SENTENCING DECISIONS OF THE SECOND CIRCUIT FOR 2001

A comprehensive list of all Second Circuit sentencing decisions, reported and unreported, updated each month.

Topics covered to date

OFFENSE CONDUCT

§ 1B1.2: Applicable Guidelines

United States v. Ben Zvi, 242 F.3d 89 [March 6, 2001]
(Walker opinion; joined by Marrero, concurrence by Van Graafeiland)

Pursuant to U.S.S.G. § 1B1.2(d), the district court treated acts of wire fraud, domestic money laundering and international money laundering as separate conspiracy acts, and then applied the grouping rules to yield an adjusted offense level of 26. Defendant argued that the district court should not have used the time-barred money laundering objects in applying § 1B1.2(d). The Second Circuit dismissed defendant's challenge as moot, as she was no longer incarcerated. The Court rejected defendant's argument that the length of her sentence might have collateral effects on future immigration proceedings.

§ 1B1.3: Relevant Conduct

United States v. McLeod, ___ F.3d ____[2001 WL 533353; May 21, 2001]
(Newman Opinion; Cabranes, Underhill)

The Second Circuit rejected the defendant's argument that, based upon *Apprendi*, the sentencing judge could not include as relevant conduct a tax loss resulting from a civil audit without proof beyond a reasonable doubt of such a loss. The court reaffirmed that the correct standard for determining relevant conduct is "preponderance of the evidence."

United States v. White, 240 F.3d 127 [Feb. 13, 2001]
(Katzmann opinion; joined by Sack, Sotomayor)

The Second Circuit rejected defendant's argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) prohibited the district court from relying upon relevant conduct as defined by U.S.S.G. § 1B1.3, because it resulted in effectively increasing defendant's sentence based on facts not found to have been proven beyond a reasonable doubt by a jury. The defendant further argued that even if relevant conduct need not be found by a jury, the district court should be required to determine them by a higher standard of proof than a preponderance of the evidence. The Court declined to "read *Apprendi* so broadly" because to do so "would be to eviscerate the Sentencing Guidelines, despite the Court's explicit statement that '[t]he Guidelines are, of course, not before the Court.'" The Court further held that *Apprendi* does not alter the Court's prior holding that a preponderance of the evidence is the appropriate standard to be used in considering uncharged relevant conduct for sentencing purposes. *See United States v. Cordoba-Murgas*, 233 F.3d 704, 708-09 (2d Cir. 2000).

The defendant also argued that the district court's comment at sentencing that it had "no leeway" to depart from the 240 year sentence it imposed indicated that it did not understand its authority to depart. The Second Circuit agreed and remanded for resentencing noting that where findings made by the court as to uncharged relevant conduct substantially increase the defendant's sentence, the sentencing court has authority to depart. *See United States v. Cordoba-Murgas*, 233 F.3d 704, 709 (2d Cir. 2000).

United States v Farrah, ___ F.3d ___ [2001 WL 668493; June 12, 2001)
(Summary Order: McLaughlin, Cabranes, Cote)

The Second Circuit rejected the defendant's argument that *Apprendi* precluded the sentencing judge from determining his relevant conduct, where the resulting sentence remains within the statutory maximum. Further, the court found that there was sufficient evidence that the defendant had engaged in the uncharged conduct that was the basis for the upward departure, i.e., fraud, bankruptcy fraud and failure to file tax returns. Additionally, the Second Circuit upheld the district court's determination that the bankruptcy fraud was not "relevant conduct" pursuant to § 1B1.3, but "prior similar adult criminal conduct," pursuant to § 4A1.3(e), which authorizes an upward departure. Even if this determination were error, however, the error was harmless since the other uncharged acts were sufficient to warrant the upward departure.

United States v. Fuller, _____ F.3d _____ [2001 WL 224072; March 7, 2001]
(Summary Order: Kearse, McLaughlin, Straub)

Defendants argued that the district court erred in calculating their sentences based on the total value of all of the stolen cars involved in the conspiracy, rather than just the cars each of them stole. The Second Circuit disagreed, noting that the defendants' offense levels should be calculated based on all reasonably foreseeable acts in furtherance of the conspiracy. The Court also rejected defendants' arguments that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), they were entitled to have the value of the vehicles used to calculate their sentences determined beyond a reasonable doubt by a jury. The Court stated that since the sentences imposed were below the statutory maximum, and the value of the stole cars did not trigger a mandatory minimum, the value was a question properly decided by the sentencing judge, and not by a jury.

United States v. Nunez, _____F.3d _____ [2001 WL 491236; May 8, 2001]
(Summary Order; Leval, Sack, Sotomayor)

Defendant argued that the district court abused its discretion by increasing his sentence because he committed an uncharged rape in the course of the offense. The Second Circuit rejected this argument, stating that courts are entitled to take into account the personal characteristics of the defendant being sentenced.

§ 2A1.1: First Degree Murder

*United States v Velazquez,*_ _____F.3d _____[2001 WL 363470; April 12, 2001]
(Newman opinion; joined by Cabranes, Straub)

The defendant-prison guards were convicted of civil rights violations where they beat a prisoner to death. The defendants argued that the court erred in finding that the most applicable offense was voluntary manslaughter, rather than involuntary manslaughter or minor assault. The government, though not cross-appealing, agreed that the applicable offense was not voluntary manslaughter, but claimed it was second degree murder. Because the judge's findings about heat and passion and malice were ambiguous, the Second Circuit remanded. Notably, the Circuit did not resolve whether or not a higher sentence could not be imposed in light of the absence of a cross-appeal, reasoning that the question might ultimately be academic. In light of the *risk* of a higher sentence, though, the court gave the defendants an opportunity to withdraw the appeal.

Further, based upon *Apprendi,* the Second Circuit determined that the sentence of one of the defendants, convicted as an accessory, exceeded the maximum that could be imposed without a jury determination as to the cause of death. Accordingly, after the other issues were resolved, the court directed that the defendant's sentence be reduced by four months, to remedy the *Apprendi* problem.

Ferranti v. United States, ___F.3d___ [2001 WL 273827; March 20, 2001]
(Summary Order; Jacobs, Calabresi, Arterton)

The Second Circuit rejected the defendant's argument that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it was error for the district court to determine the degree of homicide under section 2A of the Sentencing Guidelines. The court reasoned that the sentence was based on a factor found by the jury beyond a reasonable doubt (that the arson defendant was convicted of resulted in death) and was not in excess of the relevant statutory maximum.

Jamison v. United States, _____F.3d _____ [2001 WL 179072; Feb. 20, 2001]
(Summary Order; Van Graafeiland, Kearse, Leval)

Defendant argued that his trial counsel was ineffective for failing to argue that he should be sentenced under U.S.S.G. § 2A1.2 (second degree murder), resulting in a base offense level of 33, rather than § 2A1.1 (first degree murder), resulting in a base offense level of 43, because the most serious predicate act for defendant's RICO conviction was the state-law offense of second degree murder. In an affidavit, defendant's trial attorney admitted that he was not aware his client was being sentenced under the Guidelines for first degree murder. The Second Circuit found that the attorney's performance fell below an objective standard of reasonableness, but stated that defendant failed to show that his counsel's failure resulted in prejudice because the district court was free to treat the state second degree murder as a federal first degree murder under the Guidelines. However, because the district court had erroneously stated that it was bound by *United States v. Minicone*, 960 F.2d 1099 (2d Cir.), *cert. denied* 503 U.S. 950 (1992) to apply the Guideline provision for first degree murder, the Second Circuit sent the case back to the district court for clarification.

§ 2B1.1: Theft

United States v. Learner, ___ F.3d ___ [2001 WL 1168345; September 25, 2001]
(Summary Order: Meskill, Cabranes, Chin)

The Second Circuit rejected the defendant's argument that the district court abused its discretion in concluding that the theft involved "more than minimal planning," pursuant to U.S.S.G. §2B1.1(b)(4)(A). That finding was supported by the evidence that; (1) the defendant perpetrated the criminal conduct over several years; (2) his conduct was not opportunistic; and (3) the scheme involved detailed and deliberate action to effectuate the commission and concealment of the offense.

United States v. Rosario, ____F.3d____ [2001 WL 224071; March 7, 2001]
(Summary Order; Kearse, McLaughlin, Straub)

The Second Circuit upheld a four-level increase in defendant's offense level pursuant to U.S.S.G. § 2B1.1(b)(4)(B) on the basis that he was in the business of buying and selling stolen property. There was evidence in the record that the defendant dealt with about two stolen cars a week for most of a year.

§ 2C1.1: Bribery

United States v. Arshad, 239 F.3d 276 [Feb. 2, 2001]
(Sack opinion; joined by Newman, Winter)

The Court rejected the defendant's argument that a two-level enhancement based on his payment or more than one bribe, pursuant to U.S.S.G. § 2C1.1(b)(1), was improper since the separate payments were actually "installment" of a single bribe. The Court agreed with the district court's finding that the defendant had made discrete payments to obtain three distinct actions, and thus the payments were not installment payments for a single action.

§ 2D1.1: Narcotics

Forbes v. United States, ___ F.3d ___ [2001 WL 930174; August 16, 2001]
(Per Curiam: Parker, Sotomayor, Katzmann)

Defendant sought permission to file a second motion pursuant to 28 U.S.C. § 2255, on the ground that his sentence was unconstitutional under *Apprendi*. Because the Supreme Court has not, to date, explicitly declared that *Apprendi* is to be applied retroactively, the Second Circuit denied defendant's application for leave to file the second § 2255 motion.

United States v. Breen, 243 F.3d 591 [March 16, 2001]
(Feinberg opinion; joined by Parker, Covello)

Defendant argued that the Supreme Court' decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) required the jury to determine beyond a reasonable doubt the quantity of narcotics on which his sentence was based under the Guidelines. The Second Circuit held that a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v. Chavez, ___ F.3d ___ [2001 WL 1160751; September 25, 2001]
(Per Curiam: Meskill, Cabranes, Chin)

Defendant argued that the district court erred by not making findings as to the type and quantity of narcotics in accordance with *Apprendi*. The Second Circuit disagreed. Because defendant was sentenced within the lowest maximum for heroin offenses under 21 U.S.C. §960(b), the amount of heroin that defendant pleaded guilty to importing did not affect the statutory maximum. Therefore, *Apprendi* was inapplicable. Citing *United States v. Garcia*, 240 F.3d 180 (2d Cir. 2001), the Second Circuit reiterated that *Apprendi* applies only to guideline factors related to a sentence above a statutory maximum or to a mandatory statutory minimum.

United States v. White, 240 F.3d 127 [Feb. 13, 2001]
(Katzmann opinion; joined by Sack, Sotomayor)

The Second Circuit decided that it need not consider defendant's argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires that the amount of drugs attributed to the defendant must be found by a jury because in this case, defendant entered into a stipulation regarding the type and quantity of drugs involved in three charged transactions.

United States v. Williams, ____F.3d ____[2001 WL 391985; April 18, 2001]
(Calabresi opinion; joined by Jacobs, Arterton)

The Second Circuit held that, where there is no conspiracy at issue, drugs intended solely for personal use are not part of a scheme or plan to distribute those drugs and, consequently, must be excluded from a finding of drug quantity under 21 U.S.C. § 841. Accordingly, the matter was remanded to clarify what quantity of drugs was relevant to the conviction.

Sarroca v. United States, ____F.3d ____ [2001 WL 548890; May 10, 2001]
(Per Curiam; Parker, Sack, Magill)

In a decision largely concerned with a lawyer's obligation to file a notice of appeal, the Second Circuit also held the district court appropriately determined, pursuant to U.S.S.G. § 2D1.4, that defendant should be sentenced based upon 25 kilograms of cocaine that he "agreed to" produce and that he "was going to make an effort to get," rather than the 3 kilograms of cocaine that he actually delivered.

Ogando v. United States, ____ F.3d ____ [2001 WL 533545; May 17, 2001]
(Summary Order; Oakes, Winter, Straub)

The Second Circuit upheld the District Court's denial of defendant's motion, pursuant to 28 U.S.C. §2255, to vacate, set aside, or correct his sentence following convictions for conspiracy to distribute and possess with intent to distribute over five kilograms of cocaine, and operating a continuing criminal enterprise (CCE). Defendant argued that under *Rutledge v. United States,* 517 U.S. 292 (1996), his convictions cannot stand because the narcotics conspiracy is a lesser included offense of the CCE count. The Second Circuit held that defendant's argument is foreclosed by *Underwood v. United States*, 116 F.3d 84 (2d Cir. 1999), which held that relief under *Rutledge* cannot be obtained on collateral review where the issue was not raised on direct appeal and the error did not have a "substantial and injurious effect." Defendant's CCE conviction carried an offense level (36) that was two levels lower than the offense level applicable to his conspiracy conviction (38). Here, there was no substantial and injurious effect, because the District Court could have vacated defendant's CCE conviction rather than his conspiracy conviction, thereby providing defendant with no sentence reduction.

Sanders v. United States, 242 F.3d 367 [2001 WL 25702; Jan. 11, 2001]
(Summary Order; Van Graafeiland, Winter, Sotomayor)

In an attempt to vacate his sentence pursuant to 28 U.S.C. § 2255, the defendant argued that the government did not satisfy its burden of proving that the substance he possessed was crack cocaine, justifying application of that penalty provision in U.S.S.G. § 2D1.1. As defendant failed to raise this issue on direct appeal, he had to show a complete miscarriage of justice, which the Second Circuit decided he did not do. Defendant claimed that the evidence was lacking because there was no evidence that the cocaine base contained sodium bicarbonate.

United States v Bacote, ____F.3d ____[2001 WL 393705; April 18, 2001]
(Summary Order; McLaughlin, Calabresi, Pooler)

The Second Circuit agreed that, even if two amendments to the guidelines concerning cocaine were retroactively applicable, they did not provide a basis to reduce the defendant's sentence. The court emphasized that the defendant had admitted to selling crack during his plea. Further, the Second Circuit said that the defendant's *Apprendi* claim was not properly brought pursuant to 18 U.S.C. § 3582(c)(2), which permits courts to modify sentences where a sentencing range has subsequently been lowered by the Sentencing Commission,

United States v Bermudez, ____F.3d ____[2001 WL 409442; April 20, 2001]
(Summary Order; Miner, Sack, Raggi)

Because the defendant's sentence was based upon the same guideline calculation, regardless of whether his case fell within section 841(b)(1)(A), (B) or (C), and was well within the 20-year maximum, the Second Circuit held that "it was entirely appropriate for Judge Mukasey to determine the applicable drug quantity guideline by a preponderance of the evidence." In addition, the court rejected defendant's argument that the factual finding as to the amount was clearly erroneous.

United States v. Bonilla, ___F.3d___[2001 WL _____; July 11, 2001)
(Summary Order; Miner, Leval, Rakoff)

Two of four defendants argued that their sentences violated *Apprendi v New Jersey, 530 U.S. 466 (2000)*; the Second Circuit rejected these arguments. Defendant Vega's sentence was below the statutory maximum of 20 years provided by 21 U.S.C. §841(b)(1)(C), and defendant Casas's sentence, although above the statutory maximum provided by §841(b)(1)(C), was justified because he admitted the fact that there was more than one kilogram of heroin involved in the conspiracy in his plea allocution.

United States v. Cambrelen, ____ F.3d ____ [2001 WL 219285; March 6, 2001]
(Summary Order; Oakes, Kearse, Korman)

Defendant argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires that the jury should have determined beyond a reasonable doubt the quantity of narcotics on which his sentence was

based under the Guidelines. The Second Circuit held that a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v. Chin, 242 F.3d 368 [2001 WL 40760; Jan. 10, 2001]
(Summary Order; Oakes, Cardamone, Parker)

The Second Circuit found, without discussion, no clear error as to the district court's determination of the quantity of drugs attributed to the defendant.

United States v. Garner, 242 F.3d 368 [2001 WL 46822; Jan. 18, 2001]
(Summary Order; Sack, Sotomayor, Katzmann)

The defendant challenged the district court's determination that, in addition to the 80 grams of crack cocaine seized by government agents, at least 70 additional grams were attributable to him based, in part, on recorded statements he made to an undercover agent. The Second Circuit found that the record, which included evidence of the capacity of the drug laboratory found in defendant's home, supported the calculations.

United States v. Guzman, ___F.3d____ [2001 WL 194306; Feb. 26, 2001]
(Summary Order; Van Graafeiland, Kearse, Leval)

Defendant argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires that the jury should have determined the narcotics quantity for purposes of applying the Sentencing Guidelines. The Second Circuit disagreed for two reasons. First, the calculation of defendant's criminal history category was based on his prior convictions and *Apprendi* states that findings as to prior convictions need not be made by a jury. Second, the Court relied on its recent opinion in *United States v. Garcia*, 240 F.3d 180 (2d Cir. 2001) which held that a sentencing fact that affects only the defendant's Guidelines sentencing range within a statutory maximum, but has no bearing on increasing a sentencing above a statutorily specified maximum or on triggering a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v. Kelly, ___F.3d____ [2001 WL 99508; Feb. 6, 2001]
(Summary Order; Walker, Oakes, Parker)

Defendant argued that drugs found in a vestibule where he was arrested ten days after his arrest should not have been attributed to him for sentencing purposes. The Second Circuit held that the district court's finding was not clearly erroneous. Further, the Court held that any error would have been harmless because the defendant's sentence on the drug conspiracy was to run concurrently with another charge which the defendant did not contest on appeal. The district court had also indicated on the record that even if its drug quantity calculation were reversed on appeal, on remand it would depart to impose the same sentence.

United States v. Mota, ___ F.3d ___ [2001 WL 1019380; September 5, 2001]
(Summary Order; Cabranes, Straub, Katzmann)

The Second Circuit affirmed the principle that *Apprendi* does not, by its express terms, forbid sentencing enhancements within the statutory maximum, based on judicial findings of narcotic amounts by a preponderance of the evidence.

United States v Pitcher, _____F.3d _____[2001 WL 356941April 10, 2001]
(Summary Order; Oakes, Jacobs, Parker)

The defendant argued that, since he was involved minimally in the conspiracy and believed that drugs other than heroin were involved, the court should have sentenced him on the basis of the lowest quantity of narcotics. The Second Circuit held that the district court's decision to take into account the entire amount of heroin was proper.

United States v. Reyes, ___F.3d____ [2001 WL 194359; Feb. 26, 2001]
(Summary Order; Walker, Kearse, Cardamone)

Defendant argued *pro se* that the Supreme Court' decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) required the jury to determine beyond a reasonable doubt the quantity of cocaine on which his sentence was based under the Guidelines. The Second Circuit held that a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v. Tak Sun Lee, _____ F.3d _____ [2001 WL 506259; May 11, 2001]
(Summary Order; jacobs, Parker, Katzmann)

Defendant argued that, absent a jury finding on drug quantity, the imposition of a sentence under 21 U.S.C. § 841 was a violation of his Fifth and Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Second Circuit rejected this argument, holding that, where a sentence is below the statutory maximum applicable for § 841(b)(1)(C), which does not specify any quantity of drugs, *Apprendi* does not apply. *See, United States v. Garcia*, 240 F.3d 180, 183-4 (2d Cir. 2001).

§ 2F1.1(b)(1): Fraud: Loss

United States v. Garcia, 240 F.3d 180 [Feb. 20, 2001]
(Newman opinion; joined by Leval, Sack)

Defendant argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) required the jury should to determine the amount of loss for purposes of applying the Sentencing Guidelines. The Second Circuit limited the issue to whether a jury must find a sentencing fact that affects only the defendant's Guidelines sentencing range within a statutory maximum, but has no bearing on increasing a sentencing above a statutorily specified maximum or on triggering a mandatory statutory minimum.

The Second Circuit joined the nine other circuits that have ruled that a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v Kim, ____F.3d ____[2001 WL 356792; April 10, 2001]
(Oakes opinion; joined by Kearse, Winter)

In an opinion devoted largely to other issues, the Second Circuit summarily rejected the defendant's argument that the court erred in calculating the offense level by including losses incurred before certain wire fraud occurred.

United States v. Almonte, _____ F.3d _____ [2001 WL 170424; Feb. 20, 2001]
(Summary Order; Newman, Leval, Sack)

Defendant argued that the district court erred in applying the fraud loss table of U.S.S.G. § 2F1.1(b)(1). Based upon Application Note 8(d) which provides that in cases involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses, the defendant argued that there was no diversion of benefits because the food stamps he improperly redeemed were obtained from merchants who had sold eligible food in exchange for the food stamps, but were unauthorized to do so. The Second Circuit rejected defendant's argument, stating that the record showed that the stamps redeemed by the defendant were acquired by the sale of unauthorized items, including beer and soda.

The Court also rejected defendant's argument that the district court erred in relying on the defendant's estimated food sales set forth in a food stamp application by the defendant's bodega as the basis for estimating the amount of the defendant's proper intake of stamps. The Court found that to be a reasonable estimate of the amount of loss. And the Court rejected defendant's contention that the district court erroneously attributed to him his brother's sale of stamps. The evidence revealed a conspiratorial relationship.

United States v. Boyd, 242 F.3d 368 [2001 WL 40781; Jan. 16, 2001]
(Summary Order; Feinberg; Sotomayor; Haight)

The Second Circuit affirmed the district court's method of calculating loss for the defendants' fraudulent scheme of selling gems that were worth significantly less than they claimed. The district court adopted the government's expert testimony that the gems were worth approximately ten percent or less than the price paid by the victims, and thus the loss was the difference between the sale price and the actual worth. The Second Circuit also found that it was not error for the district court to use the conversion rate used by defendants in order to convert Canadian dollars into American dollars.

United States v. Confredo, 242 F.3d 368 [2001 WL 38246; Jan. 12, 2001]
(Summary Order: Feinberg; Sotomayor, Haight)

Because the Second Circuit remanded for resentencing for other reasons, and because the

record was not clear as to whether the district court had considered defendant's objections to the district court's loss calculation, the Second Circuit instructed the district court to explicate defendant's loss calculation arguments on remand.

United States v. Hochevar, ___F.3d____ [2001 WL 266299; March 16, 2001]
(Summary Order: Meskill, Parker, Katzmann)

Rejecting defendant's argument, the Second Circuit found that the district court made a reasonable estimate of the loss attributable to the defendant given the available information.

United States v. Hussey, ___ F.3d ___ [2001 WL 699015; June 21, 2001]
(Summary Order: Cabranes, Straub, Sack)

Defendants argued that the district court violated *Apprendi* by determining the amount of loss attributable to their fraud by a preponderance of the evidence. The Second Circuit rejected this argument, noting that the defendants were all sentenced within the statutory maximum for engaging in securities fraud.

United States v. Mendoza, ___F.3d____ [2001 WL 179931; Feb. 21, 2001]
(Summary Order; Van Graafeiland, Calabresi, Sotomayor)

Defendant argued *pro se* that the district court erred in calculating the amount of loss attributable to him because it included an amount at issue in a related New Jersey case. The Second Circuit found that the defendant waived any appeal of this issue by conceding, prior to sentencing, that the amount the court was relying on was correct. The defendant also argued that the amount was incorrect because it reflected the actual amount of money he fraudulently withdrew from a financial institution, rather than the amount he intended to withdraw, which was $80,000 less. The Second Circuit disagreed, noting that "loss" means the value of the property taken, not the intended loss, unless the intended loss is greater than the actual loss. *See* U.S.S.G. § 2F1.1, cmt. n.8.

United States v. Nachamie, ___F.3d____ [2001 WL 266349; March 19, 2001]
(Summary Order; Straub, Pooler, Mukasey)

Defendant argued that the Supreme Court' decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires that the jury should have determined the amount of defendant's fraud loss for purposes of applying the Sentencing Guidelines. The Second Circuit disagreed, citing its recent opinion in *United States v. Garcia*, 240 F.3d 180 (2d. Cir. 2001), which held that *Apprendi* does not require a jury determination beyond a reasonable doubt as to a sentencing factor that does not raise a sentence beyond the statutory maximum. The Second Circuit further rejected, without discussion, the defendant's argument that the district court should have applied a heightened burden of proof concerning los and, regardless, lacked sufficient evidence to calculate the amount of intended loss.

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

United States v. Berg, _____ F.3d _____ [2001 WL 505691; May 14, 2001]
(Cardamone Opinion; McLaughlin, Jacobs)

The Second Circuit affirmed the district court's denial of a two-level enhancement for violation of judicial process pursuant to U.S.S.G. § 2F1.1(b)(4)(B), following defendant's guilty plea to bankruptcy fraud. Enhancement of a sentence in cases of this type is appropriate where a debtor either conceals property from the estate's creditors, or makes a misrepresentation that works a fraud on the bankruptcy court. Since neither circumstance was present in the instant case, no enhancement was justified. In addition, the Second Circuit agreed that defendant's improper use of assets, without more, did not constitute "aggravated criminal intent." Accordingly, imposition of an enhancement for violation of judicial process was not warranted.

§ 2J1.2: False Statements

United States v. Kurtz, 237 F.3d 154 [Jan. 3, 2001]
(Per Curiam; Oakes, Kearse, Korman)

Defendant, who was convicted of making false statements in violation of 18 U.S.C. § 1001, argued that the district court erred in applying U.S.S.G. § 2J1.2, rather than § 2F1.1. Appendix A to the guidelines designates § 2F1.1 as the appropriate guideline for a conviction under 18 U.S.C. § 1001. At the time of sentencing, Appendix A provided that "if, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." As of November, 2000, after defendant was sentenced, that language was deleted, which, defendant argued, signified that the court was required to apply only the guideline listed in Appendix A. The Second Circuit disagreed, stating that even if that were true, the district court was authorized to use § 2J1.2 rather than § 2F1.1 by the language in § 2F1.1, which states that if the offense is "more aptly covered by another guideline, apply that guideline rather than § 2F1.1."

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

United States v. Confredo, 242 F.3d 368 [2001 WL 38246; Jan. 12, 2001]
(Summary Order; Feinberg; Sotomayor, Haight)

The Second Circuit vacated and remanded for resentencing because the district court failed to apportion defendant's sentence, as required by U.S.S.G. § 2J1.7, between the sentence for the underlying offense and the sentence for the enhancement for having committed the underlying offense while on release. Further, it was unclear from the district court's oral and written judgments, whether the sentence was 230 months or 262 months.

United States v. Bezmalinovic, ___F.3d___ [2001 WL 792197; July 6, 2001]
(Summary Order; Jacobs, Parker, Sotomayor)

Pursuant to§ 2J1.7, the court increased the offense level by three levels, because the defendant committed the offenses of conviction (fraud and obstruction of justice) while on release pending adjudication of a bribery charge. Defendant argued that the district court should have applied the 1988 version of the Guidelines (which was in effect when he was on release), rather than the 1991 version, in which § 2J1.7 is an enhancement provision. Specifically, defendant argued that the 1988 version of the Guidelines would have helped him, since § 2J1.7 was a separate guideline corresponding to 18 U.S.C. §3147; because he was not charged with violating §3147, defendant reasoned that he was subject to neither the enhancement provisions of that statute nor the 1988 version of § 2J1.7. The Second Circuit rejected this argument because it was not raised before the district court. Furthermore, the court explained that the sentence actually imposed would have been permissible under either the 1988 or the 1991 versions. The Second Circuit also stated that 18 U.S.C. §3147 is an enhancement provision and therefore need not be charged separately. Still, the Second Circuit vacated and remanded the sentence, since the district court failed to allocate the sentence among the counts of conviction, as required by §2J1.7.

§ 2K2.1: Prohibited Firearms Transactions

United States v Nevarez, ____F.3d ____[2001 WL 477050; May 7, 2001]
(Per Curiam; Walker, Miner, Pooler)

The defendant argued that he should not be considered a "prohibited person" for purposes of § 2K2.1(a)(6), because he did not use illicit drugs regularly. While acknowledging that in some cases an increased penalty may be inappropriate if the illicit drug use is very unusual, the Second Circuit found that the defendant clearly had a persistent drug problem, justifying the enhancement. The court also rejected the argument that the drug use had to be connected to the firearm offense.

§ 2K2.4: Use of Firearms

United States v Finley, ____F.3d ____[2001 WL 332685; April 5, 2001]
(Feinberg opinion; joined by Leval, Winter dissenting)

Based upon the mandatory consecutive sentence requirement for a second violation of § 924(c)(1), the defendant received a sentence of 477 months. The two violations were based upon using a gun both in connection with possession with intent to distribute, and actual distribution. But the possession was continuous. The court reversed the second firearm conviction, reasoning that Congress did not intend the phrase "a second or subsequent conviction" to secure a mandatory 25-year sentence where the two criminal transactions were "so inseparably intertwined."

§ 2L1.2: Illegal Reentry

United States v. Luna-Reynoso, ___F.3d___ [2001 WL 822333; July 20, 2001]
(Kearse Opinion; joined by Cabranes and Trager)

Following his conditional plea of guilty to unlawfully reentering the United States without permission, after being deported after a conviction for an aggravated felony (burglary), the defendant was sentenced to 86 months imprisonment. Defendant argued that, since burglary did not constitute an "aggravated felony," as that term had been defined until 1996, the district court erroneously deemed the 1987 burglary conviction to be an aggravated felony. The Second Circuit rejected this contention, stating that Congress was clear and unambiguous in the language of the statute, which provides that "[n]otwithstanding any other provision of law...the term applies regardless of whether the conviction was entered before, on, *or after the date of enactment of this paragraph.*" (emphasis added). Since defendant's present unlawful reentry offense was committed well after the 1996 amendment that added burglary to the list of aggravated felonies, he was on notice that reentering without the permission of the Attorney General would subject him to a substantial sentence. Accordingly, it was not impermissible to apply the expanded aggravated felony definition retroactively. The court observed that United States Sentencing Guideline § 2L1.2 merely embodies clearly-expressed Congressional intent, and was therefore applied correctly.

United States v. Barnes, 244 F.3d 331 [March 27, 2001]
(Per Curiam; Jacobs, Straub, Pooler)

Defendant argued that under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the language of 8 U.S.C. § 1326(b), which authorizes a prison term of up to 20 years for a person whose deportation was subsequent to a conviction of an aggravated felony, must be construed as setting out an offense distinct from that set out in § 1326(a), which does not mention prior convictions and limits the term of imprisonment to two years. As defendant's indictment did not allege his prior conviction, defendant argued that it set forth only the elements of § 1326(a), and thus he should not have been sentenced to more than two years. The Second Circuit disagreed, noting that they rejected that very argument in their recent opinion in *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir. 2001).

United States v. Latorre-Benavides, 241 F.3d 262 [Feb. 26, 2001]
(Per Curiam; Kearse, Jacobs, Cabranes)

Defendant argued that under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the language of 8 U.S.C. § 1326(b), which authorizes a prison term of up to 20 years for a person whose deportation was subsequent to a conviction of an aggravated felony, must be construed as setting out an offense distinct from that set out in § 1326(a), which does not mention prior convictions and limits the term of imprisonment to two years. As defendant's indictment did not allege his prior conviction, defendant argued that it set forth only the elements of § 1326(a), and thus he should not have been sentenced to more than two years. Following *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Second Circuit stated that § 1326(b) does not set out a separate offense but rather is a penalty provision with respect to a violation of § 1326(a).

United States v. Artega, ___F.3d____ [2001 WL 266321; March 19, 2001]
(Summary Order; Walker, Oakes, Calabresi)

Defendant argued that under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the language of 8 U.S.C. § 1326(b), which authorizes a prison term of up to 20 years for a person whose deportation was subsequent to a conviction of an aggravated felony, must be construed as setting out an offense distinct from that set out in § 1326(a), which does not mention prior convictions and limits the term of imprisonment to two years. As defendant's indictment did not allege his prior conviction, defendant argued that it set forth only the elements of § 1326(a), and thus should not have been sentenced to more than two years. The defendant argued that *Apprendi* overruled *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The Second Circuit disagreed, noting that they rejected that very argument in their recent opinion in *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir. 2001).

United States v. Caminero, _____F.3d _____ [2001 WL 266310; March 19, 2001]
(Summary Order; Walker, Oakes, Parker)

Defendant argued that under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the language of 8 U.S.C. § 1326(b), which authorizes a prison term of up to 20 years for a person whose deportation was subsequent to a conviction of an aggravated felony, must be construed as setting out an offense distinct from that set out in § 1326(a), which does not mention prior convictions and limits the term of imprisonment to two years. As defendant's indictment did not allege his prior conviction, defendant argued that it set forth only the elements of § 1326(a), and thus should not have been sentenced to more than two years. The defendant argued that *Apprendi* overruled *sub silentio Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The Second Circuit disagreed, noting that they rejected that very argument in their recent opinion in *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir. 2001).

United States v. Cruz-Garcia, _____ F.3d _____ [2001 WL 498115; May 10, 2001]
(Summary Order; Jacobs, Parker, Katzmann)

The Second Circuit rejected the defendant's argument that a prior felony conviction is an element of the offense of re-entry following deportation after a felony conviction rather than a sentencing enhancement factor contained in 8 U.S.C. § 1326(b), such that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would require the indictment to include the element of a prior felony conviction. Relying upon *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *United States v. Latorre-Benavides*, 2001 WL 184566 (2d Cir. Feb. 26, 2001), the Court reaffirmed that § 1326(b) does not set out a separate offense but rather is merely a penalty provision with respect to a violation of § 1326(a).

United States v Garcia, _____F.3d _____[2001 WL 431472; April 25, 2001]
(Summary Order; Parker, Sack, Stein)

The Second Circuit reaffirmed that a prior state court conviction, which the State defines as a felony, constitutes a prior conviction "for an aggravated felony" for purposes of the guidelines, even

if that crime would not constitute a federal felony. Thus, the court properly imposed the 16-level enhancement pursuant to § 2L1.2(b)(2).

United States v. Grant, ___ F.3d ___ [2001 WL 682280; June 13, 2001]
(Summary Order; Leval, Sack, Sotomayor]

Defendant argued that, under *Apprendi*, his sentence pursuant to the penalty provisions of 8 U.S.C. §1326(b)(2) was illegal. The Second Circuit rejected this argument by relying on *Almendarez-Torres v. United States, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219* (1998), which held that 8 U.S.C. §1326(b) does not set out a separate offense but rather is a penalty provision with respect to §1326(a).

United States v. Jestine, ___ F.3d ___ [2001 WL 994947; August 30, 2001]
(Summary Order; Cabranes, Straub, Katzmann)

Based on *Apprendi*, defendant asserted that the district court should not have sentenced him as if he had been deported following commission of an aggravated felony, pursuant to 8 § U.S.C. 1326(b)(2), since he had not admitted that during his allocution. Thus, defendant argued that the sentence was governed by § 1326(a) only. The Second Circuit rejected defendant's argument, holding that this case was governed by *Almendarez-Torres v. United States*, 523 U.S. 224, which held that 1326(b) was a penalty provision that did not amount to a separate offense.

United States v. Jorge-Carlos, ___F.3d ___[2001 WL 514300; May 15, 2001]
(Summary Order: Newman, Cabranes, Thompson)

Based upon *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the defendant argued that the district court should not have sentenced him above the two-year statutory maximum provided by 8 U.S.C. § 1326(a), since neither his indictment nor his plea allocution mentioned his prior conviction for an aggravated felony. He contended that§ 1326(b) sets out a separate offense that must be charged in the indictment and proved to a jury beyond a reasonable doubt. Following *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Second Circuit held that §1326(b) does not set out a separate offense but rather is a penalty provision with respect to § 1326(a).

United States v. LaPorte, ___ F.3d___ [2001 WL 498113; May 9, 2001]
(Summary Order; Meskill, Kearse, Squatrito)

Defendant argued that his sentence of more than two years for violation of 18 U.S.C. § 1326 was improper under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the indictment did not allege his prior conviction of an aggravated felony, and such conviction was neither admitted by him nor proven beyond a reasonable doubt. Relying upon *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *United States v. Latorre-Benavides*, 241 F.3d 262, 264 (2d Cir. 2001), the Second Circuit held that defendant's sentence was permissible.

United States v. Martinez-Cuadros, ___F.3d____ [2001 WL 290117; March 23, 2001]
(Summary Order; Cardamone, Leval, Katzmann)

The defendant argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) overruled *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The Second Circuit disagreed, noting that they had recently rejected that very argument in *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir. 2001).

United States v. Mejia-Vasquez, ___F.3d___ [2001 WL 792351; July 6, 2001]
(Summary Order; Jacobs, Parker, Sotomayor)

Upon defendant's plea to one count of entering the United States after having been deported in violation of 8 U.S.C. §1326(a), the court sentenced defendant to 77 months imprisonment, a term above the statutory maximum, based upon the finding that defendant had committed an aggravated felony prior to deportation. That fact, however, was not charged in the indictment. The Second Circuit rejected defendant's argument that *Apprendi* overruled *Almendarez-Torres*, citing reasons stated in *Unites v. Latorre-Benavides*. It was irrelevant that the defendant did not admit in his plea allocution to having committed an aggravated felony prior to deportation. Furthermore, the Second Circuit noted that a court may base factual findings for sentencing purposes on "any information known to it" (citing *United States v. Franklyn,* 157 F.3d 90, 97 [2d Cir. 1998]).

United States v. Newell, 242 F.3d 369 [2001 WL 30650; Jan. 10, 2001]
(Summary Order; Cardamone, Parker, Katzmann)

Defendant argued that his sentence of 77 months for illegal reentry violated the ex post facto clause because it was greater than the statutory maximum in effect before September 1994, when the maximum penalty was increased from five to ten years. Because defendant was found in the United States in December, 1994, the Second Circuit held that he was properly sentenced under the ten year statutory maximum provision. Defendant argued that because he reentered in November 1992 and used an invalid alien registration card to reenter, the INS had notice of his presence and therefore his offense was completed at that time and thus prior to the increase in the statutory maximum. The Second Circuit disagreed, stating that although the INS had notice of his presence, it did not have notice of the illegality of that presence.

United States v. Perez, ___F.3d____ [2001 WL 300530; March 28, 2001]
(Summary Order; Feinberg, Newman, Sack)

Defendant argued that under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the language of 8 U.S.C. § 1326(b), which authorizes a prison term of up to 20 years for a person whose deportation was subsequent to a conviction of an aggravated felony, must be construed as setting out an offense distinct from that set out in § 1326(a), which does not mention prior convictions and limits the term of imprisonment to two years. As defendant's indictment did not allege his prior conviction, defendant argued that it set forth only the elements of § 1326(a), and thus he should not have been sentenced to more than two years. Following *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Second

Circuit stated that § 1326(b) does not set out a separate offense but rather is a penalty provision with respect to a violation of § 1326(a).

§ 2R1.1: Antitrust Offenses

United States v. SKW Metals & Alloys, ___F.3d____ [2001 WL 273824; March 20, 2001]
(Summary Order: Jacobs, Calabresi, Jones)

Upon remand, the district court ordered supplemental briefing and ultimately re-imposed the same sentence. On appeal, the government argued that the sentence was inconsistent with the mandate of the Second Circuit's initial order. The Second Circuit found no inconsistency. Further, the Court held that the government had failed on remand to satisfy its burden of proving which sales were affected during the relevant period.

§ 2S1.1: Money Laundering

United States v. Sabbeth, ___ F.3d ___ [2001 WL _____; August 21, 2001]
(Cabranes Opinion; Walker, Straub)

Defendant argued that his money-laundering offense was "atypical" within the meaning of Appendix A to the 1998 version of the Guidelines, and that therefore his sentence should have been determined by the fraud guideline, rather than the money-laundering guideline. The Second Circuit held that, considering defendant used false social security numbers to funnel fraud proceeds through two bogus accounts, and structured his transactions so as to circumvent currency reporting requirements, his conduct was not atypical. The Second Circuit alluded to the fact that defendant's money-laundering activity consisted of a series of financial transactions completely separate from the bankruptcy fraud with which defendant was charged. Therefore, application of the money-laundering guideline was proper.

United States v. Korman, ___F.3d ____[2001 WL 699076; June 19, 2001]
(Summary Order; Van Graafeiland, Kearse, Seybert]

Defendant argued that the district court improperly applied U.S.S.G. §2S1.1 (by grouping his money-laundering offenses separately from his fraud offenses) because the laundered funds did not conceal moneys derived from narcotics trafficking or organized crime. The Second Circuit rejected defendant's argument, and clearly stated that § 2S1.1 is not limited to the proceeds derived from those crimes. The Second Circuit held that the district court was correct in characterizing defendant's scheme as one designed to "handle th[e] stolen money in such a way as to conceal what really happened to it," warranting the application of the money laundering guidelines.

United States v. Miller, ___F.3d____ [2001 WL 300536; March 23, 2001]
(Summary Order; Sotomayor, Katzmann, Chin)

Defendant argued that because his money laundering conduct was "atypical," the district court erred in not sentencing him in accordance with a more lenient guideline, such as smuggling or fraud. Defendant relied on *United States v. Smith*, 186 F.3d 290 (3d Cir. 1999) which instructs a district court to consider whether the designated guideline applies or whether the conduct is "atypical," and if so, to decide which guideline is more appropriate. The Court declined to consider defendant's arguments because there was no indication that the district court was unaware of its authority to depart, and further, it was clear that defendant's conduct fell within the "heartland" of the money laundering guideline.

United States v. Opran, _____ F.3d _____ [2001 WL 138274; Feb. 16, 2001]
(Summary Order; Jacobs, Sotomayor, Cote)

Defendant argued that because his money laundering conduct was "atypical," the district court erred in not sentencing him in accordance with the more lenient fraud guideline, § 2F1.1. Defendant relied on *United States v. Smith*, 186 F.3d 290 (3d Cir. 1999) which instructs a district court to consider whether the designated guideline applies or whether the conduct is "atypical," and if so, to decide which guideline is more appropriate. However, the Sentencing Commission characterized *Smith* as the result of "confusion," and amended the Guidelines to remove the word "atypical." The Second Circuit declined to adopt the *Smith* approach. Further, the Court noted that the sentencing judge found that the money laundering was integral to the overall scheme and not incidental to it and therefore the money laundering guideline was the appropriate one.

§ 2X3.1: Accessory After the Fact

United States v. Ortiz, 242 F.3d 369 [2001 WL 11049; Jan. 4, 2001]
(Summary Order; Oakes, Jacobs, Parker)

Defendant argued that the district court adopted a high guidelines range when sentencing him as an accessory pursuant to U.S.S.G. § 2X3.1. Under that guideline, the offense level shall not be more than level 20 if the defendant's conduct was limited to harboring a fugitive. Since the defendant failed to object to the presentence report or raise an objection at the sentencing hearing, his claim was deemed waived. Further, the Second Circuit held that the district court did not commit plain error in determining that the defendant's conduct exceeded mere harboring.

ADJUSTMENTS

§ 3A1.1: Vulnerable Victim

United States v. Boyd, 242 F.3d 368 [2001 WL 40781; Jan. 16, 2001]
(Summary Order; Feinberg; Sotomayor; Haight)

The Second Circuit affirmed the district court's imposition of a vulnerable victim upward adjustment pursuant to U.S.S.G. § 3A1.1 based on a scheme in which the defendants targeted numerous victims who had made earlier purchases, and thus had a "track record" for falling for fraudulent schemes. The district court also imposed the adjustment based on the defendants' attempts to sell to the victims whenever the victims wanted to get out of the market.

§ 3B1.1: Aggravating Role

United States v. Bonilla, ___F.3d___[2001 WL 792179; July 11, 2001)
(Summary Order; Miner, Leval, Rakoff)

The Second Circuit rejected the argument that the sentencing court abused its discretion by determining, without considering the defendant's psychologically dependent mental state, that she had acted in the capacity of manager or supervisor. Further, the Second Circuit relied on the district court's determination that the abuse that defendant had suffered at the hands of her husband had no bearing on her role in the conspiracy.

United States v. Cambrelen, ___F.3d____ [2001 WL 219285; March 6, 2001]
(Summary Order; Oakes, Kearse, Korman)

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. The district court found that the defendant received tips as to what drug dealer was "ripe for robbing," supplied vehicles and guns used by the robbery crew and sold the drugs stolen by the crew. Further, there was evidence that the defendant was referred to as the leader of the crew by other members.

United States v. Kissoon, ___F.3d____ [2001 WL 253070; March 13, 2001]
(Summary Order; Walker, Oakes, Pooler)

Defendant argued that the district court failed to make findings on the record in support of a two-level upward adjustment for being a leader of the cocaine conspiracy, and, in any event, that the evidence did not support the adjustment. The Second Circuit disagreed. While recognizing that the district court's findings consisted only of an "oblique" reference to the defendant's directing the conduct of others in the conspiracy, the Court also found that the record contained strong evidence of the defendant's role in the offense and, thus, saw "no point in remanding the case to the district court solely to make rote findings of fact."

United States v. Provenzano, 242 F.3d 369 [2001 WL 15609; Jan. 8, 2001]
(Summary Order; McLaughlin, Sack, Chatigny)

The district court's finding were sufficient to support a 4 level upward adjustment in the offense level for a leadership role in the offense pursuant to U.S.S.G. § 3B1.1. The district court found that the defendant introduced the members of the scheme to one another and coordinated the criminal relationship between them, that he arranged the details of the extortion payments and that he actively

ensured that the payments would continue. The defendant also twice stated in his allocution that he had directed another individual to make payments.

United States v. Rosario, ___F.3d____ [2001 WL 224071; March 7, 2001]
(Summary Order; Kearse, McLaughlin, Straub)

The Second Circuit upheld a three-level adjustment in defendant's offense level pursuant to U.S.S.G. § 3B1.1 on the basis that he was a leader of a car theft ring and supervised five or more participants. The Court noted that the defendant's counsel conceded in a pre-sentencing letter to the court that there were more than five persons involved in the auto theft conspiracy. There was also evidence that the defendant acted as a teacher, directed other members, and handled financial arrangements on behalf of the conspiracy.

§ 3B1.2: Mitigating Role

United States v. Carpenter, 252 F.3d 230 [June 8, 2001]
(Meskill Opinion; Leval, Calabresi]

The Second Circuit held that it was improper for the district court to grant a three-level mitigating role adjustment pursuant to U.S.S.G. §3B1.2, based solely upon the relative culpability of the defendant and his co-conspirator. Rather, the district court should have compared the role of the defendant to the average participant in a similar criminal venture. The Second Circuit noted that the defendant possessed an intimate knowledge or understanding of the scope and structure of the enterprise for which he pleaded guilty. The Second Circuit also stated that even though the illegally-obtained firearms were not used for unlawful purposes, he still played a central role in the theft and resale of the firearms, which was sufficient to preclude a 3B1.2 mitigating role adjustment.

United States v Bonilla, ___F.3d___ [2001 WL 792179; July 11, 2001]

The Second Circuit rejected defendant's argument that the evidence did not support a finding of his awareness of 30 kilos and that the evidence required a minor role adjustment. The information provided during the safety valve proffer, along with other information, showed defendant's awareness of the scope of the conspiracy. The court noted that Application note 7 to U.S.S.G. §5C1.2 explicitly states that the information provided by a defendant in a safety valve proffer may be considered in determining the applicable guideline range.

United States v. Fuller, ___F.3d____ [2001 WL 224072; March 7, 2001]
(Summary Order; Kearse, McLaughlin, Straub)

The Second Circuit rejected without discussion defendant's contention that he was entitled to a downward adjustment for a minimal role in a stolen car conspiracy. The Court merely stated, "[s]tealing the cars for such an operation is hardly a minimal role."

United States v Miceli, _____F.3d _____[2001 WL 363504; April 12, 2001]
(Summary Order: Kearse, Cabranes, Katzmann)

The Second Circuit rejected defendant's argument that she was entitled to a minor role adjustment, since she was part-owner of the corporation that was subject of the investigation, took an active role in the finances and was not a passive, but a major, participant.

United States v. Nachamie, ___F.3d____ [2001 WL 266349; March 19, 2001]
(Summary Order; Straub, Pooler, Mukasey)

The Second Circuit rejected, without discussion, the defendant's argument that the district court erred in refusing to grant a mitigating role adjustment.

United States v. Santiago, 242 F.3d 369 [2001 WL 30531; Jan. 12, 2001]
(Summary Order; Meskill, Leval, Calabresi)

The Second Circuit found no error in the district court's denial of a two-level reduction as a minor participant under U.S.S.G. § 3B1.2(b). The defendant extensively participated in the offense; agreed to supply 550 grams of crack cocaine for $11,000; solicited a supplier and recruited a courier; and gave instructions for method of the exchange of drugs for money.

United States v Miceli, _____F.3d _____[2001 WL 363504; April 12, 2001]
(Summary Order: Kearse, Cabranes, Katzmann)

The Second Circuit rejected defendant's argument that she was entitled to a minor role adjustment, since she was part-owner of the corporation that was subject of the investigation, took an active role in the finances and was not a passive, but a major, participant.

§ 3B1.3: Abuse of Trust

United States v. Hirsch, 239 F.3d 222 [Jan. 17, 2001]
(Sack opinion; joined by McLaughlin, Chatigny)

The Second Circuit distinguished defendant's case from *United States v. Jolly*, 102 F.3d 46 (2d Cir. 1996), where the Court had reversed an enhancement for abuse of trust. Unlike that case, this defendant conceded that there was a fiduciary relationship between him and his investors and that he was an investment advisor who acted on behalf of hundreds of investors and, consequently, was "in a position of trust at all times." The district court also found that the defendant developed personal relationships with his clients, who in turn relied upon and trusted him. The Second Circuit held that the defendant used the victims' trust in him to facilitate his crime and thus the adjustment was not clearly erroneous.

United States v. Hussey, ___ F.3d ___ [2001 WL 699015; June 21, 2001]
(Per Curiam: Cabranes, Straub, Sack)

The Second Circuit held that a two-level sentencing enhancement for "abuse of [a] position of trust" within the meaning of U.S.S.G. §3B1.3, was proper where defendants falsely represented themselves to be licensed stockbrokers and received commissions that were never disclosed to investors, in connection with a plan to sell stock in a private company in which they had an ownership interest. Based on *United States v. Echevarria,* 33 F.3d 175 (2d Cir. 1994), the defendants argued that § 3B1.3 was inapplicable because they did not "legitimately hold" positions of trust. Distinguishing *Echevarria*, the Second Circuit noted that victims in the instant case were under an impression that defendants were acting as their fiduciaries and, therefore, entrusted them with discretionary authority. This enabled defendants to commit "difficult to detect wrongs." In addition, the two-level enhancement here did not duplicate the punishment for the underlying offenses of conviction. From the perspective of defendants' victims, defendants were legitimate stockbrokers and appeared to occupy a fiduciary-like relationship, thereby supporting the adjustment.

§ 3C1.1: Obstruction of Justice

United States v Juncal, ____F.3d ____[2001 WL 314615; April 2, 2001]
(Winter opinion; joined by Cardamone, Pooler)

Based upon defendant's allegation that his guilty plea was "coerced" by his attorney, the district court concluded that he had obstructed justice, warranting the two-level adjustment. The Second Circuit, however, held that the defendant did not intend to commit perjury by using the term "coercion," but only meant to convey that he was "frightened," "pressured" and "under duress." Accordingly, the court concluded that the enhancement was unjustified.

United States v. McLeod, ____ F.3d ____[2001 WL 533353; May 21, 2001]
(Newman Opinion; Cabranes, Underhill)

Based upon the trial judge's findings that the defendant had repeatedly lied at the sentencing hearing in an attempt to disclaim responsibility for fraudulent returns uncovered in a civil audit, the Second Circuit upheld the enhancement for obstruction of justice.

United States v. White, 240 F.3d 127 [Feb. 13, 2001]
(Katzmann opinion; joined by Sack, Sotomayor)

The Second Circuit upheld the district court's two-level adjustment for obstruction of justice where the defendant had told a co-defendant, at the time of their arrest, to tell the police that the drugs were hers. Defendant argued that because he admitted shortly thereafter that the drugs were his, he did not wilfully attempt to obstruct justice.

United States v. Woodard, 239 F.3d 159 [Feb. 1, 2001]
(Jacobs opinion; joined by Leval, Katzmann)

The Second Circuit held that the district court failed to make sufficient findings that the defendant left the jurisdiction with the intent to miss a court appearance or otherwise obstruct justice and, consequently, the two-level adjustment pursuant to U.S.S.G. § 3C1.1 was inappropriate. Although the district court found that the defendant knowingly and willful left the jurisdiction while out on bail, the defendant did not miss any court appearances. Nnor was there any evidence that his absence prevented the government's prosecution of the defendant or another individual about whom the defendant was providing information to the government.

United States v Ben-Shimon, _____F.3d _____[2001 WL 460298; May 2, 2001]
(Per Curiam; Jacobs, Calabresi, Arterton)

On appeal, the defendant claimed that the district court failed to make all the necessary findings under *United States v Dunnigan,* 507 U.S. 87 [1993], in order to support an enhancement for obstruction of justice. Although it remains open whether a district court's adoption of the PSR findings is sufficient to discharge its duties under *Dunnigan*, the Second Circuit found that the PSR findings in this case were wholly insufficient anyway. Accordingly, the court remanded for further findings.

United States v. Carty, ___ F.3d ___ [2001 WL 1012256; September 5, 2001]
(Per Curiam: Miner, Jacobs, Calabresi)

While on bail, following his guilty plea, defendant fled to the Dominican Republic, claiming that he was visiting an ill family member. Following failed attempts of DEA agents to procure his return, defendant was extradited to the United States. The district judge enhanced defendant's sentence for obstruction of justice. Defendant argued that this was improper because the district court did not make a determination that defendant had the "specific intent to obstruct justice." The Second Circuit disagreed, and declined to disturb the sentencing court's determination that the defendant fled to and remained in the Dominican Republic in order to avoid sentencing.

United States v. Hussey, ___ F.3d ___ [2001 WL 699015; June 21, 2001]
(Summary Order: Cabranes, Straub, Sack)

The Second Circuit rejected defendants' argument that the district court erred in enhancing their sentences two levels for obstruction of justice. Specifically, the district court found that one defendant had testified falsely about a material element of his offense, and that another defendant had intentionally induced others to testify falsely on his behalf about a material element of his offense. Under these circumstances, a two level enhancement for obstruction of justice was fully warranted.

United States v. Mendoza, ___ F.3d ___ [2001 WL 699111; June 19, 2001]
(Summary Order; Kearse, Straub, Sack)

The Second Circuit rejected the defendant's argument that the district court erred in enhancing his sentence for obstruction of justice based on his knowing, material, and false statements in an affidavit, submitted in support of a motion to suppress a firearm. Based on the PSR, the court properly concluded that the defendant had falsely denied removing the gun from his waistband and discarding it. The Second Circuit also noted that the Guidelines allow the court to impose the obstruction enhancement for both successful and unsuccessful obstructions.

United States v Miceli, _____F.3d _____[2001 WL 363504; April 12, 2001]
(Summary Order: Kearse, Cabranes, Katzmann)

The Second Circuit found no basis for reversing the district court's finding, by clear and convincing evidence, that the defendant gave false testimony concerning a material matter, and did so intentionally, rather than due to confusion, mistake or faulty memory. Thus, the obstruction enhancement was proper.

United States v. Mocombe, ___F.3d____ [2001 WL 138242; Feb. 16, 2001]
(Summary Order; Sotomayor, Cote)

Defendant argued that because he was not counseled properly before taking the stand, he was forced to perjure himself, and thus was exposed to an upward adjustment for perjury. The Second Circuit found that the adjustment was proper. Regardless of whether the defendant had been inadequately prepared before testifying, he was aware of his obligation to tell the truth.

United States v. Nelson, ___F.3d____ [2001 WL 290199; March 23, 2001]
(Summary Order; Cardamone, Leval, Amon)

The Second Circuit rejected defendant's argument that the district court erred in upwardly adjusting his offense level for obstruction of justice. The Court found that there was adequate evidence of obstruction, including testimony that the defendant had asked a confederate to sign a false affidavit and wrote letters urging him not to cooperate with the authorities.

United States v. Provenzano, 242 F.3d 369 [2001 WL 15609; Jan. 8, 2001]
(Summary Order; McLaughlin, Sack, Chatigny)

Defendant argued that the district court's imposition of a two-level increase for obstruction of justice constituted impermissible double counting because the basis for the adjustment was the offense for which he was convicted, *i.e.*, the destruction of evidence and witness tampering. The Second Circuit held that defendant's sentence was governed by Application Note 8 to § 3C1.1 which applies when a defendant is convicted of both an obstruction offense and the underlying offense with respect to which the obstruction occurred. Under that provision, the counts for the obstruction offense and the underlying offense should be grouped under § 3D1.2, and thus no impermissible double counting

occurs.

United States v. Sencion, 242 F.3d 369 [2001 WL 46479; Jan. 18, 2001]
(Summary Order; Kearse, Jacobs, Cabranes)

Defendant argued that the district court improperly conflated the issues of willfulness and materiality in its determination to impose an upward adjustment for obstruction of justice. In a motion to suppress narcotic found in his bag, defendant submitted an affidavit stating, "an agent opened and searched my bag without my permission." The district court, after a hearing, determined that the defendant consented to the search and thus determined that defendant's false denial that he had given permission was willful and material. The Second Circuit affirmed.

United States v. Shapiro, 242 F.3d 369 [2001 WL 51034; Jan. 23, 2001]
(Summary Order; Van Graafeiland, Newman, Leval)

The Second Circuit affirmed, without discussion, the district court's imposition of an upward adjustment for obstruction of justice based on perjury.

§ 3D1.2: Grouping

United States v Percan, ____F.3d ____[2001 WL 468115; May 3, 2001]
(Calabresi opinion; joined by Van Graafeiland; Winter concurs separately)

Defendant argued that, because the money laundering in his case involved the promotion of the fraud, as opposed to the concealment of the fraud, the counts should have been grouped, as an exception to *United States v Napoli,* 179 F.3d 1 [2nd Cir. 1999]). The Second Circuit rejected the distinction. Further, the court found that, on these facts, the crimes were not so highly interwoven as to indicate that the victims of the crimes were the same for grouping purposes.

United States v. Sabbeth, ___ F.3d ___ [2001 WL 945853; August 21, 2001]
(Cabranes Opinion; Walker, Straub)

The district court declined to group defendant's money-laundering and bankruptcy-fraud counts under U.S.S.G. §3D1.2, resulting in a sentencing range of 97 to 121 months, instead of 87 to 108 months. Relying on *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), the defendant argued that those counts should have been grouped under U.S.S.G. §3D1.2(b), because the money laundering was "highly interwoven into [the] fraud scheme." Distinguishing *Napoli*, the Second Circuit stated that fraud and money laundering generally should not be grouped together, because fraud harms the person defrauded while money-laundering harms society at large.

§ 3E1.1: Acceptance of Responsibility

United States v. Hirsch, 239 F.3d 222 [Jan. 17, 2001]
(Sack opinion; joined by McLaughlin, Chatigny)

The Second Circuit affirmed the district court's decision not to impose a downward adjustment for acceptance of responsibility, noting that the defendant was not entitled to such an adjustment as of right merely for entering a guilty plea. Further, the defendant had attempted to withdraw his plea, which is a well-established, though not automatic, ground for denying the adjustment. The Court stated that "the record shows that [the defendant] has resisted admitting guilt at every step in the process."

United States v. McLeod, ___ F.3d ____[2001 WL 533353; May 21, 2001]
(Newman Opinion; Cabranes, Underhill)

The Second Circuit affirmed the denial of a credit for acceptance of responsibility to the defendant, who had received an enhancement for obstruction of justice. The court noted that the acceptance of responsibility credit, in such a situation, is available only in "extraordinary circumstances."

United States v Sewell, 252 F.3d 647 [June 11, 2001]
(Pooler Opinion; Jacobs, Straub)

In a prosecution under 18 U.S.C.S. § 2113(a), a general intent crime, defendant argued that his case fell within the exception to the rule that a sentence reduction pursuant to U.S.S.G. § 3E1.1 is generally not reserved for a defendant who puts the government to its burden of proof at trial by denying the essential elements of guilt. Specifically, defendant challenged the pre-trial exclusion of evidence relating to his intoxication during the alleged commission of the crime. The Second Circuit affirmed, finding that the district court did not commit clear error in concluding that defendant's legal challenges essentially amounted to a denial of an essential factual element of guilt. Without resolving whether a sentencing reduction might be available where a defendant asserts that his *mens rea* was insufficient to establish factual guilt, the Second Circuit relied on the district court's factual conclusion that defendant was not "totally candid" about the circumstances of the crime and his responsibility for his actions.

United States v Bermudez, _____F.3d _____[2001 WL 409442; April 20, 2001]
(Summary Order; Miner, Sack, Raggi)

The Second Circuit summarily rejected defendant's argument that the court failed to rule on his motion for an acceptance of responsibility adjustment. The finding that defendant had obstructed justice implicitly contained a finding that he was not entitled to a credit for acceptance of responsibility. Further, the court's ruling that defendant had dealt more drugs than he had claimed, in effect, rejected the motion for acceptance of responsibility.

United States v. Boyd, 242 F.3d 368 [2001 WL 40781; Jan. 16, 2001]
(Summary Order; Feinberg; Sotomayor; Haight)

The district court's determination not to grant the defendant a downward adjustment for acceptance of responsibility was based on his refusal to surrender and his decision to become a fugitive and spend $500,000 of the victims' money until arrested two years after the date of the indictment, all after initially engaging in negotiations to surrender. The Second Circuit affirmed the district court's decision, noting that the defendant was not entitled to such an adjustment as of right merely for entering a guilty plea.

United States v. Crown, ___ F.3d ___ [2001 WL 682289; June 18, 2001]
(Summary Order; Cardamone, Parker, Spatt)

Defendant was convicted of one count of illegally reentering the United States after having been deported subsequent to an aggravated felony conviction, in violation of 8 U.S.C. §1326(a) and (b)(2). Without elaboration, the Second Circuit held that the district court's determination to not grant an acceptance of responsibility reduction was "not without foundation," and affirmed defendant's conviction.

United States v. Darling, 242 F.3d 368 [2001 WL 30664; Jan. 11, 2001]
(Summary Order; Feinberg; Sotomayor; Katzmann)

Defendant argued that the district court erred by denying an acceptance of responsibility downward adjustment because, just prior to sentencing, he had been arrested in Virginia. Defendant argued that the district court should have followed the Sixth Circuit's minority rule that criminal conduct unrelated to the underlying offense is irrelevant to a determination of acceptance of responsibility. The Second Circuit disagreed, holding that if a defendant commits a second crime while awaiting sentence for the underlying offense, that is relevant and can be considered in denying an acceptance of responsibility adjustment. The Court further found meritless the defendant's argument that the district court failed to make specific factual findings in support of its denial. The record showed that the district court explicitly adopted the factual findings of the PSR.

United States v. Diconstanza, ___ F.3d ___ [2001 WL 1168324; September 28, 2001]
(Summary Order: Walker, Leval, Sotomayor)

After defendant Bloome pled guilty by way of a Rule 11(e)(1)(C) agreement, the district court sentenced him to 108 months' imprisonment, followed by three years' supervised release. Defendant challenged his sentence, arguing, *inter alia*, that the district court should have granted him a credit for acceptance of responsibility under U.S.S.G. §3E1.1(b)(2). The Second Circuit, however, construed the plea agreement's provision that "...the [United States Attorney's] Office and the defendant agree that a *specific* sentence of [108 months] is the appropriate disposition of the case (emphasis added)" to mean that the sentence actually imposed was the exact sentence for which the defendant bargained. Accordingly, the court held that the district judge was bound by the terms of the plea agreement.

United States v. Hussey, ___ F.3d ___ [2001 WL 699015; June 21, 2001]
(Summary Order: Cabranes, Straub, Sack)

Defendant Zitkevitz argued that the district court improperly denied him a three-point reduction for acceptance of responsibility. The Second Circuit rejected this argument, based on defendant's persistent refusal to acknowledge his complete role in the offense and attempts to shift blame to others.

United States v. Ortiz, 242 F.3d 369 [2001 WL 11049; Jan. 4, 2001]
(Summary Order: Oakes, Jacobs, Parker)

The Second Circuit affirmed the district court's refusal to grant a reduction for acceptance of responsibility. Although the defendant pled guilty, he continued to maintain that: he was not a member of the gang that had been charged with various crimes; he never sold narcotics on the gang territory; he did not receive substantial profits from the conspiracy; and that the government informants were lying.

United States v. Parker,___F.3d____ [2001 WL 290087; March 23, 2001]
(Summary Order; Cardamone, Leval, Katzmann)

The Second Circuit upheld the district court's denial of a reduction for acceptance of responsibility despite the court's indication, at the time of defendant's plea, that it was likely to grant the reduction. The Second Circuit found that the district court "never made a commitment" to the reduction.

United States v. Provenzano, 242 F.3d 369 [2001 WL 15609; Jan. 8, 2001]
(Summary Order; McLaughlin, Sack, Chatigny)

Because the defendant waived his right to appeal, the Second Circuit refused to address the merits of his argument that he should have been granted an additional one-level reduction of his offense level for timely notification of his intention to enter a guilty plea.

United States v. Ruttner, ___F.3d____ [2001 WL 138308; Feb. 16, 2001]
(Summary Order; Van Graafeiland, Calabresi, Sotomayor)

The Second Circuit held that the district court abused its discretion by granting an adjustment for acceptance of responsibility. A letter submitted on behalf of the defendant by a rabbi did not reflect acceptance of responsibility that was "extraordinary." The Court noted that there was nothing unusual about a criminal defendant expressing serious contrition "as the proverbial day of reckoning nears." Accordingly, the court remanded for resentencing.

United States v Wobo, _____F.3d _____[2001 WL 431488; April 27, 2001]
(Summary Order; Leval, Sack, Sotomayor)

The Second Circuit rejected the defendant's contention that the court abused its discretion in

denying him a credit for acceptance of responsibility. The court noted that the defendant lied to his probation officer regarding the extent of his responsibility.

CRIMINAL HISTORY

§ 4A1.1: Criminal History Category

United States v. Caminero, _____ F.3d _____ [2001 WL 266310; March 19, 2001]
(Summary Order; Walker, Oakes, Parker)

The defendant argued, and the government conceded, that the criminal history category used was erroneous. Both the PSR and the court treated defendant's offense as committed on the date he "reentered" the United States, rather than the date he was "found" in the United States, the specific offense of which he was convicted. Using the wrong date, the sentencing court adjusted his criminal history category under U.S.S.G. § 4A1.1(d) for having committed the offense while on supervised release, and under § 4A1.1(e) for having committed the offense within two years after his release from custody. Since neither applied to the correct date, the defendant should not have received either adjustment, and thus his criminal history category should have been IV instead of V.

United States v. Kolawole, 242 F.3d 368 [2001 WL 40575; Jan. 17, 2001]
(Summary Order; Kearse, Jacobs, Cabranes)

The defendant argued that, in determining that his range was 6-12 months, the district court erroneously relied on hearsay statements to decide upon his criminal history category. Excluding those statements, the defendant maintained the proper range was 4 to 10 months. The district court, however, sentenced defendant to 10 months and indicated that the sentence would have been the same even if defendant's view of the guideline range. The Second Circuit affirmed the sentence because the sentence would have been the same under either guideline range, and because the sentencing judge is permitted to consider hearsay evidence, so long as it is determined to be reliable.

United States v Lowe, ___ F.3d ___ [2001 WL 900209; June 29, 2001]
(Summary Order; Winter, Katzmann, Hodges)

Defendant was sentenced to 57 months imprisonment following his guilty plea for illegally reentering the United States following deportation, in violation of 8 U.S.C. §1326. Defendant argued that the district judge's decision to impose a two-level "horizontal" departure from Criminal History Category I to Criminal History Category III was objectively unreasonable. Rejecting the defendant's argument, the Second Circuit reasoned that the district judge had based the departure on the defendant's attendant substantive criminal acts that he committed while in the United States, in addition to his prior illegal entries. Furthermore, the district judge acted reasonably in deciding that Criminal History Category II did not adequately reflect the seriousness of the defendant's record or the likelihood of recidivism, as this was the third time that the defendant illegally entered the United States

and then committed a crime.

§ 4A1.2: Computing Criminal History

*United States v Cox,*___F.3d___[2001 WL 314585; March 28, 2001]
(Straub opinion: joined by Pooler, Sack)

In light of the dismissal of defendant's state conviction, he was entitled to a review of his federal sentence, which was enhanced on account of that prior conviction. The Second Circuit rejected the government's claim that the defendant was required to raise this claim pursuant to a § 2255 petition. The court observed that the government conceded that the case could be remanded to the district court in order to supplement the record.

United States v. Nelson, ___F.3d____ [2001 WL 290199; March 23, 2001]
(Summary Order; Cardamone, Leval, Amon)

Defendant argued that his two previous sentences which were separately counted in computing his criminal history category, should have been considered related and counted as one under § 4A1.2. Disagreeing, the Second Circuit found that there was no indication that the sentences were connected to each other other than the fact that they were imposed by the same court on the same day. The Court also rejected defendant's argument that the district failed to make factual findings, since the district court clearly indicated that it relied on and adopted the factual findings in the PSR.

§ 4A1.3: Adequacy of Criminal History Category

United States v. Mishoe, 241 F.3d 214 [Feb. 23, 2001]
(Newman opinion; joined by Cabranes, Straub)

The government appealed the district court's decision to depart "horizontally" to reduce the defendant's criminal history category ("CHC") from VI to V. The district court concluded that CHC VI over-represented the seriousness of his criminal history because all of his four prior offenses, as well as the instant offense, were street-level sales of narcotics. The Second Circuit interpreted the district court's reasoning to have adopted a special rule that prior offenses involving street-level sales permit a horizontal departure, and rejected such a general rule. The Court remanded, indicting that the district court would be entitled to consider a departure based on individualized consideratione of factors, rather than based upon any generalized rule.

United States v. Miller, ___ F.3d ___ [2001 WL _____; August 23, 2001]
(Per Curiam: Miner, Calabresi, Cabranes)

Defendant argued that the district court improperly relied on his prior arrest record in refusing to grant his departure on the ground that the career offender guideline over-represented his conduct, pursuant to U.S.S.G. § 4A1.3. Defendant noted that the policy statement expressly states that "a prior arrest record itself shall not be considered under § 4A1.3." The Second Circuit, however, held that

the district court's reliance on prior arrest records as a basis for refusing to depart downward does not constitute plain error, and that it was "not implausible" that the Sentencing Commission intended to prohibit the use of prior arrest records only in the context of upward departures.

United States v. Sherpa, ___ F.3d ___ [2001 WL 1025328; September 7, 2001]
(Per Curiam: Cabranes, Straub, Katzmann)

The Second Circuit rejected the defendant's argument that the district court possessed authority to depart by reducing his criminal history category. The court observed that § 4A1.3 permits upward departures when the criminal history category inadequately reflects the seriousness of his past criminal conduct, but does not contain any symmetrical provision for downward departures. Therefore, a departure below the lower limit of the criminal history range is inappropriate. The court also found that, since defendant was ineligible for safety valve treatment, his base offense level also could not be reduced.

United States v Farrah, ___ F.3d ___ [2001 WL 668493; June 12, 2001)
(Summary Order: McLaughlin, Cabranes, Cote)

Defendant argued that the district court erred in departing upward from Criminal History Category I to Category III, without explicitly considering Category II. The Second Circuit found that the court had fully and reasonably explained the departure, notwithstanding the lack of reference to Category II.

United States v. Omoruyi, ___F.3d___ [2001 WL 289968; March 23, 2001]
(Summary Order; Straub, Pooler, Sack)

Given the defendant's record of recidivism, which included thirteen arrests and six convictions, the Second Circuit found no error in an upward departure on the ground that his criminal history category did not adequately reflect his criminal history.

United States v. Parker, ___F.3d___ [2001 WL 290087; March 23, 2001]
(Summary Order; Cardamone, Leval, Katzmann)

Considering the defendant's extensive criminal record and the indication of likely recidivism, the Second Circuit found no error in an upward departure to increase his criminal history category.

United States v Tejeda-Campusano, _____F.3d ____[2001 WL 468137; May 1, 2001]
(Summary Order: Jacobs, Parker, Katzmann)

The district court's refusal to grant a downward departure, on the ground that the 16-level enhancement overstated his criminal past, was not reviewable since there was no suggestion in the record that the judge mistakenly believed he lacked the authority to depart as a matter of law.

§ 4B1.1: Career Offender

United States v. Cambrelen, ___F.3d____ [2001 WL 219285; March 6, 2001]
(Summary Order; Oakes, Kearse, Korman)

Defendant argued that he should be resentenced because the district court, in sentencing him to life imprisonment without parole on the basis of his record of convictions, failed to ask him whether he affirmed or denied his prior convictions. The Second Circuit disagreed since the defendant had failed to object at sentencing and had stipulated to his prior convictions at trial.

United States v. Moyhernandez, ___ F.3d ___ [2001 WL 1019392; September 6, 2001]
(Summary Order; Meskill, Winter, Straub)

Defendant argued that the district court improperly sentenced him in accordance with the career offender provisions of the guidelines, reasoning that, since his prior criminal history was not included in the indictment and the jury was not required to consider that fact, the sentence violated *Apprendi*. The Second Circuit rejected this argument, and stated that *Apprendi* did not apply for two reasons: First, the sentence imposed did not exceed the statutory maximum; second, *Apprendi* expressly exempted the fact of a prior conviction from its holding.

DETERMINING THE SENTENCE

§ 5C1.1: Imposing a Term of Imprisonment

United States v. Scarpa, ___F.3d _____ [2001 WL 194350; Feb. 26, 2001]
(Summary Order: Kearse, Leval, Katzmann)

The government appealed defendant's sentence, alleging that the district court had not granted the defendant a downward departure, but misapplied the Guidelines, and that a correct application of the Guidelines would have resulted in a sentence of some 90 years, instead of the sentence of some 40 years that the defendant received. While the sentencing transcript was ambiguous, the written judgment contained a check next to a box stating that "the Court makes a DOWNWARD DEPARTURE." At oral argument, the government conceded that it had not reviewed the written judgment prior to filing its cross-appeal and had not realized their oversight until the defendant pointed it out to them at oral argument. The Second Circuit affirmed.

§ 5C1.2: Safety Valve

United States v. Dejesus-Abad, ___ F.3d ___ [2001 WL 958070; August 23, 2001]
(Per Curiam: Walker, Jacobs, Larimer)

Defendant, who eventually received the benefit of the safety valve (18 U.S.C. §3553(f)), argued that the district court should have informed him of the potential sentence he could receive with the advent of the safety valve (70 – 87 months), rather than a sentencing range of 10 years to life

imprisonment. The Second Circuit disagreed, holding that a district court is not obligated by Federal Rule of Criminal Procedure 11(c)(1) to inform the defendant of the applicable guidelines sentencing range. Furthermore, determining whether a defendant qualifies for the safety valve at the time of plea would be tantamount to "guesswork".

United States v Bermudez, ____F.3d ____[2001 WL 409442; April 20, 2001]
(Summary Order; Miner, Sack, Raggi)

The Second Circuit summarily rejected defendant's argument that the court failed to rule on his motion for safety valve credit. The finding that defendant had obstructed justice implicitly contained a finding that he was not entitled to such a credit. Further, the court's ruling that defendant had dealt more drugs than he had claimed, in effect, rejected the motion for safety valve treatment.

§ 5D1.3: Supervised Release

United States v. Mendoza, ___F.3d _____ [2001 WL 179931; Feb. 21, 2001]
(Summary Order; Van Graafeiland, Calabresi, Sotomayor)

Because the five-year term of supervised release exceeded the three-year statutory maximum applicable to the defendant, the Second Circuit vacated and remanded for resentencing. Unless defendant's offenses of wire and mail fraud affected a "financial institution," his crimes were Class D felonies, *see* 18 U.S.C. § 3559, carrying a maximum supervised release term of three years. The government conceded that the investment firm from which the defendant fraudulently obtained funds was not a "financial institution" and that therefore the five-year term exceeded the three-year maximum.

§ 5E1.1: Restitution

United States v. Ben Zvi, 242 F.3d 89 [March 6, 2001]
(Walker opinion; joined by Marrero, concurrence by Van Graafeiland)

The Second Circuit upheld the district court's imposition of restitution in the amount of $6,624,512., rejecting defendant's arguments that the district court failed to make specific findings as to the identity of the underwriters of an insurance policy and the amount of money each lost, and that the defendant had limited financial resources.

United States v. Boyd, 239 F.3d 471 [Jan. 16, 2001]
(Per Curiam; Feinberg; Sotomayor; Haight)

Defendant argued that the district court's order of restitution under the Mandatory Victims Restitution Act ("MVRA") violated the Ex Post Facto clause because the conspiracy for which he was convicted began before, but ended after, the effective date of the MVRA. In a case of first impression, the Second Circuit held that a sentencing court may constitutionally apply the MVRA to orders of

restitution for defendants whose conspiracies began before, but ended after, the MVRA's effective date. In so holding, the Second Circuit joined the Seventh, Ninth, Tenth, and Eleventh Circuits.

United States v Kowalewski, ____F.3d ____[2001 WL 345142; April 5, 2001]
(Summary Order; McLaughlin, Straub, Korman)

As the government conceded, the district court improperly ordered that the payment schedule for the restitution order be set by the Probation Department. Because that is a judicial function, it may not be delegated to the probation office. The Second Circuit rejected, however, the defendant's claim that the district court had not considered all the mandatory factors in determining the amount of restitution.

United States v. Loudon, 242 F.3d 369 [2001 WL 50901; Jan. 23, 2001]
(Summary Order; Newman, Leval, Sack)

The defendant challenged the district court's order to sell his house in Ireland and apply the proceeds to the restitution balance. The Second Circuit found there order was not an abuse of discretion in view of the evidence that the proceeds of the defendant's frauds were invested in that house, that the defendant could not make restitution without selling the house, and that the defendant would be unable to live in that house during the three years he would be on supervised release.

United States v. Nachamie, _____F.3d _____ [2001 WL 266349; March 19, 2001]
(Summary Order; Straub, Pooler, Mukasey)

The Second Circuit rejected, without discussion, the defendant's argument that the district court abused its discretion in refusing to apportion restitution to reflect his relative culpability and gain.

United States v Popovic, ____F.3d ____[2001 WL 345146; April 5, 2001]
(Summary Order; Oakes, Straub, Kaplan)

Although the defendant failed to object to the amount of loss at the first sentencing hearing, she made such an objection when the matter was remanded so that the court could consider all the factors relevant to restitution. The Second Circuit held that the district court was obligated to regard the loss objection as timely and valid. For "when a sentence has been vacated, the defendant is placed in the same position as if he had never been sentenced." Accordingly, the court remanded again for a determination of loss.

§ **5E1.2**: Fines

United States v. Aregbeyen, _____ F.3d _____ [2001 WL 568114; May 25, 2001]
(Per Curiam: Feinberg, Oakes, Sotomayor)

The defendant argued that the district court abused its discretion in determining he was able to pay a fine, pursuant to U.S.S.G. § 5E1.2 (a), which was belied by the pre-sentence report and that

fact that he had been assigned counsel. The Second Circuit held that the defendant's indigence, once established, should be enough to compel a district court to exercise its discretion in favor of this exception to the fine requirement. Because the basis of the district court's finding was unclear, the Second Circuit remanded, noting that the defendant must be afforded an opportunity to present evidence of his inability to pay a fine.

United States v Lowe, ___ F.3d ___ [2001 WL 900209; June 29, 2001]
(Summary Order; Winter, Katzmann, Hodges)

Defendant argued that the district court erred in imposing a $5,000 fine. Disagreeing, the Second Circuit observed that the district court had expressly considered the defendant's financial constraints and found that he could pay part of the fine while in prison. The fact that he was represented by assigned counsel, though probative, was not detetminative.

§ 5G1.2: Multiple Counts

United States v. McLeod, ____ F.3d____ [2001 WL 533353; May 21, 2001]
(Newman Opinion; Cabranes, Underhill)

Pursuant to a plea agreement, defendant pled guilty to a five-count information. Count One charged assisting in the preparation of 46 fraudulent tax returns, in violation of 26 U.S.C. § 7206(2), and Counts Two through Five charged obstructing the administration of the tax laws with respect to one false tax return, in violation of 26 U.S.C. § 7212(a). All five counts carried a three-year statutory maximum. The Second Circuit affirmed defendant's sentence as modified, and explained the proper method for imposing sentences on multiple counts where the total punishment sought to be imposed by the sentencing judge exceeds the statutory maximum sentence on any one count. If the total punishment exceeds the highest statutory maximum on any count, the Guidelines require that the sentences run consecutively, to the extent necessary to achieve the total punishment. The Court reaffirmed that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is inapplicable to Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count.

United States v. White, 240 F.3d 127 [Feb. 13, 2001]
(Katzmann opinion; joined by Sack, Sotomayor)

The Second Circuit rejected defendant's argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) prohibited the district court's use of U.S.S.G. § 5G1.2(d) to run his sentences consecutively, on the ground that effectively increased his sentence based on facts not found to have been proven beyond a reasonable doubt by a jury. The Court said *Apprendi* was concerned with whether the sentencing court had exceeded the sentence for a particular court based on facts not found by a jury and that here, the district court did not exceed the maximum for any individual count.

The defendant also argued that the district court's comment at sentencing that it had "no leeway" to depart from the 240 year sentence it imposed indicated that it did not understand its authority to depart. The Second Circuit agreed and remanded for resentencing noting that

notwithstanding the apparent mandatory nature of § 5G1.2, a sentencing court may depart from the "stacking" provision of that section to impose concurrent sentences where the imposition of multiple stacked sentences based on similar conduct created an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission. *See United States v. Rahman*, 189 F.3d 88, 154-57 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).

United States v Vincente, ___F.3d___[2001 WL 431482; April 26, 2001]
(Summary Order; Winter, Straub, Pooler)

The Second Circuit rejected the defendant's argument that the district court failed to recognize its discretion to impose a partially concurrent sentence. In fact, the record showed that the court correctly assumed it had such discretion, but rejected that approach due to the heinous nature of the offense.

§ 5G1.3: Undischarged Sentence

United States v. Williams, 260 F.3d 160 [2001 WL _____; August 9, 2001]
(Walker Opinion; Pooler, Haden)

Defendant argued that the district court failed to credit him for time served on his state conviction in violation of U.S.S.G. §5 G1.3(b). Because the district court did not consider the state offense conduct in imposing defendant's federal sentence, however, the Second Circuit reasoned that the state offense conduct was not "fully taken into account." Thus, § 5G1.3(b) did not mandate that the federal sentence run concurrently with the state sentence.

United States v. Burgos, 242 F.3d 368 [2001 WL 55790; Jan. 23, 2001]
(Summary Order; Oakes, Jacobs, Parker)

At sentencing, the district court "recommend[ed]" that defendant's sentence "run concurrent to any state time" while the written judgment ordered that the sentences "shall run concurrently." Defendant claimed that the Bureau of Prisons improperly treated the district court's determination to be merely a recommendation and imposed the sentences consecutively. The Second Circuit refused to review the merits of defendant's appeal because he filed his notice of appeal six days after the deadline. The Court noted that the defendant may still seek relief through administrative means within the Bureau of Prisons, or under Federal Rule of Civil Procedure 36, which provides for the correction of errors in the record at any time.

United States v. Diconstanza, ___ F.3d ___ [2001 WL 1168324; September 28, 2001]
(Summary Order: Walker, Leval, Sotomayor)

In accordance with his plea agreement, the district court directed that defendant's sentence run concurrently with the undischarged portion of his state sentence, from the date his federal sentence was imposed. Defendant argued that the district court should have imposed his sentence to run concurrently with the entire term of imprisonment on his state sentence, in accordance with U.S.S.G.

§5G1.3(b). The Second Circuit rejected this argument, noting that defendant received the sentence for which he bargained.

United States v. Polanco-Coplin, ___F.3d ___ [2001 WL 290147; March 23, 2001]
(Summary Order: Leval, Sack, Raggi)

Defendant argued that the district court had discretion under § 5G1.3(c) to run his federal sentence fully concurrent with his undischarged state sentence by giving credit for six months he served on the state conviction prior to being transferred into federal custody, as described in this section's application note 2. The Second Circuit rejected defendant's argument, noting that note 2 applies to subsection (b) of this section. Further, the Court stated that it need not decide whether that note applies to subsection (c) because the district court indicated that would not apply note 2 in any event. The Court also rejected defendant's argument that the district court mistakenly believed that it could not depart as an alternative method of giving him credit for time served on this state sentence. The Court found no indication that the sentencing judge had any inclination to depart and further, that the there were no special circumstances justifying a downward departure.

United States v. Villanueva, ___F.3d___ [2001 WL 792221; July 11, 2001]
(Summary Order: Walker, Cabranes, Straub)

Defendant argued that the district court should have made his federal sentence of 540 months (following a guilty plea to counts of conspiracy to commit murder, attempted murder, and using a firearm in connection with a crime of violence) run concurrent with, rather than consecutive to, his state sentence of 4 ½ years for a narcotics conviction, which he was serving at the time of his federal sentencing. The Second Circuit held that §5G1.3(b) was inapplicable because the record indicated that defendant's state court conviction was not taken into account for purposes of determining his federal sentence. Thus, defendant's narcotics conviction was properly used to determine his Criminal History Category, rather than as a factor to determine his base offense level under § 5G1.3(b). The Second Circuit emphasized that the district court is entitled to a significant amount of discretion under § 5G1.3(c) to determine whether to make sentences concurrent or consecutive. Finally, the Second Circuit also held that the district court properly applied the Guidelines that were in effect at the time of the plea agreement (as of November 1, 1998), pursuant to the terms of the plea agreement.

§ 5K1.1: Substantial Assistance to Authorities

United States v. Benjelloun, ___ F.3d ___ [2001 WL 682275; June 13, 2001]
(Summary Order; McLaughlin, Pooler, Koeltl]

The Second Circuit rejected defendant's argument that the government acted in bad faith by not recommending a downward departure pursuant to U.S.S.G. §5K1, as provided by the plea agreement. The district court properly found that a hearing was not necessary, where the government provided reasons for refusing to move for a downward departure, and the defendant did not respond to these allegations.

United States v. Husenaj, ___ F.3d ___ [2001 WL 699080; June 19, 2001]
(Summary Order; Van Graafeiland, Kearse, Rakoff]

The Second Circuit held that the government's determination whether a defendant had sufficiently cooperated so as to warrant a § 5K1.1 motion was entitled to broad discretion. The Court accordingly rejected the defendant's argument that the government acted in bad faith in declining to make the motion. The Second Circuit relied on the fact that subsequent to entering the cooperation agreement, the defendant had repeatedly engaged in criminal activity.

United States v. Seid, ____ F.3d ____[2001 WL 533468; May 17, 2001]
(Summary Order; Straub, Pooler, Korman)

The defendant appealed his one year prison sentence for tax evasion pursuant to 26 U.S.C. § 7201, even though it was below the 15 - 21 month sentence mandated by the guideline for this offense. Defendant argued that, while the district court granted the government's motion for a downward departure pursuant to U.S.S.G. § 5K1.1, it would have departed to an even greater extent but for its material misapprehension of facts concerning his offense. The Second Circuit found affirmed the district court's judgment because the evidence was insufficient to establish that the district court labored under a material misapprehension of fact. Although the court relied on a factually incorrect statement of a government attorney regarding the defendant's attempts to pay his tax obligation, the magnitude of the mistake, when compared to that of the total amount at issue, rendered the misstatement immaterial.

United States v. Zayas ___ F.3d ___ [2001 WL 1020434; September 6, 2001]
(Summary Order; Meskill, Winter, Straub)

Defendant argued that the government acted in bad faith when it refused to move for a downward departure pursuant to U.S.S.G. §5K1.1., and that the district court erred by refusing to hold a factual hearing on the issue. Rejecting this claim, the Second Circuit held that the defendant failed to present evidence sufficient to make a threshold showing of bad faith.

§ 5K2.0: Downward Departures

Generally

United States v. Koczuk, _____ F.3d _____ [2001 WL 536624; May 21, 2001]
(Cabranes Opinion; Kearse, Katzmann)

The Second Circuit rejected the district court's downward departure following a conviction for illegally smuggling caviar into the United States under 18 U.S.C. § 545, 18 U.S.C. § 371, and 16 U.S.C. § 3372. With respect to one defendant, the district court applied a base offense level of six for offenses involving endangered fish, a two-level increase for pecuniary gain, a fifteen-level increase for the retail value of the smuggled caviar, a four-level enhancement for defendant's leadership role, and a two-level enhancement for obstruction of justice, resulting in a total adjusted offense level of

29, which yielded a sentencing range of 87 to 108 months.

The district court departed downward for three reasons: First, it concluded that a fifteen level enhancement based on the retail value of the smuggled goods "overstated the seriousness of the offense," because it could discern no resulting economic loss. Second, the district court found that the illegal importation of sturgeon fell outside the "heartland" of cases involving endangered species because the statutes at issue in the present case regulate, rather than prohibit, the importation of a class of wildlife. The court also noted that the defendant suffered from serious physical ailments. Thus, the court sentenced that defendant to 20 months imprisonment.

With regard to the first rationale, the Second Circuit held that the district court should not have evaluated the seriousness of the offenses by referring to economic loss. U.S.S.G. § 2Q2.1 requires a sentencing court to base the enhancement on the market value or the fair-market retail price of the endangered species involved, not on the economic loss caused by an offense. The fact that the enhancement provision required the use of the table in U.S.S.G. § 2F1.1 does not warrant the inference that the enhancement provision incorporated the concept of "loss" mentioned in U.S.S.G. § 2F1.1. By directing a sentencing court to use the market value of the endangered species, the Commission made the decision that this value was the best measure of the seriousness of the offense. The Second Circuit also rejected the district court's determination that this case qualified for an "outside the heartland" departure; for the court failed to analyze the particular facts of the defendant's case and compare them with those of other cases that typically fall within U.S.S.G. § 2Q2.1. A district court has no authority to determine whether a class of offenses should be placed in a particular guideline; rather, that determination is for Congress and the Sentencing Commission. Thus, the Second Circuit vacated the sentence, leaving open the possibility that other grounds for a departure might be appropriate.

United States v. Luna-Reynoso, ___ F.3d ___ [2001 WL 822333; July 20, 2001]
(Kearse Opinion; joined by Cabranes, Trager)

Defendant argued that the district court erred by not granting him a downward departure for the approximately 10 months he was held in federal custody between the date of his transfer from state custody and the date of his sentencing. The Second Circuit, however, stated that the district court did not possess the authority to do so. The Bureau of Prisons, rather than the sentencing court, determines when a sentence is deemed to "commence" within the meaning of 18 U.S.C. §3585.

United States v. Carty, ___ F.3d ___ [2001 WL 1012256]
(Per Curiam: Miner, Jacobs, Calabresi)

Following his guilty plea, defendant fled to the Dominican Republic, claiming that he was visiting an ill family member. Eventually, defendant was extradited to the United States for sentencing. Defendant argued that he was entitled to a downward departure based on the allegedly substandard conditions of his confinement in the Dominican Republic. The district court, though, stated that "under no circumstance" would defendant be entitled to a downward departure under the circumstances in this case. The Second Circuit agreed with defendant that the Sentencing Commission had not taken the conditions of a pre-sentence detainee's confinement into account in creating the

Guidelines. Accordingly, the Second Circuit held that pre-sentence confinement conditions may, under certain circumstances, provide an adequate basis for a downward departure.

United States v. Adams, ___ F.3d ___ [2001 WL 491652; May 8, 2001]
(Summary Order; Meskill, Kearse, McLaughlin)

The Second Circuit rejected the defendant's argument that his sentence of 46 months imprisonment for violating 21 U.S.C. §§ 841(a)(1) and 846 amounted to a violation of equal protection and due process, since it was longer than the sentence for his more culpable co-conspirators. The Second Circuit reasoned that a defendant has no constitutional or otherwise fundamental interest in whether a sentence reflects his or her relative culpability with respect to his or her co-defendants. The Second Circuit also rejected defendant's argument that the district court failed to consider his motion for a departure pursuant to U.S.S.G. § 5K2.0. Because the court neither made an error of law nor mistakenly believed that it lacked the authority to grant a requested departure, its refusal to depart was not appealable.

United States v Pirro, ____F.3d____[2001 WL 47647; May 4, 2001]
(Summary Order: McLaughlin, Calabresi, Pooler)

The court held that the judge's decision not to depart was unreviewable since there was no evidence that he misapprehended his authority to grant a departure. The judge's expression of frustration about the guidelines did not indicate a misapprehension of his departure authority.

United States v. Seethaler, ____ F.3d____ [2001 WL 491573; May 8, 2001]
(Summary Order; Kearse, Sack, Rakoff)

The Second Circuit dismissed the defendant's appeal for lack of appellate jurisdiction. The Court held that a district court's refusal to grant a downward departure is not reviewable except for an error of law, such as the court's mistaken belief that it has no authority to depart on the basis proffered. Here, the district court acknowledged its authority to grant a downward departure on the ground that the defendant had a significantly reduced mental capacity, but stated that the record did not support such a departure.

Additional cases where the court deemed the failure to depart unappealable, stating merely that the district court understood its authority to depart.

United States v Percan, ____F.3d____[2001 WL 468115; May 3, 2001]
(Calabresi opinion; joined by Van Graafeiland; Winter concurs separately)

United States v Sewell, 252 F.3d 647 [June 11, 2001]
(Pooler Opinion; Jacobs, Straub)

United States v. Benjelloun, ___ F.3d ___ [2001 WL 682275; June 13, 2001]
(Summary Order; McLaughlin, Pooler, Koeltl]

*United States v. Collins,*_____ F.3d_____ [2001 WL 194302; Feb. 26, 2001]
(Summary Order; Kearse, Leval, Katzmann)

United States v. Crown, ___ F.3d ___ [2001 WL 682289; June 18, 2001]
(Summary Order; Cardamone, Parker, Spatt)

United States v. Husenaj, ___ F.3d ___ [2001 WL 699080; June 19, 2001]
(Summary Order; Van Graafeiland, Kearse, Rakoff)

United States v Korman, ___F.3d___ [2001 WL 699076; June 19, 2001]
(Summary Order: Van Graafeiland, Kearse, Seybert)

United States v. Learner, ___ F.3d ___ [2001 WL 1168345; September 25, 2001]
(Summary Order: Meskill, Cabranes, Chin)

United State v Noguera, ___F.3d___ [2001 WL 699088; June 19, 2001]
(Summary Order: Van Graafeiland, Kearse, Seybert)

United States v. Osorio, ___ F.3d ___ [2001 WL _____994977; August 24, 2001]
(Summary Order: Miner, Calabresi, Cabranes)

United States v. Tiedeman, ___ F.3d ___ [2001 WL 830578; July 24, 2001]
(Summary Order: Cabranes, Pooler, Sack)

Aberrant Conduct

United States v. Ortiz,____ F.3d ____ [2001 WL 558174; May 22, 2001]
(Rakoff opinion; Oakes, Straub)

The Second Circuit held that a downward departure for "aberrant behavior" may not be applied to the enhancement for trial perjury required by U.S.S.G. § 3C1.1. The Court cited *United States v. Dunnigan*, 507 U.S. 87 (1993), for the proposition that a sentencing court is required, upon a proper determination that the accused has committed perjury at trial, to enhance the sentence imposed. The Second Circuit further held that under *Dunnigan*, the upward adjustment for obstruction of justice is addressed not to the underlying criminal conduct, but rather to attempts to interfere with the integrity of the truth-find process regarding that conduct.

United States v. Cabrera, ___F.3d____ [2001 WL 138256; Feb. 16, 2001]
(Summary Order; Van Graafeiland; Winter; Calabresi)

The district court's decision no to depart based on aberrant conduct was unappealable, since the guidelines were not misapplied and the court defendant not misunderstand its authority to depart.

United States v. Martinez, ___F.3d____ [2001 WL 179822; Feb. 20, 2001]
(Summary Order; Kearse, Leval, Katzmann)

In *United States v. Martinez*, 207 F.3d 133 (2d. Cir. 2000), the Second Circuit previously held that the district court had erroneously downwardly departed on the ground of aberrant conduct, reasoning that the prolonged, calculated and systematic nature of the defendant's activity (importation of cocaine on three occasions over a 13-month period) could not be considered aberrant. On remand, the district court declined to grant a downward departure. On appeal of that judgment, the defendant aargued that the district court was free to consider other bases for departure on remand. The Second Circuit disagreed, stating that they did not suggest that the court should consider any other basis for a departure.

United States v. Mocombe, ____F.3d____ [2001 WL 138242; Feb. 16, 2001]
(Summary Order; Sotomayor, Cote)

The district court's decision not to depart based on aberrant conduct was unappealable, since the guidelines were not misapplied and the court defendant not misunderstand its authority to depart.

Child Abuse

United States v. Richardson, ___F.3d____ [2001 WL 138284; Feb. 15, 2001]
(Summary Order; Parker, Sack, Katzmann)

Defendant argued that the sentencing court erred in concluding that *United States v. Rivera*, 192 F.3d 81 (2d Cir. 1999) constrained it to consider only abuse that occurred during childhood. The Second Circuit found that the district court understood its authority to depart, but declined to do so.

Consent to Deportation

United States v. Martinez, ___F.3d____ [2001 WL 99822; Feb. 2, 2001]
(Summary Order; Van Graafeiland, Calabresi, Patterson)

Defendant argued that the district court should have *sua sponte* downwardly departed to allow him to be deported more quickly. The Second Circuit dismissed his appeal, stating that the defendant had failed to make this argument below and that his claim was unreviewable.

Disparities among districts

United States v Tejeda-Campusano,____F.3d___[2001 WL 468137; May 1, 2001]
(Summary Order: Jacobs, Parker, Katzmann)

The court reaffirmed that a downward departure is not available for interdistrict disparities in illegal reentry cases.

Extraordinary Efforts to Overcome Poverty

United States v. Richardson, ___F.3d____ [2001 WL 138284; Feb. 15, 2001]
(Summary Order; Parker, Sack, Katzmann)

Although it was unclear whether the district court understood its authority to depart based on the defendant's extraordinary efforts to overcome poverty, the Second Circuit found that the facts of the case would not warrant such a departure anyway, and thus any error would be harmless. Defendant had overcome poverty by gaining an education and obtaining a responsible job, where she then converted funds which led to her conviction.

Extraordinary Family Circumstances

United States v. Ramirez, ___F.3d____ [2001 WL 290276; March 23, 2001]
(Summary Order; Leval, Sack, Patterson)

The Second Circuit agreed with the government that a seven-level downward departure based on extraordinary family circumstances was unwarranted.. Without further discussion, the court found that "this case does not fall outside the 'heartland' of typical cases."

United States v. Ruttner, ___F.3d____ [2001 WL 138308; Feb. 16, 2001]
(Summary Order; Van Graafeiland, Calabresi, Sotomayor)

The Second Circuit held that the district court abused its discretion by downwardly departing based on extraordinary family circumstances solely on a showing that the defendant had three young children. The Court found that fact alone not to be sufficient to warrant a departure and remanded for resentencing.

Pretrial Confinement Conditions

United States v. Mendoza, ___F.3d____ [2001 WL 179931; Feb. 21, 2001]
(Summary Order; Van Graafeiland, Calabresi, Sotomayor)

The Second Circuit refused to review defendant's claim that the district court erred in not downwardly departing based on the conditions of his pretrial confinement, rejecting his claim that the district court's statement that defense counsel was "making a legal argument which I don't thinks is valid," evidenced that it misunderstood its authority to depart. Defendant contended that the conditions were harsh because during a prison transfer, the Bureau of Prisons lost his hearing aid and artificial eye and that they were slow to replace them.

Rehabilitation

Quesada-Mosquera v. United States, ___F.3d____ [2001 WL 282657; March 23, 2001]
(Per Curiam; Straub, Pooler, Mukasey)

Defendant argued the district court erred in denying his 18 U.S.C. § 3582 motion for reduction in sentence, based on his post-conviction rehabilitation, which included completing a college degree. The Second Circuit disagreed and cited to a recent amendment in the Sentencing Guidelines which explicitly states that post-sentencing rehabilitative efforts are not an appropriate basis for a downward departure when resentencing a defendant.

Pughe v. United States, ___F.3d____ [2001 WL 138295; Feb. 16, 2001]
(Summary Order; Jacobs, Calabresi, Sotomayor)

After defendant successfully vacated his sentence on a habeas corpus petition, the government appealed from the district court's judgment on remand. On remand, the district court (Judge Weinstein) departed downward based on the defendant's rehabilitation. The Second Circuit vacated the sentence and remanded for resentencing within the guideline range. Judge Jacobs noted that he would assign the case to a different district court judge on remand because Judge Weinstein made no attempt to distinguish the Court's recent reversal of him in *United States v. Bryson*, 63 F.3d 742 (2d Cir. 1998) (which was virtually identical to this case). The Court noted, "Judge Jacobs believes that reassignment is advisable in part to avoid in the future the stirring of futile hopes that the defendant and his mother have been led to entertain."

United States v. Cabrera, ___F.3d____ [2001 WL 138256; Feb. 16, 2001]
(Summary Order; Van Graafeiland; Winter; Calabresi)

The district court's decision not to depart based on rehabilitation was unappealable, since the guidelines were not misapplied and the court defendant not misunderstand its authority to depart.

Upward Departures

United States v. Bennett, ___ F.3d ___ [2001 WL 589434; May 31, 2001]
(Newman Opinion: Cabranes, Thompson)

The Second Circuit struck an upward departure of 10 years that was based on the defendant's wife's refusal to surrender properties alleged to have been purchased with proceeds of his crimes. The Court held that the threat of enhanced punishment based on the wife's failure to surrender properties in which she had at least a nominal ownership interest would undermine the statutory forfeiture right accorded her under 18 U.S.C. § 982. It was impermissible, therefore, for the district court to punish defendant for his wife's refusal to relinquish her statutory right to contest the forfeiture of properties in her name. The Second Circuit rejected defendant's remaining challenges to his sentence.

United States v. Karro, ___F.3d___ [2001 WL 789096; July 13, 2001]
(Katzmann Opinion; joined by Jacobs, Parker)

Defendant pleaded guilty to twelve counts of mail fraud related to identity theft and fraudulent applications for credit cards, in violation of 18 U.S.C. §1341. The district court departed upward five levels, with a sentencing range of 24-30 months, because it found that the loss calculation only

addressed the loss sustained by the credit card companies, and did not take into consideration the harms inflicted on the individuals whose identities and sensitive information were used by the defendant. The Second Circuit held that the risk of reasonably foreseeable, substantial non-monetary harms associated with identity theft was a permissible basis for an upward departure. *See* U.S.S.G. 2F1.1, app. note 11(a). The Second Circuit rejected the defendant's argument that the absence of victim testimony regarding actual non-monetary harm foreclosed an upward departure. In addition, a five level departure was held not to be unreasonable, especially where the actual or potential harm from identity theft was present to an exceptional degree.
See U.S.S.G. §2F1.1, app. note 16.

United States v Farrah, ___ F.3d ___ [2001 WL 668493; June 12, 2001)
(Summary Order: McLaughlin, Cabranes, Cote)

Defendant argued that the district court erred in departing upward from Criminal History Category I to Category III, without explicitly considering Category II. The Second Circuit found that the court had fully and reasonably explained the departure, notwithstanding the lack of reference to Category II.

United States v. Omoruyi, ___F.3d____ [2001 WL 289968; March 23, 2001]
(Summary Order: Straub, Pooler, Sack)

Defendant argued that he did not received adequate notice of the district court's intention to upwardly depart. Since the PSR recommended an upward departure on the same grounds, to which the defendant submitted written objections, the court held that defendant had adequate notice.

§ 5K2.13: Diminished Capacity

United States v. North, ___F.3d ____[2001 WL 290306; March 23, 2001]
(Summary Order; Sotomayor, Katzmann; Bertelsman)

Defendant argued that the district court misapprehended its power to depart on the ground of diminished capacity because it incorrectly assumed that there had to be a showing that the diminished capacity would have contributed to the commission of the offense. The Second Circuit dismissed defendant's appeal because, whether or not the district court misinterpreted the guidelines, it also stated a departure was unwarranted, regardless of whether such a showing had to be made.

SENTENCING PROCEDURES

Denial of Request for Adjournment

United States v. Doe, 239 F.3d 473 [Jan. 24, 2001]
(Per Curiam; Van Graafeiland, Winter, Calabresi)

The Second Circuit held that it was not an abuse of discretion for the district court to deny

defendant's request for an adjournment of his sentencing on the grounds that he was about to file a motion to vacate his prior state conviction. The vacatur of his state conviction would change his sentencing exposure on his federal case from a Guidelines range of 51 to 63 months with a statutory mandatory minimum of 60 months to a range of 27 to 33 months with no statutory mandatory minimum. The Court noted that if defendant's attack on his state conviction were successful, he could than seek review of this sentence.

Denial of Request for Psychiatric Evaluation

United States v. Parker, ___F.3d____ [2001 WL 194329; Feb. 26, 2001]
(Summary Order; Kearse, Leval, Katzmann)

Defendant argued that he was denied due process because the district court did not provide him with a psychiatric examination, which would have illustrated the link between his criminal activity and post traumatic stress disorder so as to justify a downward departure. The Second Circuit disagreed, finding that although defense counsel had made a request for an evaluation, his later actions indicated that he might not need such an evaluation if he were able to obtain a report from the defendant's treating psychiatrist. The Court further stated that if defendant were also contending that the district court should have downwardly departed, that claim would not be reviewable as there was no indication in the record that the district court believed it lacked the authority to depart or applied an erroneous legal standard.

Duplicity

United States v. Sturdivant, 244 F.3d 71 [March 19, 2001]
(Sotomayor opinion; Calabresi, Trager)

The Second Circuit agreed with the defendant that he was prejudiced by being convicted and sentenced based upon a single count in the indictment that charged him with participating in two separate and distinct drug transactions. The duplicity resulted in uncertainty as to whether the jury's general verdict represented a unanimous finding that defendant was guilty based on participation in both drug transactions or just one. The Court held that the prejudice to the defendant could be avoided by resentencing him only on the transaction involving the lesser drug amount, as if had been acquitted on the other transaction. The Court remanded for resentencing, noting that the district court would be free to consider the now-deemed acquitted conduct as relevant conduct and make any permissible adjustments or departures.

Ineffective Assistance of Counsel

United States v Cox, ___F.3d___[2001 WL 314585; March 28, 2001]
(Straub opinion; joined by Pooler, Sack)

Where the case was being remanded to supplement the record on another issue, the Second Circuit also directed further fact-finding on defendant's claim of ineffective assistance, which was

based upon the claim that his lawyer, who represented him both during the state and federal sentencing proceedings, should not have allowed him to plead guilty to the state charges without advising him about the consequences on the federal case. The court observed that the government conceded the authority to remand for additional fact-finding in this type of case.

Abbamonte v. United States, ___F.3d____ [2001 WL 290524; March 23, 2001]
(Summary Order; Cardamone, Leval, Amon)

Defendant argued, and the government conceded, that he was denied ineffective assistance of counsel when his attorney completely abandoned him at sentencing. The Second Circuit remanded for resentencing.

Collier v. United States, ___ F.3d____[2001 WL 540793; May 21, 2001]
(Summary Order; Walker, Feinberg, Cabranes)

Defendant argued that (1) his waiver of the right to appeal a sentence within the range stipulated to in a plea agreement (168 to 210 months) was invalid because he was not informed of that waiver by the district court, and that (2) his attorney's failure either to file an appeal or to challenge his sentence for conspiracy to distribute crack cocaine constituted constitutionally ineffective assistance of counsel. The Second Circuit disagreed, noting that the district court had questioned defendant "personally and extensively" about his understanding of the plea agreement and that his answers demonstrated that the plea and its included waiver were knowing and voluntary. Furthermore, the Second Circuit held that defendant's attorney's actions did not constitute ineffective assistance of counsel. Because defendant's plea included a stipulation to the base offense level based upon crack, counsel's failure to object to the base offense level at sentencing on the ground that the conspiracy involved some other type of cocaine was not unreasonable.

United States v. Motipersad, ___F.3d____ [2001 WL 266285; March 16, 2001]
(Summary Order; Meskill, Parker, Katzmann)

Defendant argued that his counsel was ineffective for failing to seek a downward departure on the ground that he provided substantial assistance to the government and because of his extraordinary acceptance of responsibility. The Second Circuit held that the record did not support a "reasonable probability" that sentencing hearing would have had a more favorable result but for his counsel's alleged errors.

Resentencing *de novo*

United States v. Stephenson, 242 F.3d 369 [2001 WL 40571; Jan. 17, 2001]
(Summary Order; Kearse, Jacobs, Cabranes)

After defendant's conviction for one of two concurrent terms of money laundering was vacated, the district court refused, without a hearing, to resentence the defendant. The Second Circuit held that

because of the other undisturbed money laundering conviction, the district did not abuse its discretion in refusing to reduce the sentence or in refusing to conduct a hearing.

Version of Guidelines

United States v Vincente, ___F.3d___[2001 WL 431482; April 26, 2001]
(Summary Order; Winter, Straub, Pooler)

Since the defendant could have received a consecutive sentence under the version of the guidelines in 1994 – when he committed the offense – and in 2000 – when he was sentenced – the Second Circuit found no *ex post facto* problem in applying the 2000 Guidelines. The court observed that it is only when an *ex post facto* problem occurs that courts should not apply the version of the Guidelines in effect at the time of sentencing.

SUPERVISED RELEASE AND PROBATION

United States v. Thomas, 239 F.3d 163 [Feb. 1, 2001]
(Kaplan opinion; joined by Van Graafeiland, Katzmann)

The Second Circuit upheld the district court's finding that the defendant had violated the terms of his supervised release by possessing ammunition, despite the fact that the Court reversed the defendant's conviction for possession of ammunition. The Court found that "while the untainted evidence against [the defendant] was not overwhelming, this finding – which was properly made on the preponderance of the evidence standard – was not clearly erroneous."

United States v Peterson, ___F.3d___[2001 WL 436029; April 30, 2001]
(Per Curiam; Kearse, Leval, Cabranes)

As a condition of probation for the defendant's violation of bank larceny, which arose out of bad checks he wrote in connection with a failing computer business, the district court prohibited him from possessing, purchasing or using a computer or from accessing the internet. This condition was influenced by the fact that defendant was previously convicted of incest and had accessed legal adult pornography web sites. The Second Circuit held that the broad restrictions on computer use and internet access were not "reasonably related" to the "nature and circumstances of the offense," to the defendant's "history and characteristics," or were "reasonably necessary" to the broad sentencing purposes indicated in 18 U.S.C. § 3553(a)(2).

The district court also required, as a special condition of probation, that defendant participate in sex offender therapy "as directed by the U.S. Probation Office." The Second Circuit held that the defendant's prior offense justified this condition, but agreed that it was inappropriate to delegate to the probation office the decision whether or not to participate in a program. On the other hand, the court may delegate the details with respect to the selection and schedule of the program.

In addition, the district court directed the defendant to notify third parties of risks that may be occasioned by his criminal record, including both the incest and the bank larceny conviction. The Second Circuit held that the statute did not authorize notification of the defendant's state-court incest conviction. Further, the court remanded to clarify the probationary condition that the defendant stay away from any school, grounds, child care center, playground, park and area "in which children are likely to congregate." Finally, the district court did not abuse its discretion in barring the defendant from unsupervised contact with children under eighteen.

United States v. Cotsalas, ___ F.3d___ [2001 WL 533513; May 17, 2001]
(Summary Order; Winter, Straub, Pooler)

Where the defendant had pled guilty to one count of mail fraud, the Second Circuit vacated the daily reporting requirement and travel ban imposed as conditions of his probation. The Second Circuit stated that the district court had failed to state adequately how the travel restrictions were "reasonably related to rehabilitating the defendant and protecting the public." In addition, the district court was unclear with respect to the time over which the reporting requirement should extend. The Second Circuit, however, rejected defendant's argument that he or his counsel were denied an opportunity to speak on his behalf during the sentencing hearing.

United States v. Ilori, 242 F.3d 368 [2001 WL 40785; Jan. 16, 2001]
(Summary Order; Van Graafeiland, Winter, Sotomayor)

According to defendant's criminal history category, the policy statements of the guidelines indicated a revocation range of between 4 to 10 months and the statutory maximum term of imprisonment was not more than 3 years. The district court sentenced defendant to 24 months. The Second Circuit found that the district court had considered the policy statements and that the 24 month sentence was a reasonable departure based on the defendant's lack of legitimate employment history and involvement in several fraudulent schemes. The Second Circuit also rejected defendant's argument that the sentencing judge had established a general presumption in favor of departing from the revocation range.

Violation of Supervised Release

United States v. Wirth, ___F.3d ___ [2001 WL 543361; May 17, 2001]
(Per Curiam: Walker, Winter, Jacobs)

The Second Circuit remanded for resentencing because the district court failed to impose a sentence of incarceration when defendant violated his supervised release by possessing a controlled substance. Once defendant admitted to cocaine use, the district court was obligated to terminate his supervised release and impose a term of imprisonment of at least one-third of his term of supervised release, or not less than one year, pursuant to 18 U.S.C. § 3583(g). The Second Circuit rejected defendant's argument that he admitted only to using cocaine and not to possessing it, noting that testing positive for drug use amounts to possession under 18 U.S.C. § 3583(g). Because defendant committed

the underlying offenses in 1990 and 1991, his case was governed by the pre-1994 version of 18 U.S.C. § 3583.

Defendant further argued that the district court had discretion to substitute a drug treatment program for a term of imprisonment after it terminated his supervised release, pursuant to U.S.S.G. § 5C1.1(e). Because the illegality of the sentence stemmed from the district court's failure to terminate defendant's supervised release as required by § 3583(g), the Second Circuit declined to address the question of whether, if defendant's supervised release had been properly terminated, drug treatment would have been a permissible substitute for imprisonment under U.S.S.G. § 5C1.1.

Upward Departures

United States v. Bennett, ___ F.3d ___ [2001 WL 589434; May 31, 2001]
(Newman Opinion; Cabranes, Thompson)

The Second Circuit struck down an upward departure of 10 years that was based on the defendant's wife's refusal to surrender properties alleged to have been purchased with proceeds of the defendant's crimes. The Court held that the threat of enhanced punishment based on the wife's failure to surrender properties in which she has at least a nominal ownership interest would undermine the statutory forfeiture right accorded her under 18 U.S.C. § 982. It was impermissible, therefore, for the district court to punish defendant for his wife's refusal to relinquish her statutory right to contest the forfeiture of properties in her name. The Second Circuit rejected defendant's remaining challenges to his sentence.

United States v. Williams, 254 F.3d 44 [June 14, 2001]
(Per Curiam; Calabresi, Katzmann, Kaplan)

The Second Circuit affirmed the district court's decision, based on the totality of the circumstances, to impose a two-level sentence enhancement pursuant to U.S.S.G. § 3C1.2, based on the defendant's automotive flight from law enforcement officials. The district court's conclusion 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" was not clearly erroneous.

United States v. Omoruyi, ___F.3d___ [2001 WL 289968; March 23, 2001]
(Summary Order; Straub, Pooler, Sack)

Given the defendant's record of recidivism, which included thirteen arrests and six convictions, the Second Circuit found no error in an upward departure on the ground that his criminal history category did not adequately reflect his criminal history. Defendant also argued that he did not receive adequate notice of the district court's intention to upwardly depart. Since the PSR recommended an upward departure on the same grounds, to which the defendant submitted written objections, the court held that defendant had adequate notice.

United States v. Parker, ___F.3d___ [2001 WL 290087; March 23, 2001]
(Summary Order; Cardamone, Leval, Katzmann)

Considering the defendant's extensive criminal record and the indication of likely recidivism, the Second Circuit found no error in an upward departure to increase his criminal history category.