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43.00 SENTENCING: TAX DIVISION POLICIES AND GUIDELINES

43.01 GENERALLY

Federal sentencings are guided by two related but distinct frameworks: the Sentencing Guidelines promulgated by the U.S. Sentencing Commission, which provides a detailed step-by-step process for calculating a sentencing range, and 18 U.S.C. § 3553(a), which provides a general framework district courts must consider when choosing what sentence to impose. From 1987 until 2005, the Sentencing Guidelines were mandatory, with judges having little discretion to impose a sentence outside the sentencing range computed under the Guidelines. In 2005, the Supreme Court significantly altered the federal sentencing landscape when it decided ***United States v. Booker***, 543 U.S. 220 (2005), and held the Sentencing Guidelines to be advisory, which restored much of the discretion district courts had before promulgation of the Sentencing Guidelines in 1987. But even though the Guidelines are now advisory, calculating the Guidelines range remains an essential part of federal sentencing. Indeed, the Supreme Court considers a district court's failure to properly calculate the Guidelines a "significant procedural error." ***Molina-Martinez v. United States***, 578 U.S. 189, 199 (2016) ("the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar"). And errors in calculating the Guidelines may be enough for an appellate court to vacate and remand for resentencing even when a defendant fails to contemporaneously object during the sentencing hearing and the sentence imposed is within the range urged by the defendant. ***Id.*** at 203 (finding miscalculation of the Guidelines procedural error even when the sentence falls in the correct range); *see also* ***Rosales-Mireles v. United States***, 138 S. Ct. 1897, 1911 (2018) (holding that failure to correct a Guidelines error that affects a defendant's substantial rights seriously affects the fairness, integrity, and public reputation of judicial proceedings). Given the potential for vacatur if an appellate court later determines the Guidelines range was miscalculated, the best way to protect a sentence when the Guidelines range found by the district court may be contested by the defendant is to ask for a statement on the record that "the sentence [the district court] chose was appropriate irrespective of the Guidelines range." ***Molina-Martinez***, 578 U.S at 200. (On the other hand, when the Guidelines range found by the court is contested by the government, a prosecutor should, as explained below, preserve a contemporaneous objection.)

Neither ***Booker*** nor its progeny abrogated the bulk of appellate courts' preexisting sentencing guidance. *See, e.g.*, ***United States v. Kluger***, 722 F.3d 549, 566 (3d Cir. 2013) (courts must continue to calculate a defendant's Guidelines sentence as they would have before ***Booker***, taking into account the Circuit's pre-***Booker*** caselaw, which "continues to have advisory force"); ***United States v. Sanchez-Juarez***, 446 F.3d 1109, 1117 (10th Cir. 2006) (pre-***Booker*** requirement that district court provide sufficient reasons "to allow meaningful appellate review of their discretionary sentencing decisions continues to apply in the post-***Booker*** context"); ***United States v. Webb***, 403 F.3d 373, 385 n. 8 (6th Cir. 2005) (same).

In ***Rita v. United States***, 551 U.S. 338 (2007), the Supreme Court held that the courts of appeal "*may* apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," but did not require courts of appeals to do so.[1] 551 U.S. at 347-51. No "presumption of unreasonableness" attaches, however, to a sentence outside the Guidelines range. ***Id.*** at 354-55. More important to trial prosecutors, the ***Rita*** Court made clear that the presumption of reasonableness is "an *appellate* court presumption," and that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351. Rather,

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[1] Following ***Rita***, most courts of appeals have adopted a presumption of reasonableness, but the Ninth and Eleventh Circuits have rejected it. *Compare* ***United States v. Cortes-Medina***, 819 F.3d 566, 572 (1st Cir. 2016) (acknowledging that "a reviewing court may apply "a presumption of reasonableness" to a within-the-range sentence" (quoting ***Rita***)); ***United States v. Betts***, 886 F.3d 198, 201 (2d Cir. 2018) ("a sentence within the Guidelines is presumptively reasonable"); ***United States v. Pawlowski***, 967 F.3d 327, 331 (3d Cir. 2020) (defendant's "sentence was within the applicable Sentencing Guidelines range and thus [was] presumptively reasonable"); ***United States v. Bynum***, 604 F.3d 161, 168-69 (4th Cir. 2010) (applying presumption); ***United States v. Duke***, 788 F.3d 392, 397 (5th Cir. 2015) (same); ***United States v. Adams***, 873 F.3d 512, 520 (6th Cir. 2017) (same); ***United States v. Fletcher***, 763 F.3d 711, 715 (7th Cir. 2014) (same, citing ***Rita***); ***United States v. Struzik***, 572 F.3d 484, 487 (8th Cir. 2009); ***United States v. Sandoval***, 959 F.3d 1243, 1246 (10th Cir. 2020); ***United States v. Law***, 806 F.3d 1103, 1106 (D.C. Cir. 2015); *with* ***United States v. Carty***, 520 F.3d 984, 994 (9th Cir. 2008) (declining to adopt presumption because "[a] 'presumption' carries baggage as an evidentiary concept that we prefer not to import"); ***United States v. Hunt***, 526 F.3d 739, 746 (11th Cir. 2008) ("we do not automatically presume a sentence within the guidelines range is reasonable").

as required by 18 U.S.C. 3553(a), sentencing courts are to "impose a sentence sufficient, but not greater than necessary, to accomplish the goals of sentencing." *See* ***Kimbrough v. United States***, 552 U.S. 85, 101 (2007).

Successful sentencing advocacy is therefore dependent upon demonstrating to the district court that the sentence urged by the government both satisfies the goals of sentencing – "to reflect the seriousness of the offense," "to promote respect for the law," "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide restitution to any victims of the offense" – and is supported by the other statutory factors in determining the appropriate sentence. 18 U.S.C. 3553(a). *See* ***Kimbrough***, 552 U.S. at 101 (identifying which Section 3553(a) factors constitute the goals of sentencing and which factors constitute additional statutory factors in determining the appropriate sentence).

After calculating the advisory Guidelines range, a district court must therefore 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:

> (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;[2]

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[2] Although sentencing courts may "discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs" with a defendant, they

(continued . . .)

(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 v. United States***, 552 U.S. 38, 50 (2007) (explaining that sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing"). "[F]ailing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range" is procedural error. ***Id.*** at 51.

General deterrence is particularly significant in tax prosecutions. Inherent in the Sentencing Guidelines applicable to tax crimes is the recognition that general deterrence should be a primary consideration in sentencing tax offenders:

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

"may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." ***Tapia v. United States***, 564 U.S. 319, 335 (2011). Also see 18 U.S.C. § 3582(a), which instructs courts that "imprisonment is not an appropriate means of promoting correction and rehabilitation."

USSG Ch.2, Pt.T, intro. comment. (1998). Department prosecutors are similarly obligated to consider general deterrence in sentencing recommendations. *See* Justice Manual, 6-4.340 ("Because of the exceptional importance of general deterrence in criminal tax prosecutions, and because a sentence commensurate with the gravity of the offense acts as a deterrent to would-be violators, a sentencing recommendation advocating for a term of imprisonment is almost always warranted in a criminal tax case. A court's order of probation and a defendant's payment of civil liability rarely constitutes a satisfactory disposition of a criminal tax case, especially since the IRS and the Tax Division considered the sentencing factors under 18 U.S.C. 3553(a) in determining that the case warranted criminal prosecution.").

In drafting the Guidelines, the Sentencing Commission recognized that pre-Guidelines, many serious offenses, including tax evasion, inappropriately received probationary sentences. USSG Ch. 1, Pt. A, intro. comment. The Commission's solution was to write guidelines that reflected the seriousness of the offense, concluding "that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." ***Id.***; *see also* ***United States v. Engle***, 592 F.3d 495, 501 (4th Cir. 2010) ("the policy statements issued by the Sentencing Commission make it clear that the Commission views tax evasion as a serious crime and believes that, under the pre-Guidelines practice, too many probationary sentences were imposed for tax crimes").

Notwithstanding this applicable policy statement, district courts may and do vary downward from a Guidelines range of imprisonment to probation, especially post-***Booker***. It thus is incumbent upon prosecutors to be effective advocates for imprisonment and to also preserve a contemporaneous objection if a district court imposes a probationary sentence without adequately taking into consideration the Sentencing Commission's policy statements regarding general deterrence. *See, e.g.*, ***United States v. Park***, 758 F.3d 193 (2d Cir. 2014) (where district court imposed a below-Guidelines probationary sentence rather than a term of imprisonment based solely on its belief that the government could not afford the cost of incarceration during a "government shut-down," the prosecutor insisted on getting her objections into the record notwithstanding the judge's insistence that she did not need to do so; appellate court held that the district court had committed both procedural and substantive error in sentencing the defendant).

In ***United States v. Engle***, the Fourth Circuit held that a sentence of probation for tax evasion was procedurally defective because of the "district court's failure to consider the relevant policy statements issued by the Sentencing Commission." 592 F.3d at 501. Engle's Guidelines range was 24-30 months' incarceration, but the district court varied downward to probation because it feared that incarceration would "take away his livelihood" and thus "destroy the ability of the government to collect the money" Engle still owed the IRS. ***Id.*** at 499. As to general deterrence, the district court said only that "[a]nything at all that happens to make him pay money affords some deterrence to criminal conduct." ***Id.***

Finding this explanation procedurally defective, the ***Engle*** court observed that the "district court . . . made no mention of [the Commission's] policy statements, nor did the court more broadly acknowledge the general principles underlying the Guidelines' approach to sentencing for serious economic crimes like tax evasion." ***Id.*** at 502. Instead, the district court "suggest[ed] that [it] fundamentally disagreed with the Guidelines' approach in these cases," as shown by its statement that "'*[a]nything at all* that happens to make him pay money affords some deterrence to criminal conduct.'" ***Id.*** (emphasis in original). The ***Engle*** court concluded that a fuller explanation was necessary, particularly given "facts that could perhaps be viewed as warranting an above-Guidelines sentence." ***Id.*** These facts included Engle's sixteen years of continuous tax evasion, his alteration of tax returns his accountants had prepared, his diversion of income to shell corporations, and his lies to the IRS. ***Id.***

Notwithstanding the potential for reversing an unreasonable sentence on appeal, the more promising avenue for obtaining an appropriate sentence is effective advocacy before the district court. *See infra* § 43.11 (Appellate Review of Sentences).

43.02 GUIDELINES APPLICATION PRINCIPLES

43.02[1] Select the Appropriate Guidelines Manual

By statute, a sentencing court should use the version of the guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii); s*ee* ***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).

Relatedly, the Sentencing Guidelines adopt what is called the "one-book rule," which states that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual." USSG §1B1.11(b)(2); *see also* ***United States v. Fitzgerald***, 232 F.3d 315, 319 (2d Cir. 2000); ***United States v. Keller***, 58 F.3d 884, 890 (2d Cir. 1995) (abrogated on other grounds by ***United States v. Mapp***, 170 F.3d 328 (2d Cir. 1999)); ***United States v. Nelson***, 36 F.3d 1001, 1003-04 (10th Cir. 1994); ***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 set forth what is called the "multiple-offense rule," which states that "[i]f 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 the multiple-offense rule states that "the approach set forth in [§1B1.11(b)(3)] should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d)," §1B1.11 comment. (backg'd), but, importantly, the Guidelines also warn that the manual in effect at the time of sentencing should not be used if doing so "would violate the ex post facto clause." §1B1.11(b)(1).

In ***Peugh v. United States***, 569 U.S. 530 (2013), the Supreme Court resolved a circuit split "over whether the *Ex Post Facto* Clause may be violated when a defendant is sentenced under the version of the Sentencing Guidelines in effect at the time of sentencing rather than the version in effect at the time the crime was committed, and the newer Guidelines yield a higher applicable sentencing range." 569 U.S. at 535. Even before ***Peugh***, most Courts of Appeals held that applying the later, more punitive version of the Guidelines violated the Ex Post Facto Clause notwithstanding that ***Booker*** had rendered the Guidelines advisory, *see* ***id.*** at 535 n.1 (collecting cases), but the Seventh Circuit held otherwise in ***United States v. Demaree***, 459 F.3d 791, 794-95 (7th Cir. 2006).

Peugh abrogated ***Demaree***, rejecting the government's argument that, post-***Booker***, the advisory Sentencing Guidelines do not have "adequate legal force" to constitute an ex post facto violation. ***Peugh***, 569 U.S. 530, 547-48 (2013) (the

government argued, "in essence, that the Guidelines are too much like guideposts and not enough like fences to give rise to an *ex post facto* violation"). Noting that calculating an incorrect Guidelines range was procedural error, ***id***. at 542, the Court reiterated the importance of the advisory Guidelines, saying that the procedural measures in federal sentencing were "intended to make the Guidelines the lodestone of sentencing."[3] ***Id***. at 544. Thus, a "retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation."[4] ***Id***.

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[3] In finding that the advisory Sentencing Guidelines were sufficiently weighty to invoke the ex post facto clause, the ***Peugh*** Court made some statements that may be useful in urging a within-Guidelines sentence. *See e.g.*, 569 U.S. at 536 ("The ***Booker*** remedy, 'while not the system Congress enacted,' was designed to 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.'); ***id.*** at 542 ("These requirements mean that "[i]n the usual sentencing, ... the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range."); ***id***. at 545 ("The Sentencing Guidelines represent the Federal Government's authoritative view of the appropriate sentences for specific crimes"). ***United States v. Doe***, 810 F.3d 132, 160 (3d Cir. 2015) (citing this language from *Peugh*).

[4] ***Peugh*** acknowledged that "sentencing courts will be free to give careful consideration to the current version of the Guidelines as representing the most recent views of the agency charged by Congress with developing sentencing policy." ***Id***. at 549. The Guidelines in effect at the time of the offense "anchor both the district court's discretion and the appellate review process," while the newer Guidelines "have the status of one of many reasons a district court might give for *deviating* from the older Guidelines." ***Id***. (emphasis in original); *see* USSG §1B1.11(b)(2) ("if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes. The courts of appeal have, however, taken divergent approaches to determining whether an amendment is clarifying or substantive under Section 1B1.11. In the Fourth and Eighth Circuits, the courts have treated the existence of circuit precedent that conflicts with an amendment to the Guidelines as conclusively establishing that an amendment is substantive. *See* ***United States v. Capers***, 61 F.3d 1100, 1109-10 (4th Cir. 1995); ***United States v. Reedy***, 30 F.3d 1038, 1039 (8th Cir. 1994). In contrast, the Ninth Circuit has held that when the Guidelines are amended to resolve a circuit split, the amendment is clarifying, not substantive, even if the amendment overturns circuit precedent. ***United States v. Christensen***, 598 F.3d 1201, 1203-06 (9th Cir. 2010); *see also* ***United States v. Van Alstyne***, 584 F.3d 803, 818, 818 n.15 (9th Cir. 2009). Other circuits do not give dispositive weight to the presence of contrary precedent or existing circuit conflicts, but employ multi-factor tests to determine whether an amendment is clarifying or

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When a "continuing offense"—defined in this context as a count alleging the defendant's conduct extended over a period of time[5]—straddles the effective date of a Guideline revision that makes the range more punitive, courts uniformly hold that there is no ex post facto violation in applying the later version of the Guidelines. Continuing offenses, such as conspiracy, obstructing and impeding the IRS, escape, and continuing criminal enterprise, are straightforward examples of this. *See, e.g.*, ***United States v. Vallone***, 752 F.3d 690, 695, 699 (7th Cir. 2014) (no violation of Ex Post Facto Clause because the conspiracy "straddl[ed] the former and current versions of the tax loss table"); ***United States v. Mehanna***, 735 F.3d 32, 68 (1st Cir. 2013) (failure to apply pre-amendment version of guidelines was not plain error because conspiracy continued past the effective date of the new version of Guidelines); ***United States v. Josephberg***, 562 F.3d 478, 502 (2d Cir. 2009) ("as to a continuing offense that was begun prior to the effective date of a Guidelines amendment and completed after that date, application of the amendment does not violate the *Ex Post Facto* Clause"); ***United States v. Brennan***, 326 F.3d 176, 198 (3d Cir. 2003) (bankruptcy fraud is a continuing offense; no ex post facto violation using Guidelines in effect at sentencing because defendant's concealment of assets continued after the effective date of the relevant amendment); ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992); ***United States v. Stanberry***, 963 F.2d 1323, 1327 (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).

Even when criminal conduct is not considered a "continuing offense" for this purpose, the Circuit Courts, with the notable exception of the Ninth Circuit, hold that there is no ex post facto violation in applying the later version of the Guidelines where

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substantive. *See* ***United States v. Huff***, 370 F.3d 454, 466 (5th Cir. 2004); ***United States v. Hartz***, 296 F.3d 595, 599 (7th Cir. 2002); ***United States v. Jerchower***, 631 F.3d 1181, 1185 (11th Cir. 2011).

[5] The meaning of the phrase "continuing offense" depends on the context. In the statute of limitations context, the phrase "continuing offense" "is a term of art, and does not mean an offense that continues in a factual sense." ***United States v. Yashar***, 166 F.3d 873, 875 (7th Cir. 1999). *See* ***Toussie v. United States***, 397 U.S 112, 115 (1970) (in the statute of limitations context, the phrase "continuing offense" is very limited). In the Ex Post Facto context, the phrase is used similarly to how it is used in the venue context, where a count alleges the defendant's conduct extended over a period of time. *See* ***United States v. Sullivan***, 255 F.3d 1256 (10th Cir. 2001).

the offenses are grouped under the Sentencing Guidelines, based on the conclusion that the Guidelines' "one-book" and "multiple offense" rules provide sufficient notice that the version of the Guidelines in effect when the defendant committed the last in a series of grouped offenses will apply to the entire group. *See, e.g.*, ***United States v. Ngombwa***, 893 F.3d 546, 555-56 (8th Cir. 2018); ***United States v. Fletcher***, 763 F.3d 711, 717 (7th Cir. 2014) ("the grouping guidelines together with the one book rule provide adequate notice to defendants" that continuing a course of conduct after the guidelines are amended will result in the application of "the harsher version of the guidelines"); ***United States v. Pagan-Ferrer***, 736 F.3d 573 (1st Cir. 2013) ("Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint.") (quoting ***Weaver v. Graham***, 450 U.S. 24, 30 (1981)); ***United States v. Siddons***, 660 F.3d 699, 706-07 (3d Cir. 2011)[6]; ***United States v. Anderson***, 570 F.3d 1025, 1034 (8th Cir. 2009) (revised edition of Guidelines applied to wire fraud cases committed pre-amendment and failure to appear on those charges post-amendment); ***United States v. Sullivan***, 255 F.3d 1256, 1263 (10th Cir. 2001) ("while failure to file a tax return is not a continuing offense even if committed in successive years, a series of such failures is the 'same course of conduct' under the guidelines," and thus "is analogous to a continuing offense like conspiracy, the ending date of which determines the applicable sentencing guidelines."); ***United States v. Barker***, 556 F.3d 682, 689 (8th Cir. 2009) ("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")[7]. *Contra* ***United States v. Ortland***, 109 F.3d 539, 546-47 (9th Cir. 1997) (finding ex post facto violation where district court applied revised Guidelines to all five mail fraud counts, only one of which involved conduct committed after the amendment);

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[6] In ***Siddons***, the Third Circuit distinguished ***United States v. Bertoli***, 40 F.3d 1384 (3d Cir. 1994), a prior case finding an ex post facto violation, on the ground that the case involved "discrete, unconnected acts" and government had agreed that the grouping in ***Bertoli*** was, in fact, improper.

[7] ***Barker***, in applying this rule, described tax evasion a "continuing offense." 556 F.3d at 689. In so stating, ***Barker*** relied on cases holding that tax evasion is a "continuing offense" for venue purposes, meaning that it is an offense that is committed through multiple acts over an extended period of time, and thus an offense for which venue is proper in any district in which one of those acts is committed. *See* ***United States v. Marchant***, 774 F.2d 888, 890-91 (8th Cir. 1985). *See* CTM 8.10 (Section 7201 tax evasion is not a "continuing offense" for statute of limitations purposes).

United States v. Wijegoonaratna, 922 F.3d 983, 991 (9th Cir. 2019) (following ***Ortland*** in a post-**Peugh** decision).

Where non-grouped offenses straddle the effective date of a Guideline revision that makes the range more punitive, prosecutors must research the law of the applicable circuit.

43.02[2] Guidelines Calculation

After determining which edition of the Guidelines Manual applies to the case, the prosecutor should next follow the steps outlined in the Manual's Application Instructions to calculate the appropriate guideline range.

> (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:
>
> (1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.
>
> (2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
>
> (3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
>
> (4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
>
> (5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
>
> (6) 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.

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

(8) 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.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

USSG §1B1.1 (Nov. 2018).

Finally, the prosecutor must also confirm that the calculation complies with Department of Justice policies. For example, the prosecutor must 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 major count policy, which requires approval for any plea agreements not containing the major count. *See* § 5.01[1], *supra*, for discussion of the major count policy, which is set forth in § 6-4.310 of the Justice Manual.

43.03 CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES

Most tax crimes are sentenced under Part T of Chapter Two of the Sentencing Guidelines. Except for regulatory offenses and some misdemeanor and obstruction offenses, the amount of "tax loss" attributable to the defendant is the key determinant of the base offense level for tax offenses. Once the sentencing court determines the total tax loss, the tax loss table contained in Section 2T4.1 provides a defendant's base offense level.[8] ***United States v. Powell***, 124 F.3d 655, 663 n.8 (5th Cir. 1997).

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

43.03[1] Tax Loss

Section 2T1.1(c) of the Guidelines provides the core definition of "tax loss": "If the offenses involved tax evasion or a fraudulent or false return, statement or other document, 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). In other words, "tax loss" for the purpose of establishing a base offense level is "intended loss" rather than "actual loss."[9] *See* ***United States v. Delfino***, 510 F.3d 468, 472-73 (4th Cir. 2007) ("the object of the offense" is the loss "that would have resulted had a defendant been successful in his scheme to evade payment of tax"); ***United States v. Black***, 815 F.3d 1048, 1052 (7th Cir. 2015); ***United States v. Clarke***, 562 F.3d 1158, 1164 (11th Cir. 2009); ***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). And this is so regardless of whether the intended loss occurred or was realistic, ***United States v. Clements***, 73 F.3d 1330, 1339 (5th Cir. 1996); ***United States v. Moore***, 997 F.2d 55, 59-62 (5th Cir. 1993); ***United States v. Lorenzo***, 995 F.2d 1448, 1459-60 (9th Cir. 1993), and regardless of the amount of tax money the IRS actually could recover. *See* ***United States v. Maynard***, 984 F.3d 948, 960 (10th Cir. 2020); ***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 loss is not limited to the value of the assets that the defendant attempted to hide from the IRS. ***Brimberry***, 961 F.2d at 1292; ***United States v. Memmott***, 667 F. App'x 206 (9th Cir. 2016).

Section 2T1.1 recognizes that the court may estimate tax loss based on the available facts. As the Commentary to Section 2T1.1 explains, "[i]n some instances . . . 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). Courts have routinely applied this principle in diverse circumstances. *See e.g.*, ***United States v. Rankin***, 929 F.3d 399, 409 (6th Cir. 2019) (finding no error in court's acceptance of Presentence Report's calculation of loss based on indirect method of proof); ***United States v. Johnson***, 841 F.3d 299, 305 (5th Cir. 2016) (upholding loss

[9] In contrast, restitution is limited to actual loss. *See* § 43.13, *infra*.

calculation obtained through extrapolation as "reasonable estimate based on the available facts" where defendants failed to offer contrary evidence or alternative calculations); ***United States v. Stargell***, 738 F.3d 1018, 1025-26 (9th Cir. 2013) (court made a "reasonable estimate based on the available facts" where tax return preparer failed to provide evidence that she intended to give clients the portion of the refunds to which they were entitled); ***United States v. Hoskins***, 654 F.3d 1096, 1097 (10th Cir. 2011) (finding no error in district court's considering additional evidence regarding the accuracy of the tax loss calculation and accepting government's estimate over defendant's); ***United States v. O'Doherty***, 643 F.3d 209, 219 (7th Cir. 2011) (district court entitled to rely on Presentence Report in making tax loss calculations); ***United States v. Pesaturo***, 476 F.3d 60, 73 (1st Cir. 2007) (estimation of tax loss was necessary when defendant's records detailed purchases but failed to record sales); ***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 where the average loss derived from "a non-random universe of returns" that had been specifically "flagged" for audit).[10]

Even though the district court may estimate tax loss based on the available facts, the government must prove the amount of tax loss resulting from the charged offense conduct by a preponderance of the evidence. USSG §6A1.3, comment. *See e.g.*, ***United States v. Leahy***, 473 F.3d 401, 413 (1st Cir. 2006); ***United States v. Singletary***, 458 F.3d 72, 79-80 (2d Cir. 2006); ***United States v. Grier***, 475 F.3d 556, 568 (3d Cir. 2007) (en

[10] For further discussion of extrapolation of tax loss in fraudulent return preparer cases, see *infra*, Section 43.03[1][c][i].

banc); ***United States v. Sander***, 178 Fed. App'x, 221, 223 (4th Cir. 2006); ***United States v. Harper***, 448 F.3d 732, 735 (5th Cir. 2006); ***United States v. Gates***, 461 F.3d 703, 708 (6th Cir. 2006); ***United States v. Hollins***, 498 F.3d 622, 633 (7th Cir. 2007); ***United States v. Thorpe***, 447 F.3d 565, 569 (8th Cir. 2006); ***United States v. Montano***, 250 F.3d 709, 713 (9th Cir. 2001); ***United States v. Bustamante***, 454 F.3d 1200, 1202 (10th Cir. 2006); ***United States v. Pope***, 461 F.3d 1331, 1335 (11th Cir. 2006); ***United States v. Coles***, 403 F.3d 764, 768 (D.C. Cir. 2005).

The Guidelines specify that any tax paid after the offense is committed does not reduce the tax loss used to establish the base offense level. USSG §2T1.1(c)(5) (stating that "[t]he tax loss is not reduced by any payment of tax subsequent to the commission of the offense"); *see also* ***United States v. Vernon***, 814 F.3d 1091, 1107 (10th Cir. 2016) (that defendant was "ultimately forced to pay those back taxes, interest and penalties is irrelevant" to calculation of intended tax loss); ***United States v. Lynch***, 735 F. App'x. 780, 793 (3d Cir. 2018) (subsequent payments cannot retroactively reduce tax loss).

It follows that the tax loss is not reduced by payment of taxes after notification of an investigation or by payment before sentencing. ***United States v. Tandon***, 111 F.3d 482, 490 (6th Cir. 1997) (district court did not err when it did not reduce the tax loss by amounts defendant paid to IRS after the offenses of conviction were complete); ***United States v. Gassaway***, 81 F.3d 920, 921-22 (10th Cir. 1996) (district court did not err by including in tax loss calculation the payments to the IRS defendant made after being notified of audit but before criminal charges); ***United States v. Mathis***, 980 F.2d 496, 497 (8th Cir. 1992) (payment to the IRS before sentencing does not reduce the amount of tax loss used for determining base offense level). See also *infra*, Section 43.07[2].

Previously, the federal circuit courts were in conflict regarding whether a sentencing court calculating tax loss could consider previously unclaimed credits, deductions, and exemptions. The Sentencing Commission resolved this conflict by adding an Application Note, effective November 1, 2013, providing that courts "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. USSG §2T1.1, comment. (n.3(A)). 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."[11] Second, the credit, deduction, or exemption must be "reasonably and practicably ascertainable." USSG §2T1.1, comment. (n.3(B)); *see* ***United States v. Foxx***, 681 Fed. App'x 249, 251-52 (4th Cir. 2017) (district court did not clearly err in finding that amount of unclaimed deductions was not reasonably and practically ascertainable where the defendant's expert said her calculations "at best, were just a guesstimate"); ***United States v. Saifan***, 671 Fed. App'x 543, 544 (9th Cir. 2016) (no error in finding that deduction amounts were not reasonably and practically ascertainable where claimed expenses related to "a cash business [that operated] in wartime Iraq" and the defendant did not "point to a reliable method for the district court to reasonably approximate those expenses" in the absence of documentary evidence of the expenses). And 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." USSG §2T1.1, comment. (n.3(C)); *see* ***United States v. Christensen***, 705 Fed. App'x 599, 600 (9th Cir. 2017) (affirming district court's refusal to consider unclaimed deduction for legal fees where the defendant "submitted no evidence before sentencing to support his claim that he spent [money] on legal fees"). And 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. USSG §2T1.1, comment. (n.3(C)); *see* ***United States v. Sanchez***, 2016 WL 1103849, at *6-7 (E.D.N.Y. Jan. 4, 2016) (recognizing that the defendant "clearly would not be permitted to deduct cash he paid 'off the books' to undocumented workers under the Guidelines" following the 2013 amendment and disallowing such deductions under pre-amendment circuit law).

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

The defendant bears the burden of establishing any such credit, deduction, or exemption by a preponderance of the evidence, and courts have declined to account for unclaimed deductions where defendants have failed to meet this burden. *See* ***United States v. Black***, 815 F.3d 1048, 1055-56 (7th Cir. 2015) (acknowledging that the new amendment abrogated prior circuit law prohibiting consideration of unclaimed deductions, but concluding that "Black did not meet his burden" because "[t]here is insufficient evidence on the record to establish that at the time of Black's criminal conduct, he could have challenged the audit and reduced his tax liability"); ***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 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).

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 §2T1.1(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." USSG §2T1.1(c)(1), comment. (n.1). *See* ***United States v. Montanari***, 863 F.3d 775, 779 (8th Cir. 2017) (no error by district court including penalties and interest in tax loss calculation for evading the payment of tax); ***United States v. Josephberg***, 562 F.3d 478, 502-03 (2d Cir. 2009) (district court did not err by including penalties and interest in tax loss from evasion of payment); ***United States v. Kellar***, 394 Fed. App'x 158, 170 (5th Cir. 2010) (affirming district court's rejection of defendant's tax loss calculation that did not include penalties and interest).

Several Circuits have held that the commentary to USSG §2T1.1(c)(1) does not require a conviction under Section 7201 or 7203 for penalties and interest to be counted, but that those amounts should be counted irrespective of the count of conviction as long as the object of the defendant's conduct included an intent to evade payment of penalties

and interest. In ***United States v. Black***, 815 F.3d 1048, 1053-55 (7th Cir. 2015), the court affirmed the inclusion of penalties and interest in the tax loss calculation for a defendant charged with corruptly obstructing the IRS's collection of taxes under § 7212(a). The Seventh Circuit concluded that the defendant's offense conduct was "tantamount" to § 7201 and § 7203 conduct and stated "[i]f the object of the offense is to avoid the tax, penalties, and interest, then penalties and interest should be included in the tax loss." ***Id***. at 1055; *see also* ***United States v. Hamelink***, 483 F. App'x 789, 791 (4th Cir. 2012) (where defendant pleaded guilty to a conspiracy to defraud under 18 U.S.C. § 371 and the overt acts included steps to conceal assets from the IRS, court held that the stipulated tax loss, which included penalties and interest, "was not erroneous").

The First Circuit affirmed the inclusion of penalties and interest in a tax loss calculation based on relevant conduct.[12] ***United States v. Thomas***, 635 F.3d 13, 16-17 (1st Cir. 2011). The defendant argued that he had only pleaded guilty to evasion of assessment and the district court erred by including penalties and interest for tax years charged in other counts of the indictment. The First Circuit disagreed, pointing to "activities and omissions that are more properly considered evasion of the *payment* of a tax liability" described in the first two counts of the indictment. ***Id***. at 17 (emphasis in original). *See also* ***United States v. Adams***, 955 F.3d 238, 248-49 (2d Cir. 2020) (holding that interest and penalties could be included in tax loss calculation based on uncharged conduct involving "willful evasion of payment" or the "willful failure to pay" regardless of the offense of conviction); ***United States v. Lombardo***, 582 Fed. App'x 601, 619 (6th Cir. 2014) (no abuse of discretion when district court included penalties and interest in tax loss based on uncharged conduct that was part of the common scheme).

Because under the Guidelines "the tax loss is the total amount of loss that was the object of the offense," USSG §2T1.1(c)(1), the penalties and interest attributable to offense conduct will be determined by reference to the allegations in the indictment for the counts of conviction, including any temporal allegations. Whether any additional tax loss related to penalties and interest from relevant conduct can be included is a case and fact specific question.

43.03[2] Relevant Conduct

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[12] The concept of "relevant conduct" is discussed at Section 43.03[2], *infra*.

In determining the base offense level, a court must include all relevant conduct. USSG §1B1.3(a). The Guidelines generally define "relevant conduct" to include "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that 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)(A). When there is "jointly undertaken criminal activity," relevant conduct also includes "all acts and omissions of others" that were "within the scope" and "in furtherance" of the jointly undertaken criminal activity and were also "reasonably foreseeable in connection with that criminal activity." USSG §1B1.3(a)(1)(B).

Relevant conduct further includes "all acts and omissions described in subdivisions (1)(A) and (1)(B) [of USSG §1B1.3] that were part of the same course of conduct or common scheme or plan as the offense of conviction," but only for "offenses of a character for which §3D1.2(d) would require grouping of multiple counts" – which includes tax offenses sentenced under Part T of Chapter Two of the Guidelines. USSG § 3D1.2(d) (providing that "offenses covered by," *inter alia*, "§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, [and] 2T3.1," "are to be grouped under this subsection"). The commentary to Section 2T1.1 further explains that "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."[13] USSG §2T1.1, comment. (n.2).

Because relevant conduct in tax cases includes conduct that was part of the same course of conduct or common scheme or plan as the offense of conviction, a court should account for both charged and uncharged conduct in calculating the tax loss. *See* ***United States v. Hendrickson***, 822 F.3d 812, 829-30 (6th Cir. 2016) (court properly included tax loss from fraudulent refunds in failure to file case); ***United States v. Bove***, 155 F.3d 44, 47-48 (2d Cir. 1998) (court properly included unreported W-2 income as relevant

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[13] For example, self-employment taxes may be properly included in the tax loss computation, ***United States v. Twieg***, 238 F.3d 930, 933 (7th Cir. 2001), as may delinquent social security taxes, ***United States v. Martinez-Rios***, 143 F.3d 662, 674 (2d Cir. 1998) (superseded on other grounds by ***United States v. Cook***, 722 F.3d 477 (2d Cir. 2013)). State tax loss, which can be a significant source of relevant conduct tax loss, is discussed separately at Section 43.03[2][a], *supra*.

conduct); ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997) (no error in court's including amounts of tax evaded by clients using the defendants' business trust scheme); ***United States v. Meek***, 998 F.2d 776, 781 (10th Cir. 1993) (court properly included tax loss from uncharged tax evasion in prior years). That said, with respect to relevant conduct tax loss, the government must still be able to prove the requisite mens rea (typically "willfulness") by a preponderance of the evidence. ***Id.***; *see also* ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994); ***United States v. Harvey***, 996 F.2d 919, 922 (7th Cir. 1993) ("civil tax liability is not an adequate substitute for 'tax loss' under the Guidelines, which is limited to criminal understatements").

The Guidelines 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. Baker***, 227 F.3d 955, 964-66 (7th Cir. 2000); ***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); ***United States v. Johnson,*** 971 F.2d 562, 574-75 (10th Cir. 1992). The Second Circuit has 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) (cleaned up). The "reasonable foreseeability" requirement "applies only to the conduct of others." ***Id***. "In a tax loss case, a defendant's sentence may be based on both the tax loss that he caused directly and the tax loss caused by his coconspirators, if that loss was reasonably foreseeable to the defendant." ***United States v. Clark***, 139 F.3d 485, 490 (5th Cir. 1998); *see also* ***United States v. Lombardo***, 582 F. App'x 601, 619-20 (6th Cir. 2014) (unpub.) (same).

The Guidelines themselves note that "[b]ecause a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the 'jointly undertaken criminal activity' 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.3(B)). 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. Thus, 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).

A court may compute tax loss by including tax loss from years barred by the statute of limitations. *See, e.g.*, ***United States v. Ziskind***, 491 F.3d 10, 16-17 (1st Cir. 2007); ***United States v. Williams***, 217 F.3d 751, 753-54 (9th Cir. 2000); ***United States v. Stephens***, 198 F.3d 389, 391 (3d Cir. 1999); ***United States v. Behr***, 93 F.3d 764, 765-66 (11th Cir. 1996); ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. Silkowski***, 32 F.3d 682, 688 (2d Cir. 1994); ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994); ***United States v. Neighbors***, 23 F.3d 306, 311 (10th Cir. 1994); ***United States v. Wishnefsky***, 7 F.3d 254, 256 (D.C. Cir. 1993); ***United States v. Lokey***, 945 F.2d 825, 840 (5th Cir. 1991).

A sentencing court may also rely on charges that have been dismissed if the conduct otherwise qualifies under §1B1.3(a). *See, e.g.*, ***United States v. Wright***, 873 F.2d 437, 440-42 (1st Cir. 1989); ***United States v. Fernandez***, 877 F.2d 1138, 1141-42 (2d Cir. 1989); ***United States v. Frierson***, 945 F.2d 650, 654 (3d Cir. 1991); ***United States. Byrd***, 898 F.2d 450, 452 (5th Cir. 1990); ***United States v. Conway***, 513 F.3d 640, 643 (6th Cir. 2008); ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. White***, 447 F.3d 1029, 1032-33 (8th Cir. 2006); ***United States v. Fine***, 975 F.2d 596, 602-03 (9th Cir. 1992); ***United States v. Trujillo,*** 537 F.3d 1195, 1200-01 (10th Cir. 2008); ***United States v. Pinnick***, 47 F.3d 434, 438 (D.C. Cir. 1995).

The Guidelines were amended to exclude certain acquitted conduct from the definition of relevant conduct: "Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction." USSG §1B1.3(c) (effective Nov. 1, 2024). The commentary to Section 1B1.3 states that "[t]here may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct." USSG §1B1.3, comment. (n.10). ***United States v.***

Scott, No. 21-cr-491, 2025 WL 1172170, at *3 (N.D. Ohio, Apr. 23, 2025) ("In short, when calculating the guideline range, a court may consider any evidence of the total loss within the scope of the conspiracy, even if a jury acquitted a defendant of some conduct accounting for some specific losses."); ***Hayden v. United States***, No. 17-cr-9, 2025 WL 2054856, at *6 (E.D. Tex. June 9, 2025) (holding that "where the drugs formed the basis for both the (acquitted) conspiracy charge and the (convicted) obstruction charge," they can be used as relevant conduct for the obstruction charge under §1B1.3(c)).

Generally, the government bears the burden of persuasion on the issue of relevant conduct by a preponderance of the evidence, just as it does for offense conduct. USSG §6A1.3, comment.; ***United States v. Watts***, 519 U.S. 148, 156 (1997) (per curiam) (facts relevant to sentencing will be proved by a preponderance of the evidence); ***United States v. De La Rosa***, 922 F.2d 675, 679 (11th Cir. 1991) (the government bears the burden of proof on relevant conduct); ***United States v. Lucas***, 101 F.4th 1158, 1162-63 (9th Cir. 2024) (en banc) (holding that preponderance of the evidence standard is sufficient to satisfy due process for fact-finding, even when a fact has an extremely disproportionate effect on the sentence, and overruling ***United States v. Staten***, 466 F.3d 708 (9th Cir. 2006) and its progeny). This includes proving the requisite mens rea (typically "willfulness" for tax offenses) by a preponderance. ***Id.***; *see also* ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994); ***United States v. Harvey***, 996 F.2d 919, 922 (7th Cir. 1993) ("civil tax liability is not an adequate substitute for 'tax loss' under the Guidelines, which is limited to criminal understatements").

43.03[2][a] State Tax as Relevant Conduct

A court may include state tax losses in the tax loss computation if the state tax loss constitutes relevant conduct under Section 1B1.3. *See, e.g.*, ***United States v. Yip***, 592 F.3d 1035, 1039-40 (9th Cir. 2010); ***United States v. McElroy***, 587 F.3d 73, 88-89 (1st Cir. 2009); ***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); ***United States v. Powell***, 124 F.3d 655, 664-65 (5th Cir. 1997) (when computing tax loss arising from federal motor fuel excise tax

scheme, district court properly considered state excise tax loss); *cf.* ***United States v. Jones***, 635 F.3d 909, 919-20 (7th Cir. 2011) (possession of a rifle "need not have been within the power of the federal government to prosecute in order for it to be considered relevant conduct"); ***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 about the calculation of the state tax loss.[14] In some cases, the testimony of state taxing authorities will be required, which necessitates the cooperation of the state officials. Most states are willing to cooperate because their Department of Revenue has a Memorandum of Understanding with the IRS that permits sharing of information. Less frequently, some states may demonstrate reluctance to cooperate because of state privacy laws. 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.

43.03[2][b] Constitutional Limitations on the Use of Relevant Conduct

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. If the court treats the properly calculated 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

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[14] 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.

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). "[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." ***United States v. Wright***, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)).

Sentencing based on judicial factfinding is 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).

But the Supreme Court has identified two exceptions to judicial factfinding by a preponderance of the evidence. In ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000), the Court held that other than the fact of a prior conviction, any fact that increased the prescribed statutory maximum of an offense must be submitted to a jury and found beyond a reasonable doubt. In ***United States v. Alleyne***, 570 U.S. 99, 115-16 (2013), the Court held that facts that increase a mandatory minimum sentence must be submitted to the jury and found beyond a reasonable doubt. Neither holding disturbed standing precedent that district courts' "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment," as long as that discretion results in a sentence within the range prescribed by statute. ***Id***. at 116.

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 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. Gobbi***, 471 F.3d 302, 314-15 (1st Cir. 2006) (superseded on other grounds by rule as stated in ***United States v. Nagell***, 911 F.3d 23, 30 (1st Cir. 2018)); ***United States v. Vaughn***, 430 F.3d

518, 526-27 (2d Cir. 2005); ***United States v. Hayward***, 177 F. App'x 214, 215 (3d Cir. 2006) (unpub.); ***United States v. Ashworth***, 139 F. App'x 525, 527 (4th Cir. 2005) (unpub.); ***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. Price,*** 418 F.3d 771, 788 (7th Cir. 2005); ***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).

43.03[3][a] Sections 7201 & 7206(1)

Section 2T1.1 provides that "[i]f the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense." USSG §2T1.1(c)(1). Section 2T1.1 sets forth presumptions a sentencing court should use in calculating this loss "unless a more accurate determination of the tax loss can be made." USSG §2T1.1(c)(1)(A)-(C). Generally, these presumptions provide that the tax loss should equal 28% 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%), plus 100% of any falsely claimed credits against tax. ***Id***.; *see also* ***United States v. Delfino***, 510 F.3d 468, 472-73 (4th Cir. 2007) (affirming district court's calculation of tax loss for tax evasion by using presumption that loss is 28% of unreported gross income); ***United States v. Fulwood***, 569 F. App'x 691, 696-97 (11th Cir. 2014) (same); ***United States v. Beverley***, 775 F. App'x 468, 476 (11th Cir. 2019) (unpub.) (affirming district court's calculation of tax loss for filing false tax returns by using presumption that loss is 28% of unreported gross income); ***United States v. Tarwater***, 308 F.3d 494, 518 (6th Cir. 2002) (same); ***United States v. Spencer,*** 178 F.3d 1365, 1367-68 (10th Cir. 1999) (same); ***United States v. Hoover***, 175 F.3d 564, 568 (7th Cir. 1999) (same).

If the offense conduct involves false individual and corporate returns, the tax loss should be aggregated. USSG §2T1.1(c)(1)(D). *See* ***United States v. Patti***, 337 F.3d 1317, 1323-24 (11th Cir. 2003) (district court properly aggregated personal and corporate tax loss); ***United States v. Martinez-Rio***, 143 F.3d 662, 672 (2d Cir. 1998) (same) (superseded by rule on other grounds as stated in ***United States v. Cook***, 722 F.3d 477 (2d Cir. 2013)); ***United States v. Cseplo***, 42 F.3d 360, 364-65 (6th Cir. 1994) (same); *but*

cf. ***United States v. May***, 568 F.3d 597, 605 (6th Cir. 2009) (district court erred by aggregating payroll taxes and individual income tax in an employment tax case where such aggregation constituted double counting).

43.03[3][b] Section 7203

The tax loss for offenses involving failure to file a return, supply information, or pay tax is the amount the taxpayer owed and did not pay. USSG §2T1.1(c)(2), (3). If the tax loss caused by the failure to file cannot be determined more accurately, it can be assumed to be 20% of gross income (25% for corporations) less any tax withheld or otherwise paid, and individual and corporate tax loss is to be aggregated. USSG §2T1.1(c)(2)(A), (B); ***United States v. Collins***, 685 F.3d 651, 659 (7th Cir. 2012) (no error in court adopting presentence report recommendation to calculate tax loss as 20% of gross income).

For example, 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 and concluded that the tax loss simply equaled twenty percent of the defendant's unreported gross income. The defendant objected that this method was not the most accurate determination of the tax loss and that the district court had failed to account for 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) (finding no error in district court's use of 20% presumption when it 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 under USSG §2S1.3.

43.03[3][c] 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). "Tax loss" for purposes of Section 2T1.4 is the tax loss 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***.

Tax loss calculations in cases arising under Section 7206(2) may be based on IRS interviews with taxpayers, even if there were no opportunity for the defendant to cross-examine the taxpayers. ***United States v. Goosby***, 523 F.3d 632, 639 (6th Cir. 2008). In some cases, tax loss may be based solely on civilly audited returns. ***United States v. Neal***, 487 F. App'x 308, 310 (7th Cir. 2012) (unpub.) (tax loss solely based on audited returns prepared by defendant convicted of § 7206(2)); ***United States v. McLeod***, 251 F.3d 78, 82 (2d Cir. 2001) (district court properly included "the tax loss ascertained in the civil audit in determining relevant conduct").

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).

43.03[3][c][i] Extrapolation of Tax Loss in Return Preparer Cases

As noted above, in calculating tax loss, "the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts." USSG §2T1.1 comment. (n.1). A sentencing court thus does not have to calculate the amount of tax loss attributable to a false return scheme with full certainty or precision. Audited returns therefore may form the basis for extrapolating tax loss resulting from unaudited returns.

"To extrapolate means to estimate the values of a function or series outside a range in which some of its values are known, on the assumption that the trends followed inside the range continue outside it." ***United States v. Mehta***, 594 F.3d 277, 283 (4th Cir. 2010) (cleaned up). In a fraudulent-return-preparer case, that means taking a random sample of tax returns, "representative of the larger group of" returns, calculating the tax loss within that sample, and then using that figure to estimate the total tax loss. ***Id.***

For an extrapolation to be unbiased, the sample returns must be randomly chosen. *See* ***United States v. Jenkins***, 786 F. App'x 852, 860 (11th Cir. 2019) (extrapolation can be valid if it "start[s] with a random sample"); ***Mehta***, 594 F.3d at 283 (similar). A sample used for extrapolation also must be made up of enough returns to allow the estimate of the total tax loss to be made with reasonable confidence — typically, that means the sample must be at least 30. *See* ***United States v. Johnson***, 185 F.3d 765, 769 (7th Cir. 1999) (observing that the "confidence interval" — the range that surrounds an estimate based on a sample — is "particularly difficult to calculate when the sample used is very small (*i.e.* less than 30)" (citing Richard A. Wehmhoefer, STATISTICS IN LITIGATION 57 (1985)).[15]

Several courts have endorsed the use of extrapolation to calculate tax loss. For instance, in ***United States v. Littrice***, the Seventh Circuit affirmed the district court's estimate of relevant conduct based on calculations in the presentence report. 666 F.3d 1053, 1062 (7th Cir. 2012). A jury convicted the defendant of 14 § 7206(2) counts resulting in a tax loss of $31,849. ***Id***. at 1055. The government identified 662 audited returns, out of over 4,000 returns defendant helped prepare, that contained materially false and fraudulent claims similar to those proven at trial. ***Id***. at 1055, 1061. The district court found that the government established by a preponderance of the evidence "that other tax returns prepared by this defendant were infected with the same kinds of phony claims that we heard about at the trial" and noted that "the claims were of a similar type and size." ***Id***. at 1058. The Seventh Circuit agreed with the district court "that requiring the government to go through all the needles in the haystack of materially fraudulent and false returns" the defendant helped prepare to determine "her exact level of involvement" would place a burden on the government "beyond what the preponderance standard requires." ***Id***. at 1061.

And in ***United States v. Bryant***, the defendant ran an income tax "mill," helping prepare 8,521 individual tax returns from 1991 to 1993. 128 F.3d 74, 76 (2d Cir. 1997)

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[15] The size of the sample needed does *not* vary depending on the size of the entire universe of fraudulent returns; "it is the absolute size of a sample rather than its ratio to the population from which it is drawn that determines the sample's reliability." ***United States v. Gometz***, 730 F.2d 475, 482 (7th Cir. 1984) (en banc) (Posner, J.) (citing Freedman, Pisani & Purves, STATISTICS 332-33 (1980)).

(per curiam). The defendant was convicted of violating Section 7206(2) by helping prepare 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 on $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 argued on appeal that the $600,000 in tax loss attributed to the unaudited returns was speculative and unfair. The Second Circuit rejected this argument, explaining: "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." ***Id***. at 76. Noting that the tax loss based on the unaudited returns averaged less than $100, while the audited returns averaged more than $2,400, the court said the extrapolation was "highly generous." ***Id***. *See also* ***United States v. Barber***, 591 F. App'x 809, 818-19 (11th Cir. 2014) (affirming relevant conduct tax loss where IRS agent conducted a statistical sampling of 105 of 434 returns reporting HSH (household help) income then extrapolated the average loss to the total population of 434); ***United States v. Poltonowicz***, 353 F. App'x 690, 694 (3d Cir. 2009) (unpub.) (district court did not err when it considered "statistical evidence" to determine the tax loss from over 20,000 false tax returns) ***United States v. Ukwu***, 546 Fed. App'x 305, 308 (4th Cir. 2013); ***United States v. Murray***, 468 Fed. App'x 104, 110–11 (3d Cir. 2012); ***United States v. Jordan***, 374 Fed. App'x 3, 6-7 (11th Cir. 2010); ***United States v. Simmons***, 420 F. App'x 414, 417-18 (5th Cir. 2011) (upholding use of extrapolation from 41 examined returns to find a tax loss of over $28,000,000 from a fraudulent return preparation scheme); ***United States v. Maye***, 205 F.3d 1335 (Table), 2000 WL 223344, at *1 (4th Cir. Feb. 28, 2000) (holding that district court did not err in finding tax loss greater than $2,500,000 by extrapolating loss attributable to 600 returns from average loss calculated for 51 examined returns).

On the other end of the spectrum, the Fourth Circuit disapproved of the method of extrapolation used in ***United States v. Mehta***, finding it statistically flawed. 594 F.3d 277, 282-83 (4th Cir. 2010). The case agent had extrapolated from the average tax loss in 30%

of returns containing Schedules A that had been "flagged for audit" to the larger set of Schedule A returns. ***Id***. The court found that the sample was neither representative nor random since it was pulled from a set of returns that had been "flagged in the first place" because "they were different from the rest of the larger group." ***Id***. at 283. The court ultimately found the error harmless because "a reasonable estimate of the tax loss" would fall into the same range on the Tax Table as the district court's erroneous calculation. ***Id***. at 283-84. Even so, prosecutors are urged to adhere to the Fourth Circuit's admonition that the government should extrapolate from a random and representative sample. *See also* ***United States v. Jenkins***, 786 F. App'x 852 (11th Cir. 2019) (unpub.) (government's extrapolation "statistically unreliable because it ignored 55 tax returns that reported profitable businesses," but error was harmless).

In ***United States v. Johnson,*** the defendants argued that the tax loss from relevant conduct was inflated because it was extrapolated from too small a sample that was not sufficiently random and representative. 841 F.3d 299, 304-05 (5th Cir. 2016). The Fifth Circuit considered the argument "reasonable and relevant" but found it insufficient "to warrant a reversal of the district court's adoption of the tax loss calculation." ***Id***. at 305. The court pointed to defendants' failure "to offer evidence or alternative calculations to contradict or rebut a finding that the alleged tax loss was anything but a 'reasonable estimate based on the available facts.'" ***Id***.

43.03[3][d] 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 district courts two options for sentencing a defendant convicted under the omnibus clause: §2T1.1., applicable to tax offenses, or §2J1.2, applicable to obstruction of justice. *See* USSG App. A. When "more than one guideline section is referenced for the particular statute," the Guidelines direct the sentencing court to "use the guideline most appropriate for the offense conduct charged." USSG App. A, intro. comment. (n.1); *see also* §1B1.2(a). A sentencing court considers the "function of relevant guidelines (what does each guideline section say it is for) and the neighborhood of covered offenses (what other crimes does the guideline section apply to)." ***United States v. Ballard***, 850 F.3d 292, 295 (6th Cir. 2017). The ultimate question is "whether the conduct described in the

count of conviction is 'more akin to the conduct covered' by one guideline section or the other." ***Id.*** (quoting ***United States v. Neilson***, 721 F.3d 1185, 1187-88 (10th Cir. 2013)).

Section 2T1.1 covers many tax offenses including tax evasion, willful failure to supply information, making fraudulent or false statements, attempting to evade or defeat the assessment or collection of any tax, and engaging in various forms of fraud against the IRS. *See* 26 U.S.C. §§ 7201, 7203, 7206(1), 7206(3), 7206(4), 7207, 7212(a); USSG §2T1.1;[16] *see also* ***Ballard***, 850 F.3d at 294. Under §2T1.1, a defendant's base offense level depends on the amount of tax loss from the Tax Table. USSG §2T4.1. If there is no tax loss, the base offense level is 6. USSG §2T1.1(a).

Section 2J1.2, on the other hand, applies to obstruction of justice more generally and includes obstructing a criminal investigation, intimidating jurors, stealing or altering court records, intercepting grand jury deliberations, altering evidence, threatening or injuring witnesses, and impeding the communications of judges or law enforcement. USSG §2J1.2; *see* 18 U.S.C. §§ 1001, 1503, 1505, 1506, 1508, 1509, 1510(a), 1512, 1513, 1516, 1519; USSG App. A. Conduct sentenced under §2J1.2 generally involves "interfering with the administration of the justice system." ***Neilson***, 721 F.3d at 1188-90. Under §2J1.2, the base offense level is 14, with enhancements for more egregious acts of obstruction. Section 2J1.2(b)(1) (Specific Offense Characteristics) instructs sentencing courts to increase the base offense level when the offense involves, for example, violence or threats, sex offenses, terrorism, or substantial fabrication or destruction of documents, but does "not mention tax offenses or lying to investigators specifically." ***Ballard***, 850 F.3d at 295.

The fact that a defendant's conduct could have been charged under other statutes covered by §2T1.1, such as tax evasion, 26 U.S.C. § 7201, or willfully failing to supply required information, 26 U.S.C. § 7203, supports the use of §2T1.1. ***Ballard***, 850 F.3d at 295. Likewise, §2T1.1 is appropriate where the central harm caused is the loss of tax dollars. ***Id***. Section 2J1.2, in contrast, "covers a broad genus of obstruction offenses," so "when another possible guideline explicitly includes the offense conduct, in addition to

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[16] Section 7212(a) is not expressly listed in the commentary to Section 2T1.1 but the commentary directs the reader to the statutory index for additional statutory provisions, which index cross-references Section 7212(a) with Section 2T1.1 (and Section 2J1.2).

covering other offenses that are close cousins of that conduct, that's where the offense belongs." ***Id***. at 295-96.

As noted, 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 tax loss table effective in 2025, a tax loss of more than $40,000, but no more than $100,000, 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 $40,000 or less, whereas Section 2T1.1 ordinarily will yield a higher base offense level than Section 2J1.2 if the tax loss exceeds $100,000.[17]

43.03[3][e] 18 U.S.C. Sections 286 and 287

Title 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 or conspire to file income tax returns claiming false or fraudulent refunds of income tax.

In typical criminal tax cases, Section 2T1.1 or another Section 2T1 guideline will apply to a conviction under Sections 286 or 287. Although the statutory appendix to the Guidelines indicates that Section 2B1.1[18] applies to violations of Sections 286 and 287, a

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[17] For additional discussion of sentencing for Section 7212(a) offenses, see *supra*, Section 17.07.

[18] 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).

cross-reference provision in Section 2B1.1directs the use of a different guideline "[i]f . . . the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally . . . and . . . the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct)." USSG §2B1.1(c)(3). The commentary to Section 2B1.1 explains that this cross-reference applies "in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline." ***Id.*** comment. (n.17).

Courts have applied the Section 2B.1(c)(3) cross-reference to conclude that Section 2T1 provided the guideline applicable to a violation of Section 286 or 287 based on a fraudulent claim for tax refund. For instance, in ***United States v. Brisson***, 448 F.3d 989 (7th Cir. 2006), the court affirmed the district court's application of Section 2T1.1 to a fraudulent return charged under Section 287. Brisson lied to obtain a bank loan for his hotel business, diverted most of the loan proceeds to pay his personal expenses, failed to pay over the taxes withheld from his employees' wages, and filed an individual income tax return that falsely claimed he was due a refund on taxes withheld from his own wages as a hotel employee. ***Id.*** at 990-91. Brisson pleaded guilty to bank fraud, willfully failing to pay over employment taxes in violation of 26 U.S.C. § 7202, and to filing a fraudulent claim for a tax refund in violation of Section 287. ***Id.*** at 991. The district court applied Section 2B1.1(c)(3)'s cross-reference to determine that 2T1.1 should apply to the Section 287 offense, and accordingly grouped it together with the Section 7202 offense, but not the bank fraud offense, in its Guidelines calculation. ***Id.*** The court of appeals affirmed, explaining that "Brisson's attempt to claim tax refunds to which he was not entitled caused a different type of loss than the fraud against his bank," because his Section 287 "offense conduct was at heart a scheme to file fraudulent tax returns and thus could be considered on par with tax fraud." ***Id.*** at 991-92 (cleaned up); *see also* ***United States v. Moon***, 384 F. App'x 517 (7th Cir. 2010) (on the defendant's appeal, held that the district court erred in using § 2B1.1 instead of § 2T1.1, but found the error harmless because § 2T1.1 yielded a higher range). And in ***United States v. Barnes***, 324 F.3d 135 (3rd Cir. 2003), the Third Circuit found no ineffective assistance of counsel where the defendant's attorney failed to object to the district court's applying Section 2T1.1 to a Section 287

offense instead of Section 2F1.1[19] because the "offense was more aptly covered" by the tax guideline. ***Id.*** at 139-40. *See also* ***United States v. Aragbaye***, 234 F.3d 1101, 1105-06 (9th Cir. 2000) (affirming application of §2T1.4 to Section 287 conviction); ***United States v. Hill***, 683 F.3d 867, 869 (7th Cir. 2012) (Section 286 "requires the application of USSG §2T1.1"); ***United States v. Croteau***, 819 F.3d 1293, 1303 (11th Cir. 2016); *cf.* ***United States v. Taylor***, 276 F. App'x 910, 911 (11th Cir. 2008) (sentence vacated because the district court should have applied §2T1.1 instead of §2B1.1 to employment tax fraud charged as wire fraud).

In ***United States v. Baldwin***, 774 F.3d 711 (11th Cir. 2014), however, the court affirmed the district court's application of Section 2B1.1, at the government's urging, to a tax scheme involving substantial use of stolen identities that was charged under Section 286. The defendant, relying on ***Brisson***, ***Barnes***, and ***Aragbaye***, argued that the tax guidelines should have been applied to the Section 286 conviction, but the court of appeals disagreed. ***Id.*** at 732-33. The court distinguished these cases because the "the heart of [the defendant's] scheme was not simply to file fraudulent tax returns, impede the IRS from collecting taxes, or counsel others to falsify their own returns." ***Id.*** at 733. Instead, the defendant "unlawfully enriched himself by stealing identities, defrauding the victims by filing false returns, and obtaining and using fraudulent debit cards in the victims' names to receive the fraudulent returns." ***Id.*** The court thus concluded that "the 2B1.1 guidelines more aptly fit the specifics of the crimes committed by [the defendant]."[20] ***Id.*** *See also* ***United States v. Gonzalez***, 611 F. App'x 619, 623, 629-30

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[19] Section 2F1.1 was deleted as of November 1, 2001, and Appendix A now references Section 2B1.1 as the guideline applicable to Section 287.

[20] Section 2B1.1, unlike the Section 2T guidelines, contains a specific offense characteristic that increases the offense level depending on the number of victims — including identity theft victims — of the offense. USSG §2B1.1(b)(2); *see also* ***id.*** comment. (n.4(E)) (including "any individual whose means of identification was used unlawfully or without authority" within the definition of "victim" for purposes of the (b)(2) specific offense characteristic).

(11th Cir. 2015) (affirming application of §2B1.1, as recommended in the PSR, in tax preparation case with over 150 victims of identity theft).[21]

Prosecutors should carefully consider the defendant's fraudulent conduct to determine which Guideline Section more aptly covers the conduct. Reflexively urging the section with the higher range is unlikely to be in the government's long-term interest.

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 on 25 counts of violating Section 287, based on 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 taxpayers associated with the returns underlying his counts of conviction 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.***

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[21] Several other reported cases involve application of Section 2B1.1 to convictions under Sections 286 or 287 based on tax schemes that did not involve the use of stolen identities, but these cases did not address whether a Section 2T guideline should apply instead under the Section 2B1.1(c)(3) cross-reference. *See, e.g.*, ***United States v. Igboba***, 964 F.3d 501 (6th Cir. 2020); ***United States v. Pierre***, 870 F.3d 845 (8th Cir. 2017); ***United States v. White***, 571 F. App'x 20 (2d Cir. 2014).

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. *See* ***United States v. Igboba***, 964 F.3d 501, 508-10 (6th Cir. 2020) (concluding that the district court "could rightly attribute" $4.1 million in losses to defendant's individual criminal activity by a preponderance); ***United States v. Okoronkwo***, 46 F.3d 426, 438 (5th Cir. 1995) (district court did not err by finding that defendant was responsible for 75 percent of all false claims filed through a certain tax preparation office, including false claims filed by other co-conspirators, 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, showed 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).

Although the government bears the burden of proving any contested sentencing increase based on the amount of loss, *see, e.g.*, ***United States v. Rice***, 52 F.3d 843, 848 (10th Cir. 1995), a defendant must present evidence to support a claim that losses were wrongly attributed to him, *see* ***Igboba***, 964 F.3d at 508-10.

43.03[3][f] 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).[22] 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).

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[22] *But see supra*, Section 23.07[2][a] (explaining that the phrase "***Klein*** conspiracy" is "in some sense a misnomer" because ***Klein*** simply applied existing Supreme Court precedent to conspiracies to defraud involving the collection of revenue).

Section 2T1.9 directs the court to use the base offense level determined by either Section 2T1.1 or Section 2T1.4, depending on 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) (opining in *dicta* that the government "sensibly" did not appeal when the district court applied §2T1.9 but departed down two levels to match what the level would have been under §2T1.4, based on the district court's view that the conduct generating the low tax loss ($3001-$5000) was outside the heartland of the ***Klein*** conspiracy sentencing guideline).

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 co-conspirator 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. Jinwright***, 683 F.3d 471, 484-85 (4th Cir. 2012); ***United States v. Fleschner***, 98 F.3d 155, 160 (4th Cir. 1996) (tax loss finding was not confined to assessing only conduct that 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 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 on 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." ***United States v. Dale***, 991 F.2d 819, 854 (D.C. Cir. 1993) (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 on conduct that was uncharged. 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 on 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 discussed the scope of relevant conduct under §1B1.3(a)(1)(B) and noted that the section does not refer solely to conspiracy "but rather to the general concept of assisting others to achieve some unlawful end." ***United States v. Hull***, 160 F.3d 265, 269-70 (5th Cir. 1998) ("whether the defendant was charged with, convicted of, or acquitted of conspiracy should not dispositively affect attributable conduct for sentencing purposes as per § 1B1.3(a)(1)(B).")

Finally, a sentencing court should make specific findings on the amount of reasonably foreseeable tax loss. In ***Ladum***, the sentencing court found that one defendant participated in a thirteen-year ***Klein*** conspiracy for only ten of those years. 141 F.3d at 1346-47. The sentencing court found, however, that this defendant was still 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 on 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 underreporting the gross receipts of 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 about the reasonably foreseeable tax loss. ***Id.***[23]

43.03[3][g] Section 7202

Section 2T1.6 of the Sentencing Guidelines governs failures to collect, truthfully account for, or pay over tax in violation of 26 U.S.C. § 7202. The base offense level for such offenses is the level under the §2T1.4 Tax Table "corresponding to the tax not collected or accounted for and paid over." USSG §2T1.6(a).

Section 2T1.6 alternately provides that, "[w]here the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," the offense level from the fraud Guideline, §2B1.1, should be used instead "if the resulting offense level is greater." USSG §2T1.6(b)(1), comment. (backg'd) (observing that "the offense is a form of tax evasion[] and is treated as such" when "no effort is made to defraud the employee"). In practice, this alternate calculation does not usually apply because employees receive credit for taxes actually withheld from their wages regardless of whether their employers pay those taxes over to the IRS. *See* 26 C.F.R. § 1.31-1(a) ("If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Government by the employer.").

Section 7202 offenses are typically charged by quarter since an employment tax return (Form 941) is required to be filed each quarter with the required payment. Be aware that the offense conduct tax loss for a Section 7202 conviction is limited to the tax required to have been withheld from employees and paid over to the IRS that quarter. For the counts of conviction, the unpaid portion of the employer's separate share of the employment taxes is relevant conduct. *See supra*, Section 9.03 (explaining that the Internal Revenue Code imposes taxes directly on employers for Social Security,

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[23] For further discussion of sentencing for Section 371 offenses in tax cases, see *supra*, § 23.11.

Medicare, and Federal Unemployment that are separate from employees' shares of Social Security and Medicare taxes). And with respect to quarters not part of the counts of conviction, both the employee's share and the employer's share of the payroll tax is relevant conduct tax loss. *See* ***United States v. Rankin***, 929 F.3d 399, 407-08 (6th Cir. 2019) (holding that "the sentencing court may consider relevant uncharged criminal conduct" where the defendant was convicted of Section 7202 and other tax offenses); ***United States v. Lyon***, 161 F.3d 15 (9th Cir. 1998) (table) (same); ***United States v. Lynch***, 735 F. App'x 780, 792-93 (3d Cir. 2018) (upholding inclusion of loss attributable to "unpaid taxes from quarters for which Lynch was * * * not charged with any offense" because, under USSG § 2T1.1, comment. (n.2), "'[i]n determining the total tax loss attributable to the offense ... all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated'"); ***United States v. Fecondo***, 2023 WL 7646494, at *3-6 (E.D. Pa. Nov. 14, 2023) (relevant conduct tax loss included employer's share of payroll taxes for quarters of conviction under Section 7202 and employee and employer shares for uncharged quarters). Although these distinctions do not affect the total amount of tax loss counted under the Sentencing Guidelines, they do affect restitution, which, absent a plea agreement, is limited to loss from the counts of conviction.

43.03[3][h] Title 31 Offenses

Criminal tax prosecutions sometimes involve charges brought under 31 U.S.C. § 5322, which prohibits willfully violating any provision of the Bank Secrecy Act of 1970 (codified at 31 U.S.C. §§ 5311-5322) or a regulation issued thereunder.[24]

One of the covered provisions is 31 U.S.C. § 5314(a), which instructs the Secretary of the Treasury to require United States citizens, residents, and institutions to "keep records and file reports" regarding their foreign financial "transaction[s]" and "relation[s]." Following that statutory provision, the Secretary of the Treasury issued implementing regulations requiring United States citizens and residents to file, with some

[24] "Willfully" in this context refers to a "voluntary, intentional violation of a known legal duty," just as it does under the tax statutes. *See* ***Ratzlaf v. United States***, 510 U.S. 135, 141 (1994); ¶ 8.08[1], *supra*.

exceptions, annual reports disclosing their foreign financial accounts. *See* 31 C.F.R. § 1010.350; see also 31 C.F.R. § 1010.306(c) (excluding accounts with $10,000 or less). This required disclosure form is known as a "Report of Foreign Bank and Financial Accounts," or "FBAR." *See, e.g.*, ***In re Grand Jury Proceedings***, No. 4-10, 707 F.3d 1262, 1265 & n.1 (11th Cir. 2013).[25]

Willfully failing to report a foreign financial account on an FBAR, as required by the Bank Secrecy Act and its implementing regulations, is therefore a violation of 31 U.S.C. § 5322. A willful failure to report, standing alone, is punished under § 5322(a), which provides for imprisonment of up to five years and a fine of $250,000. A willful failure that occurs "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period" is punished under § 5322(b), which provides for imprisonment of up to ten years and a fine of $500,000.

In a case involving tax crimes as well as Title 31 violations, Section 5322(b) will often apply, because a defendant who willfully fails to report a foreign financial account on an FBAR will often willfully sign a false tax return that likewise fails to disclose the existence of the account. (An account required to be reported on an FBAR must also be

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[25] A separate regulation, 31 C.F.R. § 1010.420, requires that records relating to foreign accounts "be retained by each person having a financial interest in or signature or other authority over any such account" for at least five years and be kept "available for inspection as authorized by law." *See also* 31 U.S.C. § 5318(a)(4) (authorizing the Secretary of the Treasury to "summon . . . any person having possession, custody, or care of the reports and records required under this subchapter . . . to produce such books, papers, records, or other data"). All the courts of appeals to address the issue have held that, in light of this recordkeeping provision, a person cannot invoke the Fifth Amendment's right against self-incrimination to refuse to produce foreign-account records required to be kept available for inspection. *See* ***United States v. Chen***, 815 F.3d 72 (1st Cir. 2016); ***In re Grand Jury Subpoena Dated February 2, 2012***, 741 F.3d 339 (2d Cir. 2013); ***United States v. Chabot***, 793 F.3d 338 (3d Cir. 2015), *cert. denied*, 577 U.S. 1009 (2015); ***United States v. Under Seal***, 737 F.3d 330 (4th Cir. 2013); ***In re Grand Jury Subpoena***, 696 F.3d 428 (5th Cir. 2012); ***In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011***, 691 F.3d 903 (7th Cir. 2012), *cert. denied*, 569 U.S. 972 (2013); ***In re M.H.***, 648 F.3d 1067 (9th Cir. 2011), *cert. denied*, 567 U.S. 934 (2012); ***In re Grand Jury Proceedings, No. 4-10***, 707 F.3d 1262 (11th Cir. 2013), *cert. denied*, 571 U.S. 824 (2013).

disclosed on Schedule B of the Form 1040, Individual Income Tax Return.) A defendant may also have evaded taxes on interest income from the same undisclosed account.

The Sentencing Guidelines provide that violations of 31 U.S.C. §§ 5314 and 5322 are governed by §2S1.3. *See* USSG §2S1.3, comment. (statutory provisions). Section 2S1.3(c) provides that "[i]f the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate [tax] guideline . . . if the resulting offense level is greater." Accordingly, the starting point for determining the guidelines range for all FBAR cases is USSG §2S1.3, which is to be used at sentencing unless §2T provides a greater offense level.[26]

Under §2S1.3, the base offense level for violations of §§ 5314 and 5322 is six, plus more levels determined by the total "value of the funds" involved in the "reporting conduct." USSG §2S1.3(a)(2) & comment. (n.1). That additional number of levels is calculated by reference to the table in the general fraud guideline, §2B1.1. USSG §2S1.3(a)(2). Thus, the base offense level for violations of §§ 5314 and 5322 is based primarily on the total amount of undisclosed funds.

Section 2S1.3, however, contains specific offense characteristics that modify the base offense level for violations of §§ 5314 and 5322. Under §2S1.3(b)(3), the offense level is reset to six if (in addition to other requirements) the unreported funds were derived from lawful activity and were used for a lawful purpose, and if the enhancement in subsection (b)(2) does not apply. USSG §2S1.3(b)(1) & (3). The subsection (b)(2) enhancement, which refers to violations of the Bank Secrecy Act ("subchapter II of chapter 53 of title 31," the same subchapter covered by 31 U.S.C. § 5322), increases the offense level by two if the defendant "committed the offense while violating another law of the United States[27] or as part of a pattern of unlawful activity involving more than

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[26] These two Guidelines provisions will often yield different offense levels. While the offense level under Section 2T1.1 is based primarily on the actual or intended loss, the offense level under Section 2S1.3 is, as explained below, based primarily on the total value of the unreported funds.

[27] Until November 1, 2024, Section 2S1.3(b)(2) inadvertently omitted the "while violating another law of the United States" prong of the statute. Prior to that amendment, the case law, accordingly, relied on the "pattern of unlawful activity" prong in imposing the enhancement.

$100,000 in a 12-month period," tracking the language of Section 5322(b), the statutory provision with the enhanced penalty provision.

Sentencing courts have held that Section 2S1.3(b)(2)'s two-level enhancement applies — and the offense level therefore is not reset to six — if the defendant's willful failure to file an FBAR occurred along with a willful failure to disclose the same foreign financial account(s) on a tax return. *See, e.g.*, ***United States v. Manafort***, No. 18-CR-83 (E.D. Va.) (Dkt. No. 328); ***United States v. Desai***, No. 11-CR-846 (N.D. Cal.) (Dkt. No. 286). Under Section 2S1.3(b)(2), a "pattern of unlawful activity" means "at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion." USSG §2S1.3 comment. (n.3). Willfully failing to report a foreign account containing more than $100,000 on both an FBAR and a tax return satisfies the plain language of this requirement, because a "'pattern of unlawful activity' can consist solely of conduct that occurred during the course of the offense." ***United States v. Peterson***, 607 F.3d 975, 979-80 (4th Cir. 2010) ("structur[ing] a series of deposits to avoid paying income taxes" would constitute a pattern of unlawful activity comprising both a "structuring offense" and "income tax evasion"). That conclusion is consistent with 31 U.S.C. § 5322(b), as well, since the term "pattern of unlawful activity" in USSG §2S1.3(b)(2) expressly copies the statutory language. *See* USSG App. C, vol. II, amend. 637, supp. at 244 (2002) (explaining that the enhancement in §2S1.3(b)(2) "gives effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)"). And courts have repeatedly held that Section 5322(b)'s ten-year statutory maximum applies when a violation of the Bank Secrecy Act's reporting requirements is coupled with any related crime. *See, e.g.*, ***United States v. Bradley***, 644 F.3d 1213, 1241 (11th Cir. 2011) (failing to file an FBAR while also committing mail and wire fraud); ***United States v. Mourning***, 914 F.2d 699, 703 (5th Cir. 1990) (violating the Bank Secrecy Act and conspiring to sell marijuana).

In ***United States v. Gyetvay***, __ F.4th ___, 2025 WL 2253942, at *16-*19 (11th Cir. 2025), the court affirmed a district court's calculation of "the value of the funds" under §2S1.3(a)(2) that accounted for uncharged willful failures to file compliant FBARs in earlier years as relevant conduct. Gyetvay was convicted of willfully failing to file a compliant 2014 FBAR because his timely-filed FBAR for that year omitted one offshore account that contained around $9 million. ***Id.*** at *2-3. Gyetvay also failed to file timely

and compliant 2008-2013 FBARs; these FBARs also omitted a second offshore account that held stock worth around $84 million in 2013. ***Id.*** The court of appeals held that the evidence supported the district court's inclusion of the funds in this second account because Gyetvay's earlier-year failures to disclose shared a common victim, the IRS, and a common purpose of "conceal[ing] taxable money in Swiss bank accounts." ***Id.*** at *18.

43.03[4] Specific Offense Characteristics

After determining the base offense level, the sentencing court must adjust the offense level to account for any applicable specific offense characteristic. In determining whether a specific offense characteristic applies to a tax offense, prosecutors should bear in mind that the Guidelines sections that apply to various tax offenses do not all contain the same specific offense characteristics, and that §2T1.6 — applicable to violations of 26 U.S.C. § 7202 — contains no specific offense characteristics.

43.03[4][a] Illegal Source Income

Section 2T1.1, the guideline governing violations of 26 U.S.C. §§ 7201, 7203, 7206(1), and 7207, requires an increase in the base offense level "[i]f the defendant failed to report or correctly identify the source of income exceeding $10,000 in any year 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 various circumstances. *See, e.g.*, ***United States v. Fairchild,*** 819 F.3d 399, 415-16 (8th Cir. 2016) (enhancement proper when defendant failed to report on her tax returns large sums of cash a client paid to her for sex); ***United States v. Doxie***, 813 F.3d 1340, 1345-47 (11th Cir. 2016) (defendant failed to report income from mail and wire fraud charged in the same indictment as tax fraud; enhancement was proper because the fraud losses were not aggregated with the tax loss); ***United States v. Hoskins***, 654 F.3d 1086, 1099 (10th Cir. 2011) (enhancement proper where defendant failed to report income from prostitution); ***United States v. Roush***, 466 F.3d 380, 387-88 (5th Cir. 2006) (affirming enhancement where defendant failed to report income from a fraud conspiracy); ***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. Martin,*** 363 F.3d 25, 42-44 (1st Cir. 2004) (affirmed enhancement when

defendant failed to report income from receiving stolen property); ***United States v. Fitzgerald***, 232 F.3d 315, 321 (2d Cir. 2000) (enhancement proper where defendant converted over $100,000 from a charity); ***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); ***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).

One court has upheld the enhancement in employment tax cases where the defendant withheld the employment taxes, failed to pay them over to the IRS, and then failed to report those funds as income on his personal tax return. ***United States v. Heard***, 709 F.3d 413, 423-24 (5th Cir. 2013) (affirming enhancement where defendant diverted unreported employment taxes to his own use and failed to report it as income). The enhancement does not apply in employment tax cases charged under Section 7202, as the relevant guideline does not include this enhancement as a specific offense characteristic. USSG §2T1.6. Another limitation is that the income must be attributable to the defendant. In ***Heard***, the withheld tax not paid over to the IRS became income to the defendant when the business, a C-corporation, distributed the funds to him. 709 F.3d at 423-24.

The illegal source income enhancement requires the defendant to have received more than $10,000 from criminal activity "in any year." The "year" in question must correspond to the relevant taxable year for the offense. For example, when a defendant was convicted of filing a false individual tax return for calendar year 1989, it was held to be improper to impose the enhancement where the defendant received $5,000 derived from criminal activity in December 1988 and $10,000 in January 1989, because the defendant did not receive more than $10,000 in 1989. ***United States v. Barakat***, 130 F.3d 1448, 1453-54 (11th Cir. 1997). 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)).

The $10,000 threshold of the illegal source income enhancement does not refer to profit; Section 2T1.1(b)(1) refers 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. 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.***[28]

As with any enhancement, the government must provide the court with a factual basis to find by a preponderance of the evidence that a contested enhancement for illegal source income applies and can rely on the facts set forth in the presentence report only when those facts are uncontested. ***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 district court relied on defendant's admission in plea agreement and admission did not establish intent for racketeering offense); ***United States v. Parrott***, 148 F.3d 629, 633-34 (6th Cir. 1998) (district court erred in relying solely upon the presentence report as the factual basis for a contested illegal source income enhancement but finding the error harmless).

43.03[4][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":

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[28] 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. *See* 26 CFR § 1.61-3 ("Gross income" defined as gross receipts less cost of goods sold). The opinion correctly illustrates, however, that there is a distinction between gross receipts and gross income, and that the cost of goods sold must be accounted for in calculating gross income.

> "[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.5); 2T1.4, comment. (n.3). The Guidelines also 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).[29]

Merely making misrepresentations on a tax return likely does not justify an enhancement for sophisticated means. ***United States v. Powell***, 124 F.3d 655, 666 (5th Cir. 1997); ***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").

On the other hand, the "essence" of sophisticated conduct "is merely deliberate steps taken to make the offense . . . difficult to detect." ***United States v. Kontny***, 238 F.3d 815, 821 (7th Cir. 2001). "'[S]ophistication' [in the Guideline does not refer] 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." ***Id***. The enhancement "does not require a brilliant scheme, just one that displays a greater level of planning or concealment than the usual tax evasion case." ***United States v. O'Doherty***, 643 F.3d 209, 220 (7th Cir. 2011 (quoting ***United States v. Fife***, 471 F.3d 750, 754 (7th Cir. 2006). 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. Tandon***, 111 F.3d

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[29] Between 1998 and 2001, the language for this enhancement was changed from "sophisticated means" to "sophisticated concealment" as part of a separate Sentencing Commission effort to, among other things, clarify that the enhancement broadly applies with respect to overall offense conduct; the language in §2T1.1 reverted to "means" in 2001 to clarify that the enhancement applies to the execution of the offense as well as its concealment. See USSG App. C, Amend. 617, Reason for Amend; USSG App. C. Amends. 219-223, Reason for Amends.

482, 491 (6th Cir. 1997) (taken together, defendant's actions demonstrated "a sophisticated and multi-pronged effort to deceive the IRS and evade paying taxes"); *see also* ***United States v. Ghaddar***, 678 F.3d 600, 602-03 (7th Cir. 2012) (defendant's actions "when viewed as a whole constituted a sophisticated scheme"). Moreover, the fact that a defendant could have used "even more elaborate mechanisms to conceal" the fraud does not defeat a finding of sophisticated means. ***United States v. Bickart***, 825 F3d. 832, 837 (7th Cir. 2016) (citing ***United States v. Madoch***, 108 F.3d 761, 766 (7th Cir. 1997)). "Even if any single step is not complicated, repetitive and coordinated conduct can amount to a sophisticated scheme." ***United States v. Laws***, 819 F.3d 388, 393 (8th Cir. 2016).

The commentary does not purport to offer an exhaustive list of the acts which may justify an enhancement for sophisticated means. It "provides a nonexclusive list of examples of sophisticated means of concealment." ***United States v. Campbell***, 491 F.3d 1306, 1315-16 (11th Cir. 2007). Indeed, while the offense conduct may involve the use of banks and creative finance, it is not necessary to constitute sophisticated means. ***United States v. Friend***, 104 F.3d 127, 130 (7th Cir. 1997). Courts have upheld the application of this enhancement for a variety of reasons. Courts have found that the indicia of sophisticated means include:

1. Use of shell corporations. USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); ***United States v. Igboba***, 964 F.3d 501, 511 (6th Cir. 2020); ***United States v. Stegman***, 873 F.3d 1215, 1237-38 (10th Cir. 2017); ***United States v. Pierre***, 870 F.3d 845, 850 (8th Cir. 2017); ***United States v. Vernon***, 814 F.3d 1091, 1107 (10th Cir. 2016); ***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 (8th Cir. 2003) (indicating that the failure to keep records does not constitute sophisticated means).

4. Destruction or alteration of records. ***Stegman***, 873 F.3d at 1238; ***United States v. Melton***, 870 F.3d 830, 843 (8th Cir. 2017); ***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. ***Stegman***, 873 F.3d at 1238; ***Pierre***, 870 F.3d at 850; ***United States v. Thomsen***, 830 F.3d 1049, 1073 (9th Cir. 2016); ***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); ***United States v. Ghaddar***, 678 F.3d 600, 603 (7th Cir. 2012); ***Whitson***, 125 F.3d at 1075; ***Kraig***, 99 F.3d at 1371; ***Hammes***, 3 F.3d at 1083.

8. Use of false documents. ***United States v. Lundberg***, 990 F.3d 1087, 1097 (7th Cir. 2021) (doctoring another person's tax forms to support lease application); ***Melton***, 870 F.3d at 843; ***Thomsen***,

830 F.3d at 1073; ***United States v. Bickart***, 825 F.3d 832, 838 (7th Cir. 2016), ***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 (7th 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. ***Stegman***, 873 F.3d at 1238; ***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. ***United States v. Osman***, 929 F.3d 962, 967 (8th Cir. 2019); ***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); ***Osman***, 929 F.3d at 967.

16. Using technology to conceal and execute the offense. ***Igboba***, 964 F.3d at 511.

17. Using straw purchasers for luxury items. ***Stegman***, 873 F.3d at 1238.

18. Using layers of people and LLCs to launder money. ***Stegman***, 873 F.3d at 1239.

This is not an exhaustive list of acts that may justify an enhancement for sophisticated means. Courts have also upheld the application of this enhancement based on 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 that the defendant then converted to cash to purchase personal items; 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 the excessive number of withholding deductions he claimed in accordance with changes in IRS regulations to avoid attracting the IRS's attention, and directed his 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).

Though the definition of "sophistication" is broad, for an enhancement to apply under §2T1.1(b)(2) or §2T1.4, the sophistication must relate to the tax offense. In ***United States v. Mankarious***, 151 F.3d 694, 710-11 (7th Cir. 1998), the Seventh Circuit held that the enhancement applied because although the fraud scheme was not directed primarily towards the IRS, the scheme did have the effect of hiding the scheme's gain from the IRS. "Whether 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." ***Id***. at 711. Accordingly, "the scheme constituted a sophisticated means of tax fraud, even if that was not its primary purpose." ***Id***. 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 (defendant created "an elaborate scheme

which involved the use of a shell corporation, falsified documents, and failure to record cash payments").

In ***United States v. Stokes***, 998 F.2d 279, 282 (5th Cir. 1993), 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. ***Id***. 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 that she had embezzled because she did not want her employer to discover her embezzlement, not because she wanted to avoid paying her taxes. ***Id***.

In ***United States v. Barakat***, 130 F.3d 1448 (11th Cir. 1997), the Eleventh Circuit distinguished ***Stokes***, saying that using an attorney's trust account to conceal income is not analogous to mere concealment of income from an accountant, although the court indicated whether the sophisticated means enhancement applied was a "close question." ***Id***. at 1457-58. The court cautioned that the sophisticated means enhancement could not apply to Barakat's tax offense if Barakat had used the trust account only to conceal mail fraud and not tax evasion. ***Id***. at 1457. Noting that the district court had said that evidence of mail fraud and tax evasion were "inextricably intertwined," creating uncertainty as to the district court's findings, the Eleventh Circuit remanded for reconsideration in light of its holding "that only evidence relating to the tax evasion count may be considered." ***Id***. at 1457-58.

A sentencing court may impose both the enhancement for use of sophisticated means and the enhancement for being in the business of preparing or assisting in the preparation of tax returns set forth in Section 2T1.4(b)(1)(B). ***United States v. Hunt***, 25 F.3d 1092, 1098 (D.C. Cir. 1994); ***United States v. Ambort***, 405 F.3d 1109, 1120 (10th Cir. 2005). Similarly, a sentencing court may impose both the enhancements for use of sophisticated means and for obstruction of justice, under Section 3C1.1, so long as separate conduct forms the factual basis for each enhancement. S***ee United States v. Thorsen***, 633 F.3d 312, 321 (4th Cir. 2011) (sophisticated means enhancement punishes defendant's past attempts to avoid detection while obstruction of justice enhancement punishes conduct intended to obstruct the investigation); ***United States v. Friend***, 104 F.3d 127, 130-31 (7th Cir. 1997) (no double counting because the district court

"specifically omitted from its consideration of the applicability of the sophisticated means enhancement the obstructive conduct that formed the basis for the obstruction of justice enhancement"); ***United States v. Furkin***, 119 F.3d 1276, 1284-85 (7th Cir. 1997) (despite some overlap, the base offense level, the various enhancements and the upward departure each represented "different considerations under the Guidelines").

43.03[4][c] Substantial Portion of Income Derived from Criminal Scheme

Section 2T1.4, the guideline governing aiding, assisting, procuring, counseling, or advising 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." USSG §2T1.4(b)(1)(A). 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" is defined by reference to the federal minimum wage and the "totality of the circumstances":

> "Engaged in as a livelihood" means that (A) 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 (B) 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).

USSG §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). ***Welch***, 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 wording of §2T1.4(b)(1)(A) and §4B1.3 is 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 failed 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[4][d] Business of Preparing or Assisting in the Preparation of Tax Returns

Section 2T1.4 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) (construing "regularly" to mean "that the enhancement is not to be applied to a person whose tax-return preparation activity was only occasional or sporadic"); *see also* ***United States v. Hammerschmidt***, 881 F.3d 633, 639 (8th Cir. 2018) (enhancement properly applied to defendant who was VP of a tax preparation business that filed more than 1,000 returns and collected fees for the service). *Cf.* ***United States v. Rosa***, 17 F.3d 1531, 1552 (2d Cir. 1994) (court could reasonably infer that defendant was "in the business" of receiving stolen goods "given evidence that incidents were more than sporadic and that defendant held himself out as a professional"); ***United States v. St. Cyr***, 977 F.2d 698, 703-04 (1st Cir. 1992) (requiring proof of more than "isolated, casual, or sporadic" conduct to show that a defendant was "in the business" of dealing in stolen property). 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) (emphasizing the district court's finding that the defendant "was unable to

provide evidence of legitimate profits as a sports agent" or that he was "otherwise gainfully employed," affirmed imposition of enhancement where the defendant "played the principal role in the drafting and filing of at least five individual fraudulent tax returns over a three-year period" and "misrepresented himself at least once 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) ("It is possible for a tax preparer to conduct a simple scheme and a nonpreparer to conduct a complex one."); *see also* ***Aragbaye***, 234 F.3d at 1106-08 (affirming sentence that included enhancements for both tax preparation and sophisticated means). 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[4][e] Planned or Threatened Use of Violence

Section 2T1.9, 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 is limited case law applying this enhancement, the Eleventh Circuit has upheld its imposition 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[4][f] Encouragement of Others to Violate Tax Code

Section 2T1.9(b)(2) 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 §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 §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). *See* ***United States v. Reinke***, 283 F.3d 918, 920-21 (8th Cir. 2002) (defendant sold hundreds of trusts over 10 years telling purchasers that by assigning all of their assets to a trust, they could deduct from their taxes the money they paid for personal living expenses; "You put your assets, everything you have into the trust, and the trust takes care of you."); ***United States v. Sileven***, 985 F.2d 962, 969-70 (8th Cir. 1993) (defendant formed a financial services company that conducted seminars in tax avoidance and provided such services as transferring a client's untaxed cash income to Canada that would be returned to the client in the form of untaxable loan proceeds); ***United States v. Springer***, 444 F. App'x 256, 266 (10th Cir. 2011) (unpub.) (defendants fraudulently advised people how to violate the tax code); ***United States v. Demer***, 369 F. App'x 979, 983 (11th Cir. 2010) (unpub.) (defendant encouraged others to evade taxes by assisting with anti-tax seminars encouraging the use of trusts to avoid

taxes and opening warehouse bank accounts based on approximately 30 shell companies). ***United States v. Chugay***, No. 22-12984, 2024 WL 1526115, at *8 (11th Cir. Apr. 9, 2024) (district court did not err in applying the enhancement where defendant "provided a means by which his hospitality workers could avoid paying taxes").

Prosecutors should evaluate the evidence in the case, considering whether the facts support a finding that the other people were co-conspirators or not. In ***United States v. Lucidonio***, 137 F.4th 177, 188 (3d Cir. 2025), the court reversed a district court's application of the enhancement where the defendant engaged in a payroll tax fraud scheme at his restaurant by paying employees partially "off-the-books." The court held that the government failed to show by a preponderance that the employees were not co-conspirators and therefore did not prove that defendant intended to encourage persons "other than or in addition to co-conspirators" to violate the tax laws. If prosecutors determine that the other people involved were co-conspirators, they may consider whether the defendant qualifies instead for a role-in-the-offence enhancement.

43.04 ROLE IN THE OFFENSE

The Guidelines authorize a sentencing court to adjust a defendant's offense level based on 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 if it finds that the defendant played a leadership or management role. USSG §3B1.1. If a defendant is found to be 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. Finally, if the court finds that the defendant abused a position of public or private trust, or used a special skill, 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." Thus, a sentencing court may consider uncharged relevant conduct when determining whether to adjust a defendant's offense level on the basis of his or her role in the offense, so long as conduct has been proven by preponderance of the evidence. ***United States v. Harris***, 70 F.3d 1001, 1003 (8th Cir. 1995) ("Unquestionably, the

district courts may consider conduct from uncharged or dismissed counts for certain purposes under the guidelines. First, such conduct can factor into the offense level as a specific offense characteristic, including victim-related and role-in-the-offense adjustments.") ***United States v. Lanese***, 937 F.2d 54, 57 (2d Cir. 1991).

43.04[1] Aggravating Role in the Offense

Section 3B1.1 of the Guidelines provides for increases in the offense level of varying sizes depending on the number of participants in the criminal activity at issue and whether the defendant was an "organizer, leader, manager, or supervisor" of that activity. In particular, Section 3B1.1 provides for (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 criminal activity that involved five or more participants or was otherwise extensive, 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 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 or to recidivate. USSG §3B1.1, comment. (backg'd). Along with increasing the offense level, application of the aggravating role enhancement disqualifies a zero-point offender from receiving a reduction of 2 levels under § 4C1.1(a)(10). *See* § 43.08, *infra*.

As with all sentencing enhancements, the government bears the burden of proving its applicability to a defendant by a preponderance of the evidence. *See* ***United States v. Colon***, 919 F.3d 510, 517 (7th Cir. 2019); ***United States v. Shabazz***, 887 F.3d 1204, 1222 (11th Cir. 2018); ***United States v. Vasquez***, 552 F.3d 734, 737 (8th Cir. 2009). On appeal, the district court's factual findings about the applicability of this enhancement are reviewed for clear error only. ***United States v. Powell***, 124 F.3d 655, 667 (5th Cir. 1997).

Any title the defendant may have had, e.g., "kingpin" or "boss," is not determinative of whether the defendant acted as an organizer or leader, rather than a mere manager or supervisor. USSG §3B1.1, comment. (n.4). While the Guidelines do not provide definitions for these terms, they recommend that courts should consider the following factors when making the determination:

> [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.

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.") (cleaned up). Further, there can be more than one organizer in a criminal operation. USSG §3B1.1, comment. (n.4). 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). Further, 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, but the defendant only needs to have been the organizer, leader, manager, or supervisor of one or more of the participants. USSG §3B1.1, comment. (n.2).

The commentary to §3B1.1 provides that the aggravating role enhancement only applies to those who organize, lead, manage or supervise other participants:

> To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

USSG §3B1.1, comment. (n.2); *see* ***United States v. Capers***, 61 F.3d 1100, 1110 (4th Cir. 1995) ("[A]n enhancement (as opposed to an upward departure) is the appropriate vehicle only for those defendants who controlled people."). "Once a sentencing court makes a factual finding as to the applicability of a particular adjustment provision, the court has no discretion, but must increase the offense level by the amount called for in the applicable provision." ***United States v. Feinman****,* 930 F.2d 495, 500 (6th Cir. 1991).

Most circuit courts follow this application note. ***United States v. Cali***, 87 F.3d 571, 577 (1st Cir. 1996) (holding §3B1.1(b) and Application Note 2 preclude

"management responsibility over property, assets, or activities as the basis" for an enhancement to a defendant's base offense level); ***United States v. Christian***, 804 F.3d 819, 824 (6th Cir. 2015) (an aggravating role adjustment cannot be based on property management alone); ***United States v. McFarlane***, 64 F.3d 1235, 1239 (8th Cir. 1995) (the only means to increase a sentence when a defendant merely exercised managerial control over property, assets, or activities is an upward departure); ***United States v. Glover***, 179 F.3d 1300, 1303 (11th Cir. 1999) (aggravating role enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy).

However, the Fifth Circuit continues to uphold enhancements under §3B1.1 based solely on management of property, assets, or activities. *See* ***United States v. Delgado***, 672 F.3d 320, 345 (5th Cir. 2012) (en banc) (holding enhancement was proper when the defendant exercised control over the property and activities of a drug trafficking ring); ***United States v. Bourrage***, 138 F.4th 327, 354 (5th Cir. 2025) (citing circuit law construing ***Delgado*** as permitting an "adjustment"); *but see* ***United States v. Warren***, 986 F.3d 557, 569 (5th Cir. 2021) (upholding the enhancement even though the court believed ***Delgado*** incorrectly applied the Guidelines; "we are bound by [*Delgado*] under our court's rule of orderliness").

A defendant who did not have an aggravating role during the commission of the offense may still qualify for an enhancement if he assumed a dominant role during a later cover-up. ***United States v. Mankarious***, 151 F.3d 694, 710 (7th Cir. 1998) (holding enhancement of defendant's sentence was proper when an equal participant in one portion of the offense later became an underling and defendant assumed dominant role in the cover-up over the underling). Further, 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) (holding it unnecessary that each organizer or leader be responsible for the same actions or have equal culpability).

Courts often have upheld the application of an aggravating role enhancement in cases involving tax crimes. *See, e.g.*, ***United States v. Grullon***, 996 F.3d 21 34-35 (1st Cir. 2021) (holding that giving orders to a co-conspirator to join his company in furtherance of a conspiracy to falsify tax returns was more than sufficient for enhancement); ***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); ***United States v. Thorson***, 633 F.3d 312, 318-319 (4th Cir. 2011) (holding enhancement was proper for a lawyer who performed legal work to carry out the conspiracy, recruited investors, and supervised and collected the paperwork and supporting data necessary to document and consummate the fraudulent activity); ***United States v. Powell***, 124 F.3d 655, 667 (5th Cir. 1997) (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. Kraig***, 99 F.3d 1361, 1370 (6th Cir. 1996) (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. Mankarious***, 151 F.3d 694, 710 (7th Cir. 1998) (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); ***United States v. Radtke***, 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); ***United States v. Kubick***, 205 F.3d 1117, 1126-27 (9th Cir. 1999) (enhancement was proper when defendant recruited attorneys, friends, accountants, his daughter, and his wife for his criminal activity, as well as directed and manipulated the other participants); ***United States v. Baldwin***, 774 F.3d 711, 734-735 (11th Cir. 2014) (holding enhancement was proper when defendant recruited co-conspirators, received names and social security numbers from those co-conspirators, and used that information to file fraudulent tax returns); ***United States v. Gehrmann***, 966 F.3d 1074, 1083-84 (10th Cir. 2020) (upholding aggravating role enhancement because defendant was an organizer, and rejecting defendant's argument that such a finding required "a hierarchy among the participants in the conspiracy"); *but see* ***United States v. Chisum***, 502 F.3d 1237, 1242 (10th Cir. 2007) (remanding for further proceedings regarding enhancement where the district court did not find that defendant organized, led, managed, or supervised at least one person who was criminally responsible).

The term "participant" refers to a person who is criminally responsible for the commission of the offense; the term includes persons who may not be convicted of an offense but excludes undercover law enforcement officers or other individuals not criminally responsible for the commission of the offense. USSG §3B1.1, comment. (n.1). But 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).

The circuits are split on the correct test to determine whether an organization is "otherwise extensive" under the Guidelines. The Second Circuit remanded a case to the district court, finding it had "relied upon too broad a test for extensiveness." ***United States v. Carrozzella***, 105 F.3d 796, 802 (2d Cir. 1997) (abrogated in part on other grounds, ***United States v. Kennedy***, 233 F.3d 157,160-61 (2d Cir. 2000)). ***Carrozzella***, instead, concluded that "an adjustment under Guidelines § 3B1.1 is based primarily on the number of people involved, criminally and noncriminally, rather than on other possible indices of the extensiveness of the activity." ***Id***. Limiting the analysis "primarily to head-counting" would, the court concluded, best "carry out the intent of the [Sentencing] Commission." ***Id***. ***Carrozzella***, then, crafted the following test for a district court to determine "whether a criminal activity is 'otherwise extensive' as the functional equivalent of one involving five or more knowing participants":

(i) the number of knowing participants;

(ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; and

(iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme.

Id. at 803-804. The Third, Sixth, and D.C. Circuits have all adopted the ***Carrozzella*** test. *See* ***United States v. Helbling***, 209 F.3d 226, 244-45 (3d Cir. 2000); ***United States v. Anthony***, 280 F.3d 694, 699-701 (6th Cir. 2002); ***United States v. Wilson***, 240 F.3d 39, 47-51 (D.C. Cir. 2001). But the other circuits have interpreted "otherwise extensive" more broadly.

The First Circuit found "the extensiveness of a criminal activity is not necessarily a function of the precise number of persons, criminally culpable, or otherwise, engaged in the activity," but rather "the totality of the circumstances, including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme." ***United States v. Dietz***, 950 F.2d 50, 53 (1st Cir. 1991). The Tenth Circuit expressly agreed with the First Circuit's interpretation of "otherwise extensive." ***United States v. Yarnell***, 129 F.3d 1127, 1139 (10th Cir. 1997). The Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have all adopted interpretations of "otherwise

extensive" that consider factors other than the number of participants in a criminal activity. See ***United States v. Roberts***, 881 F.2d 95, 104 (4th Cir. 1989) (holding that a four-level increase was proper, even though there was no evidence of five or more participants because of the amount of money and drugs involved, the interstate transportation, and the reputation of defendants for widespread drug dealings); ***United States v. Tuma***, 738 F.3d 681, 694 (5th Cir. 2013) (imposing enhancement regardless of the number of participants); ***United States v. Tai***, 41 F.3d 1170, 1174 (7th Cir. 1994) ("if a head count is the sole basis for an 'otherwise extensive' finding, the heads counted must add up to something greater than five" but permitting district courts to examine other factors in addition to a head count); ***United States v. Brockman***, 183 F.3d 891, 900 (8th Cir. 1999) (considering the number of participants and the amount of loss caused by the offense); ***United States v. Rose***, 20 F.3d 367, 374 (9th Cir. 1994) (considering such factors as the number of knowing participants and unwitting outsiders, the number of victims; and the amount of money fraudulently obtained or laundered); ***United States v. Holland***, 22 F.3d 1040, 1046 (11th Cir. 1994) (stating there are several factors relevant to the extensiveness determination, including the length and scope of the criminal activity as well as the number of persons involved).

43.04[2] Mitigating Role in the Offense

Section 3B1.2 of the Guidelines directs a sentencing court to decrease the offense level if the defendant was a minimal or minor participant in the criminal activity. USSG §3B1.2. A participant is defined for purposes of §3B1 as "a person who is criminally responsible for the commission of the offense but need not have been convicted." USSG §3B1.1, comment. (n.1) (further explaining that a person who is not criminally responsible (e.g., an undercover law enforcement officer) is not a participant). A minimal participant is a defendant who is "plainly among the least culpable of those involved in the conduct of a group" and may have his offense level decreased by four. USSG §3B1.2(a); USSG §3B1.2, comment. (n.4) (suggesting that a defendant's "lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant"). A minor participant may have his offense level decreased by two because his role is less culpable than most other participants but cannot be described as "minimal." USSG §3B1.2(b); USSG §3B1.2, comment. (n.5). In cases where a defendant falls between a minor and minimal participant, the offense level may be decreased by three. USSG §3B1.2. For a mitigating

role deduction, more than one participant must be involved in the offense. USSG §3B1.2, comment. (n.2).

The defendant bears the burden of proving by a preponderance of the evidence that he or she played only a minimal or minor role in the offense and is therefore entitled to the role reduction. ***United States v. Searan***, 259 F.3d 434, 447-48 (6th Cir. 2001) (defendant who was "deeply involved" in the tax fraud scheme, including active participation in the offense conduct and splitting the proceeds equally with his co-conspirator, was not entitled to a mitigating role reduction). If a defendant fails to put forth evidence showing who else was involved or what their roles were, the district court cannot compare the roles of other conspirators to "determine that the defendant was less culpable than *most other participants* in her relevant conduct." ***United States v. Wright***, 862 F.3d 1265 (11th Cir. 2017) (denying defendant's request for minor role reduction because defendant "failed to establish by a preponderance of the evidence that she is less culpable than the average participant.") (emphasis in original). *See also* ***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.")

The adjustment applies when the defendant's role in the offense makes him substantially less culpable than the *average participant* in the criminal activity. USSG §3B1.2, comment. (n.3(A)) (emphasis added). Before 2015, circuits split on whether "average participant" referred to co-participants in the instant offense, or the hypothetical "average participant" in a similar crime. But a 2015 amendment to the Commentary to §3B1.2, USSG App. C, Amendment 794 (amending USSG 3B1.2, comment. (n.3(A)), provides that the term refers to the "average participant in the criminal activity," and explains that "the 'average participant' means only those persons who actually participated in the criminal activity at issue in the defendant's case," and that "the defendant's relative culpability is determined only by reference to his or her co-participants").

The sentencing court must consider the defendant's role as compared to *all* the participants in the offense. ***United States v. Kubick***, 205 F.3d 1117, 1127 (9th Cir. 1999) (defendant not entitled to a mitigating role adjustment in bankruptcy and tax fraud despite being less culpable than the leader of the scheme because he was more culpable than others in the offense); ***United States v. James***, 598 F. App'x 714, 718 (11th Cir. 2015)

(defendant played a "significant role" in the stolen-identity refund fraud conspiracy including channeling tax refunds to debit cards, traveling across state to withdraw proceeds from different ATMs and dividing proceeds between co-conspirators); ***United States v. Pope***, 62 F. App'x 470, 472 (4th Cir. 2003) (defendant not less culpable than other participants because he ran a tax preparation service and materials related to the tax scheme were recovered from his apartment); ***United States v. Schroeder***, 500 F. App'x 426, 439 (6th Cir. 2012) (defendant not entitled to a mitigating role adjustment; he was the executive director, had control over an account, and authorized payments to co-participant).

The culpability determination is "heavily dependent upon the facts." USSG §3B1.2, comment. (n.3(C)). As part of its 2015 Amendment of Section 3B1.2, the Sentencing Commission set forth a list of non-exhaustive factors the sentencing court should consider:

> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
>
> (ii) the degree to which the defendant participated in planning and organizing the criminal activity;
>
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
>
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; [and]
>
> (v) the degree to which the defendant stood to benefit from the criminal activity.

Id.; *see* USSG. App. C, Amendment 794. The courts of appeal have applied these factors to reject mitigating role adjustments because of the defendant's knowledge of and benefits derived from the criminal scheme at issue. *See* ***United States v. Nkome***, 987 F.3d 1262, 1276-80 (10th Cir. 2021) (rejecting defendant's claim that she was merely a "money mule" in a wire fraud conspiracy and upholding district court's refusal to grant mitigating role adjustment based on defendant's understanding of the scope and nature of criminal activity, her level of participation and the amount to which she benefitted from the activity); ***United States v. Taylor***, 818 F. App'x 495, 501-03 (6th Cir. 2020)

(defendant's personal actions indicated that she knew she was not entitled to Social Security benefits and she stood to gain from the fraud); ***United States v. Jones***, 705 F. App'x 859, 861-62 (11th Cir. 2017) (denial of mitigating role adjustment upheld where defendant in Social Security fraud and identity theft conspiracy "understood the structure of the criminal activity, and she benefitted tremendously from [it] and wanted to increase her benefits during the commission of the crime").

A defendant who has already received a lower offense level after being 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. *See* ***Atanda***, 60 F.3d at 199 (upholding refusal to apply the mitigating role reduction when defendant was convicted of both filing a false claim for tax refund in his 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 in his own name); ***United States v. Lampkins***, 47 F.3d 175, 180-81 (7th Cir. 1995) (affirming district court's refusal to give defendant a mitigating role adjustment on grounds that defendant's "minor participation was already recognized by the low base offense level of his sentence").

43.04[3] Abuse of Position of Trust or Use of a Special Skill

Section 3B1.3 instructs the 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. But this section 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 provides that an adjustment based on an abuse of trust may accompany an additional adjustment based on an aggravating role in the offense under Section 3B1.1, but that an adjustment based solely on 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. Prochner, 417 F.3d 54, 60-61 (1st Cir. 2005) (use of special skill); ***United States v. Bhagavan***, 116 F.3d 189, 191 (7th Cir. 1997) (abuse of position of trust); ***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 "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." USSG §3B1.3, comment. (n.1). These individuals "ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature." ***Id***. 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, 201-02 (10th Cir. 1996); *see also* ***United States v. Laljie***, 184 F.3d 180, 194 (2d Cir. 2001) ("the primary trait that distinguishes a position of trust from other positions is the extent to which the position provides the freedom to commit a difficult-to-detect wrong").

Opinions from the Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have concluded that whether the defendant occupied a position of trust should be "viewed from the perspective of the victim." ***United States v. Hussey***, 254 F.3d 428, 431 (2d Cir. 2001). That is, the defendant must possess discretion "entrusted to the defendant by the victim." ***United States v. Broderson***, 67 F.3d 452, 456 (2d Cir. 1995) (reversing lower court's application of enhancement for abuse of position of trust). In ***Broderson***, a high-ranking executive with managerial discretion to negotiate contracts between the company and the U.S. government held a position of trust vis-a-vis his employer, but the government had not entrusted the executive with managerial discretion. ***Id***. at 455-56. Whatever "trust" the government placed in the executive "was based strictly on the explicit commands of [the controlling statutes and regulations]." ***Id***. at 456; *see also* ***United States v. Thomsen***, 830 F.3d 1049, 1073 (9th Cir. 2016) ("We have repeatedly held that, to support the abuse of trust enhancement, a position of trust must be established from the perspective of the victim." (cleaned up)); ***United States v. Miell***, 661 F.3d 995, 999 (8th Cir. 2011) (whether defendant "holds a position of trust with respect to a victim, [] turns on the nature of the defendant's position and amount of discretion and control relative to the victim, not whether the victim subjectively trusted the defendant"); ***United States v. Abdelshafi***, 592 F.3d 602, 611 (4th Cir. 2010); ***United***

States v. Ghertler, 605 F.3d 1256, 1264 (11th Cir. 2010); ***United States v. Jenkins***, 578 F.3d 745, 752 (8th Cir. 2009) ("The issue of whether an abuse-of-trust enhancement applies is fact intensive because it turns on the precise relationship between the defendant and his victims.") (cleaned up); ***United States v. Morris***, 286 F.3d 1291, 1295-1300 (11th Cir. 2002) (reversing application of enhancement where attorney conspired to launder money, but his clients were not the intended victims); ***United States v. White***, 270 F.3d 356, 371 (6th Cir. 2001) (enhancement "may only be applied where the defendant abused a position of trust with the victim of his charged conduct"); ***United States v. Trammell***, 133 F.3d 1343, 1355 (10th Cir. 1998); ***United States v. Mills***, 138 F.3d 928, 941 (11th Cir. 1998) (reversing enhancement where Medicare-funded care provider did not occupy position of trust vis-à-vis Medicare).

In ***United States v. Barringer***, 25 F.4th 239 (4th Cir. 2022), the Fourth Circuit held that the abuse-of-trust enhancement was properly applied in a prosecution for willfully failing to pay over employment taxes, in violation of 26 U.S.C. § 7202, on the theory that the defendant occupied a position of trust vis-à-vis the IRS. That court concluded that Barringer, who effectively ran the company, occupied a position of trust based on her discretion in determining who to pay and when and to sign the checks on the company's behalf. ***Id.*** at 254-59. The court also rejected Barringer's argument that applying the abuse-of-trust enhancement represented impermissible double-counting because a hypothetical defendant could be a responsible party for § 7202 while still having minimal or limited discretion in the role. ***Id.*** ("While it is true that many responsible persons under § 7202 will also occupy positions of trust, being a responsible person does not ipso facto equate to holding a position of trust for USSG §3B1.3 purposes.").

Other courts, however, have rejected application of the abuse-of-trust enhancement for tax offenses where the enhancement was based on the theory that the defendant was in a position of trust with respect to the IRS. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), another § 7202 case, the court held that the enhancement was improper because the defendant did not occupy a position of trust vis-à-vis the IRS. ***Id.*** at 603-04. The court reasoned that May "had no discretion" because the "only duty" he owed the IRS was "simply . . . to collect the payroll taxes from his employees and transfer the funds to the IRS." ***Id.*** at 603; *see also* ***United States v. DeMuro***, 677 F.3d 550, 568-69 (3d Cir. 2012) (following ***May*** to hold that the defendants convicted of violating § 7202 did not abuse positions of trust when they failed to pay over

employment taxes the IRS had required them to deposit in a special fund in trust pursuant to 26 U.S.C. § 7512); ***United States v. Guidry***, 199 F.3d 1150, 1159 (10th Cir. 1999) (a defendant who embezzled from her employer then failed to report the embezzled income on her tax return may hold a position of trust with her employer but not with the IRS; enhancement is improper where offense is filing a false tax return); ***United States v. Barakat***, 130 F.3d 1448, 1454-56 (11th Cir. 1997) (abuse-of-trust enhancement was improperly applied to defendant convicted of evading tax due on embezzled funds; defendant's use of a position of trust to embezzle the funds did not matter because he "did not use his particular position of trust to give him an advantage in the commission or concealment of the offense of tax evasion"); *cf.* ***United States v. Technic Services, Inc.***, 314 F.3d 1031, 1051 (9th Cir. 2002), *overruled on other grounds by* ***United States v. Contreras***, 593 F.3d 1135, 1136 (9th Cir. 2010) (suggesting that the abuse-of-trust enhancement is only appropriate in a tax case if "the defendant is a government employee or exercises directly delegated public authority").

Unlike the majority view, the Fifth, Seventh, and District of Columbia Circuits have expressly rejected the view that an adjustment for abuse of a position of trust applies only to the victim of an offense. For instance, in ***United States v. Kay***, 513 F.3d 432 (5th Cir. 2007), a defendant was convicted of violating the Foreign Corrupt Practices Act by falsely reporting import quantities and bribing Haitian officials to accept the false reports. ***Id***. at 460. The Fifth Circuit concluded that the defendant occupied a position of trust with respect to the Haitian government but rejected the defendant's contention that the enhancement applies only when a defendant "abuses a position of trust vis-à-vis the victim of the crime," noting that the guidelines do not explicitly require that "the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim." ***Id***.; *see also* ***United States v. Thomas***, 510 F.3d 714, 726 (7th Cir. 2007) (Seventh Circuit law "does not require a particular 'victim' relationship between the criminal and the person or group whose trust has been abused" because "[l]awbreaking in the exercise of a position of public or private trust is necessarily an abuse of that position"); ***United States v. Buck***, 324 F.3d 786, 794-95 (5th Cir. 2003) (rejecting argument by defendant convicted of misapplication of government funds that she was not in a position of trust with the government because her duties in the non-profit were limited to following government regulations); ***United States v. Shyllon***, 10 F.3d 1, 5 (D.C. Cir. 1993) (nothing in the language of the Guideline text or the application notes require "any 'trust' other than that of the party or entity entrusting the offender with some special discretion"); *but see* ***United States v. Bikundi***, 926 F.3d 761, 799 (D.C. Cir. 2019)

(owners of home health care company providing services paid by Medicaid held position of trust vis-à-vis the government); *cf.* ***United States v. Scott***, 405 F.3d 615, 618 (7th Cir. 2005) (upholding the enhancement as applied to defendant's sentence for money laundering, the court observed: "Had he not abused a position of trust, he might not have obtained any money to launder.").

Additionally, even in the circuits that have required a defendant to occupy a position of trust with respect to a victim of the offense, some cases have recognized that there can be "secondary victims" of an offense that provide a basis for imposing the abuse-of-trust enhancement. For example, in ***United States v. Thorn***, 446 F.3d 378, 381 (2d Cir. 2006), the defendant, owner of an asbestos abatement company, was charged with violations of the Clean Air Act and money laundering. Based on the testimony of a homeowner who had given the defendant absolute discretion in removing the asbestos in her basement, ***id.*** at 389, the Second Circuit ordered the district court to apply the enhancement on remand even though the homeowner was not the primary victim of the defendant's Clean Air Act violations. ***Id.*** at 390; *see also* ***United States v. Roberts***, 660 F.3d 149, 164 (2d Cir. 2011) (no error in district court applying enhancement based on defendant's abuse of a position of trust with his employer, an airline, even though the primary victim of his drug trafficking offense was the United States).

Thus, in the circuits that either reject outright the requirement that the defendant occupy a position of trust vis-à-vis a victim of the offense or recognize the possibility of secondary victims, some cases have affirmed abuse-of-trust enhancements in tax cases based on the defendant's trust relationship with a person or entity other than the IRS. In ***United States v. Bhagavan***, 116 F.3d 189 (7th Cir. 1997), the Seventh Circuit held that the majority shareholder of a corporation qualified for the abuse-of-trust enhancement when he used his position to divert corporate income to facilitate the crime of personal income tax evasion. ***Id***. 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 said it was a fallacy to think "that there can be only one victim of a tax evasion scheme—the United States—and thus that the §3B1.3 enhancement can never apply in tax evasion cases." ***Id***. at 193. "It 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***.

And in ***United States v. Cianci***, 154 F.3d 106 (3d Cir. 1998), the Third Circuit upheld an abuse of position of trust enhancement to defendant's tax evasion offense based on relevant conduct; to wit, embezzlement. The defendant, a high-ranking corporate official, used his position of trust with the corporation to facilitate the crime of individual income tax evasion when he diverted embezzled corporate property in exchange for kickbacks. ***Id***. Even though the victim of the offense of conviction was the IRS and not the corporation, the Court found the enhancement was proper. ***Id***. at 112-13; *see also* ***United States v. Thomsen***, 830 F.3d 1049, 1073-74 (9th Cir. 2016) (IRS was not the only victim in a fraudulent tax return scheme; affirming enhancement based on position of trust tax-preparer had with clients whose identifying information he used in fraudulent returns); ***United States v. Friedberg***, 558 F.3d 131, 136 (2d Cir. 2009) (holding that where "a defendant's tax evasion was part of a larger scheme constituting relevant conduct, an integral part of which involved abusing a position of trust," the sentencing court may apply the enhancement).

For further discussion of the abuse-of-trust enhancement in § 7202 cases, see *supra*, Section 9.07[1].

43.05 OBSTRUCTION OF JUSTICE

Section 3C1.1 of the Guidelines provides for 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."

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***. at 435. Under some circumstances, an enhancement may be permitted based on obstructive conduct that occurred before a federal investigation began. USSG §3C1.1, comment. (n.1) ("[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."); ***United States v. Ayers***, 416 F.3d 131, 134 (2d Cir. 2005) (destruction of firearm used in a state crime before federal investigation for felon in possession of a firearm); *but see* ***United States v. Perrault***, 995 F.3d 748, 778 (10th Cir. 2021) (error to apply enhancement to priest who fled the country when he realized a journalist was investigating his criminal conduct; enhancement only applies to obstructive conduct "during the investigation, prosecution, or sentencing of the instant offense"); ***United States v. Jeune***, 2021 WL 3716406 (11th Cir. 2021) (per curiam) (remanding for resentencing without obstruction-of-justice enhancement because defendant's false affidavit in civil investigation was "impetus of the criminal investigation, not the impediment").

Denial of guilt does not qualify for this enhancement unless it is under oath and constitutes perjury. §3C1.1, comment. (n.2); *see* ***United States v. Jones***, 308 F.3d 425, 429 (4th Cir. 2002) (holding that when a defendant commits perjury "to gain an unwarranted release from custody," the obstruction of justice enhancement applies); *compare* ***United States v. Surasky***, 976 F.2d 242, 245 (5th Cir. 1992) (defendant's statement to law enforcement that "he had nothing to do with the escape attempt" was "fairly described as a mere denial of guilt" insufficient to warrant enhancement) *with* ***United States v. Owens***, 308 F.3d 791, 794 (7th Cir. 2002) (obstruction of justice enhancement appropriate where defendant told law enforcement a story intended to send them on a "wild goose chase"); ***United States v. Gormley***, 201 F.3d 290, 294 (4th Cir. 2000) (holding that obstruction of justice enhancement applied because defendant went beyond merely denying guilt and implicated his taxpayer clients in scheme to defraud); ***United States v. McKay***, 183 F.3d 89, 92-96 (2d Cir. 1999) (obstruction of justice enhancement applied because defendant did more than deny his guilt in interview with probation officer by concocting a story that admitted guilt but denied that he was the leader of the organization).

Federal Rule of Criminal Procedure 32 provides, in part, that at sentencing the court "(A) may accept any undisputed portion of the presentence report as a finding of fact; (B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed.R.Crim.P. 32(i)(3)(A-B).

Some Courts of Appeals apply Rule 32 more literally than others. For example, the Sixth Circuit has held that, where the defendant contests the enhancement, "the district court must review the evidence and set forth findings independent of those contained in the presentence investigation report," and that "[w]here a district court fails to provide an on-the-record, independent evaluation of the evidence, the reviewing court must vacate the sentence and remand the case for resentencing. ***United States v. Middleton***, 246 F.3d 825, 847 (6th Cir. 2001). *See also* ***United States v. Griffin,*** 656 Fed. App'x 138,141-42 (6th Cir. 2016) (remanding because district court failed to make factual findings in support of obstruction of justice enhancement); ***United States v. Harmon***, 944 F.3d 734, 739 (8th Cir. 2019) (vacating sentence because court did not make specific factual findings or clarify the basis—perjury or witness interference—for an obstruction of justice enhancement); ***United States v. Guzman***, 318 F.3d 1191, 1198 (10th Cir. 2003) ("this Circuit has repeatedly held that a District Court may not satisfy its obligation under Rule 32[] by simply adopting the presentence report as its finding"); *but see* ***United States v. Wright***, 147 Fed. App'x 53, 57 (10th Cir. 2005) ("although the district court apparently did not make explicit factual findings, such findings were contained in the presentence report adopted by the court"); ***United States v. Alpert***, 28 F.3d 1104, 1108 (11th Cir. 1994) (acknowledging that record might support enhancement for obstruction of justice but holding that district court's findings were insufficient to permit it).

Other circuits permit more reliance on the Pre-Sentence Investigation Report. In ***United States v. Huerta***, 182 F.3d 361, 364-65 (5th Cir. 1999), the court upheld the imposition of obstruction of justice enhancement for the defendant's flight based on unrebutted evidence in the PSR. ***Id***. at 365 ("A defendant's rebuttal evidence must demonstrate that the information contained in the PSR is materially untrue, inaccurate or unreliable, and mere objections do not suffice as competent rebuttal evidence.");[30] *see*

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[30] While the Fifth and Fourth Circuits require the defendant to rebut a controverted factual finding in the PSR, see ***Huerta***, *supra*.; ***United States v. Terry***, 916 F.2d 157, 162 (4th Cir. 1990) (burden is on defendant to show inaccuracy or unreliability of the presentence report), other courts require the government to provide evidence in support of the PSR's factual findings supporting a Guidelines enhancement. *See* ***United States v. Begay***, 117 F. App'x 682, 685 (10th Cir. 2004) ((district court failed to comply with Rule 32 when it "effectively required the defendant to disprove the facts contained in the

(continued . . .)

also ***United States v. Cheal***, 389 F.3d 35, 44-45 (1st Cir. 2004) (court not required to make specific findings before imposing obstruction of justice enhancement when it "had already adopted the whole of the PSR's factual findings," which covered the details of defendant's conduct); ***United States v. Rivera***, 809 Fed. App'x 14, 17 (2d Cir. 2020) (district court's explicitly adopting the factual statements in the PSR serve as sufficient basis for obstruction enhancement) citing ***United States v. Molina***, 356 F.3d 269, 275 (2d Cir. 2004) (noting that a district court "satisfies its obligation to make the requisite factual findings" in support of a Guidelines enhancement by expressly adopting factual findings in a PSR); ***United States v. Terry***, 916 F.2d 157, 162 (4th Cir. 1990) ("Without an affirmative showing [by defendant that] the information is inaccurate, the court is free to adopt the findings of the presentence report without more specific inquiry or explanation.") (cleaned up); *cf.* ***United States v. Doe***, 488 F.3d 1154, 1158-59 (9th Cir. 2007) (court's adoption of victim's statements in PSR satisfied Rule 32 as to credibility). However, as discussed below, express findings are nonetheless mandatory when the obstruction enhancement is based on a defendant's trial testimony. ***United States v. Dunnigan***, 507 U.S. 87, 95 (1993).

The commentary to Section 3C1.1 provides a non-exhaustive list of conduct that constitutes obstruction of justice.[31] Case law provides a variety of scenarios that justify an obstruction of justice enhancement.

PSR") citing ***United States v. Guzman***, 318 F.3d 1191, 1198 (10th Cir. 2003) (government bears the burden with respect to sentencing enhancements).

[31] The commentary to §3C1.1 also provides a non-exhaustive list of types of conduct that do *not* warrant an obstruction of justice enhancement, including: providing a false name or identification document at arrest, except where it actually resulted in a significant hindrance to the investigation or prosecution of the instant offense; making false statements, not under oath, to law enforcement officers, unless the statements are materially false and significantly obstruct or impede the investigation or prosecution of the offense; providing incomplete or misleading information not amounting to a material falsehood in respect to presentence investigation; avoiding or fleeing from arrest unless it constitutes reckless endangerment during flight; and lying to a probation or pretrial services officer about drug use while on pre-trial release although that may be a factor in determining whether a defendant gets a reduction for acceptance of responsibility. USSG §3C1.1, comment. (n.5). *See* ***United States v. Morales-Sanchez***, 609 F.3d 637, 641 (5th Cir. 2010) (sentencing court erred in finding defendant's call asking that a vehicle be falsely reported as stolen qualified for obstruction enhancement; the call, made while

(continued . . .)

The first behavior the Guidelines commentary identifies 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* ***United States v. Guidry***, 960 F.3d 676, 682 (5th Cir. 2020) (defendant's jail calls telling a third party to "make sure [a witness] ain't gonna testify for no Grand Jury or nothing man" sufficient to support enhancement for obstruction of justice); ***United States v. Dale***, 498 F.3d 604, 608-10 (7th Cir. 2007) (defendant's threats against witness after learning she was a potential witness against him qualified for obstruction of justice enhancement); ***United States v. West***, 58 F.3d 133, 137-38 (5th Cir. 1995) (court's finding that the defendant obstructed justice by intimidating witnesses 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. Hong***, 938 F.3d 1040, 1052 (9th Cir. 2019) (enhancement applied based on defendant's instructing and encouraging other co-schemers to lie to agents); ***United States v. Harris***, 881 F.3d 945, 948 (6th Cir. 2018) (witness interpreted defendant's statement, "Remember, we sold watches," as an invitation to make a false statement to FBI); ***United States v. Emerson***, 128 F.3d 557, 563 (7th Cir. 1997) (defendant gave false statements to postal inspectors, attempted to fabricate a common story and influence witnesses, and provided perjured testimony); ***United States v. Ewing***, 129 F.3d 430, 434-35 (7th Cir. 1997) (court rejected defendant's claim that "he was simply reinforcing an idea" when he attempted to influence a witness in a letter); ***United States v. Atkinson***, 966 F.2d 1270, 1277 (9th Cir. 1992) (defendant contacted witness and told him not to speak to police about a hunting trip and helped witness concoct a story for authorities if he was forced to discuss it); ***United States v. Hollis***, 971 F.2d 1441, 1460 (10th Cir. 1992) (defendant told witness to lie to FBI).

"[C]ommitting, suborning, or attempting to suborn perjury" likewise warrants an obstruction of justice enhancement. USSG §3C1.1, comment (n. 4(B)). When a defendant perjures himself or herself on the stand, enhancing the defendant's offense level for obstruction of justice is warranted, and does not undermine the defendant's constitutional right to testify. ***United States v. Dunnigan***, 507 U.S. 87, 96 (1993); *see also* ***United***

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defendant was in the backseat of police car, occurred "contemporaneously with arrest" and did not "result[] in a material hindrance" to investigation, prosecution, or sentencing of the defendant) (quoting USSG §3C1.1, comment. (n.4(D)).

States v. Law, 990 F.3d 1058, 1066 (7th Cir. 2021) (defendant committed perjury in an affidavit that was read during trial); ***United States v. Friedman***, 971 F.3d 700, 716 (7th Cir. 2020) (enhancement based on perjury during evidentiary hearing); ***United States v. Harriman***, 970 F.3d 1048, 1056 (8th Cir. 2020) (enhancement based on perjury during trial); ***United States v. Cabezas-Montano***, 949 F.3d 567, 602 (11th Cir. 2020) (enhancement based on perjury during trial); ***United States v. Hawthorne***, 316 F.3d 1140, 1148-49 (10th Cir. 2003) (enhancement based on perjury during suppression hearing) (collecting cases); ***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. Case***, 180 F.3d 464, 465 (2d Cir. 1999) (submitting a false Form 433-A justified the obstruction enhancement). "[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury." ***United States v. Dunnigan***, 507 U.S. 87, 95 (1993).

A sentencing court must be satisfied that the inaccurate testimony was not due to confusion, mistake, or faulty memory. ***Id.*** Therefore, in applying the obstruction enhancement for a defendant's perjury, the trial court *must* make findings on the record that encompass all the factual predicates for a finding of perjury. ***Id.*** at 95-97 (concluding that constitutional challenge to §3C1.1 was "dispelled by our earlier explanation that if an accused challenges a sentence increase based on perjured testimony, the trial court must make findings to support all the elements of a perjury violation in the specific case"). Perjury requires (1) the giving of false testimony (2) concerning a material matter (3) with the willful intent to provide false testimony, rather than because of confusion, mistake, or faulty memory. ***Id.*** at 94; s*ee also* ***United States v. Castro***, 960 F.3d 857, 870 (6th Cir. 2020) (district court made sufficient findings to conclude that defendant "willfully gave false testimony concerning a material matter"); ***United States v. Feldman***, 931 F.3d 1245, 1263 (11th Cir. 2019) (findings adequate as long as "the record clearly reflects that the district court found willfulness, falsity, and materiality and that a sufficient basis supports each element); ***United States v. Colby***, 882 F.3d 267, 273-74 (1st Cir. 2018) (district court "permissibly concluded that [defendant's] completely contradictory accounts" of key facts were not the result of "confusion, mistake, or faulty memory"). Following ***Dunnigan***, the courts of appeal have routinely remanded cases where the district court failed to make explicit findings on the elements of perjury. *See, e.g.*, ***United States v. Raia,*** 993 F.3d 185, 193 (3d Cir. 2021); ***United States v. Rosario***, 988 F.3d 630, 634 (2d Cir. 2021); ***United States v. Gomez-Diaz***, 911 F.3d 931, 936 (8th Cir. 2018); ***United States v. Smith***, 62 F.3d 641, 647-48 (4th Cir. 1995).

Another scenario 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)). *See* ***United States v. Zambrano***, 971 F.3d 774, 783 (8th Cir. 2020) (defendant obstructed justice by submitting a false affidavit to the court in an attempt to impede prosecution of co-defendant); ***United States v. Iverson***, 874 F.3d 855, 859-60 (5th Cir. 2017) (lying to judicial officer to obtain appointed counsel qualified as obstruction of justice); ***United States v. Thorson***, 633 F.3d 312, 321 (4th Cir. 2011) (obstruction of justice found when defendant fabricated documentation in support of tax deduction and purchase agreement to thwart IRS audit and grand jury investigation); ***United States v. Waldner***, 580 F.3d 699, 707-08 (8th Cir. 2009) (obstruction of justice enhancement applied when defendant forged facsimile documents purporting to be invoices for sentencing hearing); ***United States v. Gilpatrick***, 548 F.3d 479, 485 (6th Cir. 2008) (obstruction of justice found when defendant produced a false affidavit from inmates to hinder investigation of prison fight); ***United States v. Martin***, 369 F.3d 1046, 1061 (8th Cir. 2004) (defendant's backdating checks qualified as obstruction of justice); *but see* ***United States v. Parrott***, 148 F.3d 629, 635 (6th Cir. 1998) (enhancement was not warranted because there was no evidence that the defendant submitted the false documents to impede the government's investigation). The Second, Seventh, Ninth, and Eleventh Circuits have upheld obstruction of justice enhancements based on submission of a false or misleading handwriting exemplar. ***United States v. Flores***, 172 F.3d 695, 701 (9th Cir. 1999); ***United States v. Taylor***, 88 F.3d 938, 943-45 (11th Cir. 1996); ***United States v. Yusufu***, 63 F.3d 505, 514-15 (7th Cir. 1995); ***United States v. Valdez***, 16 F.3d 1324, 1335 (2d Cir. 1994).

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)); *see* ***United States v. Pawlak,*** 935 F.3d 337, 352 (5th Cir. 2019) (no error in applying enhancement when defendant downloaded a program intended to delete material evidence from a hard drive even though he was ultimately unsuccessful; conduct not contemporaneous with arrest); ***United States v. Thompson***, 367 F.3d 1045, 1047 (8th Cir. 2004) (defendant destroyed both hard and digital copies of counterfeit obligations even though government would not have known of the destroyed evidence without defendant's cooperation). 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 who escapes or attempts to "escape from custody before trial or sentencing" or willfully fails "to appear, as ordered for a judicial proceeding" also qualifies for a §3C1.1 obstruction of justice enhancement. USSG §3C1.1, comment. (n.4(E)); *see* ***United States v. Schwanke***, 694 F.3d 894, 897 (7th Cir. 2012) (obstruction of justice enhancement applied to defendant who was released from custody before indictment because of his initial cooperation and fled the jurisdiction knowing he was under criminal investigation); ***United States v. Huerta***, 182 F.3d 361, 365 (5th Cir. 1999) (defendant's flight from law enforcement who have custody over the defendant may "constitute obstruction of justice under section 3C1.1, even if such flight closely follows the defendant's arrest") (collecting cases); ***United States v. Maccado***, 225 F.3d 766, 772-73 (D.C. Cir. 2000) (upholding obstruction of justice enhancement when defendant failed to comply with court order to provide handwriting exemplar); ***United States v. Billingsley***, 160 F.3d 502, 507 (8th Cir. 1998) (obstruction of justice enhancement applied to defendant who fled jurisdiction after agreeing to cooperate with police); ***United States v. Hare***, 49 F.3d 447, 453 (8th Cir. 1995) (upholding obstruction of justice enhancement when defendant breached his cooperation agreement by traveling to Canada and taking with him proceeds of his wire fraud and money laundering); *but see* ***United States v. Douglas****,* 885 F.3d 145, 152 (3d Cir. 2018) (imposing enhancement was clear error where medical records confirmed that the defendant's failure to appear for trial was the result of a medical emergency); ***United States v. Burton***, 933 F.2d 916, 917-18 (11th Cir. 1991) (per curiam) (mere flight from law enforcement qualifies for enhancement only if it constitutes reckless endangerment).

An obstruction of justice enhancement is also 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. Brown***, 539 F.3d 835, 839-40 (8th Cir. 2008) (defendant lied at sentencing hearing in an attempt to discredit a government

witness); ***United States v. McLeod***, 251 F.3d 78, 82 (2d Cir. 2001) (defendant lied at sentencing when he denied responsibility for fraudulent tax returns discovered in civil audit). The Ninth Circuit held that submission of a false financial affidavit to a magistrate judge to obtain appointed counsel supported a Section 3C1.1 enhancement even though the defendant would have qualified for appointed counsel anyway. ***United States v. Hernandez-Ramirez***, 254 F.3d 841, 843-44 (9th Cir. 2001); *but see* ***United States v. Khimchiachvili***, 372 F.3d 75, 82-83 (2d Cir. 2004) (declining to follow ***Hernandez-Ramirez*** and concluding that providing a false financial affidavit to obtain appointed counsel does not satisfy USSG §3C1.3(A)'s requirement that the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice").

The Fifth, Seventh, and Eleventh Circuits have upheld an enhancement based on a defendant's perjured testimony during a change of plea hearing or subsequent hearing on a motion to withdraw the previously entered guilty plea. ***United States v. Adam***, 296 F.3d 327, 334-35 (5th Cir. 2002) (based on false statements made under oath at original change of plea hearing); ***United States v. Freixas***, 332 F.3d 1314, 1321 (11th Cir. 2003) (based on perjurious statements made in hearing on withdrawal of guilty plea); ***United States v. Martinez***, 169 F.3d 1049, 1056 (7th Cir. 1999) (same).

The Second Circuit has held that backdating a promissory note warranted 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) (making false statements to investigating IRS agent and attempting to suborn perjury justified obstruction of justice enhancement); ***United States v. August***, 984 F.2d 705, 714 (6th Cir. 1992) (defendant made a series of false statements to investigating agents, falsified records, and lied to a state licensing department regarding the percentage of drugs administered to his patients).

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, e.g.*, ***United States v. Montanari***, 863 F.3d 775, 780 (8th Cir. 2017) (obstruction enhancement appropriate where defendant made false statements to a revenue officer and on a Form 433-A); ***United States v. Thomas***, 841 F.3d 760, 766 (8th Cir. 2016) (enhancement for obstruction upheld where defendant gave police officers a false name and fake identification allowing him to evade arrest for three days during which time he continued trafficking in fraudulent access devices); ***United States v. Dullum***, 560 F.3d 133, 141 (3d Cir. 2009) (defendant obstructed investigation of mail and bank fraud by making multiple sworn false statements); ***United States v. Uscinski***, 369 F.3d 1243, 1247 (11th Cir. 2004) (false statements to investigators in tax evasion case qualified for obstruction of justice); ***United States v. Emerson,*** 128 F.3d 557, 563 (7th Cir. 1997) (defendant gave false statements to postal inspectors, attempted to fabricate a common story and influence witnesses, and provided perjured testimony); *see also* ***United States v. Baker***, 200 F.3d 558, 561-62 (8th Cir. 2000) (exculpatory statements were more than denial of guilt).

But not all false statements to law enforcement officers justify a sentencing enhancement for obstruction of justice. *See, e.g.*, ***United States v. Phillips***, 210 F.3d 345, 349 (5th 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." ***Isabel v. United States***, 980 F.2d 60, 61 (1st Cir. 1992); *see also* ***United States v. Fiala***, 929 F.2d 285, 290 (7th Cir. 1991) (defendant's denial of guilt could not be said to have significantly obstructed investigation); ***United States v. Adejumo***, 772 F.3d 513, 528-29 (8th Cir. 2014) (false statements to investigators in proffer session did not qualify for enhancement because there was no evidence that the statements substantially obstructed or impeded investigation or prosecution); ***United States v. Ahmed***, 324 F.3d 368, 371-74 (5th Cir. 2003) (defendant's false statement to law enforcement that he did not know the sailors who had jumped ship may have been material but did not significantly impede investigation and constituted no more than a denial of guilt); ***United States v. Shriver***, 967 F.2d 572, 575 (11th Cir. 1992) (defendant's false statement to IRS did not constitute obstruction of justice without evidence of significant impediment to investigation; defendant claimed the IRS agent was not deceived by his false statement and government

did not carry burden to contradict the claim). However, the detrimental effect on an investigation "need not amount to a total frustration of the government's efforts." ***United States v. Selvie***, 684 F.3d 679, 684 (7th Cir. 2012) (defendant's claim that law enforcement planted a gun on him represented "material misinformation that exert[ed] [an] impact on the government's resources" and obstruction of justice enhancement was proper).

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)).[32] 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. Thomas***, 933 F.3d 605, 610-11 (6th Cir. 2019) (false statements to probation officer minimizing his role in the offense qualified for obstruction of justice enhancement); ***United States v. Manning***, 704 F.3d 584, 586-87 (9th Cir. 2012) (enhancement applied where defendant did more than deny that he still had guns; he concocted a story about how he had returned them during pre-trial release); ***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.'" ***United States v. Gormley***, 201 F.3d 290, 294 (4th Cir. 2000) (cleaned up). A defendant's failure to provide a probation officer with information concerning the defendant's financial status, where it is necessary to determining the 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); *see also* ***United States v. Craft***, 478 F.3d 899, 901-02 (8th Cir. 2007) (enhancement proper where defendant misrepresented the value of his assets, attempted to liquidate assets and purchase silver and gold, attempted to transfer assets to children and purposely directed investigators to an accountant with no knowledge of defendant's financial affairs). The sentencing court need not make an express finding of materiality if it can be fairly implied from the court's statements during sentencing. ***United States v. Romer***, 148 F.3d 359, 372-73 (4th Cir. 1998).

"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)).

The First Circuit analogized a defendant's feigned incompetency and malingering during a competency determination to providing materially false information to a probation officer and upheld the district court's enhancing his sentence for obstruction of justice. ***United States v. Nygren***, 933 F.3d 76, 87-88 (1st Cir. 2019) (defendant charged with 63 counts of bank fraud, use of an unauthorized device and tax evasion). In reaching that conclusion, the court reasoned that "the application notes make pellucid that obstruction of justice is capacious enough to encompass a broad swathe of conduct." ***Id.*** at 84; *cf.* ***United States v. Maccado***, 225 F.3d 766, 771 (D.C. Cir. 2000) ("egregious as well as non-egregious conduct" alike appear within the covered conduct list).

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); *see* ***United States v. Gonzalez,*** 608 F.3d 1001, 1009 (7th Cir. 2010) (finding no extraordinary circumstances and noting that granting credit for acceptance would have negated enhancement for obstruction with the contradictory result that "his initial cooperation would have bought him the right to become a fugitive from justice"); ***United States v. Turner,*** 324 F.3d 456, (6th Cir. 2003) (upholding district court's refusal to give defendant credit for acceptance of responsibility based on his claim that his deteriorating mental health represented extraordinary circumstances because defendant failed to explain how his mental health was related to his accepting responsibility); ***United States v. Wilson***, 197 F.3d 782, 786 (6th Cir. 1999) (no extraordinary circumstances); ***United States v. Anderson***, 68 F.3d 1050, 1056 (8th Cir. 1995) (same); *but see* ***United States v. Guidry***, 960 F.3d 676, 682 (5th Cir. 2020) (upholding application of both adjustments given the time between defendant's obstruction and acceptance of guilt).

43.05[1] Applying §3C1.1 to Section 7212(a)

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 under USSG §2J1.2,[33] an enhancement for obstruction of justice is appropriate only if "a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (*e.g.* if the defendant threatened a witness during the course of the prosecution for the obstruction offense)." USSG §3C1.1, comment. (n.7). This note does not apply to violations of § 7212(a) sentenced under §2T1. *See* ***United States v. Kelly***, 147 F.3d 172, 178-79 (2d Cir. 1998) (obstruction of justice enhancement applied in 26 U.S.C. § 7212(a) offense sentenced under §2T1.1 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 for violating § 7212(a)).[34]

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 application would constitute impermissible double counting. *See, e.g.*, ***United States v.***

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[33] This application note also applies to defendants convicted of an offense covered by §2J1.1 (Contempt), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), as well as other offenses covered by §2J1.2. *See* ***United States v. McCoy***, 316 F.3d 287, 288-89 (D.C. Cir. 2004) (rejecting defendant's claim that it was impermissible double counting to apply the §3C1.1 obstruction of justice enhancement because she repeated the same perjured testimony in her criminal trial for perjury that she made at bankruptcy proceeding that gave rise to the perjury charge; "lying under oath to protect oneself from punishment for lying under oath seems…to be precisely the sort of 'significant further obstruction' to which the Guidelines refer"); ***United States v. Roche***, 321 F.3d 607, 608-11 (6th Cir. 2003) (application of §3C1.1 obstruction of justice enhancement when defendant attempted to influence sentencing witness's testimony appropriate in sentencing for obstruction of justice charge sentenced under §2J1.2, which was based on submission of false documents to court during sentencing).

[34] 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 and that conduct is grouped with non-obstruction counts to calculate the offense level. *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).

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). But 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, 448-50 (6th Cir. 2002) (requiring application of enhancement when defendant testified falsely before grand jury, even when false testimony was part of ***Klein*** conspiracy). For further discussion of double counting under the Guidelines, *see* ***United States v. Vizcarra***, 668 F.3d 516, 519-27 (7th Cir. 2012).

43.06 GROUPING

Section 3D1.2 of the Guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together." The purpose of the grouping rules 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), *superseded on other grounds*, ***United States v. Corrado,*** 53 F.3d 620, 624 (3d Cir. 1995).

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). That said, the commentary to §3D1.2 explains that the first step must always be to determine the victims of the offenses of conviction. USSG §3D1.2, comment. (backg'd). And "[g]enerally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim." USSG §3D1.2, comment. (n.2).

For offenses to be grouped under subsections (a) and (b), the offenses must involve the same victim. 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 so-called victimless crimes, if the grouping decision is controlled by subsections (a) or (b), separate offenses harming closely related societal interests may be grouped. As an example, if one offense is unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests are closely related. On the other hand, if one count involves sale of controlled substances and the other violates immigration law, the counts are not grouped. USSG §3D1.2, comment. (n.2). If the counts involve offenses against different agencies of the federal government, the counts may not group. ***United States v. Reyes***, 908 F.2d 281, 289 (8th Cir. 1990) ("where the interests promoted by different agencies are distinct, the agencies can be separate victims" justifying multiple victims enhancement). *See also* ***United States v. Kim***, 896 F.2d 678, 687 (2d Cir. 1990) ("[t]he interests protected by the immigration laws and the currency laws are so distinct that it is not realistic to consider both offenses to have as a common 'victim' the United States"). If counts involve different victims, or different societal harms, they will be "grouped together only as provided in subsections (c) or (d)." USSG §3D1.2, comment. (backg'd).

The rules for grouping multiple offenses are not for the faint of heart. *See* ***United States v. Gist***, 101 F.3d 32, 34 (5th Cir. 1996) (grouping is a difficult area, and the section outlining the rules for grouping "is not a model of clarity"). But correctly identifying the primary victim is half the battle. In tax cases, the primary victim is the IRS. ***United States v. Perry***, 714 F.3d 570, 577 (8th Cir. 2013) (identifying the IRS as the victim of the tax offense).

In the average tax case, subsection (d) will apply to all counts of conviction. Except for regulatory violations under 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, and 5762, which fall within §2T2.2, all offenses sentenced under the tax guidelines are groupable under subsection (d), and the tax loss from all counts is aggregated to determine the base offense level. USSG §3D1.2(d). "A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d)."

USSG §3D1.2, comment. (n.6). Thus, for example, three counts of tax evasion and a conspiracy to commit tax evasion will be grouped.

When tax counts are sentenced at the same time as other criminal offenses, particularly fraud offenses such as bank fraud, wire fraud, and mail fraud, it is typically to the government's benefit to group tax offenses separately from fraud offenses. *See* ***United States v. D'Ambrosia***, 313 F.3d 987, 995 (7th Cir. 2002) (Posner, J., dissenting) (grouping usually results in a more lenient sentence and the government argues against its long-term interests in advocating for tax evasion and illegal gambling offenses to be grouped).[35] Fraud losses will usually exceed tax loss, particularly where the tax offense is the result of a defendant failing to report illegal income from fraud. As a result, the fraud guideline will determine the defendant's offense level. In most circuits, tax counts will not be grouped with other criminal offenses. The exceptions are the Second, Fifth, and Ninth Circuits. *See* ***United States v. Doxie***, 813 F.3d 1340, 1345 n.3 (11th Cir. 2016) ("The only circuit to conclude that fraud counts and tax offense counts should be grouped under § 3D1.2(c) is the Fifth Circuit"; "The only circuit to conclude that fraud counts and tax offense counts should be grouped together under § 3D1.2(d) is the Second Circuit"). *See also* ***United States v. Narum***, 577 F. App'x 689, 691 (9th Cir. 2014) (grouping tax and fraud losses under § 3D1.2(c)).

In ***United States v. Haltom***, 113 F.3d 43 (5th Cir. 1997), the Fifth Circuit held that mail fraud and tax evasion convictions must be grouped under the Guidelines to calculate the combined offense level. Haltom had misappropriated money from his clients and failed to report this illegal income on his tax returns. ***Id***. at 43-44. While recognizing that the two offenses involved different victims and did not cause "substantially the same harm," the court noted that the defendant's offense level for tax evasion was increased by two levels because his unreported income derived from criminal activity. ***Id***. at 46. Specifically, the Fifth Circuit concluded that the mail fraud count "embodies conduct that is treated as a specific offense characteristic of the tax evasion counts." ***Id***. The court

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[35] In some cases, grouping the tax and fraud loss amounts will lead to a higher guidelines range because the aggregate amount leads to a higher level in the loss table. See, e.g., ***United States v. Platt***, 715 F. App'x 80 (2d Cir. 2018); ***United States v. Bernstein***, 43 F. App'x 429 (2d Cir. 2002); ***United States v. Napoli***, 179 F.3d 1, 12 (2d Cir. 1999) (noting that aggregate grouping would "actually increase" the sentence in some cases).

found that the "mail fraud conviction was counted twice toward [the defendant's] sentence, once as the basis for his mail fraud offense level and again a specific offense characteristic of the tax evasion counts," resulting in forbidden double-counting. ***Id***. The Fifth Circuit believed it was bound by §3D1.2(c) to group mail fraud with the tax evasion counts even though doing so spared the defendant "any incremental punishment for his tax crime." ***Id***. at 46-47.

In ***United States v. Gordon***, 291 F.3d 181 (2d Cir. 2002), the Second Circuit reached the same conclusion—that grouping the mail fraud and tax evasion counts was required, but not under §3D1.2(c). ***Id***. at 192-93. In fact, that court found the district court erred by grouping the counts under §3D1.2(c). ***Id***. According to the Second Circuit, "the distinct structure of the punishment for §3D1.2(d) offense create[d] a unique mechanism for [mail fraud and tax evasion] by using the aggregate amount of money involved" to determine the offense level. ***Id***. at 193. However, in a well-reasoned concurrence, Judge Newman noted that the Second Circuit cases forming the foundation of the ***Gordon*** opinion[36] were decided when the tax loss and fraud loss tables were substantially the same, so subsequent amendments to these tables have raised doubts over whether the offenses should continue to be grouped. ***Gordon,*** 291 F.3d at 197 (Newman, J., concurring). ***Id***. Still, as recently as 2018, the Second Circuit continues to treat ***Gordon*** as binding precedent. ***United States v. Platt***, 715 Fed. App'x 80, 82 (2d Cir. 2018) (finding no error in district court's grouping tax offenses with wire fraud).

In most circuits, however, tax counts will not be grouped with non-tax fraud counts. The Eleventh Circuit's opinion in ***United States v. Doxie***, 813 F.3d 1340 (11th Cir. 2016) is particularly instructive. The defendant pleaded guilty to multiple counts of mail fraud, wire fraud, and filing false tax returns. ***Id***. at 1342. The district court grouped all of the mail and wire fraud counts together and grouped the tax counts separately, and on appeal, the defendant argued that all counts should have been grouped together. ***Id***. at 1342-43. The Eleventh Circuit disagreed and concluded that the district court did not err by grouping the tax counts separately from the fraud counts. ***Id***. at 1345.

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[36] ***United States v. Petrillo***, 237 F.3d 119, 125 (2d Cir. 2000); ***United States v Fitzgerald***, 232 F.3d 315, 320 (2d Cir. 2000).

In reaching its conclusion, the Eleventh Circuit examined the propriety of grouping fraud and tax offenses under both subsections (c) and (d), looking to the commentary to §3D1.2 to resolve ambiguities. ***Id***. at 1344. The court rejected grouping under subsection (c) for two reasons. First, because the fraud offenses produced the highest level, the defendant's offense level was determined by §2B1.1 not §2T1.1, so the specific offense characteristic in §2T1.1(b)(1) for failing to report income from criminal activity did not increase his sentence. ***Id***. at 1345-46. Second, the purpose of the two-level increase provided for in § 2T1.1(b)(1) was "to adjust for the fact that criminally derived income is generally difficult to establish" and that tax loss tended to be "substantially understated." ***Id***. (cleaned up). As a result, the defendant's fraud counts were not "embodied by the conduct treated as a specific offense characteristic in §2T1.1(b)(1), and grouping the tax and fraud counts separately [did] not result in double counting." ***Id***. (cleaned up).

And ***Doxie*** rejected grouping fraud and tax counts under subsection (d) despite §2T1.1 and §2B1.1 being included in the "to be grouped" list because the offenses were "not of the same general type." ***Id***. The court identified several relevant distinctions between mail and wire fraud and tax offenses, including: the fraud offenses were governed by the criminal code in Title 18 and punished under a different guideline provision than the tax offenses governed by the Internal Revenue Code in Title 26; and the loss for tax offenses is based on tax loss rather than fraud loss and the losses are not aggregated to determine the offense level. ***Id***. at 1346. The court also noted that on the facts of the case, the fraud offenses and tax crimes were not closely related since they involved different victims and distinct offense behavior. ***Id***. At 1347.

Finally, the Eleventh Circuit in ***Doxie*** reasoned that any ambiguity was "resolved by reference to the Sentencing Guidelines' stated goals for grouping counts." ***Id***. The defendant's advisory guidelines range "furthered the goal of providing incremental punishment for significant additional criminal conduct." ***Id***. (cleaned up). If all counts had been grouped together, there would have been no additional punishment for the defendant's tax crimes. ***Id***.

The First, Third, Sixth, Seventh, Eighth, and Tenth Circuits have all likewise held that fraud counts and tax offense counts "involving the proceeds of the fraud should not be grouped together under subsection (c) or (d) of §3D1.2." ***Id***. at 1345; *see* ***United States v. Martin***, 363 F.3d 25, 43-44 (1st Cir. 2004) (addressing subsections (c) and (d)); ***United***

States v. Vitale, 159 F.3d 810, 815 (3rd Cir. 1998) (addressing subsection (c)); ***United States v. Seligsohn***, 981 F.2d 1418, 1425-26 (3d Cir. 1992) (addressing subsection (d)); ***Weinberger v. United States***, 268 F.3d 346, 354-55 (6th Cir. 2001) (addressing (c) and (d)); ***United States v. Vucko***, 473 F.3d 773, 779-780 (7th Cir. 2007) (addressing (c) and (d)); ***United States v. Shevi***, 345 F.3d 675, 680-81 (8th Cir. 2003) (addressing (d)); ***United States v. Peterson***, 312 F.3d 1300, 1302-04 (10th Cir. 2002) (addressing (c)).

The Ninth Circuit, in ***United States v. Smith***, 424 F.3d 992, 1015 (9th Cir. 2005), concluded that the district court did not abuse its discretion by not grouping tax, fraud, and money laundering offenses. But in ***United States v. Narum***, 577 Fed. App'x 689, 691 (9th Cir. 2014), the court said that wire fraud and tax counts were properly grouped under §3D1.2(c). The D.C. Circuit found no clear error in the district court's grouping fraud counts separately from money laundering and tax evasion counts for purposes of § 3D1.2(b) based on the determination that the crimes had different victims. *See* ***United States v. Braxtonbrown-Smith***, 278 F.3d 1348, 1356 (D.C. Cir. 2002).

Several opinions before 2003 refer to a defendant's reliance on *Questions Most Frequently Asked About the Guidelines*, a publication from the Sentencing Commission.[37] The Sentencing Commission's Training Staff was asked whether tax evasion and another count embodying criminal conduct that generated the income on which the tax was evaded could be grouped. The Training Staff 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.

Questions Frequently Asked About the Guidelines (1993 Ed.).

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[37] ***Gordon***, 291 F.3d at 198; ***Peterson***, 312 F.3d at 1303; ***Weinberger***, 268 F.3d at 335; ***Fitzgerald***, 232 F.3d at 320; ***Vitale***, 159 F.3d at 815; ***Haltom***, 113 F.3d at 47, n.6.

But as noted in the opinions, the guidance is not binding on the Sentencing Commission, much less the federal courts:

> Information provided by the Commission's Training Staff is offered to assist in understanding and applying the sentencing guidelines. This information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding on the Commission, the courts, or the parties in any case.

Id. Besides being a nonbinding opinion, this publication has been out of print since 1994. Prosecutors should continue to argue that tax offenses are not groupable with other offenses.

43.07 ACCEPTANCE OF RESPONSIBILITY

43.07[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 . . ." 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); *see also* ***United States v. Crawford***, 906 F.2d 1531, 1534 (11th Cir. 1990)).

Unlike the application of almost every other provision of the Sentencing Guidelines, where the government bears the burden, the defendant bears the burden to demonstrate his acceptance of responsibility by a preponderance of the evidence. *See, e.g.*, ***United States v. Harris***, 890 F.3d 480, 487-88 (4th Cir. 2018); ***United States v. Rodriguez***, 851 F.3d 931, 949 (9th Cir. 2017); ***United States v. Rivernider***, 828 F.3d 91, 114 (2d Cir. 2016); ***United States v. Boone,*** 279 F.3d 163, 193 (3d Cir. 2002); ***United States v. Middleton***, 246 F.3d 825, 845 (6th Cir. 2001).

The commentary to this section provides a non-exhaustive list of things to consider in determining whether a defendant qualifies for acceptance of responsibility:

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

(B) voluntarily terminating criminal conduct or withdrawing from criminal associations;

(C) voluntarily paying restitution prior to adjudication of guilt;

(D) voluntarily surrendering to authorities promptly after committing the offense;

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

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

(G) making significant post-offense rehabilitation efforts, such as counseling or drug treatment; or

(H) timely accepting responsibility.

USSG §3E1.1, comment. (n.1).

According to the commentary to §3E1.1, to qualify for a reduction for acceptance of responsibility, a defendant must truthfully admit not just the offense conduct, but any additional relevant conduct for which the defendant is accountable under §1B1.3. USSG §3E1.1, comment. (n.1(A)). At the same time, a defendant need not volunteer or affirmatively admit relevant conduct. ***Id***.; *see, e.g.*, ***United States v. Frierson***, 945 F.2d 650, 659-60 (3d Cir. 1991) (defendant had right to refuse to answer questions at any point in sentencing process without foregoing credit for acceptance, but his voluntary false statement denying possession of a gun during the crime of conviction was proper basis for sentencing court's refusal to reduce sentence for acceptance); ***Mitchell v. United States***, 526 U.S. 314, 330 (1999) (the government bears the burden of proving facts relevant to the crime at sentencing and "cannot enlist the defendant in this process at the expense of the self-incrimination privilege"); ***United States v. Reyes***, 9 F.3d 275, 279 (2d Cir. 1993) (although "a sentencing court may not compel testimony in respect of any offense *other* than the offense that is the subject of the plea . . . as to the offense that *is* the subject of the plea, the district court may require a candid and full unraveling, and need not accept lies or equivocation").

A defendant may remain silent about relevant conduct but may not falsely deny or frivolously contest relevant conduct. USSG §3E1.1, comment. (n.1(A)); *see* ***United***

States v. Thomas, 933 F.3d 605, 612 (6th Cir. 2019) (defendant did not just challenge relevant conduct, he falsely denied it and did not qualify for acceptance of responsibility); ***United States v. Gordon***, 495 F.3d 427, 431 (7th Cir. 2007) (after government had carried its burden of proving loss from embezzlement scheme, defendant's "non-specific objections to the loss amount in the face of overwhelming evidence can be nothing other than frivolous"); ***United States v. Rutledge***, 28 F.3d 998, 1003 (9th Cir. 1994) (defendant convicted of being a felon in possession of a firearm "entitled to remain silent about any relevant, uncharged conduct," i.e., attempted robbery, but once he chose to relinquish that right, "his lack of veracity could be considered in deciding whether he qualified for the reduction" for acceptance of responsibility); ***United States v. Olea***, 987 F.2d 874, 878 (1st Cir. 1993) (defendant denied credit for acceptance when he denied involvement in two later drug sales; defendant may "remain silent as to the conduct contained in a dismissed charge" but may not give "materially false information relative thereto"). "[B]ut, the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous." USSG §3E1.1, comment. (n.1(A)).

The most common means by which a defendant qualifies for a reduction in his or her offense level for acceptance of responsibility is by pleading guilty and admitting to the elements of the crime. 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, comment. (n.2). Merely being regretful is not sufficient to warrant the reduction. ***United States v. Gallant***, 136 F.3d 1246, 1248 (9th Cir. 1998) ("implicit in acceptance of responsibility is an admission of moral wrongdoing and [] this moral element is satisfied by the expression of contrition and remorse").

To qualify for the reduction, the defendant must affirmatively accept personal responsibility. ***United States v. Lublin***, 981 F.2d 367, 370 (8th Cir. 1992) (defendant not entitled to acceptance where he admitted to no more than being caught on a "technicality" and not that he "did wrong" and deserved punishment). The defendant must show sincere contrition to warrant such a reduction. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990) (upheld district court's denial of credit for acceptance where defendant did not express regret for having broken the law); ***United States v. Royer***, 895 F.2d 28, 30 (1st Cir. 1990) ("acceptance of responsibility necessitates candor and authentic remorse—not merely a pat recital of the vocabulary of contrition").

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."); *See, e.g.*, ***United States v. Cooper***, 998 F.3d 806, 811-12 (8th Cir. 2021) (upholding district court's denial of credit for acceptance based on pre-trial criminal conduct while incarcerated before pleading guilty); ***United States v. Hinojosa-Almance***, 977 F.3d 407, 411 (5th Cir. 2020) (not reversible error for district court to deny credit for acceptance where defendant broke the law while on pre-trial release even though violations were not "directly related to the underlying criminal conduct" of charge); ***United States v. Zeaiter***, 891 F.3d 1114, 1123-24 (8th Cir. 2018) (defendant's attempt to minimize his conduct and his frivolous objections to his relevant conduct sufficient to support district court's refusal to grant him acceptance of responsibility despite guilty plea); ***United States v. Sellers***, 595 F.3d 791, 793 (7th Cir. 2010) (upholding district court's refusal to grant defendant credit for acceptance despite pleading guilty based on evidence that defendant had continued his criminal conduct and associations); ***United States v. Scrivener***, 189 F.3d 944, 949 (9th Cir. 1999) (district court not required to credit a defendant's "cursory expressions of contrition" or grant acceptance where defendant seeks to minimize his conduct); ***United States v. Brigman***, 953 F.2d 906, 909 (5th Cir. 1992) (defendant who pleaded guilty to wire fraud, mail fraud, and tax evasion not entitled to reduction for acceptance; "coyness and lack of candor demonstrate an inadequate acceptance of responsibility" and grudging cooperation with authorities or "merely going through the motions of contrition does not oblige a district court to grant an unrepentant criminal the two-step deduction"); ***United States v. Ervasti***, 201 F.3d 1029, 1043 (8th Cir. 2000) (district court not required to accept defendant's "bare claims of remorse"; defendant's apology "expressly limited his regret to not having found an investor to bail out the scheme" and did not entitle him to credit for acceptance); ***United States v. Brigman****,* 953 F.2d 906, 909 (5th Cir. 1992) (no reduction for acceptance of responsibility because, in part, defendant refused to disclose financial information to probation officer); ***United States v. Cojab***, 978 F.2d 341, 344 (7th Cir. 1992) (affirming denial of reduction for acceptance of responsibility because defendant provided no financial information to the probation office; fifth amendment privilege not violated because the denial of the

reduction is properly characterized as a denied benefit rather than a penalty).[38] The reduction is not appropriate when a defendant has pleaded guilty to obtain tactical advantage. *See* ***United States v. Muhammad***, 146 F.3d 161, 168 (3d 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). For example, 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 a consent judgment after conviction. The defendants had placed $55,000 in escrow before trial and had offered before 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 before trial to avoid indictment. ***Id***. The Tenth Circuit noted that the defendants were willing to concede responsibility only to the extent that they could avoid the consequences of their criminal conduct, and their "conditional willingness to enter into a beneficial agreement" did not demonstrate recognition and affirmative acceptance of responsibility. ***Id***.

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. *See* ***United States v. McKittrick***, 142 F.3d 1170, 1178 (9th Cir. 1998) (defendant challenged his taking a gray wolf in violation of the Endangered Species Act on regulatory grounds while admitting to his factual guilt; remanded to district court to reconsider granting

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[38] Generally, the government does not breach the plea agreement by arguing against a downward adjustment for acceptance of responsibility where the defendant's conduct post-plea justifies such a position. ***United States v. Adams***, 132 F.4th 259, 266 (3d Cir. 2025) (noting that the parties had agreed that the defendant demonstrated acceptance "as of the date of th[e] agreement). Courts look at the language of the plea agreement. In some cases and circuits, the best practice may be to seek a court determination that the defendant breached the plea agreement. *See* ***United States v. Logan***, 542 F. App'x 484, 490 (6th Cir. 2013) (holding that government breached the plea agreement by later advocating against the acceptance of responsibility reduction).

acceptance of responsibility). In such a case, determination of whether the defendant accepted responsibility will be based mainly 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); *cf.* ***United States v. Mack***, 159 F.3d 208, 220 (6th Cir. 1998) (finding district court did not err by refusing to grant defendant acceptance of responsibility despite going to trial since his proposed "defense theory" amounted to "an outright denial of culpability"). But if a defendant proceeds to trial 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).

The guideline commentary recognizes that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." USSG §3E1.1, comment. (n.5). As a result, the "determination of the sentencing judge is entitled to great deference on review." ***Id***. The court's "determination to withhold the reduction will be overturned only if it is clearly erroneous." ***United States v. Nygren***, 933 F.3d 76, 88 (1st Cir. 2019); *see also* ***United States v. Rodriguez***, 851 F.3d 931, 949 (9th Cir. 2017); ***United States v. Rivernider***, 828 F.3d 91, 114 (2d Cir. 2016) ("Whether a defendant has carried his burden to demonstrate acceptance of responsibility is a factual question on which we defer to the district court unless its refusal to accord such consideration is without foundation."); ***United States v. Melot***, 732 F.3d 1234, 1243-44 (10th Cir. 2013); ***United States v. Partee***, 301 F.3d 576, 580 (7th Cir. 2002); ***United States v. Rickett***, 89 F.3d 224, 227 (5th Cir. 1996); ***United States v. Hill***, 79 F.3d 1477, 1487 (6th Cir. 1996); ***United States v. Lublin***, 981 F.2d 367, 370 (8th Cir. 1992). 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).

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). *See, e.g.*, ***United States v. Brown***, 316 F.3d 1151, 1158 (10th Cir. 2003) (Section 3E1.1 is an "all or nothing proposition" and district court erred by granting one-level downward adjustment); ***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).

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); *see* § 43.06 *supra.*

43.07[2] Filing Delinquent Returns and Paying Taxes Before Sentencing

The payment of restitution, either before adjudication of guilt or before sentencing, is one factor a sentencing court may consider when determining whether a defendant has accepted responsibility for criminal conduct. USSG §3E1.1, comment. (n.1(C)). *See* ***United States v. Abboud,*** 438 F.3d 554, 594 (6th Cir. 2006) (repayment after criminal loss discovered may indicate "some acceptance of responsibility" (cleaned up)); ***United States v. Chastain***, 84 F.3d 321, 324 (9th Cir. 1996). But payment of restitution without acknowledgment of guilt is not enough to support a reduction for acceptance of responsibility, particularly in cases where the defendant has the financial wherewithal to do so. *See* ***United States v. Zichettello***, 208 F.3d 72, 107 (2d Cir. 2000) (defendant, who pleaded 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. Tandon***, 111 F.3d 482, 491 (6th Cir. 1997) (the "mere 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); ***United States v. Field***, 110 F.3d 592, 594 (8th Cir. 1997) (voluntary preindictment payment of a substantial amount of restitution not sufficient to support credit for acceptance given defendant's other actions demonstrating lack of acceptance); ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1992) (the defendants signed consent judgment providing for restitution only after they had been found guilty, and the defendants' offer to settle in part before trial showed willingness to concede responsibility only to extent they could avoid consequences of their criminal conduct); *cf.* ***United States v. Mikutowicz***, 365 F.3d 65, 77-78 (1st Cir. 2004) (vacating sentence and remanding for reconsideration where district court granted acceptance of responsibility to defendant who paid a small fraction of what he owed the IRS pretrial then went to trial to challenge the willfulness of his tax crime).

43.07[3] Timely Government Assistance

In some cases, 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 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). 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 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.

The government possesses significant, but not total, discretion to determine whether a three-level reduction for acceptance of responsibility is warranted "[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), *added by* The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act), Pub. L. 108–21. § 401(g). Generally, the district court may not grant the additional one-level reduction absent a motion from the government. *See, e.g.*, ***United States v. Sainz-Preciado***, 566 F.3d 708, 715 (7th Cir. 2009) ("We, along with every other circuit to consider the issue, have held that the government motion is a necessary prerequisite to a §3E1.1(b) reduction."); ***United States v. Beatty,*** 538 F.3d 8, 13-14 (1st Cir. 2008) (same; gathering cases); ***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. 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).

The Sentencing Commission amended §3E1.1(b), effective Nov. 1, 2013, to resolve two conflicts within the circuits concerning the balance of discretion between the district court and the government. USSG App. C, Amend. 775. The first conflict concerned the government's discretion to refuse to move for the extra level for acceptance based on an interest not identified in §3E1.1. The second conflict concerned the court's discretion to deny the government's motion. ***Id***.

Prior to Amendment 775, the courts of appeal divided over whether the government could withhold a motion under §3B1.1 because a defendant refused to waive his right to appeal as part of a plea agreement. ***Id***. (collecting cases). The Sentencing Commission resolved this conflict by amending the commentary to §3E1.1 to clarify that "[t]he government should not withhold [a §3E1.1(b)] motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." USSG §3E1.1, comment. (n.6); *see also* ***United States v. Johnson***, 980 F.3d 1364, 1385 (11th Cir. 2020) ("it is clear that the Government can no longer base its refusal to move for a third-level deduction on a defendant's refusal to waive appellate rights"); ***United States v. Palacios***, 756 F.3d 325, 326 (5th Cir. 2014) (per curiam) (same). And the First Circuit, consistent with this amendment, has expressly recognized that a defendant can contest whether the government "withheld its section 3E1.1(b) motion for an improper reason." ***United States v. Melendez-Rivera***, 782 F.3d 26, 31 (1st Cir. 2015). In such cases, the defendant is entitled to have the district court determine whether the government's withholding the motion "was based on an unconstitutional motive or was not rationally related to any legitimate government end." ***Id***. at 31-32 (quoting ***United States v. Beatty***, 538 F.3d 8, 14 (1st Cir. 2008)); *see also* ***United States v. Rivera-Morales***, 961 F.3d 1, 16 (1st Cir. 2020) (defendant "bore the burden of persuading the district court that the withholding of the predicate motion was either based on an unconstitutional motive or unrelated to a legitimate government end"; district court's finding to the contrary not clearly erroneous); ***United States v. Halverson***, 897 F.3d 645, 656-57 (5th Cir. 2018) (holding that the district court did not err by "denying the one-level reduction in the absence of a motion by the government" where Amendment 775 permits government to refuse to make §3E1.1(b) motion as long as its reasons are based on an interest within §3E1.1).

The second conflict that Amendment 775 settled concerned whether the district court has discretion to deny a §3E1.1(b) motion once the government has moved for one. *Compare* ***United States v. Williamson***, 598 F.3d 227, 230 (5th Cir. 2010) (recognizing the district court's discretion), *with* ***United States v. Mount***, 675 F.3d 1052, 1054-59 (7th Cir. 2012) (no discretion to deny if government moves and other requirements of §3E1.1(b) are met).

The Sentencing Commission addressed this conflict by amending the §3E1.1 commentary to clarify that the district court has independent authority to assess whether the requirements of §3E1.1(b) have been met once the government has moved for a reduction, but that the court "should" grant the motion if it finds that those requirements have been met:

> If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has 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, the court should grant the motion.

USSG §3E1.1, comment. (n.6). As the Commission explained, "[i]n its study of the PROTECT Act, [it] could discern no congressional intent to take away from the court its responsibility under §3E1.1 to make its own determination of whether the conditions were met." USSG App. C, Amendment 775.

The Second Circuit illustrated the operation of this provision in ***United States v. Vargas***, 961 F.3d 566 (2d Cir. 2020). The defendant, indicted for conspiracy to distribute cocaine, moved to suppress the evidence. ***Id***. at 570. Several months after losing the suppression motion, she pleaded guilty to the conspiracy. ***Id***. The district court granted the defendant the two-level reduction for acceptance for responsibility under §3E1.1(a) but denied the government's §3E1.1(b) motion because the defendant had only pleaded guilty after a long suppression hearing. ***Id***. The defendant made two claims on appeal; first, that the district court lacked the discretion to deny the government's §3E1.1(b) motion and second, that if the court had discretion to deny the motion, it erred by denying the motion in her case. ***Id***. at 571. The Second Circuit rejected her first claim but agreed that the district court's denial of the government's motion in her case was erroneous. ***Id***.

The Second Circuit explained that "although the government's motion is a necessary prerequisite[39] for the application of the one-level reduction under §3E1.1(b) such a motion is not sufficient to require the court to grant that reduction." ***Id***. at 580. The government's §3E1.1(b) motion "triggers the district court's responsibility to assess whether the defendant's notification that she intended to plead guilty was sufficiently timely to allow the government and the district court to efficiently allocate their resources." ***Id***. If the district court determines the conditions are not satisfied, it is "authorized to deny the government's motion." ***Id***.

In essence, the Second Circuit determined that §3E1.1(b) serves two interests—the government's interest in avoiding preparing for trial and allocating its resources efficiently and the court's interest in efficiently allocating its resources. ***Id***. at 577-78. In ***Vargas***, the government's §3E1.1(b) motion said that the defendant's timely plea served its interests. ***Id***. at 580-81. But the Second Circuit found that the district court had failed to make factual findings about the plea's effect on the allocation of the court's resources. ***Id***. at 581. As a result, the court vacated the sentence and remanded the case to the district court to make the necessary findings to justify its position. ***Id***. at 584.

Circuit courts have also disagreed on the propriety of the government withholding a §3E1.1(b) motion because the defendant forced the government to litigate a sentencing issue. In ***United States v. Castillo***, 779 F.3d 318 (5th Cir. 2015), the Fifth Circuit held that it was impermissible for the government to withhold a §3E1.1(b) motion based on a defendant's good faith challenge to the "accuracy of the factual findings in the PSR." ***Id***. at 325-26. The court also stated in dicta that the government may not withhold a

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[39] In ***United States v. Johnson***, 980 F.3d 1364, 1378 (11th Cir. 2020), the defendant argued that the district court erred by failing to sua sponte declare impermissible the government's refusal to make a §3E1.1(b) motion. Reviewing for plain error, the Eleventh Circuit identified the key question to be whether "the Government should have been required to file the motion." ***Id***. That court did not find plain error because it was not clear that the government was not permitted to withhold the motion because of a defendant's obstruction of justice before pleading guilty. ***Id***. at 1384-85. But the Eleventh Circuit did not foreclose the possibility that a district court could sua sponte grant a defendant the third-level reduction absent the government's §3E1.1(b) motion. *Cf.* ***United States v. Melendez-Rivera***, 782 F.3d 26, 30 & n.3 (1st Cir. 2015) (the government's discretion to move for the third level reduction is not absolute, but subject to the district court's review of the propriety of its reasons).

§3E1.1(b) "simply because it has had to use its resources to litigate a sentencing issue." ***Id***. at 324; *see also* ***United States v. Igboanugo***, 655 F. App'x 578, 580 (9th Cir. 2016) (holding that the government erred by withholding §3E1.1(b) motion on grounds that the defendant refused to agree to sentencing factors); ***United States v. Lee***, 653 F.3d 170, 174-75 (2d Cir. 2011) (defendant's forcing government to prepare for a sentencing hearing insufficient reason to withhold §3E1.1(b) motion).

The Eighth Circuit reached a contrary conclusion in ***United States v. Jordan***, 877 F.3d 391, 395-96 (8th Cir. 2017). The defendant had pleaded guilty to a firearm offense but denied relevant conduct, forcing the government to call six witnesses at a sentencing hearing. ***Id***. at 395. The court concluded that the government's refusal to make a §3E1.1(b) motion was "not unconstitutional and was rationally related to an interest identified in §3E1.1(b) (a legitimate government end)" because the defendant's challenge to relevant conduct "did not permit[] the government and the court to allocate their resources efficiently." ***Id***. (*quoting* USSG §3E1.1(b)).

The ***Castillo*** decision is consistent with Amendment 810 to the Sentencing Guidelines that became effective Nov. 1, 2018. USSG App. C. In response "to concerns that some courts have interpreted the commentary to §3E1.1 (Acceptance of Responsibility) to automatically preclude application of the 2-level reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct," the Sentencing Commission amended the commentary to §3E1.1 to add "but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous" to the end of Application Note 1(A)." Amend. 810, App. C (Reason for Amend.). The commentary does not alter the requirement that a defendant must "truthfully admit[] the conduct comprising the offenses(s) of conviction." ***Id***.

The circuits have also split regarding the propriety of the government refusing to move for the additional one-level reduction when a defendant has forced the government to litigate a suppression hearing. The Second, Ninth, Tenth, and D.C. circuits have determined that forcing a suppression hearing is not a valid reason to withhold the

reduction. *See* ***United States v. Vargas***, 961 F.3d 566, 584 (2d Cir. 2020);[40] ***United States v. Price***, 409 F.3d 436, 443-44 (D.C. Cir. 2005); ***United States v. Marquez***, 337 F.3d 1203, 1212 (10th Cir. 2003); ***United States v. Kimple***, 27 F.3d 1409, 1414-15 (9th Cir. 1994). The Fifth and Sixth Circuits have taken the contrary position, concluding that forcing the government to litigate a suppression hearing may justify withholding a §3E1.1(b) reduction. *See* ***United States v. Longoria***, 958 F.3d 372, 377 (5th Cir. 2020), *cert. denied sub nom.* ***Longoria v. United States***, 141 S. Ct. 978 (Mem) (2021);[41] ***United States v. Collins***, 683 F.3d 697, 704-05 (6th Cir. 2012) (government could refuse to make motion for additional on-level reduction based on defendant's forcing government to litigate a suppression hearing).

43.08 ADJUSTMENT FOR ZERO-POINT OFFENDERS

The Sentencing Commission amended Chapter 4, effective Nov. 1, 2023, to add a provision providing for a reduction to the offense level of certain "zero-point offenders." § 4C1.1. A defendant's offense level is decreased by two levels if he did not receive any criminal history points under Chapter Four, Part A, and he meets ten additional criteria. U.S.S.G. § 4C1.1(a). These include requirements that the defendant did not use or credibly threaten violence, that the offense of conviction was not a sex offense, and that the defendant did not receive a terrorism-related adjustment. Most first-time criminal tax offenders are likely to satisfy most of these criteria. One criterion, however, is not uncommon in criminal tax prosecutions: "the defendant did not receive an adjustment under §3B1.1 (Aggravating Role)." § 4C1.1(a)(10).

The commentary to this guideline states, "An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history." §4C1.1 comment. (n.2). Under Section 4A1.3, the basis of such an upward adjustment may include prior similar misconduct established by a civil

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[40] ***United States v. Rogers***, 129 F.3d 76, 80-81 (2d Cir. 1997) (per curiam) took the opposite position, but intervening revisions to the Guidelines likely abrogated it, although that is not addressed in *Vargas*.

[41] On denial of writ of certiorari Justice Sotomayor wrote a memorandum, joined by Justice Gorsuch, calling on the Sentencing Commission to "address this issue in the first instance" and "take steps to ensure that §3E1.1(b) is applied fairly and uniformly."

adjudication or by a failure to comply with an administrative order and prior similar criminal conduct not resulting in a criminal conviction. In tax cases, this misconduct may include a history a failing to file tax returns or pay taxes, obstructing audits or collection efforts, or failing to comply with Tax Court rulings, as well as other kinds of fraud or financial misconduct.

The amendment also creates two application notes to §5C1.1, which describes the appropriate sentences for defendants in Zones A-D of the Sentencing Table. The first provides that if the defendant received an adjustment under §4C1.1 and the applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment is generally appropriate. This may include a sentence of probation that includes intermittent confinement, community confinement, or home detention. The second provides that a downward departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 and the applicable guidelines range overstates the gravity of the offense because the offense of conviction is not a crime of violence or "otherwise serious" offense.

"Zero-point" defendants may thus argue that a departure is appropriate. But the background note to §2T1.1 states, "Tax offenses, in and of themselves, are serious offenses." And recidivism rates, which the Commission relied on in drafting these amendments, are relevant to specific deterrence. But the introductory commentary to Chapter 2T provides that general deterrence is "a primary consideration underlying [tax] guidelines," and that criminal tax prosecutions serve to "preserv[e] the integrity of the nation's tax system" and "promote respect for the tax laws." The commentary emphasizes that the sentence in a criminal tax case should be "commensurate with the gravity of the offense" to deter "would be violators." Prosecutors may point to this language in sentencing memoranda and at sentencing to argue that non-custodial sentences in criminal tax cases are not appropriate under §5C1.1 because, as the guidelines state, tax offenses are serious offenses and because such sentences are insufficient to promote respect for the law, reflect the seriousness of the offense, and deter others, as required by 18 U.S.C. § 3553(a). Indeed, the background note to §2T1.1 indicates that the guideline was intended to increase average sentence length and to reduce the number of purely probationary sentences.

43.09 DEPARTURES

43.09[1] Generally

Section 5K of the Guidelines permits departures from the prescribed Guidelines range in certain limited circumstances. Departures under Section 5K should not be confused with non-Guidelines sentences imposed under ***United States v. Booker***, 543 U.S. 220 (2005), which are properly called "variances." *See* § 43.09, *infra* (discussing ***Booker*** variances). The Guidelines discourage departures, with rare exceptions. Following ***Booker***, a sentencing court has broader discretion to impose a non-Guidelines sentence by relying on the 18 U.S.C. § 3553(a) factors, so Guidelines departures were rarely used.

In an amendment that will be effective November 1, 2025, absent congressional action, the Commission simplified the sentencing process by removing most departures. *See* Proposed Amendments to the Sent'g Guidelines (U.S. Sent'g Comm'n Apr. 30, 2025).[42] Previously, sentencing courts applied a three-step process: (1) calculate the guidelines range, (2) consider departures, and (3) apply the Section 3553(a) factors. Except for departures for substantial assistance (see *infra* § 43.08[2]), the amendment removed departures from Section 5K and moved them to an appendix as "Additional Considerations" that may be relevant to the court's analysis under Section 3553(a). This removed the second step of the sentencing process; now sentencing courts perform a guideline calculation, then consider the Section 3553(a) factors to determine the final sentence.

43.09[2] Departures for Substantial Assistance

Section 5K1.1 permits a sentencing court to depart downward from the calculated Guidelines range "[u]pon motion by the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 5K1.1(a) sets forth a non-exhaustive list of considerations for the court to consider in determining the degree of departure:

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[42] https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202505_RF.pdf

(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;

(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(a).

A departure under §5K1.1 should be determined independently of a deduction for acceptance of responsibility. USSG §5K1.1, comment. (n.2). Substantial assistance is directed to the investigation and prosecution of other criminal offenders while acceptance of responsibility reflects the defendant's affirmative recognition of responsibility for her own conduct. ***Id***.

Unlike a government motion under 18 U.S.C. § 3553(e),[43] a §5K1.1 motion does not authorize a sentencing court to impose a sentence below the statutory minimum. A §5K1.1 motion only allows a sentencing court to impose a sentence below the applicable Guidelines range. *See* ***Melendez v. United States***, 518 U.S. 120, 122 (1996). Post-***Booker***, the district court does not require a motion from the government to vary below the guidelines range. ***United States v. Blue***, 453 F.3d 948, 952 (7th Cir. 2006) ("[i]f the court has a sound basis for concluding that a sentence above or below the Guidelines range is appropriate, it has the discretion to select such a sentence"). Even so, §5K1.1 motions still play a role in plea negotiations.

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[43] Section 3553(e) provides: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." 18 U.S.C. § 3553(e).

Plea agreements are contractual and "the government is held to the literal terms of the agreement." ***United States v. Camarillo-Tello***, 236 F.3d 1024, 1026 (9th Cir. 2001). Any ambiguity is construed against the government. *See* ***United States v. Morton***, 412 F.3d 901, 908 (8th Cir. 2005). If the government elects not to file a motion for a downward departure and the plea agreement contains language regarding the availability of a Section 5K1.1 motion, the sentencing court will apply settled principles of contract law to determine whether the government has breached the agreement. ***United States v. Isaac***, 141 F.3d 477, 482-83 (3d Cir. 1998); *see also* ***United States v. Barnes***, 730 F.3d 456, 457 (5th Cir. 2013) ("This Court applies general principles of contract law in interpreting the terms of the plea agreement."). A defendant "alleging the Government's breach of a plea agreement bears the burden of establishing that breach by a preponderance of the evidence." ***United States v. Snow***, 234 F.3d 187, 189 (4th Cir. 2000).

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.*, ***United States v. Benjamin***, 138 F.3d 1069, 1073-74 (6th Cir. 1998); ***United States v. Mitchell***, 136 F.3d 1192, 1194 (8th Cir. 1998). If the government alleges that a defendant's breach of the plea agreement relieves it of its obligation to file a downward departure, the government must first prove the breach by a preponderance of the evidence. ***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).

Plea agreements regularly mention the possibility of a §5K1.1 motion but the government usually reserves discretion to determine whether such a motion is appropriate. ***United States v. Benjamin***, 138 F.3d 1069, 1073 (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 has performed the conditions of his plea agreement, even if the plea agreement is silent on the appropriate party. ***United States v. Snow***, 234 F.3d 187, 190 (4th Cir. 2000).

A district court has the authority to review the government's refusal to move for a downward departure and grant a remedy if "the 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); *see also* ***United States v. Trimm***, 999 F.3d 119, 125-26 (2d Cir. 2021); ***United States v. Patton***, 847 F.3d 883, 885 (7th Cir. 2017). 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. *See* ***Wade***, 504 U.S. at 186; ***Patton***, 847 F.3d at 885-86; ***United States v. Kelly,*** 14 F.3d 1169, 1177-78 (7th Cir. 1994). The court may also review whether the government's refusal was in bad faith and, accordingly, in violation of the plea agreement. *See* ***Trimm***, 999 F.3d at 128-29; ***United States v. Doe***, 865 F.3d 1295, 1300 (10th Cir. 2017); ***Isaac***, 141 F.3d at 483-84. "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." ***Id.*** at 484.

43.09 VARIANCES

Under the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), district courts can vary 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 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 variant sentence. *See* ***United States v. Irizarry***, 553 U.S. 708, 714 (2008) ("departure" is 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 a standard of 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 said that appellate courts should 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 43-44.

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*** implies 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 explained that the Sentencing Commission has an institutional advantage over district courts in using empirical data to establish national sentencing standards. ***Id.*** at 108 (citations omitted). The Court also 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 (cleaned up); *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.").

43.10 APPELLATE REVIEW OF SENTENCES

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, 582 (6th Cir. 2007) (affirming upward variance); ***United States v. Braggs***, 511 F.3d 808, 812 (8th Cir. 2008) (same).

More recent Supreme Court decisions have tied the district courts' discretion firmly to the Sentencing Guidelines and lowered defendants' burdens on appeal to show reversible error attributable to miscalculations of the Guidelines range. In ***Molina-Martinez v. United States***, 578 U.S. 189 (2016), the district court sentenced the defendant based on an incorrect guidelines range calculated using the wrong criminal history score. ***Id***. at 195-97. The erroneous range and the correct range overlapped, and the defendant's sentence fell within the correct range. ***Id***. at 197. On plain-error review, the Fifth Circuit held that the defendant had failed to carry his burden under the plain-error test first set forth in ***United States v. Olano***, 507 U.S. 725 (1995), to prove that the error had affected his substantial rights;[44] i.e., that there was a reasonable probability his sentence would have been different if the correct range had been applied. ***Id***.

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[44] This is often called ***Olano***'s third prong. 507 U.S. at 734 (on plain-error review, defendant has burden to show (1) error, that (2) is clear or obvious, (3) that affects substantial rights, which in most cases means that it must have been prejudicial, and (4) that warrants the court's discretionary correction because it seriously affects the fairness, integrity, or public reputation of judicial proceedings).

The Supreme Court, however, reversed. ***Id***. at 205. The ***Molina-Martinez*** Court reiterated the importance of the Guidelines as the "starting point" and "anchor" of the district court's discretion and found that "a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range." ***Id***.

In ***Rosales-Mireles v. United States***, 138 S. Ct. 1897 (2018), the Supreme Court revisited the parameters of plain-error review of Guidelines errors, holding that a miscalculation of the Guidelines range determined to be plain that affects a defendant's substantial rights will "in the ordinary case" satisfy ***Olano***'s fourth prong because it will "seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief" on appeal. ***Id***. at 1903. The district court had miscalculated the defendant's criminal history score by double-counting one of his prior offenses. ***Id***. at 1905. As in ***Molina-Martinez***, the sentence imposed fell within the correct Guidelines range despite the calculation error. ***Id***. The Fifth Circuit declined to exercise its discretion to reverse for plain error because it determined that the error would not "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." ***Id***. The Supreme Court reversed, concluding that the Fifth Circuit had abused its discretion by applying "an unduly burdensome articulation of ***Olano***'s fourth prong." ***Id***. at 1906.

In ***Holguin-Hernandez v. United States***, 140 S. Ct. 762 (2020), the Supreme Court held that the defendant had preserved his claim that his sentence upon revocation of supervision "was unreasonably long by advocating for a shorter sentence." ***Id***. at 767. The Court, rejecting the Fifth Circuit's contrary position, held that no specific objection was required to preserve a claim that a defendant's sentence is substantively unreasonable. ***Id***. As a result, a defendant's claim that his sentence is substantively[45] unreasonable will be reviewed on the merits for abuse of discretion in all cases except those where the defendant did not argue that a shorter sentence was sufficient but not greater than necessary to comply with 18 U.S.C. § 3553(a). ***Id***. at 766-67. (Note, however, that the Solicitor General is unlikely to authorize a government appeal of a

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[45] ***Holguin-Hernandez*** does not apply to appellate challenges to the procedural reasonableness of a sentence. ***Id***. at 767.

sentence based on substantive unreasonableness absent a contemporaneous objection on that ground by the prosecutor, even if the prosecutor argued for a higher sentence before the pronouncement of the sentence.)

Appellate courts are more likely to vacate sentences based on procedural error than on substantive unreasonableness, regardless of whether the claim of procedural error was preserved in the district court. *See, e.g.*, ***United States v. Ghuman***, 966 F.3d 567, 578 (7th Cir. 2020) (district court plainly erred by imposing three-year term of supervised release for filing a false tax return); ***United States v. Abney***, 957 F.3d 241, (D.C. Cir. 2020) (vacating sentence because district court's failure to provide defendant with opportunity for allocution at revocation hearing was error under any standard of review); ***United States v. Yurek***, 925 F.3d 423, 447 (10th Cir. 2019) (district court plainly erred by applying wrong test for mitigating-role adjustment to determine wife's relative culpability in tax evasion); ***United States v. Daniels***, 760 F.3d 920, 926 (9th Cir. 2014) (vacating sentence because district court's failure to provide defendant with opportunity for allocution at revocation hearing was plain error); ***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); ***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 will not result in vacatur, however, if the court of appeals determines that the error was harmless. "[A] finding of harmless error removes the pointless step of returning to the district court when we are convinced that the sentence the judge imposes will be identical to the one we remanded." ***United States v. Clark***, 906 F.3d 667, 671 (7th Cir. 2018). Following ***Molina-Martinez***,[46] a finding of harmless

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[46] *See* ***Molina-Martinez***, 578 U.S. at 201 ("Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range,

(continued . . .)

sentencing error will usually require the district court's making a clear statement that it would impose the same sentence even if its calculation of the guidelines range was erroneous. *Compare* ***United States v. Acevedo-Hernández***, 898 F.3d 150, 172 (1st Cir. 2018); ***United States v. Jackson***, 848 F.3d 460, 462-63 (D.C. Cir. 2017) (plain-error review); ***United States v. Dace***, 842 F.3d 1067, 1070 (8th Cir. 2016) *with* ***United States v. Guevara***, 894 F.3d 1301, 1311-13 (11th Cir. 2018).

Although courts have been significantly less willing to find sentences to be substantively unreasonable, the Second Circuit, in ***United States v. Cutler***, 520 F.3d 136, 164 (2d Cir. 2008), held that a significant downward variance in a tax case *was* substantively unreasonable. The two defendants —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. As 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.

Several other cases, however, have rejected claims that below-Guidelines sentences in tax cases were substantively unreasonable. For instance, in ***United States v.***

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the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights.")

Taffaro, 919 F.3d 947 (5th Cir. 2019), the court of appeals affirmed a downward variance to probation from the Guidelines range of 27 to 33 months. ***Id.*** at 948. Taffaro had been the Chief Deputy in "the primary law enforcement and tax collecting agency in Jefferson Parish," Louisiana, and used his position of public service to cheat the U.S. Treasury for 12 years. ***Id***. at 949-50 (Ho, J. concurring). Tafarro was convicted at a jury trial for six counts of tax evasion, five counts of filing a false return, and one count of failing to file a return. ***Id.*** at 950. And Taffaro had "claimed a series of brazenly false business expense deductions—ignoring repeated warnings from his accountant," including an Alaskan cruise with his wife and friends and the uniform, firearms, training, and first responder equipment that had been provided to him by the Sheriff's Office at no charge. ***Id.*** Still, the court of appeals, noting that appellate review of this issue is "highly deferential," found no abuse of discretion in a probationary sentence. ***Id.*** at 948; *see also* ***id.*** at 949-51 (Ho, J., concurring) (observing that the sentence created "the perception that there are two different legal standards—one for the powerful, the popular, and the well-connected, and another for everyone else" and would thus "further fuel public cynicism and distrust of our institutions of government," but concluding that "established precedents" still required affirmance). *See also* ***United States v. Tomko***, 562 F.3d 558 (3d Cir. 2009) (en banc) (affirming downward variance to probation with home detention from guidelines imprisonment range of 12-18 months for tax evasion); ***United States v. Warner***, 792 F.3d 847, (7th Cir. 2015) (affirming downward variance to probation from guidelines range of 46-57 months for tax evasion, where government agreed that a variance of some length was appropriate).

43.11 SENTENCING POLICIES

43.11[1] Departures and Variances from the Guidelines

As noted above, the sentencing court must calculate and consider the applicable Guidelines range. A prosecutor may recommend a sentence below the calculated range where appropriate if any required approval is obtained. But a prosecutor should not recommend that there be no period of incarceration in a tax case except in rare cases. *See* JM 6-4.340 ("Because of the exceptional importance of general deterrence in criminal tax prosecutions, and because a sentence commensurate with the gravity of the offense acts as a deterrent to would-be violators, a sentencing recommendation advocating for a term of imprisonment is almost always warranted in a criminal tax case.")

43.11[2] Costs of Prosecution

The principal substantive criminal tax offenses (*i.e.*, 26 U.S.C. §§ 7201, 7203, 7206(1) & (2)) mandates the 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, 688-89 (8th Cir. 1984);[47] ***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 imposing 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. JM 6-4.350.

43.11[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 these four situations:

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[47] *But see* ***United States v. May***, 67 F.3d 706, 707-08 (8th Cir. 1995) (recognizing costs of prosecution as mandatory yet still considering defendant's ability to pay).

a. When the sentence is imposed in violation of law;[48]

b. When the sentence is imposed as a result of an incorrect application of the Guidelines;[49]

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.[50]

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 protective notice of appeal in district court for review of an otherwise final sentence. But any further action requires the approval of the Solicitor General. JM 2-2.121.

43.12 RESTITUTION

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

43.13 FINES

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

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[48] *See* ***United States v. Hardy***, 101 F.3d 1210, 1212 (7th Cir. 1996); ***United States v. Underwood***, 61 F.3d 306, 308 (5th Cir. 1995); ***United States v. Nnanna***, 7 F.3d 420, 422 (5th Cir. 1993); ***United States v. Piche***, 981 F.2d 706, 719 (4th Cir. 1992); ***United States v. Lopez***, 974 F.2d 50, 52-53 (7th Cir. 1992).

[49] ***Williams v. United States***, 503 U.S. 193, 199-202 (1992); ***United States v. Soltero-Lopez***, 11 F.3d 18, 20 (1st Cir. 1993).

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

43.14 CONDITIONS OF SUPERVISED RELEASE

While supervised release is not mandated by statute for all federal crimes, federal courts impose supervised release in virtually all cases. There are three categories of conditions of supervised release. The first is a group of mandatory conditions, which are required by various statutes. *See* USSG §5D1.3(a). The second is a group of "standard" conditions, such as a work requirement, a bar on owning a firearm, and conditions related to sharing information timely with the probation officer. *See* USSG §5D1.3(c). The third is a group of "special" conditions that are recommended in some cases, such as providing access to financial information, mental health programming, and conditions related to substance abuse. *See* USSG §5D1.3(d).

There are certain special conditions of supervised release that are often appropriate to request in criminal tax prosecutions. If restitution was not agreed to in a plea agreement, it can be ordered as a condition of supervised release. ***United States v. Nolen***, 523 F.3d 331, 333 (5th Cir. 2008) ("[R]estitution may be imposed if done so as a condition of supervised release in a criminal tax case, even in the absence of a prior definitive determination or adjudication of the amount of taxes owed, and if limited to losses from the crime of conviction."). Another common supervised release condition requires the defendant to file tax returns and pay the taxes owed. ***United States v. Thomas***, 635 F.3d 13 (1st Cir. 2011) (affirming conditions of supervised release requiring defendant to file tax returns, even those outside the statute of limitations, and to pay back taxes). A condition of supervised release can also require the defendant to cooperate with the IRS. ***United States v. Mosher***, 493 F. App'x 672, 675 (6th Cir. 2012) (revocation of supervised release was warranted for failure to satisfy the conditions of his supervised release requiring him to cooperate with the IRS and to prepare amended income tax returns). In cases involving fraudulent tax return preparers, a condition of supervised release that prohibits the defendant from acting as a tax preparer is appropriate. ***United States v. Preacely***, 702 F.3d 373 (7th Cir. 2012) (special condition of defendant's supervised release prohibiting him from acting directly or indirectly as a tax preparer was not unconstitutionally vague). Depending on the facts, it may be appropriate to seek a condition of supervised release that requires the defendant to seek the approval of the Probation Office for certain financial transactions. ***United States v. Banks***, 55 F.4th 246, 260 (3d Cir. 2022) (affirming condition preventing defendant from engaging in financial transactions above a certain amount without approval of the probation office.).

Most circuits require district courts to orally pronounce all discretionary supervision conditions – that is, all conditions other than the mandatory conditions listed in 18 U.S.C. § 3583(d). This includes the "standard" conditions of supervised release recommended in the guidelines. USSG §§5D1.3(c)(1)-(13).[51] Typically, when the oral sentence conflicts with a later written judgment, the "right of a defendant to be present at sentencing dictates that the oral pronouncement of sentence must control."[52] ***United States v. A-Abras Inc.***, 185 F.3d 26, 29 (2d Cir. 1999); ***United States v. Faulks***, 201 F.3d 208, 211 (3d Cir. 2000) (same); ***United States v. Ramirez***, 98 F.4th 1141, 1146 (9th Cir. 2024), *cert. denied,* 145 S. Ct. 1107, 220 L. Ed. 2d 410 (2025) (same).

In some circuits, any alteration or addition to the oral sentence made in the written judgment is invalid and must be stricken. *See* ***United States v. Matthews***, 47 F.4th 851, 856 (D.C. Cir. 2022) ("remand for the district court to conform the written judgment to the orally pronounced one"); ***United States v. Washington***, 904 F.3d 204, 208 (2d Cir. 2018) (directing district court to delete requirement imposed in written judgment that was not included in oral pronouncement of sentence); ***United States v. Martinez***, 250 F.3d 941, 942 (5th Cir. 2001) (same). In others, the later added written conditions are vacated, and the case is remanded for limited resentencing. ***United States v. Thurber***, 106 F.4th

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[51] The First and Second Circuits do not require the oral pronouncement of the "standard" conditions. ***United States v. Truscello***, 168 F.3d 61 (2d Cir. 1999); ***United States v. Tulloch***, 380 F.3d 8, 12-13 (1st Cir. 2004). The Second Circuit has extended the exemption to some "special" conditions as well. *See, e.g.*, ***United States v. Asuncion-Pimental***, 290 F.3d 91, 94 (2d Cir. 2002) (oral pronouncement not needed where the condition is plainly appropriate to the specific defendant, such as a firearms prohibition). The Second Circuit, however, recently agreed to rehear an appeal en banc and may overrule ***Truscello***. *See* ***United States v. Maiorana***, No. 22-1115, Dkt. 111 (2d Cir. June 2, 2005) (order stating no oral argument is necessary and that the case will be taken on submission on June 25, 2025).

[52] When the written judgment includes conditions of supervised release that were not orally pronounced, an appellate waiver in a plea agreement may not bar the defendant from raising the issue on appeal. ***United States v. Singletary***, 984 F.3d 341, 345 (4th Cir. 2021) (holding that appeal waiver does not cover this issue because the defendant "has never been sentenced to those conditions at all."); ***United States v. Harris***, 51 F.4th 705, 710 (7th Cir. 2022) ("an appeal waiver will generally not bar this type of claim."); ***United States v. Shaw***, No. 24-5461, 2025 WL 1587792, at *2 (6th Cir. June 5, 2025) (same). *But see* ***United States v. Higgins***, 739 F.3d 733, 739 (5th Cir. 2014) (upholding appeal waiver in this situation).

814, 834 (8th Cir. 2024) (vacated the standard conditions of supervised release that conflicted with the oral pronouncement and remanded for a limited resentencing); ***United States v. Knight***, 122 F.4th 845, 850 (9th Cir. 2024) (vacating conditions of supervised released not orally pronounced and remanding for the limited purpose of reconsidering the vacated supervised release conditions).

In the Fourth and Seventh Circuits, however, if there is a discrepancy between the oral pronouncement and the written judgment, the court will vacate the entire sentence and remand for full sentencing. ***United States v. Rogers***, 961 F.3d 291, 300–01 (4th Cir. 2020). ***United States v. Sanchez***, 814 F.3d 844, 847-48 (7th Cir. 2016) ("We do not merely delete these conditions, but instead remand the case for resentencing").

Even the Fourth Circuit, which is rather stringent in requiring the oral pronouncement of all discretionary conditions of supervised release, allows district courts to satisfy this obligation by incorporation of the PSR's recommendations. In ***Rogers***, the court clarified that a district court may "satisfy its obligation to orally pronounce discretionary conditions through incorporation—by incorporating, for instance, all Guidelines 'standard' conditions when it pronounces a supervised-release sentence, and then detailing those conditions in the written judgment." 961 F.3d at 299. Such incorporation during the oral sentencing proceedings can include a "written list of discretionary conditions of supervised release, such as the recommendations of conditions of release that have been spelled out in the defendant's PSR." ***United States v. Smith***, 117 F.4th 584, 604 (4th Cir. 2024). Other circuits have approved of this procedure as well. *See, e.g.*, ***United States v. Nardozzi***, 2 F.4th 2, 8 (1st Cir. 2021) ("A sentencing court pronounces supervision conditions when it orally adopts a document recommending those conditions."); ***United States v. Montoya***, 82 F.4th 640, 651 (9th Cir. 2023) ("where the defendant has been informed of the proposed conditions of supervised release in advance of sentencing, the court can incorporate those conditions by reference at the hearing," and this is satisfied by reference to conditions set forth in the PSR).

In addition to orally pronouncing the conditions of supervised release, the district court must provide some reason for the conditions. Because the conditions of supervised release are part of the sentence, the district court must apply the sentencing considerations listed in 18 U.S.C. § 3553(a) to the proposed conditions. Conditions of supervised release are subject to the requirement that "the court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence," 18

U.S.C. § 3553(c), and "in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in" eight enumerated subsections of § 3553(a). 18 U.S.C. § 3583(c). How much a district court needs to say will vary with the circumstances. ***Rita v. United States,*** 551 U.S. 338, 356 (2007) ("The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends on the circumstances.").

The Seventh Circuit has been particularly focused on procedure in imposing supervised release conditions. In ***United States v. Thompson***, the court concluded that district courts had wrongly imposed standardized conditions of supervised release without considering the relevant statutory sentencing factors in 18 U.S.C. § 3553, and had imposed too many vague and ambiguous conditions that violated a defendant's constitutional rights or were insufficiently justified by the facts of the case. 777 F.3d 368 (7th Cir. 2015). The court expressed concern that district courts in the circuit were not providing defendants adequate notice of the supervised release conditions that the court could impose and the reasons for doing so. ***Id.*** at 377. The court suggested one "best practice" could be for the district court to, before the sentencing hearing, "inform the parties of the conditions and the possible reasons for imposing them, so that they can develop arguments pro or con to present at the sentencing hearing." ***Id.*** This is another benefit of ensuring that the PSR includes all relevant conditions of supervised release and is incorporated at the sentencing hearing. ***United States v. Kappes***, 782 F.3d 828, 843 (7th Cir. 2015) (suggesting "that sentencing judges require the probation office to include any recommended conditions of supervised release—and the reasons for the recommendations—in the presentence report that is disclosed to the parties prior to the sentencing hearing"). *See also* ***United States v. Lawrence***, No. 24-419-CR, 2025 WL 1553093, at *5 (2d Cir. June 2, 2025) (adopting a PSR satisfies requirement of stating sentencing court's reasons for imposing a special condition of supervised release in open court because the PSR provides the grounds for the sentence imposed). As noted by several courts, this process provides the defendant "far more opportunity to review and consider objections to those conditions than the defendants who have them read and imposed upon them at sentencing." ***United States v. Bloch***, 825 F.3d 862, 872 (7th Cir. 2016). *See also* ***United States v. Diggles***, 957 F.3d 551, 560–61 (5th Cir. 2020) (citing ***Bloch***); ***United States v. Montoya***, 82 F.4th 640, 652 (9th Cir. 2023) (same).