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43.00 SENTENCING: TAX DIVISION POLICIES AND GUIDELINES

43.01 GENERALLY

In 2005, the Supreme Court significantly altered the federal sentencing landscape when it decided ***United States v. Booker***, 543 U.S. 220 (2005). From 1987 until 2005, federal sentencing had been governed by the mandatory application of the United States Sentencing Guidelines (the Guidelines). The Guidelines required judges to find a number of facts at sentencing, to calculate the appropriate range of imprisonment, and to impose a sentence within the appropriate range. In ***Booker***, the Supreme Court held that the mandatory application of the Guidelines violated the Sixth Amendment. The Court elected to remedy this defect by making the Guidelines advisory. Sentencing judges must now impose sentences in accordance with 18 U.S.C. § 3553(a), which describes Congress's federal sentencing goals and lists the factors that sentencing judges must consider.

Both Supreme Court precedent and 18 U.S.C. § 3553(a)(4) require district courts to consider the applicable Guidelines range at sentencing. Although the Guidelines are no longer mandatory, a district court must still use the Guidelines to calculate a defendant's sentencing range and must consider this range when devising a sentence. ***Gall v. United States***, 552 U.S. 38, 49 (2007) ("[T]he Guidelines should be the starting point and the initial benchmark"); ***Rita v. United States***, 551 U.S. 338, 349-350 (2007); ***Booker***, 543 U.S. at 245-46. Thus, in calculating the advisory Guidelines range, the sentencing judge must make factual findings using the preponderance of the evidence standard, just as before ***Booker***. *See* ***Rita***, 551 U.S. at 350-351 (holding that the judicial fact-finding necessary to calculate the advisory Guidelines range does not violate the Sixth Amendment).

Accordingly, although the Guidelines are now advisory, calculating the Guidelines range remains a significant part of federal sentencing. The Supreme Court has recognized that the Sentencing Commission continues to play an important role at sentencing, because the Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" ***Kimbrough v. United States***, 522 U.S. 85, 108-09 (2007) (quoting ***United States v. Pruitt***, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J.,

concurring)). Accordingly, "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" ***Id***. at 109 (quoting ***Rita***, 551 U.S. at 350). Moreover, because every sentencing court must consider the sentencing range recommended by the Guidelines, the Guidelines range is the sole means available for assuring some measure of uniformity in sentencing. Thus, a non-Guidelines sentence runs the risk of creating unwarranted disparities in sentencing, a result that conflicts with 18 U.S.C. § 3553(a)(6). A majority of the courts of appeals have held that sentences that fall within the properly calculated Guidelines range are entitled to a presumption of reasonableness on appeal. *See* ***United States v. Dorcely***, 454 F.3d 366, 376 (D.C. Cir. 2006); ***United States v. Green***, 436 F.3d 449, 457 (4th Cir. 2006); ***United States v. Alonzo***, 435 F.3d 551, 554 (5th Cir. 2006); ***United States v. Williams***, 436 F.3d 706, 708 (6th Cir. 2006); ***United States v. Mykytiuk***, 415 F.3d 606, 608 (7th Cir. 2005); ***United States v. Lincoln***, 413 F.3d 716, 717 (8th Cir. 2005); ***United States v. Kristl***, 437 F.3d 1050, 1053-1054 (10th Cir. 2006) (*per curiam*). The Supreme Court upheld the use of this appellate presumption in ***Rita***, 551 U.S. at 347. The Court made clear, however, that the presumption of reasonableness may only apply on appeal and that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." ***Id***. at 351.

After calculating the advisory Guidelines range, the Court must consider that range along with all the factors listed in 18 U.S.C. § 3553(a) before arriving at the final sentence. These factors include the following:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or

> other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) . . . the sentencing range established . . . [by the Guidelines];
>
> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . that . . . is in effect on the day of sentencing[;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). Although a district court need not address each of these factors at length, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." ***Rita***, 551 U.S. at 356; ***Gall***, 552 U.S. at 50 (explaining that sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing").

43.02 GUIDELINES APPLICATION PRINCIPLES

43.02[1] Select the Appropriate Guidelines Manual

Section 1B1.11(a) of the Sentencing Guidelines mandates that a court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced." *See* ***United States v. Fitzgerald***, 232 F.3d 315, 318 (2d Cir. 2000); ***United States v. Zagari***, 111 F.3d 307, 323 (2d Cir. 1997); *see also* ***United States v. Bailey***, 123 F.3d 1381, 1403-1406 (11th Cir. 1997). The same is true of policy statements. ***United States v. Schram***, 9 F.3d 741, 742 (9th Cir. 1993). If the court determines, however, that the use of the current Manual would violate the *ex post facto* clause by recommending a longer sentence, the court "shall use the Guidelines Manual in effect on the date that the offense was committed." USSG §1B1.11(b)(1); *see also* ***Fitzgerald***, 232 F.3d at 318-19; ***Zagari***,

111 F.3d at 323; ***United States v. Nelson***, 36 F.3d 1001, 1003 (10th Cir. 1994). Thus, if the sentencing guideline in effect at the time the offense was committed is more favorable to the defendant than the guideline in effect at the time of sentencing, the court must apply the more favorable guideline. ***United States v. Chasmer***, 952 F.2d 50, 52 (3d Cir. 1991).

Although the Guidelines are now advisory rather than mandatory, *ex post facto* principles largely still apply to the selection of the appropriate Guidelines Manual. Most of the courts of appeals have continued to require the use of the Manual in effect at the time the crime was committed if the use of the current Manual would disadvantage the defendant. *See* ***United States v. Cruzado-Laureano***, 404 F.3d 470, 488 (1st Cir. 2005); ***United States v. Kilkenny***, 493 F.3d 122, 127-30 (2d Cir. 2007); ***United States v. Iskander***, 407 F.3d 232, 242-43 (4th Cir. 2005); ***United States v. Wood***, 486 F.3d 781, 791 (3d Cir. 2007); ***United States v. Reasor***, 418 F.3d 466, 479 (5th Cir. 2005); ***United States v. Harmon***, 409 F.3d 701, 706 (6th Cir. 2005);[1] ***United States v. Larrabee***, 436 F.3d 890, 894 (8th Cir. 2006); ***United States v. Lopez-Solis***, 447 F.3d 1201, 1204-05 (9th Cir. 2006); ***United States v. Foote***, 413 F.3d 1240, 1248-49 (10th Cir. 2005). The Seventh Circuit is the only court to have held that, post-***Booker***, *ex post facto* principles do not apply to the selection of the Guidelines Manual. ***United States v. Demaree***, 459 F.3d 791, 794-95 (7th Cir. 2006).[2] After the Supreme Court's decisions in ***Gall v. United States,*** 522 U.S. 38 (2007); ***Kimbrough v. United States,*** 552 U.S. 85 (2007); and ***Irizarry v. United States***, 553 U.S. 708, 128 S. Ct. 2198 (2008), the Solicitor General determined that, in light of district courts' significant discretion to vary from the advisory Guidelines range, the government should take the position that the *Ex Post Facto* clause does not prevent the use of a post-offense Guidelines amendment that increases the advisory Guidelines range. In any event, even if the district court begins its sentencing deliberations with an earlier version of the Guidelines, the sentencing court may now consider subsequent changes to the Guidelines as part of its analysis of the 18 U.S.C. § 3553(a) factors. ***Larrabee***, 436 F.3d at 894; ***Demaree***, 459 F.3d at 795.

Generally, for *ex post facto* purposes, the completion date of the offense determines which version of the Sentencing Guidelines is to be employed. USSG

[1] Although the Sixth Circuit suggested in ***Harmon*** that *ex post facto* analysis continues to apply to the Guidelines post-***Booker***, in a later opinion the court suggested the contrary in a footnote. *See* ***United States v. Barton***, 455 F.3d 649, 655 n.4 (6th Cir. 2006).

[2] The government confessed error in ***Demaree***, but the court of appeals rejected the government's position and found no error. 459 F.3d at 793, 795.

§1B1.11, comment (n.2); ***Bailey***, 123 F.3d at 1406; ***Zagari***, 111 F.3d at 324; ***United States v. Cooper***, 35 F.3d 1248, 1251 (8th Cir. 1994), *vacated*, 514 U.S. 1094 (1995), *reinstated*, 63 F.3d 761 (8th Cir. 1995). When a revised edition of the Guidelines is applied to offenses that predate and postdate the revision, the Fourth Circuit has determined that such use does not violate the *ex post facto* clause. ***United States v. Lewis***, 235 F.3d 215, 217-18 (4th Cir. 2000); *see also* ***United States v. Sullivan***, 255 F.3d 1256, 1262 (10th Cir. 2001).

Section 1B1.11(b)(2) establishes the "one book" rule. This rule provides that the "Guidelines Manual in effect on a particular date shall be applied in its entirety." Thus, a court cannot pick and choose or apply guidelines sections piecemeal. *See* USSG §§1B1.11(b)(2) & 1B1.11, comment. (backg'd); *see also* ***Fitzgerald***, 232 F.3d at 319; ***United States v. Keller***, 58 F.3d 884, 890 (2d Cir. 1995) ("A version of the sentencing guidelines is to be applied in its entirety. A sentencing court has no authority to pick and choose, taking one provision from an earlier version of the guidelines and another from a later version."); ***Nelson***, 36 F.3d at 1003-04; ***United States v. Springer***, 28 F.3d 236, 237 (1st Cir. 1994); ***United States v. Lance***, 23 F.3d 343, 344 (11th Cir. 1994). The Guidelines also provide, "If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." USSG §1B1.11(b)(3). The commentary to this provision explains that the use of a later version of the Guidelines does not violate the *ex post facto* clause, "[b]ecause the defendant completed the second offense after the amendment to the guidelines took effect." USSG §1B1.11(b)(3), comment. (backg'd). However, some courts have disapproved of the use of the one book rule and Section 1B1.11(b)(3) on *ex post facto* grounds. ***See United States v. Ortland***, 109 F.3d 539, 546 (9th Cir. 1997); ***United States v. Seligsohn***, 981 F.2d 1418, 1424 (3d Cir. 1992), *superseded on other grounds*, USSG App. C, amend. 474.

When a court applies an earlier edition of the Guidelines Manual, the court also must apply subsequent amendments to the extent that such amendments represent merely clarification rather than substantive changes. USSG §1B1.11(b)(2); *see also* ***United States v. Isabel***, 980 F.2d 60, 62 (1st Cir. 1992); ***United States v. Caballero***, 936 F.2d 1292, 1299 n.8 (D.C. Cir. 1991); ***United States v. Perdomo***, 927 F.2d 111, 116-17 (2d Cir. 1991); ***United States v. Howard***, 923 F.2d 1500, 1504 n.4 (11th Cir. 1991). Some offenses, such as conspiracy, attempted evasion, escape, and continuing criminal

enterprise, are continuing offenses. For continuing offenses, a revised version of the Guidelines applies if the offense continues until after the effective date of the Guidelines revisions. Thus, in these so-called "straddle cases," there is no *ex post facto* violation in applying the version of the Guidelines that was in effect when the last affirmative act occurred, rather than the earlier version in effect when the conspiracy began, even though the later version specified a higher offense level for the same conduct. ***United States v. Barker***, 556 F.3d 682, 689 (8th Cir. 2009) ("Because tax evasion is a continuing offense, the date of the defendant's last act of evasion is the 'date of the offense of conviction' in determining the appropriate version of the guidelines under U.S.S.G. § 1B1.11."); ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992); ***United States v. Stanberry***, 963 F.2d 1323 (10th Cir. 1992)**;** ***United States v. Walton***, 908 F.2d 1289, 1299 (6th Cir.1990); ***United States v. Walker***, 885 F.2d 1353, 1354 (8th Cir. 1989).

43.02[2] Guidelines Calculation

After determining which Guidelines Manual applies to the case, the prosecutor should next follow the steps outlined in the Manual in order to calculate the appropriate guideline range:

(a) Determine the applicable offense guideline from Chapter Two. *See* USSG §1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

See USSG §1B1.1. Finally, the prosecutor must also check to make sure that the calculation complies with Department of Justice policies. For example, compute the possible guideline range for each count of an indictment or information prior to accepting a plea to a single count to ensure that the plea is consistent with the Tax Division's major count policy.[3]

43.03 CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES

Consistent with the overall plan of the sentencing guidelines, each tax guideline begins with a base offense level. Part T of Chapter Two of the Sentencing Guidelines contains the provisions governing most tax crimes. In determining the starting point for the base offense level, most guidelines in Part T of Chapter Two refer to the dollar amount of the "tax loss" attributable to the defendant. Once the sentencing court determines the total tax loss attributable to a defendant, the tax loss table contained in

[3] *See* United States Attorneys' Manual § 6-4.310.

Section 2T4.1 then provides the base offense level of the defendant. ***United States v. Powell***, 124 F.3d 655, 663 n.7 (5th Cir. 1997).[4]

43.03[1] Tax Loss

Section 2T1.1 defines tax loss for 26 U.S.C. §§ 7201, 7203 (with a minor exception), 7206(1) (with a minor exception), and 7207.[5] As provided in Section 2T4.1, a defendant's base offense level varies with the amount of tax loss. USSG §2T1.1(a)(1). If there is no tax loss, the base offense level is 6. USSG §2T1.1(a)(2).

For cases involving income tax evasion and filing false returns or statements, the tax loss is "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 also defines tax loss for failure to file offenses in Section 2T1.1(c)(2), failure to pay offenses, Section 2T1.1(c)(3); and offenses involving an improperly claimed refund, Section 2T1.1(c)(4). Section 2T1.1 further describes "presumptions" that the sentencing court should employ when calculating the tax loss in various situations involving tax evasion offenses, false return or statement offenses, and failure to file a return offenses. USSG §2T1.1(c)(1)(A)-(C); USSG §2T1.1(c)(2)(A)-(B). Specifically, these presumptions provide that the tax loss should equal a certain percentage of the unreported gross income, or improperly claimed deductions or exemptions at issue, plus all false credits claimed against tax, "unless a more accurate determination of the tax loss can be made." USSG §2T1.1(c)(1)(A)-(C); USSG §2T1.1(c)(2)(A)-(B).

The commentary to Section 2T1.1 explains that these presumptions are not binding, but rather serve as general formulas:

> In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

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[4] Most guidelines also contain "specific offense characteristics," which allow the base offense level to be increased on the basis of certain aggravating facts. *See* § 43.03[2], *infra*.

[5] Section 2T1.4 defines tax loss for 26 U.S.C. § 7206(2), and Section 2T1.9 defines tax loss for 18 U.S.C. § 371, although both sections refer back to Section 2T1.1.

USSG §2T1.1, comment. (n.1). Likewise, the commentary states that a court should use an applicable presumption, unless one of the parties "provides sufficient information for a more accurate assessment of tax loss." ***Id.***; *see also* ***United States v. Barski***, 968 F.2d 936, 937 (9th Cir. 1992) (*per curiam*) (rejecting due process challenge to tax loss presumption contained within now-deleted Section 2T1.3; presumption did not establish irrebuttably that tax loss was 28 percent of unreported taxable income, but merely established "the legally operative fact as the amount of unreported income"); ***United States v. Hoover***, 178 F.3d 1365, 1367-68 (7th Cir. 1999) (affirming use of 28 percent presumption when defendant's lack of records did not permit more accurate calculation).

Ultimately, "[i]n some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts." USSG §2T1.1, comment. (n.1); *see also* ***United States v. Pesaturo***, 476 F.3d 60, 73 (1st Cir. 2007) (estimation of tax loss was necessary when defendant did not keep accurate records); ***United States v. Hart***, 324 F.3d 575, 578 (8th Cir. 2003); ***United States v. Bishop***, 291 F.3d 1100, 1114-15 (9th Cir. 2002) (finding no error where the court based its sentence on the government's calculation of tax loss and concluding, "It is not the government's or the court's responsibility to establish the defendants' itemized deductions, if no itemized deduction information was offered by the defendants."); ***United States v. Spencer***, 178 F.3d 1365, 1368 (10th Cir. 1999) (recognizing that, although government has the burden of proof, "neither the government nor the court has an obligation to calculate the tax loss with certainty or precision"); ***United States v. Bryant***, 128 F.3d 74, 75-76 (2d Cir. 1997) (*per curiam*) (relying on Section 2T1.1 commentary to uphold tax loss estimation for defendant convicted of assisting in the preparation of numerous false returns; estimation included tax loss extrapolated from unaudited returns). *But see* ***United States v. Mehta***, 594 F.3d 277, 283 (4th Cir. 2010) (finding extrapolation inappropriate in that case because extrapolation would require a threshold finding that the trend in the known sample was likely to be present in the larger group of all tax returns prepared by the defendant during the relevant period and that the known sample was a random sample).

When the parties contest the amount of tax loss, the sentencing court must hold an evidentiary hearing to resolve factual issues, unless the court presided over a trial and can base its findings upon the trial record. ***United States v. Marshall***, 92 F.3d 758, 760 (8th Cir. 1996). The government must prove the amount of tax loss by a preponderance of the

evidence. USSG §6A1.3, comment. In the wake of ***Booker***, every court of appeals has held that judicial fact-finding at sentencing by the preponderance of the evidence standard remains the proper way to calculate the advisory Guidelines range. ***United States v. Leahy***, 473 F.3d 401, 413 (1st Cir. 2006); ***United States v. Singletary***, 458 F.3d 72, 80 (2d Cir. 2006); ***United States v. Grier***, 475 F.3d 556, 561 (3d Cir. 2007) (*en banc*); ***United States v. Washington***, 404 F.3d 834, 848 (4th Cir. 2005); ***United States v. Mares***, 402 F.3d 511, 519 (5th Cir. 2005); ***United States v. Kosinski***, 480 F.3d 769, 775-77 (6th Cir. 2007); ***United States v. Bryant***, 420 F.3d 652, 656 (7th Cir. 2005); ***United States v. Garcia-Gonon***, 433 F.3d 587, 593 (8th Cir. 2006); ***United States v. Hagege***, 437 F.3d 943, 959 (9th Cir. 2006); ***United States v. Magallanez***, 408 F.3d 672, 685 (10th Cir. 2005); ***United States v. Lindsey***, 482 F.3d 1285, 1294 (11th Cir. 2007); ***United States v. Coles***, 403 F.3d 764, 768 (D.C. Cir. 2005).

In determining the base offense level, a court must include all relevant conduct. USSG §1B1.3(a). Hence, in calculating the tax loss, a court may consider both charged and uncharged conduct. ***United States v. Bove***, 155 F.3d 44, 47-48 (2d Cir. 1998); ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997); ***United States v. Meek***, 998 F.2d 776, 781 (10th Cir. 1993). A court also may account for acquitted conduct when calculating the tax loss. *See generally* ***United States v. Watts***, 519 U.S. 148, 157 (1997) (*per curiam*) (Guideline range may rest on uncharged conduct or conduct underlying acquitted charges, if court finds conduct proven by a preponderance of evidence); ***United States v. Kelly***, 147 F.3d 172, 178 (2d Cir. 1998). The Supreme Court's holding in ***Booker*** did not overrule ***Watts***, and, as a majority of the circuits have held, district courts may continue to consider acquitted conduct at sentencing. *See* ***United States v. Gobbi***, 471 F.3d 302, 313-14 (1st Cir. 2006); ***United States v. Vaughn***, 430 F.3d 518, 525-27 (2d Cir. 2005); ***United States v. Mendez***, 498 F.3d 423, 426-27 (6th Cir. 2007); ***United States v. Hurn***, 496 F.3d 784, 788 (7th Cir. 2007); ***United States v. High Elk***, 442 F.3d 622, 626 (8th Cir. 2006); ***United States v. Mercado***, 474 F.3d 654, 656-57 (9th Cir. 2007); ***United States v. Magallanez***, 408 F.3d 672, 684-85 (10th Cir. 2005); ***United States v. Duncan***, 400 F.3d 1297, 1304-05 (11th Cir. 2005); ***United States v. Dorcely***, 454 F.3d 366, 372-73 (D.C. Cir. 2006). Further, a court may compute tax loss by including tax loss from years barred by the statute of limitations. ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994). Self-employment taxes may be properly included in the tax loss computation, ***United States v. Twieg***, 238 F.3d 930 (7th Cir. 2001), as may delinquent social security taxes, ***United States v. Martin-Rios***, 143 F.2d 662 (2d. Cir. 1998).

Moreover, a court may include state tax losses in the tax loss computation, if the state tax loss constitutes relevant conduct under Section 1B1.3. ***United States v. Maken***, 510 F.3d 654, 657-59 (6th Cir. 2007); ***United States v. Baucom***, 486 F.3d 822, 829 (4th Cir. 2007), *vacated on other grounds*, ***Davis v. United States***, 552 U.S. 1092 (2008); ***United States v. Fitzgerald***, 232 F.3d 315, 320-21 (2d Cir. 2000) (adding federal, state, and local tax losses was a proper application of guidelines under Section 1B1.3(a)(2) where they all were part of the relevant conduct to the offense of conviction); ***United States v. Schilling,*** 142 F.3d 388, 390 (7th Cir. 1998) (state excise tax loss included in tax loss calculation); ***Powell***, 124 F.3d at 664-65 (when computing tax loss arising from federal motor fuel excise tax scheme, district court properly considered state excise tax loss); s*ee also* ***United States v. Fuentes***, 107 F.3d 1515, 1526 (11th Cir. 1997) (state offenses that are part of the same course of conduct as federal offenses and part of a common scheme or plan must be considered relevant conduct); ***United States v. Newbert,*** 952 F.2d 281, 284 (9th Cir. 1991) (holding that nonfederal offenses may be considered for sentence enhancement under Section 1B1.3). Inclusion of the state tax loss may increase the defendant's sentence under the Guidelines, and prosecutors are encouraged to include it as relevant conduct whenever practicable. Generally, the government's summary witness can testify as to the calculation of the state tax loss.[6] In some cases, the testimony of state taxing authorities will be required, which necessitates the cooperation of the state officials. Some states are reluctant to cooperate because of state privacy laws. Other states are willing to disclose their audit and investigatory files. The guideline provisions which simplify the determination of tax loss by using a percentage of the defendant's income, like Sections 2T1.1(c)(1) and (2), may be unavailable to determine state tax losses because of wide variations between the guideline rates and state tax rates.

Generally, the tax loss computation is not confined to the amount the government actually lost in taxes, ***United States v. Tandon***, 111 F.3d 482, 490 (6th Cir. 1997); ***United States v. Kraig***, 99 F.3d 1361, 1370-71 (6th Cir. 1996); ***United States v. Hunt***, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); ***United States v. Lorenzo***, 995 F.2d 1448, 1459-60 (9th Cir. 1993), or the amount of tax money the IRS actually could recover, ***United States v. Clements***, 73 F.3d 1330, 1339 (5th Cir. 1996); ***United States v. Brimberry***, 961 F.2d 1286, 1292 (7th Cir. 1992). Likewise, the tax loss is not reduced by payment of taxes after notification of an investigation, ***Tandon***, 111 F.3d at 490; ***United States v.***

[6] Defendants who are prosecuted for failing to report business income often fail to accurately report sales to the state, so state sales taxes, in addition to state income taxes, may also be relevant conduct for sentencing purposes.

Gassaway, 81 F.3d 920, 921-22 (10th Cir. 1996), or by payment before sentencing, ***United States v. Mathis***, 980 F.2d 496, 497 (8th Cir. 1992); ***United States v. Pollen***, 978 F.2d 78, 90-91 (3d Cir. 1992); *see also* USSG §2T1.1(5) (stating that "[t]he tax loss is not reduced by any payment of tax subsequent to the commission of the offense"). Ultimately, the tax loss is based upon the loss intended by the defendant, ***Clements***, 73 F.3d at 1339; ***United States v. Moore***, 997 F.2d 55, 59-62 (5th Cir. 1993), regardless of whether the intended loss occurred or was realistic, ***Moore,*** 997 F.2d at 61; ***Lorenzo***, 995 F.2d at 1459-60. *See* USSG §2T1.1.

Previously, the federal circuit courts were in conflict regarding whether a sentencing court calculating tax loss as defined in Section 2T1.1 could consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return. The Sentencing Commission resolved this conflict by adding an Application Note, effective November 1, 2013, explaining that the sentencing court "should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled." USSG §2T1.1, comment. (n.3); USSG App. C, amend. 774. In addition, the Note explains that the court "should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss," but only to the extent that three conditions are met.

First, the credit, deduction, or exemption must be related to the tax offense and have been claimable at the time the tax offense was committed. The Commission explained when submitting the amendment to Congress that defendants "should not be permitted to invoke unforeseen or after-the-fact changes or characterizations—such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status—to lower the tax loss."[7] Second, the credit, deduction, or exemption must be "reasonably and practicably ascertainable." Third, the defendant must present "information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy."

Moreover, the court is not to account for "payments to third parties made in a manner that encouraged or facilitated a separate violation of law," such as "under the table" payments to employees or expenses incurred to obstruct justice. The defendant

[7] http://www.ussc.gov/Legal/Amendments/Official_Text/20130430_Amendments.pdf

bears the burden of establishing any such credit, deduction, or exemption by a preponderance of the evidence.

Even though a defendant may attempt to reduce the amount of tax loss attributable to his offense by introducing evidence of unclaimed expenses or deductions, the court ultimately may reject the assertions of the defendant based upon the particular facts. *See* ***United States v. Hoskins***, 654 F.3d 1086, 1096 (10th Cir. 2011) (sentencing court did not err in declining to accept defendants' proposed deductions, which were self-serving, based on a short and non-representative period of time, and where court could not independently verify the proposed figures); ***United States v. Valenti***, 121 F.3d 327, 333-34 (7th Cir. 1997) (upholding refusal of sentencing court to give defendant convicted of tax evasion and failing to file tax returns credit for asserted legitimate business expenses when sentencing court determined that testimony of defendant was speculative and incredible); ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997) (defendants convicted of tax fraud conspiracy under 18 U.S.C. § 371 were not entitled to charitable deductions for sham distributions to "nonprofit" corporation).

A court, however, may not base the tax loss for sentencing purposes upon civil tax liability. ***Pierce***, 17 F.3d at 150; ***Meek***, 998 F.2d at 783; *see also* ***Harvey***, 996 F.2d at 922 (interpreting ***United States v. Daniel***, 956 F.2d 540, 544 (6th Cir. 1992), as indicating that civil tax liability is not an adequate substitute for "tax loss").

Generally, a tax loss calculation cannot include penalties or interest. An exception applies, however, in evasion of payment cases and failure to pay cases. *See* USSG §1T1.1(c)(1). The commentary to that section provides that "[t]he tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." The First Circuit addressed this issue in ***United States v. Thomas***, 635 F.3d 13, 16-17 (1st Cir. 2011). The ***Thomas*** court analyzed whether penalties and interest could be included as tax loss in a case where the defendant pleaded guilty to evasion of assessment. The court looked at relevant conduct and determined that the defendant's evasion of payment conduct in years preceding the evasion of assessment charge to which the defendant pleaded guilty was relevant conduct. Observing that the prior years' conduct was an attempt to evade payment of taxes, the court determined that it could properly include penalties in its tax loss calculation. ***Id.*** *Accord* ***United States v. Josephberg***, 562 F.3d 478, 502-03 (2d Cir. 2009) and ***United States v. Barker***, 556 F.3d 682 (8th Cir. 2009).

43.03[1][a] Section 7201

Section 2T1.1 provides that if there is a tax loss, the base offense level for tax evasion offenses derives from Section 2T4.1, the Tax Table, according to the amount of tax loss. USSG §2T1.1(a)(1). Otherwise, the base offense level is 6. USSG §2T1.1(a)(2). The current version of Section 2T1.1 defines tax loss for the purposes of evasion offenses as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 further describes presumptions that a court should employ when calculating the tax loss in various situations involving tax evasion offenses. Generally, these presumptions provide that the tax loss should equal 28 percent of the unreported gross income or improper deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34 percent), plus 100 percent of any falsely claimed credits against tax. USSG §2T1.1(c)(1)(A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.; see* 43.03[1], *supra.*

43.03[1][b] Section 7203

Section 2T1.1 governs the base offense level for violations of Section 7203 that involve a willful failure to file a return, supply information, or pay tax. §2T1.1; USSG Appendix A. Under Sections 2T1.1(c)(2) and (3), "tax loss" for offenses involving the failure to file a return or to pay tax is "the amount of tax that the taxpayer owed and did not pay"; however, "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made." §2T1.1(c)(2)(A). The guideline commentary indicates that sentencing courts should employ the tax loss formula in cases in which the tax loss may not be "reasonably ascertainable," but should disregard the formula if either party provides sufficient information for a more accurate assessment of the tax loss. USSG §2T1.1, comment. (n.1).

In ***United States v. Valenti***, 121 F.3d 327, 333-34 (7th Cir. 1997), the district court employed the formula in USSG §2T1.1(c)(2)(A), when sentencing a defendant for failing to file returns, concluding that the tax loss simply equaled twenty percent of the defendant's unreported gross income. The defendant objected that this method failed to

produce the most accurate determination of the tax loss and that the district court had failed to account for his evidence of his legitimate business expenses. ***Id***. The ***Valenti*** court rejected this claim and upheld the sentence imposed under Section 2T1.1(c)(2), noting that the district court had found that the defendant's evidence was speculative and incredible, that the government had tried to measure the business expenses accurately, and that it was likely that the defendant had "got[ten] off easy" because additional unreported income probably existed. ***Id.*** at 334; *see also* ***United States v. Sullivan***, 255 F.3d 1256, 1263-64 (10th Cir. 2001) (upholding use of 20 percent presumption when district court lacked information to make a more accurate determination).

The single exception to the use of Section 2T1.1 to determine the base offense level for offenses under Section 7203 is willful failure to file a Form 8300 reporting the receipt of more than $10,000 in a business transaction. *See* 26 U.S.C. § 6050I. For that offense, the base offense level is determined pursuant to USSG §2S1.3.

43.03[1][c] Section 7206(1)

Section 2T1.1 governs offenses involving fraudulent or false returns and provides that the base offense level for fraudulent or false return offenses is the level from Section 2T4.1 (the Tax Table), corresponding to the amount of tax loss. USSG §2T1.1(a)(1). Otherwise, the base offense level is 6. USSG §2T1.1(a)(2). As with offenses involving tax evasion, Section 2T1.1 now defines tax loss for the purposes of fraudulent or false return offenses as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 further describes presumptions that a court should employ when calculating the tax loss in various situations involving fraudulent or false return offenses. Generally, these presumptions provide that the tax loss should equal 28 percent of the unreported gross income or improperly claimed deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34 percent), plus 100 percent of any falsely claimed credits against tax. USSG §2T1.1(c)(1)(A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.*

The section regarding the calculation of base offense levels for tax offenses in general, *see* §43.03[1], *supra*, outlines in detail the principles that currently govern the

calculation of the base offense level under Section 2T1.1 for violations of Section 7206(1).

43.03[1][d] Section 7206(2)

Section 2T1.4 governs the sentencing of defendants who have aided, assisted, procured, counseled, or advised tax fraud. The base offense level is the level from Section 2T4.1 (the Tax Table), corresponding to the amount of tax loss. USSG §2T1.4(a)(1). Otherwise, the base offense level is 6. USSG §2T1.4(a)(2). This provision defines tax loss as "the tax loss, as defined in §2T1.1, resulting from the defendant's aid, assistance, procurance or advice." USSG §2T1.4(a). If the defendant advises others to violate their tax obligations by filing returns which have no support in the tax law (such as by promoting a fraudulent tax shelter scheme), and if such conduct results in the filing of false returns, the misstatements in all such returns will contribute to one aggregate tax loss. USSG §2T1.4, comment. (n.1). This aggregation occurs regardless of whether the taxpayers realized that the returns were false. *Id.*

A sentencing court does not necessarily have to calculate the amount of tax loss attributable to a false return scheme with full certainty or precision. ***United States v. Bryant***, 128 F.3d 74, 75-76 (2d Cir. 1997) (*per curiam*). In ***Bryant***, the defendant ran an income tax "mill," assisting in the preparation of 8,521 individual tax returns from 1991 to 1993. ***Id***. at 76. The defendant was convicted of violating Section 7206(2) by assisting in the preparation of 22 false tax returns, each of which resulted in an average tax loss of $2,435. ***Id***. Over 99 percent of all returns prepared by the defendant resulted in refunds. ***Id***. The IRS audited more than 20 percent of the returns prepared by the defendant, discovering that 1,683 of them yielded an average tax loss of $2,651 each. ***Id***. During sentencing, the district court calculated the tax loss under Sections 2T1.4 and 2T4.1 as equaling at least $5,115,203. ***Id***. at 75. This sum was based upon $53,570 in loss from the 22 returns underlying the counts of conviction, $4,461,633 in loss from the audited returns, and at least $600,000 in estimated loss from unaudited returns prepared by the defendant. *Id.* The defendant complained on appeal that the $600,000 in tax loss attributed to the unaudited returns was speculative and unfair. Noting that this sum rested upon an average tax loss of less than $100 per unaudited return, the ***Bryant*** court rejected this argument, explaining:

> The §2T1.1 commentary, which is applicable to a violation of § 7206(2), states that "the amount of the tax

> loss may be uncertain," and it envisions that "indirect methods of proof [may be] used. . . ." It states expressly that "the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts."
>
> . . . [Therefore,] it is permissible for the sentencing court, in calculating a defendant's offense level, to estimate the loss resulting from his offenses by extrapolating the average amount of tax loss from known data and applying that average to transactions where the exact amount of loss is unknown. . . .
>
> We see no reason why [estimation of total tax loss through extrapolation] may not be used in a § 7206(2) case in which, as here, the defendant has been convicted of assisting in the preparation of numerous fraudulent tax returns, and government records show many more such instances. Although extrapolation might not be reasonable if, for example, there were few instances of fraud, or if the returns audited constituted a minuscule percentage of the total that the defendant prepared or in whose preparation he assisted, we see no unreasonableness here.

Bryant, 128 F.3d at 75-76 (internal citations omitted); *cf.* ***United States v. Marshall***, 92 F.3d 758, 760-61 (8th Cir. 1996) (trial record supported determination that tax loss equaled $2,004,961 because defendant admitted that he had prepared more than 1,200 returns, admitted that he controlled all employees in his return preparation business, and returns submitted during sentencing contained the same improprieties as returns underlying Section 7206(2) convictions).

As with other tax crimes, the tax loss arising from a Section 7206(2) violation includes the attempted or intended tax loss, rather than the tax loss actually suffered by the government. ***United States v. Hunt***, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); ***United States v. Moore***, 997 F.2d 55, 59-61 (5th Cir. 1993); ***United States v. Brimberry***, 961 F.2d 1286, 1292 (7th Cir. 1992). Tax loss calculations in cases arising under Section 7206(2) may be based upon IRS interviews with taxpayers, even if there was no opportunity for the defendant to cross-examine the taxpayers. ***United States v. Goosby***, 523 F.3d 632, 639 (6th Cir. 2008).

43.03[1][e] Section 7212(a)

The omnibus clause of 26 U.S.C. § 7212(a) prohibits an individual from corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the internal revenue laws. The statutory index to the Guidelines, Appendix A, provides that either Section 2J1.2, the guideline applying to obstruction of justice, or Section 2T1.1 normally governs Section 7212(a) violations involving the omnibus clause. The index also states that Section 2A2.4, which applies to obstruction of officers, ordinarily governs Section 7212(a) violations not involving the omnibus clause.

Because the statutory index identifies both Sections 2J1.2 and 2T1.1 as appropriate guideline provisions for Section 7212(a) omnibus clause violations, a sentencing court must determine which guideline is the most appropriate provision for the particular omnibus clause violation at issue. The Guidelines provide that, in selecting the appropriate provision, the sentencing court should apply "the most analogous guideline." USSG §1B1.2(a); *see also* USSG §2X5.1. Accordingly, if the offense conduct at issue resembles a tax evasion scheme, Section 2T1.1 will normally apply. Similarly, Section 2J1.2 will govern offense conduct that primarily aims to disrupt IRS procedures. Section 2J1.2 establishes a base offense level of 14, subject to certain enhancements for specific offense characteristics. Section 2T1.1, however, establishes a base offense level of either 6, if there is no tax loss, or a higher base offense level, corresponding to the specific tax loss under the Tax Table. Under the current tax loss table, a tax loss of more than $30,000, but no more than $80,000, results in a base offense level of 14. USSG §2T4.1. Accordingly, Section 2J1.2 ordinarily will yield a higher base offense level than Section 2T1.1 if the tax loss is $30,000 or less, whereas Section 2T1.1 ordinarily will yield a higher base offense level than Section 2J1.2 if the tax loss exceeds $80,000.

43.03[1][f] 18 U.S.C. Sections 286 and 287

18 U.S.C. § 287 prohibits the knowing presentation of false, fictitious, or fraudulent claims to the government. Similarly, 18 U.S.C. § 286 prohibits conspiracies to defraud the government by obtaining or aiding to obtain the payment of any false, fictitious, or fraudulent claim. In the criminal tax context, these statutes generally apply to individuals who file income tax returns claiming false or fraudulent refunds of income tax. The general sentencing guideline pertaining to fraud, Section 2B1.1, governs sentencings for Section 286 and 287 violations, including false claims for tax refunds.

USSG Appendix A. Section 2B1.1 establishes a base offense level of 6 for crimes involving fraud or deceit, USSG §2B1.1(a), and provides for an increase in the base offense level corresponding to the amount of loss exceeding $5,000, as calculated by the sentencing court. USSG §§2B1.1(b)(1)(A)-(P). Loss under Section 2B1.1 need only be a "reasonable estimate" and includes the intended loss attributable to the offense or scheme. USSG §2B1.1, comment. (n.3).

Although the statutory appendix indicates that Section 2B1.1 governs violations of Sections 286 and 287, some courts have held that it may be appropriate to apply Section 2T1.1 to cases involving the filing of a false claim for a tax refund. ***United States v. Brisson***, 448 F.3d 989, 991-92 (7th Cir. 2006); *see also* ***United States v. Barnes***, 324 F.3d 135, 139-40 (3rd Cir. 2003); ***United States v. Aragbaye***, 234 F.3d 1101, 1105-06 (9th Cir. 2000).

Defendants who pursue false claim for refund schemes may be responsible at sentencing for the total sum of refunds claimed, even if the taxpayers in whose names the false returns were filed might have been able to claim legitimate refunds. In ***United States v. Fleming***, 128 F.3d 285 (6th Cir. 1997), the defendant was convicted of 25 counts of violating Section 287, based upon his preparation of tax returns containing false claims for refunds in the names of third-party taxpayers. ***Id.*** at 286. The district court sentenced the defendant according to the total dollar amount of refunds claimed in the 25 returns underlying his convictions, as well as refunds claimed in 32 additional false returns introduced at sentencing. ***Id.*** The defendant challenged this tax loss calculation, arguing that the district court had enhanced his sentence improperly because the government had not established the employment or income status of the 32 taxpayers associated with the returns introduced at sentencing. ***Id.*** He also argued that up to five of the taxpayers associated with the returns underlying his counts of conviction actually had earned legitimate income. ***Id.*** The ***Fleming*** court rejected the defendant's claims, finding that any portion of the total loss that the third-party taxpayers might have been entitled to claim legally was irrelevant to the loss computation, because the defendant had fabricated every W-2 form, dependent, and employer associated with the returns. ***Id.*** at 288-89. As the Sixth Circuit observed, "[i]t was simply fortuitous that some of those whom Mr. Fleming preyed upon were employed . . . . Their actual income and employment status did not influence his choice when he recruited them; he cannot use those facts now to narrow the scope of the fraud he designed." ***Id.***

Likewise, a defendant involved in a conspiracy to file numerous false claims for tax refunds will be held accountable at sentencing for the entire amount of loss which was reasonably foreseeable to the defendant. ***United States v. Okoronkwo***, 46 F.3d 426, 438 (5th Cir. 1995) (holding that evidence supported finding that defendant was responsible for 75 percent of all false claims filed through certain tax preparation office, including false claims filed by other coconspirators, because defendant joined conspiracy early and had a central role); ***United States v. Atkins***, 25 F.3d 1401, 1403-04 (8th Cir. 1994) (rejecting claim that defendant was responsible for only four of thirty false claims for refund filed; involvement of defendant in every level of the conspiracy, coupled with her close working relationship with coconspirator, indicated that loss arising from all thirty false returns was reasonably foreseeable); ***United States v. Mickle***, 464 F.3d 804, 808-09 (8th Cir. 2006) (holding codefendant responsible for full amount of loss resulting from conspiracy to file false claims). The government, however, carries the burden of supporting through sufficient evidence any contested sentencing increase based upon the amount of loss. *See*, *e.g.*, ***United States v. Rice***, 52 F.3d 843, 848 (10th Cir. 1995).

43.03[1][g] 18 U.S.C. Section 371

Section 2T1.9 of the Sentencing Guidelines governs conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." USSG §2T1.9, comment. (n.1) (quoting ***United States v. Carruth***, 699 F.2d 1017, 1021 (9th Cir. 1983)). This guideline applies to what is commonly called a "*Klein* conspiracy," as described in ***United States v. Klein***, 247 F.2d 908 (2d Cir. 1957). This guideline does not apply to taxpayers, such as husband and wife, who jointly evade taxes or file a fraudulent return. USSG §2T1.9, comment. (n.1). Section 2T1.9 directs the court to use the base offense level determined by Sections 2T1.1 or 2T1.4, according to which guideline most closely addresses the underlying conduct, if that offense level is greater than 10. USSG §2T1.9, comment. (n.2). If Section 2T1.1 or 2T1.4 does not provide an offense level greater than 10, the base offense level under Section 2T1.9 is 10. ***Id.*** ***But cf.*** ***United States v. Goldberg***, 105 F.3d 770, 777 (1st Cir. 1997) (commenting in *dicta* that government "sensibly" chose not to appeal downward departure based upon view of district court that base offense level of 8 under Section 2T1.4 was "more reflective" of defendant's conduct than base offense level of 10 under Section 2T1.9 because tax loss was only $3,000 to $5,000).

When calculating the tax loss attributable to a defendant convicted of a ***Klein*** conspiracy, the court should hold the defendant "responsible for 'all reasonably foreseeable acts and omissions . . . in furtherance of the jointly undertaken criminal activity.'" ***United States v. Ladum***, 141 F.3d 1328, 1346 (9th Cir. 1998) (quoting USSG §1B1.3(a)(1)(B)). "This requires a determination of 'the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement).'" *Id.* (quoting USSG §1B1.3, comment. (n.2)). Accordingly, a court should sentence a defendant according to the tax loss which he directly caused, as well as the tax loss which his coconspirator caused, if that tax loss was reasonably foreseeable to the defendant. ***United States v. Clark***, 139 F.3d 485, 490 (5th Cir. 1998) (citing ***United States v. Charroux***, 3 F.3d 827, 838 (5th Cir. 1993)); *see also* ***United States v. Fleschner***, 98 F.3d 155, 160 (4th Cir. 1996) (tax loss finding was not confined to assessing only conduct which occurred when coconspirators were physically together or acting in unison). Further, "[i]n assessing the amount of tax loss, the district court is to make a 'reasonable estimate' of the amount of the loss that the defendant intended to inflict, not the actual amount of the government's loss." ***United States v. Kraig***, 99 F.3d 1361, 1370-71 (6th Cir. 1996). Whether the conspirators actually completed the offense is irrelevant to calculating the offense level. ***United States v. Dale***, 991 F.2d 819, 855 (D.C. Cir. 1993). At sentencing, a district court applies the preponderance of the evidence standard when determining the duration of a conspiracy. ***United States v. Furkin***, 119 F.3d 1276, 1281 (7th Cir. 1997).

If a defendant is convicted of a count charging a conspiracy to commit more than one offense, a sentencing court should treat that conviction "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." ***Dale***, 991 F.2d at 854 (quoting §1B1.2(d)). After calculating the offense level for each such "separate" conspiracy, the court then must group the various offenses, "such that instead of sentencing the defendant[] for each object offense, the court would sentence the defendant[] on the basis of only one of the offenses." ***Id.*** (citing §3D1.2). The court then must sentence according to the offense level for the most serious counts constituting the group. ***Id***. (citing §3D1.3).

Consistent with general sentencing guideline law, loss computations for *Klein* conspiracies may rest upon conduct which was uncharged, or for which the defendant was acquitted. For example, in ***United States v. Seligsohn***, 981 F.2d 1418, 1420 (3d Cir. 1992), *superseded on other grounds*, USSG App. C, amend. 474, the defendants paid

cash as part of wages earned by employees, underreported their total payroll, filed false reports with the IRS regarding withholding taxes, and deprived a union welfare plan of contributions to which it was entitled. Although the indictments charged only a conspiracy with respect to the personal returns, the defendants' sentences were based upon a tax loss attributable to the defendants' companies, rather than only the amount of individual tax loss. ***Id.*** at 1427. The court found that the tax fraud conspiracy was "clearly intended to encompass the tax losses attributable to the employees of the defendants' companies as well as the losses from the defendants' own personal tax evasion." ***Id.*** The Fifth Circuit has held that a defendant who has been acquitted of conspiracy may be held liable as a coconspirator for sentencing purposes. ***United States v. Hull***, 160 F.3d 265, 269-70 (5th Cir. 1998).

Finally, a sentencing court should make specific findings regarding the amount of reasonably foreseeable tax loss. In ***Ladum***, the sentencing court found that one defendant participated for ten years in a thirteen-year tax fraud scheme which involved the under-reporting of gross business receipts from several stores. ***Ladum***, 141 F.3d at 1346-47. The sentencing court further found that this defendant was responsible for the entire tax loss attributable to the conspiracy, which exceeded $550,000. ***Id.*** The district court, however, failed to make a specific factual finding regarding whether the tax loss that occurred when the defendant was not participating in the conspiracy was reasonably foreseeable to him. ***Id.*** at 1347. Stating that it was not "self-evident" that the defendant would have foreseen the tax loss arising from stores that did not exist when he ceased participating in the conspiracy, or from the stores that had existed when he left the conspiracy, the Ninth Circuit remanded so that the district court could make specific factual findings regarding the reasonably foreseeable tax loss. ***Id.***

43.03[2] Specific Offense Characteristics

In addition to determining the base offense level, the sentencing court must adjust the offense level according to the specific offense characteristics of each subsection.

43.03[2][a] Illegal Source Income

The guideline governing violations of 26 U.S.C. §§ 7201, 7203, 7206 (with the exception of Section 7206(2)), and 7207 requires an increase in the base offense level if the defendant failed either to report or correctly identify the source of income of over

$10,000 in any year resulting from criminal activity. USSG §2T1.1(b)(1). The phrase "criminal activity" means "any conduct constituting a criminal offense under federal, state, local, or foreign law." USSG §2T1.1, comment. (n.3).

Courts have upheld illegal source income enhancements in a variety of circumstances. *See, e.g.*, ***United States v. Ellis***, 440 F.3d 434, 437-38 (7th Cir. 2006) (enhancement proper when defendant, a church bishop, took money from the church's Sunday collections for his personal use); ***United States v. Fitzgerald***, 232 F.3d 315, 321 (2d Cir. 2000) (enhancement proper where defendant intentionally converted more than $107,000 from union welfare fund and defrauded medical specialists of such funds); ***United States v. Parrott***, 148 F.3d 629, 633-34 (6th Cir. 1998) (enhancement proper when defendant misappropriated $282,000 of clients' funds, thereby committing theft under state law); ***United States v. Ladum***, 141 F.3d 1328, 1343 (9th Cir. 1998) (enhancement proper when defendants obtained facially valid firearms license by making false statements on license application and license enabled defendants to sell more than $10,000 in guns); ***United States v. Karterman***, 60 F.3d 576, 582-83 (9th Cir. 1995) (enhancement proper when defendant distributed several pounds of cocaine per month, earned limited income from legitimate business, and lived expensive lifestyle); *cf.* ***United States v. Griggs***, 47 F.3d 827, 829 (6th Cir. 1995) (noting uncontested finding by sentencing court that enhancement applied because defendant had failed to identify source of approximately $475,000 in embezzled funds).

The illegal source income enhancement requires the defendant to have received more than $10,000 from criminal activity "in any year." In ***United States v. Barakat***, 130 F.3d 1448, 1453-54 (11th Cir. 1997), the sentencing court had imposed a §2T1.1(b)(1) enhancement upon the defendant who had received and deposited in December 1988 a $5,000 check derived from criminal activity and had received and deposited in January 1989 another check for $10,000, similarly derived from criminal activity. Observing that the propriety of the enhancement depended upon the definition of a "year" under Section 2T1.1(b)(1), the ***Barakat*** court employed the definition of "calendar year" contained in 26 U.S.C. § 441. In the case of this defendant, a personal income tax filer who did not keep accounting records, the court interpreted "calendar year" to mean "taxable year." ***Id.*** at 1453. Because the defendant was convicted of filing a false tax return for the calendar year 1989 and because he had not received more than $10,000 from criminal activity in 1989, the ***Barakat*** court reversed the Section 2T1.1(b)(1) enhancement. ***Id.*** at 1454; s*ee also* ***United States v. Schmidt***, 935 F.2d 1440, 1451-52 (4th Cir. 1991) (reversing

enhancement when defendant received no more than $8,000 in income from criminal activity in 1987 and received no more than $2,000 in such income in 1988), *abrogated on other grounds by* ***United States v. Delfino***, 510 F.3d 468, 473 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3569 (U.S. Apr 07, 2008) (No. 07-1273).

The $10,000 threshold of the illegal source income enhancement does not refer to profit; rather, the terms of Section 2T1.1(b)(1) refer broadly to "income." In ***Ladum***, the defendant claimed that the enhancement was inapplicable because there was no evidence that he had realized more than $10,000 from his illegal firearms trade once the district court had accounted for overhead and the costs of goods. ***Ladum***, 141 F.3d at 1343. The Ninth Circuit rejected this argument by noting that the cost of goods sold had already been accounted for in determining the illegal source income figure and that "nothing in the Guidelines requires the government to determine and deduct the portion of overhead expenses fairly allocable to gun sales." ***Id.***[8]

As with any enhancement, the government must provide the court with a factual basis on which to find by a preponderance of the evidence that a contested enhancement for illegal source income applies. ***United States v. Hagedorn***, 38 F.3d 520, 522-23 (10th Cir. 1994) (remanding for factual inquiry regarding applicability of illegal source income enhancement when charging document to which the defendant pled guilty did not establish intent for racketeering offense and sentencing court relied solely upon contents of charging document). In at least one case, however, the error of the district court in relying solely upon the presentence report as the factual basis for a contested illegal source income enhancement was harmless: by pleading guilty to one count of filing a false tax return, the defendant thereby admitted that money he secretly took from his clients and did not report on his tax return was income to himself. ***Parrott***, 148 F.3d at 633-34. Accordingly, the defendant implicitly and necessarily admitted that he had committed theft of property under state law and that the money did not constitute a loan. ***Id.***

In ***United States v. Karterman***, 60 F.3d at 580-81, the Ninth Circuit held that, although a conviction for the income-producing criminal offense is not necessary for an illegal source income enhancement, such an enhancement may not rest upon conduct of which the defendant was acquitted or upon facts that the jury necessarily rejected.

[8] The opinion contains an apparent error, stating that the income figure "was derived by subtracting sales price from cost of goods sold," 141 F.3d at 1343, thereby reversing the calculation.

However, the Supreme Court subsequently ruled that a sentencing court may take into account relevant conduct of which a defendant was acquitted, so long as the government has proven the acquitted conduct by a preponderance of the evidence. *See* ***United States v. Watts***, 519 US. 148, 157 (1997) (*per curiam*). Therefore, the holding in ***Karterman*** no longer appears to be good law. *See also* ***Barakat***, 130 F.3d at 1442 (under ***Watts***, Section 2T1.1(b)(1) enhancement may rest upon income-producing criminal conduct of which the defendant was acquitted); ***United States v. Sherpa***, 97 F.3d 1239, 1245 (9th Cir.), *amended*, 110 F.3d 656 (9th Cir. 1996) (noting that Supreme Court overruled certain other Ninth Circuit decisions by holding in ***Koon v. United States***, 518 U.S. 81, 106-08 (1996), that sentencing court could consider facts that jury necessarily rejected).

43.03[2][b] Sophisticated Means

The tax guidelines for violations of 26 U.S.C. §§ 7201, 7203, 7206, 7207, and 7212(a) provide for a two-level enhancement of the base offense level if "the offense involved sophisticated means." USSG §§2T1.1(b)(2); 2T1.4(b)(2).

> "[S]ophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3). The Guidelines further provide that, "[a]lthough tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes." USSG §2T1.1, comment. (backg'd).[9]

Conduct need not involve banking or financial methods in order to constitute sophisticated means. ***United States v. Friend***, 104 F.3d 127, 130 (7th Cir. 1997). Even if certain acts would not constitute sophisticated means when considered in isolation, such acts may constitute sophisticated means when viewed in the aggregate. ***United States v.***

[9] Prior to 1998, the Guidelines referred to "sophisticated concealment" in tax cases, rather than "sophisticated means." The Commission made clear, however, that the change was a clarification, rather than a substantive change, designed to align the language in the tax guidelines with the language in the fraud guideline (USSG §2B1.1). We do not believe that there is all that much difference between "sophisticated concealment" and "sophisticated means." Consequently, cases interpreting either concept should inform interpretation of the other.

Tandon, 111 F.3d 482, 491 (6th Cir. 1997***).*** *Accord* ***United States v. Ghaddar***, 678 F.3d 600 (7th Cir. 2012). Further, the sophisticated conduct at issue may occur during the actual commission of the tax offense because "the guideline contemplates enhancement based on the degree of sophistication, not necessarily whether it came after the conclusion of the operative portion of the tax scheme." ***United States v. Hunt***, 25 F.3d 1092, 1097 (D.C. Cir. 1994).

Courts have upheld the application of this enhancement for a variety of reasons. Specifically, courts have found that indicia of sophisticated means include the following:

1. Use of shell corporations. USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); ***United States v. Roush***, 466 F.3d 380, 387 (5th Cir. 2006); ***United States v. Cianci***, 154 F.3d 106, 110 (3d Cir. 1998); ***United States v. Whitson***, 125 F.3d 1071, 1075 (7th Cir. 1997); ***United States v. Kraig***, 99 F.3d 1361, 1371 (6th Cir. 1996); ***United States v. Paradies***, 98 F.3d 1266, 1292 (11th Cir. 1996).

2. Use of cash transactions. ***United States v. Gricco***, 277 F.3d 339, 360 (3d Cir. 2002); ***United States v. Middleton***, 246 F.3d 825, 848 (6th Cir. 2001); ***Cianci***, 154 F.3d at 110; ***United States v. Furkin***, 119 F.3d 1276, 1285 (7th Cir. 1997).

3. Failure to record income or inventory. ***Cianci***, 154 F.3d at 110; ***Furkin***, 119 F.3d at 1285. *But see* ***United States v. Hart***, 324 F.3d 575, 579-80 (2d Cir. 2003) (indicating that the failure to keep records does not constitute sophisticated means).

4. Destruction of records. ***Furkin***, 119 F.3d at 1285; ***United States v. Hammes***, 3 F.3d 1081, 1083 (7th Cir. 1993).

5. Deposit of funds in a trust account. ***United States v. Sabino***, 274 F.3d 1053, 1075-76 (6th Cir. 2001), *amended in part on other grounds on rehearing*, 307 F.3d 446 (6th Cir. 2002); ***United States v. Minneman***, 143 F.3d 274, 283 (7th Cir. 1998); *but cf.* ***United States v. Barakat***, 130 F.3d 1448, 1457-58 (11th Cir. 1997) (remanding for reconsideration of whether use of trust account justified enhancement, and directing district court to consider only evidence that related to tax offense conviction).

6. Deposit of funds in a bank account not directly attributable to the defendant. ***United States v. Campbell***, 491 F.3d 1306, 1315-16 (11th Cir. 2007); ***Tandon***, 111 F.3d at 490; ***United States v. Lewis***, 93 F.3d 1075, 1081-83 (2d Cir. 1996); ***United States v.***

Clements, 73 F.3d 1330, 1340 (5th Cir. 1996); ***United States v. Wu***, 81 F.3d 72, 74 (7th Cir. 1996); ***Hammes***, 3 F.3d at 1083; ***United States v. Becker***, 965 F.2d 383, 390 (7th Cir. 1992).

7. Use of offshore bank accounts. USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); ***Whitson***, 125 F.3d at 1075; ***Kraig***, 99 F.3d at 1371; ***Hammes***, 3 F.3d at 1083.

8. Use of false documents. ***Cianci***, 154 F.3d at 110; ***United States v. Madoch***, 108 F.3d 761, 766 (7th Cir. 1997); ***Lewis***, 93 F.3d at 1081; ***Wu***, 81 F.3d at 74; ***United States v. Jagim***, 978 F.2d 1032, 1042 (8th Cir. 1992).

9. Use of fictitious names, ***Tandon***, 111 F.3d at 491; ***Madoch***, 108 F.3d at 766; ***Wu***, 81 F.3d at 74; ***Hammes***, 3 F.3d at 1083, or fictitious entities, ***United States v. Allan***, 513 F.3d 712, 716 (10th Cir. 2008); ***Lewis***, 93 F.3d at 1082; ***United States v. Veksler***, 62 F.3d 544, 550-51 (3d Cir. 1995).

10. Use of multiple corporate names. ***Minneman***, 143 F.3d at 283.

11. Manipulation of ownership of income-producing assets. ***Tandon***, 111 F.3d at 491.

12. Arranging for the IRS to mail multiple refund checks to several different addresses. ***Madoch***, 108 F.3d at 766.

13. Befriending and bribing an IRS employee in order to provide insurance against detection of tax scheme. ***Friend***, 104 F.3d at 130.

14. Depositing receipts in non-interest bearing business bank accounts. ***Middleton***, 246 F.3d at 848.

15. Using unauthorized social security numbers, filing false tax returns, and having tax refund checks mailed to mail drop. ***United States v. Aragbaye***, 234 F.3d 1101, 1107-08 (9th Cir. 2000).

The above list is not an exhaustive description of acts which may justify an enhancement for sophisticated means. Courts also have upheld the application of this enhancement on the basis of other circumstances. *See, e.g.*, ***United States v. Ambort***, 405 F.3d 1109, 1120 (10th Cir. 2005) (defendant helped operate a tax defier program that instructed participants to file "non-resident alien" returns and to omit Social Security

numbers from their returns); ***United States v. Guidry***, 199 F.3d 1150, 1158-59 (10th Cir. 1999) (defendant's embezzled money came from checks made payable to bank, which checks defendant then converted to cash to purchase personal items, and defendant never took more than $10,000 in one day to avoid filing of Currency Transaction Reports); ***United States v. Powell***, 124 F.3d 655, 666 (5th Cir. 1997) (defendant purchased ethanol plant to facilitate scheme to avoid fuel excise taxes); ***United States v. Pierce***, 17 F.3d 146, 151 (6th Cir. 1994) (defendant provided inapplicable IRS publication to employer to exempt himself from withholding taxes, used several different mailing addresses in different IRS regions, changed excessive number of withholding deductions in accordance with changes in IRS regulations, and directed wife to file misleading returns); ***United States v. Ford***, 989 F.2d 347, 351 (9th Cir. 1993) (defendant used foreign corporation to generate corporate foreign tax payments in order to claim foreign tax credits on domestic personal income tax returns).

Merely making misrepresentations on a tax return likely does not justify an enhancement for sophisticated means. ***Powell***, 124 F.3d at 666; ***United States v. Rice***, 52 F.3d 843, 849 (10th Cir. 1995) (enhancement inapplicable because defendant only claimed that he had paid taxes which he had not); *see also* ***United States v. Stokes***, 998 F.2d 279, 282 (5th Cir. 1993) (stating that "[t]here is nothing sophisticated about simply not disclosing income to your accountant").

Although this enhancement should not apply if the defendant uses sophisticated means solely to commit a crime in order to obtain the income at issue in the tax offense conviction, this enhancement can rest upon sophisticated conduct which served both as means to obtain income and to further the tax crime relating to that income. "[T]he mere fact that the scheme might have been more sophisticated or may have had some uncomplicated elements does not preclude the enhancement." ***United States v. Utecht***, 238 F.3d 882, 889 (7th Cir. 2001). While it is apparent that some degree of concealment is inherent in every tax fraud case, "'sophistication' must refer not to the elegance, the 'class,' the 'style' of the defrauder – the degree to which he approximates Cary Grant – but to the presence of efforts at concealment that go beyond . . . the concealment inherent in tax fraud." ***United States v. Kontny***, 238 F.3d 815, 820-21 (7th Cir. 2001). For example, in ***United States v. Mankarious***, 151 F.3d 694, 710-11 (7th Cir. 1998), the Seventh Circuit held that the enhancement applied because the scheme at issue had the dual effect of creating illicit gain and hiding that gain from the IRS. Likewise, in ***Cianci***, the Third Circuit held that the enhancement applied because, although the sophisticated

methods of the defendant impeded the discovery of his embezzlement offense, those methods also facilitated the concealment of the income which he derived from the embezzlement. ***Cianci***, 154 F.3d at 109.

In ***Stokes***, however, the defendant deposited money embezzled from her employer into two separate bank accounts. She then wrote checks to herself and transferred the money into money orders. ***Stokes***, 998 F.2d at 280. The Fifth Circuit reversed the district court's application of the sophisticated means enhancement, finding that the defendant had used sophisticated methods to commit the crime of embezzlement, but not the crime of tax evasion. ***Id.*** at 282. The Fifth Circuit stated that the defendant had hidden the money which she had embezzled because she did not want her employer to discover her embezzlement, not because she wanted to avoid paying her taxes. ***Id.***

Despite the implication by the Fifth Circuit in ***Stokes*** that this enhancement is inapplicable unless the sophisticated conduct pertains solely to the tax offense of conviction, or unless the defendant employs sophisticated methods for the specific and sole purpose of concealing his or her tax status, the Seventh Circuit has held that this enhancement may apply even if the defendant did not intend specifically to hinder the ability of the IRS to discover the tax offense at issue. In ***Mankarious***, the Seventh Circuit upheld an application of this enhancement because, "[w]hether or not the defendants consciously intended it, the [underlying fraud] scheme would have thwarted IRS from successfully auditing the defendants and determining their real income." 151 F.3d at 711. Accordingly, "the scheme constituted a sophisticated means of tax fraud, even if that was not its primary purpose." ***Id.***; *see also* ***Barakat***, 130 F.3d at 1457 (distinguishing ***Stokes*** by characterizing opinion as holding only that mere concealment of income from accountant cannot constitute sophisticated means).

Finally, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for being in the business of preparing or assisting in the preparation of tax returns, under Section 2T1.4(b)(1)(B). ***Hunt***, 25 F.3d at 1098. Similarly, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for obstruction of justice, under Section 3C1.1, *see* ***Friend***, 104 F.3d at 130-31; ***Furkin***, 119 F.3d at 1284-85, so long as separate conduct forms the factual basis for each enhancement. ***Friend***, 104 F.3d at 131.

In ***United States v. Newell***, 239 F.3d 917, 922 (7th Cir. 2001), the doctrine of judicial estoppel did not bar application of the sophisticated means enhancement when the prosecutor argued in closing that the defendant's scheme was "not particularly sophisticated," because the argument did not provide a ground for conviction and was not inconsistent with the position taken by the prosecutor at sentencing.

43.03[2][c] Substantial Portion of Income Derived From Criminal Scheme

Section 2T1.4(b)(1)(A), the guideline governing aiding, assisting, procuring, counseling, or advising of tax fraud in violation of 26 U.S.C. §7206(2), provides for a two-level enhancement of the offense level if "the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income." This enhancement applies, for example, to defendants who derive a substantial portion of their income through the promotion of fraudulent tax shelters. USSG §2T1.4, comment. (n.2).

The Fifth Circuit has upheld a sentencing court's use of the quasi-formula from the Guidelines' criminal livelihood provision, Section 4B1.3, in determining whether to impose an enhancement under Section 2T1.4(b)(1)(A). *See* ***United States v. Welch***, 19 F.3d 192, 194-95 (5th Cir. 1994). Under Section 4B1.3, "engaged in as a livelihood" means that

> (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period *(e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).§4B1.3, comment. (n.2). In ***Welch***, the defendant argued that use of §4B1.3 was improper because §2T1.4 does not explicitly authorize the sentencing court to refer to §4B1.3 when determining whether to enhance under §2T1.4(b)(1)(A). 19 F.3d at 194. Rejecting this claim, the Fifth Circuit noted that the guidelines do not specify what constitutes a "substantial portion" of one's income and that the court previously had upheld application of §4B1.3 to other specific offenses, even though the guidelines governing those specific offenses did not refer to §4B1.3. ***Id***. at 194-95. The court further observed that the wordings of §2T1.4(b)(1)(A) and §4B1.3 are nearly identical. ***Id***. at 195 n.6. Applying the §4B1.3 formula to the facts of the case, the ***Welch*** court upheld the §2T1.4(b)(1)(A) enhancement

> imposed by the sentencing court because the fraudulent return scheme created a tax loss of at least $29,000 and because the defendant was unable to show any evidence of any legitimate employment or source of income. ***Id***. at 195; *see also* ***United States v. Searan***, 259 F.3d 434, 448-49 (6th Cir. 2001) ($16,970 in gross income from tax service qualifies for enhancement where record reflects no non-tax fraud sources of income).

43.03[2][d] Business of Preparing or Assisting in the Preparation of Tax Returns

The sentencing guideline governing aiding, assisting, procuring, counseling, or advising tax fraud also provides for a two-level enhancement of the offense level if "the defendant was in the business of preparing or assisting in the preparation of tax returns." USSG §2T1.4(b)(1)(B). This enhancement applies to defendants "who regularly prepare or assist in the preparation of tax returns for profit." USSG §2T1.4, comment. (n.2).

This enhancement "does not, by language or logic, purport to focus only on persons for whom tax-return preparation is a primary business." ***United States v. Phipps***, 29 F.3d 54, 56 (2d Cir. 1994). Likewise, this enhancement is not limited to defendants who "hang out a shingle" as professional tax return preparers. ***United States v. Welch***, 19 F.3d 192, 196 (5th Cir. 1994) (upholding imposition of enhancement when defendant, who argued that his primary occupation was as a sports agent, showed no other gainful employment, filed five fraudulent tax returns for four clients over the span of three years, and once misrepresented himself as a CPA). Nor is the enhancement limited to only those tax preparers with a legitimate tax preparation business who commit tax fraud. ***United States v. Aragbaye***, 234 F.3d 1101, 1106-07 (9th Cir. 2000) (upholding application of 2T1.4(b)(1)(B) enhancement to defendant whose tax preparation business consisted solely of preparing fictitious tax returns). Rather, the focus of this enhancement is on whether the defendant "regularly" prepared or assisted in the preparation of tax returns for profit. ***Phipps***, 29 F.3d at 56. Accordingly, the sentencing court may impose this enhancement if the defendant's tax-return preparation activity was not occasional or sporadic, and if the defendant received payment for his services. ***Id***. Because this provision "was intended, in part, to reach paid preparers whose activities are sufficiently extensive to expose the government to the risk of loss of significant revenues," the term "regularly" does not mean necessarily "'year-round,' especially when dealing with a business so clearly seasonal as the filing of personal income tax returns." ***Phipps***, 29 F.3d at 56 (upholding imposition of enhancement when defendant prepared at least 155

fraudulent tax returns over period of five or six consecutive years for fee of $90 to $200 per return).

Finally, this enhancement may apply even though the sentencing court also applies an enhancement under Section 2T1.4(b)(2) for use of sophisticated means. ***United States v. Hunt***, 25 F.3d 1092, 1098 (D.C. Cir. 1994); *see also* ***United States v. Ambort***, 405 F.3d 1109, 1119-20 (10th Cir. 2005) (affirming sentence that included enhancements for both tax preparation and sophisticated means); ***Aragbaye***, 234 F.3d at 1106-08 (same). This enhancement cannot apply, however, if the sentencing court applies an enhancement under Section 3B1.3 for abuse of position of trust or use of special skill. USSG §2T1.4, comment. (n.2); ***United States v. Young***, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991).

43.03[2][e] Planned or Threatened Use of Violence

The guideline governing conspiracies to impede, impair, obstruct or defeat a tax, in violation of 18 U.S.C. § 371, provides for a four-level enhancement of the offense level "[i]f the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." USSG §2T1.9(b)(1). Section 2T1.9 includes this enhancement because of the potential danger that tax fraud conspiracies may pose to law enforcement agents and the public. USSG §2T1.9, comment. (backg'd). Although there appears to be extremely limited case law regarding this provision, the Eleventh Circuit has upheld an enhancement under Section 2T1.9(b)(1) in a case in which the defendant and his brother threatened a witness with a gun during the course of a conspiracy to evade income taxes. *See* ***United States v. Pritchett***, 908 F.2d 816, 824 (11th Cir. 1990).

43.03[2][f] Encouragement of Others to Violate Tax Code

Section 2T1.9(b)(2) also provides for a two-level enhancement of the offense level for conspiring to impede, impair, obstruct or defeat a tax under 18 U.S.C. § 371 "[i]f the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." The application notes to Section 2T1.9 explain that this provision "provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (*e.g.*, an offense involving a 'tax protest' group that

encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes)." USSG §2T1.9, comment. (n.4). The sentencing court should not apply this enhancement, however, if an adjustment is applied under Section 2T1.4(b)(1), which provides an enhancement for a defendant who derived a substantial portion of his income from a tax fraud scheme or who was in the business of preparing or assisting in the preparation of tax returns. USSG §2T1.9(b)(2).

This provision apparently applies even if the persons encouraged by the defendant to violate the tax code are government agents. In ***United States v. Sileven***, 995 F.2d 962 (8th Cir. 1993), the Eighth Circuit held that the district court did not clearly err by enhancing the defendant's sentence under Section 2T1.9(b)(2), because the evidence indicated that the defendant through his actions and words repeatedly encouraged two other individuals to hide income. ***Id.*** at 970. Although the status of the other individuals whom the defendant had encouraged was not an issue on appeal, the facts of the case indicate that these individuals (one private party and one IRS agent) were acting at the direction of the IRS. ***Id.*** at 964. Further, this provision applies when the defendant simply encourages others to disguise the defendant's own tax status. ***United States v. Rabin***, 986 F. Supp. 887, 890-91 (D.N.J. 1997) (defendant encouraged girlfriend and attorney to hide defendant's income).

43.04 RELEVANT CONDUCT

Section 1B1.3 of the Guidelines permits a sentencing court to consider all of a defendant's relevant conduct in determining the base offense level, specific offense characteristics, and Chapter Three adjustments. That provision specifically authorizes a court to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." USSG §1B1.3(a)(1)(A). The court may additionally consider "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG §1B1.3(a)(1)(B). These acts may have "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG §1B1.3(a)(1). Moreover, solely with respect to offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts (tax offenses among others), all acts and omissions of the sort described in Section 1B1.3(a)(1) that were part of the same course of conduct or common scheme or plan as

the offense of conviction should be grouped. USSG §1B1.3(a)(2). *See also* USSG §§1B1.3(a)(3) and (4).

As discussed above, the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), did not alter a district court's obligation to consider relevant conduct at sentencing. As long as the court treats the resulting Guidelines range as advisory, rather than mandatory, consideration of a defendant's relevant conduct does not violate the Sixth Amendment. ***United States v. Rita***, 551 U.S. 338, 349-350 (2007) (holding that the judicial fact-finding necessary to calculate the advisory Guidelines range does not violate the Sixth Amendment). Moreover, consideration of relevant conduct accords with the requirement under 18 U.S.C. § 3553(a) that the sentencing court consider the history and characteristics of the defendant and the seriousness of the offense. 18 U.S.C. § 3553(a)(1).

Generally, the government bears the burden of persuasion on the issue of relevant conduct, by a preponderance of the evidence. USSG §6A1.3, comment.; ***United States v. Watts***, 519 U.S. 148, 156 (1997) (*per curiam*); ***United States v. De La Rosa***, 922 F.2d 675, 679 (11th Cir. 1991). Note, however, that the Supreme Court has specifically left open the question whether, under exceptional circumstances in which the sentencing enhancement was "a tail which wags the dog of the substantive offense," due process might require the relevant conduct to be proven by clear and convincing evidence. ***Watts***, 519 U.S. at 156-57 n.2 (internal quotation omitted). The Guidelines' relevant conduct provisions are consistent with the long-standing principle that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." ***Williams v. New York***, 337 U.S. 241, 246 (1949); *accord* ***Witte v. United States***, 515 U.S. 389, 402 (1995) ("'[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.'") (quoting ***United States v. Wright***, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)).

This principle was codified at 18 U.S.C. § 3661, which provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense

> which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661; *see also* ***Watts***, 519 U.S. at 152. Thus, "[a]s a general proposition a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." ***Watts***, 519 U.S. at 152. The commentary to Section 1B1.3 specifically provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." §3B1.3, comment. (backg'd.). And every court of appeals to address the question has held that the Supreme Court's decision in ***Booker*** did not alter or overrule the Court's reasoning in *Watts*. ***United States v. Vaughn***, 430 F.3d 518, 526-27 (2d Cir. 2005); ***United States v. Farias***, 469 F.3d 393, 399-400 (5th Cir. 2006); ***United States v. Mendez,*** 498 F.3d 423, 426-27 (6th Cir. 2007); ***United States v. Hurn,*** 96 F.3d 784, 788 (7th Cir. 2007); ***United States v. High Elk***, 442 F.3d 622, 626 (8th Cir. 2006); ***United States v. Mercado***, 474 F.3d 654, 656-57 (9th Cir. 2007); ***United States v. Magallanez***, 408 F.3d 672, 684-85 (10th Cir. 2005); ***United States v. Duncan,*** 400 F.3d 1297, 1304-05 (11th Cir. 2005); ***United States v. Bras***, 483 F.3d 103, 107 (D.C. Cir. 2007).

A sentencing court may consider acquitted conduct without running afoul of the Double Jeopardy Clause, which "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." ***Witte***, 515 U.S. at 389 (quoting ***Helvering v. Mitchell***, 303 U.S. 391, 399 (1938)) (emphasis omitted). The Supreme Court determined that sentencing enhancements "do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." ***Watts***, 519 U.S. at 154; ***Witte***, 515 U.S. at 402-03. The Court based its decision on the premise that "'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.'" ***Watts***, 519 U.S. at 156 (quoting ***Dowling v. United States***, 493 U.S. 342, 349 (1990)); *see also* ***United States v. Averi***, 922 F.2d 765, 766 (11th Cir. 1991).

A sentencing court may also rely on conduct that occurred outside the statute of limitations. ***United States v. Williams***, 217 F.3d 751, 754 (9th Cir. 2000); ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. Behr***, 93 F.3d 764 (11th Cir. 1996); ***United States v. Silkowski***, 32 F.3d 682, 687 (2d Cir. 1994); ***United States v. Neighbors***, 23 F.3d 306, 310-11 (10th Cir. 1994); ***United States v. Pierce***, 17 F.3d 146,

150 (6th Cir. 1994); ***United States v. Wishnefsky***, 7 F.3d 254, 256-57 (D.C. Cir. 1993); ***United States v. Lokey***, 945 F.2d 825, 840 (5th Cir. 1991).

Additionally, a sentencing court may rely on uncharged conduct or charges that have been dismissed. ***United States v. Bove***, 155 F.3d 44, 47-48 (2d Cir. 1998) (relevant conduct "clearly encompasses both charged and non-charged conduct"); ***United States v. Georges***, 146 F.3d 561, 562 (8th Cir. 1998) (court included as relevant conduct deposit of loan repayment to a personal account and deduction of loan as these acts were inextricably tied to long pattern of conduct to conceal income); ***Valenti***, 121 F.3d at 334; ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997); ***United States v. Fine***, 975 F.2d 596, 602-03 (9th Cir. 1992) (*en banc*); ***United States v. Johnson,*** 971 F.2d 562, 576 n.10 (10th Cir. 1992) (funds associated with uncharged instances of money laundering can be included to determine the offense level under Section 2S1.1 if those acts are within the scope of relevant conduct under Section 1B1.3(a)(2)).

The Guidelines also permit a defendant to be sentenced for acts committed by others during the course of jointly undertaken criminal activities, when those acts were in furtherance of the activity and reasonably foreseeable. USSG §1B1.3(a)(1)(B); ***United States v. Guerra***, 113 F.3d 809, 819 (8th Cir. 1997); ***United States v. House***, 110 F.3d 1281, 1284-85 (7th Cir. 1997) (all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity would be attributable to defendant found to have reasonably foreseen the scope of the conspiracy); ***United States v. Lorenzo***, 995 F.2d 1448, 1460 (9th Cir. 1993); ***Johnson,*** 971 F.2d at 574-75. In ***United States v. Logan,*** 250 F.3d 350 (6th Cir. 2001), the Sixth Circuit found that fraudulent claims submitted by coconspirators are correctly included as relevant conduct in determination of the total loss, even if those claims were not charged in the indictment. ***Id***. at 371-72.

The Guidelines themselves note that "[b]ecause a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." USSG §1B1.3, comment. (n.2). The relevant inquiry focuses upon the scope of criminal activity agreed upon by the defendant. ***United States v. Ladum***, 141 F.3d 1328, 1346 (9th Cir. 1998) (inquiry requires determination of the scope of the specific conduct and objects embraced by the defendant's agreement). The

Ladum court noted that the principles and limits of criminal liability are not always the same as the principles and limits of sentencing accountability. Therefore, the focus is on specific acts and omissions for which a defendant is accountable in determining the applicable guideline range, which requires "a determination of the scope of the criminal activity the particular defendant agreed to jointly undertake." ***Id.*** (citation and punctuation omitted). The Second Circuit held that under §1B1.3(a)(1), a defendant "may be held accountable for (i) any tax evasion in which he had a direct, personal involvement and (ii) as to jointly undertaken criminal activity, any reasonably foreseeable tax losses." ***United States v. Martinez-Rios***, 143 F.3d 662, 674 (2d Cir. 1998) (punctuation and citation omitted). The "reasonable foreseeability" requirement "applies only to the conduct of others." ***Id.***

43.05 ROLE IN THE OFFENSE

The Guidelines authorize the sentencing court to adjust a defendant's offense level based upon the court's assessment of each offender's actions and relative culpability in the offense. The court may enhance the offense level by up to four levels upon a finding that the defendant played a leadership role. USSG §3B1.1. Upon a finding that a defendant was a "minimal" or "minor" participant in the offense, the court may reduce the defendant's offense level by up to four levels. USSG §3B1.2. If the court finds that the defendant abused a position of public or private trust, or used a special skill, in order to significantly facilitate the commission or concealment of the offense, the court may enhance the defendant's offense level by two levels. USSG §3B1.3.

The introductory commentary to Chapter 3, Part B declares that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." A sentencing court therefore may consider uncharged relevant conduct, or even relevant conduct underlying an acquitted charge, when determining whether to an adjust a defendant's offense level on the basis of his or her role in the offense. *See* ***United States v. Watts***, 519 U.S. 148, 151-57 (1997) (*per curiam*) (holding that Section 1B1.3 permits sentencing court to determine applicable guideline range by relying upon uncharged conduct or conduct underlying acquitted charges, so long as conduct has been proven by preponderance of the evidence); *see also* ***United States v. Ramos-Oseguera***, 120 F.3d 1028, 1039 (9th Cir. 1997) (under ***Watts***, court may enhance base offense level

for aggravated role in the offense by relying upon conduct underlying count for which jury acquitted defendant); ***United States v. Thomas***, 114 F.3d 228, 261-62 (D.C. Cir. 1997) (holding the same). Note, however, that at least one opinion issued subsequent to the Supreme Court's decision in ***Watts*** has concluded that an abuse of trust enhancement may rely only upon conduct involved in an offense of conviction. *See* ***United States v. Barakat***, 130 F.3d 1448, 1455 (11th Cir. 1997); *but see* ***United States v. Cianci***, 154 F.3d 106, 111 (3d Cir. 1998) (declining to follow *Barakat* and holding that an abuse of trust enhancement may rest upon facts outside the offense of conviction).

43.05[1] Aggravating Role in the Offense

Section 3B1.1 permits an increase in the offense level as follows: (a) an increase of four levels if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; (b) an increase of three levels if the defendant was a manager or supervisor of such a criminal activity; or (c) an increase of two levels if the defendant was an organizer, leader, manager or supervisor in any criminal activity other than that described in (a) or (b). The term "participant" refers to a person who is criminally responsible for the commission of the offense; the term includes persons not convicted of an offense, but excludes undercover law enforcement officers. USSG §3B1.1, comment. (n.1). When assessing whether an organization is "otherwise extensive," courts should consider all persons involved during the course of the entire offense, including unwitting outsiders used by the criminal participants. USSG §3B1.1, comment. (n.3); ***United States v. Randy***, 81 F.3d 65, 68-69 (7th Cir. 1996). Any particular title the defendant may have had, i.e., "kingpin" or "boss," is not determinative of whether the defendant acted as an organizer or leader, as opposed to a mere manager or supervisor. USSG §3B1.1, comment. (n.4). Rather, courts should consider the following factors when deciding whether a defendant was an organizer or leader:

> [T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. The purpose of Section 3B1.1 is to account for the relative responsibilities of the participants in a scheme and to deter those persons who are most likely to present a greater danger to the public and/or recidivate. USSG §3B1.1, comment. (backg'd). An

appellate court will review factual findings regarding the applicability of this enhancement for clear error only. ***United States v. Powell***, 124 F.3d 655, 667 (5th Cir. 1997).

Section 3B1.1 defines "organizer or leader" broadly, and a defendant may have acted as an organizer even if he or she did not control others in the organization directly. ***United States v. Morris***, 18 F.3d 562, 569 (8th Cir. 1994); *see also* ***United States v. Ervasti***, 201 F.3d 1029, 1041 (8th Cir. 2000) ("While control of other participants is an important factor, section 3B1.1 focuses on the 'relative responsibility within a criminal organization.'") (citations omitted). Further, there can be more than one organizer in a criminal operation. USSG §3B1.1, comment. (n.4); ***Morphew v. United States***, 909 F.2d 1143, 1145 (8th Cir. 1990). Likewise, a defendant may be a manager or supervisor even if he or she is not at the top of a criminal scheme. ***United States v. Goldberg***, 105 F.3d 770, 777 (1st Cir. 1997). Moreover, a defendant may qualify for a §3B1.1(b) enhancement so long as he or she had a managerial or supervisory role in illegal conduct involving five or more persons; the defendant does not have to manage or supervise five other persons directly. ***United States v. Kraig***, 99 F.3d 1361, 1369-70 (6th Cir. 1996). Even if the defendant did not have an aggravating role during the commission of the offense, he or she still may qualify for an enhancement if he or she assumed a dominant role during a later cover-up. ***United States v. Mankarious***, 151 F.3d 694, 710 (7th Cir. 1998). And more than one codefendant with varying degrees of culpability may qualify for an aggravating role enhancement. ***United States v. Mickle***, 464 F.3d 804, 808 (8th Cir. 2006).

Courts often have upheld the application of an aggravating role enhancement in cases involving tax crimes. *See, e.g.*, ***United States v. Radke***, 415 F.3d 826, 845 (8th Cir. 2005) (Section 3B1.1(c) enhancement proper for business owner who expressly authorized employees to use illegal checks and who received disproportionate share of profits derived from the illegal scheme); ***Ervasti***, 201 F.3d at 1041-42 (upholding Section 3B1.1(c) enhancement for husband defendant who "was not just [company's] CEO in title, he was its leader in all respects"(internal quotation omitted)); ***Mankarious***, 151 F.3d at 710 (upholding Section 3B1.1(c) enhancement for defendant who directed and paid underling to conceal scheme to commit money laundering, wire fraud, and filing of false tax returns); ***Powell***, 124 F.3d at 667 (distributor of gasoline and diesel fuel, convicted of evading federal fuel excise taxes, qualified for Section 3B1.1(c) enhancement because he supervised in-house accountant's work on false tax returns regarding fuel sales); ***United***

States v. Madoch, 108 F.3d 761, 767 (7th Cir. 1997) (CPA, convicted of corruptly endeavoring to obstruct government from collecting taxes, qualified for Section 3B1.1(a) enhancement because five other individuals helped him further scheme, according to his directions); ***Goldberg***, 105 F.3d at 777 (defendant, convicted of conspiring to defraud the IRS and aiding the filing of false tax returns, qualified for Section 3B1.1(c) enhancement; although bookkeeper whom defendant supervised was not a culpable participant, defendant also managed receipt of false tax documents by straw employees); ***Kraig***, 99 F.3d at 1370 (lawyer, convicted of conspiring to defraud the IRS, qualified for Section 3B1.1(b) enhancement because he recruited lawyers and accountants to participate in scheme to conceal assets of client); ***United States v. Brinkworth***, 68 F.3d 633, 641-42 (2d Cir. 1995) (defendant, convicted of filing false return, qualified for Section 3B1.1(c) enhancement because he directed and provided records to criminally responsible accountant); ***United States v. Dijan***, 37 F.3d 398, 403-04 (8th Cir. 1994) (defendants, convicted of conspiring to bribe IRS agent, qualified for Section 3B1.1(a) enhancement because criminal activity involved more than five people, including indicted and unindicted coconspirators, and because decision to attempt bribe rested with defendants); ***United States v. Leonard***, 37 F.3d 32, 37-39 (2d Cir. 1994) (corporate vice-president, convicted of conspiring to defraud the IRS, qualified for Section 3B1.1(b) enhancement because he organized and managed efforts of other employees to skim cash from corporation, even though he did so at the behest of another individual).

43.05[2] Mitigating Role in the Offense

Section 3B1.2(a) provides that a court may reduce by four the offense level of a defendant who was "a minimal participant in any criminal activity." This reduction, which covers "defendants who are plainly among the least culpable of those involved in the conduct of a group," applies infrequently. USSG §3B1.2, comment. (n.4). A minimal participant will have "a lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others." *Id.* Section 3B1.2(b) similarly provides that a court may reduce by two the offense level of a defendant who was "a minor participant in any criminal activity." Under Section 3B1.2(b), a minor participant is any participant "who is less culpable than most other participants, but whose role could not be described as minimal." USSG §3B1.3, comment. (n.5). A defendant whose role in the criminal activity was greater than "minimal," but less than "minor," may receive an intermediate reduction of three levels. USSG §3B1.2.

A defendant bears the burden of proving that he or she played only a minimal or minor role in the offense. ***United States v. Searan***, 259 F.3d 434, 447-48 (6th Cir. 2001); ***United States v. Atanda***, 60 F.3d 196, 198 (5th Cir. 1995) (*per curiam*). When assessing whether a defendant qualifies for a mitigating role reduction, the sentencing court "must take into account the broad context of the defendant's crime." *Id.* A finding that a defendant did or did not have a minimal or minor role is reviewed for clear error because such a determination depends heavily upon the facts of the particular case. ***Searan***, 259 F.3d at 447; ***United States v. Ladum***, 141 F.3d 1328, 1348 (9th Cir. 1998). A defendant does not qualify for a mitigating role reduction simply because he or she is less culpable than other codefendants. ***Ladum***, 141 F.3d at 1348 (upholding refusal to apply mitigating role reduction when defendant, although acquitted of false tax return charges, nonetheless played instrumental role in bankruptcy fraud scheme); ***Atanda***, 60 F.3d at 198 n.1. Generally, a reduction for minimal participation is reserved for those individuals who play "'a single, limited role in a very large organization.'" *See* ***United States v. Tilford***, 224 F.3d 865, 869 (6th Cir. 2000) (quoting ***United States v. Williams***, 940 F.2d 176, 180 (6th Cir. 1991)).

A defendant who already has received a lower offense level because he or she has been convicted of an offense significantly less serious than his actual criminal conduct ordinarily cannot qualify for any mitigating role reduction. USSG §3B1.3, comment. (n.3). Likewise, a defendant cannot qualify for a reduction when his or her sentence rests solely upon criminal activity in which he or she actually participated, even though the defendant's role in a larger conspiracy may have been minor or minimal. ***Atanda***, 60 F.3d at 199 (upholding refusal to apply mitigating role reduction when defendant was convicted of both filing a false claim for tax refund in own name and participating in broad conspiracy to file false claims for tax refunds; although defendant's role in overall conspiracy was relatively small, his sentence was based only upon the tax loss arising out of the single false claim filed by defendant in his own name); ***United States v. Lampkins***, 47 F.3d 175, 180-81 (7th Cir. 1995); ***United States v. Lucht***, 18 F.3d 541, 555 (8th Cir. 1994).

43.05[3] Abuse of Position of Trust or Use of a Special Skill

Section 3B1.3 permits a sentencing court to increase the defendant's base offense level by two levels if the court finds that 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. Section 3B1.3, however, prohibits use of this enhancement when the base offense level or the specific offense characteristics of the guideline being applied already include an abuse of trust or special skill. Section 3B1.3 further indicates that an adjustment based upon an abuse of trust may accompany an additional adjustment based upon an aggravating role in the offense under Section 3B1.1, but that an adjustment based solely upon the use of a special skill may not accompany an additional adjustment under Section 3B1.1. An appellate court reviews *de novo* a sentencing court's interpretation of the meanings of the terms "position of trust" and "special skill," but reviews the sentencing court's application of those terms to the facts for clear error. ***United States v. Noah***, 130 F.3d 490, 499 (1st Cir. 1997); ***United States v. Bhagavan***, 116 F.3d 189, 192 (7th Cir. 1997); ***United States v. Young***, 932 F.2d 1510, 1512 (D.C. Cir. 1991).

The Guidelines define a position of "public or private trust" as "a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." USSG §3B1.3, comment. (n.1). For example, the enhancement would apply to a fraudulent loan scheme by a bank executive, but not to embezzlement by an ordinary bank teller. *Id.* The purpose of this enhancement is "to penalize defendants who take advantage of a position that provides them freedom to commit or conceal a difficult-to-detect wrong." ***United States v. Koehn***, 74 F.3d 199, 201 (10th Cir. 1996). Courts assess whether a defendant occupied a position of trust from the perspective of the victim of the crime. ***United States v. Brickey***, 289 F.3d 1144, 1154-55 (9th Cir. 2002) (defendant's position as border inspector for the INS constituted position of trust because defendant had discretion to allow vehicles to cross border without inspection, thereby facilitating defendant's collection of payments from drug smugglers and his failure to report that income); ***United States v. Guidry***, 199 F.3d 1150, 1159-60 (10th Cir. 1999); ***United States v. Garrison***, 133 F.3d 831, 837 (11th Cir. 1998); ***United States v. Ragland***, 72 F.3d 500, 502 (6th Cir. 1996). The concept of "trust" under Section 3B1.3 resembles the degree of discretion traditionally accorded a trustee or fiduciary. ***Ragland***, 72 F.3d at 502-03.

Some courts have held that an enhancement under Section 3B1.1 may be appropriate in a criminal tax case even if the defendant did not occupy a position of trust in relation to the federal government. For example, the Seventh Circuit has held that the majority shareholder of a corporation qualified for the abuse of trust enhancement when

he used his position to divert corporate income in order to facilitate the crime of personal income tax evasion. ***Bhagavan***, 116 F.3d at 193-94. Although the dissent in ***Bhagavan*** argued that the enhancement was inapplicable because the victims of the defendant's abuse of trust, the minority shareholders, were not the victims of the actual crime of conviction, tax evasion, ***id.*** at 194-95 (Cudahy, J., dissenting), the majority determined that "[i]t is enough that identifiable victims of Bhagavan's overall scheme to evade his taxes put him in a position of trust and that his position 'contributed in some significant way to facilitating the commission or concealment of the offense.'" ***Id.*** at 193 (quoting USSG §3B1.3, comment. (n.1)); *see also* ***United States v. Kay***, 513 F.3d 432, 460 (5th Cir. 2007) ("We have never held . . . nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim." (internal quotation omitted)), *cert. denied*, 129 S. Ct. 42 (2008); ***United States v. Cianci***, 154 F.3d 106, 111-13 (3d Cir. 1998) (high-ranking corporate official facilitated crime of individual income tax evasion by abusing position of trust and diverting embezzled corporate property in exchange for kickbacks; enhancement was proper even though the victim of defendant's abuse of trust was not the victim of the offense of conviction). However, other courts have indicated that a §3B1.1 enhancement is only appropriate in a tax case if "the defendant is a government employee or exercises directly delegated public authority." ***United States v. Technic Services, Inc.***, 314 F.3d 1031, 1051 (9th Cir. 2002); *see also* ***United States v. Ebersole***, 411 F.3d 517, 536 (4th Cir. 2005) (abuse of trust enhancement improper when victims were federal agencies and defendant had no fiduciary relationship with federal government).

Courts have upheld the use of the Section 3B1.1 enhancement in a variety of settings. In ***United States v. Lowder***, 5 F.3d 467, 470 (10th Cir. 1993), the defendant, a certified public accountant, was convicted of mail fraud based on misrepresentations he made when soliciting his tax clients for investments, which he then misused for personal expenditures. The Tenth Circuit upheld an enhancement for abuse of trust, explaining that the defendant "was a CPA who provided tax and financial advice to elderly and unsophisticated clients. He advised them to place their money with him and promised them security. As president of the corporations he was free to spend that money, without oversight." ***Id.*** at 473. The ***Lowder*** court further stated that factors relevant to whether a defendant abused a position of trust include the "defendant's level of knowledge and authority, the level of public trust in defendant, and whether the abuse could be easily or readily noticed." ***Id.***

In ***United States v. Baker***, 200 F.3d 558, 560 (8th Cir. 2000), the defendant, an insurance agent, was convicted of mail fraud, insurance theft, and making false statements to the government. Defendant represented to elderly clients that she would use their insurance premium payments to purchase insurance policies or annuities when she actually misused the money for personal expenses. ***Id***. In upholding the abuse of trust enhancement, the Eighth Circuit stated that "ordinary commercial relationships do not constitute a trust relationship sufficient to invoke the . . . enhancement . . . [but] the issue is fact intensive because it turns on the precise relationship between defendant and her victims." ***Id.*** at 564 (citation omitted). The ***Baker*** court stated that the defendant "was an insurance agent who persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those monies." ***Id***. It concluded that "a licensed insurance agent with control over client funds *may* occupy a position of private trust." ***Id***.

Courts also have upheld application of the abuse of trust enhancement to bank officers who used their positions to facilitate the commission of crimes. ***United States v. McCord***, 33 F.3d 1434, 1435 (5th Cir. 1994) (bank president convicted of misapplication of bank funds used position to arrange for bank funds to pay for installation of air conditioning unit at his home, and to arrange for false entries in bank records); ***United States v. Morris***, 18 F.3d 562, 568 (8th Cir. 1994) (bank officer and director convicted of bank fraud and money laundering used position to approve payment of insufficient funds checks and conceal overdraft status of account). Likewise, law enforcement officers who use their positions to further or conceal their criminal activity may be subject to this enhancement. ***United States v. Terry***, 60 F.3d 1541, 1545 (11th Cir. 1995) (deputy sheriff used office and patrol car to prevent police interception of his drug sales to undercover agent); ***United States v. Duran***, 15 F.3d 131, 132-33 (9th Cir.1994) (*per curiam*) (sheriff used office to embezzle funds seized during drug investigations). The Eleventh Circuit has upheld an abuse of public trust enhancement applied to a grand juror who provided information to an individual under grand jury investigation for drug smuggling and money laundering. ***United States v. Brenson***, 104 F.3d 1267, 1287-88 (11th Cir. 1997).

Because Section 3B1.3 states that the abuse of trust enhancement cannot apply when an abuse of trust is included in the base offense level or specific offense characteristic, some opinions have stated that this enhancement cannot apply in the context of certain fraud crimes. *See* ***Garrison***, 133 F.3d at 842 (owner and chief executive officer of home health care provider, convicted of submitting fraudulent cost

reports for Medicare reimbursements, could not receive abuse of trust enhancement based upon same conduct underlying conviction); ***United States v. Broderson***, 67 F.3d 452, 456 (2d Cir. 1995) (vice-president of company with government contract, convicted of misrepresenting to the government that his company had complied with applicable regulations, could not receive abuse of trust enhancement because the base offense level for his fraud conviction already included any abuse of trust); *but cf.* ***United States v. Chimal***, 976 F.2d 608, 613 (10th Cir. 1992) (affirming abuse of trust enhancement in embezzlement case, even after acknowledging that "embezzlement by definition involves an abuse of trust"). Similarly, the Second Circuit has observed that the abuse of trust enhancement does not apply simply because the defendant violated a statutory duty to provide accurate information to the government; for example, the abuse of trust enhancement does not apply to every taxpayer who files a false tax return. ***Broderson***, 67 F.3d at 456.

The Guidelines define a "special skill" as a "skill not possessed by members of the general public and usually requiring substantial education, training or licensing." Persons with special skills include pilots, lawyers, doctors, accountants, chemists, and demolition experts. USSG §3B1.3, comment. (n.4). A special skill enhancement may apply even if the defendant is self-taught or lacks either formal education or professional stature. ***Noah***, 130 F.3d at 500. "[A] skill can be special even though the activity to which the skill is applied is mundane. The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public." *Id.* The special skill enhancement "requires only proof that the defendant's use of that skill makes it significantly 'easier' for him to commit or conceal the crime." ***United States v. Atkin***, 107 F.3d 1213, 1219-20 (6th Cir. 1997) (upholding special skill enhancement when lawyer, convicted, in part, of obstruction of justice, used position in order to facilitate and conceal his attempt to bribe a judge). A special skill enhancement may not be based on a coconspirator's actions. ***United States v. Gormley***, 201 F.3d 290, 295 (4th Cir. 2000). A sentencing court may apply a special skill enhancement even though it is also applying an additional enhancement for use of sophisticated means, under Section 2T1.3(b)(2). ***United States v. Rice***, 52 F.3d 843, 850-51 (10th Cir. 1995).

The First Circuit upheld the application of a special skill enhancement to a professional tax return preparer convicted of making false claims for refund through the filing of false electronic returns. ***Noah***, 130 F.3d at 500. In ***Noah***, the defendant unsuccessfully argued that the enhancement was inapplicable because the preparation and

electronic filing of tax returns are relatively simple tasks and because he lacked formal training. ***Id***. The First Circuit relied upon the holding of the Second Circuit in ***United States v. Fritzson***, 979 F.2d 21, 22 (2d Cir. 1993) (*per curiam*), in which the defendant, an accountant convicted of a tax fraud conspiracy, disputed the propriety of the enhancement by claiming that even people without his special skills could prepare the Forms W-2 and W-3 at issue. ***Fritzson***, 979 F.2d at 22. Rejecting this claim, the ***Fritzson*** court found that "[a]n accountant's knowledge of the withholding process, including the roles of the claim and transmittal documents, and how and when to file them, exceeds the knowledge of the average person." *Id.* at 22-23; *see also* ***Rice***, 52 F.3d at 850 (accountant convicted of making false claims for tax refunds and filing false tax returns qualified for special skill enhancement).

In ***United States v. Wright***, 211 F.3d 233 (5th Cir. 2000), the defendant, a Certified Public Accountant and tax attorney, received an enhancement for use of a special skill. In upholding the enhancement, the Fifth Circuit stated that while the defendant's contribution to the scheme was not particularly sophisticated, the defendant did use his special skills to prepare legal documents which furthered the conspiracy. ***Id***. at 238.

Note, however, that the enhancement for use of a special skill cannot be used if the defendant regularly acts as a return preparer or advisor for profit and is convicted pursuant to 26 U.S.C. § 7206(2). USSG §2T1.4, comment. (n.3); ***United States v. Young***, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991). This is because the specific offense characteristics of Section 2T1.4 include a two-level enhancement if the defendant was in the business of preparing or assisting in the preparation of tax returns. USSG §2T1.4(b)(3); ***Young***, 932 F.2d at 1514 n.4.

43.05[4] USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202, which proscribes a willful failure to collect, account for, and pay over trust fund employment taxes, is USSG § 2T1.6. Section 2T1.6 directs that the base offense level for Section 7202 is determined by the Section 2T4.1 Tax Table; Section 2T1.6 does not contain any enhancements for specific offense characteristics. USSG §2T1.6(b) does contain a cross reference indicating that the base offense level is to be determined by USSG §2B1.1 (Theft, Property Destruction, and Fraud) "[w]here the offense involved

embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater. Section 3B1.2 of the Sentencing Guidelines, entitled "Abuse of Position of Trust of Use of Special Skill," provides, in pertinent part, that: "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, increase by two levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics."

In at least two cases, the Courts of Appeals have reversed the imposition of the Section 3B1.2 abuse-of-trust enhancement in a Section 7202 trust fund case. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), the court held that the enhancement can be applied only where the defendant abused a position of trust vis-à-vis the victim, that the IRS is the victim of a Section 7202 offense, and that the defendant did not hold a position of trust in relation to the IRS. In ***United States v. DeMuro***, 677 F.3d 550 (3d Cir. 2012), the court similarly held that the defendants were not in positions of trust vis-à-vis the IRS where the defendants had been required by 26 U.S.C. § 7512 to establish a segregated bank account for withheld taxes.

There is an inter-circuit conflict as to whether a defendant must occupy a position of trust in relation to the victim of the count of conviction, or whether the Section 3B1.2 enhancement may be applied where the abuse of trust occurred with respect to uncharged conduct that significantly facilitated the count of conviction. ***See United States v. Friedberg***, 558 F.3d 131, 133-35 (2d Cir. 2009) (identifying conflict). In those circuits limiting the enhancement to situations where the defendant held a position of trust vis-à-vis the victim, prosecutors should be cautious about asserting that the defendant held a position of trust vis-à-vis the IRS. In those circuits that allow uncharged conduct to be the basis for the Section 3B1.2 enhancement, the employees in a Section 7202 prosecution might be considered the "victims" of the defendant's embezzlement, as contemplated by USSG § 2T1.6(b), but the force of that position is somewhat undermined by the fact that employees automatically receive credit for taxes that are "actually withheld" even if the monies are not paid over to the government. 26 C.F.R. § 1.31-1(a). And although the definition of a "responsible person" for Section 7202 purposes is broader than the position-of-trust definition used in Section 3B1.2 – meaning that the enhancement can only apply to a subset of Section 7202 cases – defendants are sure to argue that an abuse of trust is already included in the base offense level for a Section 7202 "trust fund"

offense. *See* USSG §3B1.2 ("This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics.")

In sum, there is litigation risk in seeking the USSG §3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases. As the ***May*** and ***DeMuro*** cases illustrate, a sentence that is otherwise valid may be vacated on appeal due to the imposition of that enhancement. In a Section 7202 prosecution where a defendant's egregious abuse of a position of trust is clearly not adequately reflected in the offense level, prosecutors should consider seeking a variance under Section 3553(a) as opposed to the Section 3B1.2 enhancement.

43.06 OBSTRUCTION OF JUSTICE

The Guidelines require a two-level increase in the offense level when the court finds that a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense, and [] the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." The application notes specifically provide that "[o]bstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction" may warrant a two-level increase under Section 3C1.1 "if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." USSG §3C1.1, comment. (n.1).

The commentary to Section 3C1.1 provides a non-exhaustive list of conduct that constitutes obstruction of justice. Case law provides a variety of scenarios that justify an obstruction of justice enhancement.

Section 3C1.1 requires specific intent to obstruct justice. ***United States v. Henderson***, 58 F.3d 1145, 1153 (7th Cir. 1995). The government bears the burden of proving that the enhancement is warranted, by a preponderance of the evidence. ***United States v. Parrott***, 148 F.3d 629, 634 (6th Cir. 1998); ***United States v. Ewing***, 129 F.3d 430, 434 (7th Cir. 1997). Section 3C1.1 does not require proof that the defendant's conduct actually prejudiced or impacted the case. ***Id***. Section 3C1.1 provides for a denial of guilt exception. §3C1.1, comment. (n.2); *see also* ***United States v. Gormley***, 201 F.3d 290, 294 (4th Cir. 2000) (holding that defendant was not entitled to exception because his

statements went beyond merely denying guilt and implicated his taxpayer clients in scheme to defraud).

The first behavior defined as obstruction of justice is "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." USSG §3C1.1, comment. (n.4(a)); *see also* ***United States v. West***, 58 F.3d 133, 137-38 (5th Cir. 1995) (holding that the court's finding may properly be based on uncorroborated hearsay evidence). It is obstruction of justice for a defendant to tell a witness to lie or confirm a common story. ***United States v. Emerson***, 128 F.3d 557, 563 (7th Cir. 1997); ***United States v. Friend***, 104 F.3d 127, 130 (7th Cir. 1997); ***United States v. Hollis***, 971 F.2d 1441, 1460 (10th Cir. 1992).

"[C]ommitting, suborning, or attempting to suborn perjury" is likewise considered conduct warranting an obstruction of justice enhancement. USSG §3C1.1, comment (n. 4(b)). The Supreme Court has held that when a defendant perjures himself or herself on the stand, enhancing the defendant's offense level for obstruction of justice is warranted. ***United States v. Dunnigan***, 507 U.S. 87, 96 (1993); *accord* ***United States v. Fitzgerald***, 232 F.3d 315, 321 (2d Cir. 2000) (concluding that obstruction enhancement was required by defendant's perjury at both trial and sentencing); ***United States v. Tandon***, 111 F.3d 482, 491 (6th Cir. 1997). Noting that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury," the Supreme Court has held that the sentencing court must be satisfied that the inaccurate testimony was not due to confusion, mistake, or faulty memory. ***Dunnigan***, 507 U.S. at 95. Therefore, in applying the obstruction enhancement for a defendant's perjury, the trial court must make findings on the record that encompass all of the factual predicates for a finding of perjury. ***Dunnigan***, 507 U.S. at 95; s*ee also* ***United States v. Logan***, 250 F.3d 350, 374-75 (6th Cir. 2001); ***United States v. Mounkes***, 204 F.3d 1024, 1028-30 (10th Cir. 2000). The ***Dunnigan*** Court indicated that perjury requires (1) the giving of false testimony (2) concerning a material matter (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. ***Dunnigan***, 507 U.S. at 94; *cf.* ***United States v. Rubio-Topete***, 999 F.2d 1334, 1341 (9th Cir. 1993) (rejecting two-level enhancement for obstruction of justice in absence of factual findings by the sentencing court encompassing all of the factual predicates necessary for a finding of perjury). The obstruction guideline was amended in 1997 to clarify that there is no heightened standard of proof when making an adjustment for perjury, merely that "the

court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice." USSG App. C, amend. 566 (1997).

Another scenario that is specifically described by the commentary is "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." USSG §3C1.1 comment. (n.4(c)). However, in ***Parrott***, 148 F.3d at 635, the court found that the enhancement was not warranted because there was no evidence from which the sentencing court could have concluded that the defendant submitted the false documents for the purpose of impeding the government's investigation.

The commentary to Section 3C1.1 also identifies as an example of obstruction "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding . . . or attempting to do so." USSG §3C1.1, comment. (n.4(d)). Relying on the commentary, the Ninth Circuit held that a transfer of $280,000 to Switzerland three weeks after the defendant had learned of the criminal investigation warranted the obstruction enhancement. ***United States v. Shetty***, 130 F.3d 1324, 1333-35 (9th Cir. 1997) ("[I]n a tax case, money is material evidence."). Similarly, the Eleventh Circuit held that a Section 3C1.1 enhancement was appropriate when the defendant attempted arson, to destroy records at his accountant's office. ***United States v. Patti***, 337 F.3d 1317, 1325-26 (11th Cir. 2003). And the Sixth Circuit has held that a defendant's withholding of documents responsive to grand jury subpoenas justifies the enhancement. ***United States v. Gray***, 521 F.3d 514, 543 (6th Cir. 2008).

A defendant also obstructs justice by "providing materially false information to a probation officer in respect to a presentence . . . investigation for the court." USSG §3C1.1, comment. (n.4(h)).[10] The Guidelines define material evidence as information which, "if believed, would tend to influence or affect the issue under determination." USSG §3C1.1, comment. (n.6); *see* ***United States v. Martinez-Rios***, 143 F.3d 662, 678 (2d Cir. 1998) (false information in affidavit for sentencing). "The threshold for materiality . . . is 'conspicuously low.'" ***Gormley***, 201 F.3d at 294 (internal citations omitted). A defendant's failure to provide a probation officer with information concerning the defendant's financial status, where it is necessary to determining the

[10] Note that "lying to a probation officer or pretrial services officer about drug use while released on bail does not warrant obstruction of justice under §3C1.1." USSG §3C1.1, comment. (n.5(E)).

defendant's ability to pay a fine or restitution, constitutes obstruction of justice. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990); *accord* ***United States v. Romer***, 148 F.3d 359, 372-73 (4th Cir. 1998). The sentencing court does not need to make an express finding of materiality if it can be fairly implied from the court's statements during sentencing. ***Id.*** at 372.

The commentary to Section 3C1.1 also advises that it is obstruction of justice to provide a law enforcement officer with a materially false statement that significantly obstructs or impedes the official investigation or prosecution of the instant offense. USSG §3C1.1, comment. (n.4(g)); *see* ***United States v. Uscinski***, 369 F.3d 1243, 1247 (11th Cir. 2004); ***Emerson,*** 128 F.3d at 563; *see also* ***United States v. Baker***, 200 F.3d 558, 561-62 (8th Cir. 2000). Interpreting the plain language of the section, the First Circuit held "that an enhancement may be made for unsworn, false statements to law enforcement officers only if the government shows that the statements significantly obstructed or impeded the official investigation or prosecution of the offense." ***United States v. Isabel***, 980 F.2d 60, 61 (1st Cir. 1992); *accord* ***United States v. Fiala***, 929 F.2d 285, 290 (7th Cir. 1991).

An obstruction of justice enhancement is appropriate when a defendant provides "materially false information to a judge or magistrate." USSG §3C1.1, comment. (n.4(f)). Thus, a defendant who makes false statements at sentencing is eligible for such an enhancement. ***United States v. McLeod***, 251 F.3d 78, 82 (2d Cir. 2001). The Ninth Circuit has held that submission of a false financial affidavit to a magistrate judge for the purpose of obtaining counsel is sufficiently related to the offense of conviction (violation of the Internal Revenue Code) to support a Section 3C1.1 enhancement. ***United States v. Hernandez-Ramirez***, 254 F.3d 841, 843-44 (9th Cir. 2001).

The Second Circuit has held that backdating a promissory note warrants an obstruction of justice enhancement. ***United States v. Coyne***, 4 F.3d 100, 114 (2d Cir. 1993). In ***Coyne***, the defendant was convicted of numerous charges including mail fraud and bribery, but was acquitted of a tax evasion charge based on failure to report $30,000. A backdated note was used to make the money appear to be a loan to the defendant. ***Id***. at 104-05. The defendant argued that the jury must have concluded that the transaction was a loan and that he, therefore, did not obstruct the IRS investigation. ***Id***. at 114. The court ruled, however, that the proof of the crime had to be supported beyond a reasonable doubt, but that the burden of proving obstruction of justice was by a preponderance of the

evidence. Thus, the sentencing court "was free to find that the backdating was an intentional attempt to thwart the investigation of a bribe." ***Id***. at 115; *see also* ***United States v. Powell***, 124 F.3d 655, 666-67 (5th Cir. 1997) (submitting false documents in IRS audit, submitting false documents, and attempting to suborn perjury justified obstruction of justice enhancement); ***United States v. August***, 984 F.2d 705, 714 (6th Cir. 1992).

Note that application note 4 to Section 3E1.1 states that "[c]onduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply." USSG §3E1.1, comment. (n.4).

The Sixth Circuit has held that a district court must review the evidence and set forth findings independent of those contained in the presentence investigation report when applying an obstruction of justice enhancement. ***United States v. Middleton***, 246 F.3d 825, 847 (6th Cir. 2001). When a district court fails to do so, the reviewing court must vacate the sentence and remand the case for resentencing. ***Id***.

In a case in which the base offense level for a defendant convicted of violating 26 U.S.C. § 7212(a) (corruptly endeavoring to obstruct or impede the enforcement of the internal revenue laws) is determined pursuant to USSG §2J1.2, an enhancement for obstruction of justice is only appropriate if "a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself. USSG §3C1.1, comment. (n.7); *see also* ***U.S. v. Kelly***, 147 F.3d 172, 179 (2d Cir. 1998) (obstruction of justice enhancement proper in 26 U.S.C. § 7212(a) case when defendant committed perjury at trial); ***United States v. Friend***, 104 F.3d 127, 131 (7th Cir 1997) (enhancement appropriate when defendant's attempt to influence the testimony of a witness was distinct from the conduct underlying his conviction).[11]

Some courts have held that the obstruction of justice enhancement does not apply when the conduct at issue is coterminous with the offense of conviction because such

[11] Note that in employing the grouping rules under Section 3D1.2, several courts have held that a Section 3C1.1 enhancement may be appropriate if the defendant has been convicted of a separate count involving obstructive conduct. *See, e.g.* ***United States v. Davist***, 481 F.3d 425, 427 (6th Cir. 2007); ***United States v. Frank***, 354 F.3d 910, 924 (8th Cir. 2004); ***United States v. Edwards***, 303 F. 3d 606, 646 (5th Cir. 2002); ***United States v. Crisci***, 273 F.3d 235, 240 (2d Cir. 2001).

application would constitute impermissible double counting. *See*, *e.g.*, ***United States v. Clark***, 316 F.3d 210, 211-13 (3d Cir. 2003) (holding that enhancement was inappropriate when obstructive conduct was the same as offense of conviction); ***United States v. Lamere***, 980 F.2d 506, 516-17 (8th Cir. 1992) (same). However, other courts have permitted the enhancement even when the obstructive conduct was part of the offense of conviction. *See* ***United States v. Sabino***, 307 F.3d 446, 448 (6th Cir. 2002) (requiring application of enhancement when defendant testified falsely before grand jury, even when false testimony was part of *Klein* conspiracy). For a more detailed discussion of double counting under the Guidelines, *see* ***United States v. Vizcarra***, 668 F.3d 516, 519-27 (7th Cir. 2012).

43.07 GROUPING

Section 3D1.2 of the Guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together." The purpose is to impose "'incremental punishment for significant additional criminal conduct,' but at the same time prevent double punishment for essentially the same conduct." ***United States v. Seligsohn***, 981 F.2d 1418, 1425 (3d Cir. 1992) (quoting ***United States v. Toler***, 901 F.2d 399, 402 (4th Cir. 1990)), *superseded on other grounds*, USSG App. C, amend. 474. Grouping is a difficult area, and the section outlining the rules for grouping "is not a model of clarity." ***United States v. Gist***, 101 F.3d 32, 34 (5th Cir. 1996).

Section 3D1.2 identifies four alternative methods to determine what constitutes "substantially the same harm": (a) the counts involve the same victim and the same act or transaction; (b) the counts involve the same victim and two or more acts connected by a common criminal objective or a common scheme; (c) one of the counts embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts; or (d) the offense level is determined largely on the basis of the total amount of harm or loss. §3D1.2. The methods are alternative and any one or more may be applied. ***United States v. Bove***, 155 F.3d 44, 49 (2d Cir. 1998).

Subsections (a) and (b) are closely related. In essence, they provide for grouping when two counts are sufficiently interrelated and involve the same victim within the meaning of Section 3D1.2. The term "victim" is defined by application note 2:

> The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and

> most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims . . ., the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related.

USSG §3D1.2, comment. (n.2). Thus, in victimless crimes, "'the grouping decision must be based *primarily* upon the nature of the interest invaded by each offense.'" ***United States v. Gallo,*** 927 F.2d 815, 824 (5th Cir. 1991) (money laundering and drug trafficking are not closely related) (internal quotation omitted); *see* ***United States v. Harper***, 972 F.2d 321, 322 (11th Cir. 1992); *see also* ***United States v. Braxtonbrown-Smith***, 278 F.3d 1348, 1356 (D.C. Cir. 2002) ("[T]he district court did not clearly err in grouping, for purposes of § 3D1.2(b) of the Guidelines, the fraud counts (bank, mail, and wire) separately from the money laundering and tax evasion counts given the district court's finding that there were different victims . . . ."); *but see* ***United States v. Lopez***, 104 F.3d 1149, 1150 (9th Cir. 1997) (so-called victimless crimes are treated as involving the same victim when the societal interests that are harmed are closely related, and societal interests harmed by money laundering and drug trafficking are closely related).

Subsection 3D1.2(c) provides that when conduct that represents one count is also a specific offense characteristic or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision is designed to prevent "double counting." USSG §3D1.2, comment. (n.5). Grouping under this section is only proper, however, when the offenses are closely related. *Id.* Nevertheless, this provision will apply even where the offenses involve different harms or societal interests. *Id.* For example, in ***United States v. Martin***, 363 F.3d 25, 41-43 (1st Cir. 2004), the defendant pleaded guilty to both fraud and tax evasion. The defendant participated in a scheme to defraud several victims of $1.8 million and then failed to report this income on his tax returns. ***Id.*** at 30-31. Although the defendant's failure to report income from his illegal fraud scheme resulted in a two-level enhancement under Section 2T1.1(b)(1), the First Circuit held that the district court erred in grouping the fraud counts with the tax counts. ***Id.*** at 41-43. The court concluded that the fraud and tax counts were not sufficiently "closely related" to apply Section 3D1.2(c). ***Id.***; *see also* ***United States v. Peterson***, 312 F.3d 1300, 1302-04 (10th Cir. 2002).

Subsection 3D1.2(d) applies to crimes where "the guidelines are based primarily on quantity or contemplate continuing behavior." USSG §3D1.2, comment. (n.6). Section 3D1.2(d) lists a number of offenses, including tax offenses, which are to be included in the category of offenses that have the offense level determined by loss, and the guideline provides a list of offenses specifically excluded from the operation of that subsection. In other words, Section 3D1.2(d) "divides offenses into three categories: those to which the section specifically applies; those to which it specifically does not apply; and those for which grouping may be appropriate on a case-by-case basis." ***United States v. Gallo***, 927 F.2d 815, 823 (5th Cir. 1991); *accord* ***United States v. Williams***, 154 F.3d 655, 656 (6th Cir. 1998) ("Subsection (d) further divides Guidelines sections covering classes of harms more or less susceptible to aggregation into three broad categories – those which 'are to be grouped,' those 'specifically excluded' from aggregated treatment, and those subject to grouping on a 'case by case' basis.") (citation omitted). The Eleventh Circuit reversed a defendant's sentence because the trial court erred in not grouping all of the defendant's counts where the defendant pleaded guilty to thirteen counts of failure to pay over federal employment taxes that had been withheld and four counts of filing false individual returns because the counts involved substantially the same harm. ***United States v. Register***, WL 1570775 (11th Cir. 2012) ([C]ounts should have been grouped because their offense level is determined largely on the basis of the amount of loss). There is no automatic grouping merely because the counts are on the "to be grouped" list. ***Id.***; ***Seligsohn,*** 981 F.2d at 1425; *see* ***Williams***, 154 F.3d at 56-57; ***United States v. Taylor***, 984 F.2d 298, 303 (9th Cir. 1993); ***United States v. Johnson***, 971 F.2d 562, 576 (10th Cir. 1992).

Grouping is not appropriate under Section 3D1.2 when the Guidelines measure harm differently. ***Weinberger v. United States***, 268 F.3d 346, 354-55 (6th Cir. 2001) (holding that tax and fraud counts should not be grouped); ***United States v. Taylor***, 984 F.2d 298, 303 (9th Cir. 1993) (holding that wire fraud and money laundering do not group); ***United States v. Johnson***, 971 F.2d 562, 576 (10th Cir. 1992) (holding that because wire fraud measures the harm based on the loss resulting from the fraud, and money laundering measures harm on the basis of the value of the funds, the two crimes do not group); *but see* USSG §3D1.2, comment. (n.5). Several courts have held that grouping is inappropriate in a case involving both fraud and tax evasion, when the fraud and tax crimes were not closely connected. *See, e.g.*, **United *States v. Vucko***, 473 F.3d 773, 779-781 (7th Cir. 2007) (wire fraud and tax offenses should not have been grouped because they were not "closely related"); ***United States v. Smith***, 424 F.3d 992, 1015 (9th

Cir. 2005) (concluding that district court's decision not to group tax, fraud, and money laundering offenses was not an abuse of discretion); ***United States v. Martin***, 363 F.3d 25, 41-43 (1st Cir. 2004) (holding that fraud and tax evasion should not be grouped because they involve "different victims," cause "different harms," and require "different conduct."); ***United States v. Shevi***, 345 F.3d 675, 680-81 (8th Cir. 2003) (finding that fraud and tax offenses should not be grouped because the different Guidelines provisions governing the two offenses "punish the same amount of loss differently"); ***United States v. Peterson***, 312 F.3d 1300, 1303-04 (10th Cir. 2002) ("[T]he specific offense characteristic for failure to report criminally-derived income is not sufficiently based here on conduct embodied in the mail fraud count as to warrant grouping.") (internal quotation omitted); ***Weinberger v. United States***, 268 F.3d 346, 354-55 (6th Cir. 2001) (holding that tax and fraud counts should not be grouped); ***United States v. Vitale***, 159 F.3d 810 (3rd Cir. 1998) (wire fraud and tax evasion do not group). Other courts, however, have reached a contrary conclusion and have grouped tax offenses with other offenses under §3D1.2(d). *See* ***United States v. Haltom***, 113 F.3d 43, 45-47 (5th Cir. 1997) (holding that mail fraud and tax evasion counts had to be grouped when the base offense level for tax evasion was increased because income was derived from criminal activity); *see also* ***United States v. Fitzgerald***, 232 F.3d 315, 319-20 (2d Cir. 2000) (upholding grouping of tax evasion, fraud, and conversion offenses under Section 3D1.2(d) because they "measure the harm by reference to the amount of monetary loss" and they are offenses of the same general type due to the "unity of the offense tables for tax evasion, fraud, and conversion.").

The Ninth Circuit held that conspiracy to distribute drugs and money laundering counts should be grouped because they harmed the same societal interests. ***Lopez***, 104 F.3d at 1150. The ***Lopez*** court based its holding on the legislative history of the Anti-Drug Abuse Act of 1986, which demonstrated that Congress's primary purpose in prohibiting money laundering was "to add a weapon to the arsenal against drug trafficking and to combat organized crime." ***Id.*** The court further noted that *Most Frequently Asked Questions About the Sentencing Guidelines* 20 (7th ed. 1994) stated: "because money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as 'closely intertwined' and groupable with the underlying offense."

Question 89 in the *Questions Most Frequently Asked About the Guidelines* (1993 Edition) addressed the question whether tax evasion and another count embodying

criminal conduct that generated the income on which the tax was evaded could be grouped. The Commission responded:

> Yes. The counts can be grouped under §3D1.2(c). Grouping rule (c) instructs that counts are to be grouped when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Specific offense characteristic (b)(1) of 2T1.1 (Tax Evasion) provides an enhancement if the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity. Tax evasion is always grouped with the underlying offense according to rule (c), regardless of whether (b)(1) was actually applied.

However, several courts have reached the opposite conclusion and have held that crimes that generate income on which tax was evaded need not be grouped with the tax crimes at issue. *See, e.g.*, ***Vucko***, 473 F.3d at 779-781; ***Martin***, 363 F.3d at 41-43.

The Second Circuit held that violations of 26 U.S.C. § 7206(1), filing a false return, did not merge with conspiracy to structure financial transactions to evade reporting requirements in violation of 18 U.S.C. § 371. ***Bove***, 155 F.3d at 50. The Second Circuit also determined that "the laws prohibiting perjury and tax evasion protect wholly disparate interests and involve distinct harms to society." ***United States v. Barone***, 913 F.2d 46, 49 (2d Cir. 1990). Thus, the two crimes cannot be grouped for sentencing purposes. ***Id***., at 50; *accord* ***Williams***, 154 F.3d at 657 (when bankruptcy count charged a false oath or account filed under Title 11 of the United States Code, harm is measured in a different fashion than tax fraud); ***United States v. Madoch***, 108 F.3d 761, 764 (7th Cir. 1997) (bankruptcy and fraud counts are grouped separately because they represent separate victims with separate harms).

At least one circuit has concluded that verdicts entered at different times in the same case can be grouped for sentencing purposes. *See* ***United States v. Kaufman***, 951 F.2d 793 (7th Cir. 1992). In ***Kaufman***, the defendant was indicted on four counts of money laundering and one count of attempted money laundering. At trial, the jury acquitted the defendant of counts one and two, convicted on count five, and was unable to reach a verdict on counts three and four. The court declared a mistrial as to counts three and four, leaving them unresolved. The court sentenced on count five, and the defendant appealed. The appellate court found that count five could be grouped for sentencing with counts three and four, if necessary, when counts three and four were

resolved by vacating the sentence on count five and sentencing on all counts at once. ***Kaufman***, 951 F.2d at 796.

The Sixth Circuit has held that Section 3D1.4, regarding multiple count adjustments, permits a court to apply the multiple count adjustment to counts arising from separate indictments. ***United States v. Griggs***, 47 F.3d 827, 830-31 (6th Cir. 1995). The defendant in ***Griggs*** pleaded guilty to one count of each of two indictments. Relying on Section 5G1.2, "Sentencing on Multiple Counts of Conviction," the ***Griggs*** court noted that a combined offense level must first be determined which incorporates the counts from the separate indictments. Only then is the court free to apply a sentence to multiple counts in a separate indictment. ***Id***. Note that the First Circuit has affirmed a district court finding that counts from different indictments did not group because they were not "closely related" as defined in Section 3D1.2. ***United States v. Hernandez Coplin***, 24 F.3d 312, 319-20 (1st Cir. 1994).

43.08 ACCEPTANCE OF RESPONSIBILITY

43.08[1] Generally

Section 3E1.1(a) of the Guidelines authorizes the district court to reduce a defendant's offense level by two levels "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense . . ." A defendant demonstrates acceptance of responsibility by:

1) truthfully admitting conduct comprising the offense, and truthfully admitting or not falsely denying any additional relevant conduct;

2) voluntarily terminating criminal conduct or withdrawing from criminal associations;

3) voluntarily paying restitution prior to adjudication of guilt;

4) voluntarily surrendering to authorities promptly after committing the offense;

5) voluntarily assisting authorities in recovering fruits and instrumentalities of the offense;

6) voluntarily resigning from an office or position held while committing the offense;

7) making significant post-offense rehabilitation efforts; or

8) timely accepting responsibility.

USSG §3E1.1(a), comment. (n.1). The provision for a reduction of a defendant's sentence "for acceptance of responsibility 'merely formalizes and clarifies a tradition of leniency extended to defendants who express genuine remorse and accept responsibility for their wrongs.'" ***United States v. Lancaster***, 112 F.3d 156, 159 (4th Cir. 1997) (quoting ***United States v. Crawford***, 906 F.2d 1531, 1534 (11th Cir. 1990)).

The most common means by which a defendant qualifies for a reduction in his or her offense level for acceptance of responsibility is by entering a guilty plea and admitting to the elements of the crime to which he or she is pleading. An adjustment under Section 3E1.1 "is *not* intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG §3E1.1(a), comment. (n.2) (emphasis added).

In rare circumstances, a defendant may clearly accept responsibility yet proceed to trial. Such a circumstance occurs when a defendant goes to trial to assert and preserve issues of constitutionality or statutory application unrelated to factual guilt. ***United States v. Mack***, 159 F.3d 208, 220 (6th Cir. 1998); ***United States v. Wilson***, 159 F.3d 280, 292 (7th Cir. 1998); ***United States v. McKittrick***, 142 F.3d 1170, 1178 (9th Cir. 1998). In such a case, determination of whether the defendant accepted responsibility will be based primarily on pre-trial statements and conduct. ***United States v. Mikutowicz***, 365 F.3d 65, 75-77 (1st Cir. 2004) (reduction for acceptance of responsibility was clearly erroneous when defendant admitted pretrial that he committed the acts in question but went to trial to contest the issue of willfulness); ***Mack***, 159 F.3d at 220. However, if a defendant proceeds to trial in order to contest issues of constitutionality and also contests his factual guilt, a reduction is not warranted. ***United States v. Baucom***, 486 F.3d 822, 830 (4th Cir. 2007), *vacated and remanded on other grounds*, ***Davis v. United States***, 552 U.S. 1092 (2008).

Even if a defendant pleads guilty, the district court may properly find that the defendant has not accepted responsibility for his or her conduct and is therefore not entitled to a reduction in offense level. USSG §3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is *not* entitled to an adjustment under [§3E1.1] as a matter of right.") (emphasis added); ***United States v. Muhammad***, 146 F.3d 161, 168 (3d Cir. 1998). An attempt to plead guilty also does not guarantee this reduction. ***United States v. Middleton***, 246 F.3d 825, 845 (6th Cir. 2001); ***United States v. Ervasti***, 201 F.3d 1029, 1043 (8th Cir. 2000). In order to qualify for the reduction, the defendant must affirmatively accept personal responsibility. ***United States v. Lublin***, 981 F.2d 367, 370 (8th Cir. 1992). The defendant must show sincere contrition to warrant such a reduction. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990); ***United States v. Royer***, 895 F.2d 28, 30 (1st Cir. 1990). The burden is on the defendant to demonstrate his acceptance of personal responsibility, ***Lublin***, 981 F.2d at 370, by a preponderance of the evidence, ***Middleton***, 246 F.3d at 845 (citing ***United States v. Tucker***, 925 F.2d 990, 991 (6th Cir. 1991)). "[T]he question is not whether [the defendant] actively asserted his innocence, but whether he clearly demonstrate[d] acceptance of his guilt." ***United States v. Portillo-Valenzuela***, 20 F.3d 393, 394 (10th Cir. 1994) (internal citation omitted). Being merely regretful is not sufficient to warrant the reduction. ***United States v. Gallant***, 136 F.3d 1246, 1248 (9th Cir. 1998). The reduction is not appropriate when a defendant has pleaded guilty in order to obtain tactical advantage. ***Muhammed***, 146 F.3d at 168. The range of conduct upon which a court may base its decision varies in different circuits.

Generally, the assertion of an entrapment defense is inconsistent with acceptance of responsibility when the defendant claims that his or her actions are not his or her own fault, but rather are due to the inducements of the government. ***United States v. Hansen***, 964 F.2d 1017, 1021-22 (10th Cir. 1992). Other courts also have reasoned that the reduction may not rest solely on the basis that a defendant admitted performing the acts leading to conviction when the defendant claims entrapment. *See* ***United States v. Chevre***, 146 F.3d 622, 623 (8th Cir. 1998); ***United States v. Brace***, 145 F.3d 247, 264-65 (5th Cir. 1998) (entrapment defense is a challenge to criminal intent and thus to culpability); ***United States v. Kirkland***, 104 F.3d 1403, 1405-06 (D.C. Cir. 1997); ***United States v. Simpson***, 995 F.2d 109, 112 (7th Cir. 1993); *but see* ***United States v. Davis***, 36 F.3d 1424, 1435-36 (9th Cir. 1994) (district court may not deny defendant acceptance of responsibility solely because he has presented an entrapment defense). Similarly, the Tenth Circuit affirmed the denial of acceptance of responsibility to a defendant who

acknowledged the factual basis for the charges and went to trial only to assert the insanity defense. ***United States v. Moudy***, 132 F.3d 618, 621 (10th Cir. 1998).

The district court may deny a reduction for acceptance of responsibility even when the actions of a defendant facially appear to be in accordance with the language contained in USSG §3E1.1, comment. (n.1). In ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1992), the Tenth Circuit found that the sentencing court properly denied a downward adjustment where the defendants had signed after conviction a consent judgment as to $35,000 that had previously been seized from them, had placed $55,000 in escrow prior to trial, and had offered prior to trial to pay $90,000 in restitution. ***Id***. The appellate court noted that the consent judgment was signed only after the defendants were found guilty, that the amount placed in escrow was to be turned over only if they were found guilty, and that the defendants only offered to pay restitution prior to trial in order to avoid indictment. ***Id.***

A defendant, in order to qualify for acceptance of responsibility, need not admit to conduct beyond the count of conviction. USSG §3E1.1, comment. (n.1(a)) ("[A] defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a)."). The government "may not impose substantial penalties because [an individual] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." ***Lefkowitz v. Cunningham***, 431 U.S. 801, 805 (1977). To require a defendant to admit to behavior beyond the crime of conviction would require a defendant to incriminate himself or herself in violation of the Fifth Amendment privilege. Therefore, a sentencing court cannot condition the acceptance of responsibility reduction on the defendant's admitting conduct for which he or she has not been convicted. *See, e.g.*, ***United States v. Frierson***, 945 F.2d 650, 659-60 (3d Cir. 1991); ***United States v. Piper***, 918 F.2d 839, 841 (9th Cir. 1990); ***United States v. Oliveras***, 905 F.2d 623, 632 (2d Cir. 1990); ***United States v. Perez-Franco***, 873 F.2d 455, 463 (1st Cir. 1989). However, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." USSG §3E1.1, comment. (n.1(a)); *see* ***United States v. Bindley***, 157 F.3d 1235 (10th Cir. 1998); *see also* ***United States v. McLeod***, 251 F.3d 78, 82-83 (2d Cir. 2001); ***United States v. Hicks***, 978 F.2d 722, 726 (D.C. Cir. 1992).

Courts have consistently rejected the argument that Section 3E1.1 unconstitutionally punishes a defendant who invokes the Fifth Amendment right not to incriminate himself or herself by admitting guilt. Denial of the two-level reduction does not constitute a penalty and does not implicate the Fifth Amendment. ***United States v. Clemons***, 999 F.2d 154, 159 (6th Cir. 1993); ***United States v. Saunders***, 973 F.2d 1354, 1362 (7th Cir. 1992); ***United States v. Frazier***, 971 F.2d 1076, 1084 (4th Cir. 1992); ***United States v. Piper***, 918 F.2d 839, 841 (9th Cir. 1990); ***United States v. Henry***, 883 F.2d 1010, 1011 (11th Cir. 1989); ***United States v. White***, 869 F.2d 822, 826 (5th Cir. 1989).

Once a court has determined that a defendant has accepted responsibility for his or her conduct, a court has no discretion to award less than the two-level reduction for acceptance of responsibility under Section 3E1.1(a). ***United States v. Carroll***, 6 F.3d 735, 741 (11th Cir. 1993) (holding that Section 3E1.1(a) does not contemplate a partial acceptance of responsibility or a court's being halfway convinced that a defendant accepted responsibility).

Appellate courts review a sentencing court's factual determination of whether an individual accepted responsibility deferentially, applying the clearly erroneous standard. ***United States v. Mack***, 159 F.3d 208, 220 (6th Cir. 1998); ***United States v. Fellows***, 157 F.3d 1198, 1202 (9th Cir. 1998); ***United States v. Bove***, 155 F.3d 44, 46 (2d Cir. 1998); ***United States v. Bonanno***, 146 F.3d 502, 512 (7th Cir. 1998); ***United States v. Marmolejo***, 139 F.3d 528, 531 (5th Cir. 1998); ***United States v. Cruz Camacho***, 137 F.3d 1220, 1226 (10th Cir. 1998); ***United States v. McQuay***, 7 F.3d 800, 801 (8th Cir. 1993). The sentencing court's factual finding is clearly erroneous only if egregiously, obviously, and substantially erroneous. ***United States v. Ivy***, 83 F.3d 1266, 1294-95 (10th Cir. 1996).

Note that application note 4 to Section 3E1.1 states that "[c]onduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply." USSG §3E1.1, comment. (n.4).

43.08[2] Filing of Delinquent Returns and Payment of Taxes

Generally, the payment of restitution, either prior to adjudication of guilt or prior to sentencing, can constitute some evidence that a defendant has accepted responsibility for his or her criminal conduct. *See* ***United States v. Asher***, 59 F.3d 622, 624-25 (7th Cir. 1995) (voluntary payment of restitution after scheme was discovered taken into account by reducing offense level for acceptance of responsibility); ***United States v. White***, 875 F.2d at 431 (performance of one or more acts listed in application note 1 does not necessarily equate to acceptance of responsibility). On the other hand, the district court may consider a defendant's failure to pay restitution, when the defendant has the financial wherewithal to do so, as evidence of a lack of acceptance of responsibility. *See* ***United States v. Zichettello***, 208 F.3d 72, 107 (2d Cir. 2000) (defendant, who pled guilty, failed to demonstrate acceptance of responsibility where he had $80,000 available and failed to give adequate explanation for not making promised $19,100 restitution payment); ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1993) (the defendants signed consent judgment only after they had been found guilty, and the defendants' offer to settle in part prior to trial showed willingness to concede responsibility only to extent they could avoid consequences of their criminal conduct).

Based on the above, it appears unlikely that a court of appeals would adopt a bright-line test whereby a defendant in a criminal tax case could be denied a reduction for acceptance of responsibility simply on the ground that he or she did not pay restitution. Certainly one can envision a case in which a defendant clearly manifests acceptance of responsibility, for example, by pleading guilty, filing amended returns, changing business practices to ensure timely payment of taxes, and agreeing to cooperate with the IRS or enter into a payment plan, but does not have the financial ability to pay restitution immediately. It would not seem that a current inability to pay would necessarily negate the other evidence of acceptance. The courts of appeals have emphasized that district courts should not unfairly discriminate in favor of defendants possessing greater financial resources than others. *See, e.g.*, ***United States v. Flowers***, 55 F.3d 218, 221-22 (6th Cir. 1995) (payment of restitution by check kiter to bank after the fact merely indicates some acceptance of responsibility, not grounds for downward departure – "we do not operate under a system that unfairly rewards financially able defendants who voluntarily make restitution after they are caught"); ***United States v. Shaffer***, 35 F.3d 110, 115 (3d Cir. 1994) (court of appeals noted that it agreed with the sentiment expressed by the district court at sentencing that a reduction of sentence because of a last minute payment of

restitution would unfairly discriminate in favor of those with greater financial resources).[12] Consequently, it is likely that a district court's refusal, without the consideration of any other factors, to grant an acceptance of responsibility reduction in a tax case simply because the defendant did not agree to pay restitution would be subject to challenge on appeal.

On the other hand, it is just as unlikely that a district court's ruling would be overturned for refusing a reduction for acceptance of responsibility when all the defendant did was pay restitution and there was nothing else to suggest that the defendant accepted responsibility. *See* ***United States v. Tandon***, 111 F.3d 482, 490 (6th Cir. 1997) (fact that the defendant filed amended returns and paid some additional money to IRS simply a factor to consider and did not require reduction for acceptance); ***White***, 875 F.2d at 431. After all, a defendant's motivation to pay restitution could be based on something other than acceptance of responsibility. *See* ***Harris***, 882 F.2d at 906-07.

Ultimately, the decision as to whether a defendant has demonstrated by a preponderance of the evidence that he or she has clearly accepted personal responsibility for criminal conduct is one for the district court to decide based on all of the facts and circumstances of the case. No bright-line tests appear to apply. Accordingly, it seems reasonable to conclude that a district court, without fear of reversal on appeal, could refuse to grant a reduction for acceptance of responsibility in a criminal tax case where the defendant, despite having the financial means to do so, refused to pay restitution for the criminal losses caused by his or her offense. In such a case, the refusal to grant the reduction would not simply be for failure to pay restitution, but for a failure to pay restitution in circumstances that reasonably could be characterized as reflective of a refusal to accept responsibility.

43.08[3] Timely Government Assistance

In certain circumstances, a defendant may be entitled to a three-level reduction for acceptance of responsibility. Section 3E1.1(b) provides:

> If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has

[12]The question in ***Shaffer*** was whether the loss in a check kiting scheme should be determined as of the date of detection of the scheme or as of the date of sentencing, at which time the loss might be reduced because of the payment of restitution.

> assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense by **1** additional level.

USSG §3E1.1(b).[13] Thus, Section 3E1.1(b) provides an additional one-level decrease in offense level for a defendant (1) whose offense level is 16 or greater before any reduction

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[13] From 1992 until April 30, 2003, Section 3E1.1(b) provided for an additional one-level reduction if:

the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. USSG §3E1.1(b) (Nov. 2002).

Note that this earlier version of Section 3E1.1(b) was written in the disjunctive and, therefore, a defendant did not need to satisfy both timeliness requirements of subsections (b)(1) and (b)(2) to qualify for the third point reduction. ***United States v. Eyler***, 67 F.3d 1386, 1391 (9th Cir. 1995); ***United States v. Lancaster***, 112 F.3d 156, 158 (4th Cir. 1997).

The version of Section 3E1.1(b) in effect until 2003 required a defendant to meet the requirements of Section 3E1.1(a), to have an offense level of at least 16, and to assist the authorities in a timely fashion in order to be eligible for the additional one-level reduction. Timeliness was the key to determining whether a defendant merited the additional one-level reduction. ***Lancaster***, 112 F.3d at 158; ***United States v. Thompson***, 60 F.3d 514, 517 (8th Cir. 1995). The focus of an inquiry into the timeliness of a defendant's conduct is "whether the defendant provides information in sufficient time to aid the Government in the investigation or prosecution of the case." ***Thompson***, 60 F.3d at 517; *see* ***Lancaster***, 112 F.3d at 158. As the Guidelines formerly noted, the conduct qualifying for a decrease in offense level under §§3E1.1(b)(1) and (2) generally will occur "particularly early in the case." §3E1.1, comment. (n.6) (Nov. 2002). This is so even if the information the defendant discloses is otherwise easily discoverable. ***Lancaster***, 112 F.3d at 158; ***United States v. Stoops***, 25 F.3d 820, 822-23 (9th Cir. 1994).

Timeliness of a defendant's acceptance of responsibility is a context-specific, factual question, to be determined on a case-by-case basis. USSG §3E1.1(b), comment. (n.6) (Nov. 2002); ***United States v. Ayers***, 138 F.3d 360, 364 (8th Cir. 1998); ***United States v. Marroquin***, 136 F.3d 220, 224 (1st Cir. 1998); ***Lancaster***, 112 F.3d at 158; ***United States v. McPhee***, 108 F.3d 287, 289 (11th Cir. 1997); ***United States v. Hawkins***, 78 F.3d 348, 352 (8th Cir. 1996); ***United States v. Eyler***, 67 F.3d 1386, 1391 (9th Cir. 1995); ***United States v. McConaghy***, 23 F.3d 351, 353 (11th Cir. 1993). Because it is fact-specific, timeliness "cannot always be measured by counting calendar pages." ***United States v. Dethlefs***, 123 F.3d 39, 43 (1st Cir. 1997). Pleas on the eve of trial are generally untimely. ***United States v. Brown***, 148 F.3d 1003, 1007(8th Cir. 1998); ***Wilson***, 134 F.3d at 871-72; ***United States v. Kimple***, 27 F.3d 1409, 1413 (9th Cir. 1994); ***United States v. Tello***, 9 F.3d 1119, 1125 (5th Cir. 1993); ***United States v. Donavan***, 996 F.2d 1343, 1345 (1st Cir. 1993). "Thus, a defendant who delays the disclosure of information to the Government until shortly before a scheduled trial does not qualify for the reduction." ***Lancaster***, 112 F.3d at 158-59; *see also* ***Thompson***, 60 F.3d at 517; ***United States v. Hopper***, 27 F.3d 378, 384-85 (9th Cir. 1994). Likewise,

under Section 3E1.1(a); (2) who admits responsibility under Section 3E1.1(a); and (3) who assists the government by timely notifying authorities of intent to plead guilty. However, the district court may not grant the additional one-level reduction absent a motion from the government. *See, e.g.*, ***United States v. Pacheco-Diaz***, 506 F.3d 545, 552 (7th Cir. 2007) ("[I]n calculating the correct guidelines range, the district court may not grant the third level reduction for acceptance of responsibility absent a motion by the government."); ***United States v. Chase***, 466 F.3d 310, 315 (4th Cir. 2006) (because the Guidelines authorize the third-level reduction only upon motion of the government, a district court is correct not to grant the reduction in the absence of a motion); ***United States v. Espinoza-Cano***, 456 F.3d 1126, 1134 & n.10 (9th Cir. 2006) (the prerequisite government motion in subsection (b) of Section 3E1.1 is a statutory requirement that the district court must apply in its calculations under the Guidelines); ***United States v. Moreno-Trevino***, 432 F.3d 1181, 1185-87 (10th Cir. 2005) (prosecutors retain discretion to move or not move for a third point acceptance of responsibility reduction); ***United States v. Smith***, 429 F.3d 620, 628 (6th Cir. 2005) (even after ***Booker***, a district court consulting the Guidelines remains constrained in awarding a Section 3E1.1(b) reduction absent a motion by the government); ***United States v. Smith***, 422 F.3d 715, 726-27 n.3 (8th Cir.2005) (under the PROTECT Act, there is no basis for a district court to grant the third level reduction *sua sponte*).

"[p]leas [on the eve of trial] do not help either the Government to avoid trial preparation or the court to manage its schedule efficiently, the two purposes served by the . . . additional one-point reduction." ***United States v. Gilbert***, 138 F.3d 1371, 1373 (3d Cir. 1998). However, a court may consider prosecutorial foot dragging when ascertaining a plea's timeliness. ***Wilson***, 134 F.3d at 872.

Moreover, under the old Section 3E1.1(b), once a court determined that a defendant had accepted responsibility for his criminal acts and met the three-prong test of Section 3E1.1, that court could not withhold the additional one-level reduction for issues other than timeliness. ***United States v. McPhee***, 108 F.3d 287, 289 (11th Cir. 1997) ("[W]hether or not to grant the additional one-level reduction is a matter of determining only whether the defendant timely provided information and notified authorities of his intention to enter a plea of guilty."); ***United States v. Townsend***, 73 F.3d 747, 755 (7th Cir. 1996); ***United States v. Huckins***, 53 F.3d 276, 279 (9th Cir. 1955). The First, Seventh, Eighth, and Ninth Circuits held that the additional one-point reduction was "mandatory," not permissive, once the defendant satisfied the relevant guideline criteria. *See* ***United States v. Mickle***, 464 F.3d 804, 809 (8th Cir. 2006); ***Marroquin***, 136 F.3d at 223; ***United States v. Villasenor-Cesar***, 114 F.3d 970, 973 (9th Cir. 1997); ***United States v. Cunningham***, 103 F.3d 596, 598 (7th Cir. 1996); ***United States v. Garrett***, 90 F.3d 210, 213 (7th Cir. 1996); ***Townsend***, 73 F.3d at 755; ***Eyler***, 67 F.3d at 1390; ***United States v. Talladino***, 38 F.3d 1255, 1262-63 (1st Cir. 1994).

Accordingly, in those cases in which the district court is using a version of the Guidelines that predates the 2003 amendments, the defendant may qualify for an additional one-level reduction absent a government motion. In contrast, the post-2003 versions of Section 3E1.1(b) permit a three-level reduction only upon motion of the government.

Accordingly, the government possesses significant discretion to determine whether a three-level reduction for acceptance of responsibility is warranted. The commentary to the Guidelines provides that this amendment to Section 3E1.1(b) was appropriate "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial." USSG §3E1.1, comment. (n.6). "Congress' aim in amending the provision makes plain that under the new version both the court and the government must be satisfied that the acceptance of responsibility is genuine." ***United States v. Sloley***, 464 F.3d 355, 360 (2d Cir. 2006).

43.09 DEPARTURES[14]

43.09[1] Generally

Section 5K of the Guidelines provides for departures from the prescribed Guidelines range in certain limited circumstances. Departures under Section 5K should not be confused with non-Guidelines sentences imposed pursuant to ***United States v. Booker***, 543 U.S. 220 (2005), which are often called "variances." *See* § 43.10, *infra* (discussing ***Booker*** variances). The Guidelines generally discourage departures, except in certain rare circumstances. Although Guidelines departures are reviewed for abuse of discretion, *see* ***United States v. Husein***, 478 F.3d 318, 325-26 (6th Cir. 2007),[15] the Guidelines significantly limit the sentencing court's ability to depart. Because a sentencing court has broader discretion to impose a non-Guidelines sentence by relying

[14] Since the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), there has been some confusion regarding the term "departure." Some judges have used the term to describe all sentences that are outside of the initially calculated Guidelines range, while others have distinguished between departures under Section 5K of the Guidelines and non-Guidelines sentences imposed pursuant to ***Booker***. *Compare* ***United States v. Irizarry***, 553 U.S. 708, 128 S. Ct. 2198, 2202 (2008) (treating "departure" as a term of art under the Guidelines that is distinct from an 18 U.S.C. § 3553(a) "variance") *with* ***Irizarry*** 128 S. Ct. at 2204 (Breyer, J., dissenting) (arguing that the term "departure" should encompass both variances and Guidelines departures). To avoid confusion, this Manual will use the term "departure" to refer only to departures under the Guidelines.

[15] In 2003, Congress passed a law mandating that appellate courts review departures under the Guidelines de novo. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650; 18 U.S.C. § 3742(e)(4). In ***United States v. Booker***, 543 U.S. 220 (2005), however, the Supreme Court excised 18 U.S.C. § 3742(e) from federal sentencing law. Since ***Booker***, the courts of appeals that have addressed the question have held that Guidelines departures should be reviewed for abuse of discretion. ***Husein***, 478 F.3d at 325-26; ***United States v. Menyweather***, 431 F.3d 692, 697 (9th Cir. 2005), amended on other grounds on denial of rehearing, 447 F.2d 625 (9th Cir. 2006); ***United States v. Smith***, 417 F.3d 483, 489-90 (5th Cir. 2005); ***United States v. Selioutsky***, 409 F.3d 114, 119 (2d Cir. 2005).

on the 18 U.S.C. § 3553(a) factors, it seems likely that Guidelines departures will become less common. However, departures remain part of the Guidelines calculation, and most of the pre-***Booker*** precedents governing departures remain good law.

43.09[2] Departures for Aggravating or Mitigating Circumstances

Section 5K provides a non-exhaustive outline of factors that the court may consider in enhancing or reducing a defendant's sentence. These factors include, but are not limited to:

-the victim's death (§5K2.1);

-the victim's physical injury (§5K2.2);

-the victim's extreme psychological injury (§5K2.3);

-abduction or unlawful restraint of the victim (§5K2.4);

-property damage or loss not otherwise accounted for within the Guidelines (§5K2.5);

-weapons and dangerous instrumentalities (§5K2.6);

-disruption of government function unless inherent in the offense (§5K2.7);[16]

-extreme conduct to victim (§5K2.8);

-criminal purpose (§5K2.9)

-victim's contributory conduct (§5K2.10);

-lesser harm avoided (§5K2.11);

-coercion and duress (§5K2.12);

-involuntarily diminished capacity (§5K2.13);[17]

[16] *See generally* ***United States v. Gunby***, 112 F.3d 1493 (11th Cir. 1997); ***United States v. Horton***, 98 F.3d 313 (1996); ***United States v. Heckman***, 30 F.3d 738 (6th Cir. 1994) (upward departure justified on this basis where defendant filed at least 79 false IRS Forms 1099); ***United States v. Flinn***, 18 F.3d 826 (10th Cir. 1994) (one-point enhancement under this provision does not preclude another one-point increase for financial loss to government); ***United States v. Kikumura***, 918 F.2d 1084 (3d Cir. 1990).

-public welfare (§5K2.14);

-voluntary disclosure prior to discovery (§5K2.16);[18]

-possession of high-capacity, semiautomatic firearms during offense (§5K2.17);

-violent gang membership (§5K2.18);

-post-sentencing rehabilitative efforts (§5K2.19);

-aberrant behavior (§5K2.20);

-dismissed and uncharged conduct (§5K2.21);

-discharged terms of imprisonment (§5K2.23); and

-commission of offense while wearing unauthorized insignia or uniform (§5K2.24).

When contemplating departure, the sentencing court must first determine the appropriate Guidelines sentence. Then the court must consider whether there are aggravating or mitigating circumstances present that warrant departure.[19] ***United States v. Davern***, 970 F.2d 1490, 1493 (6th Cir. 1992). The defendant must prove by a preponderance of the evidence that he or she is entitled to a downward departure. ***United States v. Wilson***, 134 F.3d 855, 871 (7th Cir. 1998); ***United States v. Urrego-Linares***, 879 F.2d 1234, 1238 (4th Cir. 1989). The government bears the burden of proof by a preponderance of the evidence when seeking an upward departure. ***United States v. Walls***, 80 F.3d 238, 241 (7th Cir. 1996); ***United States v. Okane***, 52 F.3d 828, 835 (9th Cir. 1995). A district court's discretionary decision not to depart downward is not appealable when the Guidelines range was properly computed. ***United States v. Burdi***, 414 F.3d 216, 220 (1st Cir. 2005); ***United States v. Stinson***, 465 F.3d 113, 114 (2d Cir.

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[17] "'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." USSG §5K2.13, comment. (n.1).

[18] *See* ***United States v. Aerts***, 121 F.3d 277, 279 (7th Cir. 1997); ***United States v. Besler***, 86 F.3d 745 (7th Cir. 1997).

[19] In making this determination, a court may include relevant conduct. A sentencing court may upwardly depart on the basis of conduct in dismissed counts. ***United States v. Baird***, 109 F.3d 856, 862 (3d Cir. 1997).

2006); ***United States v. Cooper***, 437 F.3d 324, 333 (3d Cir. 2006); ***United States v. Allen***, 491 F.3d 178, 193 (4th Cir. 2007); ***United States v. Puckett***, 422 F.3d 340, 345 (6th Cir. 2005); ***United States v. Frokjer***, 415 F.3d 865, 874-75 (8th Cir. 2005); ***United States v. Sierra-Castillo***, 405 F.3d 932, 936 (10th Cir. 2005); ***United States v. Winingear***, 422 F.3d 1241, 1245-46 (11th Cir. 2005).

In addition to the reasons for departure specifically delineated by Section 5K, the court may depart when 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." 18 U.S.C. § 3553(b); USSG §5K2.0; ***Burns v. United States***, 501 U.S. 129, 133 (1991). Thus, a sentencing court may only depart from the "mechanical dictates" of the Guidelines when the court finds that the case falls outside the "heartland" of cases covered by the Guidelines. *Id.*; *see generally*, USSG §5K2.0, comment. The Seventh Circuit characterizes the "outside the heartland cases" in the following manner:

> The Sentencing Guidelines were intended to carve out a "heartland," or a set of typical cases, against which each successive case would be measured. Departures from the guidelines are allowed only in cases that involve factors for which the guidelines do not adequately account, either because the factors are nowhere incorporated into the guidelines or because the factors are present in an exceptional way. Therefore, a factor supporting departure from the guidelines must be sufficiently unusual either in type or degree to take the case out of the Guidelines' heartland.

United States v. Carter, 122 F.3d 469, 473 (7th Cir. 1997) (citations and punctuation omitted), (*quoting* ***United States v. Otis***, 107 F.3d 487, 490 (7th Cir. 1997), and ***Koon v. United States***, 518 U.S. 81, 96 (1996)).

Essentially, for purposes of departure, a court may take into consideration any factor that the Guidelines do not proscribe:

> . . . [A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no -- as it will be most of the time -- the sentencing court must determine whether the factor, as

> occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.

Koon, 518 U.S. at 109; *see also* ***United States v. Whitaker***, 152 F.3d 1238, 1239-40 (10th Cir. 1998); ***United States v. Rhodes***, 145 F.3d 1375 (D.C. Cir. 1998); ***United States v. O'Hagan***, 139 F.3d 641, 657 (8th Cir. 1998); ***United States v. Arce***, 118 F.3d 335, 339 (5th Cir. 1997); ***United States v. Brown***, 98 F.3d 690, 693 (2d Cir. 1996).

In ***Koon***, the Supreme Court agreed with then-Chief Circuit Judge Breyer's explanation in ***United States v. Rivera***, 994 F.2d 942, 949 (1st Cir. 1993), that a sentencing court considering a departure should ask itself the following questions:

> 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
>
> 2) Has the Commission forbidden departures based on those features?
>
> 3) If not, has the Commission encouraged departures based on those features?
>
> 4) If not, has the Commission discouraged departures based on those features? ***Koon***, 518 U.S. at 95 (internal quotation marks omitted). The Supreme Court further explained:
>
> If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent."

Id. at 95-96 (internal citations omitted).

The Guidelines list certain factors that can never be bases for departure: 1) race, sex, national origin, creed, religion, socioeconomic status, USSG §5H1.10; 2) lack of guidance as a youth, USSG §5H1.12; 3) drug or alcohol dependance, USSG §5H1.4; and 4) economic hardship, USSG §5K2.12. Further, it has been held that Section 5K2.0 does not authorize a sentencing court to grant a substantial assistance departure without a motion from the government since the Guidelines adequately consider substantial assistance departures in USSG §5K1.1. ***United States v. Maldonado-Acosta***, 210 F.3d 1182, 1184 (10th Cir. 2000).

Courts have departed from the guidelines in a myriad of circumstances after finding that the circumstances surrounding the case placed it "outside the heartland." A few examples of departures that courts found to be supported by circumstances taking a case outside the heartland follow: (1) upward departure where the defendant was a tax defier who had contempt for government, "cult-like belief that the laws of the United States do not apply" to him, and high risk of recidivism, ***United States v. Simkanin***, 420 F.3d 397, 414-15, 417-19 (5th Cir. 2005); (2) upward departure where defendants' use of false sight drafts and filing of false IRS Forms 8300 was not adequately reflected in the Guidelines range, ***United States v. Anderson***, 353 F.3d 490, 508-10 (6th Cir. 2003); (3) upward departure where defendant egregiously obstructed justice by conspiring to hide millions in assets from the IRS, ***United States v. Furkin***, 119 F.3d 1276, 1284 (7th Cir. 1997); (4) downward departure where government agent in conspiracy and money laundering sting manipulated defendant through sexual misconduct, ***United States v. Nolan-Cooper***, 155 F.3d 221, 244 (3d Cir. 1998); (5) downward departure for extraordinary rehabilitation effort, ***Whitaker***, 152 F.3d at 1239-40; (6) upward departure where defendant misrepresented himself as acting on behalf of charitable organization, ***United States v. Smith***, 133 F.3d 737, 750 (10th Cir. 1997); (7) downward departure for extraordinary pre-conviction record of civic contributions, ***United States v. Crouse***, 145 F.3d 786, 791 (6th Cir. 1998); (8) upward departure for use of minor to perpetrate mail fraud, ***United States v. Porter***, 145 F.3d 897 (7th Cir. 1998); and (9) downward departure for combination of factors, not one of which, if individually considered, would take a situation out of the "heartland." ***United States v. Rioux***, 97 F.3d 648, 663 (2d Cir. 1996).

The defendant's intent to pay eventually has been sustained as the basis for a downward departure in a tax evasion case. ***United States v. Brennick***, 134 F.3d 10, 13-15 (1st Cir. 1998). Job loss to innocent employees has also been upheld as a basis for a downward departure in a tax evasion case. ***United States v. Olbres***, 99 F.3d 28, 34 (1st

Cir. 1996) (under ***Koon v. United States***, 518 U.S. 81, 109-10 (1996), a factor the Guidelines neither forbids nor discourages may be considered).

Appellate courts have declined to find cases "outside the heartland" where (1) a defendant falsely testified that his violations of the tax laws were not willful and thereby disqualified himself for an aberrant behavior departure, ***United States v. Mikutowicz***, 365 F.3d 65, 79-80 (1st Cir. 2004); (2) a defendant made restitution within the Guidelines' contemplation, ***United States v. O'Kane***, 155 F.3d 969, 975 (8th Cir. 1998); *see also* ***United States v. Martin***, 363 F.3d 25, 47-49 (1st Cir. 2004) (holding that downward departure based on defendant's pretrial restitution did not justify downward departure when defendant had already received downward adjustment for acceptance of responsibility); (3) a defendant was willing to be deported, ***United States v. Marin-Castenada***, 134 F.3d 551, 555 (3d Cir. 1998); ***United States v. Clase-Espinal***, 115 F.3d 1054, 1059 (1st Cir. 1997); (4) district courts reconciled state and federal sentencing disparities and differences between codefendants, ***United States v. Jones***, 145 F.3d 959, 962 (8th Cir. 1998); ***United States v. Schulte***, 144 F.3d 1107, 1109 (7th Cir. 1998); ***United States v. Willis***, 139 F.3d 811, 812 (11th Cir. 1998); ***United States v. Snyder***, 136 F.3d 65, 67 (1st Cir. 1998); ***United States v. Searcy***, 132 F.3d 1421, 1422 (11th Cir. 1998); (5) a defendant asserted "cultural differences," ***United States v. Tomono***, 143 F.3d 1401, 1404 (11th Cir. 1998); ***United States v. Weise***, 128 F.3d 672 (8th Cir. 1997);[20] (6) the sentencing court considered the costs of imprisoning the defendant, ***United States v. Wong***, 127 F.3d 725, 728 (8th Cir. 1997); (7) a relatively minor white-collar offender who used credit cards without authorization was harshly punished under the Guidelines, ***United States v. Weaver***, 126 F.3d 789, 793 (6th Cir. 1997); and (8) a defendant committed a fraud of long duration and great extent against eight financial institutions, depriving them of $500,000, ***United States v. Alpert***, 28 F.3d 1104, 1108-09 (11th Cir. 1994).

Courts consistently hold that only "extraordinary" family responsibilities warrant downward departure. *See, e.g.*, ***United States v. Jones***, 158 F.3d 492, 499 (10th Cir. 1998); ***United States v. Archuleta***, 128 F.3d 1446, 1550 (10th Cir. 1997); ***United States v. Carter***, 122 F.3d 469, 474 (7th Cir. 1997); ***United States v. Romero***, 32 F.3d 641, 653 (1st Cir. 1994); ***United States v. Johnson***, 964 F.2d 124, 128 (2d Cir. 1992); ***United States v. Thomas***, 930 F.2d 526, 530 (7th Cir. 1991). "Disruption of the defendant's life,

[20] *But see* ***United States v. Lipman***, 133 F.3d 726, 730 (9th Cir. 1998) (holding "cultural assimilation" a basis for downward departure).

and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." ***United States v. Tejeda***, 146 F.3d 84, 87 (2d Cir. 1998) (internal quotation marks and citations omitted). Moreover, the Guidelines specifically provide that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. USSG §5H1.6.

To similar effect, defendants' mental and physical health problems rarely rise to the level of "extraordinary physical impairment" necessary for downward departure. USSG §§5H1.3, 5H1.4. Sentencing courts, however, have found extraordinary impairments in the following cases: (1) liver cancer where death is imminent, ***United States v. Maltese***, No. 90-CR–87-19, 1993 WL 222350, at *10 (N.D. Ill. 1993); and (2) cancer spread, combined with removal of testicles and ongoing chemotherapy, ***United States v. Velasquez***, 762 F. Supp. 39, 40 (E.D.N.Y. 1991). Appellate courts, on the other hand, have affirmed denial of downward departures to defendants with AIDS, ***United States v. Rabins***, 63 F.3d 721, 727-29 (8th Cir. 1995); and past brain tumor operations, ***United States v. Carey***, 895 F.2d 318, 324 (7th Cir. 1990). Where a defendant's condition merely requires monitoring, a sentencing court's refusal to depart downwardly will be affirmed. ***United States v. Altman***, 48 F.3d 96, 104 (2d Cir. 1995).

When a sentencing court finds that departure from the prescribed guideline range is merited, 18 U.S.C. § 3553(c)(1) requires that the court state on the record its specific reasons for its imposition of the particular sentence. The sentencing court must state the specific reasons for the departure and the sentence imposed must be reasonable in light of the articulated reasons. ***United States v. Porter***, 23, F.3d 1274, 1280 (7th Cir. 1994). A court may satisfy the requirement to state specific reasons for the departure by adopting legally sufficient facts as set forth in a presentence investigation report. ***United States v. Dale***, 991 F.2d 819, 856-57 (D.C. Cir. 1993); *cf.* ***United States v. Charroux***, 3 F.3d 827, 836 (5th Cir. 1993). A sentencing court must justify the "particular" sentence imposed. ***United States v. Zanghi***, 209 F.3d 1201, 1205 (10th Cir. 2000) (appellate court remanded sentencing determination to district court for explanation as to supervised release and home confinement when district court only justified prison term). Additionally, Rule 32 of the Federal Rules of Criminal Procedure requires a district court to furnish reasonable notice to the parties of its intent to depart from the guidelines and to identify with

specificity the ground on which it is contemplating a departure. ***Burns***, 501 U.S. at 138-39.[21]

Within the parameters of 18 U.S.C. § 3553, departure is within the sentencing court's sound discretion. ***Koon***, 518 U.S. at 109; ***United States v. Kaye***, 140 F.3d 86, 87-88 (3d Cir. 1998); ***United States v. Morris***, 139 F.3d 582, 584 (8th Cir. 1998). Likewise, a sentencing court may properly refuse to exercise its discretion to depart from the Guidelines. ***United States v. Brye***, 146 F.3d 1207, 1213 (10th Cir. 1998); ***United States v. Strickland***, 144 F.3d 412, 417 (6th Cir. 1998); ***United States v. Rizzo***, 121 F.3d 794, 798-99 (1st Cir. 1997); ***United States v. Hernandez-Reyez***, 114 F.3d 800, 801 (8th Cir. 1997); ***United States v. Washington***, 106 F.3d 983, 1016 (D.C. Cir. 1997); ***United States v. Moore***, 54 F.3d 92, 102 (2d Cir. 1995); ***United States v. Byrd***, 53 F.3d 144, 145 (6th Cir. 1995).

In order to sustain a decision to depart upward or downward from the applicable sentencing guideline range, the sentencing court must (1) correctly interpret the Guidelines' policy statements, (2) accurately perform mathematical calculations, and (3) articulate the reason for its decision on the record. ***United States v. Kingdom (U.S.A.), Inc.***, 157 F.3d 133, 135 (2d Cir. 1998); ***United States v. Isaza-Zapata***, 148 F.3d 236, 238 (3d Cir. 1998); ***United States v. Szabo***, 147 F.3d 559, 561 (7th Cir. 1998). It must articulate the specific aggravating or mitigating circumstance and how it differs from "heartland" conduct in the commission of the crime. ***United States v. Onofre-Segarra***, 126 F.3d 1308, 1310 (11th Cir. 1997); ***United States v. Miller***, 78 F.3d 507, 511 (11th Cir. 1996). An appellate court will use an abuse of discretion standard when reviewing a trial court's evaluation of whether the facts and circumstances place the case outside the "heartland." ***Santoyo***, 146 F.3d at 525. Finally, a court must furnish reasonable notice to the parties of its intent to depart and to identify with specificity the grounds for departure. ***Burns***, 501 U.S. at 138-39.

43.09[3] Departure Based on Substantial Assistance to Authorities

Title 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) grant a court, upon government motion, limited authority to impose a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence,

[21] Note that the Supreme Court has held that advance notice is *not* required if the court is varying from the Guidelines pursuant to ***Booker*** and 18 U.S.C. § 3553(a). ***Irizarry***, 128 S. Ct. at 2202-03.

when the defendant has provided substantial assistance to the government. The Sentencing Guidelines permit the government to request a downward departure from the Guidelines pursuant to Section 5K1.1 when the defendant has rendered substantial assistance in the investigation or prosecution of another person.[22]

Analyzing the interplay between 18 U.S.C. § 3553(e) and 28 U.S.C. § 944(n) and USSG §5K1.1, the Supreme Court addressed the issue of whether a government motion under Section 5K1.1 for departure from the Guidelines range for substantial assistance permits a sentencing court to depart below the statutory minimum. ***Melendez v. United States***, 518 U.S. 120 (1996). The Supreme Court held that in order for the court to sentence a defendant to a range below the statutory minimum, the government must have so moved the court pursuant to 18 U.S.C. § 3553(e). A motion pursuant to Section 5K1.1 for a departure below the guideline range has the effect of "withholding from the district court the power to depart below the statutory minimum." *See generally*, ***Melendez***, 518 U.S. at 129-131; ***In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")***, 149 F.3d 1198, 1201 (D.C. Cir. 1998) (government motion under §5K1.1 for departure below sentencing guideline range does not also permit departure below the statutory minimum under 18 U.S.C. § 3553(e)) (citation omitted); ***United States v. Coleman***, 132 F.3d 440, 442 (8th Cir. 1998). The District of Columbia Circuit, however, determined that a sentencing court may depart downward for substantial assistance in the absence of a motion by the government where the circumstances of the case place it beyond the Guidelines' "heartland." ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at 1202.

Thus, within the parameters of Section 5K1.1, upon motion by the government, the sentencing court may make a downward departure from the Guidelines range because the defendant substantially assisted the government. The government motion must state that the defendant provided substantial assistance in the investigation or prosecution of another person who committed an offense. Section 5K1.1(a) sets forth a non-exhaustive list of considerations for the court to take into account in determining the degree of departure:

[22] But a defendant's refusal to assist authorities may not be considered an aggravating sentencing factor. USSG §5K1.2.

> The appropriate reduction shall be determined by the court for reasons stated[23] that may include, but are not limited to, consideration of the following:
>
> > (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;[24]
> >
> > (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
> >
> > (3) the nature and extent of the defendant's assistance;
> >
> > (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> >
> > (5) the timeliness of the defendant's assistance. USSG §5K1.1. Substantial assistance is directed to the investigation and prosecution of persons other than the defendant, while acceptance of responsibility is directed to the defendant's own affirmative recognition of responsibility for his own conduct.

USSG §5K1.1, comment. (n.2).

In the event that the government elects not to file a motion for downward departure and there is a plea agreement that contains language regarding the availability of a Section 5K1.1 motion, the sentencing court applies settled principles of contract law in resolving the defendant's assertion that the government agreed to file a Section 5K1.1 motion. ***United States v. Isaac***, 141 F.3d 477, 482-83 (3d Cir. 1998). In plea agreements, the government regularly refers to the possibility of a Section 5K1.1 motion, but reserves discretion to determine whether such a motion is appropriate. ***United States v. Benjamin***, 138 F.3d 1069, 1063 (6th Cir. 1998); ***United States v. Watson***, 988 F.2d 544, 552 n.3 (5th Cir. 1993). The government is the appropriate party to assess whether the defendant

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[23] *See* 18 U.S.C. § 3553(c).

[24] When the defendant's assistance in an investigation became almost useless because the target of the investigation died, the court was within its discretion to consider that fact in determining the extent of any departure. ***United States v. Spiropoulos***, 976 F.2d 155, 162 (3d Cir. 1992).

has performed the conditions of his plea agreement, even if the plea agreement is silent as to the appropriate party. ***United States v. Snow***, 234 F.3d 187, 190 (4th Cir. 2000). In the event that the government elects not to file the motion, the sentencing court may review the government's refusal to make a motion for downward departure "if that refusal was based on an unconstitutional motive," such as bias against the defendant's race or religion. ***Wade v. United States***, 504 U.S. 181, 185-86 (1992); ***United States v. Santoyo***, 146 F.3d 519, 523 (7th Cir. 1998); ***United States v. Carter,*** 122 F.3d 469, 476 (7th Cir. 1997). The defendant bears the burden of making a substantial threshold showing of an unconstitutional motive before he or she is entitled to discovery or an evidentiary hearing on the issue. ***Wade***, 504 U.S. at 186; ***United States v. Kelly,*** 14 F.3d 1169, 1177 (7th Cir. 1994); *accord* ***United States v. Isaac***, 141 F.3d at 484; ***United States v. Leonard***, 50 F.3d 1152, 1157-58 (2d Cir. 1995). The court may also review whether the government's refusal was in bad faith and, accordingly, in violation of the plea agreement. ***Isaac***, 141 F.3d at 483-84; ***United States v. Rexach***, 896 F.2d 710, 713 (2d Cir. 1990). "The sole requirement is that the government's position be based on an honest evaluation of the assistance provided and not on considerations extraneous to that assistance." ***Isaac*** at 484. There is a split of opinion as to whether the government forfeits its discretion to move for a Section 5K1.1 departure by failing to reserve it in a plea agreement. *See* ***Snow***, 234 F.3d at 190; *but see* ***United States v. Courtois***, 131 F.3d 937, 938-39 (10th Cir. 1997) (contractual silence waives the government's discretion); ***United States v. Price***, 95 F.3d 364, 368 (5th Cir. 1996) (same).

If the plea agreement contains an unambiguous and unconditional promise to file a downward departure motion and the promise was consideration for the guilty plea, the defendant is entitled to either specific performance or withdrawal of the guilty plea, unless the government proves that the defendant breached the plea agreement. *See, e.g.*, ***Benjamin***, 138 F.3d at 1073-74; ***United States v. Mitchell***, 136 F.3d 1192, 1194 (8th Cir. 1998). Where the government alleges that the defendant breached the plea agreement, it must prove the breach by a preponderance of the evidence, before the government can be relieved of its obligations under the plea agreement. ***Benjamin***, 138 F.3d at 1073; ***United States v. Crowell***, 997 F.2d 146, 148 (6th Cir. 1993); ***United States v. Tilley***, 964 F.2d 66, 71 (1st Cir. 1992).

Appellate review of a district court decision whether to depart downward pursuant to a Section 5K1.1 motion is available only in limited situations. Review of a sentence is governed by 18 U.S.C. § 2742 and provides for review in four situations: the sentence (1)

was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) was not within the applicable Guidelines range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. 18 U.S.C. § 2742. An appellate court "may not review the merits of a court's decision not to downwardly depart, or probe the sufficiency of its consideration, so long as the sentence imposed is not otherwise a violation of law or a misapplication of the Guidelines." ***United States v. Campo***, 140 F.3d 415, 419 (2d Cir. 1998).

A sentencing court's refusal to consider a Section 5K1.1 motion is appealable. ***Campo***, 140 F.3d at 418. In ***Campo***, the district court refused to grant a downward departure despite the filing of a Section 5K1.1 motion because the government did not recommend a specific below-guidelines range. The Second Circuit noted that, although the district court had discretion whether to grant the motion, the district court's refusal to exercise that discretion resulted in a sentence imposed "in violation of law." ***Campo***, 140 F.3d at 418. Likewise, a court's failure to recognize its authority to depart from the guidelines is legal error, and thus appealable. *See* ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at 1199 (finding that, although district court decisions not to depart are generally not subject to appellate review, appellate court has jurisdiction where appellant argues that district court misconstrued legal authority under the Guidelines); ***United States v. Adeniyi***, 912 F.2d 615, 619 (2d Cir. 1990); *accord* ***United States v. Poff***, 926 F.2d 588, 590-91 (7th Cir. 1991) *(en banc*) (court's failure to appreciate its authority to depart is reviewable, while court's decision not to depart is unreviewable).

Although a district court's decision not to depart is generally unreviewable, an appellate court will review a trial court's discretionary refusal to grant a downward departure when the defendant argues that the district court misconstrued the legal standards governing its authority to depart. ***Carter***, 122 F.3d at 471 n.1. In such a case, the court reviews for abuse of discretion. ***Id.*** at 472. A district court abuses its discretion when it makes an error of law. ***Koon***, 518 U.S. at 100. When the issue is whether a given factor could ever be a permissible basis for departure, the question is one of law subject to *de novo* review. ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at 1198.

43.10 VARIANCES

Under the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), district courts have the option of varying from the advisory Guidelines range.

After the district court performs its Guidelines calculations, it must consider the advisory range along with the factors listed in 18 U.S.C. § 3553(a). The court has discretion to impose a sentence outside of the advisory Guidelines range -- a variance, or deviation -- if it finds that a variance will better serve the statutory goals than a Guidelines sentence. Variances are distinct from departures under the Guidelines, as courts possess broader discretion to impose a variance sentence. *See* ***United States v. Irizarry***, 553 U.S. 708, 128 S. Ct. 2198, 2202 (2008) (treating "departure" as a term of art under the Guidelines that is distinct from a "variance" under 18 U.S.C. § 3553(a)). In ***Gall v. United States***, 552 U.S. 38, 50 (2007), the Supreme Court emphasized that sentencing courts "may not presume that the Guidelines range is reasonable." Rather, a district court "must make an individualized assessment based on the facts presented," and, if the court decides that a non-Guidelines sentence is appropriate, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." ***Id***. at 50. In *Gall*, the Supreme Court rejected appellate review that would require "extraordinary" circumstances to justify a variance, or that would employ a "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." ***Id***. at 47.

Although the Supreme Court made clear in ***Gall*** that a district court's decision to vary from the Guidelines is entitled to deference, the Court also indicated that appellate courts should carefully review sentences for procedural and substantive errors. ***Gall***, 552 U.S. at 51. Procedural errors may include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." ***Id***. Substantive review involves evaluating the reasonableness of the sentence while considering "the totality of the circumstances, including the extent of any variance from the Guidelines range." ***Id***.

In ***Gall***, the Supreme Court held that the district court did not abuse its discretion in imposing a probationary sentence when the Guidelines provided for a range of 30 to 37 months' imprisonment. ***Gall***, 552 U.S. at 41, 43. Although the defendant had participated in an extensive drug conspiracy, the district court found that several factors justified a below-Guidelines sentence, including "the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful

business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct." ***Id.*** at 593.

In a case decided on the same day as *Gall*, the Supreme Court held that a sentencing court can consider the disparity between Guidelines sentences for crack and powder cocaine offenses, and that the disparity can justify more lenient sentences for crack offenders than the Guidelines recommend. ***Kimbrough v. United States,*** 552 U.S. 85, 91 (2007). Although the Court's holding in ***Kimbrough*** suggests that a district court's disagreement with the policies embodied in the Guidelines can justify a variance, the Court took pains to point out that courts are not free to simply ignore the Guidelines. ***Id.*** at 108-10. The Court emphasized that the Guidelines remain the "starting point and initial benchmark" for sentencing, and it indicated that the Sentencing Commission has an institutional advantage over district courts with regard to using empirical data to establish national sentencing standards. ***Id.*** at 108 (citations omitted). In addition, the Court stated that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." ***Id.*** at 109 (internal quotation marks omitted); *see also* ***United States v. Higdon***, 531 F.3d 561, 562 (7th Cir. 2008) ("As a matter of prudence, however, in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.").

Since the Supreme Court decided ***Gall*** and ***Kimbrough***, the courts of appeals have generally reviewed district courts' sentencing decisions deferentially. *See, e.g.*, ***United States v. Martin***, 520 F.3d 87, 96 (1st Cir. 2008) (noting "the degree of respectful deference that is owed to the sentencing court's exercise of its informed discretion"); ***United States v. Wise***, 515 F.3d 207, 217-18 (3d Cir. 2008) (substantive reasonableness review and review of district court's factual findings require substantial deference to district court); ***United States v. Pauley***, 511 F.3d 468, 474-75 (4th Cir. 2007) (affirming downward variance); ***United States v. Bolds***, 511 F.3d 568 (6th Cir. 2007) (affirming upward variance); ***United States v. Braggs***, 511 F.3d 808, 812 (8th Cir. 2008) (same).

Appellate courts have been willing to vacate sentences when the sentencing court has committed a procedural error. *See, e.g.*, ***United States v. Higdon***, 531 F.3d 561, 562-63 (7th Cir. 2008) (vacating sentence because of district court's numerous factual and procedural errors, and recommending that sentencing courts explain reasons for imposing

a non-Guidelines sentence in a written order); ***United States v. Gonzalez***, 529 F.3d 94, 97-99 (2d Cir. 2008) (vacating sentence because district court's failure to provide defendant with opportunity for allocution was impermissible procedural error); ***United States v. Bartee***, 529 F.3d 357, 358 (6th Cir. 2008) (reversing on the basis of Guidelines calculation error); ***In re Sealed Case***, 527 F.3d 188, 192-93 (D.C. Cir. 2008) (district court's failure to explain reasons resulted in unreasonable sentence); ***United States v. Desantiago-Esquivel***, 526 F.3d 398, 401 (8th Cir. 2008) (holding that district court's imposition of alternative sentences was reversible procedural error); ***United States v. Grissom***, 525 F.3d 691, 697-99 (9th Cir. 2008) (finding district court's failure to consider relevant conduct reversible procedural error); ***United States v. Langford***, 516 F.3d 205, 212 (3d Cir. 2008) (concluding that error in Guidelines calculation was "significant procedural error" requiring resentencing). A procedural error may not result in reversal, however, if the court of appeals determines that the error was harmless. *See* ***United States v. Williams***, 517 F.3d 801, 808 (5th Cir. 2008) (district court's Guidelines calculation error was harmless and did not warrant resentencing, because sentence would not have been different but for error).

Although courts have been less willing to find sentences to be substantively unreasonable, in ***United States v. Cutler***, 520 F.3d 136, 164 (2d Cir. 2008), the Second Circuit held that a significant downward variance in a tax case *was* substantively unreasonable. The two defendants in this case -- Cutler and Freedman -- were involved in a $100 million bank fraud scheme. Cutler was also involved in a tax fraud scheme that caused a $5 million tax loss. The advisory Guidelines range for Cutler was 78 to 97 months, and Freedman's advisory guidelines range was 108 to 135 months. ***Id***. at 146, 149. Through a combination of Guidelines departures and downward variances, the court ultimately sentenced Cutler to 12 months' imprisonment and Freedman to three years' probation. ***Id***. at 139. With respect to Cutler, the Second Circuit rejected the district court's findings that the amount of loss in this case overstated the seriousness of the offense, ***id***. at 161; that the length of a term of imprisonment does not affect deterrence in criminal tax cases, ***id***. at 163-64; and that Cutler had extraordinary family responsibilities, ***id***. at 166. The court of appeals faulted the district court for completely disregarding the Guidelines provision that a larger amount of loss justifies a longer sentence. ***Id***. at 158-62. Similarly, the court of appeals found that the district court "gave no explanation for its disagreement with the Commission's policy judgments, reflected in the Guidelines as explained by the background commentary, that tax offenses, in and of themselves, are serious offenses; that the greater the tax loss, the more serious the offense; and that the

greater the potential gain from the tax offense, the greater the sanction that is necessary for deterrence." ***Id***. at 163. The Second Circuit ultimately concluded that both Cutler and Freedman's sentences were substantively unreasonable. ***Id***. at 176.

In ***United States v. Hunt***, 521 F.3d 636, 639 (6th Cir. 2008), a jury convicted the defendant of various health care fraud offenses. The advisory Guidelines range was 27 to 33 months, but the district court found that the defendant lacked fraudulent intent and imposed a downward variance of five years' probation. ***Id***. at 641. The Sixth Circuit ruled that this sentence was substantively unreasonable, because "it would be improper for the judge in sentencing to rely on facts directly inconsistent with those found by the jury beyond a reasonable doubt." ***Id***. at 649.

43.11 TAX DIVISION POLICY

It has long been a priority of the Tax Division to pursue vigorous prosecution of a wide range of tax crimes to deter taxpayer fraud and to foster voluntary compliance. Consistent with this long-standing priority, the Tax Division has issued a number of statements concerning policy and procedures as to pleas and sentencing.

43.12 SENTENCING POLICIES

43.12[1] Departures and Variances from the Guidelines

As noted above, the sentencing court must calculate and consider the applicable Guidelines range. Tax Division attorneys may recommend, without further approval, a departure, either upward or downward, based on any of the factors listed in Section 5K2 of the guidelines. However, within the Tax Division, approval of the appropriate Section Chief is required for an attorney to seek either: (a) a downward departure under Section 5K1.1 for substantial assistance to authorities or (2) an upward or downward departure for any factor other than one of those set out in Section 5K2. Prior to making such a recommendation, the Tax Division attorney must consult with the local U.S. Attorney's office to insure that the proposed departure is consistent with the policy of that office.

Normally, the government attorney in a tax case should not recommend that there be no period of incarceration. *But see* USAM 6-4.340.

As for variances, it is general Tax Division policy that sentences within the advisory Guidelines range adequately reflect the seriousness of the offense, promote deterrence, and reduce unwarranted sentencing disparities. Accordingly, Tax Division attorneys should seek supervisory approval before recommending either an upward or downward variance at sentencing.

43.12[2] Costs of Prosecution

The principal substantive criminal tax offenses (*i.e.*, 26 U.S.C. §§ 7201, 7203, 7206(1) & (2)) provide for the mandatory imposition of costs of prosecution upon conviction. Courts increasingly recognize that imposition of costs in criminal tax cases is mandatory and constitutional. *See, e.g.*, ***United States v. Jungels***, 910 F.2d 1501, 1504 (7th Cir. 1990); ***United States v. Palmer***, 809 F.2d 1504, 1506-07 (11th Cir. 1987); ***United States v. Saussy***, 802 F.2d 849, 855 (6th Cir. 1986); ***United States v. Fowler***, 794 F.2d 1446, 1449 (9th Cir. 1986); ***United States v. Wyman***, 724 F.2d 684, 688 (8th Cir. 1984); ***United States v. Chavez***, 627 F.2d 953, 954-57 (9th Cir. 1980).

The policy statement on costs of prosecution in Section 5E1.5 states that "[c]osts of prosecution shall be imposed on a defendant as required by statute." The commentary to Section 5E1.5 states that "[v]arious statutes *require* the court to impose the costs of prosecution" and identifies 26 U.S.C. §§ 7201, 7202, 7203, 7206, 7210, 7213, 7215, 7216, and 7232 as among the statutes requiring the imposition of costs. USSG §5E1.5, comment. (backg'd) (emphasis added).

For offenses committed by individuals, Section 5E1.3 mandates the imposition of a special assessment in the amount prescribed by 18 U.S.C. § 3013. Section 8E1.3 authorizes the court to impose the costs of prosecution and statutory assessments upon organizations that commit felonies and Class A misdemeanors. The Tax Division strongly recommends that government attorneys seek costs of prosecution in criminal tax cases. USAM 6-4.350.

43.12[3] Government Appeal of Sentences

18 U.S.C. § 3742 permits sentences imposed under the Guidelines to be appealed by both the defendant and the government under certain circumstances. The government may appeal a sentence in the following four situations:

a. When the sentence is imposed in violation of law;[25]

b. When the sentence is imposed as a result of an incorrect application of the Guidelines;[26]

c. When the sentence imposed is less than the sentence specified in the applicable Guidelines range; or

d. When the sentence is imposed for an offense for which there is no sentencing guideline and the sentence is plainly unreasonable.[27]

18 U.S.C. §§ 3742(b)(1)-(4); ***United States v. Giddings***, 37 F.3d 1091, 1093 (5th Cir. 1994).

The government may file a notice of appeal in district court for review of an otherwise final sentence. ***United States v. Hernandez***, 37 F.3d 998, 1000 (n.3) (11th Cir. 1994). However, any further action requires the approval of the Solicitor General. USAM 2-2.121.

Recommendations to the Solicitor General for government appeals of sentences on tax counts must be processed through the Tax Division, which should be notified immediately of any adverse sentencing decision. To assure consistent implementation of the Guidelines, a government attorney in a tax case should notify the Tax Division of any *significant* sentencing issue raised on appeal by a defendant that could pose a problem for the Department. The designated person to contact is the Chief of the Criminal Appeals and Tax Enforcement Policy Section (CATEPS). The current telephone number is (202) 514-5396.

A notice of appeal must be filed within 30 days of the imposition of the sentence or within 30 days of the defendant's notice of appeal. Fed. R. App. P. 4(b)(1)(B). Therefore, the government attorney who wishes to appeal an adverse sentencing decision should forward a recommendation to the Tax Division, along with accompanying

[25] *See* ***United States v. Hardy***, 101 F.3d 1201 (7th Cir. 1996); ***United States v. Underwood***, 61 F.3d 306, 308 (5th Cir. 1995); ***United States v. Nnanna***, 7 F.3d 420 (5th Cir. 1993); ***United States v. Piche***, 981 F.2d 706 (4th Cir. 1992); ***United States v. Lopez***, 974 F.2d 50 (7th Cir. 1992).

[26] ***Williams v. United States***, 503 U.S. 1193 (1992); ***United States v. Burnett***, 66 F.3d 137 (7th Cir. 1995); ***United States v. Soltero-Lopez***, 11 F.3d 18 (1st Cir. 1993).

[27] ***United States v. Giddings***, 37 F.3d 1091, 1093 (5th Cir. 1994).

documentation, promptly, preferably within two days of imposition of sentence. USAM 2-2.111.

43.13 RESTITUTION

Prosecutors should consider seeking restitution in all tax cases. See § 44.00 et seq., *infra*.

43.14 FINES

Prosecutors may consider requesting a fine. See § 45.00 et seq., *infra*.