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I. INTRODUCTION

The United States Sentencing Commission, through the Sentencing Reform Act of 1984, issues the Federal Sentencing Guidelines.[1] The United States Sentencing Commission is an independent agency in the judicial branch of the federal government.[2] The principal purpose of the Commission is to establish sentencing policies and practices for the federal criminal justice system that prescribe the appropriate sentences for offenders convicted of federal crimes. The guidelines and policy statements of the Commission are issued under the authority of 28 U.S.C. § 994(a).[3]

The stated purpose of the Guidelines is to provide a fair and uniform sentencing system that will aid the criminal justice system in combatting crime.[4] Primarily, the purpose of the Guidelines is to provide nationwide uniformity in sentencing for federal crimes.[5] Because the Guidelines govern the sentencing policies of all federal courts, and the coverage of the Guidelines includes more than ninety percent of all felony and class A misdemeanor cases in the federal courts,[6] the goal of uniformity has largely been met.

However, the Guidelines are statutory, and therefore subject to different interpretations.[7] In addition, because many of the questions that arise in

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1. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988 and Supp. 1995) and 28 U.S.C. §§ 991-998 (1988 and Supp. 1995)) [hereinafter U.S.S.G.].

2. For a comprehensive history of the development of the United States Sentencing Commission, see Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223 (1993).

3. 28 U.S.C. § 994(a) (1988 and Supp. V 1993).

4. U.S.S.G. Ch. 1, Pt. A, intro. cmt.

5. For a discussion of the various purposes and goals of the Guidelines, see Marc Miller, *Purposes at Sentencing*, 66 S. Cal. L. Rev. 413 (1992).

6. U.S.S.G. Ch. 1, Pt. A, intro. cmt.

7. As an example of this, in drug cases the Guidelines base the length of the sentence on the amount of "mixture or substance" of drugs involved. However, the Guidelines previously failed to define what constituted "mixture or substance" and the courts failed to agree on a definition. The Supreme Court, in Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919 (1991), attempted to define the term. Even then, the courts still diverged on attempts to define or apply the definition of "mixture or substance." The Second, Third, Sixth, Ninth, and Eleventh Circuits took the position that the term "mixture or substance" excluded the weight of unmarketable substances mixed with the drugs. United

sentencing issues are factual, given the great deference accorded the findings of the district court,[8] there will always be some disparity in the guideline applications, both among the various federal circuit and district courts throughout the United States in the interpretation of the Guidelines, as well as in the factual determinations by the district courts.

The Guidelines classify federal crimes by offense categories and focus on the offender's criminal history to determine the appropriate sentence. The Guidelines identify a sentencing range which is used to determine the length and the type of sentence to be imposed.

The Guidelines became effective on November 1, 1987,[9] and since that date have generated an enormous amount of litigation. In 1995, the Fifth Circuit Court of Appeals published ninety-one opinions dealing with some aspect of the Federal Sentencing Guidelines.[10] Because the Sentencing Reform Act of 1984 virtually eliminates the sentencing court as a direct avenue for review of sentences, all challenges to sentences must be made on direct appeal.[11] Thus, an understanding of the Sentencing Guidelines and their application is essential for any attorney practicing criminal law in the federal appellate court.

II. WHO MAY APPEAL

The Sentencing Reform Act provides a statutory basis for appellate courts to review both the legality and severity of sentences.[12] Thus, the right to appeal

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States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991). The First, Fifth, and Tenth Circuits took the position that the weight of the unmarketable material mixed with the drugs should be included in the weight for purposes of determining the length of sentences. United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), *cert. denied*, 502 U.S. 1009, 112 S. Ct. 648 (1991); United States v. Baker, 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983, 110 S. Ct. 517 (1989); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991). Effective November 1, 1993, the Commission adopted the position of the Second, Third, Sixth, Ninth, and Eleventh Circuits. U.S.S.G. App. C, amend. 484. Yet, as the commentators have pointed out, the law is still somewhat disharmonious. *See, e.g.*, Edward J. Tafe, Comment, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U.S.F. L. Rev. 369 (1994); Joseph Rizzo, Comment, *Federal Sentencing Guidelines: What Is the Fair Interpretation of "Mixture and Substance"?*, 14 Pace L. Rev. 301 (1994); Eric J. Stuckel, Comment, *"Mixture or Substance": Continuing Disparity Under the Federal Sentencing Guidelines § 2D1.1*, 12 Touro L. Rev. 205 (1995).

8. United States v. Kay, 83 F.3d 98 (5th Cir.), *cert. denied*, 117 S. Ct. 247 (1996); United States v. Madison, 990 F.2d 178 (5th Cir.), *cert. dismissed*, 510 U.S. 929, 114 S. Ct. 339 (1993); United States v. Humphrey, 7 F.3d 1186 (5th Cir. 1993).

9. 18 U.S.C. § 3551 (1988 and Supp. V 1993).

10. This figure was determined by using the following Westlaw search: [di(110) and date(1995) and sentencing w/2 guidelines]. The number of published opinions dealing with sentencing issues during the 1993-94 term were 106.

11. 18 U.S.C. § 3742 (1992).

12. 18 U.S.C. § 3742(a), (b) (1992).

is a statutory right, not a constitutional right.[13] Title 18, section 3742 of the United States Code governs who may appeal.

A. Defendant

A defendant may file a notice of appeal if the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the Sentencing Guidelines; (3) is greater than the sentence specified in the applicable guideline; or (4) was imposed for an offense for which no sentencing guideline has been issued and is plainly unreasonable.[14]

B. Government

The government, with the approval of either the Attorney General or Solicitor General, may appeal if the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the Sentencing Guidelines; (3) is less than the sentence specified in the applicable guideline; or (4) was imposed for an offense for which no sentencing guideline has been issued and is plainly unreasonable.[15] Approval of the Attorney General or Solicitor General is required to ensure that the government does not routinely file appeals for every sentence below the appropriate guideline range.[16] However, appeals of unreasonably lenient sentences are necessary to reduce unwarranted sentencing disparity.[17] The Senate Judiciary Committee, relying on a United States Supreme Court decision,[18] asserted that such appeals would not violate the Double Jeopardy Clause. The Fifth Circuit has concurred.[19]

III. STANDARDS OF REVIEW

Understanding the applicable standard of review is an essential first step in preparing an appeal. The appellate court uses the standard of review to determine whether an error has occurred in the trial court that warrants a remedy on appeal. Therefore, determining which standard of review applies aids counsel in deciding which potential appellate issues may warrant pursuing. There are

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13. United States v. Melançon, 972 F.2d 566 (5th Cir. 1992) (right to appeal is statutory right which may be waived).

14. 18 U.S.C. § 3742(a) (1992).

15. 18 U.S.C. § 3742(b) (1992).

16. 18 U.S.C. § 3742(b) (1992).

17. S. Rep. No. 225, *reprinted in* 1984 U.S.C.C.A.N. at 3334.

18. S. Rep. No. 225, *reprinted in* 1984 U.S.C.C.A.N. at 3334-35, relying on United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426 (1980) (double jeopardy does not prevent review of a Government's statutorily authorized appeal of a defendant's sentence).

19. United States v. Greenwood, 974 F.2d 1449 (5th Cir. 1992), *cert. denied sub nom.* Crain v. U.S., 508 U.S. 915, 113 S. Ct. 2354 (1993) (no double jeopardy when defendant had expectation government would appeal illegal sentence).

three standards which generally will apply: the de novo standard, the clearly erroneous standard, and the plain error standard. Even after applying the proper standard of review and determining that an error was committed, the appellate court may review that error under an additional standard, harmless error review, to decide whether relief is warranted.

A. De Novo

The de novo standard of review is the least restricted standard. The appellate court will make a new and independent review of the issues to which this standard applies. If the issue on appeal is purely legal, the de novo standard applies.[20] Issues that the Fifth Circuit has determined to be purely legal and subject to de novo review include: issues involving constitutional questions;[21] issues involving an interpretation of the Sentencing Guidelines;[22] issues arising out of an application of the Sentencing Guidelines;[23] and issues of whether the Sentencing Commission adequately considered particular circumstances in formulating the Sentencing Guidelines.[24] The de novo standard also applies if the issue on appeal requires the reviewing court to consider questions involving both fact and law and to exercise judgment about legal principles.[25]

B. Clearly Erroneous

The clearly erroneous standard results in a more restrictive review. This standard applies to factual findings which, under the clearly erroneous standard, are accorded great ("due") deference to the sentencing judge's application of the Sentencing Guidelines to the facts.[26] The "due deference" standard was added to federal law in November 1988.[27] The Fifth Circuit has held that the "due

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20. United States v. Mejia-Orosco, 868 F.2d 807 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S. Ct. 3257 (1989).

21. United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994).

22. United States v. Ford, 996 F.2d 83 (5th Cir. 1993), *cert. denied*, 510 U.S. 1050, 114 S. Ct. 704 (1994).

23. United States v. Marsh, 963 F.2d 72 (5th Cir. 1992); United States v. McKinney, 53 F.3d 664 (5th Cir.), *cert. denied*, 116 S. Ct. 261 (1995).

24. United States v. Harper, 932 F.2d 1073 (5th Cir.), *cert. denied*, 502 U.S. 970, 112 S. Ct. 443 (1991). The authority of the Sentencing Commission to make a particular Guideline determination is reviewed as an issue of statutory construction. United States v. Cheramie, 51 F.3d 538 (5th Cir. 1995).

25. United States v. Siciliano, 953 F.2d 939 (5th Cir. 1992); United States v. Shipley, 963 F.2d 56 (5th Cir.), *cert. denied*, 506 U.S. 925, 113 S. Ct. 348 (1992).

26. United States v. Kay, 83 F.3d 98 (5th Cir.), *cert. denied*, 117 S. Ct. 247 (1996); United States v. Madison, 990 F.2d 178 (5th Cir.), *cert. dismissed*, 510 U.S. 929, 114 S. Ct. 339 (1993); United States v. Humphrey, 7 F.3d 1186 (5th Cir. 1993).

27. 18 U.S.C. § 3742 (1988).

deference" standard did not create a new standard of review.[28] The "due deference" standard means that the appellate court will review the sentencing court's fact-based application of the Guidelines only for clear error.[29] A finding is clearly erroneous when the reviewing court is left with a definite affirmed conviction that a mistake has been committed.[30] Under the clearly erroneous standard, a sentencing court's conclusions on issues of fact will rarely be overturned.

The clearly erroneous standard has been used to review such fact-based issues as whether the defendant was a minor participant in the criminal activity;[31] whether the defendant was an organizer or a manager of the criminal offense;[32] whether the defendant obstructed justice;[33] and the determination of relevant conduct.[34]

C. *Plain Error*

For an appellate court to review an alleged sentencing error, the defendant or government must raise the issue, usually through an objection, at sentencing.[35] If the error was not raised below, the appellate court will consider the claim only if it constitutes "plain error."[36] The Fifth Circuit has established four factors that are to be considered when determining whether there has been plain error.[37] First there must be an "error," and second, that error must be "plain," meaning it must be "clear" or "obvious."[38] The third factor requires the error to affect "substantial rights," which usually requires a showing of

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28. United States v. Mejia-Orosco, 868 F.2d 809 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S. Ct. 3257 (1989). *See also* Williams v. United States, 503 U.S. 193, 205, 112 S. Ct. 1112 (1992).

29. United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996); United States v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989).

30. United States v. Castaneda-Cantu, 20 F.3d 1325 (5th Cir. 1994).

31. United States v. Buenrostro, 868 F.2d 135 (5th Cir. 1989), *cert. denied*, 495 U.S. 923, 110 S. Ct. 1957 (1990).

32. United States v. Barreto, 871 F.2d 511 (5th Cir. 1989).

33. United States v. Laury, 985 F.2d 1293 (5th Cir. 1993).

34. United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1565 (1994).

35. United States v. Francies, 945 F.2d 851, 852 (5th Cir. 1991).

36. Fed. R. Crim. P. 52(b); United States v. Ebertowski, 896 F.2d 906 (5th Cir. 1990) (district court committed plain error by placing defendant in criminal history category VI after determining not to apply career offender Guideline); United States v. Goldfaden, 959 F.2d 1324, 1327-29 (5th Cir. 1992) (plain error when government made sentencing recommendation in violation of plea agreement); United States v. Bullard, 13 F.3d 154, 159-60 (5th Cir. 1994) (per curiam) (no plain error when district court applied wrong Guidelines and decreased offense level for responsibility acceptance because no miscarriage of justice resulted); United States v. Franks, 46 F.3d 402, 404 (5th Cir. 1995) (plain error when district court applied wrong section of Guidelines in assigning base offense level).

37. United States v. Cabral-Castillo, 35 F.3d 182, 189 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1157 (1995).

38. *Id.*

prejudice.[39] Fourth, the court looks for a mistake that is "so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice."[40] Given the minimal nature of the review, the appellate court considers all of the evidence in the record to determine whether the entire record supports the imposition of the sentence.[41]

D. Harmless Error

If an appellate court finds that an error was committed, the sentence may still be affirmed if the error was harmless.[42] An error is harmless if it does not affect the defendant's substantial rights.[43] In other words, an error is harmless if the reviewing court is sure, after viewing the entire record, that the error did not influence the judge or jury or had only a slight effect on the result.[44] In sentencing review, if the sentence was imposed either in violation of law or as a result of an incorrect application of the Sentencing Guidelines, the case is remanded for new sentencing and the harmless error analysis does not apply.[45]

IV. SOURCES OF SENTENCING ISSUES

The Sentencing Guidelines themselves are not a major source of sentencing issues on appeal, but some constitutional challenges to the individual Guideline sections can be raised. The interpretation and application of the Guidelines as well as the imposition of sentence constitute the greatest source of potential appellate issues. Each of these sources of issues will be addressed in turn and include such areas as the interpretation of the Guidelines, the determination of the applicable offense level, departures from the Guidelines, plea agreements, and the determination of the sentencing range.

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39. *Id.* The defendant rather than the government bears the burden of demonstrating prejudice.

40. United States v. Pattan, 931 F.2d 1035, 1043 (5th Cir. 1991), *cert. denied*, 504 U.S. 958, 112 S. Ct. 2308 (1992). *See also* United States v. Calverley, 37 F.3d 160 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1266 (1995).

41. *Patton*, 931 F.2d at 1043. *See also Calverley*, 37 F.3d at 610.

42. 28 U.S.C. § 2111 (1988); Fed. R. Crim. P. 52(a); United States v. Pace, 955 F.2d 270, 279 (5th Cir. 1992) (errors in sentencing were harmless); United States v. Bounds, 943 F.2d 541, 545-46 (5th Cir. 1991), *cert. denied*, 510 U.S. 845, 114 S. Ct. 135 (1993) (failure to advise defendant in open court of possibility of supervised release was not harmless under the circumstances).

43. United States v. Sneed, 63 F.3d 381 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 712 (1996).

44. *Id.*

45. Williams v. United States, 503 U.S. 193, 202, 112 S. Ct. 1112, 1120 (1992); United States v. Stephenson, 887 F.2d 57 (5th Cir.), *cert. denied sub nom.* Goff v. U.S., 493 U.S. 1086, 110 S. Ct. 1151 (1989).

A. Sentencing Guidelines

1. Interpretation of Guidelines

The Guidelines consist of text and commentary. The commentary may interpret the Guideline or explain how it is to be applied.[46] With limited exceptions, courts must treat the Guidelines commentary as binding.[47] "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or plainly erroneous reading of, that guideline."[48] Other portions of the commentary express the policy of the Commission and should be treated as the legal equivalent of a policy statement.[49]

2. Application of Guidelines

The Sentencing Guidelines became effective on November 1, 1987, and the Guidelines apply to offenders who commit crimes on or after that date.[50] Defendants who are convicted of crimes that began before the effective date and continued after are subject to the Guidelines.[51] These crimes are known as "straddling crimes."[52] The most common straddling crimes are conspiracy offenses.[53] If a defendant is convicted of a conspiracy that straddled the effective

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46. U.S.S.G. § 1B1.7.

47. Stinson v. United States, 508 U.S. 36, 37, 113 S. Ct. 1913, 1915 (1993); U.S.S.G. § 1B1.7. Generally, an amendment to commentary that merely "clarifies" the meaning of the Guideline is retroactive. However, the circuits are split on whether a "clarifying" amendment to commentary should be applied retroactively when it conflicts with circuit precedent. *Compare* United States v. Saucedo, 950 F.2d 1508, 1512 (10th Cir. 1991), *cert. denied*, 507 U.S. 942, 113 S. Ct. 1343 (1993) (not retroactive); United States v. Bertoli, 40 F.3d 1384, 1407 n.21 (3d Cir. 1994), *cert. denied*, 116 S. Ct. 1425 (1996); United States v. Prezioso, 989 F.2d 52, 53 (1st Cir. 1993) *with* United States v. Garcia-Cruz, 40 F.3d 986, 990 (9th Cir. 1994) (amendment retroactive despite contrary precedent); Unites States v. Fitzhugh, 954 F.2d 253, 255 (5th Cir. 1992), *cert. denied*, 510 U.S. 895, 114 S. Ct. 259 (1993); Unites States v. Thompson, 944 F.2d 1331, 1347 (7th Cir. 1991), *cert. denied*, 502 U.S. 1097, 112 S. Ct. 1177 (1992); United States v. Caballero, 936 F.2d 1292, 1299 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1061, 112 S. Ct. 943 (1992).

48. *Stinson*, 508 U.S. at 37, 113 S. Ct. at 1915; United States v. Ortiz-Granados, 12 F.3d 39, 42-43 (5th Cir. 1994). *See also* Neal v. United States, 116 S. Ct. 763 (1996) (when sentencing guideline conflicted with federal statute, federal statute applied).

49. U.S.S.G. § 1B1.7.

50. 18 U.S.C. § 3551 (1988 and Supp. V 1993); S. Rep. No. 225, *reprinted in* 1984 U.S.C.C.A.N. at 3372.

51. United States v. Van Nymgen, 910 F.2d 164, 166 (5th Cir. 1990). *But see* United States v. Miro, 29 F.3d 194, 198 (5th Cir. 1994) (Guidelines not applied to pre-November 1, 1987 portion of continuing mail fraud offense).

52. *Id.*

53. United States v. White, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 490 U.S. 1112, 109 S. Ct. 3172 (1989) (conspiracy offenses are "straddle" crimes).

date, the Guidelines apply even if he undertook no overt acts in furtherance of the conspiracy after the effective date.[54]

The Guidelines in effect at the time of sentencing must be applied, rather than the Guidelines in effect at the time the offenses were committed.[55] Similarly, the Guidelines in effect at the time of resentencing after remand should be applied.[56] However, if amendments occur after the defendant's offense, but before sentencing, the amendments should not be applied if doing so would increase the sentence because that would violate the Ex Post Facto Clause of the Constitution.[57] Instead, the Guidelines in effect at the date that the offense was committed should be used.[58]

"A criminal law is ex post facto if it is retrospective and disadvantages the offender by altering substantial personal rights."[59] A law is retrospective if it changes the legal consequences of acts completed before its effective date.[60] The mere possibility of a higher sentence under the revised Guidelines, even though not actually proven, is sufficient to affect one's substantial personal rights.[61] Thus, Sentencing Guideline amendments that subject a defendant to the possibility of increased punishment violate the Ex Post Facto Clause.

a. Offense Level

The court must determine the applicable offense Guideline section.[62] Each offense has a corresponding base offense level which may be adjusted for any specific offense characteristics contained in the particular Guideline.[63] The burden of proof rests with the government to prove any fact necessary for the sentencing court to determine the base offense level.[64] When the statutory index lists more than one potentially applicable Guideline, the district court must choose, from among the Guidelines specified, the one that is most appropriate based on the nature of the offense conduct.[65]

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54. United States v. Devine, 934 F.2d 1325, 1332 (5th Cir. 1991), *cert. denied*, 502 U.S. 1065, 112 S. Ct. 954 (1992).

55. 18 U.S.C. § 3553(a) (1988); U.S.S.G. § 1B1.11.

56. United States v. Gross, 979 F.2d 1048, 1052-53 (5th Cir. 1992).

57. United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990); United States v. Mills, 9 F.3d 1132, 1136 n.5 (5th Cir. 1993). *See also* U.S.S.G. § 1B1.10.

58. U.S.S.G. § 1B1.11.

59. United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), *cert. denied*, 510 U.S. 858, 114 S. Ct. 170 (1993) (citing Miller v. Florida, 482 U.S. 423, 430 (1987)).

60. *Gonzales*, 988 F.2d at 18.

61. *Id.*

62. U.S.S.G. § 1B1.1.

63. U.S.S.G. Ch. 2, intro. cmt. This article does not address all offense Guidelines, but is limited to the more frequently used sections.

64. *Id.* The standard is the preponderance of the evidence standard. *See infra* note 183 and accompanying text.

65. United States v. Moeller, 80 F.3d 1053, 1061 (5th Cir. 1996) (district court is without authority to create a "compromise" base offense level).

b. Use of Guns to Determine Offense Level

One factor that is used in the determination of the base offense level, and that has generated much litigation, is whether a firearm was used during the offense. Title 18, section 924(c)(1) of the United States Code is a separate offense that requires the imposition of specified penalties if the defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm."[66] In a recent United States Supreme Court case, the Court clarified the term "use."[67] The Court held that a conviction under a statute which criminalizes the "use" of a firearm during and in relation to an offense requires more than a showing of mere possession.[68] The evidence must be sufficient to show active employment of the firearm by the defendant in such a way that the firearm is an operative factor in relation to the predicate offense.[69]

In addition to this separate offense, the Sentencing Guidelines mandate a two-level increase for the possession of a weapon by a drug defendant.[70] The increase should be applied if the weapon was "present" during, and connected with, the offense.[71] Several circuits have held that once the government satisfies its initial burden of showing that the weapon was present, the burden of proof shifts to the defendant to show that the weapon was not connected to the offense.[72] However, the Fifth Circuit has held that the burden is on the government to establish a relationship between a defendant's possession of a weapon and the offense.[73] The possession of a weapon is established if the government proves by a preponderance of the evidence that a "temporal and spatial relationship [existed] between the weapon, the proscribed activity, and the defendant."[74]

When the weapon was possessed by a co-defendant, the enhancement may be applied if the possession was reasonably foreseeable to the defendant.[75] Accordingly, the Fifth Circuit has held that "one co-conspirator may ordinarily be assessed a § 2D1.1(b)(1) increase in view of another co-conspirator's

66. 18 U.S.C. § 924(c)(1) (1988).

67. Bailey v. United States, 116 S. Ct. 501 (1995).

68. *Id.* at 508.

69. *Id. See also* United States v. Andrade, 83 F.3d 729 (5th Cir. 1996); United States v. Fike, 82 F.3d 1315 (5th Cir. 1996).

70. U.S.S.G. § 2D1.1(b)(1).

71. U.S.S.G. § 2D1.1 cmt. 3.

72. United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Corcimiglia, 967 F.2d 724, 727 (1st Cir. 1992); United States v. Durrive, 902 F.2d 1221, 1222 (7th Cir. 1990); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989); United States v. McGhee, 882 F.2d 1095, 1097 (6th Cir. 1989).

73. United States v. Siebe, 58 F.3d 161, 163 (5th Cir. 1995). This holding is consistent with the Eighth Circuit. United States v. Khang, 904 F.2d 1219, 1221 (8th Cir. 1990).

74. United States v. Ramos, 71 F.3d 1150, 1157 (5th Cir. 1995) (citing United States v. Mergerson, 4 F.3d 337 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1310 (1994)).

75. U.S.S.G. § 1B1.3 cmt. 2; United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990).

possession of a firearm during the drug conspiracy so long as the use of the weapon was reasonably foreseeable."[76] A court may infer that a defendant should have foreseen a co-conspirator's possession of a dangerous weapon if the government demonstrates that another participant knowingly possessed a weapon while he and the defendant committed the offense.[77]

This enhancement may be applied even if the defendant was acquitted of a charge of using or carrying a firearm during a drug offense.[78] The Fifth Circuit has held that, "while a conviction requires proof beyond a reasonable doubt, a district court may sentence a defendant within the Sentencing Guidelines on any relevant evidence that 'has sufficient indicia of reliability to support its probable accuracy.'"[79]

c. Stipulations to Offense Level

In the case of a conviction by a guilty plea containing a stipulation that specifically established a more serious offense than the offense of conviction, the total offense level is determined based on the stipulated offense.[80] Stipulations that establish a more serious offense than the offense of conviction must be set forth in a written plea agreement or on the record during the plea proceeding.[81] The Fifth Circuit has cautioned courts to "proceed with due deliberation" when using section 1B1.2(a), holding that "the determination that the stipulation contained in or accompanying the guilty plea 'specifically establishes a more serious offense' than the offense of conviction must be expressly made on the record by the court prior to sentencing."[82] Moreover, "the trial court must follow the directive contained in Fed. R. Crim. P. 11(f) and satisfy itself that a 'factual basis for each essential element of the crime [has been] shown.'"[83]

d. Relevant Conduct

A major factor that is used in determining the applicable Guideline range is an accumulation of all the defendant's pertinent activity, also known as "relevant conduct." A defendant's base offense level for the offense of conviction must be determined on the basis of all "relevant conduct" as defined in section 1B1.3 of the Sentencing Guidelines.[84] Relevant conduct includes "all acts and

76. United States v. Mergerson, 4 F.3d 337 (5th Cir.), *cert. denied*, 114 S. Ct. 1310 (1994).
77. United States v. Gaytan, 74 F.3d 545, 559 (5th Cir. 1996).
78. United States v. Buchanan, 70 F.3d 818, 828 (5th Cir. 1995).
79. *Id.* (citing U.S.S.G. § 6A1.3; United States v. Edwards, 65 F.3d 430, 432 (5th Cir. 1995)).
80. U.S.S.G. § 1B1.2(a).
81. U.S.S.G. § 1B1.2 cmt. 1; Braxton v. United States, 500 U.S. 344, 111 S. Ct. 1854 (1991).
82. United States v. Martin, 893 F.2d 73, 75 (5th Cir. 1990).
83. *Id.* at 75.
84. United States v. Vital, 68 F.3d 114, 117 (5th Cir. 1995).

omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[85] Thus, a defendant is held responsible (1) for certain conduct that was part of the same course of conduct or common scheme or plan as the offense of conviction and (2) for the conduct of others that was reasonably foreseeable and committed in furtherance of jointly undertaken activity.[86]

Conduct described in counts of the indictment to be dismissed, conduct otherwise barred by the statute of limitations, conduct that is the subject of a pending state proceeding, as well as evidence that would be suppressed and not available at trial may all be considered in determining relevant conduct.[87] Sentencing courts are even permitted to consider unadjudicated offenses which occur after the offense of conviction.[88] Although this may seem to result in double jeopardy, this protection in the context of sentencing proceedings has been virtually eliminated because the courts have held that the Double Jeopardy Clause precludes a second punishment for the same "offense," not a second punishment for the same conduct.[89]

The determination of whether the conduct of others was reasonably foreseeable to a defendant should be made using an objective standard of what would have been foreseeable to a reasonable person in the position of the defendant, rather than the subjective standard of what the particular defendant knew.[90] In conspiracy cases, the general rule is that co-conspirators are liable for losses occasioned or amounts of drugs distributed or agreed to be distributed by their co-conspirators.[91] However, this rule is limited to conduct that occurs after the defendant joined the conspiracy.[92] Mere knowledge that criminal activity is taking place is not enough. The government must establish that the defendant agreed to jointly undertake criminal activities with another, and that the particular crime was within the scope of that agreement.[93]

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85. U.S.S.G. § 1B1.3(a)(1)(A).

86. *Id.* at (B). *See* United States v. Ashburn, 20 F.3d 1336 (5th Cir.), *vacated in part*, 38 F.3d 803 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1969 (1995).

87. *Ashburn*, 20 F.3d at 1336; United States v. Lokey, 945 F.2d 825, 840 (5th Cir. 1991); United States v. Rosogie, 21 F.3d 632, 634 (5th Cir. 1994).

88. *Vital*, 68 F.3d at 118.

89. United States v. Cruce, 21 F.3d 70, 77 (5th Cir. 1994); United States v. Dixon, 113 S. Ct. 2849, 2860 (1993); Witte v. United States, 115 S. Ct. 2199, 2206 (1995).

90. U.S.S.G. § 1B1.3 cmt. 2.

91. United States v. Thomas, 12 F.3d 1350, 1369 (5th Cir.), *cert. denied*, 114 S. Ct. 1861 (1994) (relevant conduct could include all drugs distributed by conspiracy even though defendant didn't personally distribute).

92. United States v. Carreon, 11 F.3d 1225, 1230-34 (5th Cir. 1994) (a defendant's sentence for relevant conduct may not be enhanced based on other conspirators' conduct that occurred before the defendant joined the conspiracy).

93. United States v. Eubuomwan, 992 F.2d 70, 73 (5th Cir. 1993).

B. Adjustments

Adjustments to the base offense level are allowed (1) for harm to the victim, (2) for the defendant's role in the offense, (3) for an obstruction of justice, (4) if the defendant was convicted on multiple counts, and (5) if the defendant has accepted personal responsibility.[94]

1. Victim-Related

Three possible victim-related adjustments may be applied to a wide variety of offenses.[95] First, if the defendant knew or should have known that a victim of an offense was unusually vulnerable because of age, physical or mental condition, or other particular susceptibility, the base offense level is increased two levels.[96] The adjustment is appropriate to any offense, not just the charged one, as long as the victim's vulnerability played some part in the defendant's decision to commit the crime.[97] The vulnerability must be unusual because, otherwise, the defendant's choice of a likely victim does not demonstrate the enhanced measure of criminal depravity which the Guidelines intended to punish more severely.[98]

Under the second possible victim-related adjustment, the base offense level will be increased three levels if the victim of the offense was a state or federal official or a member of the official's immediate family and the crime was motivated by the victim's status.[99] This adjustment is typically applied in cases in which the defendant has been convicted of an offense against a police or probation officer.[100]

Under the third possible victim-related adjustment, the base offense level will be increased two levels if a victim was physically restrained during the course of the offense.[101] "Physically restrained" means forcible restraint where the victim is tied, bound, or locked up.[102] This enhancement is inapplicable

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94. U.S.S.G. §§ 1B1.1(c), (d), (e).

95. U.S.S.G. § 3A1 intro. cmt.

96. U.S.S.G. § 3A1.1; United States v. Brown, 7 F.3d 1155, 1160 (5th Cir. 1993) (§ 3A1.1 applied when mail fraud victims were specifically targeted, elderly widows who sought companionship through lonely hearts pen pal magazine).

97. United States v. Roberson, 872 F.2d 597, 608 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989).

98. United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990).

99. U.S.S.G. § 3A1.2(a).

100. United States v. Kings, 981 F.2d 790, 793 (5th Cir.), *cert. denied*, 508 U.S. 953, 113 S. Ct. 2450 (1993) (§ 3A1.2 applied to assault against federal officer).

101. U.S.S.G. § 3A1.3.

102. U.S.S.G. § 1B1.1 cmt. 1(i). Two circuits have held that this definition of "physically restrained" is not all-inclusive and that the enhancement may be warranted for other forms of restraints. Arcoren v. United States, 929 F.2d 1235, 1248 (8th Cir.), *cert. denied*, 502 U.S. 913, 112 S. Ct. 312 (1991); United States v. Roberts, 898 F.2d 1465, 1470 (10th Cir. 1990).

if restraint is an element of the charged offense, or is specifically incorporated into the base offense level.[103]

2. Role in Offense

There are various adjustments for the defendant's role in the offense that are based not only on the defendant's role, but also on the number of participants in or the extensiveness of the offense.[104] A participant is one who is "criminally responsible" although not necessarily convicted.[105] The defendant's role is based on all relevant conduct and "not solely on the basis of elements and acts cited in the count of conviction."[106] The Fifth Circuit has interpreted this language to mean that adjustments may apply even if the defendant was the only participant in the offense of conviction as long as the "criminally responsible" persons participated in the conduct considered by the court in determining the defendant's role in the offense.[107]

If the defendant had a leadership or supervisory role in criminal activity that involved five or more participants, the defendant's base offense level will be increased three or four levels depending on the "exercise of decision-making authority" and the "degree of participation in planning or organizing the offense."[108] The base offense level is increased only two levels for a leader, organizer, manager, or supervisor of criminal activity that involved fewer than five participants.[109] The rationale underlying this adjustment is rooted in the belief that leaders tend to profit more from the offense, present a greater danger to society, and are more likely to recidivate.[110] The Fifth Circuit has held that a defendant does not have to personally lead all the participants to receive this enhancement, but must lead at least one of the participants.[111] A comment to this Guideline provides that an upward departure may be warranted if a defendant did not lead one or more other participants, but the defendant did exercise "management responsibility over the property, assets, or activities of a

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103. U.S.S.G. § 3A1.3 cmt. 2.

104. U.S.S.G. §§ 1B1.1(c), 3B1.1.

105. U.S.S.G. § 3B1.1 cmt.

106. U.S.S.G. Ch. 3, Pt. B, intro. cmt.

107. United States v. Rodriguez, 925 F.2d 107, 111 (5th Cir. 1991) (defendant found to control two persons even though others not necessarily participants in offense conviction).

108. U.S.S.G. § 3B1.1 cmt. 4.; United States v. Ronning, 47 F.3d 710, 713 (5th Cir. 1995) (§ 3B1.1 erroneously applied because defendant was partner with, not leader of, co-defendant); United States v. Okoli, 20 F.3d 615, 616 (5th Cir. 1994) (§ 3B1.1 applied when defendant recruited and directed co-defendant). When counting the "five or more participants," the defendant may be counted as one of the five. United States v. Barbontin, 907 F.2d 1494, 1498 (5th Cir. 1990).

109. U.S.S.G. § 3B1.1(c).

110. U.S.S.G. § 3B1.1 cmt.

111. *Okoli*, 20 F.3d at 616. *Accord* U.S.S.G. § 3B1.1 cmt. 2 ("the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants").

criminal organization."[112] The Fifth Circuit, however, has noted that this exception, by definition, cannot be used to impose an enhancement under this Guideline because one cannot organize or lead property, but only people.[113]

If the defendant was a minor participant in the criminal activity, the base offense level is decreased two levels.[114] A minor participant is defined as one who is substantially "less culpable than most other participants."[115] If the defendant was a minimal participant in the criminal activity, the base offense level is decreased four levels.[116] A minimal participant is defined as one who is "plainly among the least culpable of those involved in the conduct of the group."[117] This reduction only applies if the defendant's role in the offense makes him substantially less culpable than the average participant.[118] Because there is a presupposition of a defendant's lack of involvement in the underlying offense, any adjustment for reduced culpability in an offense must be based on a mitigating role in that offense, not the underlying crime.[119] The circuits differ on whether the court must state for the record its finding of fact about the defendant's mitigating role.[120] The Fifth Circuit, in holding that the court is required to make factual findings on the record, reasoned that the determination of the participant's role is a complex fact question which cannot be properly reviewed unless there is an adequate record.[121] The circuits that do not require a record of factual findings have noted that while such a record would more clearly inform the defendant and would aid the appellate court in reviewing the determination, because there is no express legal requirement for the judge to state reasons, the circuit court will decline to impose one itself.[122]

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112. U.S.S.G. § 3B1.1 cmt. 2.

113. *Ronning*, 47 F.3d at 712. *Contra* United States v. Fones, 51 F.3d 663, 670 (7th Cir. 1995) (departure under comment two may be proper when defendant, who did not control others, had responsibility for the property of the criminal organization). The Fourth and Seventh Circuits have held, prior to the issuance of comment two, that a defendant who manages or supervises property rather than people may be a manager or supervisor under section 3B1.1(b). United States v. Chambers, 985 F.2d 1263, 1268 (4th Cir.), *cert. denied*, 510 U.S. 834, 114 S. Ct. 107 (1993); United States v. Carson, 9 F.3d 576, 592 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 135 (1994).

114. U.S.S.G. § 3B1.2(b).

115. U.S.S.G. § 3B1.2 cmt. 3; United States v. Marmolejo, 95-20983, 1997 WL 73833 at *4 (5th Cir. Feb. 21, 1997).

116. U.S.S.G. § 3B1.2(a).

117. U.S.S.G. § 3B1.2 cmts. 1 and 2; United States v. Sotelo, 97 F.3d 782, 799 (5th Cir. 1996).

118. U.S.S.G. § 3B1.2 cmt.; United States v. Davis, 19 F.3d 166, 172 (5th Cir. 1994) (§ 3B1.2 did not apply when defendant rode in car knowing victim was in trunk). The reduction is not warranted solely because other co-defendants are more culpable. United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992) ("[e]ach participant must be separately assessed").

119. United States v. Godbolt, 54 F.3d 232, 234 (5th Cir. 1995).

120. United States v. Melton, 930 F.2d 1096, 1099 (5th Cir. 1991) (required); United States v. Flores-Payon, 942 F.2d 556, 561 (9th Cir. 1991) (not required to make factual finding of relative culpability among co-defendants); United States v. Donaldson, 915 F.2d 612, 615 (10th Cir. 1990) (not required).

121. *Melton*, 930 F.2d at 1099.

122. *Donaldson*, 915 F.2d at 615.

"If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, [the base offense level is increased] two levels."[123] "Special skill" refers to a skill not possessed by the general public,[124] and a position of public or private trust is "characterized by professional or managerial discretion."[125] For this enhancement to apply, the "special skill" or "position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense."[126] Persons possessing these traits are generally viewed as more culpable because they possess "substantial discretionary judgment that is ordinarily given considerable deference."[127] This adjustment does not apply if an abuse of trust is included in the base offense level or specific offense characteristic.[128]

3. Obstruction of Justice

If a defendant willfully obstructs or impedes, or attempts to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the offense, the base offense level is increased two levels.[129] Acts that encompass an obstruction of justice include: testifying untruthfully; lying to authorities; fleeing arrest; disposing of or concealing material evidence; and influencing witnesses.[130] The obstruction must occur during the investiga-

123. U.S.S.G. § 3B1.3; United States v. Brown, 941 F.2d 1300, 1304 (5th Cir.), *cert. denied*, 502 U.S. 1008, 112 S. Ct. 648 (1991).

124. U.S.S.G. § 3B1.3 cmt. 2; United States v. White, 972 F.2d 590, 601 (5th Cir. 1992), *cert. denied*, 507 U.S. 1007, 113 S. Ct. 1651 (1993) (§ 3B1.3 applied when defendant used knowledge as attorney to avoid detection).

125. U.S.S.G. § 3B1.3 cmt. 1; *Brown*, 7 F.3d at 1162 (§ 3B1.3 applied when defendant used position as a prison food service manager to operate scam).

126. U.S.S.G. § 3B1.3 cmt. 1.

127. *Id.*

128. U.S.S.G. § 3B1.3; United States v. Fisher, 7 F.3d 69, 70 (5th Cir. 1993) (holding that an abuse of trust is not an element of embezzlement).

129. U.S.S.G. § 3C1.1; United States v. Velgar-Vivero, 8 F.3d 236, 242 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1865, 2715 (1994) (the increase is not discretionary); United States v. Tello, 9 F.3d 1119, 1122 (5th Cir. 1993) (§ 3C1.1 applied when defendant failed to disclose prior criminal history to probation officer); United States v. Roberson, 872 F.2d 597, 609 (5th Cir.), *cert. denied*, 493 U.S. 861, 110 S. Ct. 175 (1989) (provision refers to efforts to obstruct "instant offense").

130. U.S.S.G. § 3C1.1 cmt. 1; United States v. Pofahl, 990 F.2d 1456, 1482 (5th Cir.), *cert. denied*, 510 U.S. 898, 996, 114 S. Ct. 266, 560 (1993) (before arrest defendant assumed new name in new state); United States v. McDonald, 964 F.2d 390, 393 (5th Cir. 1992) (use of alias under oath); United States v. Rodriguez, 942 F.2d 899, 902 (5th Cir. 1991), *cert. denied*, 502 U.S. 1080, 112 S. Ct. 990 (1992) (use of alias with probation officer); United States v. Wade, 931 F.2d 300, 306 (5th Cir.), *cert. denied*, 502 U.S. 888, 112 S. Ct. 247 (1991) (defendant had co-conspirator threaten and shoot at person); United States v. Edwards, 911 F.2d 1031, 1033 (5th Cir. 1990) (failure to disclose location of co-conspirator after instructed to do so); United States v. Pierce, 893 F.2d 669, 677 (5th Cir. 1990), *cert. denied*, 506 U.S. 1007, 113 S. Ct. 621 (1992) (attempting to flee arrest); United States v. Galvan-Garcia, 872 F.2d 638, 641 (5th Cir.), *cert. denied*, 493 U.S. 857, 110 S. Ct. 164 (1989) (throwing marijuana out of car during flight).

tion or prosecution of the offense of conviction.[131] The Fifth Circuit has interpreted this language to mean that the enhancement may not be based on a defendant's attempts to conceal the crime prior to the investigation or prosecution.[132] However, the Fifth Circuit has noted that the enhancement may apply when the obstruction "occurs with [the defendant's] knowledge of an investigation, or at least with the defendant's correct belief that an investigation is probably underway."[133] Accordingly, the Fifth Circuit found that the obstruction of justice enhancement involves "both a temporal requirement and an awareness requirement."[134] These requirements reflect the notion that the defendant should cooperate and comply with authorities once government action has been initiated and the defendant is aware of such action.[135]

A plain reading of section 3C1.1 compels the conclusion that the provision should be read only to cover obstructions to the investigation of the "instant offense."[136] However, although the Guidelines clearly contemplate a relationship between information concealed and the offense conduct, the Guidelines do not require that the information concealed be related directly to a particular offense of which the defendant is convicted.[137]

Though the court may not penalize a defendant for denying his guilt as an exercise of his constitutional rights, a sentence may be enhanced if the defendant commits perjury.[138] A defendant commits perjury if he "gives false testimony concerning a material matter with the willful intent to provide false testimony" while testifying under oath.[139] When a defendant challenges the application of section 3C1.1 in such a situation, the district court must make an independent finding of willful perjury beyond the court's or jury's mere disbelief of the

131. *Roberson*, 872 F.2d at 609.

132. United States v. Luna, 909 F.2d 119, 120 (5th Cir. 1990); United States v. Wilson, 904 F.2d 234, 235 (5th Cir. 1990). The commentary to section 3C1.1 has been revised along these same lines, stating that if such conduct occurred at the time of arrest it shall not warrant an adjustment for obstruction unless it actually hindered the investigation or prosecution of the instant offense. U.S.S.G. § 3C1.1 cmt. 4. The Seventh Circuit has held contrarily, stating that the focus is not on timing but on materiality. United States v. Polland, 994 F.2d 1262, 1269 (7th Cir. 1993), *cert. denied*, 510 U.S. 1136, 114 S. Ct. 1115 (1994).

133. United States v. Lister, 53 F.3d 66, 71 (5th Cir. 1995) (enhancement affirmed for a defendant who suspected that an informant making a drug buy was actually a police officer and threatened to have her killed if he was later arrested).

134. *Id.*

135. *Id.*

136. United States v. Gacnik, 50 F.3d 848, 852 (10th Cir. 1995). The Fifth Circuit has not yet made this determination.

137. United States v. Kirk, 70 F.3d 791, 798 (5th Cir. 1995) (enhancement for obstructing justice proper for defendant's conduct in urging witness not to cooperate with government regarding other charges contained in same indictment).

138. United States v. Como, 53 F.3d 87, 91 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 714 (1996); United States v. Dunnigan, 507 U.S. 87, 98, 113 S. Ct. 1111, 1119 (1993).

139. *Dunnigan*, 507 U.S. at 94, 113 S. Ct. at 1116.

defendant's testimony reflected in a guilty verdict.[140] The Fifth Circuit has held that a court should also make explicit findings when, over the government's objection, the court refuses to make an obstruction adjustment for perjury.[141]

Obstructive conduct under section 3C1.1 may not be used to enhance sentences for offenses in which the defendant has been convicted of obstruction of justice, such as contempt, perjury, or bribery, except if further obstruction of justice occurred during the prosecution or investigation of these offenses.[142] However, once the court finds facts sufficient to constitute obstruction of justice, the enhancement is mandatory, regardless of other mitigating behavior.[143]

4. Multiple Counts

When a defendant is convicted of multiple counts, the Guidelines require that counts involving substantially the same harm be grouped into distinct "Groups of Closely-Related Counts."[144] This is so that a single offense level that encompasses all the counts of which the defendant is convicted can be determined. Counts that involve the same victim and acts or transactions connected by a common scheme or plan involve the same harm and should be grouped for purposes of determining the applicable offense level.[145] The reason is that some offenses that may be charged in a multiple count indictment are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the Guideline range. The Fifth Circuit has warned, however, that the courts should avoid bootstrapping dissimilar counts that may arise from the same transaction.[146]

An example of counts that should be grouped is when "the defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping."[147] However, if "the defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days," then these counts should not be grouped together.[148]

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140. *Dunnigan*, 507 U.S. at 95, 113 S. Ct. at 1117; United States v. Reed, 26 F.3d 523, 531 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1116 (1995) (§ 3C1.1 applied when defendant committed perjury).

141. United States v. Humphrey, 7 F.3d 1186, 1190 (5th Cir. 1993) (remanded for specific finding on whether defendant committed perjury).

142. U.S.S.G. § 3C1.1 cmt. 4.

143. United States v. Roberson, 872 F.2d 597, 609 (5th Cir. 1989).

144. U.S.S.G. §§ 1B1.1(d), 3D1.1(a), 3D1.2; United States v. Patterson, 962 F.2d 409, 417 (5th Cir. 1992) (grouping is appropriate when defendant convicted of multiple counts).

145. U.S.S.G. § 3D1.2(b); United States v. Gallo, 927 F.2d 815, 824 (5th Cir. 1991) (grouping is not appropriate when offenses not related); United States v. Packer, 70 F.3d 357, 360 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 75 (1996) (failure to appear count did not have to be grouped with other offenses for sentencing purposes).

146. *Patterson*, 962 F.2d at 415; *Gallo*, 927 F.2d at 824.

147. U.S.S.G. § 3D1.2 cmt. 4.

148. *Id.*

When counts are grouped, courts should also apply any relevant adjustments to each count before grouping.[149] Once the correct offenses are grouped and the applicable adjustments have been made, a combined offense group results. The combined offense level is determined by using the offense level of the most serious offense in that group.[150] The combined offense level is then used to adjust the defendant's final offense level.[151]

5. Acceptance of Responsibility

If the defendant accepts responsibility for his offense, the base offense level must be reduced by two levels.[152] While courts have broad discretion to grant or deny the reduction for acceptance of responsibility,[153] the sentencing court must reduce the offense level by all or nothing. A one-level reduction is not permitted.[154]

The reduction only applies if the defendant has clearly and affirmatively shown evidence of acceptance of responsibility.[155] Although the entry of a guilty plea prior to trial accompanied by a truthful admission of conduct is significant evidence of acceptance of responsibility, this does not warrant a per se reduction.[156] In addition, a reduction will not automatically be precluded if the defendant goes to trial, especially when a defendant goes to trial strictly to preserve procedural issues.[157] Because there is no hard-and-fast rule on what constitutes acceptance of responsibility, great deference is given to the sentencing judge's evaluation of the facts to determine a defendant's acceptance of responsibility.[158]

This reduction has been challenged on the grounds that the possibility of a reduction encourages guilty pleas in violation of a defendant's Sixth Amendment right to a jury trial and the Fifth Amendment right against self-incrimination.[159] The Fifth Circuit has rejected constitutional challenges to the facial validity of the reduction for a defendant's acceptance of responsibility.[160] However, there is a split in the circuits about whether the denial of the reduction for refusal to reveal

149. U.S.S.G. § 3D1.3 cmt. 2.
150. U.S.S.G. § 3D1.
151. U.S.S.G. § 3D1.
152. U.S.S.G. §§ 1B1.1(e), 3E1.1(a).
153. United States v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992).
154. United States v. Valencia, 957 F.2d 153 (5th Cir. 1992).
155. United States v. Wilder, 15 F.3d 1292, 1298 (5th Cir. 1994) (reduction denied because defendant blamed others and impeded investigation, but pled guilty on eve of trial).
156. U.S.S.G. § 3E1.1 cmt. 3; United States v. Calvereley, 37 F.3d 160 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1266 (1995) (reduction denied even though defendant pled guilty because defendant committed perjury).
157. U.S.S.G. § 3E1.1 cmt. 2; United States v. Chapa-Garza, 62 F.3d 118, 122 (5th Cir. 1995).
158. U.S.S.G. § 3E1.1 cmt. 5; United States v. Vital, 68 F.3d 114, 120-21 (5th Cir. 1995).
159. United States v. Bermea, 30 F.3d 1539, 1577 (5th Cir. 1994) (denial of reduction does not violate privilege against self-incrimination); United States v. Kleinebreil, 966 F.2d 945 (5th Cir. 1992) ("affording a possibility of a more lenient sentence does not compel self-incrimination").
160. *Id.*

or admit to potentially self-incriminating information violates the Fifth Amendment. The Fifth, along with the Fourth and Sixth Circuits have held that it does not.[161] These circuits reasoned that the purpose of this Guideline was to formalize a tradition of leniency toward contrite defendants, and that to find the Guideline unconstitutional would result in defendants who express genuine remorse not being rewarded at sentencing, which is a result not required by the Constitution.[162] The Ninth and Eleventh Circuits have held, however, that a sentencing court cannot consider against a defendant any constitutionally-protected conduct.[163] Similarly, the First, Second, and Third Circuits have held that denial of the reduction is a "penalty" rather than a "denied benefit."[164] Nevertheless, because the acceptance of responsibility determination is so fact-based, a hard-and-fast rule on the constitutionality of this Guideline will be unlikely.

A 1992 amendment added an additional one-level reduction for certain timely acceptances of responsibility.[165] The extra reduction may not be denied once the requirements of the Guideline section have been met.[166] The Fifth Circuit has formulated a three-part test for determining if the Guideline requirements are met:

> 1) the defendant qualifies for the basic 2-level decrease for acceptance of responsibility under subsection (a); 2) the defendant's offense level is 16 or higher before reduction . . . under subsection (a); and 3) the defendant timely "assisted authorities" by taking one—but not necessarily both—of two "steps": either (a) "timely" furnishing information to the prosecution about defendant's own involvement in the offense; or (b) "timely" notifying the authorities that the defendant will enter a guilty plea.[167]

The court determined "timeliness" to be recognized in only two "discrete areas: 1) the prosecution's not having to prepare for trial, and 2) the court's ability to manage its own calendar and docket."[168]

C. *Criminal History/Career Offender*

After determining the "total offense level," the sentencing court must determine the defendant's criminal history category and whether the defendant is

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161. United States v. Clemons, 999 F.2d 154, 158 (6th Cir. 1993); United States v. Frazier, 971 F.2d 1076, 1080 (4th Cir. 1992); United States v. Mourning, 914 F.2d 699, 706 (5th Cir. 1990).

162. *Id.*

163. United States v. Rodriguez, 959 F.2d 193, 195 (11th Cir. 1991); United States v. Watt, 910 F.2d 587, 590 (9th Cir. 1990).

164. United States v. Frierson, 945 F.2d 650, 658 (3d Cir. 1991); United States v. Oliveras, 905 F.2d 623, 627 (2d Cir. 1990); United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989).

165. U.S.S.G. § 3E1.1(b).

166. United States v. Tello, 9 F.3d 1119, 1124-28 (5th Cir. 1993).

167. *Id.* at 1124-28.

168. *Id. See also* United States v. Mills, 9 F.3d 1132, 1137 (5th Cir. 1993) (applying the "Tello test").

a career offender.[169] Each prior sentence of imprisonment of more than thirteen months is assigned three criminal history points.[170] Each prior sentence of imprisonment of sixty days or more, but less than thirteen months, is assigned two criminal history points.[171] Prior sentences imposed in related cases are to be treated as one sentence.[172] "Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest. Otherwise, prior sentences are considered related if they result from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."[173] The assignment of points is based on actual judgments entered, not time served.[174]

An upward departure is permitted if when counting consolidated sentences as one sentence, a defendant's criminal history is underrepresented.[175] For example, if a defendant was convicted of several serious offenses that were committed on different occasions but were tried together, the treatment of these offenses as consolidated may result in a lower number of criminal history points than would result if the offenses were each tried separately.[176] In such situations, an upward departure is permitted to compensate for the underrepresentation of the defendant's criminal history and the danger he presents to the public. In addition, the court may depart from the Guidelines when the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood of recidivism.[177]

Harsher sentences at or near the maximum term authorized will be given to "career offenders."[178] A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the offense; (2) the offense of conviction is a felony that is within a crime of violence or a controlled substance offense; and

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169. U.S.S.G. §§ 1B1.1(f), 4A1.1, 4B1.1.

170. U.S.S.G. § 4A1.1(a). Prior sentences of imprisonment of more than 13 months must have been imposed within 15 years of the commencement of the instant offense or have resulted in incarceration during any part of the 15 year period to be counted. *Id.* § 4A1.2(e)(1); United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1575 (1994) (criminal history category correct because defendant would have been incarcerated 15 years prior to instant offense but for escape).

171. U.S.S.G. § 4A1.1(b). Prior sentences of 13 months or less must have been imposed within 10 years of the commencement of the instant offense to be counted. *Id.* § 4A1.2(e)(2); United States v. Cain, 10 F.3d 261, 262 (5th Cir. 1993) (criminal history category correct even though defendant given credit for time served).

172. U.S.S.G. § 4A1.2(a)(2).

173. U.S.S.G. § 4A1.2(a)(2) cmt. 3.

174. U.S.S.G. § 4A1.2 cmt. 2.

175. United States v. Geiger, 891 F.2d 512, 513 (5th Cir. 1989).

176. U.S.S.G. § 4A1.2 cmt. 3.

177. U.S.S.G. § 4A1.3; United States v. Rosogie, 21 F.3d 632, 634 (5th Cir. 1994); United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1969 (1995); United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc).

178. U.S.S.G. § 4B1.1.

(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[179]

A crime of violence is defined as an offense that has as an element the use, attempted use, or threatened use of physical force or any offense that, by its nature, involves a substantial risk that physical force may be used.[180] The Guidelines interpret this to include "murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, and robbery."[181] In determining whether an offense is a "crime of violence," the Fifth Circuit has held that "only conduct 'set forth in the count of which the defendant was convicted' may be considered in determining whether the offense is a crime of violence."[182]

The circuits are split over whether the career offender provision covers drug conspiracies. Almost all the circuits have held that it does.[183] However, the Fifth Circuit and the D.C. Circuit have held that it does not.[184] In a matter of statutory interpretation, the two circuits found that a conviction of conspiracy does not constitute an offense that triggers a career offender enhancement because the Sentencing Commission lacked statutory authority for the Guideline.[185] However, in a 1995 amendment to the commentary of this Guideline, the Commission responded to these two circuits' opinions by explaining that the "general guideline promulgation" authority of the Commission was relied on when setting the definition of career offenders.[186] Thus, it appears that the Commission may have resolved the split by making the career offender provision applicable to drug conspiracies in all the circuits. The Fifth and D.C. Circuits may not be influenced by the Commission's explanation, however.

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179. *Id.*

180. 18 U.S.C. § 16, *incorporated by* U.S.S.G. § 4B1.2.

181. U.S.S.G. § 4B1.2 cmt. 2. The United States Supreme Court has held that the unlawful possession of a firearm by a felon is not "by its nature" a crime of violence. Stinson v. United States, 508 U.S. 36, 46-47, 113 S. Ct. 1913, 1920 (1993) (applying comment 2 to section 4B1.2).

182. United States v. Fitzhugh, 954 F.2d 253, 254 (5th Cir. 1992) (citing U.S.S.G. § 4B1.2).

183. United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995) (en banc); United States v. Jackson, 60 F.3d 128, 132 (2d Cir. 1995); United States v. Williams, 53 F.3d 769, 772 (6th Cir. 1995); United States v. Weir, 51 F.3d 1031, 1032 (11th Cir. 1995); United States v. Piper, 35 F.3d 611, 616 (1st Cir. 1994); United States v. Kennedy, 32 F.3d 876, 888 (4th Cir. 1994); United States v. Damerville, 27 F.3d 254, 257 (7th Cir. 1994); United States v. Hightower, 25 F.3d 182, 186 (3d Cir. 1994); United States v. Allen, 24 F.3d 1180, 1186 (10th Cir. 1994); United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994).

184. United States v. Bellazerius, 24 F.3d 698, 701 (5th Cir. 1994); United States v. Price, 990 F.2d 1367, 1369 (D.C. Cir. 1993).

185. United States v. Cheramie, 51 F.3d 538, 543 (5th Cir. 1995) (because § 4B1.1 was enacted under the authority of 28 U.S.C. 994(h), which does not list conspiracy offenses, conspiracy offense cannot constitute a triggering offense).

186. U.S.S.G. § 4B1.1 (background commentary).

D. Determining the Sentence

1. Presentence Investigation Report

Prior to the imposition of a sentence, the court's probation officer must conduct an investigation of the defendant and report to the court pursuant to Rule 32(b) of the Federal Rules of Criminal Procedure. The presentence investigation report and the defendant's objections to that report are essential considerations in proper sentencing because the report forms the factual basis for the judge's sentencing determination.[187]

The presentence investigation report must contain: (1) the history and characteristics of the defendant, including his prior criminal record and any circumstances affecting the defendant's behavior that might be helpful in sentencing; (2) the Guideline categories, types of sentences and sentencing range that the probation officer believes apply to the particular case, and an explanation of any factors that might warrant departure; (3) pertinent policy statements issued by the Sentencing Commission; (4) the impact of the crime on the victim; (5) the nature and extent of nonprison programs available to the defendant; (6) any report and recommendation resulting from a court-ordered study of the defendant; and (7) any other information that may be required by the court in sentencing.[188]

The presentence report must be completed unless the court offers reasons why it is unnecessary.[189] The defendant may not waive preparation of the report.[190] Subject to certain exceptions, the court must disclose the report to the defendant, the defendant's counsel, and the prosecutor before the sentencing hearing.[191] Although the report bears a sufficient indicia of reliability to permit the sentencing court to rely on it at sentencing,[192] the court must give the defendant and defense counsel an opportunity to comment on the report before imposition of the sentence.[193] However, the defendant bears the burden of demonstrating that the report is inaccurate.[194]

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187. United States v. Burch, 873 F.2d 765 (5th Cir. 1989).

188. Fed. R. Crim. P. 32(b)(4); 18 U.S.C. § 3552(a) (1988).

189. *Id.*

190. U.S.S.G. § 6A1.1. Congress deleted the provisions of the Fed. R. Crim. P. 32(c) which permitted the defendant to waive the presentence report.

191. Fed. R. Crim. P. 32(b)(6).

192. United States v. Ayala, 47 F.3d 688 (5th Cir. 1995).

193. Fed. R. Crim. P. 32(b)(6)(B).

194. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993). *See also* United States v. Terry, 916 F.2d 157 (4th Cir. 1990); United States v. Isirov, 986 F.2d 183 (7th Cir. 1993). This rule is not uniformly followed and several circuits have taken the position that once the defendant objects to findings in the presentence report, the burden then shifts to the government to prove these facts by a preponderance of the evidence. United States v. Logan, 54 F.3d 452, 455 (8th Cir. 1995); United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995); United States v. Deninno, 29 F.3d 572 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1117 (1995).

2. Plea Agreements

The procedures governing plea agreements are contained in Rule 11 of the Federal Rules of Criminal Procedure.[195] The sentencing court is not bound by stipulations contained in a plea agreement.[196] However, a defendant who has entered into a plea agreement that includes a specific sentence under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure may appeal a sentence that is greater than that set forth in the plea-bargain agreement.[197] Likewise, the government can appeal if the sentence is lower than the agreement.[198]

While a plea of guilty typically waives all non-jurisdictional defects in the proceedings below,[199] where the intervening law has established that a defendant's actions do not constitute a crime and thus that the defendant is actually innocent of the charged offense, this rule does not apply.[200] This interpretation is significant in light of *Bailey*.[201] The Fifth Circuit has held that a defendant may withdraw his plea to a violation of 18 U.S.C. § 924(c)(1) in light of *Bailey*'s change in the law, if applicable.[202]

Plea agreements in which the defendant has waived his right to appeal the conviction as well as the sentence are permissible as long as the defendant's waiver is informed and voluntary.[203] When the plea agreement contains a waiver of appeal of sentence provision, the defendant must know that he had a right to appeal his sentence and that he was giving up that right.[204] In recent cases, even though the application of the Guidelines has been disputed at the sentencing hearing, the Fifth Circuit has upheld the waiver of appeal of sentence provisions and summarily dismissed the appeal.[205]

3. Sentencing Range

The appropriate sentencing range is chosen by identifying the range in the sentencing table that corresponds to the defendant's total offense level and criminal

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195. U.S.S.G. § 6B1.1.

196. U.S.S.G. § 6B1.4(d); United States v. Galan, 82 F.3d 639 (5th Cir. 1996).

197. 18 U.S.C. § 3742(c) (1988).

198. *Id.*

199. United States v. Miramontez, 995 F.2d 56, 60 (5th Cir. 1993); Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993).

200. United States v. Andrade, 83 F.3d 729 (5th Cir. 1996).

201. Bailey v. United States, 116 S. Ct. 501 (1995). *See supra* note 67 and accompanying text.

202. *Id.*

203. United States v. Melançon, 972 F.2d 566, 567 (5th Cir. 1992).

204. *Id. See also* United States v. Portillo, 18 F.3d 290 (5th Cir.), *cert. denied*, 115 S. Ct. 244 (1994) (district court's failure to specifically admonish defendant concerning waiver-of-appeal provision in plea agreement did not render defendant's waiver of right to appeal sentence uninformed and invalid).

205. United States v. Williams, 30 F.3d 1492 (5th Cir. 1994) (table).

history category.[206] Within this range, the judge must choose a sentence that is consistent with the overall Guidelines. In determining the particular sentence, a judge must consider the broad concerns and purposes of the Sentencing Reform Act. These concerns and purposes include the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted disparities, and the need to provide restitution to any victims of the offense.[207]

The judge may consider any relevant information concerning the defendant's background, character, and conduct.[208] However, any facts considered by the court must be established by a preponderance of the evidence.[209] The defendant bears the burden of establishing a factor that would result in a reduction of his sentencing range,[210] while the government bears the burden of establishing a factor that would result in an enhancement of the defendant's sentencing range.[211] Emphasizing that an indictment is not evidence, the Fifth Circuit has held that an indictment is not itself sufficient to establish a material fact under the Sentencing Guidelines.[212] In addition, the sentencing court may not rely on allegations that are mere conclusion made by a law enforcement agent or a prosecutor.[213]

E. Departures from the Guidelines

The sentencing judge may depart from the Guidelines only if (1) the government makes a motion for a downward departure based on substantial assistance,[214] or (2) the judge finds that the particular case includes an aggravating or mitigating circumstance that the Commission did not adequately consider.[215]

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206. U.S.S.G. § 1B1.1(a)-(g).

207. 18 U.S.C. § 3553(a)(1)-(7) (1988).

208. 18 U.S.C. § 1361 (1988); U.S.S.G. § 6A1.3; United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.), *cert. denied*, 115 S. Ct. 634 (1994) (court properly considered information in presentence report that was not in indictment and plea agreement).

209. United States v. Smith, 13 F.3d 860, 864 (5th Cir.), *cert. denied*, 114 S. Ct. 2151 (1994) (reliance on presentence report on drug quantity permitted even though quantity differed from jury's finding).

210. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

211. United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990).

212. United States v. Williams, 22 F.3d 580, 582 (5th Cir.), *cert. denied*, 115 S. Ct. 367 (1994).

213. United States v. Elwood, 999 F.2d 814, 817-18 (5th Cir. 1993); United States v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992).

214. U.S.S.G. § 5K1.1; 18 U.S.C. § 3553(e) (1988); 28 U.S.C. § 994 (n) (1988); United States v. Wade, 504 U.S. 181, 185, 112 S. Ct. 1840, 1843 (1992); United States v. Hord, 6 F.3d 276, 279 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1551 (1994).

215. U.S.S.G. § 5K2.0; 18 U.S.C. § 3553(b) (1988). Although the parties can make a motion for departure, the ultimate decision to depart rests with the judge. United States v. Moore, 997 F.2d 30, 35-36 (5th Cir.), *cert. denied*, 114 S. Ct. 647 (1993) (upward departure based on injury to third party was justified); United States v. Burleson, 22 F.3d 93, 94 (5th Cir.), *cert. denied*, 115 S. Ct. 283 (1994) (downward departure not justified because defendant possessed a gun).

1. Government Motion

The government's refusal to file a substantial assistance motion for downward departure can be reviewed by the courts, and a remedy may be granted if the refusal is based on an unconstitutional motive or is not rationally related to any legitimate government end.[216] However, because the government has the power, and not the duty, to file a motion, the defendant must make a threshold showing of substantial assistance before he is entitled to discovery or an evidentiary hearing on the issue.[217] Nevertheless, if a plea agreement contains a commitment by the government to file a motion in return for the defendant's cooperation, the defendant may be able to seek specific performance of the agreement.[218] The Fifth Circuit has held that if a defendant relied on the government's promise and "accepted the government's offer and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obligated to move for a downward departure."[219] The Fifth Circuit has also stated, however, that when the plea agreement "expressly provides that the government retains absolute discretion to move for a downward departure, . . . the defendant is not entitled to relief" unless the refusal was based on an unconstitutional motive.[220]

This requirement that the government must make a motion for downward departures based on substantial assistance has been upheld against due process challenges,[221] the reasoning being that defendants have no constitutional right to a substantial assistance departure. Thus, they cannot claim that the government motion requirement unconstitutionally limits the discretion of sentencing judges.[222] The decision to depart downward pursuant to a motion by the government is left within the discretion of the sentencing judge.[223] In addition, the district courts are not limited by the government's recommended sentence.[224] "While giving appropriate weight to the government's assessment and recommendation," the court must make an independent determination of the "propriety and extent of any departure in the imposition of sentence."[225]

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216. *Wade*, 504 U.S. at 185-86, 112 S. Ct. at 1843-44; United States v. Garcia-Bonilla, 11 F.3d 45, 47 (5th Cir. 1993); United States v. White, 869 F.2d 822, 829 (5th Cir.), *cert. denied*, 490 U.S. 1112, 109 S. Ct. 3172 (1989).

217. *Wade*, 504 U.S. at 186-87, 112 S. Ct. at 1844.

218. United States v. Watson, 988 F.2d 544, 551-52 (5th Cir. 1993).

219. United States v. Melton, 930 F.2d 1096, 1098 (5th Cir. 1991). *See also* United States v. Hernandez, 17 F.3d 78, 81 (5th Cir. 1994); United States v. Laday, 56 F.3d 24, 25-26 (5th Cir. 1995).

220. *Garcia-Bonilla*, 11 F.3d at 47.

221. United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990).

222. *Id.*

223. United States v. Franks, 46 F.3d 402, 406 (5th Cir. 1995); United States v. Miro, 29 F.3d 194, 198 (5th Cir. 1994); United States v. Damer, 910 F.2d 1239, 1241 (5th Cir.), *cert. denied*, 498 U.S. 991 (1990).

224. United States v. Johnson, 33 F.3d 8, 9-10 (5th Cir. 1994).

225. *Id.* at 10.

2. Aggravating or Mitigating Circumstances

Under aggravating or mitigating circumstances, the sentencing court can depart from the Guidelines range and impose a greater or lesser sentence. District courts can depart from the applicable Guidelines range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[226] To determine whether a circumstance was adequately taken into consideration by the Commission, courts should "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[227] A judge can depart downward based on a victim's conduct, lesser harm, coercion and duress, or diminished capacity during a nonviolent offense.[228] The burden is on the defendant to prove that he has met the requirements that would warrant a downward departure.[229]

Contrarily, a judge may depart upward if the offense involved death or physical injury, extreme psychological injury, abduction or unlawful restraint, property damage or loss, possession or use of weapons and dangerous instrumentalities, disruption of a government function, extreme conduct, the facilitation or concealment of the commission of another offense, danger to public welfare, or terrorism.[230] The United States Supreme Court has held that

> before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, [rule 32 of the Federal Rules of Criminal Procedure] requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure.[231]

Factors that may not be used by the courts as aggravating or mitigating circumstances include the defendant's race, sex, national origin, creed, religion, or socioeconomic status; community standards; or likelihood of recidivism.[232]

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226. 18 U.S.C. § 3553(b). *See also* Koon v. United States, 116 S. Ct. 2035 (1996).

227. *Id.*

228. U.S.S.G. §§ 5K2.10, 5K2.11, 5K2.12, 5K2.13.

229. United States v. Flanagan, 80 F.3d 143, 144 (5th Cir. 1996).

230. U.S.S.G. §§ 5K2.1-.9, 5K2.14.

231. Burns v. United States, 501 U.S. 129, 138-39 (1991). *See also* United States v. Moore, 37 F.3d 169, 174-75 (5th Cir. 1994).

232. U.S.S.G. § 5H1.10; Koon v. United States, 116 S. Ct. 2035 (1996) (the district court abused its discretion by considering the low likelihood of recidivism because the Commission took that factor into account in formulating the criminal history category); United States v. Harrington, 82 F.3d 83, 87-88 (5th Cir. 1996) (district court abused its discretion in considering the fact that the defendant was a judge for purposes of an upward departure); United States v. McKinney, 53 F.3d 664, 677 (5th Cir.), *cert. denied*, 116 S. Ct. 261 (1995).

In addition, except in extraordinary circumstances, other factors such as age, physical condition, education, and family and community ties may not be considered.[233] Use of a factor already adequately considered in the Sentencing Guidelines or discouraged by the Sentencing Commission policy statements to justify a departure from the Guidelines is an incorrect application of the Guidelines unless the factor is present to an exceptional degree or in some other way that makes the case different from an ordinary case.[234]

3. Scope of Review

If the departure is within the statutory limits, the court will review for "abuse of discretion."[235] A discretionary decision by the district court not to depart from a properly calculated sentencing range is not appealable and should be dismissed for lack of jurisdiction.[236] The sentencing judge must clearly express the reasons for any departure from the Guidelines.[237] If the departure is justified, the length of the departure must be reasonable in light of the grounds specified by the court.[238] The fact that the departure is several times higher than the maximum range under the Guidelines, standing alone, is not determinative of the reasonableness of the sentence.[239] However, when a district court intends to depart above Category VI, it should stay within the Guidelines by considering sentencing ranges for higher base offense levels.[240]

If the decision to depart is based in part on an invalid factor, resentencing is necessary, unless the reviewing court determines that the sentencing court's reliance on the invalid factor was harmless.[241] The Fifth Circuit has declined to extend this review to a district court's determination of the extent of departure.[242] Instead, the Fifth Circuit has held that "the decision as to the extent of departure is committed to the almost complete discretion of the district

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233. U.S.S.G. §§ 5H.1-.9; United States v. Woolford, 896 F.2d 99 (5th Cir. 1990); United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990); United States v. Burch, 873 F.2d 765 (5th Cir. 1989).

234. *Koon*, 116 S. Ct. at 2035; Williams v. United States, 503 U.S. 193, 200, 112 S. Ct. 1112, 1119 (1992).

235. *Koon*, 116 S. Ct. at 2035; United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993); United States v. Rosogie, 21 F.3d 632, 634 (5th Cir. 1994).

236. United States v. DiMarco, 46 F.3d 476 (5th Cir. 1995); United States v. Aggarwal, 17 F.3d 737, 745 (5th Cir. 1994); United States v. Buenrostro, 868 F.2d 135, 139 (5th Cir. 1989), *cert. denied*, 495 U.S. 923, 110 S. Ct. 1957 (1990).

237. 18 U.S.C. § 3553(c) (1988).

238. *Id. See also* United States v. Kay, 83 F.3d 98, 100 (5th Cir. 1996); United States v. Velasquez-Mercado, 872 F.2d 632, 637 (5th Cir.), *cert. denied*, 493 U.S. 866, 110 S. Ct. 187 (1989).

239. United States v. Lopez-Escobar, 884 F.2d 170, 173 (5th Cir. 1989).

240. United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc).

241. Williams v. United States, 503 U.S. 193, 203, 112 S. Ct. 1112, 1120 (1992); *Kay*, 83 F.3d at 98.

242. United States v. Alvarez, 51 F.3d 36, 40 (5th Cir. 1995).

court, which may consider factors beyond the narrower set that could independently support the departure in the first instance."[243]

F. Imposition of Sentence

Rule 32(c)(3) of the Federal Rules of Criminal Procedure governs the imposition of sentence. Under Rule 32, a court must impose the sentence without unnecessary delay.[244] The sentencing judge is not required to state the reasons for imposing a sentence that is within the applicable range if the range does not exceed twenty-four months.[245] Otherwise, the judge, at the time of sentencing, must state in open court the reasons for the imposition of a particular sentence.[246]

The sentence that the district judge imposes generally determines the length of imprisonment, although prison terms may be shortened by credits awarded for satisfactory behavior after the first year,[247] and a sentence may be modified or credited on review. In certain circumstances, the judge has discretion to impose probation, imprisonment, or supervised release.[248] A judge must order restitution for certain crimes and must impose a fine in all cases unless the defendant is unable to pay and not likely to become able to pay.[249]

G. Constitutional Challenges

Another source of sentencing issues, apart from the interpretation and application of the Guidelines, is the United States Constitution. While constitutional challenges are incorporated into many of the issues arising from the interpretation and application of the Guidelines, some fact-based challenges outside of the application of the Guidelines exist. The United States Supreme Court has upheld the constitutionality of the Sentencing Commission and the Federal Sentencing Guidelines,[250] stating that the Sentencing Commission was not an excessive delegation of legislative power by Congress and was not a violation of the separation of powers principle.[251] Nevertheless, a defendant may be able to raise individualized, fact-based constitutional challenges to his sentence.

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243. *Id.* at 41.

244. Fed. R. Crim. P. 32(a)(1).

245. United States v. Richardson, 925 F.2d 112, 117 (5th Cir.), *cert. denied sub nom.* Boudreaux v. United States, 501 U.S. 1237, 111 S. Ct. 2868 (1991).

246. 18 U.S.C. § 3553(c) (1988); United States v. Moore, 997 F.2d 30, 36 (5th Cir.), *cert. denied*, 114 S. Ct. 647 (1993).

247. 18 U.S.C. § 3624(b) (1988).

248. U.S.S.G. §§ 5B1.1, 5C1.1, 5D.

249. U.S.S.G. §§ 5E1.1(a), 5E1.2(a), (f).

250. Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647 (1989). *See also* United States v. Guajardo, 950 F.2d 203, 206 (5th Cir. 1991), *cert. denied*, 503 U.S. 1009, 112 S. Ct. 1773 (1992).

251. *Mistretta*, 488 U.S. at 361, 109 S. Ct. at 647. *See also Guajardo*, 950 F.2d at 206.

1. Cruel and Unusual Punishment

The imposition of a sentence may violate the Eighth Amendment, which prohibits the infliction of cruel and unusual punishment on persons convicted of a crime.[252] The Cruel and Unusual Punishment Clause has been interpreted to limit "what can be made criminal and punished as such."[253] Accordingly, the Clause has been used to prohibit "grossly disproportionate" punishments.[254]

The Fifth Circuit generally will not disturb a sentence imposed for a noncapital felony conviction if the sentence falls within the statutorily prescribed limits, unless the sentencing judge commits an abuse of discretion in imposing the sentence.[255] As long as the sentence is within the guideline range, the court will usually simply deny the Eighth Amendment challenge without any analysis.[256] The court reasons that it is not within its purview to replace the judgment of the legislature in adopting the Guidelines with the judgment of the court.[257] Applying this standard, the Fifth Circuit has been reluctant to overturn a sentence under the Guidelines based on an Eighth Amendment challenge.[258] This is consistent with the views of the other circuits,[259] which have followed the guidance of the United States Supreme Court in finding that

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252. U.S. Const. amend. VIII; Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401 (1977).

253. *Ingraham*, 430 U.S. at 667, 97 S. Ct. at 1410.

254. *Id.*

255. United States v. Prudhome, 13 F.3d 147, 150 (5th Cir.), *cert. denied*, 114 S. Ct. 1866 (1994); United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991).

256. *See, e.g.*, United States v. Fike, 82 F.3d 1315, 1326 (5th Cir. 1996); United States v. Fisher, 22 F.3d 574 (5th Cir.), *cert. denied*, 115 S. Ct. 529 (1994).

257. United States v. Cardenas-Alvarez, 987 F.2d 1129, 1134 (5th Cir. 1993).

258. *Id.* (100-month imprisonment for convicted felon charged with illegally entering U.S., within applicable Guidelines; not constitutionally disproportionate); Russell v. Collins, 998 F.2d 1287, 1294 (5th Cir. 1993), *cert. denied*, 510 U.S. 1185, 114 S. Ct. 1236 (1994) (a sentence is not disproportionate just because it exceeds a co-defendant's sentence); United States v. Williams, 919 F.2d 266, 271 (5th Cir. 1990) (when defendant violates the terms of supervised release, additional prison terms are not excessive even though the combined total of both terms exceeds the statutory maximum term for the underlying offense). *See also* United States v. Lemons, 941 F.2d 309, 320 (5th Cir. 1991) (the possibility of parole, although a factor in determining the proportionality of a sentence, does not foreclose review when a defendant is sentenced to a serious offense).

259. *See, e.g.*, United States v. Baker, 78 F.3d 1241 (7th Cir. 1996) (harsh penalties are not an Eighth Amendment violation where sentence was within Guidelines); United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) (sentencing court cannot impose its own sense of fairness in place of Guidelines); United States v. Brant, 62 F.3d 367 (11th Cir. 1995) (Eighth Amendment claim limited to question of disproportionality only); United States v. Estrada-Plata, 57 F.3d 757 (9th Cir. 1995) (penalties are not an Eighth Amendment violation where sentence was within Guidelines unless so grossly out of proportion as to shock our sense of justice); United States v. Lanier, 33 F.3d 639 (6th Cir. 1994) (Eighth Amendment claim requires gross disproportionality); United States v. Nicholson, 17 F.3d 1294 (10th Cir. 1994) (penalties are not an Eighth Amendment violation where sentence was within Guidelines); United States v. Valdez, 16 F.3d 1324 (2d Cir. 1994) (successful challenge to constitutionality of sentence very rare).

the Eighth Amendment encompasses, at most, only a narrow proportionality principle.[260]

2. Due Process

The Fifth Circuit has held that the Sentencing Guidelines as a whole do not violate due process, even though they prevent individualized sentencing by establishing mandatory sentences for offenses, because individualized sentencing is not required by the Constitution.[261] However, the Fifth Circuit has entertained more specific due process challenges. One area in which the court has granted due process relief is the determination of sentencing facts.[262] While sentencing facts must be proven by a preponderance of the evidence standard rather than a beyond a reasonable doubt standard,[263] due process forbids the sentencing judge from relying on materially false or unreliable information.[264] However, the government's use of hearsay evidence at sentencing, including corroborated out-of-court statements by unidentified informants, is not a violation of a defendant's constitutional rights to due process.[265]

Another area of due process concern is the imposition of a harsher sentence when a defendant exercises a constitutionally protected right. Due process forbids the sentencing judge from vindictively inflicting a harsher punishment on the defendant for exercising his constitutional right to trial or the privilege against self-incrimination.[266] Evidence that a harsher sentence resulted from a defendant exercising his rights must be clear.[267] However, if a judge imposes a harsher sentence after retrial than was initially imposed at the first trial, a rebuttable presumption of vindictiveness may arise.[268] This presumption may also apply if a harsher sentence is imposed for remaining counts after some

260. Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680 (1991) (upholding mandatory, non-parolable life sentence imposed upon accused convicted of possession of more than 650 grams of cocaine).

261. United States v. Guajardo, 950 F.2d 203, 206 (5th Cir. 1991), *cert. denied*, 503 U.S. 1009, 112 S. Ct. 1773 (1992).

262. United States v. Cardenas-Alvarez, 987 F.2d 1129, 1133-34 (5th Cir. 1993).

263. United States v. Carreon, 11 F.3d 1225, 1241 (5th Cir. 1994).

264. United States v. Tucker, 404 U.S. 443, 447-49, 92 S. Ct. 589, 591-93 (1972) (due process requires that the defendant not be sentenced on the basis of "misinformation of a constitutional magnitude"); United States v. Cardenas-Alvarez, 987 F.2d 1129, 1133-34 (5th Cir. 1993) (dictum) (due process requires that sentence be based on information with "sufficient indicia of reliability to support its probable accuracy").

265. United States v. Young, 981 F.2d 180 (5th Cir. 1992), *cert. denied*, 508 U.S. 980, 113 S. Ct. 2983 (1993) (the district court did not err in considering at sentencing information provided by confidential informants who were neither identified nor presented for cross-examination).

266. North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 2080 (1969), *overruled in part*, Alabama v. Smith, 490 U.S. 794, 802-03, 109 S. Ct. 2201, 2206-07 (1989).

267. United States v. Brown, 7 F.3d 1155, 1162 (5th Cir. 1993).

268. *Pearce*, 395 U.S. at 725, 89 S. Ct. at 2080. This presumption does not apply when the first sentence was imposed after a guilty plea. *Smith*, 490 U.S. at 794, 109 S. Ct. at 2201.

counts have been set aside on appeal.[269] There is no presumption of vindictiveness if, after remand, the defendant's aggregate sentence is equal to or less than his original sentence.[270]

To overcome the presumption of vindictiveness, a judge must justify the harsher sentence based on identifiable conduct of the defendant which the judge became aware of after the original sentencing.[271] Thus, a sentencing judge may impose a harsher sentence based on conduct or events subsequent to the first trial.[272] The judge may also impose an increased sentence based on new evidence and testimony relating to events that occurred prior to the first trial.[273] The reasons for the harsher sentence must be stated on the record.[274] The Fifth Circuit has held, however, that the presumption of vindictiveness can also be overcome by evidence that at resentencing the judge implicitly or expressly lacked vindictive motivation.[275]

3. Equal Protection

Another constitutional provision that provides a source of sentencing issues is the Equal Protection Clause. To prevail on an equal protection claim, the defendant must prove "the existence of purposeful discrimination" in which the sentencing decision was made because of, not in spite of, disparate impact.[276] "Discriminatory purpose in an equal protection context implies that the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group."[277] Because the Guidelines are applied in a facially neutral way to all defendants, understandably this is a heavy burden. The Fifth Circuit has been reluctant to find this burden met under the Guidelines.

For example, one area which has been challenged repeatedly under the Equal Protection Clause is the disproportionality between the sentences for powdered cocaine and crack cocaine.[278] The Fifth Circuit has held that the Equal

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269. *Pearce*, 395 U.S. at 725, 89 S. Ct. at 2080; *Smith*, 490 U.S. at 794, 109 S. Ct. at 2201; United States v. Vonsteen, 950 F.2d 1086, 1092-93 (5th Cir.) (en banc), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3039 (1992) (harsher punishment must be imposed by the same judge that sentenced the defendant previously for the presumption to apply).

270. United States v. Moore, 997 F.2d 30, 37-38 (5th Cir.), *cert. denied*, 510 U.S. 1029, 114 S. Ct. 647 (1993) (resentencing not required when sentence after appeal and remand was exactly the same as original sentence).

271. *Pearce*, 395 U.S. at 726, 89 S. Ct. at 2081.

272. Wasman v. United States, 468 U.S. 559, 571-72, 104 S. Ct. 3217, 3224-25 (1984); United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.), *cert. denied*, 115 S. Ct. 634 (1994).

273. Texas v. McCullough, 475 U.S. 134, 141-44, 106 S. Ct. 976, 980-82 (1986).

274. *Id.*

275. United States v. Cataldo, 832 F.2d 869, 874-75 (5th Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S. Ct. 1577 (1988).

276. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767 (1987).

277. United States v. Galloway, 951 F.2d 64, 65 (5th Cir. 1992).

278. *Id.*

Protection Clause is not violated by the crack cocaine provisions of the Guidelines which provide higher penalties for crack cocaine convictions as opposed to powdered cocaine convictions, even though a disproportionate number of African-Americans are sentenced for crack cocaine violations than for powdered cocaine.[279] Every circuit which has considered this issue is in accord with the determination by the Fifth Circuit regarding the Equal Protection Clause.[280]

4. Free Speech

The First Amendment, as a constitutional mandate, takes priority over a federal statute, and therefore a sentencing judge is precluded from considering the defendant's First Amendment protected political or religious beliefs. The judge, however, can consider racial motivation for a crime under the Constitution.[281] The reason for this is that bias-inspired conduct is not protected by the First Amendment.[282]

5. Right to a Jury Trial

The Fifth Circuit has consistently rejected sentencing issues that claim to violate the defendant's Sixth Amendment right to a jury trial. Specifically, the Sentencing Guidelines are not unconstitutional even though they permit the district court to resolve factual disputes at the sentencing hearing without the benefit of a jury.[283] The problem of concern is that a court can use factual determinations of the defendant's "relevant conduct" for purposes of setting the sentence, although the evidence of the conduct was not presented to the jury. Thus, the defendant might be sentenced for conduct for which the jury did not convict him. The Fifth Circuit has simply chosen to affirm this as constitutional without ever fully explaining its constitutionality.[284]

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279. *Id.*

280. United States v. Payne, 63 F.3d 1200 (2d. Cir. 1995); United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995); United States v. Thompson, 27 F.3d 671 (D.C. Cir. 1994); United States v. Williams, 982 F.2d 1209 (8th Cir. 1992); United States v. King, 972 F.2d 1259 (11th Cir. 1992); United States v. Harding, 971 F.2d 410 (9th Cir. 1992); United States v. Williams, 962 F.2d 1218 (6th Cir. 1992); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990).

281. Wisconsin v. Mitchell, 508 U.S. 476, 483, 113 S. Ct. 2194, 2199 (1993) (First Amendment not violated by penalty enhancement statute even though higher penalties assessed for bias-motivated offenses because statute aimed at bias-inspired conduct not protected by First Amendment).

282. *Id.*

283. United States v. Harris, 932 F.2d 1529, 1539 (5th Cir.), *cert. denied*, 502 U.S. 897, 112 S. Ct. 270 (1991).

284. *Id.*

V. PROCESS WHEN ERROR IN SENTENCING

If the appellate court finds that there are sentencing errors that warrant correction, the case is remanded to the sentencing court for further proceedings that may include a correction or reduction of the sentence imposed. The application of the Guidelines on remand are subject to the same scrutiny as if originally applied. In addition, there are additional procedures that must be followed by the sentencing court when applying the appellate court's determinations.

A. Remand

If the appellate court determines that a sentence was imposed in violation of law, or as a result of an incorrect application of the Guidelines, or if the sentence is outside the applicable Guidelines range and unreasonable, the court must remand the case with any instructions it deems appropriate.[285] In concluding that remand is necessary, the appellate court must give due regard to the district court's opportunity to judge the credibility of witnesses and factual findings.[286] If the appellate court concludes that a sentence is outside the applicable Guidelines range and is unreasonable, or that it was imposed for an offense for which there is no Guideline and is plainly unreasonable, the court must state specific reasons for its conclusions.[287] This allows the sentencing court to properly apply the appellate court's conclusions after the case is remanded.

B. Correction and Reduction of Sentence

A sentence can be modified only after a successful appeal or for extraordinary and compelling reasons.[288] The district court may reduce a sentence prior to a successful appeal in a narrow set of circumstances.[289] The district court may reduce a defendant's sentence if a change in the offense guidelines under which the defendant was sentenced results in a lower Guideline range.[290] In

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285. 18 U.S.C. § 3742(e), (f) (1992). *But see* United States v. Mills, 9 F.3d 1132, 1139 (5th Cir. 1993) (case not remanded when district court left no doubt that the defendant should be sentenced to maximum under Guidelines without upward departure).

286. 18 U.S.C. § 3742(e) (1992); United States v. Burleson, 22 F.3d 93, 94 (5th Cir.), *cert. denied*, 115 S. Ct. 283 (1994).

287. 18 U.S.C. § 3742(f)(2) (1992).

288. 18 U.S.C. § 3582(b), (c) (1988).

289. Fed. R. Crim. P. 35; 18 U.S.C. § 3582(c)(1)(A) (1988).

290. 18 U.S.C. § 3582(c)(2) (1988); U.S.S.G. § 1B1.10 (policy statement). The sentencing court must consider the factors set forth in 18 U.S.C. § 3553(a).

Recently, both the Fifth and Second Circuits have held that the right to appointed counsel under the Criminal Justice Act does not extend to a motion for reduction of sentence based on an amendment to the Guidelines because this is not an "ancillary matter." United States v. Whitebird, 55 F.3d 1007, 1010 (5th Cir. 1995); United States v. Reddick, 53 F.3d 462 (2d Cir. 1995).

addition, a district court has the authority to correct its own obvious errors in sentencing within the time fixed for either party to file an appeal.[291] The district court is also permitted, on a motion made by the government within one year after the imposition of the sentence, to reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another criminal.[292]

Generally, however, a district court may correct a sentence only following a successful appeal of the sentence.[293] On remand, the district court is required to correct the sentence either according to the appellate court's findings or, if the appellate court simply remands for further proceedings, according to the district court's own determination of whether the original sentence was correct.[294] Thus, if no instructions are given by the appellate court, the district court has substantial discretion to correct the sentence on remand.[295] Because such a correction is the imposition of a new sentence, the defendant is entitled to be present at the resentencing.[296]

VI. CONCLUSION

The Commission drafted the initial Guidelines with considerable caution. However, the Commission is a permanent body that can amend the Guidelines each year.[297] These amendments, along with the growing body of case law, will make Guideline law ever more detailed. For this reason, the number of cases interpreting this area of the law will continue to increase rapidly. Many issues will be resolved as additional information is obtained. Nevertheless, new issues will arise with each amendment and uncertainties will continue to result and constitute a source of appellate issues.

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291. 18 U.S.C. § 3582 (1988); Fed. R. Crim. P. 35(c).

292. Fed. R. Crim. P. 35(b); United States v. Early, 27 F.3d 140, 141-42 (5th Cir.), *cert. denied*, 115 S. Ct. 600 (1994).

The Fifth Circuit has held that there is no Sixth Amendment right to counsel in a Rule 35(b) proceeding. United States v. Palomo, 80 F.3d 138, 142 (5th Cir. 1996).

293. Fed. R. Crim. P. 35 (a); United States v. Moree, 928 F.2d 654, 655 (5th Cir. 1991).

294. Fed. R. Crim. P. 35(a).

295. United States v. Vonsteen, 950 F.2d 1086, 1088-90 (5th Cir.) (en banc), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3039 (1992).

296. Fed. R. Crim. P. 43(a); *Moree*, 928 F.2d at 656. *But see* United States v. Pineda, 988 F.2d 22, 23 (5th Cir. 1993) ("[W]here the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous.").

297. U.S.S.G. Ch. 1, Pt. A.