SENTENCING DECISIONS OF THE SECOND CIRCUIT FOR 2002

A comprehensive summary of reported Second Circuit sentencing decisions issued between January 1, 2002 and October 31, 2002.

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Topics covered to date

GENERAL PRINCIPLES

§ 1B1.2: Application Instructions

*United States v Rivera,*___F.3d____(2002 WL 162693; June 3, 2002)
(Jacobs opinion; Parker, Sotomayor)

Based upon intervening Amendment 591, which clarified that the sentencing court must apply the offense guideline based only upon the offense of conviction, the defendant argued that the court was precluded from increasing the base offense level due to the amount

of narcotics. Disagreeing, the Second Circuit explained that the defendant's argument confused the selection of the applicable offense guideline – which is controlled by the conviction and corresponds to the statutory index – with adjustments to the base offense level – which are impacted by relevant conduct.

OFFENSE CONDUCT

§2B1.1 Theft

United States v Aleskerova, ___F.3d___(2002 WL 1807377; August 8, 2002)
(Walker Opinion; Katzmann, Cudahy)

The Second Circuit held that the district court's loss determination was reasonably based upon the value of the stolen artwork to the last possessor who operated on the legitimate market. Given the state of uncertainty and the ongoing dispute over which museum could claim legitimate ownership, the district court's decision to identify the victim as the Baku Museum (the entity directly impacted by the loss due to the chain of theft in which the defendant participated) and not the Bremen Museum (an earlier owner whose claim was uncertain and whose loss, if any, was the fault of a different set of actors) was not clearly erroneous for purposes of § 2B1.1. Moreover, the district court's valuation was supported by the facts.

§ 2B3.1: Robbery

United States v Jennette, ___F.3d___(2002 WL 1470406; July 9, 2002)
(Cabranes opinion; Miner, Pooler)

The Second Circuit agreed with the district court's holding that a bank robber's statement to the teller – "I have a gun" – could constitute a "threat of death," justifying the 2-level increase pursuant to§2B3.1(b)(2)(F). The court noted that the guidelines had been amended to remove the requirement that the threat be express. Rather, the test was now whether the defendant's conduct would cause an objectively reasonable person in "the position of the immediate victim" to fear death. Further, the court held that the defendant's history of mental retardation was not relevant to application of this enhancement.

§ 2D1.1: Narcotics

Beatty v United States, ___F.3d___(2002 WL 1041375; May 24, 2002)
(Newman opinion; Kearse, Leval)

In support of an application for a Certificate of Appealability, sought in order to appeal the denial of a motion pursuant to 28 U.S.C. § 2255, Petitioner contended that the enhancement of his guideline range by 8 levels, based on the drug quantity, was so severe as to warrant a heightened standard of proof. Because Petitioner previously challenged the

fact-finding on the direct review, the Second Circuit stated that his contention did not present a substantial issue. Petitioner also claimed that *Guevara* and *Thomas,* following *Apprendi*, required submission of the drug quantity issue to the jury. Without deciding whether *Guevara* or *Thomas* could be applied to challenges on collateral review, the court found that they did not benefit Petitioner; for unlike those cases, the drug quantities here did not raise the statutory mandatory minimum or maximum.

United States v Blount, 291 F.3d 201 (2nd Cir. 2002)
(Kearse opinion; Meskill, Calabresi)

Initially, the court rejected the defendants' *Apprendi* challenges, neither of which were properly preserved for review. One defendant, Streater, argued that he was improperly sentenced to a term in excess of 240 months because the jury did not determine the quantity of cocaine involved in any of the three offenses. But while this error was clear, as the government conceded, it did not affect Streater's substantial rights, since the court could have effectively imposed the same sentence by running the time consecutively on multiple counts. The other defendant, Blount, similarly argued that the failure to submit the cocaine quantity to the jury precluded the court from sentencing him to 292 months. But the Second Circuit held that, since Blount had previously been convicted of a felony, his statutory maximum term was 360 months, not 240 months. Thus, the drug-quantity determination did not affect Blount's statutory maximum.

The Second Circuit also rejected the defendants' objections to the district court's findings on drug quantity. The court emphasized that, where the narcotics have not been seized, the district court must estimate the amount of drugs involved. Contrary to the defendants' contention, the court is not restricted to accepting the low end of a quantity range estimated by a witness. Although, under the facts of this case, the total amounts of cocaine distributed may not have been foreseeable to a lower-level participant, they were plainly foreseeable to the defendants.

United States v Burrell, 289 F.3d 220 (2nd Cir. 2002)
(Pooler opinion; Oakes, Straub)

Each defendant argued that his sentence violated *Apprendi* on the ground that the drug amount was not specified in the indictment or determined by the jury. Because the defendant Banks was not sentenced to a term above the 20 term, however, the Second Circuit held that his sentence did not violate *Apprendi*. Although the defendant Burrell received a life sentence on his narcotics conspiracy charge, he also received a concurrent life sentence on a CCE count, which was valid regardless of *Apprendi*. And while the third defendant, Miles, received a sentence of 30 years, over the statutory maximum without the finding of drug-quantity, she could still have received the same total imprisonment by running two sentences consecutively, pursuant to § 5G1.2(d). Thus, the plain error did not affect Miles' substantial rights so as to warrant any corrective action.

United States v Doe, ___F.3d___(2002 WL 1565162; July 17, 2002)
(Parker opinion; Feinberg, Oakes)

Defendant was charged in count one with conspiring to import cocaine in violation of 21 U.S.C. § 963, between the dates of July 16, 1996 and July 22, 1996. The indictment did not specify the amount of drugs, but did include a parenthetical reference to § 960(b)(1)(B)(ii), the statute pertaining to the penalty for importing five or more kilograms of cocaine. Eventually, defendant entered into a cooperation agreement, which acknowledged that his statutory penalties included a minimum term of ten years and a maximum term of life. Ultimately, the government declined to submit a § 5K letter, and the court imposed a sentence of 262 months imprisonment, based on its finding that he was responsible for importing over 150 kilograms of cocaine. On appeal, defendant argued that his sentence violated *Apprendi*.

First, the Second Circuit considered the *Apprendi* error insofar as it related to the indictment. The court held that the mere inclusion of a parenthetical reference to § 960(b)(1)(B)(ii) did not satisfy the requirement that the indictment specify drug quantity. But while this error was "plain," it did not affect defendant's substantial rights, since he effectively received notice of the higher statutory sentence through both the parenthetical reference and the cooperation agreement.

But the court also held that the sentence had to be vacated due to the failure to establish drug quantity beyond a reasonable doubt. The court noted that the defendant did not discuss drug quantity during his plea allocution. Nor did anything in the plea suggest that he was aware of or waived his right to have drug quantity proven beyond a reasonable doubt. Moreover, the court found that this error was both "plain" and affected the defendant's "substantial rights." For not only did the sentence exceed the applicable statutory maximum by 22 months, this was not a case where the evidence of drug quantity was either "overwhelming" or "essentially uncontroverted." The court observed that the evidence essentially consisted of testimony from another trial, including defendant's own testimony. But such evidence related to the importation of drugs between 1993 and 1996, so could not reasonably be construed as overwhelming evidence of drugs for the six-day period referred to in defendant's indictment. Accordingly, the court remanded for resentencing pursuant to the indeterminate drug-quantity statute for importation.

United States v Flaherty, ___F.3d___ (2002 WL 1448335; July 2, 2002)
(Kearse opinion; Miner, Parker)

The Second Circuit rejected defendants' various *Apprendi* claims. Although there was no allegation of drug-quantity in the indictment, the defendants failed to raise any objection on this ground in the district court. Further, the defendants understood that quantity was a factor both under the statute and under the guidelines. In any event, the jury actually determined drug quantity by answering interrogatories. For these reasons – and because the defendants did not even dispute the sufficiency of the evidence of drug quantity

on appeal – the court held that the omission in the indictment could not have prejudicially affected their substantial rights, or seriously affected the fairness, integrity or public reputation of the proceedings.

*United States v Guevara,*___F.3d___(2002 WL 1738577; July 26, 2002)
(Jacobs opinion; Calabresi, Rakoff)

In the initial decision (*Guevara* I), the Second Circuit held that, under *Apprendi*, a statutory mandatory minimum sentence specified in either § 841(b)(1)(A) or § 841(b)(1)(B) could not mandate a prison sentence that exceeds the highest sentence to which the defendant would otherwise have been exposed, unless the jury determines the drug quantity. Because the error was plain and affected the fairness of the judicial proceedings, the court had vacated the sentence.

Following the Supreme Court's decision in *United States v Cotton,* 122 S.Ct. 1781 (2002), however, the Second Circuit granted rehearing and reversed itself. Under *Cotton*, the reviewing court must consider whether the evidence of drug quantity is "overwhelming" and "essentially uncontroverted." Because the evidence of drug quantity here was overwhelming, and there was insufficient evidence to support a jury finding that the conspiracy involved less than one kilogram of heroin, the Second Circuit found that the error had not affected the fairness of the judicial proceedings. Thus, the sentence was ultimately affirmed.

United States v McLean, 287 F.3d 127 (2nd Cir. 2002)
(Cabranes opinion; Oakes, Kearse)

The Second Circuit declared that, so long as the sentence imposed is no greater than the statutory maximum, a district court may consider drug quantity in determining relevant conduct, even if drug quantity has not been charged in the indictment. Further, the sentencing court may rely on evidence that would be inadmissible at trial, so long as it is "specific," as in drug records, admissions or live testimony. Because the district court's determination was not clearly erroneous, the Second Circuit affirmed its finding about amount.

The court agreed, however, that the sentence violated *Apprendi* since the defendant affirmatively denied that the quantity of marijuana exceeded 100 kilograms during his plea; the charge he pled to carried a maximum term of 60 months; and he was still sentenced to 63 months on the basis of that amount of drugs. Because the defendant could have received the same sentence by running the terms consecutively, however, the court held that the error did not affect his substantial rights.

United States v Martino, ___F.3d___(2002 WL 1358201; June 21, 2002)
(Sack opinion; Walker, Jacobs)

Defendant argued that the higher statutory term set forth in 21 U.S.C. § 841(b)(1)(B), which applies where a person commits a violation after a prior conviction for a felony drug offense, did not apply to him because his "prior offense" was a 1996 Texas conviction, which formed part of the conspiracy upon which his present guilty plea rested. Disagreeing, the Second Circuit held that "the conduct upon which a prior conviction rests need not be entirely separate from the conduct underlying the conviction for which the defendant is currently being sentenced." The dispositive question is whether the defendant "ceased criminal activity after the prior conviction." Thus, the sentence must be enhanced "if there is 'continued involvement' in criminality subsequent to the prior conviction." Here, the government satisfied its burden or proving such "continued involvement" by a preponderance of the evidence. In addition, the Second Circuit reiterated that *Apprendi v New Jersey* did not require that the prior conviction be specified in the indictment.

United States v Norris, 281 F.3d 357 (2nd Cir. 2002)
(Newman opinion; Kearse, Rakoff)

Reversing a "bold and thoughtful opinion" of Judge Nickerson, the Second Circuit declared that *Apprendi* has no application to the Guideline enhancements concerning drug quantity, possession of a firearm and supervisory role. The court emphasized that nothing in *Guevara* applied *Apprendi* to findings that increased the guideline range within the statutory maximum. Further, the court rejected the view that the guidelines effectively amounted to statutory minimums. Finally, the court stated that *Apprendi* did not require a heightened standard of proof for "routine Guideline determinations," i.e., those determinations that do not affect statutory mandatory maximum or minimum sentencing provisions.

United States v Outen, 286 F.3d 622 (2nd Cir. 2002)
(Sotomayor opinion; McLaughlin, Bertelsman)

Based upon *Apprendi*, the defendant argued that 21 U.S.C. § 841 was facially unconstitutional. He reasoned that, since it is no longer permissible to construe drug quantities as mere sentencing factors, it follows that § 841(a) was a "disjointed criminal statute, which prescribes no penalty and which, therefore cannot constitutionally serve as the basis for a criminal conviction, in that it does not create a crime as a matter of law." The Second Circuit joined all other circuits in rejecting this argument.

In addition, the court agreed with the government that, absent an allegation of a specific amount of marijuana in an indictment, the "default provision" is § 841(b)(1)(D), with a corresponding maximum penalty of five years, rather than§ 841(b)(4), with the corresponding maximum penalty of one year. And while the defendant's sentence of 110 months on the conspiracy count violated *Apprendi* by exceeding the statutory maximum, the

court held that this error did not affect his substantial rights, since the "stacking provisions" of § 5G1.2(d) would have required that the court impose consecutive sentences in order to arrive at the same total punishment. Accordingly, the judgment was affirmed.

United States v Richards, ___F.3d___(2002 WL 1968327; August 27, 2002)
(Feinberg Opinion; Kearse, Cardamone)

In resolving a dispute between the parties as to the exact amount of drugs that should be attributed to defendant Greenwood, the district court adopted the government's view that he should be held liable at least for 85.62 kilograms of marijuana seized from the truck, as well as for additional planned shipments. Defendant was a knowing, active participant in what was intended to be not just this one shipment, but many more.

Because drug quantity was not a required element of the offense under *Thomas* (since defendant Greenwood's sentence did not exceed the applicable statutory maximum), the district court needed to find drug quantity by only a preponderance of the evidence. In holding defendant Greenwood responsible for the greater amount, the district court reasonably found that he had agreed with his co-defendants to make multiple shipments.

As for defendant Anderson, his conviction involved 100 kilograms or more of marijuana.. Because the conspiracy was committed after a prior conviction for a felony drug offense became final, a mandatory 10-year minimum sentence applied, pursuant to 21 U.S.C. § 841(b)(1)(B). Anderson argued, however, that while his prior drug offense was a felony under state law, the federal offense for the same conduct would have been only a misdemeanor, making the ten-year minimum inapplicable. The Second Circuit rejected this argument, noting that the plain language of 21 U.S.C. § 802(44) indicated that the ten-year minimum applied if the prior crime was a state felony drug offense.

United States v Rodriguez, 288 F.3d 472 (2nd Cir. 2002)
(Winter opinion; Van Graafeiland, Calabresi)

The Second Circuit agreed with the defendant that he received "flawed" information, insofar as the district court advised him, at his plea, that he would be exposed to a life sentence if the court determined that the amount exceeded one kilogram, even if the jury had not made that determination. Because no objection was raised on the basis of *Apprendi*, however, the court reviewed the district court's acceptance of the plea for plain error. Considering that the defendant stipulated in his plea agreement that the conspiracy involved at least one kilogram of heroin, which he confirmed to the court twice without ever indicating that he believed the drug amount was incorrect, and also considering that the government's proffer amply supported the stipulation, the court concluded that any error did not affect his substantial rights.

United States v Sillgitt, 286 F.3d 128 (2nd Cir. 2002)
(Miner opinion; McLaughlin, Straub)

Defendant argued that his sentence was unconstitutional under *United States v Barnes,* 158 F.3d 662 (2nd Cir. 1998), which held that, where a jury returns a general guilty verdict on a single conspiracy count involving multiple controlled substances, the district court must sentence the defendant as if convicted of a conspiracy involving only the drug that triggers the lowest sentencing range. Because this claim was not raised before the district court, the Second Circuit applied plain error review. First, the court agreed that defendant should have been sentenced under 21 U.S.C. § 841(b)(1)(D), the statutory provision for marijuana, rather than 21 U.S.C. § 846. Second, the court held that the error was plain. Finally, because the error resulted in defendant's sentence exceeding the permissible sentence by more than 80%, the Second Circuit held that it seriously affected the fairness of the proceedings. Thus, the court elected to notice and correct the error.

United States v Yu, 285 F.3d 192 (2nd Cir. 2002)
(Jacobs opinion; Walker, Sack)

Following its decisions in *Thomas* and *Guevara,* the Second Circuit held that defendant's sentence violated *Apprendi v New Jersey*, since the district court's findings about drug quantity resulted in a sentence pursuant to the mandatory minimum provisions of § 841(b)(1)(A). Although defendant pled guilty to that charge, and explicitly stated he was willing to have the judge determine drug quantity, the court noted that this decision was influenced by his understanding that he was not entitled to have the jury make that determination. Thus, the district court erred in permitting him to plead guilty to quantity-specific charges while refusing to allocate to quantity. The Second Circuit rejected, however, defendant's claim that he should be deemed to have pled guilty to § 841(b)(1)(C), rather than the more severe charges with which he was actually charged. The court remanded with instructions that the district court be flexible and consider any motion the defendant might make to withdraw his plea.

§ 2F1.1: Fraud: Loss

United States v. Abbey, 288 F.3d 515 (2nd Cir. 2002)
(Per Curiam; Walker, Jacobs, Sack)

Applying the guidelines in effect prior to November 1, 2001, the Second Circuit held that Application Note 8(b) required that the loss attributable to the fraudulent loan be based upon the amount of the loan not repaid at the time the offense was discovered, reduced by the amount the lending institution had recovered. Contrary to defendant's argument, the application note did not permit loss to be reduced by the amount of the loan that the bank presumably would have extended absent any fraud.

United States v Coriaty, ____F.3d ____(2002 WL 1358183; June 21, 2002)
(Sack opinion; Miner, Berman)

In a case involving a complex scheme to defraud an employer of funds invested

through a securities brokerage firm, the Second Circuit found "ample evidence" to support the finding concerning the amount of intended loss. The court observed that loss in fraud cases includes the amount of property taken, even if some had been returned. The district court correctly calculated the loss based upon funds that were placed under the defendant's control. The Second Circuit summarily rejected the defendant's argument that the district court erred in including losses incurred before certain wire frauds had occurred.

United States v Guzman, 282 F.3d 177 (2nd Cir. 2002)
(Miner opinion; Kearse, Parker)

The Second Circuit affirmed the district court's upward departure, pursuant to Application Note 12 to § 2F1.1, on the ground that the loss amount of zero did not adequately reflect the seriousness of the defendant's conduct. Defendant had acted as a broker for the issuance of false identification documents by corrupt employees of the Department of Motor Vehicles. Further, it was reasonable for the court to seek out an analogous statute, i.e., bribery, in considering the magnitude of the upward departure. But because the district court incorrectly adopted the calculation of the bribery statute *in toto*, by starting with the base offense level for that crime, the Second Circuit vacated the sentence. The Second Circuit clarified that the sentencing court should always begin with the base offense level for the offense of conviction, though it may then apply an analogous guideline for purposes of determining the upward departure.

United States v Szur, 289 F.3d 200 (2nd Cir. 2002)
(Walker opinion; Parker, Katzmann)

The court rejected the defendant's claim that, under *Apprendi*, the district court was not permitted to increase his offense level based upon, *inter alia* the amount of loss and his leadership role in the fraud and money laundering offenses. Although the defendant's sentence exceeded the statutory maximum on some counts, it did not exceed the statutory maximum that he could have received on the money laundering counts.

§ 2F1.1(b)(2): More than Minimal Planning

United States v Coriaty, ___F.3d___(2002 WL 1358183; June 21, 2002)
(Sack opinion; Miner, Berman)

The Second Circuit rejected the defendant's argument that he was improperly subjected to the enhancement for "more than minimal planning" for the reasons that: he did not open or establish new investment accounts; his crime was "stupid"; and because application of the enhancement would amount to double-counting. The court commented that, under the guidelines, it was "the amount of planning, not the degree of cunning shown by a defendant in executing his or her criminal scheme, that bears on the more-than-minimal-planning enhancement." Misleading checks and false statements, standing alone, were said to merit the enhancement, independent of the multiple wire frauds.

§ 2K2.2 Firearms

United States v Campbell, ___F.3d___(2002 WL 1807078; August 7, 2002)
(Kearse Opinion; Newman, Rakoff)

Defendant argued that the increased sentence he received pursuant to § 924(c) because of his prior convictions violated *Apprendi,* since those convictions were neither alleged in the indictment nor submitted to the jury. The Second Circuit disagreed, reaffirming that *Apprendi* did not apply to the fact of a prior conviction.

§ 2L1.2 Immigration

United States v Hidalgo-Macias, ___F.3d___(2002 WL 1837939; August 5, 2002)
(Per Curiam; McLaughlin, Parker, Sessions)

Pursuant to § 2L1.2(b)(1)(A)-(D), the defendant's prior felony conviction for attempted burglary in the third degree resulted in either an 8-level enhancement (if it was an aggravated felony), or otherwise a 4-level enhancement (for "any other felony"). The commentary defines "aggravated felony," in part, as an offense with a "term of imprisonment" of at least one year. Because his initial sentence for attempted burglary was six months and five years probation, the defendant maintained that the crime was not an aggravated felony. But when he violated his probation, the defendant was re-sentenced to one year in jail. Reasoning that initial sentence was, under New York law, a "tentative disposition," the Second Circuit held that the subsequent re-sentencing controlled and, consequently, the aggravated felony provision applied. In reaching this conclusion, the court noted that its determination was not based on the rules regarding criminal history, which serve a different function than offense level calculation.

United States v Richards, ___F.3d___(2002 WL 1968327; August 27, 2002)
(Feinberg Opinion; Kearse, Cardamone)

Defendant Anderson contested imposition of a 16-level enhancement for illegally reentering the country after having committed an aggravated felony. Initially, the Second Circuit held that the plea agreement expressly permitted defendant to appeal the sentence. Even if this enhancement had not been applied, however, Anderson would still have been sentenced to 10 years due to the mandatory minimum required for the drug conspiracy conviction. Since invalidating the enhancement would have no effect on defendant's sentence the Second Circuit found no grounds to remand.

United States v Valdovinos-Soloache, ___ F.3d___(2002 WL 31388827; October 24, 2002)
(Per Curiam; Newman, Parker, Underhill)

The defendant argued that, because he was released from prison five months into his sentence and immediately deported, his prior sentence should be viewed as a sentence of less

than thirteen months, and therefore subject to only a 12-level upward adjustment pursuant to § 2L1.2, rather than the 16-level adjustment. Initially, the Second Circuit recognized that the commentary indicates that "sentence imposed" refers only to that portion of the sentence that was not probated, suspended, deferred or stayed; but the court found that defendant had not satisfied his of proving this "exception." The record showed that his 1989 release and deportation was classified as "parole," rather than "probation, suspension, deferral or a stay of his sentence."

§ 2S1.1: Money Laundering

United States v Moloney, 287 F.3d 236 (2nd Cir. 2002)
(Walker opinion; McLaughlin, Sotomayor)

Defendant argued that, because his money laundering was only intended to conceal his fraud, rather than promote it, his base offense level should have been deemed to be 20, instead of 23. The Second Circuit, however, agreed with the government that the defendant was promoting unlawful activity by using some of the fraudulently obtained funds to make purported interest payments. The court observed that a Ponzi scheme, by definition, uses purportedly legitimate, but actually fraudulently obtained money, to perpetuate the scheme.

United States v Sabbeth, 277 F.3d 94 (2nd Cir. 2002)
(Cabranes opinion; Walker, Straub)

Defendant argued that Amendment 632, which became effective in November, 2001, and instructs that money laundering and the underlying offense should be grouped together, was merely "clarifying," and therefore should be applied retroactively to his sentence. Relying on factors set forth by the Third Circuit in *United States v Diaz,* 245 F.3d 294 (3rd Cir. 2001) – including (1) the language of the amendment; (2) its purpose and effect; and (3) whether the guidelines in effect at the time were consistent with the amended sentencing manual – the Second Circuit determined that the amendment constituted a "substantive change." Accordingly, the amendment could not be applied retroactively.

§ 2T: Tax Loss

United States v Firment, ____F.3d _____ (2002 WL 1583583; July 18, 2002)
(Kearse opinion; Van Graafeiland, Parker)

The court rejected the defendant's argument that the amount of tax loss should not have included those amounts a co-defendant had failed to pay**.** When a defendant has pleaded guilty to a tax conspiracy case, conspiracy-related tax loss is attributable to him unless he proves that it was not foreseeable to him. Because the loss here was foreseeable, and was based upon income generated by defendant's participation in the conspiracy, it was properly attributed to him.

United States v Gordon, 291 F.3d 181 (2nd Cir. 2002)
(Parker opinion; Oakes, Newman)

Although the district court erred by not considering potential, though unclaimed deductions, which could have reduced the total amount of tax loss, the Second Circuit deemed such error harmless. For the defendant failed to prove that the money he received would have been treated as salary by the corporation, if properly reported.

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§ 2X1.1: Conspiracy

United States v Downing, ____F.3d____(2002 WL 1448307; July 1, 2002)
(Sack opinion; Miner, Berman)

The Second Circuit held that the district court should have reduced the defendants' base offense level three levels, pursuant to § 2X1.1(b)(2). That section provides for a reduction for conspiracy unless the defendant or co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the conspiracy, or they were about to complete such acts. The court found that, although the defendants may have completed the technical elements of the substantive offense of wire fraud or securities fraud, neither they nor their co-conspirators completed all the acts necessary to perpetrate the pump and dump scheme charged in the indictment.

ADJUSTMENTS

§ 3A1.1: Vulnerable Victim

United States v Crispo, ___F.3d ____(2002 WL 31115209; September 24, 2002)
(Cardamone Opinion; Feinberg, Pooler)

The Second Circuit upheld the enhancement to defendant's sentence on the ground that one of the victims of defendant's kidnaping threats was vulnerable. To apply this enhancement, the victim of the crime must have been "particularly vulnerable" because of his "substantial inability to avoid the crime." Initially, the court held that ascribing vulnerability to one victim simply because she was a single mother was problematic, especially in light of the policy disfavoring broad generalizations regarding members of a class. But even absent detailed individualized findings, one could presume that an extra measure of deterrence was required to prevent the kidnaping of very young children. Thus, the court affirmed the finding that the three-year old victim was "vulnerable."

United States v Firment, ___F.3d___(2002 WL 1583583; July 18, 2002)
(Kearse opinion; Van Graafeiland, Parker)

Defendant argued that the district court erred in adjusting his offense level upward on the ground that the victims of his telemarketing scheme were "vulnerable." He reasoned

that this adjustment applied only if the vulnerable persons were victims of the offense of conviction, whereas in this case he pleaded guilty only to the tax conspiracy count. Rejecting this argument, the Second Circuit observed that the guidelines in effect at the time of the tax-fraud conspiracy – though not at the time of the telemarketing activity – provided that the adjustment applied if the victims of either the offense of conviction, or of any relevant conduct, were vulnerable. Because this version of the guidelines became effective during the course of the offense of conviction, the *ex post facto* clause was not violated by its application. Further, the court noted that, even before the amendment, it had applied the vulnerable victim adjustment in similar circumstances.

§3A1.2 Official Victim

United States v Crispo, ___F.3d ___(2002 WL 31115209; September 24, 2002)
(Cardamone Opinion; Feinberg, Pooler)

In order to apply the "official victim" enhancement, two basic elements must be found: (1) one of the victims of the extortion or one of their family members must have been a government officer or employee; and (2) the crime must have been motivated by that status. Here, the victim was a private bankruptcy trustee. Because the trustee was a private party rather than a government officer, the Second Circuit concluded that the enhancement was inapplicable.

§ 3B1.1: Aggravating Role

United States v Blount, 291 F.3d 201 (2nd Cir. 2002)
(Kearse opinion; Meskill, Calabresi)

The Second Circuit held that the trial evidence amply supported the district court's finding that the defendant was a "lieutenant" for the other conspirators, in charge of the day-to-day operations. Among other things, the defendant was responsible for distributing bundles of cocaine to dealers and collecting the proceeds of the sales. Accordingly, the court did not err in concluding that he was a supervisor or manager, warranting the adjustment for an aggravating role.

United States v Firment, ___F.3d___(2002 WL 1583583; July 18, 2002)
(Kearse opinion; Van Graafeiland, Parker)

The Second Circuit affirmed the finding that defendant played a managerial or supervisory role in the offense, warranting a 2-level upward adjustment. Considering that the defendant had worked to develop a telemarketing scheme, and recruited another worker for the scheme and received commissions for the recruit's earnings, the finding was not clearly erroneous.

United States v Szur, 289 F.3d 200 (2nd Cir. 2002)
(Walker opinion; Parker, Katzmann)

The Second Circuit held that the record fully supported the district court's 4-level adjustment for the defendant's role in the fraud (which involved more than 5 participants), and 2-level adjustment for his role in the money-laundering activity. With regard to the fraud, defendant conceived the scheme and was expected to receive half the proceeds of the sale of stock. With regard to the money laundering, the defendant was responsible for instructing others how to transfer money to the other accounts. Accordingly, the district court's findings were not clearly erroneous.

§ 3B1.2: Mitigating Role

United States v Yu, 285 F.3d 192 (2nd Cir. 2002)
(Jacobs opinion; Walker, Sack)

Defendant contended that the district court abused its discretion in concluding that he failed to prove, by a preponderance of the evidence, that he played a minor role, meriting a 2-point reduction in his offense level. Rejecting this claim, the Second Circuit noted that defendant supplied his co-conspirators with names and phone numbers, spoke to potential customers, was a trusted authority and was aware of the nature and scope of the enterprise. The court emphasized that the reduction is only available if the defendant both played a lesser role than his co-conspirators, and had a minor role as compared to the average participant in such a crime.

§ 3B1.3: Abuse of Trust

United States v Downing, ___F.3d___(2002 WL 1448307; July 1, 2002)
(Sack opinion; Miner, Berman)

The defendants argued that the district court should not have imposed a 2-level enhancement pursuant to § 3B1.3 because the conspiracy never progressed to the stage at which they used their accounting skills. The Second Circuit, however, agreed with the government that the adjustment applied to conspiracy convictions where a court determines, "with reasonable certainty," that the defendant conspired, i.e., actually intended, to use a position of public or private trust, or a special skill, in a manner that facilitated the commission or concealment of the offense.

United States v Santoro, ____F.3d____(2002 WL 1899654)
(Walker Opinion; Newman, Kearse)

In finding that the District Court's two level upward adjustment for abuse of trust was not clearly erroneous, the Second Circuit explained that the adjustment is warranted where a broker in a trust relationship fails to disclose to the client that his is receiving a substantial

commission or other payment for the recommendation made. Although an abuse of trust does not arise in a fraud case simply because the defendant violates a legal obligation to be truthful, a broker assumes a position of trust and confidence in making recommendations to his clients where such clients would expect him to disclose all material information regarding the recommended transaction. While the defendant here lacked discretionary investment authority, he still exercised substantial judgment in choosing stocks to recommend to his client, thereby assuming a position of trust. Finally, the Second Circuit rejected defendant's contention that the adjustment did not apply simply because his clients did not subjectively place their trust in him.

§ 3C1.1: Obstruction of Justice

United States v Blount, 291 F.3d 201 (2nd Cir. 2002)
(Kearse opinion; Meskill, Calabresi)

The Second Circuit rejected defendant's contention that the district court applied the obstruction enhancement based upon a mistaken view of his trial testimony. Although the district court initially stated that defendant had denied selling cocaine, the court later acknowledged that defendant had actually admitted to distributing cocaine, though not with the co-defendant. Moreover, the court's finding that the witnesses refused the defendant's testimony to that effect was "amply supported."

United States v Feliz, 286 F.3d 118 (2nd Cir. 2002)
(Per Curiam; Cardamone, Parker, Parker)

Defendant argued that the obstruction of justice enhancement only applied to unlawful attempts to influence witnesses once formal proceedings had been initiated. The Second Circuit disagreed and held that the defendant's attempt to support a false alibi, by having friends lie to the police, amounted to obstructive conduct as understood in the guidelines.

§ 3D1.2: Grouping

United States v Gordon, 291 F.3d 181 (2nd Cir. 2002)
(Parker opinion; Oakes, Newman)

In its cross-appeal, the government argued that grouping of the mail fraud and tax evasion counts was inappropriate under § 3D1.2(c), but would have been proper under § 3D1.2(d). Initially, the Second Circuit observed that, plain error analysis was required since the issue was unpreserved for review. But the court agreed that the counts should have been grouped under § 3D1.2(d), since the offense levels for the crimes were based upon the amount of loss and were closely interrelated. Moreover, because the mistake resulted in a lower sentence, the court held that the error was both plain and affected substantial rights, requiring that defendant be re-sentenced. The court remarked that "the damage done by

allowing an inappropriate sentence to stand [here] while refusing other similarly situated defendants the opportunity to fall within § 3D1.2(c) and § 3D1.3(a)'s less burdensome confines is too great to allow the error to remain uncorrected."

United States v Szur, 289 F.3d 200 (2nd Cir. 2002)
(Walker opinion; Parker, Katzmann)

The defendants maintained that, because the wire fraud and money laundering offenses were so tightly interwoven that the victims were the same, the district court should have grouped them together. The Second Circuit, however, agreed with the district court that the victims were distinct; the individual investors suffered from the fraud, while the public as a whole was the victim of the defendants' attempts to conceal their relationship and their illegally obtained funds.

§ 3E1.1: Acceptance of Responsibility

United States v Cox, ___F.3d___(2002 WL 1869469; August 15, 2002)
(Pooler Opinion; Sotomayor, Kaplan)

Defendant argued that his motion to withdraw his guilty plea did not provide a sufficient basis for the district court's decision to deny him a credit for acceptance of responsibility, reasoning that he did not claim factual innocence in making the motion. The Second Circuit, however, affirmed the district court's finding that the defendant's "outlandish" claim that he was arrested as a result of racial profiling was "powerful evidence" that he had not accepted responsibility.

United States v Guzman, 282 F.3d 177 (2nd Cir. 2002)
(Miner opinion; Kearse, Parker)

Although the defendant, who was convicted of conspiracy to possess with intent to unlawfully use fraudulently obtained identification documents, conceded that his post-plea visits to the Department of Motor Vehicles violated his Cooperation Agreement, he still claimed that he was entitled to an adjustment for acceptance of responsibility. The Second Circuit disagreed, stating that the defendant's visits raised a strong inference that the defendant was continuing to engage in the very criminal conduct that led to his charges and guilty plea. Thus, defendant's post-plea conduct was inconsistent with a "full and ungrudging acceptance of responsibility."

United States v. McLean, 287 F.3d 127 (2nd Cir. 2002)
(Cabranes opinion; Oakes, Kearse)

The Second Circuit declined to disturb the district court's determination that defendant had not fully accepted responsibility. Although the defendant admitted to selling marijuana on multiple occasions, he insisted that each sale consisted of, at most, one to two

pounds of drugs, which position was belied by the record.

United States v Rood, 281 F.3d 353 (2nd Cir. 2002)
(Pooler opinion; McLaughlin, Sand)

The defense and the government agreed that the district court erred in refusing to grant him an additional one-level decrease in his offense level on the basis of factors not mentioned in § 3E1.1(b). That guideline provides for the additional one-level decrease where, *inter alia*, the defendant notifies the government of his intention to plead guilty in a timely fashion. Once the court determines that a defendant is entitled to the initial 2-level decrease for acceptance, it must award the additional level if the defendant has timely announced his intention to plead. The court emphasized that the additional decrease is not discretionary where defendant satisfies the specified criteria.

United States v Yu, 285 F.3d 192 (2nd Cir. 2002)
(Jacobs opinion; Walker, Sack)

The district court did not abuse its discretion in refusing to grant the defendant the full 3-level acceptance of responsibility credit. Because the defendant entered his plea barely one week before trial began, the plea was not sufficiently timely to permit the government to avoid preparing for trial and for the court to allocate its resources efficiently. Moreover, the district court only grudgingly awarded defendant a 2-level credit, remarking that there was little evidence of "sincere remorse."

CRIMINAL HISTORY

§ 4A1.1: Criminal History Category

United States v Cuero-Flores, 276 F.3d 113 (2nd Cir. 2002)
(Cabranes opinion; Straub, Parker)

Because the defendant was serving a special parole term at the time of the offense, the PSR determined that an additional 2 criminal history points should be included, pursuant to § 4A1.1(d). Defendant, though, objected that, since he had been deported, he had not been serving a special parole term at the time of the offense. In discussing this issue, the Second Circuit initially observed that there had been no published cases addressing whether a special parole term terminates upon deportation, though other circuits had held that deportation did not terminate supervised release. Based upon 8 U.S.C. § 1252(h), the court proceeded to hold that both parole and special parole terms survive deportation. Thus, a deported alien who returns to the United States and violates the conditions of his parole or special parole faces the "possibility of . . . further confinement in respect of the same offense." Accordingly, the sentence was affirmed.

United States v Jackson, ___ F.3d ___(2002 WL 1940693; August 22, 2002)
(Jacobs Opinion; Leval, Katzmann)

Defendant argued that his escape should not have been considered a "violent felony" for the purposes of the armed career criminal statute, since it did not involve conduct that presented a serious potential risk of physical injury to another. Adopting the reasoning of every other circuit that has considered this issue, the Second Circuit stated that an inmate who escapes by peacefully walking away from a work site will (if he can) be inconspicuous and discreet, and will (if he can) avoid confrontation and force. But because escape invites pursuit and confrontation, which entails serious risks of physical injury to law enforcement officers and the public, the crime amounts to a felony under § 924(e). Accordingly, defendant's sentence as an armed career criminal was affirmed.

§ 4A1.2: Computing Criminal History

United States v Driskell, 277 F.3d 150 (2nd Cir. 2002)
(Straub opinion; Miner, Parker)

The defendant argued that, because his prior state sentence was imposed after he was deemed a youthful offender, that sentence did not result from an "adult conviction" for purposes of calculating criminal history. The Second Circuit, however, held that criminal history should be determined by looking "at the substance of the past conviction rather than the statutory term affixed to it by a state court." Because the defendant here was tried and convicted in an adult court and served a sentence over one year and one month in an adult prison, the court held that the conviction was properly considered an "adult conviction," pursuant to §4A1.2(d)(1). The court noted that the defendant had been adjudicated a youthful offender only after he was convicted in an adult court.

§ 4A1.3: Criminal History Departures

United States v Cox, ___ F.3d___(2002 WL 1869469; August 15, 2002)
(Pooler Opinion; Sotomayor, Kaplan)

Defendant maintained that the district court improperly departed upward from criminal history category I to category II on the basis of his 1998 arrest for drug possession – as "prior similar adult criminal conduct not resulting in a criminal conviction" – since that crime was not similar to the instant crime of conviction. But while agreeing that the crimes were not similar, the Second Circuit held that the prior arrest presented reliable information about defendant's criminal history, supporting the conclusion that his criminal history category was more serious than a category I. The court emphasized that, under *Koon v United States*, 518 US 81 (1996), a sentencing court may consider other information outside the five express factors listed in §4A1.3 as a basis for departure, so long as the information is reliable.

DETERMINING THE SENTENCE

§ 5B1.3 Probation

United States v Bello, ___F.3d___(2002 WL 31388798; October 23, 2002)
(Jacobs Opinion; Cabranes, Parker)

The Second Circuit held that the district court abused its discretion in barring defendant from watching television as a condition of his probation. U.S.S.G. § 5B1.3 provides that a special condition may only be imposed if reasonably related to various factors set forth in 18 U.S.C. § 3563(a). The district court reasoned that the television restriction was designed to force "deprivation and self-reflection," thereby encouraging the defendant to "conquer recidivism." Without some closer connection between watching television and the defendant and or his particular crime, however, the Second Circuit found that the restriction was unreasonable. Further, there was an insufficient relationship between the television restriction and the abatement of defendant's criminality, since there were other amusements available to the defendant at his home. Because the condition was "evidently an essential consideration in the decision to impose a sentence of probation rather than jail," the court elected to remand for resentencing, rather than simply vacate the condition.

§ 5C1.1 Imposing Imprisonment

United States v Campbell, ___F.3d___(2002 WL 1807078; August 7, 2002)
(Kearse Opinion; Newman, Rakoff)

In light of numerous errors the district court committed in calculating the defendant's offense level and criminal history, the Second Circuit remanded for resentencing. Among other things, the sentencing court erroneously imposed concurrent prison terms of 30 years on the conspiracy count and each of seven robbery counts, though none of those counts carried a statutory maximum so high. The Second Circuit specified that the eventual sentence should be accompanied by an explicit instruction to the Bureau of Prisons that the defendant must be released after he had served 50 years in prison, which was a term of the grant of extradition from Costa Rica.

§ 5D1.1: Supervised Release

United States v Cunningham, 292 F.3d 115 (2nd Cir. 2002)
(McLaughlin opinion; Pooler, Parker)

Defendant, who pled guilty to conspiring to defraud a financial institution, argued that his personal guideline range, rather than the prescribed statutory maximum, determined the letter grade of his offense and, consequently, the length of his supervised release. Under this theory, defendant maintained that he could not receive more than one year of supervised release. The Second Circuit disagreed, explaining that stating that where, as here, the statute

of conviction does not specify a letter grade, 18 U.S.C. § 3559 indicates that the classification is determined according to "the maximum term of imprisonment." Further, a "plain reading of§ 3559 demonstrates that the maximum term of imprisonment authorized refers to the statutory maximum for the offense and not a defendant's personal Guideline range."

United States v Kremer, 280 F.3d 219 (2nd Cir. 2002)
(Newman opinion; Kearse, Rakoff)

Defendant argued that the court lacked authority, upon finding a violation of supervised release, both to extend his term of supervised release and to impose home detention as a condition of such release. Defendant reasoned that 18 U.S.C. § 3583(e) specifies four exclusive actions the court may take against one who violates his supervised release. The Second Circuit rejected this argument in light of § 3583(e)(2), which expressly authorizes a court to "extend a term of supervised release *** *and* *** modify, reduce, or enlarge the conditions of supervised release."

United States v Pettus, ___F.3d___(2002 WL 31015646; September 9, 2002)
(Sotomayor Opinion; Parker, Straub)

The Second Circuit rejected defendant's argument that §3583(h) required that he be credited for time previously served on supervised release when being sentenced to a post-revocation term. Citing cases from other circuits, the court found this conclusion to be "consistent with the policy concerns animating the supervised release program." The court reasoned that, while supervised release is technically a punishment, it was primarily intended to protect the public from further crimes by easing the re-entry of a convicted defendant into society. "Realizing this goal requires that the defendant serve his term of supervised release continuously, rather than in short intervals between prison stays." Moreover, the court rejected the argument that this interpretation of § 3583(h) violated the Double Jeopardy Clause.

United States v Sofsky, 287 F.3d 122 (2nd Cir. 2002)
(Newman opinion; Oakes, Parker)

In reviewing the defendant's challenge to a condition of supervised release, made for the first time on appeal, the Second Circuit initially observed that, although plain error review applies, "there are circumstances that permit us to relax the otherwise rigorous standards of plain error review to correct sentencing errors." Because in this case the condition in question was not recommended in the PSR and the defendant had no prior knowledge of it, the court reviewed the claim without insisting on "strict compliance with the rigorous standards of Rule 52(b)." As for the merits of the issue, the defendant argued that his supervised release should not have included the condition that he refrain from accessing a computer or the internet, without approval from the probation department. Insofar as the defendant had been convicted of receiving child pornography, the court

recognized that the condition was "reasonably related" to the purposes of his sentencing. Nevertheless, the Second Circuit vacated the condition, stating that it "inflict[ed] a greater deprivation on [defendant's] liberty than [was] reasonably necessary."

§5D1.3 Supervised Release Conditions

United States v. Thomas, ___F.3d___(2002 WL 1869522, August 15, 2002)
(Parker Opinion, Calabresi, Sack)

The Second Circuit affirmed four out of five conditions of defendant's supervised release that were mentioned in the written judgment but not articulated orally at sentencing. Since the first two conditions were listed in §5D1.3(d), the district court's failure to articulate them was inconsequential under *United States v Asuncion-Pimental*, 290 F.3d 91 (2nd Cir. 2002), which extended the holding in *United States v Truscello,* 168 F.3d 61 (2nd Cir. 1999), to permit conditions recommended in subsection (d), even if not specified orally at sentencing.

The fourth and fifth conditions - that defendant report to the nearest probation office within seventy two hours of release from custody and that he be supervised by the district of his residence - though not enumerated in §5D1.3 of the guidelines were also affirmed because they were "basic administrative requirements" that were "necessary to supervised release." Thus, those conditions do not violate Rule 43(a).

But a different result was compelled concerning the third condition, which prohibited defendant from possessing any identification in the name of another person or in any matter assuming the identity of any other person. To the extent that this condition encompassed non-criminal behavior, it did not overlap with any mandatory or standard conditions of release and was not necessary to clarify or carry out any of the mandatory or standard conditions in §5D1.3. Accordingly, the inclusion of this condition violated Rule 43(a).

§ 5E1.1: Restitution

Lavin v United States, ___F.3d___, (2002 WL 1799847; August 6, 2002)
(Cabranes Opinion; Straub, Sotomayor)

Defendant argued that he was entitled to the return of $100,800 that had been seized from his parents' home near the time of his arrest. Adopting the approach of other circuits, however, the Second Circuit held that a criminal defendant's presumptive right to the return of his property once it is no longer needed as evidence is subject to the government's legitimate continuing interest. Here, the government had a legitimate interest in ensuring that the valid restitution order was satisfied.

United States v Abbey, 288 F.3d 515 (2nd Cir. 2002)
(Per Curiam; Walker, Jacobs, Sack)

The Second Circuit was not persuaded by the defendant's argument that the record only supported a finding that the bank had extended a credit line to his company, without proving how much money the company actually drew from the credit line. While noting that restitution is limited to actual, rather than potential losses, the court found that the facts supported the order of restitution.

United States v Coriaty, ___F.3d___(2002 WL 1358183; June 21, 2002)
(Sack opinion; Miner, Berman)

Initially, the Second Circuit held that defendant's argument to the district court about the loss calculation was not sufficient to preserve his claim about restitution. The court then found that there was no "plain error," as the district court had correctly ordered restitution, as reduced by the amount that the defendant had paid to the victim out of his own funds.

United States v Firment, _____F.3d _____(2002 WL 1583583; July 18, 2002)
(Kearse opinion; Van Graafeiland, Parker)

The Second Circuit rejected the defendant's claim that, because the victims of the telemarketing scheme were not the victims of the offense of conviction (conspiracy to impede and impair the lawful functions of the IRS), the district court had exceeded its authority in directing that restitution be paid to them. The Second Circuit explained that such an order of restitution was "expressly authorized by statute [18 U.S.C. § 3663(a)(1)(A)] when the defendant's plea bargain includes an agreement for such restitution."

United States v Harris, ___F.3d___ (2002 WL 1981395; August 28, 2002)
(Per Curiam; Van Graafeiland, Winter, Sack)

The Second Circuit rejected defendant's first argument that her restitution order was improper because it was harsh, explaining that, where restitution is mandatory, the amount can only be challenged on the ground that it does not reflect the victims' losses. But since the record did not demonstrate that the district court considered the requisite statutory factors before imposing a restitution payment schedule of ten percent of the defendant's net monthly income, the matter was remanded. The court stated that it could not uphold the restitution order without some "affirmative act or statement allowing an inference that the district court considered the defendant's ability to pay."

DEPARTURES

§ 5K1.1: Substantial Assistance

United States v Reeves, ___F.3d___(2002 WL 1565550; July 17, 2002)
(Van Graafeiland opinion; Winter, Sack)

Contrary to the defendant's argument, the Second Circuit held that the district court

did not err in concluding that the government had acted in good faith in refusing to file a §5K1.1 letter. The prosecutors met with the defendant on many occasions for over a year to explore possible assistance, but the meetings did not substantially further any investigation. Considering that the government was still willing to withdraw the prior felony information it had filed, thereby allowing the defendant to seek a downward departure to 120 months, there was no basis for finding "bad faith." In this regard, the Second Circuit emphasized that the government need only demonstrate "honest dissatisfaction" with the defendant's efforts.

§ 5K2.0: Miscellaneous Departures

Aberrant Conduct

United States v Gonzalez, 281 F.3d 38 (2nd Cir. 2002)
(Miner opinion; Jacobs, Calabresi)

Applying the new, codified definition of aberrant conduct, set forth in § 5K2.20, the Second Circuit held that the district court mistakenly concluded that it lacked authority to depart because the defendant's crime – embezzlement – lacked "spontaneity." In fact, the new guideline permits the departure even if the crime did not constitute a single act. In other words, spontaneity of behavior, which is not required, and behavior of limited duration, which is required, are not the same. Further, the court held that the *ex post facto* clause was not violated by applying the new rule, since it did not establish a more severe test than the rule in effect at the time of the crime.

Asylum

United States v Aleskerova, ___F.3d___(2002 WL 1807377; August 8, 2002)
(Walker Opinion; Katzmann, Cudahy)

The Second Circuit agreed with the government that, by granting the downward departure, the district court had impermissibly circumvented Congress's legislative decision governing a criminal alien's eligibility to seek asylum. The district court reasoned that the combination of deportation, together with the effect of a lengthy sentence on the asylum application and the prospect of persecution, took the case out of the heartland. Thus, the court departed to less than one year, in order to preserve the defendant's eligibility to seek asylum. The Second Circuit held, however, that the district court lacked authority to grant a departure for the purpose of making the defendant eligible to seek asylum. Further, "the court's disapproval of [a congressional] policy [was not] an appropriate basis for a departure ****"

Cooperation with the State

United States v Gaines, ___F.3d__(2002 WL 1484496; July 12, 2002)

(Cardamone opinion; McLaughlin, Sotomayor)

The Second Circuit agreed with the defendant that § 5K2.0 authorized the district court to depart downward on the basis of his assistance in a state murder prosecution. But because the defendant's assistance occurred several years before the federal trial, his conduct was "akin to a prior good dead, which is a discouraged basis for departure." Thus, the district court did not abuse its discretion in declining to grant the departure.

Delay in Prosecution

United States v Santos, 283 F.3d 422 (2nd Cir. 2002)
(Van Graafeiland opinion; Winter, Sack)

The district court departed downward on the theory that, by delaying prosecution until after the defendant was released from state custody, the government had deprived him of the opportunity to receive a federal sentence concurrent with the state sentence. Rejecting this departure, the Second Circuit initially observed that § 5G1.3(b) would not have permitted concurrent sentences, since the state sentence (arising out of drugs) was not "fully taken into account" for the offense level of his federal charge (illegal reentry). Subsection (c), however, permits courts to award a credit in order "to achieve a reasonable punishment." But the court then held that, in order to grant a departure on the ground of delay, the defendant must show that there was either "deliberate manipulation or bad faith on the part of the government." Here, the government's "fortuitous timing raises an eyebrow," but did not prove such bad faith. Accordingly, the departure was inappropriate.

Guideline Dissatisfaction

United States v Riera, ___F.3d___(2002 WL 17700529; August 1, 2002)
(Sack Opinion; Cardamone, Winter)

Reviewing for abuse of discretion, the Second Circuit vacated and remanded defendant's sentence. Generally, a district court may not depart from the guidelines because of it's dissatisfaction with the available guidelines range, but may only depart vertically pursuant to §5K2.0 if it finds that there exists an aggravating or mitigating circumstance. Further, the court may only depart for misconduct related in some way to the offense of conviction. Here, the district court departed 4-levels based on defendant's criminal history and likelihood to commit future crimes if he received a lenient sentence. The court also remarked that the range was "astonishingly low" considering the amount of money embezzled. Since those factors were already accounted for, however, the Second Circuit remanded for resentencing, while leaving open the possibility of a "horizontal departure" should the court find the criminal history category inadequate.

Post-sentencing rehabilitation

United States v Quintieri, ___F.3d___2002 WL 31255606 (2nd Cir. Oct. 9, 2002)
(Sack opinion; Walker, Parker)

The Second Circuit reaffirmed that, as of November 1, 2000, the guidelines specifically prohibit a downward departure on the basis of post-sentencing rehabilitation, pursuant to § 5K2.19.

Sentencing Entrapment

*United States v Duverge Perez,*___F.3d___(2002 WL 1466875; July 9, 2002)
(Feinberg opinion; Miner, Katzmann)

Defendant argued that the district court erred in concluding that a downward departure could not be based upon sentencing entrapment or sentencing manipulation. But because the district court credited the cooperator's version of events that the defendant was knowingly involved in a crack deal the whole time, and therefore was not induced to commit a crime that he was not otherwise predisposed to commit, the Second Circuit did not consider whether those doctrines applied.

§ 5K2.3 Extreme Psychological Injury

United States v Crispo, ____F.3d___(2002 WL 31115209; September 24, 2002)
(Cardamone Opinion; Feinberg, Pooler)

The Second Circuit summarily rejected defendant's argument that he was given insufficient notice of the district court's intent to upwardly depart due to extreme psychological injury. It was sufficient that the presentence report specifically mentioned this ground for departure. More problematic was the argument that the district court did not and could not make factual findings sufficient to show that his crime involved aggravating circumstances sufficient to warrant a departure. As the defendant argued, this departure required a psychological injury that was much more serious than one would expect from an extortionate kidnaping threat involving a vulnerable victim. Because the district court did not explain how defendant's actions caused harm beyond this typical level, there was no assurance that the psychological injuries that resulted from defendant's crime were not already "fully accounted for by another part of the guidelines". Nevertheless, the Second Circuit declined to remand, since the district court cited a number of factors for an upward departure aside from extreme psychological injury, and those factors were not challenged on appeal. The court concluded that any error committed by the district court with regard to § 5K2.0 did not rise to the level "constituting manifest injustice that would warrant a departure from" its usual rule against reviewing issues not raised or briefed by the parties.

SENTENCING PROCEDURES

Conflict with Judgment

United States v Asuncion-Pimental, 290 F.3d 91 (2nd Cir. 2002)
(Per Curiam; Walker, Parker, Sotomayor)

The primary issue is whether a condition specified in the written judgment – that the defendant not possess a firearm during his supervised release – had to be stricken because the court failed to pronounce it orally during sentencing. At the outset, the Second Circuit reiterated that, where the oral pronouncement of the sentence conflicts with the written judgment, the oral pronouncement controls. In this case, though, the written judgment did not conflict with the oral pronouncement, but merely clarified it. For the condition that defendant not possess a weapon (which a convicted felon may not do) was merely a more specific version of the general condition that he not break the law.

§ 6B Plea Agreements

United States v Riera, F.3d (2002 WL 1770529; August 1, 2002)
(Sack Opinion; Cardamone, Winter)

Defendant asserted that the government breached its obligation under the plea agreement not to suggest an upward departure when it wrote that the court "would be well within its discretion in upwardly departing" and then detailed the reasons why such a departure would be appropriate. While the letter was "too close in tone and substance to forbidden advocacy to have been well-advised," the Second Circuit nonetheless held that the government did not breach the plea agreement because: (1) the letter was in response to a specific inquiry from the court; (2) the plea agreement provided that the government could respond to the court's inquiries by stating whether a departure would be within the court's discretion; and importantly, (3) the government later emphasized that it was not advocating an upward departure.

Prior Felony Enhancements

United States v Anglin, 284 F.3d 407 (2nd Cir. 2002)
(Per Curiam; Calabresi, Cabranes, Amon)

The defendant argued that the fact of a prior conviction had to be proved to a jury before the court could impose the 20-year mandatory minimum sentence pursuant to 18 U.S.C. § 942(c). More specifically, he claimed that this statute's sentencing enhancement fell outside the scope of *Almendez-Torres v United States,* 523 U.S. 224 (1998), where the Supreme Court stated that, unlike most facts, the fact of a prior crime did not need to be proven beyond a reasonable doubt, even if it increases the statutory sentence. Citing its prior precedent, the Second Circuit rejected the argument, reaffirming that a prior conviction was

a standard recidivist concern.

United States v Fernandez-Antonia, 278 F.3d 150 (2nd Cir. 2002)
(Meskill opinion; Jacobs, Lynch)

The Second Circuit rejected the defendant's argument that his New York State conviction for attempted robbery in the third degree did not meet the definition of an "aggravated felony," justifying the 16-level increase in offense level pursuant to § 2L1.2(b)(1)(A). The court explained that 8 U.S.C § 1101(a)(43)(G) includes within its definition of "aggravated felony" an "attempt or conspiracy to commit a specified offense. Although New York law provides that a person is guilty of an attempt when "he engages in conduct which tends to effect the commission of such crime," whereas federal law provides that a person is guilty of an attempt when he takes a "substantial step" toward committing the crime, the court declared that the differences between these standards was "more semantic than real." Accordingly, the district court correctly found that the defendant's conviction of attempted robbery in the third degree constituted an "aggravated felony."

United States v Mercedes, 287 F.3d 47 (2nd Cir. 2002)
(Feinberg opinion; Katzmann, Gleeson)

In the context of considering whether the defendant should have been permitted to withdraw his guilty plea, the Second Circuit rejected his claim that the district court was obligated to inform him that his sentence could be enhanced, pursuant to the "aggravated felony" enhancement of 8 U.S.C. § 1326(b)(1), based upon a different aggravated felony than the one incorrectly listed in the indictment. Under *Almendez-Torres v United States,* 523 U.S. 224 (1998), that statute was merely a penalty provision, making it unnecessary for the indictment to specify the prior felony. For the same reason, the court did not improperly sentence the defendant on the basis of his prior felony.

Resentencing *de novo*

United States v Bryce, 287 F.3d 249 (2nd Cir. 2002)
(Keith opinion; Kearse, Jacobs)

The Second Circuit reaffirmed that the "mandate rule" permits, but does not require, *de novo* sentencing unless the mandate specifically limits the scope of the resentencing. Further, even where the mandate includes limiting instructions, the district court still may consider a departure based on intervening circumstances. Thus, the court rejected the defendant's argument that the district court was precluded, on remand, from enhancing the sentence based on newly available evidence, even though the facts (concerning relevant conduct) existed before the first sentencing hearing. In addition, the court held that, because defendant could not have had any legitimate expectation of finality in the original sentencing, the resentencing did not violate the Double Jeopardy Clause. The court also found no merit to defendant's claim that the government was "estopped" from seeking an increased sentence

on remand. Finally, the increased sentence on remand did not deprive defendant of Due Process or violate the supervisory rules set forth in *United States v Coke,* 404 F.2d 836 (2nd Cir. 1968) (*en banc.*).

United States v Quintieri, ___F.3d___2002 WL 31255606 (2nd Cir. Oct. 9, 2002)
(Sack opinion; Walker, Parker)

In a prior appeal arising out of a § 2255 motion, the Second Circuit remanded for a determination whether the district court had engaged in impermissible double-counting when increasing the offense level for possession of a firearm, and then imposing a consecutive sentence for the same firearm. On remand, the government conceded there had been impermissible double-counting. Defense counsel, though, also made several additional sentencing arguments. The district court ultimately imposed the same sentence, though it was recalculated to avoid the double-jeopardy problem.

On the second appeal, the Second Circuit held that, pursuant to the "mandate rule," the remand did not call for resentencing *de novo*, but was limited to addressing the issue of double-counting. The court distinguished this situation from the situation where resentencing occurs because convictions on particular counts have been vacated. For "when the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing, the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered." In contrast, "resentencing to correct specific sentencing errors does not ordinarily undo the entire 'knot of calculation.'" Thus, the court reaffirmed that, "absent explicit language in the mandate to the contrary, resentencing should be limited"when the convictions are affirmed but the Court of Appeals "determines that a *sentence* has been erroneously imposed and remands to correct that error." Still, the court acknowledged that there may be circumstances when reversal of a sentencing error effectively undoes the entire "knot of calculation," requiring *de novo* resentencing. Because the resentencing here was not *de novo*, the court concluded that various issues had either been waived or already determine as "law of the case." Finally, the Second Circuit added that the trial court did not commit plain error in relying on the original PSR

Statement of Reasons

United States v James, 280 F.3d 206 (2nd Cir. 2002)
(Newman opinion; Walker, Parker)

The Second Circuit rejected defendant's claim that the district court failed to specify sufficient reasons for the sentence of 63 months. 18 U.S.C. § 3553(b) is satisfied when the sentencing judge states, either explicitly or by adopting an adequately explained analysis in the PSR, the basis for the adjusted offense level, the criminal history category and the resulting sentencing range. A more precise explanation is required only where the sentencing range exceeds 24 months, or falls outside the applicable range. *See,* 18 U.S.C. §

3553(c)(1)(2). Here, the sentencing range (57 to 71 months) did not exceed 24 months. The sentencing judge was not obligated to explain why he did not impose a sentence below 60 months, just because that might have made"boot camp" available for the defendant.