials, and (3) many of the calculations affected the other defendants, all of whom "had a right to be heard with respect to some of these fundamental issues that run throughout this series of sentences." The Second Circuit found no abuse of discretion.

Double Counting

United States v. Holmes, 205 F.3d 1325 [2000 WL 232167; Feb. 18, 2000]
(Summary Order; Walker, Meskill, Calabresi)

It was not impermissible double counting to refuse to grant a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and to increase the defendant's offense level by three points pursuant to U.S.S.G. § 2J1.7 for committing another offense while on release, relying on the same conduct.

Double Jeopardy

United States v. Khalil, 214 F.3d 111 [May 31, 2000]
(Kearse opinion; joined by Walker, Calabresi)

The Court held that the it was not a violation of the Double Jeopardy Clause to direct that a 30-year sentence for using and carrying a firearm in violation of 18 U.S.C. § 924(c) run consecutive to two concurrent terms of life imprisonment for conspiring and threatening to use a weapon of mass destruction in violation of 18 U.S.C. § 2332, notwithstanding that the "firearm" and "weapon of mass destruction" were the same weapon, a pipe bomb. The Court determined that the language in 924(c) expressly provides for a term of imprisonment of not less than thirty years which must run consecutive to any other sentence. Thus, because of Congress' explicit directive, "the imposition of cumulative punishment for conviction of 924(c) and 2332a offenses in a single prosecution does not violate the Double Jeopardy Clause." The Court also held that a § 924(c) offense is not a lesser included offense of § 2332a, since the latter does not require proof that the firearm was either used or carried.

United States v. Duggan, 208 F.3d 204 [2000 WL 246216; Feb. 22, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

The Second Circuit rejected without discussion defendant's *pro se* argument that the calculation of his sentence subjected him to multiple punishments in violation of his right to be free from double jeopardy.

Ex Post Facto

United States v. Gitten, 231 F.3d 77 [Nov. 1, 2000]
(Kearse opinion; joined by Calabresi, Sotomayor)

Defendant argued that the district court committed plain error in sentencing him under the 1998 version of the Guidelines, rather than the 1995 version, since his prior convictions were aggravated felonies only under an expanded definition introduced by the 1998 version, thereby creating an *ex post facto* violation. The Second Circuit disagreed, holding that under both versions, at least one of defendant's prior convictions constituted an aggravated felony. The defendant argued that under the 1995 version of U.S.S.G. § 2L1.2, his prior conviction for robbery was not an aggravated felony because his imprisonment for that offense ended upon his parole in 1980 and thus had not been "completed within the previous 15 years." Application Note 7 to § 2L1.2 in the 1995 version stated: "[t]he term 'aggravated felony' applies to offenses described in the previous sentence whether in violation of federal or state law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years." The Second Circuit held that the phrase "completed with the previous 15 years" referred only to violations of foreign law, and not federal or state law.

United States v. Joyner, 201 F.3d 61 [Jan. 10, 2000]
(Winter opinion; joined by Cardamone, Parker)

Defendant, relying on *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998), argued that his life sentence violated the ex post facto clause because at the time of his offense, 18 U.S.C. § 34 provided that a defendant could be subject to life imprisonment only if the jury so directed. The Second Circuit, however, held that such language in *Tocco* was *dicta*. Further, the Court held that a change in law that reduces or eliminates that jury's role in determining the crime or punishment of a defendant does not violate the *ex post facto* clause because it does not change the substantive definition of the crime, increase the punishment, or eliminate any defense with respect to the offense.

United States v. Tappin, 205 F.3d 536 [March 9, 2000]
(Cabranes opinion; joined by Sack, dissent by Oakes)

The Second Circuit rejected defendant's argument that the district court violated the Ex Post Facto Clause by applying the sentencing guideline in effect at time of sentencing, since it resulted in greater punishment than would have been imposed under the guideline in effect on the date the offense was committed. The Court found that the current guideline did not result in greater punishment than the older guideline.

United States v. Ford, 205 F.3d 1325 [2000 WL 127517; Jan. 14, 2000]
(Summary Order; Feinberg, Kearse, Sack)

Defendant argued, and the government conceded, that the imposition of a $100 special assessment, rather than the $50 assessment applicable at the time of his offense, violated the Ex Post Facto Clause of the Constitution. The Second Circuit vacated and remanded for entry of an amended judgment.

Findings

United States v. Hammie, 205 F.3d 1325 [2000 WL 232287; Feb. 24, 2000]
(Summary Order; Kearse, Jacobs, Pooler)

The Second Circuit found that the district court "thoughtfully discharged" its statutory obligation under 18 U.S.C. § 3553(c) in articulating its reasons for imposing the maximum sentence within the Guideline range. The district court listed numerous factors as a basis for the sentence, including the fact that the defendant had been a "hard-core gang member," that he was armed and wearing a bullet-proof vest when apprehended, and that he had not been a disadvantaged youth.

United States v. Lewis, 208 F.3d 204 [2000 WL 287733; March 16, 2000]
(Summary Order; Cabranes, Sotomayor, Trager)

Because there was nothing in the record to suggest that the district court abused its discretion in sentencing the defendant to the highest possible sentence within the applicable Sentencing Guidelines range, the sentence was unreviewable.

United States v. Zapata, 205 F.3d 1327 [2000 WL 253691; March 3, 2000]
(Summary Order; Straub, Sotomayor, Hurd)

Because the district court explained its reasons for sentencing the defendant to 15 months above the minimum sentence under the Sentencing Guidelines, the sentence was reviewable only for abuse of discretion. The Second Circuit found that the findings of the district court supported that court's determination to sentence the defendant to a term of imprisonment above the minimum allowed by the Guidelines.

General Verdict

United States v. Millet, 208 F.3d 204 [2000 WL 305515; March 22, 2000]
(Summary Order; Sack, Katzmann, Gibson)

Defendant was convicted by a general verdict of conspiracy to possess with intent to

distribute heroin, marijuana, cocaine and cocaine base. On his first appeal, the Second Circuit affirmed his conviction and found that it was "inconceivable" that the jury could have convicted the defendant of conspiracy to possess marijuana. That panel concluded that the defendant should have been sentenced for conspiracy to possess the controlled substance that carries the most lenient statutorily prescribed sentence, and thus he was sentenced on the heroin charges on remand. Defendant argued that he should have been sentenced according to the marijuana provision instead. The Second Circuit followed the "law of the case" and found that the district court had appropriately sentenced defendant pursuant to the heroin provision.

Inappropriate Judicial Comments

United States v. Rose, 216 F.3d 1074 [2000 WL 777945; June 15, 2000]
(Summary Order; Calabresi, Pooler, Cedarbaum)

Defendant contended that the district court committed reversible error by stating during sentencing that he was a "bad guy." The Second Circuit found that the statement was simply a reference to the circumstance of the conduct underlying the defendant's prior conviction. Indeed, the district court clarified that comment by stating, "[t]he language I used was not right. I didn't mean to suggest that you were a bad person .... What I should have said more precisely [is that] the circumstances of [your prior conviction for] robbery are very serious, it's not something that I can ignore." Further, the Court noted that the district court had sentenced the defendant to the very bottom of the applicable Guidelines range.

Ineffective Assistance of Counsel

United States v. Manzo-Andrade, 205 F.3d 1326 [2000 WL 232040; Jan. 26, 2000]
(Summary Order; Winter, Jacobs, Katzmann)

The Second Circuit rejected defendant's argument that his sentence must be vacated on the grounds of ineffective assistance of counsel and prosecutorial misconduct. The record reflected, contrary to defendant's argument, that his counsel explained to the defendant the contents of the plea agreement, that the defendant consented to counsel's absence during some of his interviews with the government, that counsel's failure to object to the PSR's estimate of amount of money laundered was not prejudicial, and that counsel's failure to move to dismiss under the Speedy Trial Act was reasonable. Further, defendant's argument that the prosecutor induced defendant's counsel not to attend debriefings was meritless, as the defendant consented to counsel's absence.

Opportunity to Speak

United States v. Baffetti, 205 F.3d 1325 [2000 WL 241300; Feb. 1, 2000]
(Summary Order; Straub, Van Graafeiland, Pooler)

The Second Circuit vacated and remanded for resentencing due to the district court's failure to address the defendant and afford him an opportunity to speak to the court, in violation of Federal Rule of Criminal Procedure 32(c)(3)(C). The government conceded that the procedure was inadequate.

Prosecutorial Vindictiveness

United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
(Winter opinion; joined by Jacobs, Katzmann)

The Second Circuit refused to entertain the government's cross-appeal from certain aspects of the district court's grouping of various counts, because the record evidenced a "radical and belated change in the government's position as to grouping as a result of a vigorous defense effort to minimize the sentence that appeared to be on the verge of success at least with regard to the [sadomasochistic] enhancement." Because the record evidenced at least the appearance of prosecutorial vindictiveness, and the cross-appeal potentially exposed the defendant to a much greater sentence, the court declined to entertain the cross-appeal.

Resentencing *de novo*

United States v. Harris, 209 F.3d 156 [April 12, 2000]
(Per Curiam; Kearse, Katzmann, Siragusa)

The Second Circuit's prior decisions in *Soto v. United States*, 185 F.3d 48 (2d Cir. 1999) and *Krevsky v. United States*, 186 F.3d 237 (2d Cir. 1999) dictate that a district court's failure to comply with Rule 32(c)(5) (informing a defendant at sentencing of his right to appeal) requires remanding the case for resentencing de novo.

United States v. Tem, 216 F.3d 1074 [2000 WL 767294; June 22, 2000]
(Summary Order; Calabresi, Sack, Cederbaum)

Defendant argued that he was entitled to resentencing de novo after the district court granted his motion to vacate his prior sentence due to ineffective assistance of counsel on the basis of his attorney's failure to file a notice of appeal. The Second Circuit held that it was in the district court's power not to permit new arguments upon resentencing because it had only granted defendant's motion to allow resentencing for the limited purpose of renewing defendant's right to appeal.

Sentencing Agreements

United States v. Branston, 216 F.3d 1073 [2000 WL 839963; June 26, 2000]
(Summary Order; Miner, McLaughlin, Cabranes)

Sentencing agreements, like plea agreements, are evaluated by reference to contract law principals. The Second Circuit rejected defendant's arguments that he had an absolute right to withdraw from the sentencing agreement prior to sentencing, since the agreement had never been "judicially accepted," or that he should have been permitted to withdraw from the agreement absent prejudice to the government. Further, the Court held that defendant failed to provide a "fair and just reason" for withdrawal from the agreement, which he had entered into knowingly and voluntarily. Thus, enforcing the agreement did not deprive defendant of his due process right to present evidence and arguments concerning the amount of loss.

Sentencing Entrapment

United States v. Thomas, 205 F.3d 1326 [2000 WL 233648; Feb. 22, 2000]
(Summary Order; Kearse, Calabresi, Katzmann)

Sentencing entrapment may only be recognized if there were "outrageous official conduct which overcomes the [defendant's will]." *See United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997). The Second Circuit found no such conduct on the part of the government in suggesting that the quantity of cocaine available for theft in a reverse sting operation was 100-120 kilograms, nor any respect in which the defendant's will was overborne.

Speedy Sentencing

United States v. Novellano, 205 F.3d 1326 [2000 WL 236477; Feb. 15, 2000]
(Summary Order; Cabranes, Oakes, Sack)

Defendant was sentenced four years after he entered a guilty plea. He argued that the delay constituted a deprivation of his right to speedy sentencing. The Second Circuit found that the record in this case made clear that the defendant's sentencing was deferred for his benefit, i.e., for the defendant to earn a § 5K1.1 letter, and thus the delay did not deprive him of his right to speedy sentencing.

Vagueness

United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
(Winter opinion; joined by Jacobs, Katzmann)

The Second Circuit rejected defendant's argument that the guideline was unconstitutionally vague, or that the rule of lenity applied. To the extent the guidelines were ambiguous, they were not so cryptic as to leave the court "with no more than a guess" as to the proper resolution.

VIOLATION OF SUPERVISED RELEASE

United States v. Sanchez, 225 F.3d 172 [Sept. 13, 2000]
(Parker opinion; joined by Miner, Straub)

The Second Circuit rejected defendant's argument the four year delay between a violation of his supervised release and the issuance of a summons charging him with a violation deprived him of due process or violated U.S.S.G. § 7B1.2(a). That section states that a probation office "shall promptly" report to the court any alleged Grade A or B violation. The Court noted that the probation officer's failure to promptly report defendant's violation did not give rise to a cognizable claim because Chapter 7 policy statements are advisory, not mandatory, and thus does not create a right to which relief may attach.

Kim v. United States, 208 F.3d 203 [2000 WL 280299; March 14, 2000]
(Summary Order; Oakes, Calabresi, Parker)

The Second Circuit upheld the district court's decision to impose 8 months imprisonment for a violation of supervise release based on defendant's failure to disclosure relevant financial information to the probation office. The record contained adequate factual findings in support of the revocation of defendant's supervised release.

United States v. Barnwell, 208 F.3d 204 [2000 WL 268578; March 8, 2000]
(Summary Order; Oakes, Leval, Sack)

The Second Circuit found no merit in defendant's argument that the district court erred in sentencing him pursuant to the Guidelines range for Grade B violations of supervised release, when it found him guilty of only Grade C violations.

United States v. Costas, 205 F.3d 1325 [2000 WL 232294; Jan. 24, 2000]
(Summary Order; Jacobs, Calabresi, Katzmann)

Defendant argued that his sentence of 30 months for a violation of supervised release was excessive and unreasonable given the seriousness of his drug problem, his willingness to enter a drug treatment program, and the fact that he completed 16 months of his supervised release without incident. The Second Circuit disagreed, noting that the district court had adjusted sentencing twice to allow the defendant to enter a drug treatment program. While in the program, the defendant tested positive for drugs and left the program without permission. The Court cited with approval the district court's reasons for the sentence: the high risk for future criminal conduct; significant downward departure in defendant's original sentence; repeated, uncooperative behavior with the Probation Office; repeated drug use; and abuse of trust of the original sentencing judge.

United States v. Hagins, 234 F.3d 1263 [2000 WL 1665071; Nov. 7, 2000]
(Summary Order; Walker, Oakes, Leval)

Defendant argued that it was unreasonable for the court to impose the statutory maximum term of 15 months incarceration for violating his supervised release. The Second Circuit found that the district court had made a deliberate choice to make an upward departure, notwithstanding the relevant policy statements suggesting 3-9 months incarceration. Because the departure was reasonable, the Second Circuit affirmed.

United States v. Holley, 216 F.3d 1073 [2000 WL 949155; July 7, 2000]
(Summary Order; Leval, Parker, Katzmann)

Defendant argued that the 2-year sentence for violating probation was unreasonable. The Second Circuit summarily dismissed this argument, observing that, "In sentencing for violations of supervised release, a district court has 'broad discretion to revoke its previous sentence and impose a term of imprisonment' up to the statutory maximum." *United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997) (citing *United States v. Sweeney*, 90 F.3d 55, 57 (2d Cir. 1996)).

United States v. Sciortino, 205 F.3d 1326 [2000 WL 227663; Jan. 19, 2000]
(Summary Order; Kearse, Walker, Calabresi)

Defendant appealed his sentence 14-month sentence for violation of supervised release, which was ordered to run consecutively to any time imposed on the defendant by the Parole Commission for violation of his parole. The Second Circuit held that defendant's appeal was not yet ripe, since the Parole Commission had not yet taken action with respect to the parole violation and because the district court's recommendation was not binding on the Commission.

United States v. Summers, 234 F.3d 1263 [2000 WL 1550166; Oct. 18, 2000]
(Summary Order; Walker, Cabranes, Parker)

Defendant argued that the district court's revocation of his supervised release was erroneous because the delay between the issuance of a warrant and the hearing on the petition was "unreasonable" in violation the rule set forth in *United States v. Morales*, 45 F.3d 693 (2d Cir. 1995). The Second Circuit agreed with the district court in finding that the delay was not unreasonable since the defendant had failed to demonstrate any prejudice as a result of the delay.

United States v. Wall, 208 F.3d 204 [2000 WL 280322; March 14, 2000]
(Summary Order; Cardamone, Calabresi, Parker)

The Second Circuit rejected defendant's argument that a six year delay between the issuance and execution of a warrant charging him with a violation of probation, violated the requirement

pursuant to Rule 32.1 that a hearing be held "within a reasonable time." The Court stated that the requirement for a hearing is triggered if a person is in custody for the parole violation after being arrested on the warrant. Here, the delay occurred prior to the execution of the warrant. The Court also rejected defendant's argument that his sentence was plainly unreasonable because it ran counter to the policy statement in Chapter 7 of the Guidelines, noting that this policy statement is merely advisory and not binding on the sentencing court.

TABLE OF CASES

United States v. Cappellazzi, 213 F.3d 627 [2000 WL 562433; May 8, 2000]
United States v. Carboni, 204 F.3d 39 [Feb. 18, 2000]
United States v. Carmichael, 216 F.3d 224 [June 15, 2000]
United States v. Carmona, 205 F.3d 1325 [2000 WL 234473; Feb. 1, 2000]
United States v. Carney, 225 F.3d 646 [2000 WL 1340550; Sept. 14, 2000]
United States v. Carter, 203 F.3d 187 [Feb. 16, 2000]
United States v. Caruso, 225 F.3d 646 [2000 WL 1134359; Aug. 9, 2000]
United States v. Castano, 234 F.3d 111 [Dec. 8, 2000]
United States v. Chaklader, 232 F.3d 343 [Nov. 17, 2000]
United States v. Champion, 234 F.3d 106 [Dec. 8, 2000]
United States v. Collis, 213 F.3d 627 [2000 WL 562435; May 5, 2000]
United States v. Colon, 213 F.3d 627 [2000 WL 637079; May 17, 2000]
United States v. Colon, 220 F.3d 48 [July 10, 2000]
United States v. Cook, 234 F.3d 1263 [2000 WL 1644524; Nov. 1, 2000]
United States v. Cordoba-Murgas, 233 F.3d 704 [Dec. 5, 2000]
United States v. Corniel, 216 F.3d 1073 [2000 WL 730391; June 7, 2000]
United States v. Correa, 205 F.3d 1325 [2000 WL 232034; Jan. 21, 2000]
United States v. Costas, 205 F.3d 1325 [2000 WL 232294; Jan. 24, 2000]
United States v. Cover-It, Inc., 234 F.3d 1263 [2000 WL 1678781; Nov. 7, 2000]
United States v. Cox, ___ F.3d___ [2000 WL 1761884; Nov. 27, 2000]
United States v. Cusack, 229 F.3d 344 [Oct. 13, 2000]
United States v. Dallas, 229 F.3d 105 [Oct. 4, 2000]
United States v. De, 216 F.3d 1073 [2000 WL 777989; June 14, 2000]
United States v. Dean, 229 F.3d 1136 [2000 WL 1370262; Sept. 19, 2000]
United States v. DeJesus, 219 F.3d 117 [July 12, 2000]
United States v. Delarosa, 234 F.3d 1263 [2000 WL 1549931; Oct. 16, 2000]
United States v. Delpiano, 225 F.3d 646 [2000 WL 1186258; Aug. 21, 2000]
United States v. Docimo, 205 F.3d 1325 [2000 WL 232076; Feb. 8, 2000]
United States v. Dominguez-Garcia, 216 F.3d 1073 [2000 WL 900208; June 29, 2000]
United States v. Duggan, 208 F.3d 204 [2000 WL 246216; Feb. 22, 2000]
United States v. Edwards, 210 F.3d 356 [2000 WL 502054; April 25, 2000]
United States v. El-Gheur, 201 F.3d 90 [Jan. 21, 2000]
United States v. Ellison, 225 F.3d 646 [2000 WL 1186257; Aug. 21, 2000]
United States v. Esquilin, 205 F.3d 1325 [2000 WL 232162; Feb. 18, 2000]
United States v. Famoti, 229 F.3d 1136 [2000 WL 1506189; Oct. 6, 2000]
United States v. Fei, 225 F.3d 167 [Sept. 13, 2000]
United States v. Feliciano, 223 F.3d 102 [Aug. 16, 2000]
United States v. Felix-Diaz, 205 F.3d 1325 [2000 WL 232661; Feb. 23, 2000]
United States v. Ferrarini, 219 F.3d 145 [July 18, 2000]
United States v. Ferrarini, 225 F.3d 647 [2000 WL 1015928; July 18, 2000]
United States v. Figueroa, ___F.3d___ [2000 WL 1862813; Dec. 18, 2000]

United States v. Finkelstein, 229 F.3d 90 [Oct. 2, 2000]
United States v. Finley, 205 F.3d 1325 [2000 WL 232166; Feb. 18, 2000]
United States v. Fisher, 232 F.3d 301 [Nov. 13, 2000]
United States v. Fitzgerald, 232 F.3d 315 [Nov. 15, 2000]
United States v. Ford, 205 F.3d 1325 [2000 WL 127517; Jan. 14, 2000]
United States v. Frederick, ___F.3d__ [2001 WL 10364; Dec. 28, 2000]
United States v. Fulwiler, 210 F.3d 356 [2000 WL 385526; April 13, 2000]
United States v. Galindo-Perez, 234 F.3d 1263 [2000 WL 1715238; Nov. 13, 2000]
United States v. Gangi, 213 F.3d 627 [2000 WL 639963; May 17, 2000]
United States v. Garcia, 205 F.3d 1325 [2000 WL 233549; Feb. 11, 2000]
United States v. Garcia-Grueso, 213 F.3d 627 [2000 WL 528653; May 1, 2000]
United States v. Garcia-Hernandez, 237 F.3d 105 [Dec. 26, 2000]
United States v. Giles, 210 F.3d 356 [2000 WL 424142; April 13, 2000]
United States v. Gitten, 231 F.3d 77 [Nov. 1, 2000]
United States v. Gomez, 208 F.3d 204 [2000 WL 280323; March 14, 2000]
United States v. Gotti, 205 F.3d 1325 [2000 WL 233647; Feb. 18, 2000]
United States v. Grajales, 234 F.3d 1263 [2000 WL 1591151; Oct. 24, 2000]
United States v. Green, 234 F.3d 1263 [2000 WL 1644069; Nov. 1, 2000]
United States v. Greer, 223 F.3d 41 [Aug. 14, 2000]
United States v. Gregory, 234 F.3d 1263 [2000 WL 1644071; Nov. 1, 2000]
United States v. Grimes, 225 F.3d 254 [Aug. 21, 2000]
United States v. Gufield, ____F.3d ____ [2000 WL 1775506; Dec. 1, 2000]
United States v. Gutierrez, 216 F.3d 1073 [2000 WL 777968; June 15, 2000]
United States v. Gutierrez, 229 F.3d 1136 [2000 WL 1370326; Sept. 20, 2000]
United States v. Hagins, 234 F.3d 1263 [2000 WL 1665071; Nov. 7, 2000]
United States v. Hahn, 216 F.3d 1073 [2000 WL 777966; June 14, 2000]
United States v. Hammie, 205 F.3d 1325 [2000 WL 232287; Feb. 24, 2000]
United States v. Harris, 209 F.3d 156 [April 12, 2000]
United States v. Hedges, 225 F.3d 647 [2000 WL 964767; July 12, 2000]
United States v. Hidalgo, 225 F.3d 647 [2000 WL 1051959; July 27, 2000]
United States v. Holley, 216 F.3d 1073 [2000 WL 949155; July 7, 2000]
United States v. Holmes, 205 F.3d 1325 [2000 WL 232167; Feb. 18, 2000]
United States v. Howard, 216 F.3d 1074 [2000 WL 772405; June 15, 2000]
United States v. Huang, 213 F.3d 627 [2000 WL 576076; May 12, 2000]
United States v. Hughley, 216 F.3d 1074 [2000 WL 730384; June 2, 2000]
United States v. Ifeagwu, 210 F.3d 356 [2000 WL 426200; April 14, 2000]
United States v. Ismail, 219 F.3d 76 [May 23, 2000]
United States v. James, 239 F.3d 120 [Dec. 22, 2000]
United States v. Jefferson, 229 F.3d 1136 [2000 WL 1459728; Sept. 29, 2000]
United States v. Johnson, 221 F.3d 83 [Aug. 7, 2000]
United States v. Jones, 210 F.3d 356 [2000 WL 357672; April 6, 2000]

United States v. Joyner, 201 F.3d 61 [Jan. 10, 2000]
United States v. Kaminski, 229 F.3d 1136 [2000 WL 1527932; Oct. 12, 2000]
United States v. Kan, 210 F.3d 356 [2000 WL 426197; April 14, 2000]
United States v. Kang, 225 F.3d 260 [Aug. 21, 2000]
United States v. Kennedy, 234 F.3d 1263 [2000 WL 1643975; Nov. 1, 2000]
United States v. Kennedy, 233 F.3d 157 [Nov. 17, 2000]
United States v. Kennedy, 234 F.3d 1263 [2000 WL 1720962; Nov. 17, 2000]
United States v. Khalil, 214 F.3d 111 [May 31, 2000]
United States v. King, 234 F.3d 126 [Dec. 8, 2000]
United States v. Kinney, 211 F.3d 13 [April 28, 2000]
United States v. Kinney, 205 F.3d 1325 [2000 WL 232284; Feb. 24, 2000]
United States v. Kitchen, 213 F.3d 627 [2000 WL 553884; May 3, 2000]
United States v. Klepfer, 234 F.3d 1263 [2000 WL 1689775; Nov. 9, 2000]
United States v. Koltun, 234 F.3d 1263 [2000 WL 1737809; Nov. 22, 2000]
United States v. Kortright, 205 F.3d 1326 [2000 WL 232291; Jan. 25, 2000]
United States v. Lapp, ___F.3d___ [2000 WL 1804516; Dec. 7, 2000]
United States v. Latham, 213 F.3d 627 [2000 WL 562429; May 9, 2000]
United States v. Lau, 216 F.3d 1074 [2000 WL 777921; June 2, 2000]
United States v. Legette, 205 F.3d 1326 [2000 WL 232283; Feb. 24, 2000]
United States v. Lewis, 208 F.3d 204 [2000 WL 287733; March 16, 2000]
United States v. Li, 205 F.3d 1326 [2000 WL 233702; Feb. 10, 2000]
United States v. Lin, 225 F.3d 647 [2000 WL 1340361; Sept. 12, 2000]
United States v. Lincecum, 220 F.3d 77 [July 20, 2000]
United States v. Lincecum, 225 F.3d 647 [2000 WL 1015927; July 20, 2000]
United States v. Littles, 216 F.3d 1074 [2000 WL 730397; June 2, 2000]
United States v. Louw-MacDonald, 210 F.3d 356 [2000 WL 426194; April 14, 2000]
United States v. Lowe, 216 F.3d 1074 [2000 WL 900209; June 29, 2000]
United States v. Lutz, 205 F.3d 1326 [2000 WL 236478; Feb. 16, 2000]
United States v. Maher, 210 F.3d 356 [2000 WL 419936; April 14, 2000]
United States v. Manzo-Andrade, 205 F.3d 1326 [2000 WL 232040; Jan. 26, 2000]
United States v. Martinez, 207 F.3d 133 [March 21, 2000]
United States v. Martinez, 210 F.3d 356 [2000 WL 510143; April 26, 2000]
United States v. Mateo, 205 F.3d 1326 [2000 WL 241683; Feb. 1, 2000]
United States v. Matera, 234 F.3d 1263 [2000 WL 1549715; Oct. 18, 2000]
United States v. Matthews, 205 F.3d 544 [March 9, 2000]
United States v. Maurer, 226 F.3d 150 [Sept. 14, 2000]
United States v. McCoy, 210 F.3d 356 [2000 WL 349278; April 4, 2000]
United States v. McDougall, 216 F.3d 1074 [2000 WL 730387; June 2, 2000]
United States v. McElwain, 205 F.3d 1326 [2000 WL 234487; Feb. 1, 2000]
United States v. McNulty, 216 F.3d 1074 [2000 WL 949166; July 7, 2000]
United States v. McSherry, 226 F.3d 153 [Sept. 22, 2000]

United States v. McSherry, 229 F.3d 1136 [2000 WL 1399832; Sept. 22, 2000]
United States v. Middlemiss, 217 F.3d 112 [June 21, 2000]
United States v. Millet, 208 F.3d 204 [2000 WL 305515; March 22, 2000]
United States v. Molina, 213 F.3d 627 [2000 WL 572911; May 11, 2000]
United States v. Molitor, 205 F.3d 1326 [2000 WL 241162; Feb. 1, 2000]
United States v. Montague, 234 F.3d 1263 [2000 WL 1617975; Oct. 27, 2000]
United States v. Moore, 208 F.3d 411 [March 27, 2000]
United States v. Morales, 239 F.3d 113 [Dec. 13, 2000]
United States v. Moree, 220 F.3d 65 [July 17, 2000]
United States v. Moskowitz, 215 F.3d 265 [May 25, 2000]
United States v. Muyet, 225 F.3d 647 [2000 WL 1275925; Sept. 8, 2000]
United States v. Novellano, 205 F.3d 1326 [2000 WL 236477; Feb. 15, 2000]
United States v. Nwosu, 205 F.3d 1326 [2000 WL 241254; Feb. 1, 2000]
United States v. Okafor, 208 F.3d 204 [2000 WL 311064; March 24, 2000]
United States v. Okoli, 210 F.3d 356 [2000 WL 426191; April 18, 2000]
United States v. Ortiz, 218 F.3d 107 [June 30, 2000]
United States v. Paccione, 202 F.3d 622 [Feb. 3, 2000]
United States v. Pacheco, 225 F.3d 148 [Aug. 29, 2000]
United States v. Pagan, ___ F.3d ___ [2000 WL 1804559; Dec. 8, 2000]
United States v. Pasqua, 205 F.3d 1326 [2000 WL 232118; Feb. 8, 2000]
United States v. Pastor, 229 F.3d 1136 [2000 WL 1506041; Oct. 10, 2000]
United States v. Pedragh, 225 F.3d 240 [Sept. 15, 2000]
United States v. Percan, 233 F.3d 164 [Nov. 22, 2000]
United States v. Perez-Gonzalez, 216 F.3d 1074 [2000 WL 821742; June 22, 2000]
United States v. Perez-Nunez, 216 F.3d 1074 [2000 WL 777987; June 14, 2000]
United States v. Petrillo, 237 F.3d 119 [Dec. 29, 2000]
United States v. Polite, 216 F.3d 1074 [2000 WL 898895; June 29, 2000]
United States v. Popovic, 216 F.3d 1074 [2000 WL 839975; June 27, 2000]
United States v. Popson, 234 F.3d 1263 [2000 WL 1568252; Oct. 19, 2000]
United States v. Porterfield, 205 F.3d 1326 [2000 WL 232027; Jan. 26, 2000]
United States v. Praylor, 205 F.3d 1326 [2000 WL 253696; March 6, 2000]
United States v. Procino, 234 F.3d 1263 [2000 WL 1715276; Nov. 13, 2000]
United States v. Proffitt, 234 F.3d 1263 [2000 WL 1550514; Oct. 18, 2000]
United States v. Reynoso, 239 F.3d 143 [Dec. 27, 2000]
United States v. Rhames, 205 F.3d 1326 [2000 WL 234465; Feb. 1, 2000]
United States v. Rivera, 208 F.3d 204 [2000 WL 326365; March 28, 2000]
United States v. Rivera, 216 F.3d 1074 [2000 WL 823361; June 21, 2000]
United States v. Rodriguez, 213 F.3d 627 [2000 WL 639954; May 17, 2000]
United States v. Rodriguez, 216 F.3d 1074 [2000 WL 898886; June 29, 2000]
United States v. Rodriguez-Berrios, 205 F.3d 1326 [2000 WL 232043; Jan. 26, 2000]
United States v. Romero-Tamayo, 212 F.3d 729 [May 22, 2000]

United States v. Rondon, 205 F.3d 1326 [2000 WL 232274; Feb. 28, 2000]
United States v. Rose, 216 F.3d 1074 [2000 WL 777945; June 15, 2000]
United States v. Rosoff, ___ F.3d ___ [2000 WL 1847105; Dec. 15, 2000] ___
United States v. Runge, 205 F.3d 1326 [2000 WL 232768; Feb. 28, 2000]
United States v. Saavedra, 225 F.3d 647 [2000 WL 1185580; Aug. 17, 2000]
United States v. Sanchez, 225 F.3d 172 [Sept. 13, 2000]
United States v. Sanders, 208 F.3d 204 [2000 WL 268577; March 9, 2000]
United States v. Sanders, 205 F.3d 549 [March 9, 2000]
United States v. Sandoval, 208 F.3d 204 [2000 WL 303202; March 22, 2000]
United States v. Santana-Cruz, 216 F.3d 1074 [2000 WL 900207; July 5, 2000]
United States v. Sarvis, 205 F.3d 1326 [2000 WL 19100; Jan. 5, 2000]
United States v. Sasso, 215 F.3d 283 [June 14, 2000]
United States v. Sciortino, 205 F.3d 1326 [2000 WL 227663; Jan. 19, 2000]
United States v. Sentamu, 212 F.3d 127 [May 12, 2000]
United States v. Shkolir, 205 F.3d 1326 [2000 WL 232201; Jan. 27, 2000]
United States v. Silva-Osuna, 225 F.3d 647 [2000 WL 1185795; Aug. 17, 2000]
United States v. Smith, 215 F.3d 237 [May 25, 2000]
United States v. Soto, 234 F.3d 1263 [2000 WL 1678782; Nov. 7, 2000]
United States v. Stevens, 211 F.3d 1 [April 17, 2000]
United States v. Stevens, 210 F.3d 356 [2000 WL 419938; April 17, 2000]
United States v. Stevenson, 205 F.3d 1326 [2000 WL 234460; Feb. 1, 2000]
United States v. Suleiman, 208 F.3d 32 [March 24, 2000]
United States v. Summers, 234 F.3d 1263 [2000 WL 1550166; Oct. 18, 2000]
United States v. Tang, 214 F.3d 365 [May 11, 2000]
United States v. Tappin, 205 F.3d 536 [March 9, 2000]
United States v. Taylor, ___ F.3d ___ [2000 WL 1786338; Dec. 5, 2000]
United States v. Tem, 216 F.3d 1074 [2000 WL 823359; June 22, 2000]
United States v. Tenzer, 213 F.3d 34 [April 26, 2000]
United States v. Thomas, ___ F.3d ___ [2000 WL 236481; Feb. 14, 2000]
United States v. Thomas, 204 F.3d 381 [Feb. 14, 2000]
United States v. Thomas, 205 F.3d 1326 [2000 WL 233648; Feb. 22, 2000]
United States v. Thompson, 227 F.3d 43 [Sept. 25, 2000]
United States v. Tisdale, 229 F.3d 1136 [2000 WL 1508875; Oct. 12, 2000]
United States v. Tran, 234 F.3d 798 [Nov. 15, 2000]
United States v. Troches, 208 F.3d 204 [2000 WL 268580; March 8, 2000]
United States v. Turner, 213 F.3d 627 [2000 WL 665561; May 18, 2000]
United States v. Upshaw, 205 F.3d 1327 [2000 WL 232280; Feb. 28, 2000]
United States v. Urena, 205 F.3d 1327 [2000 WL 224866; Jan. 14, 2000]
United States v. Uribe, 205 F.3d 1327 [2000 WL 232073; Feb. 8, 2000]
United States v. Valdera, 216 F.3d 1074 [2000 WL 949153; July 7, 2000]
United States v. Valencia, 229 F.3d 1136 [2000 WL 1370255; Sept. 19, 2000]
United States v. Valencia, 234 F.3d 1263 [2000 WL 1689755; Nov. 9, 2000]

United States v. Vasquez, ___ F.3d ___ [2000 WL 1836752; Dec. 13, 2000]
United States v. Ventrilla, 233 F.3d 166 [Nov. 22, 2000]
United States v. Volpe, 224 F.3d 72 [Aug. 16, 2000]
United States v. Walker, 205 F.3d 1327 [2000 WL 233574; Feb. 18, 2000]
United States v. Wall, 208 F.3d 204 [2000 WL 280322; March 14, 2000]
United States v. Yeung, 205 F.3d 1327 [2000 WL 232654; Feb. 29, 2000]
United States v. Young, 213 F.3d 627 [2000 WL 687750; May 25, 2000]
United States v. Yu, 216 F.3d 1074 [2000 WL 821864; June 22, 2000]
United States v. Zapata, 205 F.3d 1327 [2000 WL 253691; March 3, 2000]
United States v. Zapata, 216 F.3d 1074 [2000 WL 730418; June 7, 2000]
United States v. Zebrowski, 229 F.3d 1136 [2000 WL 1459727; Oct. 2, 2000]
United States v. Zichettello, 208 F.3d 72 [March 20, 2000]