

# Federal Sentencing Guidelines

by Rosemary T. Cakmis\*  
and  
Fritz Scheller\*\*

## I. INTRODUCTION

As in the past two years, the Eleventh Circuit's 2002 docket contained numerous conviction and sentencing appeals, primarily in drug and firearm cases, based on the Supreme Court's 2000 decision in *Apprendi v. New Jersey*.<sup>1</sup> Most of these Eleventh Circuit decisions involved the effect of *Apprendi* on statutes, such as the statutory maximum and mandatory minimum penalties provided in statutes relating to drugs and firearms.<sup>2</sup> In the cases involving *Apprendi* challenges to the United

---

\* Assistant Federal Public Defender, Chief of Appellate Division, Middle District of Florida, Orlando Division. University of Florida (B.S., 1979; J.D., 1981). Member, State Bar of Florida; United States District Court for the Middle District of Florida; Eleventh Circuit Court of Appeals; and the United States Supreme Court. Ms. Cakmis is board certified by The Florida Bar in the field of criminal appellate law. She is the President of the Federal Bar Association, Orlando Chapter, and lectures on Eleventh Circuit case law and procedure and preserving error in the Eleventh Circuit.

\*\* Assistant Federal Public Defender, Trial Division, Middle District of Florida, Orlando Division. University of Texas (B.A., 1989); Boalt Hall School of Law (J.D., Order of the Coif, 1999). Associate Editor, Berkeley Journal of International Law (1997); Associate Editor, Ecology Law Quarterly (1999); Member, State Bar of Florida; United States District Court for the Middle District of Florida; Eleventh Circuit Court of Appeals.

1. 530 U.S. 466 (2000).

2. See, e.g., *United States v. Acevedo*, 285 F.3d 1010 (11th Cir.), cert. denied, 123 S. Ct. 401 (2002); *United States v. Allen*, 302 F.3d 1260 (11th Cir. 2002); *United States v. Anderson*, 289 F.3d 1321 (11th Cir. 2002); *United States v. Bender*, 290 F.3d 1279 (11th Cir.), cert. denied, 123 S. Ct. 571 (2002); *United States v. Hester*, 287 F.3d 1355 (11th Cir.), cert. denied, 123 S. Ct. 402 (2002); *United States v. Miles*, 290 F.3d 1341 (11th Cir.), cert. denied, 123 S. Ct. 707 (2002); *United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002); *United States v. Suarez*, 313 F.3d 1287 (11th Cir. 2002); *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002), cert. denied, 123 S. Ct. 872 (2003).

The Supreme Court also applied *Apprendi* in three cases in 2002, but none of those cases involved the federal sentencing guidelines. See *United States v. Cotton*, 535 U.S. 625

States Sentencing Guidelines (“U.S.S.G.”),<sup>3</sup> the Eleventh Circuit remained consistent with its decisions in 2000 and 2001 and continued to rule that *Apprendi* does not apply to the sentencing guidelines.<sup>4</sup>

Child pornography cases were also the focus of much debate in the Eleventh Circuit in 2002. The most apparent reason for this focus is the Supreme Court’s recent decision in *Ashcroft v. Free Speech Coalition*,<sup>5</sup> in which the Court held that part of the child pornography statute was unconstitutional.<sup>6</sup> This decision produced a wave of challenges to child pornography convictions, much like numerous defendants challenged their drug convictions in the aftermath of the Supreme Court decision in *Apprendi*. In addition to challenging their convictions, many defendants in these child pornography cases raised challenges to several guideline enhancements involving child pornography found in Chapter Two, Part G, of the sentencing guidelines.<sup>7</sup>

As in 2001, the Eleventh Circuit again in 2002 addressed various aspects of U.S.S.G. section 2F1.1, which was the fraud guideline in effect at the time some of the defendants who appealed in 2002 were sentenced.<sup>8</sup> In November 2001, section 2F1.1 was deleted, and its provisions were consolidated into the amended version of section 2B1.1.<sup>9</sup>

Departures from the guidelines also continued to attract much attention from the Eleventh Circuit in 2002. The court followed the general trend it established by affirming upward departures and

---

(2002) (addressing the effect of *Apprendi* on the federal drug statute under the plain error standard of review); *Harris v. United States*, 536 U.S. 545 (2002) (discussing the effect of *Apprendi* on the mandatory minimum penalties of a federal firearm statute); *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* in a state death penalty sentencing context).

3. The United States Sentencing Guidelines Manual that incorporates the November 1, 2001 amendments is relied on herein unless a different version of the manual was relied on in a specific case.

4. See, e.g., *United States v. Rodriguez*, 279 F.3d 947 (11th Cir. 2002); *United States v. Snyder*, 291 F.3d 1291 (11th Cir. 2002).

5. 535 U.S. 234 (2002).

6. *Id.* at 256, 258. In *Ashcroft* the Supreme Court held one part of the definition of child pornography found in 18 U.S.C. § 2256(8)(B) (2000) and another definition found in 18 U.S.C. § 2256(8)(D) unconstitutional. *Id.*

7. See, e.g., *Bender*, 290 F.3d 1279; *United States v. Caro*, 309 F.3d 1348 (11th Cir. 2002); *United States v. Dunlap*, 279 F.3d 965 (11th Cir. 2002); *United States v. Hall*, 312 F.3d 1250 (11th Cir. 2002); *United States v. Richardson*, 304 F.3d 1061 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 930 (2003).

8. See, e.g., *United States v. Kimball*, 291 F.3d 726 (11th Cir. 2002); *Snyder*, 291 F.3d 1291; *United States v. Singh*, 291 F.3d 756 (11th Cir. 2002).

9. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2001); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2001).

reversing downward departures in most cases.<sup>10</sup> Other guidelines that played an important part in Eleventh Circuit case law in 2002 include U.S.S.G. section 1B1.2(d) (multiple object conspiracies),<sup>11</sup> U.S.S.G. section 1B1.3 (relevant conduct),<sup>12</sup> U.S.S.G. sections 3B1.1 and 3B1.2 (role adjustments),<sup>13</sup> U.S.S.G. section 2S1.1 (money-laundering),<sup>14</sup> U.S.S.G. section 3D1.2 (grouping),<sup>15</sup> and U.S.S.G. Chapter Four, Parts A and B (criminal history considerations).<sup>16</sup>

## II. CHAPTER ONE, PART B: GENERAL APPLICATION PRINCIPLES

Chapter One, Part B of the guidelines contains the general principles used in applying the guidelines. Two of these principles that were the subject of several Eleventh Circuit cases in 2002 involved conspiracies to commit more than one offense<sup>17</sup> and relevant conduct.<sup>18</sup>

---

10. See, e.g., *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002); *United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002); *United States v. Schlaen*, 300 F.3d 1313 (11th Cir. 2002); *Caro*, 309 F.3d 1348; *United States v. Smith*, 289 F.3d 696 (11th Cir. 2002).

11. See, e.g., *Hersh*, 297 F.3d 1233; *United States v. Venske*, 296 F.3d 1284 (11th Cir. 2002); *United States v. Vallejo*, 297 F.3d 1154 (11th Cir.), *cert. denied*, 123 S. Ct. 694 (2002).

12. See, e.g., *Petrie*, 302 F.3d 1280; *Vallejo*, 297 F.3d 1154; *United States v. Ryan*, 289 F.3d 1339 (11th Cir.), *cert. denied*, 123 S. Ct. 324 (2002); *Suarez*, 313 F.3d 1287; *Dunlap*, 279 F.3d 965; *Singh*, 291 F.3d 756.

13. See, e.g., *Vallejo*, 297 F.3d 1154; *Suarez*, 313 F.3d 1287; *United States v. Phillips*, 287 F.3d 1053 (11th Cir. 2002); *United States v. Boyd*, 291 F.3d 1274 (11th Cir. 2002); *Ryan*, 289 F.3d 1339.

14. See, e.g., *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002); *Venske*, 296 F.3d 1284; *Petrie*, 302 F.3d 1280; *Schlaen*, 300 F.3d 1313.

15. See, e.g., *United States v. Bradford*, 277 F.3d 1311 (11th Cir.), *cert. denied*, 123 S. Ct. 304 (2002); *Hersh*, 297 F.3d 1233.

16. See, e.g., *United States v. Davis*, 313 F.3d 1300 (11th Cir. 2002) (addressing criminal history calculations under U.S.S.G. section 4A1.1); *Suarez*, 313 F.3d 1287 (same); *United States v. Jones*, 289 F.3d 1260 (11th Cir.) (reviewing a criminal history departure under U.S.S.G. section 4A1.3), *cert. denied*, 123 S. Ct. 661 (2002); *United States v. Govan*, 293 F.3d 1248 (11th Cir. 2002) (discussing a criminal history departure under U.S.S.G. section 4A1.3 and a career offender enhancement under U.S.S.G. section 4B1.1); *Smith*, 289 F.3d 696 (addressing a criminal history departure under U.S.S.G. section 4A1.3); *United States v. Duty*, 302 F.3d 1240 (11th Cir. 2002) (concerning the career offender enhancement under U.S.S.G. section 4B1.1); *United States v. Sutton*, 302 F.3d 1226 (11th Cir. 2002) (involving the armed career criminal enhancement found in U.S.S.G. section 4B1.4).

17. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(d).

18. See *id.* § 1B1.3.

A. *U.S.S.G. section 1B1.2(d): Multiple Object Conspiracies*

The offense level for a conspiracy charge is the offense level for the substantive offense upon which the conspiracy is based.<sup>19</sup> Many indictments, however, charge conspiracies to commit more than one offense. Such multiple object conspiracies are the subject of U.S.S.G. section 1B1.2(d).

In *United States v. Hersh*,<sup>20</sup> the Eleventh Circuit noted that under section 1B1.2(d), a conspiracy count may be divided into separate counts for guideline calculations if the defendant is convicted of a conspiracy containing multiple objects. That guideline, however, does not apply when the “conspiracy involves the commission of ‘one crime in two ways.’”<sup>21</sup> Because the indictment in *Hersh* charged a conspiracy with only one object, the Eleventh Circuit found that section 1B1.2(d) did not apply.<sup>22</sup> Accordingly, the Eleventh Circuit ruled that the district court erred by dividing the conspiracy count into separate counts in calculating defendant’s offense level.<sup>23</sup>

In *United States v. Venske*,<sup>24</sup> defendants were convicted, inter alia, of conspiracy to launder money based on their participation in a telemarketing scheme. The conspiracy had two objects: one was a violation of 18 U.S.C. § 1956(a)(1)(A)(i), and the other was a violation of 18 U.S.C. § 1956(a)(1)(B)(i).<sup>25</sup> The jury returned a general verdict, and the district court sentenced defendants, using the more severe base offense level required for the § 1956(a)(1)(A)(i) offense, “without determining beyond a reasonable doubt which of the charged offenses was the basis of the jury’s verdict.”<sup>26</sup>

Applying the plain error standard of review because defendants did not preserve the issue for appeal, the Eleventh Circuit found that the district court erred when it failed to determine which offense formed the basis of the conspiracy.<sup>27</sup> The Eleventh Circuit also found that the

---

19. *See id.* § 2X1.1(a).

20. 297 F.3d 1233 (11th Cir. 2002).

21. *Id.* at 1248 (quoting *United States v. Riley*, 142 F.3d 1254, 1257 (11th Cir. 1998)).

22. *Id.* at 1248-49.

23. *Id.* at 1249. *Hersh* is discussed in more detail in the section of this Article that addresses the grouping rules contained in Chapter Three, Part D of the guidelines. See discussion *infra* Part IV.D.

24. 296 F.3d 1284 (11th Cir. 2002).

25. *Id.* at 1292 (citing 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i) (2000)).

26. *Id.* at 1293.

27. *Id.* (citing *United States v. McKinley*, 995 F.2d 1020, 1025-26 (11th Cir. 1993); U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(d) & cmt. n.5 (1998)). The court applied the version of the guidelines in effect when defendants were sentenced, i.e., the guidelines

error affected defendants' "substantial rights and the fairness, integrity, and public reputation of the judicial proceedings."<sup>28</sup> The court explained that the sentence could have been lower depending on which money-laundering offense was determined to be the object of the conspiracy.<sup>29</sup> Thus, the sentence was vacated, and the case was remanded for resentencing.<sup>30</sup>

In *United States v. Vallejo*,<sup>31</sup> defendant was convicted of conspiracy<sup>32</sup> and extortion.<sup>33</sup> The indictment alleged, and the government argued at the bench trial, that the conspiracy was based on multiple substantive offenses, including extortion, mail fraud, and money-laundering.<sup>34</sup> At the conclusion of the bench trial, the trial court found defendant guilty of conspiracy, but did not mention the substantive offenses on which the conspiracy was based. Defendant's sentencing guidelines were calculated based on a multiple object conspiracy.<sup>35</sup>

The commentary to section 1B1.2(d) cautions the courts to exercise "[p]articular care" when applying that guideline "because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy."<sup>36</sup> The commentary explains that section 1B1.2(d) should only be applied in such cases "with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense."<sup>37</sup>

The phrase "were it sitting as trier of fact" has been defined as requiring the court to "find beyond a reasonable doubt that the defendant conspired to commit the particular object offense."<sup>38</sup> The Eleventh Circuit rejected the government's argument in *Vallejo* that "because the district court both acted as the trier of fact and imposed the sentence, the court's decision to base [defendant's] sentence on a multi-object conspiracy for mail fraud and money[-]laundering necessarily

---

effective on November 1, 1998. *Id.* at 1293 n.6.

28. *Id.* at 1293.

29. *Id.* at 1293-94.

30. *Id.* at 1294.

31. 297 F.3d 1154 (11th Cir.), *cert. denied*, 123 S. Ct. 694 (2002).

32. *See* 18 U.S.C. § 371.

33. *See id.* § 1951(a).

34. The money-laundering offenses were alleged under two statutes: 18 U.S.C. §§ 1956(a), § 1957. 297 F.3d at 1170.

35. *Id.*

36. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2, cmt. n.4 (2001).

37. *Id.*

38. *Vallejo*, 297 F.3d at 1169-70 (quoting *McKinley*, 995 F.2d at 1026).

implies that those objects were proved beyond a reasonable doubt.”<sup>39</sup> In light of the district court’s application of the preponderance of the evidence standard in ruling on defendant’s various sentencing objections and failure to mention proof beyond a reasonable doubt or make specific findings, the Eleventh Circuit refused to speculate or assume that the district court found the multiple objects of the conspiracy were proved beyond a reasonable doubt.<sup>40</sup> The Eleventh Circuit concluded that the “failure to apply the proper standard of proof at sentencing *compels* us to vacate the appellant[’]s sentence[] and remand this case to the district court for resentencing.”<sup>41</sup>

*B. U.S.S.G. section 1B1.3: Relevant Conduct*

U.S.S.G. section 1B1.3 allows for relevant conduct to be considered in calculating a defendant’s sentencing guidelines.<sup>42</sup> In 2002 this guideline arose in the context of various offenses. Some of the cases are discussed in connection with the specific offense guideline for which the relevant conduct was considered.<sup>43</sup> Two of the cases discussed in this section involve some general principles for applying the relevant conduct guideline.

In *United States v. Petrie*,<sup>44</sup> defendant was convicted of conspiracy to launder funds that were derived from wire fraud. On appeal, defendant challenged the ten-level enhancement found in U.S.S.G. section 2S1.1(b)(2)(K),<sup>45</sup> which applies if the loss was more than \$20 million but not more than \$35 million.<sup>46</sup> The district court based the loss on defendant’s direct conduct and the reasonably foreseeable acts of his co-conspirators.<sup>47</sup>

---

39. *Id.* at 1171.

40. *Id.*

41. *Id.* (quoting *United States v. Farese*, 248 F.3d 1056, 1061 (11th Cir. 2001) (alterations in original)).

42. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3.

43. For example, the relevant conduct in *United States v. Suarez*, 313 F.3d 1287 (11th Cir. 2002), is discussed in connection with offenses involving drugs (see discussion *infra* Part III.C.2.); the relevant conduct in *Vallejo* is discussed in connection with offenses involving extortion (see discussion *infra* Part III.B.2.); the relevant conduct in *United States v. Singh*, 291 F.3d 756 (11th Cir. 2002), is discussed in connection with offenses involving fraud (see discussion *infra* Part III.D.4.); and the relevant conduct in *United States v. Dunlap*, 279 F.3d 965 (11th Cir. 2002), is discussed in connection with offenses involving pornography (see discussion *infra* Part III.E.2-3.).

44. 302 F.3d 1280 (11th Cir. 2002).

45. This guideline was amended on November 1, 2001. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1.

46. 302 F.3d at 1290.

47. *Id.*

Pursuant to sections 1B1.3(a)(1)(A) and (B), the district court must consider “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity” in calculating the loss in conspiracy cases.<sup>48</sup> Because the “scope of the activity jointly undertaken by the defendant is not necessarily the same as the scope of the entire conspiracy,” the district court “must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake.”<sup>49</sup> Then the district court must determine the “conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant.”<sup>50</sup> In so doing, the district court may consider “any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.”<sup>51</sup> In affirming defendant’s sentence in *Petrie*, the Eleventh Circuit concluded that the district court correctly calculated the amount of money laundered based on defendant’s conduct “in contacting clients and introducing them to the scheme to defraud them and his establishment of a company . . . used to defraud clients at later stages of the conspiracy.”<sup>52</sup>

In *United States v. Ryan*,<sup>53</sup> defendant was convicted of conspiracy to possess and attempt to distribute 100 kilograms or more of marijuana and simple possession of marijuana.<sup>54</sup> On appeal, defendant argued he should not have been held accountable for approximately 227 kilograms of marijuana because there was no evidence that he was a party to the negotiations for the purchase of the marijuana.<sup>55</sup> The Eleventh Circuit disagreed, holding that defendant was accountable for the acts the co-conspirators committed in furtherance of the conspiracy.<sup>56</sup> The Eleventh Circuit noted that the evidence supported an inference beyond a reasonable doubt that defendant was a knowing participant in the drug conspiracy and the amount attributed to him was consistent with the object of the conspiracy.<sup>57</sup> Thus, the district court did not err in holding defendant accountable for that amount.<sup>58</sup>

---

48. *Id.*

49. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2).

50. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2).

51. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2).

52. *Id.* at 1290-91.

53. 289 F.3d 1339 (11th Cir.), *cert. denied*, 123 S. Ct. 324 (2002).

54. See 21 U.S.C. §§ 841(b)(1)(B)(vii), 844, 846 (2000).

55. 289 F.3d at 1348.

56. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B 1.3(a)(1)(B)).

57. *Id.*

58. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.12 (stating in part that “in a reverse sting, the agreed-upon quantity of the controlled substance would more

## III. CHAPTER TWO: OFFENSE CONDUCT

## A. Part A: Offenses against the Person

In *United States v. Root*,<sup>59</sup> the court was confronted with an issue of first impression.<sup>60</sup> Defendant's conviction for attempting to persuade a minor to engage in criminal sexual activity<sup>61</sup> and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor, was based on his dealings with an undercover officer portraying a minor.<sup>62</sup> In arriving at a sentence of forty months of imprisonment, the district court applied the two-level enhancement for unduly influencing a minor to engage in a sexual act found at U.S.S.G. section 2A3.2(b)(2)(B).<sup>63</sup>

The commentary to section 2A3.2 specifically provides that the term "victim," for the purpose of that guideline, can include "an undercover law enforcement officer who represented to a participant that the officer had not attained the age of [sixteen] years."<sup>64</sup> When the Sentencing Commission amended the guideline commentary in 2000, it explained that undercover officers were included as victims, thereby "ensuring that offenders who are apprehended in undercover operation[s] are appropriately punished."<sup>65</sup> The court in *Root* also noted that although the Sentencing Commission instructed the district court to "closely consider the facts of the case" in determining whether the defendant exerted undue influence over the victim, the Commission created a rebuttable presumption of such influence for purposes of section 2A3.2(b)(2)(B) when "a participant is at least [ten] years older than the victim."<sup>66</sup>

In evaluating the enhancement under the facts in *Root*, the Eleventh Circuit noted that the enhancement applied whether defendant engaged in sex acts or attempted to do so.<sup>67</sup> If the conviction is based on an

---

accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant").

59. 296 F.3d 1222 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1006 (2003).

60. *Id.* at 1232.

61. *See* 18 U.S.C. § 2422(b) (2002).

62. 296 F.3d at 1226. *See* 18 U.S.C. § 2423(b).

63. 296 F.3d at 1227.

64. *Id.* at 1232. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A3.2, cmt. n.1 (2000).

65. 296 F.3d at 1234 (quoting U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 592, cmt.).

66. *Id.* at 1232-33, 1234 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A3.2, cmt. n.4).

67. *Id.* at 1234.

attempt, the identity of the victim is irrelevant for purposes of the enhancement.<sup>68</sup> In an attempt situation in which the “victim” is an undercover officer, the undue influence consideration focuses on the offender’s conduct rather than the officer’s feeling about the offender’s conduct.<sup>69</sup> “In assessing whether an offender’s conduct constitutes ‘undue influence,’ the district court may look to a variety of factors, including whether it displays an abuse of superior knowledge, influence[,] and resources.”<sup>70</sup>

The court in *Root* concluded that “a sentencing court may also employ the rebuttable presumption of undue influence created by the Sentencing Commission when there is a [ten]-year difference between the offender’s age and the age of the child portrayed by an undercover agent.”<sup>71</sup> In upholding the district court’s conclusion in *Root* that defendant had not rebutted that presumption, the Eleventh Circuit rejected the defendant’s contention that a defendant could never rebut this presumption when there was no child victim who could testify about the voluntariness of her actions.<sup>72</sup> The court noted that a defendant in that situation could “point to the reasonableness of the interpretation of the facts adduced at trial . . . to argue against this enhancement.”<sup>73</sup> Regardless, the court stated that the facts of this case supported a finding of undue influence even without the presumption.<sup>74</sup>

#### B. Part B: Robbery, Extortion, and Blackmail

**1. U.S.S.G. § 2B3.1(b)(2)(F): Robbery.** In *United States v. Murphy*,<sup>75</sup> the Eleventh Circuit interpreted the 2000 amendment to U.S.S.G. section 2B3.1(b)(2)(F), which allows for a two-level enhancement if a defendant made a “threat of death” in committing a robbery.<sup>76</sup> During a bank robbery, defendant in *Murphy* gave a bank teller a written note that stated he had a gun.<sup>77</sup> The Eleventh Circuit held that the note constituted a “threat of death” even though defendant had no gun and never expressly threatened to shoot the teller.<sup>78</sup>

---

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1236 n.27.

73. *Id.*

74. *Id.*

75. 306 F.3d 1087 (11th Cir. 2002).

76. *Id.* at 1088. See U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2)(F).

77. 306 F.3d at 1088.

78. *Id.* at 1088-89.

In reaching this conclusion, the Eleventh Circuit relied on the commentary to the guideline, which states that “the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply.”<sup>79</sup> The commentary goes on to provide that the enhancement applies when “the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.”<sup>80</sup> According to the Eleventh Circuit, defendant’s note stating that he had a gun would instill such a fear in a reasonable person.<sup>81</sup>

While upholding the enhancement, the Eleventh Circuit noted its precedent that found statements similar to the one made in *Murphy* insufficient to justify the enhancement under section 2B3.1(b)(2)(F).<sup>82</sup> The court, however, explained that those cases were decided prior to the 2000 amendment, when the guideline could only be applied “if an *express* threat of death was made.”<sup>83</sup> Because defendant’s offense was committed after the amendment to the guideline became effective, the amended version applied, and Eleventh Circuit precedent interpreting the materially different prior guideline did not control.<sup>84</sup>

**2. U.S.S.G. section 2B3.2(b): Extortion.** In sentencing defendants in *United States v. Vallejo*<sup>85</sup> for various criminal acts related to extortion, the district court applied three enhancements found in U.S.S.G. section 2B3.2(b).<sup>86</sup> Section 2B3.2(b)(5)(B) allows for a two-level enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.”<sup>87</sup> Physical restraint is defined as “the forcible restraint of the victim such as by being tied, bound, or locked up.”<sup>88</sup>

Noting that it had not addressed the scope of physical restraint in connection with section 2B3.2(b)(5), which relates to extortion, the Eleventh Circuit referred to its precedent addressing physical restraint

---

79. *Id.* at 1089 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B3.1, cmt. n.6).

80. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B3.1, cmt. n.6).

81. *Id.*

82. *Id.* (citing *United States v. Moore*, 6 F.3d 715, 722 (11th Cir. 1993); *United States v. Canzater*, 994 F.2d 773, 775 (11th Cir. 1993)).

83. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2)(F) (1995)).

84. *Id.* at 1090.

85. 297 F.3d 1154 (11th Cir.), *cert. denied*, 123 S. Ct. 694 (2002).

86. *Id.* at 1166-67. Defendants in *Vallejo* were convicted of “conspiracy in violation of 18 U.S.C. § 371; extortion in violation of 18 U.S.C. § 1951(a); mail fraud in violation of 18 U.S.C. § 1341; and money[ ]laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1957.” *Id.* at 1159.

87. *Id.* at 1166 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B3.2(b)(5)(B) (2001)).

88. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.1(h)).

in connection with section 2B3.1(b)(4), which relates to robbery.<sup>89</sup> The court recognized that, concerning the robbery enhancement, it had held that “[a]lthough no threats were made, the obvious presence of handguns ensured the victims’ compliance and effectively prevented them from leaving the room for a brief period.”<sup>90</sup> The court then found that the victims in *Vallejo* were physically restrained when they were grabbed and held against their will because “the victims had no alternative but to comply and were effectively prevented from leaving the club, even if only for a short time.”<sup>91</sup> The court further ruled that “[t]he fact that the victims were eventually free to leave does not mean that they were not physically restrained.”<sup>92</sup> Thus, the Eleventh Circuit affirmed the physical restraint enhancement.<sup>93</sup>

The court in *Vallejo* also affirmed the two-level enhancement for express or implied threat of bodily injury pursuant to section 2B3.2(b)-(1).<sup>94</sup> The Eleventh Circuit noted that under the commentary to this guideline, “[e]ven if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it.”<sup>95</sup> Also, the guidelines hold co-conspirators accountable for “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.”<sup>96</sup> Based on the facts of this case, which included one defendant holding a machete to a victim’s throat and defendant’s reputation, the Eleventh Circuit affirmed the district court’s finding that “the victims were threatened with death or serious bodily injury.”<sup>97</sup>

Finally, in *Vallejo*, the Eleventh Circuit affirmed the three-level enhancement for brandishing a dangerous weapon during the commission of extortion by force or threat of injury under section 2B3.2(b)(3)(A)-(v).<sup>98</sup> Defendants did not argue that a dangerous weapon was not present; rather, they argued that it was not reasonably foreseeable that

---

89. *Id.* at 1166-67.

90. *Id.* at 1167 (quoting *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994)) (alteration in original).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Section 2B3.2(b)(1) provides for a two-level enhancement if “the offense involved an express or implied threat of death, bodily injury, or kidnapping.” *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B3.2(b)(1)).

95. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B3.2, cmt. n.2).

96. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B)).

97. *Id.*

98. *Id.* at 1167-68 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B3.2(b)(3)(A)(v)).

a defendant would use such a weapon in committing the offense.<sup>99</sup> Given that defendants “deliberated and carried out the forced sale of a nightclub from its owners[,]” the Eleventh Circuit refused to “accept the argument that they had no reason to foresee that a dangerous weapon might be employed to force the victims to give up ownership of their business.”<sup>100</sup>

**3. U.S.S.G. section 2B5.3: Criminal Infringement.** In *United States v. Guerra*,<sup>101</sup> defendants were convicted of conspiring to traffic and trafficking in counterfeit cigars.<sup>102</sup> Applying U.S.S.G. section 2B5.3, the Eleventh Circuit found error in the sentence based on the value and number of the counterfeit cigars used in calculating defendant’s sentencing guidelines.<sup>103</sup>

Loss valuation under section 2B5.3 is based on “the retail value of the infringing item, multiplied by the number of infringing items.”<sup>104</sup> Section 2B5.3(b)(1) provides that “if the retail value of the infringing item exceeded \$2,000, increase by the corresponding number of levels from the table in [section] 2F1.1 (Fraud and Deceit).”<sup>105</sup> Defendant’s relevant conduct is considered in determining the loss, including the reasonably foreseeable acts of others taken in furtherance of jointly undertaken criminal activity.<sup>106</sup>

In reviewing the district court’s loss valuation in *Guerra*, the Eleventh Circuit found that the district court correctly considered the “infringing items” to be the cigars rather than cigar labels.<sup>107</sup> “The value of the bands and labels is inextricably intertwined with that of the completed product, as the value of the counterfeit cigars derives primarily from the degree to which the bands and labels bear marks that are indistinguishable from the genuine marks.”<sup>108</sup> The Eleventh Circuit, however, held that the district court erred in basing the loss on the “value of *genuine* cigars where there is sufficient evidence of the value of the counterfeit items and no findings as to the quality of the counterfeit goods.”<sup>109</sup>

---

99. *Id.* at 1168.

100. *Id.*

101. 293 F.3d 1279, 1283 (11th Cir.), *cert. denied*, 123 S. Ct. 934 (2002).

102. *See* 18 U.S.C. §§ 371, 2320 (2000).

103. 293 F.3d at 1291-94.

104. *Id.* at 1291 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B5.3, cmt. n.2(B) (2000)).

105. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B5.3(b)(1)).

106. *Id.* at 1291 n.10 (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3).

107. *Id.* at 1292.

108. *Id.*

109. *Id.*

Additionally, the Eleventh Circuit concluded that the district court erred in basing the number of “infringing items” on the number of labels found “simply because the labels constituted ‘part’ of the conspiracy.”<sup>110</sup> The district court improperly used two different definitions of “infringing items” for loss purposes.<sup>111</sup> It based the value of the infringing items on the value of the cigars, while basing the number of infringing items on the number of labels that were seized.<sup>112</sup> According to the Eleventh Circuit, the definition of “infringing items” must be consistent for the purpose of sentencing under section 2B5.3.<sup>113</sup>

Further, the Eleventh Circuit held that

the number of “infringing items” may [not] be based on the number of seized articles that have a mere *potential* of ultimately forming a component of a finished counterfeit article, without a determination as to the extent to which the defendant had a reasonable likelihood of actually completing the goods.<sup>114</sup>

Thus, the district court erred when it based the number of infringing items on the labels “simply because the labels constituted ‘part’ of the conspiracy” rather than making findings as to “(1) how close the defendants came to completing additional sales; [and] (2) whether there was a reasonable likelihood of generating revenue corresponding to the amounts assigned.”<sup>115</sup> Thus, the case was remanded for resentencing.<sup>116</sup>

### C. Part D: Offenses Involving Drugs

The bulk of the drug cases before the Eleventh Circuit in 2002 did not involve significant guideline issues.<sup>117</sup> Rather, they dealt mainly with

---

110. *Id.* at 1292-93.

111. *Id.*

112. *Id.*

113. *Id.* at 1293.

114. *Id.* at 1293-94.

115. *Id.* at 1293.

116. *Id.* at 1294.

117. For example, in *United States v. Ryan*, 289 F.3d 1339, 1342 (11th Cir.), *cert. denied*, 123 S. Ct. 324 (2002), defendant was convicted of various drug offenses arising from his efforts to buy marijuana from a confidential informant and government agents. The drug statutes, like U.S.S.G. section 2D1.1, provide for increased penalties based on the amount of drugs involved in the offense. *See, e.g.*, 21 U.S.C. § 841(b) (2000).

Defendant in *Ryan* sought a jury instruction on sentencing entrapment, claiming the government entrapped him into agreeing to a larger amount of drugs than he was predisposed to purchase and that he should not be held accountable for that larger amount. 289 F.3d at 1342. The Eleventh Circuit declined to reach the question of whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), impacted the availability of this sentencing entrapment

the application of *Apprendi*.<sup>118</sup> Even the *Apprendi*-related cases that mentioned the guidelines did not provide much guidance in their application inasmuch as the Eleventh Circuit has remained firm in its position that *Apprendi* does not affect the guidelines. Therefore, the only three cases that provide some substantive guidance regarding the guidelines involving drug offenses are discussed below.

**1. U.S.S.G. section 2D1.1(a)(2): Death or Serious Bodily Injury Enhancement.** In *United States v. Rodriguez*,<sup>119</sup> defendant was convicted of conspiracy and possession of heroin with intent to distribute.<sup>120</sup> The sentencing court applied U.S.S.G. section 2D1.1(a)(2), which sets a base offense level of thirty-eight if the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) and “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.”<sup>121</sup> The district court applied that guideline based on its finding that the decedent would not have died if he had not ingested the heroin defendant provided to him.<sup>122</sup>

Defendant argued that he should not be held accountable for the death because the negligence of two men, who failed to call paramedics when they found the victim unconscious, was an intervening factor that severed the causal connection between the offense and the death.<sup>123</sup> The Eleventh Circuit declined to decide whether there is an intervening cause exception to the death or serious bodily injury enhancement because it concluded the district court did not clearly err in finding that the death was caused by the heroin defendant provided to the victim.<sup>124</sup>

Nonetheless, the court noted that even if such an exception existed, it did not apply in this case because defendant “failed to adduce facts showing an intervening cause of death sufficient to relieve him of liability for the death.”<sup>125</sup> The court in *Rodriguez* pointed to the general proposition that “one may be held criminally liable for victim’s death even where medical negligence or mistreatment also contributed

---

defense based on its finding that a sentencing entrapment instruction was not warranted in this case. 289 F.3d at 1343-46.

118. See cases cited, *supra* note 2.

119. 279 F.3d 947 (11th Cir. 2002).

120. See 21 U.S.C. §§ 841(a), 846.

121. 279 F.3d at 950 n.2 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(2) (citing 21 U.S.C. § 841(b)(1)(C) (2000)).

122. *Id.* at 951.

123. *Id.*

124. *Id.* at 952 & n.5.

125. *Id.* at 951.

to the victim's death."<sup>126</sup> To establish a defense, there must be gross medical negligence that was the "sole cause of the victim's death."<sup>127</sup> No such gross negligence was established in this case, especially as it had not been established that the victim would have lived if paramedics had been called immediately.<sup>128</sup>

The Eleventh Circuit also noted the "basic principle of criminal law that foreseeable negligent acts of a third party do not sever the chain of causation."<sup>129</sup> According to the Eleventh Circuit, the actions of the two men who found the victim were foreseeable and naturally resulted from defendant's criminal conduct.<sup>130</sup>

**2. U.S.S.G. section 2D1.1(b)(1): Weapon Enhancement.** In *United States v. Suarez*,<sup>131</sup> three defendants were convicted of conspiracy to possess with the intent to distribute drugs,<sup>132</sup> and one defendant was also convicted of possessing a firearm in furtherance of a drug trafficking crime.<sup>133</sup> The two defendants who were not convicted of the firearm offense received a two-level enhancement under U.S.S.G. section 2D1.1(b)(1) based on the co-conspirator's possession of the firearm. They appealed the enhancement, arguing that their co-conspirator's possession of the firearm was not reasonably foreseeable to them.<sup>134</sup>

The Eleventh Circuit noted that section 1B1.3(a)(1)(B) subjects conspiracy members to sentencing enhancements based on "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."<sup>135</sup> To support the firearm enhancement under section 2D1.1(b)(1) based on a co-conspirator's possession of a firearm, the government has the burden of proving "by a preponderance of the evidence that: (1) the possessor of the firearm was a co-conspirator; (2) the possession was in furtherance of the conspiracy; (3) the defendant was a member of the conspiracy at the time of the possession; and (4) the co-conspirator[s] possession was reason-

---

126. *Id.* (citing Carolyn Kelly MacWilliam, Annotation, *Homicide: Liability Where Death Immediately Results From Treatment or Mistreatment of Injury Inflicted by Defendant*, 50 A.L.R. 5th 467 (1997)).

127. *Id.* (quoting MacWilliam, *supra* note 127, at 467).

128. *Id.* at 952.

129. *Id.*

130. *Id.*

131. 313 F.3d 1287 (11th Cir. 2002).

132. *See* 21 U.S.C. § 846.

133. *See* 18 U.S.C. § 924(c).

134. 313 F.3d at 1289, 1294.

135. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B)).

ably foreseeable by the defendant.<sup>136</sup> The Eleventh Circuit summarily held that the government had satisfied its burden of proof in this case.<sup>137</sup>

In *United States v. Timmons*,<sup>138</sup> defendant was convicted of drug offenses and using and carrying a firearm during and in relation to the drug trafficking offenses in violation of 18 U.S.C. § 924(c).<sup>139</sup> The Eleventh Circuit reversed the two-level firearm enhancement for the drug offenses imposed under section 2D1.1(b)(1).<sup>140</sup> The court noted that under the guidelines, a sentence imposed for a firearm conviction under § 924(c) precludes any firearm enhancement to the underlying offense based on relevant conduct for which the defendant is accountable.<sup>141</sup> Defendant's two drug charge convictions were deemed relevant conduct to each other under section 1B1.3 because they were "part of the same course of conduct or common scheme or plan."<sup>142</sup> Because defendant was convicted and sentenced under § 924(c) for possessing a firearm during and in relation to the drug trafficking offenses of which he was convicted, the Eleventh Circuit held that the district court erred in applying the firearm enhancement under section 2D1.1(b)(1).<sup>143</sup>

#### D. Part F: Offenses Involving Fraud or Deceit

**1. U.S.S.G. section 2F1.1 versus U.S.S.G. section 2N2.1.** In *United States v. Kimball*,<sup>144</sup> defendant was convicted of conspiracy to distribute and distribution of a prescription drug without a prescription with the intent to defraud or mislead and making false statements. He was sentenced in accordance with the 2000 version of U.S.S.G. section 2F1.1, which was applicable when he committed the offenses, but has since been deleted and consolidated with U.S.S.G. section 2B1.1.<sup>145</sup>

In 2000 two different sections of guidelines applied to the offense of selling a prescription drug without a prescription: U.S.S.G. section 2F1.1

---

136. *Id.* (citing *United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999)).

137. *Id.*

138. 283 F.3d 1246 (11th Cir.), *cert. denied*, 123 S. Ct. 516 (2002).

139. *Id.* at 1247. 18 U.S.C. § 924(c) (2000).

140. 283 F.3d at 1254.

141. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2).

142. *Id.*

143. *Id.*

144. 291 F.3d 726 (11th Cir. 2002).

145. *Id.* at 729, 733 & n.3.

and U.S.S.G. section 2N2.1.<sup>146</sup> Section 2N2.1(b)(1), however, directed the court to apply section 2F1.1 if the offense involved fraud.<sup>147</sup>

The Eleventh Circuit rejected defendant's argument in *Kimball* that it was improper to sentence him under the fraud guideline because his fraud in selling drugs without a prescription was a regulatory offense against the state and federal agencies rather than a crime involving fraud as contemplated by the guidelines.<sup>148</sup> The court noted that convictions for fraud may be sustained when the government is the only victim and there was "no good reason" to treat sentences for such convictions differently.<sup>149</sup>

**2. U.S.S.G. section 2F1.1(b)(1): Upward Departure.** The court in *Kimball* also affirmed the district court's upward departure based on the "nonmonetary" harm caused to the government agencies.<sup>150</sup> The Eleventh Circuit noted that in deciding whether to depart from the guidelines, the district court must determine "(1) whether any factor makes the case atypical, meaning that it takes the case out of the "heartland" of cases involving the conduct described in the applicable guideline, and (2) whether that factor should result in a different sentence."<sup>151</sup> One of the factors relied upon by the district court in taking this case outside the "heartland" of typical fraud cases was "the harm posed to the public by [d]efendant's scheme to defraud the government."<sup>152</sup> The Eleventh Circuit agreed with the district court that this nonmonetary loss had not been adequately addressed by the sentencing guidelines.<sup>153</sup> The court noted that the guidelines specifically provided for an upward departure if "the loss determined under subsection [2F1.1(b)(1)] does not fully capture the harmfulness and seriousness of the conduct."<sup>154</sup> One example cited in the commentary is when "a primary objective of the fraud was nonmonetary; or the fraud caused or risked reasonably foreseeable, substantial nonmonetary harm."<sup>155</sup>

---

146. *Id.* at 733.

147. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2N2.1(b)(1)).

148. *Id.*

149. *Id.*

150. *Id.* at 733-35.

151. *Id.* at 733 (quoting *United States v. Regueiro*, 240 F.3d 1321, 1324 (11th Cir. 2001)).

152. *Id.* at 734.

153. *Id.*

154. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.11) (alteration in original).

155. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.11(a)).

The Eleventh Circuit also affirmed the amount of the departure, finding it to be reasonable.<sup>156</sup> The district court calculated the amount of the departure by relying on the government's calculation of defendant's gain from his fraud and using the fraud table formerly found in section 2F1.1(b)(1).<sup>157</sup>

**3. U.S.S.G. section 2F1.1(b)(1): Loss Calculations.** Additionally, the Eleventh Circuit noted in *Kimball* that the government argued in the district court that defendant's offense level should be increased under section 2F1.1(b)(1) based on the amount of loss the fraud caused.<sup>158</sup> The district court rejected that argument because the victims were federal and state regulatory agencies and the harm to those agencies was too difficult to calculate.<sup>159</sup> The district court also concluded that "it was inappropriate to substitute [d]efendant's gain as a proxy for loss, because no connection existed between [d]efendant's gain and the agencies' loss."<sup>160</sup> The Eleventh Circuit declined to state any opinion on the correctness of that conclusion.<sup>161</sup>

In *United States v. Snyder*,<sup>162</sup> the parties appealed the district court's loss calculations under the 1998 version of section 2F1.1(b)(1), which was applied because it was in effect at the time of defendants' sentencing.<sup>163</sup> At sentencing, a certified public accountant estimated the loss based on the amount stockholders were deemed to have lost due to defendants' fraud. The sentencing court, however, found that a reasonable estimate of the victims' loss was not feasible and determined that a better method of calculating the loss would be to use the intended or potential gain to defendants.<sup>164</sup>

The Eleventh Circuit noted that defendants' gain is not the preferred method of calculating loss under section 2F1.1(b)(1) "because it

---

156. *Id.* at 734-35.

157. *Id.* at 734.

158. *Id.* at 734 n.4.

159. *Id.*

160. *Id.*

161. *Id.*

162. 291 F.3d 1291 (11th Cir. 2002).

163. *Id.* at 1295. The guidelines direct the sentencing court to "use the Guidelines Manual in effect on the date the defendant is sentenced." *Id.* at 1294 n.4 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (1998)). Thus, the court in *Snyder* relied on the 1998 edition of the guidelines in applying U.S.S.G. section 2F1.1(b)(6)(A). *Id.* at 1294-95 & n.4. That section was later deleted from the guidelines and consolidated into U.S.S.G. section 2B1.1 (2001). *Id.* at 1294 n.4 (citing Thomas W. Hutchison, Highlights of the 2001 Amendments, Federal Sentencing Guidelines Manual, XXV (West 2001 ed.); U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)).

164. *Id.* at 1295-96.

ordinarily underestimates the loss.”<sup>165</sup> Instead, the guidelines direct that “[w]here precise figures are not ascertainable, it is preferable to calculate the victims’ loss by determining ‘the approximate number of victims and an estimate of the average loss to each victim.’”<sup>166</sup>

The Eleventh Circuit stated that although a precise loss to each victim could not be ascertained in *Snyder*, the district court should not have foregone a loss calculation all together.<sup>167</sup> Rather, the district court should have estimated the loss based on the available information.<sup>168</sup> The court noted, however, that the government’s proposed method of calculating the loss based on all of the outstanding shares would overestimate the loss because all of the shares did not become worthless due to the fraud.<sup>169</sup> Thus, not all of the shareholders suffered a loss.<sup>170</sup> In remanding the case to the district court to estimate the loss caused by the fraud, the court noted that defendants claimed that the price of the stock rose after the fraud was discovered.<sup>171</sup> The Eleventh Circuit suggested that the sentencing court focus on the price of the stock in the days immediately after the fraud and the discovery of the fraud and calculate the loss on the average daily number of innocent shares traded on those days.<sup>172</sup>

**4. U.S.S.G. section 2F1.1(b)(6)(B): Fraud Committed from Outside of the United States.** In *United States v. Singh*,<sup>173</sup> the Eleventh Circuit interpreted the two-level enhancement found at U.S.S.G. section 2F1.1(b)(6)(B) that applies when “a substantial part of the fraudulent scheme was committed from outside of the United States.”<sup>174</sup> Noting the lack of any federal appellate decisions analyzing or determining “the meaning or scope of the phrase committed from

---

165. *Id.* at 1295 (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.9 (1998)).

166. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.9).

167. *Id.* at 1296.

168. *Id.* at 1295-96.

169. *Id.*

170. *Id.* at 1296.

171. *Id.*

172. *Id.*

173. 291 F.3d 756 (11th Cir. 2002).

174. *Id.* at 759. The 2000 version of section 2F1.1(b)(6) provided:

If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside of the United States; or (C) the offense otherwise involved sophisticated means, increased by [two] levels. If the resulting offense level is less than [twelve], increase to level [twelve].

U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(6)(B) (2000).

outside of the United States” as contained in section 2F1.1(b)(6), the Eleventh Circuit ruled that a defendant need not “*personally* commit a substantial part of the fraudulent scheme from outside of the United States” in order for that enhancement to apply.<sup>175</sup>

Defendant’s fraud in *Singh* involved a scheme that used telephones in the United States to make long distance calls and calls abroad without paying for them.<sup>176</sup> The Eleventh Circuit noted that although section 2F1.1 was aimed at telemarketing fraud operated from outside the United States, it was not designed “solely to punish telemarketing fraud.”<sup>177</sup> Thus, the scheme in *Singh* was subject to this guideline.<sup>178</sup>

The court in *Singh* further noted that the plain meaning of section 2F1.1(b)(6)(B) “only requires that a substantial portion of the scheme be committed from outside of the United States; it does not require that the scheme originate from outside of the United States.”<sup>179</sup> The court also ruled that defendant need not “personally take action from outside of the United States in order for the enhancement to apply.”<sup>180</sup> The court recognized the general principle that the acts of one co-conspirator can be imputed to other co-conspirators.<sup>181</sup> Section 2F1.1 contains no language qualifying or limiting that principle.<sup>182</sup> According to the Eleventh Circuit, the three-way calling feature used ninety percent of the time to make telephone calls to other countries implied someone other than defendant “took actions outside of the United States in furtherance of the fraudulent scheme.”<sup>183</sup> Because defendant was responsible for those reasonably foreseeable actions taken in furtherance of the conspiracy, the court affirmed the section 2F1.1(b)(6)(B) enhancement.<sup>184</sup>

**5. U.S.S.G. section 2F1.1(b)(6)(A): Serious Risk of Bodily Injury.** In *Snyder* the district court applied the two-level enhancement under U.S.S.G. section 2F1.1(b)(6)(A) for knowingly endangering clinical-trial volunteers when sentencing defendants for various fraud-related offenses based on their misrepresentation of the results of clinical tests of a publicly-traded pharmaceutical company’s cancer drug in order to

---

175. 291 F.3d at 759-61.

176. *Id.* at 759.

177. *Id.* at 761 (citing U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 577).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 761-62.

182. *Id.* at 762.

183. *Id.*

184. *Id.*

make profits on stocks to the detriment of public shareholders.<sup>185</sup> On appeal, the Eleventh Circuit rejected defendants' argument that the sentencing court failed to make explicit findings with regard to the enhancement and that the government failed to prove defendants' behavior created a risk of bodily injury.<sup>186</sup>

The Eleventh Circuit noted that under the guidelines, the victim need not "actually suffer serious bodily injury. Rather, the question is whether the defendant placed the victim at such a risk."<sup>187</sup> The Eleventh Circuit noted that several patients were required to forego treatment in order to participate voluntarily in defendants' drug testing scheme.<sup>188</sup> This placed these patients' health at risk, thus warranting the enhancement, which the Eleventh Circuit affirmed.<sup>189</sup>

#### *E. Part G: Pornography*

**1. U.S.S.G. section 2G2.2 versus U.S.S.G. section 2G2.4.** In *United States v. Bender*,<sup>190</sup> defendant was convicted of transporting child pornography by computer<sup>191</sup> and possession of a computer disc containing three or more images of child pornography transported by computer in interstate commerce.<sup>192</sup> On appeal, he argued that the district court erred in applying U.S.S.G. section 2G2.2, which applies to trafficking in material involving the sexual exploitation of a minor instead of U.S.S.G. section 2G2.4, which applies to mere possession of such material.<sup>193</sup> Because defendant did not raise this specific argument in the district court, his challenge was reviewed for plain error on appeal.<sup>194</sup>

The Eleventh Circuit noted that section 2G2.4(c)(2) directs the court to apply section 2G2.2 if the offense involved "trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the

---

185. 291 F.3d at 1294. Defendants in *Snyder* were convicted "of mail fraud, making false statements to the Food and Drug Administration, and conspiring to commit offenses against the United States." *Id.* at 1293.

186. *Id.* at 1294.

187. *Id.* at 1294-95.

188. *Id.* at 1295.

189. *Id.*

190. 290 F.3d 1279 (11th Cir.), *cert. denied*, 123 S. Ct. 571 (2002).

191. *See* 18 U.S.C. § 2252(a)(1).

192. *See id.* § 2252A(a)(5)(B).

193. 290 F.3d at 1285.

194. *Id.*

sexual exploitation of a minor with intent to traffic).<sup>195</sup> The court concluded that section 2G2.2 was properly applied in this case because the evidence showed defendant received and transmitted child pornography, making him more than a “mere possessor of pornography.”<sup>196</sup>

**2. U.S.S.G. section 2G2.2(b)(2): Pecuniary Gain Enhancement.** Defendant in *Bender* also challenged the district court’s application of the five-level enhancement found in section 2G2.2(b)(2), arguing that the government did not establish that he distributed pornography for “pecuniary gain” or “valuable gain” and there was “no real proof of distribution.”<sup>197</sup> The Eleventh Circuit concluded that under the 1999 version of section 2G2.2(b)(2), which the district court applied, the court correctly found that the guidelines did not require any pecuniary or other gain.<sup>198</sup> That version of section 2G2.2(b)(2) simply stated that “[i]f the offense involved distribution, increase by the number of levels from the table in [section] 2F1.1 corresponding to the retail value of the material, but in no event by less than [five] levels.”<sup>199</sup>

The Eleventh Circuit, however, held that the district court should have applied the November 2000 version of the guideline because that version was in effect at the time defendant was sentenced.<sup>200</sup> The 2000 version of section 2G2.2(b)(2) calls for a five-level enhancement if the child pornography trafficking offense involved “[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.”<sup>201</sup>

Nonetheless, although the district court applied the wrong version of section 2G2.2(b)(2), the Eleventh Circuit affirmed the sentence because the enhancement was warranted in this case under either version.<sup>202</sup> The court held that “when a defendant trades child pornography in exchange for other child pornography, the defendant has engaged in ‘distribution for the receipt, or expectation of receipt, of a thing of value’ as provided in the 2000 version of U.S.S.G. [section] 2G2.2(b)(2).”<sup>203</sup>

---

195. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.4(c)(2) (1999)).

196. *Id.*

197. *Id.* at 1286.

198. *Id.*

199. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2)) (first and second alteration in original).

200. *Id.* (citing *United States v. Marin*, 916 F.2d 1536, 1538 (11th Cir. 1990)).

201. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2000)) (first and second alteration in original).

202. *Id.* at 1286-87.

203. *Id.* at 1286 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2)).

Because defendant distributed child pornography expecting to receive other child pornography, which was a thing of value, the Eleventh Circuit concluded that the enhancement would apply even under the amended version of the guidelines.<sup>204</sup>

In sentencing defendant for transporting child pornography in interstate commerce,<sup>205</sup> the district court in *United States v. Dunlap*<sup>206</sup> also applied the section 2G2.2(b)(2) enhancement. The Eleventh Circuit quickly disposed of defendant's challenge to that enhancement based on Eleventh Circuit precedent, holding that defendant's distribution of child pornography need not be motivated by pecuniary gain.<sup>207</sup>

**3. U.S.S.G. section 2G2.2(b)(3): Sadistic Conduct Enhancement.** In several cases in 2002, the Eleventh Circuit addressed the four-level enhancement under section 2G2.2(b)(3) for an offense involving material that portrayed sadistic conduct. In *Bender* the Eleventh Circuit affirmed the enhancement, referring to its precedent that defines sadistic conduct within the meaning of section 2G2.2(b)(3) as "the 'subjection of a young child to [a] sexual act that would have to be painful.'"<sup>208</sup> The court then found this definition would include "photographs of very young children being vaginally and anally penetrated by adult males."<sup>209</sup>

In *United States v. Caro*,<sup>210</sup> the district court refused to apply the section 2G2.2(b)(3) enhancement without expert testimony showing the images involved pain to the minors portrayed so as to constitute sadistic or masochistic material. Relying on *Bender*, the Eleventh Circuit noted that it had "clearly held that [vaginal or anal] penetration would be painful to young children, and that pictures depicting young children being subjected to sexual acts that would have to be painful—without reference to any supporting expert medical testimony—are sadistic images warranting a [section] 2G2.2(b)(3) enhancement."<sup>211</sup>

The Eleventh Circuit further noted that pictures depicting minors in bondage, such as in this case, warrant the sadistic conduct enhancement.<sup>212</sup> Thus, the Eleventh Circuit held that "the district court erred

---

204. *Id.* at 1287.

205. See 18 U.S.C. § 2252A(a)(1).

206. 279 F.3d 965 (11th Cir. 2002).

207. *Id.* at 967 (citing *United States v. Probel*, 214 F.3d 1285, 1287-88 (11th Cir. 2000)).

208. 290 F.3d at 1286 (quoting *United States v. Garrett*, 190 F.3d 1220, 1224 (11th Cir. 1999)).

209. *Id.*

210. 309 F.3d 1348 (11th Cir. 2002).

211. *Id.* at 1351-52 (citing *Bender*, 290 F.3d at 1286-87).

212. *Id.* at 1352 (citing *United States v. Tucker*, 136 F.3d 763, 764 (11th Cir. 1998)).

in its interpretation that in order to support a sadistic conduct enhancement, the government is required to present expert medical testimony to prove whether the images necessarily involved pain to the minors involved.”<sup>213</sup>

Defendant in *Dunlap* raised legal and factual challenges to the district court’s application of the section 2G2.2(b)(3) enhancement.<sup>214</sup> As a legal matter, defendant first argued that the sadistic images discovered when the search warrant was executed three months after the offense occurred were not relevant conduct because they were “not the same images sent in the transmission that formed the basis of his conviction.”<sup>215</sup> Rejecting this argument, the Eleventh Circuit noted that in addition to the offense of conviction, the guidelines hold defendant accountable for his relevant conduct, which includes “all acts and omissions committed . . . by the defendant . . . that occurred *during the commission of the offense of conviction.*”<sup>216</sup> The Eleventh Circuit concluded that if defendant possessed the sadistic images when he committed the offense, such possession was relevant conduct for guidelines purposes, regardless of whether the sadistic images were ever transmitted.<sup>217</sup>

Next, as a factual matter, defendant argued that the evidence did not support the application of section 2G2.2(b)(3).<sup>218</sup> The Eleventh Circuit found that defendant had established plain error because no evidence was presented in the district court to establish that he possessed the sadistic images “at the same time he transmitted the child pornography.”<sup>219</sup> Therefore, the sentence was vacated and the case remanded with instructions that the district court allow the government to present further evidence concerning when the images were possessed.<sup>220</sup>

---

213. *Id.* *Caro* is discussed further under the departure section of this Article. See discussion *infra* Part VI.C.

214. 279 F.3d at 966-67.

215. *Id.* at 966.

216. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)).

217. *Id.*

218. *Id.* at 966-67.

219. *Id.* at 967. Because defendant only raised the legal argument in the district court, the Eleventh Circuit applied the plain error standard of review to the factual argument raised for the first time on appeal. *Id.* at 966-67 n.4. To establish plain error, defendant must show there was an error that was plain and that affected his substantial rights. *Id.* at 967 (citing *United States v. Stevenson*, 68 F.3d 1292, 1294 (11th Cir. 1995)).

220. *Id.*

In *United States v. Hall*,<sup>221</sup> the government appealed the district court's refusal to enhance defendant's sentence under section 2G2.2(b)(3) for trafficking in materials that portrayed sadistic or masochistic conduct. The government sought the enhancement based on an image defendant transmitted through his computer that portrayed an adult male vaginally penetrating a girl under the age of twelve years.<sup>222</sup>

One reason the district court refused to apply the enhancement was that it declined to find the image was sadistic "because the young child's expression in that picture did not indicate sufficiently that she actually was experiencing pain."<sup>223</sup> The Eleventh Circuit rejected this reason based on its precedent, including *Bender* and *Caro*, that established "a sentencing enhancement under [section] 2G2.2(b)(3), for the portrayal of sadistic conduct, is warranted when cases involve images displaying an adult male vaginally or anally penetrating a young child."<sup>224</sup> The court in *Hall* held that

when an image contains such a portrayal, a sentencing court need not determine, in applying [section] 2G2.2(b)(3), whether the minor's expression sufficiently reveals that he or she is experiencing pain if the court determines that (1) the minor in the image is a young child and (2) the image portrays vaginal or anal penetration of a young child by an adult male.<sup>225</sup>

The court determined that "such penetration would necessarily be painful" under Eleventh Circuit precedent, thereby warranting the four-level enhancement under section 2G2.2(b)(3).<sup>226</sup>

The district court also determined the enhancement would be inappropriate in *Hall* because the activity depicted was the same activity for which defendant was charged and convicted. The court further noted that it had already applied the two-level enhancement found in section 2G2.2(b)(1) because defendant trafficked in materials involving the sexual exploitation of a minor under the age of twelve years.<sup>227</sup>

The Eleventh Circuit also rejected this reasoning, stating that "an image [that] forms the basis of a conviction under 18 U.S.C. § 2252A(a)-(2) does not preclude the application of a sentencing enhancement under

---

221. 312 F.3d 1250 (11th Cir. 2002). Defendant in *Hall* was convicted of distributing and receiving child pornography by computer through interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(2). *Id.* at 1254.

222. *Id.* at 1260-61.

223. *Id.*

224. *Id.* at 1261-62 (citing *Bender*, 290 F.3d at 1285-86; *Caro*, 309 F.3d at 1351-52).

225. *Id.* at 1263.

226. *Id.*

227. *Id.* at 1261.

the Guidelines.”<sup>228</sup> The court further noted that the category of pictures at issue under section 2G2.2(b)(3), which include sadistic, masochistic, or violent conduct, is much narrower than the category of pictures at issue under 18 U.S.C. § 2252A(a)(2), which encompasses any child pornography.<sup>229</sup>

**4. U.S.S.G. section 2G2.2(b)(4): Pattern of Sexual Abuse or Exploitation Enhancement.** In sentencing defendant for possessing and transporting child pornography,<sup>230</sup> the district court in *United States v. Richardson*<sup>231</sup> applied U.S.S.G. section 2G2.2(b)(4), which provides for a five-level enhancement when “the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor . . . .”<sup>232</sup> The Eleventh Circuit rejected defendant’s challenge to that enhancement, which was based on the claim that the evidence the district court relied upon to apply the enhancement was unreliable.<sup>233</sup> The evidence came from defendant’s former step-daughter, who claimed that defendant sexually abused her numerous times when she was between the ages of eight and fourteen.<sup>234</sup> The Eleventh Circuit examined her testimony and found that the district court did not err in crediting it.<sup>235</sup> Therefore, the enhancement was affirmed.<sup>236</sup>

*F. Part K: Offenses Involving Public Safety—Firearms*

**1. U.S.S.G. section 2K2.1(b)(5): Possession of a Firearm in Connection with Another Felony Offense.** In *United States v. Rhind*,<sup>237</sup> defendants were convicted of counterfeiting offenses<sup>238</sup> and possession of firearms and ammunition by a convicted felon.<sup>239</sup> In calculating the sentence for the firearm possession charge, the district

---

228. *Id.* at 1262 n.17.

229. *Id.*

230. *See* 18 U.S.C. § 2252A(a)(1), (a)(5)(B).

231. 304 F.3d 1061 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 930 (2003).

232. *Id.* at 1065 & n.3 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4)).

233. *Id.* at 1065-66.

234. *Id.*

235. *Id.* at 1066.

236. *Id.* Another child pornography case, *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002), is discussed in other sections of this Article dealing with multiple object conspiracies, *supra* Part II.A., and grouping and departures, *infra* Part IV.D.

237. 289 F.3d 690 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 869 (2003).

238. *See* 18 U.S.C. § 472.

239. 289 F.3d at 692. *See* 18 U.S.C. §§ 922(g), 924(a)(2). One defendant was also charged with transporting a stolen vehicle in interstate commerce in violation of 18 U.S.C. § 2312. 289 F.3d at 692.

court applied the four-level enhancement found in U.S.S.G. section 2K2.1(b)(5) because the firearm or ammunition was possessed “in connection with” another felony offense.<sup>240</sup> On appeal, defendants argued that the firearms were not possessed in connection with the underlying felony offense of counterfeiting, but rather were “a mere coincidence and unrelated to the underlying felony.”<sup>241</sup>

Noting that the phrase “in connection with” is not defined in section 2K2.1(b)(5), the Eleventh Circuit interpreted the “ordinary meaning” of the phrase by looking to the definition of that phrase in other sections of the guidelines.<sup>242</sup> For example, under the Armed Career Criminal Guideline,<sup>243</sup> the phrase has been determined to “merely reflect[] the context of [the defendant’s] possession of the firearm.”<sup>244</sup> The same phrase was also given an “expansive interpretation” for purposes of U.S.S.G. section 2B5.1(b)(3) and was held not to require that the firearm facilitate the underlying offense.<sup>245</sup>

In upholding the enhancement in *Rhind*, the Eleventh Circuit ruled that it did not matter that the guns were unloaded or inoperable for purposes of the “in connection with” requirement.<sup>246</sup> Also, the court stated that “it would be reasonable to conclude that the presence of the firearms protected the counterfeit money from theft during the execution of the felony.”<sup>247</sup> Further, the fact that defendants drove cars containing these guns for several days supported the conclusion that the defendants possessed the guns in connection with the counterfeiting offense.<sup>248</sup>

**2. U.S.S.G. section 2K2.4 Amendments.** In *United States v. White*,<sup>249</sup> defendant sought to modify his sentence under 18 U.S.C. § 3582(c)(2) based on amendments to U.S.S.G. section 2K2.4 that became effective after he was sentenced in 1992 for armed assault and attempted robbery,<sup>250</sup> in addition to the use of a firearm during a crime of

---

240. *Id.* at 695 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(5) (2001)).

241. *Id.* at 694-95.

242. *Id.* at 695.

243. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.4(b)(3)(A) (1997).

244. 289 F.3d at 695 (quoting *United States v. Young*, 115 F.3d 834, 838 (11th Cir. 1997) (second alteration in original)).

245. *Id.* (citing *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1308-09 (11th Cir. 1999)).

246. *Id.*

247. *Id.*

248. *Id.* at 695-96.

249. 305 F.3d 1264 (11th Cir. 2002).

250. *See* 18 U.S.C. § 2114.

violence (hereinafter “§ 924(c) offense”).<sup>251</sup> Under the guidelines in effect in 1992, the sentencing court applied a firearm enhancement for the robbery offense<sup>252</sup> but then subtracted sixty months from the resulting guideline range in accordance with application note two of section 2K2.4 because defendant was also convicted of a § 924(c) offense.<sup>253</sup>

After sentencing, Amendment 489 became effective. Under that amendment, instead of subtracting the sixty months from the robbery sentence, which included the weapon enhancement, a sentencing court was precluded from imposing any weapon enhancement but, rather, invited to depart upward.<sup>254</sup> Amendment 489 was not made retroactive.<sup>255</sup>

Application note two of section 2K2.4 was further amended in 2000 by Amendment 599 to clarify cases in which the defendant was sentenced for a § 924(c) offense in addition to another offense.<sup>256</sup> “The first sentence of the amended commentary, though slightly altered, repeats the long-standing prohibition against duplicative punishment for the same offense conduct . . . .”<sup>257</sup> Amendment 599 was made retroactive.<sup>258</sup>

In holding that the district court correctly denied defendant’s motion to reduce his sentence, the Eleventh Circuit stated that “Amendment 599 did not materially change the relevant language of [section] 2K2.4’s application note two.”<sup>259</sup> Rather, the retroactive 2000 version of the commentary simply changed the language “from passive to active voice, but it did not make any substantive change that would affect Appellant’s sentence.”<sup>260</sup>

---

251. 305 F.3d at 1265, 1267. *See* 18 U.S.C. § 924(c).

252. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2)(A) (1992).

253. 305 F.3d at 1265-66. Under the 1992 guidelines, the court could not impose the weapon enhancement for the robbery offense when the defendant was also convicted of the § 924(c) offense unless the failure to do so resulted in a lower aggregate sentence for both the § 924(c) offense and the robbery offense than would have been imposed for only the robbery offense without the weapon enhancement. *Id.* at 1266 (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2). Because this was such a case, under the 1992 guidelines, the sentencing court imposed the weapon enhancement for the robbery offense but subtracted sixty months from the guideline range to reflect the sixty-month mandatory sentence for the § 924(c) offense. *Id.*

254. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2 (1993)).

255. *Id.*

256. *Id.*

257. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2 (2000)).

258. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.10).

259. *Id.* at 1267.

260. *Id.*

The court in *White* rejected defendant's request that it read Amendment 599 in conjunction with Amendment 489 because the latter amendment had not been made retroactive.<sup>261</sup> "Appellant cannot clothe an argument based upon Amendment 489 in the garb of Amendment 599 in order to take advantage of Amendment 599's retroactivity."<sup>262</sup> Thus, the Eleventh Circuit affirmed the denial of the motion to reduce sentence because defendant had already received the benefit of the rule against double-counting offense conduct found in the only amendment that was retroactive, Amendment 599.<sup>263</sup>

*G. Part P: Escape*

U.S.S.G. section 2P1.1(b)(2) authorizes a seven-level reduction of an escapee's base offense level if he "escaped from non-secure custody and returned voluntarily within ninety-six hours."<sup>264</sup> This reduction, however, is not authorized "if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."<sup>265</sup>

In *United States v. Bradford*,<sup>266</sup> defendant appealed the district court's refusal to reduce the base offense level for his escape conviction<sup>267</sup> under section 2P1.1(b)(2) given that he returned to prison after each escape.<sup>268</sup> The Eleventh Circuit noted that the felony committed during the escape need not result in a conviction as long as the felony is shown by a preponderance of the evidence.<sup>269</sup> The district court in *Bradford* concluded that the felony had been shown by the evidence and testimony submitted during his trial on the escape charge.<sup>270</sup> In light of defendant's failure to offer any contradictory evidence, the Eleventh Circuit held that the district court did not err in declining to apply the reduction.<sup>271</sup>

The Eleventh Circuit also agreed with the district court that defendant was not entitled to the reduction because he did not return voluntarily

---

261. *Id.*

262. *Id.*

263. *Id.*

264. U.S. SENTENCING GUIDELINES MANUAL § 2P1.1(b)(2) (2001).

265. *Id.*

266. 277 F.3d 1311 (11th Cir.), *cert. denied*, 123 S. Ct. 304 (2002).

267. *See* 18 U.S.C. § 751(a).

268. 277 F.3d at 1312.

269. *Id.* at 1313 (citing *United States v. Strachan*, 968 F.2d 1161, 1163 (11th Cir. 1992)).

270. *Id.* at 1314.

271. *Id.*

within the meaning of the guideline.<sup>272</sup> The commentary to the guideline defines “returned voluntarily” to include “voluntarily returning to the institution or turning one’s self in to a law enforcement authority as an escapee (not in connection with an arrest or other charges).”<sup>273</sup> The court interpreted the commentary to “clearly assume[] that the escapee has reconsidered his actions and intends to surrender.”<sup>274</sup> The court found that defendant “did not return to the prison camp because he reconsidered his actions,” as evidenced by the facts that he continued to escape after each return to the camp and his escapes were not discovered until he was arrested on subsequent charges.<sup>275</sup>

#### H. Part S: Money-Laundering

In *United States v. Descent*,<sup>276</sup> defendant was convicted of various fraud and money-laundering offenses.<sup>277</sup> Pursuant to the guidelines in effect on the day of sentencing, the district court did not group the money-laundering counts with the fraud counts under U.S.S.G. section 3D1.2.<sup>278</sup> Relying on an amendment to the guidelines that took effect on November 1, 2001, after his sentencing, defendant argued that the district court should have grouped the offenses.<sup>279</sup>

The Eleventh Circuit noted that although defendants are normally sentenced under the version of the guidelines in effect on the date of sentencing, later amendments that clarify the guidelines “should be considered on appeal regardless of the date of sentencing.”<sup>280</sup> The court explained that “[c]larifying amendments do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned the application of the relevant guideline.”<sup>281</sup> The issue of whether the amendment in question

---

272. *Id.*

273. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2P1.1(b)(2), cmt. n.2 (2001)).

274. 277 F.3d at 1314.

275. *Id.*

276. 292 F.3d 703 (11th Cir. 2002).

277. *Id.* at 705 n.1. Defendant in *Descent* was convicted of conspiracy to commit mail and wire fraud under 18 U.S.C. §§ 371, 2326; mail fraud under 18 U.S.C. §§ 2, 1341, 2326; conspiracy to commit money-laundering under 18 U.S.C. § 1956(h); and money-laundering under 18 U.S.C. §§ 1957, 1956(a)(1). *Id.*

278. *Id.* at 707. Although this case discussed grouping counts under section 3D1.2, it is discussed here because the case focused on the interpretation of the new money-laundering guideline.

279. *Id.*

280. *Id.*

281. *Id.* at 707-08 (quoting *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998)).

effected a substantive change to the guidelines was an issue of first impression in the Eleventh Circuit.<sup>282</sup>

The amendment at issue in *Descent*, inter alia, added the following commentary to U.S.S.G. section 2S1.1: “In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense for which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of [section] 3D1.2 (Groups of Closely-Related Counts).”<sup>283</sup> The Eleventh Circuit noted that the amendment did not just provide for grouping; instead, it “redefine[d] the way in which the offense level associated with the crime of money-laundering is calculated, so that the offense level for money-laundering may now be dependent upon the offense level assigned to the underlying offense.”<sup>284</sup>

Under the prior version of section 2S1.1, the base offense level was dependent upon which subsection of the money-laundering statute the defendant was convicted under rather than the underlying offense from which the funds were derived.<sup>285</sup> Under the amended version of the money-laundering guideline, the offense level for the underlying offense is the base offense level for the money-laundering if defendant committed that offense and the offense level can be determined.<sup>286</sup>

Also, the court noted that according to the amended commentary, the amendment was not intended to merely clarify, but rather to address “concerns that the prior penalty structure, by failing to account for the underlying offense, did not adequately reflect the culpability of the defendant or the seriousness of the money[-]laundering activity.”<sup>287</sup> The Eleventh Circuit explained that “[t]o alleviate those concerns, the amendment ‘is designed to promote proportionality by providing for increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct.’”<sup>288</sup> The Eleventh Circuit held “[t]hese statements reflect a substantive change in the punishment for money[-]laundering offenses.”<sup>289</sup> Additionally, the court noted that the amendment was not made retroactive, which further indicated it was

---

282. *Id.* at 708 (referring to U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 634).

283. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2S1.1, cmt. n.6).

284. *Id.* (quoting *United States v. Sabbeth*, 277 F.3d 94, 97 (2d Cir. 2002)).

285. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2S1.2(a) (1998)).

286. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(a) (2001)).

287. *Id.* at 708-09 (citing U.S. SENTENCING GUIDELINES MANUAL, app. C., amend. 634).

288. *Id.* at 709 (quoting U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 634, at 233-34).

289. *Id.*

not intended to be a clarifying amendment.<sup>290</sup> Because the court in *Descent* concluded that the amendment effected a substantive change in the guidelines, instead of a clarifying change, and was not retroactive, it affirmed the district court's application of the guideline in effect at the time of defendant's sentencing.<sup>291</sup>

#### IV. CHAPTER THREE: ADJUSTMENTS

##### A. Part A: Victim-Related Adjustments

In *United States v. Phillips*,<sup>292</sup> the district court enhanced defendant's bank robbery sentence under the vulnerable victim provision found in U.S.S.G. section 3A1.1(b).<sup>293</sup> The Eleventh Circuit noted that the vulnerable victim enhancement must be assessed on a "case-by-case basis, and is appropriate where the defendant knows that the victim has 'unique characteristics' that make the victim more vulnerable to the crime than other potential victims of the crime."<sup>294</sup> The focus of the analysis is "on the defendant's perception of the victim's vulnerability to the offense."<sup>295</sup>

The victims in *Phillips* were bank tellers.<sup>296</sup> Although the guidelines direct that "a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank,"<sup>297</sup> the Eleventh Circuit noted that "the tellers in this case had the additional 'unique characteristics,' as perceived by [defendant], of being located in a remote location with little or no police protection."<sup>298</sup> Thus, the Eleventh Circuit found that the enhancement was appropriate.<sup>299</sup>

---

290. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c)).

291. *Id.* Three other money-laundering appeals are discussed in other sections of this Article. See *United States v. Schlaen*, 300 F.3d 1313 (11th Cir. 2002) (discussed in connection with downward departures, *infra* Part VI.K.); *United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002) (discussed in connection with relevant conduct, *supra* Part II.B.); and *United States v. Venske*, 296 F.3d 1284, 1292-93 (11th Cir. 2002) (discussed in connection with multiple object conspiracies, *supra* Part II.A).

292. 287 F.3d 1053 (11th Cir. 2002).

293. *Id.* at 1054.

294. *Id.* at 1056-57 (citing *United States v. Malone*, 78 F.3d 518, 521 (11th Cir. 1996)).

295. *Id.* at 1057.

296. *Id.* at 1055. Defendant was convicted of conspiracy under 18 U.S.C. § 371 (2000), bank robbery with the use of a dangerous weapon under 18 U.S.C. § 2113, and possession of an unregistered firearm under 26 U.S.C. § 5861(d) (2000). *Id.* at 1054.

297. *Id.* at 1057 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3A1.1, cmt. n.2 (2001)).

298. *Id.* at 1057-58.

299. *Id.* at 1058. The court applied the plain error standard of review because defendant had not objected to the enhancement in the district court. *Id.* at 1054, 1057-58.

*B. Part B: Role in the Offense*

**1. U.S.S.G. section 3B1.1: Aggravating Role.** U.S.S.G. section 3B1.1 contains graduated enhancements for leadership roles depending on the level and extent of supervision the defendant exercised in the criminal offense.<sup>300</sup> The four-level leadership role enhancement in section 3B1.1(a) was addressed in *United States v. Vallejo*.<sup>301</sup> That enhancement applies to any defendant who “was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.”<sup>302</sup> Factors relevant to the application of that enhancement include:

(1) exercise of decision-making authority, (2) nature of participation in the commission of the offense, (3) recruitment of accomplices, (4) claimed right to a larger share of the fruits of the crime, (5) degree of participation and planning or organizing the offense, (6) nature and scope of the illegal activity, and (7) degree of control and authority exercised over others.<sup>303</sup>

In *Vallejo* defendant’s acts of giving orders, arranging and planning security, and coordinating participants, in addition to testimony that defendant was one of the bosses, warranted the finding that the defendant was an organizer or leader.<sup>304</sup> As explained by the Eleventh Circuit, “The defendant does not have to be the sole leader or kingpin of the conspiracy in order to be considered an organizer or leader within the meaning of the Guidelines.”<sup>305</sup>

The four-level role enhancement was also at issue in *United States v. Suarez*.<sup>306</sup> In finding that the record supported the enhancement in that case because defendant “had decision-making authority and exercised control,” the Eleventh Circuit noted that defendant planned and organized aspects of the drug conspiracy, directed the movement of the co-conspirators and the drugs, and oversaw the distribution of the drugs.<sup>307</sup>

---

300. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1.

301. 297 F.3d 1154, 1169 (11th Cir.), *cert. denied*, 123 S. Ct. 694 (2002).

302. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a)).

303. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, cmt. n.4).

304. *Id.*

305. *Id.* (citing *United States v. Revel*, 971 F.2d 656, 660 (11th Cir. 1992)).

306. 313 F.3d 1287, 1294 (2002). *Suarez* is also discussed in connection with the weapon enhancement found in U.S.S.G. section 2D1.1, *supra* Part III.C.2.

307. *Id.*

The two-level leadership role enhancement found in section 3B1.1(c) was addressed in *Phillips*.<sup>308</sup> To warrant this two-level enhancement, it is sufficient if defendant asserted “control or influence over only one individual.”<sup>309</sup> The Eleventh Circuit found sufficient evidence to warrant the enhancement in *Phillips* based on the facts that defendant suggested, planned, and prepared for the bank robbery; attended to the details of the robbery, including purchasing masks and bags and giving another participant a gun; and waiting in the getaway car and monitoring the police scanner while co-defendants robbed the bank.<sup>310</sup>

**2. U.S.S.G. section 3B1.2: Mitigating Role.** In addition to the leadership role enhancement, the guidelines provide for varying offense level reductions if the defendant had a minor role in the offense.<sup>311</sup> A minor participant is one “who is less culpable than most other participants, but whose role could not be described as minimal.”<sup>312</sup> The two-level minor role reduction was discussed in two cases in 2002.

In November 2001, Amendment 635 revised the commentary to section 3B1.2 to provide that

a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under [section 1B]1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.<sup>313</sup>

Based on Amendment 635, defendant in *United States v. Boyd*<sup>314</sup> argued on appeal that the district court, in effect, created a presumption that drug couriers are not entitled to a minor role reduction when the court stated that a defendant who is only held accountable for his own conduct will rarely be granted a minor role adjustment.<sup>315</sup> The Eleventh Circuit stated that Amendment 635 ratified Eleventh Circuit precedent that held there was no presumption against finding that drug

---

308. 287 F.3d at 1058.

309. *Id.* (quoting *United States v. Jiminez*, 224 F.3d 1243, 1251 (11th Cir. 2000), *cert. denied*, 534 U.S. 1043 (2001)).

310. *Id.*

311. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(b).

312. *Id.* § 3B1.2, cmt. n.5.

313. *Id.* § 3B1.2, cmt. n.3(A). See *id.* app. C, amend. 635.

314. 291 F.3d 1274 (11th Cir. 2002). Defendant in *Boyd* was convicted of importing a detectable amount of cocaine into the United States in violation of 21 U.S.C. § 952(a). *Id.* at 1277.

315. *Id.*

couriers were minor participants.<sup>316</sup> The court then ruled that the district court's decision in this case was consistent with Amendment 635 and with Eleventh Circuit precedent holding, "only that the district court must assess all of the facts probative of the defendant's role in her relevant conduct in evaluating the defendant's role in the offense."<sup>317</sup> The Eleventh Circuit noted that defendant had the burden of proving, by a preponderance of the evidence, that he was a minor participant and that the district court had "considerable discretion in making this fact-intensive determination."<sup>318</sup> In affirming the denial of the minor role adjustment in *Boyd*, the Eleventh Circuit concluded that the district court did not clearly err or create per se law in its decision.<sup>319</sup>

*United States v. Ryan*<sup>320</sup> is another example of how the role determination is made on a "case-by-case factual inquiry."<sup>321</sup> As explained by the court in *Ryan*, in conducting this inquiry, the court must first determine "whether a defendant's particular role was minor in relation to the relevant conduct attributed to him in calculating his base offense level."<sup>322</sup> Second, the court must "assess a defendant's relative culpability vis-a-vis that of any other participants."<sup>323</sup> In finding that defendant in *Ryan* was not entitled to the minor role adjustment, the Eleventh Circuit referred to the amount of time defendant was a member of the conspiracy and the relevant conduct attributable to him during that time.<sup>324</sup>

**3. U.S.S.G. section 3B1.3: Abuse of a Position of Trust.** Pursuant to U.S.S.G. section 3B1.3, a two-level enhancement for abuse of a position of trust applies "[i]f 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."<sup>325</sup> In *United States v. Morris*,<sup>326</sup> defendant appealed the

---

316. *Id.* (citing *United States v. Rodriguez De Varon*, 175 F.3d 930, 943 (11th Cir. 1999) (en banc)).

317. *Id.* (quoting *De Varon*, 175 F.3d at 943).

318. *Id.* at 1277-78.

319. *Id.* at 1278.

320. 289 F.3d 1339 (11th Cir. 2002).

321. *Id.* at 1348 (citing U.S. SENTENCING GUIDELINES MANUAL § 3B1.2, cmt. background).

322. *Id.* (citing *DeVaron*, 175 F.3d at 941).

323. *Id.* at 1349 (citing *DeVaron*, 175 F.3d at 944).

324. *Id.*

325. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3.

326. 286 F.3d 1291 (11th Cir. 2002).

abuse of trust enhancement that was applied to his sentence for conspiracy to defraud and to launder money.<sup>327</sup>

The Eleventh Circuit noted that to justify the enhancement, the government must establish “(1) that the defendant held a place of public or private trust; and (2) that the defendant abused that position in a way that significantly facilitated the commission or concealment of the offense.”<sup>328</sup> Concerning the first element, the government in *Morris* argued that the representations of co-conspirators that defendant was an attorney and trader placed defendant in a position of trust from the perspective of the victims.<sup>329</sup> The Eleventh Circuit rejected the government’s position that the enhancement could be based on the representations of others.<sup>330</sup>

The court next turned to defendant’s statements made during the course of the investment fraud, wherein he portrayed himself as a successful trader and attorney.<sup>331</sup> The Eleventh Circuit noted that the fact-specific determination of what constitutes a position of trust under section 3B1.3 is not simple, especially given the lack of a clear definition of a position of trust in the guidelines.<sup>332</sup> The court concluded that although defendant may have abused the trust of the victims, the government had not established that defendant occupied a position of trust so as to warrant the enhancement.<sup>333</sup>

The court explained that defendant’s “status as an attorney . . . does not necessarily mean he abused a position of trust.”<sup>334</sup> Defendant did not have an attorney-client relationship with the victims, nor did he commingle the funds contained in his attorney trust account with non-related funds or otherwise use that account in connection with any of the victims.<sup>335</sup> Although the victims sent funds to the co-conspirators, who then transferred the funds to the attorney trust account, the Eleventh Circuit did not address whether the use of that account satisfied the second element of the enhancement (i.e., whether it “significantly enhanced the commission or concealment of the offense”) because the

---

327. *Id.* at 1292.

328. *Id.* at 1295 (quoting *United States v. Ward*, 222 F.3d 909, 911 (11th Cir. 2000)).

329. *Id.*

330. *Id.* at 1295-96 (citing *United States v. Moore*, 29 F.3d 175, 179 (4th Cir. 1994); U.S. SENTENCING GUIDELINES MANUAL Ch. 3, Pt. B, introductory cmt.).

331. *Id.* at 1296.

332. *Id.* at 1296-97 (citing *United States v. Mullens*, 65 F.3d 1560, 1566 (11th Cir. 1995); *United States v. Iannone*, 184 F.3d 214, 222 (3d Cir. 1999); *United States v. Hart*, 273 F.3d 363, 375 (3d Cir. 2001)).

333. *Id.* at 1297-1300.

334. *Id.* at 1297.

335. *Id.*

government had not established the first element (i.e., that defendant “held a position of trust”).<sup>336</sup>

Concerning defendant’s representations to the victims that he was a trader, the Eleventh Circuit acknowledged that the enhancement had been applied in situations involving brokers and financial advisors.<sup>337</sup> However, “[e]ach situation involving a financial advisor must . . . be analyzed individually.”<sup>338</sup> To justify the enhancement, Eleventh Circuit precedent requires more than simply portraying oneself as a trader and having control and complete discretion over the funds of the victims.<sup>339</sup>

The Eleventh Circuit explained that “[f]raudulently inducing trust in an investor is not the same as abusing a bona fide relationship of trust with that investor.”<sup>340</sup> Noting that there is no precise definition of a bona fide relationship of trust, the court stated that “[s]omething more akin to a fiduciary function is required,” as opposed to merely establishing that the victim had confidence in the defendant.<sup>341</sup> Because the evidence did not establish that defendant had such a relationship with the victims in *Morris*, the Eleventh Circuit held that the abuse of trust enhancement was improper.<sup>342</sup>

### C. Part C: Obstruction

U.S.S.G. section 3C1.1 allows for a two-level enhancement if a “defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction.”<sup>343</sup> The obstruction of justice enhancement applies in various situations, one of which is when a defendant threatens, intimidates, or otherwise unlawfully influences a witness, directly or indirectly, or attempts to do so.<sup>344</sup>

---

336. *Id.*

337. *Id.* at 1298.

338. *Id.*

339. *Id.*

340. *Id.* (quoting *Mullens*, 65 F.3d at 1567).

341. *Id.* at 1299 (quoting *United States v. Garrison*, 133 F.3d 831, 838 (11th Cir. 1998)).

342. *Id.* at 1299-30. The dissent disagreed, stating that it would hold that “persons who are engaged in a brokerage-trading business and who utilize trust bank accounts as an integral part of that business occupy a position of private trust.” *Id.* at 1300 (Hull, J., dissenting).

343. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1.

344. *Id.* § 3C1.1, cmt. n.4(a).

In *United States v. Bradford*,<sup>345</sup> the court addressed the question of “whether indirect threats made to third parties constitute obstruction under [section] 3C1.1 absent a showing that they were communicated to the target.”<sup>346</sup> In addressing this issue of first impression in the Eleventh Circuit, the court in *Bradford* noted that there was disagreement among the other circuits considering this issue.<sup>347</sup> The Eleventh Circuit agreed with those circuits that held that the threat need not be communicated directly to the target.<sup>348</sup> Thus, the court affirmed the enhancement in *Bradford*, which was based on the testimony of a deputy marshal that inmates told him defendant had made threats against him and another inmate witness.<sup>349</sup> Such conduct was determined to be “an attempt to obstruct justice by influencing or attempting to influence testimony through a threat.”<sup>350</sup>

Another situation warranting the obstruction enhancement, which was addressed in two Eleventh Circuit cases in 2002,<sup>351</sup> occurs when the defendant commits perjury.<sup>352</sup> Perjury is defined as “false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”<sup>353</sup> A material matter is defined as a matter that “if believed, would tend to influence or affect the issue under determination.”<sup>354</sup> While specific findings are preferred, “a general finding that an enhancement is warranted suffices if it encompasses all of the factual predicates necessary for a perjury finding.”<sup>355</sup> These factual predicates include: “(1) the testimony must be under oath or affirmation; (2)

---

345. 277 F.3d 1311 (11th Cir. 2002).

346. *Id.* at 1313.

347. *Id.* at 1315 (citing *United States v. Brooks*, 957 F.2d 1138, 1149-50 (4th Cir. 1992) (holding that the threat must be made in the target’s presence or issued with the likelihood that the target will learn of it); *United States v. Shoulberg*, 895 F.2d 882, 884-86 (2d Cir. 1990) (holding that a note to a third party was sufficient for the enhancement); *United States v. Capps*, 952 F.2d 1026, 1028 (8th Cir. 1991) (holding that the threat need not be communicated to the target); *United States v. Jackson*, 974 F.2d 104, 106 (9th Cir. 1992) (holding that “[w]here a defendant’s statements can be reasonably construed as a threat, even if they are not made directly to the threatened person, the defendant has obstructed justice”)).

348. *Id.*

349. *Id.*

350. *Id.*

351. See *United States v. Singh*, 291 F.3d 756, 762-64; *Vallejo*, 297 F.3d at 1168-69.

352. See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.4(b).

353. *Singh*, 291 F.3d at 763 (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)).

354. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.6).

355. *Id.* (quoting *United States v. Lewis*, 115 F.3d 1531, 1538 (11th Cir. 1997)).

the testimony must be false; (3) the testimony must be material; and (4) the testimony must be given with the willful intent to provide false testimony and not as a result of a mistake, confusion, or faulty memory.<sup>356</sup>

Giving “due deference to the district court’s application of the guidelines to the facts” of the case<sup>357</sup> and reviewing that application *de novo*,<sup>358</sup> the court of appeals affirmed the obstruction of justice enhancement in *United States v. Singh*.<sup>359</sup> Similarly, the Eleventh Circuit affirmed the obstruction enhancement in *Vallejo* because the district court’s factual findings that defendant had perjured himself and that defendant’s testimony was false and related to a material matter were not clearly erroneous.<sup>360</sup>

#### D. Part D: Multiple Counts

U.S.S.G. section 3D1.2 explains when the sentencing court is to group multiple counts of conviction that involve “substantially the same harm.”<sup>361</sup> The guideline describes four situations in which counts involve “substantially the same harm.”<sup>362</sup> The four situations were addressed in *Bradford* in connection with defendant’s challenge to the district court’s refusal to group his two counts of escape.<sup>363</sup>

In affirming the sentence in *Bradford*, the Eleventh Circuit noted that none of the situations described in section 3D1.2 applied in that case.<sup>364</sup> First, section 3D1.2(a), which defines “same harm” as “the same victim and the same act or transaction,” did not apply because the two escape counts involved two separate instances of escape.<sup>365</sup> Second, the two escapes did not constitute the same harm because, although they “involved the same general type of conduct, they were separate and distinct offenses,” and defendant did not demonstrate that the two escapes were “connected by a common criminal objective.”<sup>366</sup>

---

356. *Id.* at 763 n.4 (citing *Dunnigan*, 507 U.S. at 94).

357. *Id.* at 763 (quoting *United States v. Yount*, 960 F. 2d 955, 956 (11th Cir. 1992)).

358. *Id.* (citing *United States v. Trout*, 68 F.3d 1276, 1279 (11th Cir. 1995)).

359. *Id.* at 764. In *Singh* the district court applied the obstruction enhancement based on its specific factual findings in support of its determination that defendant committed perjury when he testified during his sentencing hearing and only admitted to a minor part of the crime. *Id.* at 763.

360. 297 F.3d at 1168-69.

361. U.S. SENTENCING GUIDELINES MANUAL § 3D1.2.

362. *Id.* § 3D1.2(a)-(d).

363. 277 F.3d at 1315-16.

364. *Id.* at 1316.

365. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(a)).

366. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(b)).

Third, the court found the same harm was not present because the two escape counts did not embody “conduct that is treated as a specific offense characteristic in, or adjustment to, the guideline applicable to another of the counts.”<sup>367</sup> Escape is specifically excluded from the fourth situation.<sup>368</sup> Thus, the district court correctly declined to group the two escape counts as closely related under section 3D1.2.<sup>369</sup>

*United States v. Hersh*<sup>370</sup> involved a more complicated question relating to the grouping rules. Defendant in *Hersh* was convicted of numerous counts of several offenses related to sex with children.<sup>371</sup> In calculating the sentence, the district court grouped all counts involving “substantially the same harm” together and assigned one offense level to each group.<sup>372</sup> The court then divided count ten (conspiring to travel in foreign commerce with the intent to engage in sexual acts with minors) into eight separate groups by treating the eight trips to Honduras as separate offenses.<sup>373</sup>

The Eleventh Circuit found that neither of the guideline provisions that allow a sentencing court to split a single count into several counts applied in this case.<sup>374</sup> For example, the court noted that under section 3D1.2, a conspiracy count may be divided into several counts, “each one charging conspiracy to commit one of the substantive offenses, when a defendant is convicted of conspiring to commit several substantive offenses and also convicted of committing one or more of the underlying substantive offenses.”<sup>375</sup> However, defendant in this case was convicted of conspiracy to travel but not of any substantive travel offenses.<sup>376</sup>

Also, as discussed in the section of this Article dealing with multiple object conspiracies,<sup>377</sup> the Eleventh Circuit concluded that section

---

367. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(c)).

368. *Id.* See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(d).

369. 277 F.3d at 1316.

370. 297 F.3d 1233 (11th Cir. 2002).

371. Defendant’s offenses in *Hersh* included transporting a minor in foreign commerce with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a) (2000); conspiracy to travel in foreign commerce with the intent to engage in sexual acts with a minor in violation of 18 U.S.C. § 2423(b); receiving and possessing child pornography in violation of 18 U.S.C. §§ 2252(a)(2), 2252A(a)(5)(B); making false statements in violation of 18 U.S.C. §§ 1001(a)(2), 1542; and harboring an illegal alien in violation of 8 U.S.C. § 1324(a)(1)(A), (B) (2000). *Id.* at 1236.

372. *Id.* at 1239 & n.7 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (1998)).

373. *Id.* at 1247.

374. *Id.* at 1248.

375. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3D1.2, cmt. n.8).

376. *Id.*

377. See discussion *supra* Part II.A.

1B1.2(d) did not justify the district court's calculations.<sup>378</sup> Accordingly, the Eleventh Circuit determined that the district court erred in dividing the tenth count into separate groups.<sup>379</sup>

Additionally, the Eleventh Circuit held that the Ex Post Facto Clause<sup>380</sup> was violated when defendants were sentenced separately based on events that occurred before and after the statute of conviction was amended.<sup>381</sup> Had the district court sentenced defendant "for one overarching conspiracy, comprised of the various dates of travel, there would be no ex post facto concern, since . . . there is no ex post facto violation in [defendant's] conviction for the conspiracy spanning the amendment of 18 U.S.C. § 2423(b)."<sup>382</sup> However, because defendant's conspiracy straddled the effective date of the statute and his sentence was increased under the grouping guideline based on travel that was not illegal when it occurred, the sentence violated the Ex Post Facto Clause.<sup>383</sup>

Nonetheless, although the district court erred in applying the grouping guideline, the Eleventh Circuit found the error to be harmless because the sentencing court indicated that if its approach were invalidated on appeal, it would arrive at the same result by granting an upward departure.<sup>384</sup> The court's analysis of the upward departure is discussed in the section of this Article relating to departures.<sup>385</sup>

#### *E. Part E: Acceptance of Responsibility*

In addition to applying the obstruction of justice enhancement found at section 3C1.1, the district court in *Singh* refused to adjust defendant's guidelines downward based on acceptance of responsibility under U.S.S.G. section 3E1.1.<sup>386</sup> The Eleventh Circuit affirmed, finding that the district court did not clearly err in denying defendant the acceptance of responsibility adjustment and that the record did not clearly establish defendant had "fully accepted personal responsibility for his crimes."<sup>387</sup> The court noted that "[c]onduct resulting in an enhancement under [section] 3C1.1 . . . ordinarily indicates that the defendant has not

---

378. 297 F.3d at 1248-49.

379. *Id.* at 1249.

380. U.S. CONST. art. I, § 9, cl.3.

381. 297 F.3d at 1249.

382. *Id.*

383. *Id.* at 1249-50.

384. *Id.* at 1250.

385. See discussion *infra* Part VI.C.

386. 291 F.3d at 764-65.

387. *Id.* at 764.

accepted responsibility for his criminal conduct.”<sup>388</sup> Given that defendant committed perjury at his sentencing hearing and “no extraordinary circumstances exist[ed] which would justify applying adjustments under both U.S.S.G. [sections] 3C1.1 and 3E1.1,” the court held that the acceptance of responsibility adjustment was not warranted.<sup>389</sup>

## V. CHAPTER FOUR: CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

### A. Part A: Criminal History

**1. U.S.S.G. section 4A1.1: Criminal History Calculations.** In *United States v. Davis*,<sup>390</sup> defendant challenged the district court’s calculation of his criminal history based on U.S.S.G. section 4A1.1(d), which adds two points if the defendant committed the offense of conviction “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.”<sup>391</sup> Specifically, defendant asserted that he was not “under a criminal justice sentence” because “the district court should not have relied on a possibly stale bench warrant for a probation violation that [the state] authorities had chosen to forego.”<sup>392</sup>

The commentary to section 4A1.1(d) includes an outstanding violation warrant under the definition of a “criminal justice sentence.”<sup>393</sup> The Eleventh Circuit determined that the criminal history enhancement applies regardless of whether the warrant is “(1) stale due to an unreasonable delay in its execution, or (2) forfeited due to the lack of diligence of state authorities in executing it.”<sup>394</sup> Thus, the two points must be added under section 4A1.1(d) as long as the warrant exists, regardless of whether the warrant is valid.<sup>395</sup>

In *United States v. Suarez*,<sup>396</sup> defendant argued for the first time on appeal that the district court should not have accessed criminal history points for a conviction that occurred more than fifteen years prior to the

---

388. *Id.* at 765 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, cmt. n.4 (2000)).

389. *Id.*

390. 313 F.3d 1300 (11th Cir. 2002).

391. *Id.* at 1305 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2001)).

392. *Id.*

393. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, cmt. n.4).

394. *Id.*

395. *Id.* at 1306.

396. 313 F.3d 1287 (11th Cir. 2002).

offense of conviction.<sup>397</sup> Reviewing the issue for plain error, the Eleventh Circuit noted that the district court assumed that defendant was incarcerated for the prior offense within fifteen years of the offense because the record reflected that he was sentenced to four years of incarceration in 1983 and the offense occurred in 1999.<sup>398</sup> In ruling that defendant had not established his entitlement to relief under the plain error standard, the Eleventh Circuit stated that “[a]ny error would not result in manifest injustice because, even if [defendant] had been placed in criminal history category I, he would still have received a sentence of life imprisonment.”<sup>399</sup>

**2. U.S.S.G. section 4A1.3: Criminal History Departures.** In *United States v. Jones*,<sup>400</sup> defendant appealed the two-category upward departure from his criminal history category on three grounds. First, defendant argued that the upward departure was unwarranted based on his criminal history.<sup>401</sup> In rejecting this argument, the Eleventh Circuit noted that U.S.S.G. section 4A1.3 “expressly authorizes a court to depart upward from a defendant’s sentencing guidelines range where the defendant’s criminal history category fails to adequately reflect the seriousness of his past criminal conduct or the likelihood of recidivism.”<sup>402</sup> The Eleventh Circuit noted that defendant’s numerous juvenile convictions may have been dissimilar to the offense of conviction and too remote to use in calculating his criminal history category, but they nonetheless represented “serious criminal conduct” and were properly considered in determining the upward departure was warranted.<sup>403</sup>

Second, defendant asserted that the criminal history departure was based upon impermissible factors because the district court relied on the offense of conviction as a ground for the departure.<sup>404</sup> In support of this assertion, defendant pointed to the district court’s statement that his “criminal misconduct over the years, including, of course, the subject offenses, [demonstrated] he has not learned to abide by the laws of society and is likely to recidivate.”<sup>405</sup> The Eleventh Circuit agreed that “an upward departure must be based on factors relating to past criminal

---

397. *Id.* at 1294-95 n.4.

398. *Id.*

399. *Id.*

400. 289 F.3d 1260 (11th Cir.), *cert. denied*, 123 S. Ct. 661 (2002).

401. *Id.* at 1266-67.

402. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1999)).

403. *Id.* at 1267.

404. *Id.*

405. *Id.*

conduct as opposed to the offense for which the defendant is being sentenced.”<sup>406</sup> The Eleventh Circuit, however, held that the district court’s statement did not establish that it impermissibly relied on the offense of conviction in departing upward.<sup>407</sup>

Third, defendant claimed that the district court improperly based the departure on defendant’s “highly inflammatory and irreverent” outburst in court, which occurred prior to the district court’s decision to depart.<sup>408</sup> Finding that the record supported the departure, the Eleventh Circuit noted that if defendant’s “conduct in court affected this decision at all, it likely only confirmed [defendant’s] high likelihood of recidivism by manifesting his enduring disrespect for the judicial system and insistence upon violating the law.”<sup>409</sup>

In *United States v. Govan*,<sup>410</sup> the government appealed the district court’s two-category downward departure, which was based on overrepresentation of the seriousness of the criminal history and sentencing manipulation by the government.<sup>411</sup> The Eleventh Circuit noted that under section 4A1.3, a downward departure for overrepresentation of criminal history is authorized, even if the defendant is a career offender.<sup>412</sup> The court, however, found that the departure was not authorized when, as here, the district court concluded that the prior convictions qualified as predicate offenses for the career offender enhancement but concluded that those offenses were not actually serious or violent.<sup>413</sup> Because the district court in *Govan* based the overrepresentation of the seriousness of the offense departure on its conclusion that defendant’s prior convictions only involved “small transactions for cocaine,” the Eleventh Circuit held that the district court erred in departing downward under section 4A1.3.<sup>414</sup>

The Eleventh Circuit also rejected the district court’s second basis for the departure, i.e., sentencing manipulation.<sup>415</sup> The Eleventh Circuit

---

406. *Id.* (citing *United States v. Adudu*, 993 F.2d 821, 824 (11th Cir. 1993)).

407. *Id.* at 1267-68.

408. *Id.* at 1268.

409. *Id.*

410. 293 F.3d 1248 (11th Cir. 2002).

411. *Id.* at 1250.

412. *Id.* (citing *United States v. Webb*, 139 F.3d 1390, 1395 (11th Cir. 1998)). The Eleventh Circuit’s discussion of the career offender guideline in *Govan* is discussed in connection with U.S.S.G. section 4B1.1. See discussion *infra* Part V.B.1.

413. 293 F.3d at 1250-51 (citing *United States v. Rucker*, 171 F.3d 1359 (11th Cir. 1999) (holding that the district court could not depart from the armed career criminal guideline when it determined the prior convictions fit within the statutory definition of serious drug offenses but were minor because they involved only small amounts of drugs)).

414. *Id.*

415. *Id.*

explained that the focus of sentencing manipulation is on the government's conduct and the sentencing court was required "to consider whether the manipulation inherent in a sting operation, even if insufficiently oppressive to support an entrapment defense . . . or due process claim, . . . must sometimes be filtered out of the sentencing calculus."<sup>416</sup>

The district court in *Govan* concluded that the government engaged in sentencing manipulation because it bought small quantities of drugs from defendant on four separate occasions rather than arresting defendant after the first buy.<sup>417</sup> The Eleventh Circuit stated that such conduct was no more manipulative than the government setting up a sting operation aimed at a large quantity of drugs, rather than a small quantity.<sup>418</sup> Thus, the court held that the district court erred in basing the downward departure on sentencing manipulation.<sup>419</sup>

In sentencing defendant in *United States v. Smith*,<sup>420</sup> the district court departed downward six offense levels based on the nonviolent nature of defendant's criminal history, as well as two grounds discussed in connection with departures under Chapter Five, Part K.<sup>421</sup> The Eleventh Circuit reversed, finding that none of the grounds relied upon by the district court permitted the vertical downward departure in this case.<sup>422</sup>

The Eleventh Circuit rejected the district court's criminal history basis for the departure for three reasons. First, the Eleventh Circuit noted that a departure based on criminal history must proceed under section 4A1.3, rather than U.S.S.G. section 5K2.0, which was relied upon by the district court in *Smith*.<sup>423</sup>

Second, the Eleventh Circuit stated that departures based on overrepresentation of criminal history, pursuant to section 4A1.3, are only permissible on the horizontal axis of the guidelines (an increase or

---

416. *Id.* (quoting *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998) (internal quotation marks and citation omitted)).

417. *Id.*

418. *Id.* (citing *Sanchez*, 138 F.3d at 1414).

419. *Id.*

420. 289 F.3d 696 (11th Cir. 2002). Defendant in *Smith* faced a statutory maximum sentence of thirty years in prison for his drug convictions. *See* 21 U.S.C. §§ 841(b)(1)(C), 851 (2000).

421. 289 F.3d at 708. *See* discussion *infra* Part VI.C. The other two grounds relied upon by the district court in *Smith* to justify the departure were defendant's diminished capacity and the disparity between his sentence and that of other offenders. 289 F.3d at 708.

422. 289 F.3d at 708-15.

423. *Id.* at 710.

decrease in the criminal history category), not on the vertical axis (an increase or decrease in the offense level).<sup>424</sup> The only exception occurs when calculating an upward departure above criminal history category VI.<sup>425</sup> Thus, even though the district court had the authority to depart downward from the defendant's career offender guideline, it was required to do so only on the horizontal axis.<sup>426</sup> Also, in making such a departure, the district court was required to "discuss each criminal history category it passe[d] over en route to the category that adequately reflect[ed] the defendant's past criminal conduct."<sup>427</sup>

Third, however, the Eleventh Circuit determined that defendant's criminal history was not overrepresented, thereby precluding even a horizontal departure.<sup>428</sup> The Eleventh Circuit noted that in addition to defendant's nonviolent prior convictions, he was also convicted of possession of cocaine with intent to deliver and robbery with a deadly weapon.<sup>429</sup> Additionally, even without the career offender status, defendant's criminal history points resulted in a criminal history category VI.<sup>430</sup> Further, the court noted that the guideline's policy statement was "concerned with the pattern or timing of prior convictions, and not with the facts of the individual crimes as relied upon by the district court."<sup>431</sup> Because defendant had repeatedly committed crimes for almost a decade and the instant offense occurred within two years of his release from imprisonment, the Eleventh Circuit found that defendant's criminal history category did not significantly overrepresent the seriousness of his criminal history.<sup>432</sup>

### *B. Part B: Criminal Livelihood*

**1. U.S.S.G. section 4B1.1: Career Offender.** Pursuant to U.S.S.G. section 4B1.1, a defendant is deemed to be a career offender subject to enhanced penalties if:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two

---

424. *Id.* at 710-11.

425. *Id.* at 711 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1998)).

426. *Id.* at 711-12.

427. *Id.* at 711.

428. *Id.* at 712-13.

429. *Id.* at 712.

430. *Id.*

431. *Id.* at 713.

432. *Id.*

prior felony convictions for either a crime of violence or a controlled substance offense.<sup>433</sup>

In *Govan* the government appealed the district court's failure to apply the career offender guideline in determining defendant's sentence.<sup>434</sup> The Eleventh Circuit rejected the defendant's argument that the district court had applied the career offender guideline but then departed downward from the base offense level required under it.<sup>435</sup> The Eleventh Circuit found that the district court's failure to apply the career offender guideline was demonstrated by the fact that immediately after being advised that the base offense level was thirty-four under that guideline, the district court set the adjusted base offense level (which included a three-level reduction for acceptance of responsibility under section 3E1.1) at twenty-nine.<sup>436</sup> In reversing, the Eleventh Circuit held that because defendant met the three criteria set forth in section 4B1.1, the district court was required to apply the career offender guideline and set defendant's base offense level at thirty-four.<sup>437</sup>

In *United States v. Duty*,<sup>438</sup> defendant argued that he was improperly classified as a career offender because he did not have the required number of prior felony convictions. The career offender guideline requires that the defendant have "at least two prior felony convictions for either a crime of violence or a controlled substance offense"<sup>439</sup> and that the convictions be unrelated.<sup>440</sup>

In rejecting defendant's argument that his guilty pleas in state court on four prior drug-related felony charges should have been counted as a single conviction under the state statute, the Eleventh Circuit noted that "the proper definition of the term 'conviction' as used in U.S.S.G. [section] 4B1.1 is governed by federal law, not state law."<sup>441</sup> Under the commentary to the guideline "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)."<sup>442</sup> Because defendant's "state drug

---

433. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2001).

434. 293 F.3d at 1249.

435. *Id.* at 1249-51.

436. *Id.* at 1249.

437. *Id.* at 1250.

438. 302 F.3d 1240 (11th Cir. 2002).

439. *Id.* at 1241 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.1).

440. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(c)).

441. *Id.* at 1242 (citing *United States v. Fernandez*, 234 F.3d 1345, 1347 (11th Cir. 2000)).

442. *Id.* at 1241-42 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.3).

offenses were separated by intervening arrests, those offenses were not related, and the district court properly applied [section] 4B1.1.<sup>443</sup>

**2. U.S.S.G. section 4B1.4: Armed Career Criminal.** The armed career criminal guideline, found in U.S.S.G. sections 4B1.4(b)(3)(A) and 4B1.4(c)(2), assigns offense level thirty-four and criminal history category VI to defendants subject to the provisions of 18 U.S.C. § 924(e) “if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in [section] 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a).”<sup>444</sup> The Eleventh Circuit interpreted this guideline in *United States v. Sutton*.<sup>445</sup>

In sentencing defendant in *Sutton* for being a felon in possession of certain firearms and ammunition,<sup>446</sup> the district court found that none of the weapons charged in the indictment were used in connection with a drug offense. Nonetheless, the court applied sections 4B1.4(b)(3)(A) and 4B1.4(c)(2) based on other ammunition, which was not charged in the indictment but which was connected to the drug offense.<sup>447</sup>

The Eleventh Circuit noted that the armed career criminal guideline referred to “the” firearm or ammunition, as opposed to “a” or “any” firearm or ammunition.<sup>448</sup> A plain reading of this language indicated to the court that the guideline only applies to the “firearms or ammunition for which the defendant is convicted.”<sup>449</sup> Thus, the Eleventh Circuit reversed, holding that the ammunition not charged in the indictment was not contemplated by section 4B1.4(b)(3)(A) or section 4B1.4(c)(2) and could not be used to justify the enhancements provided therein.<sup>450</sup>

## VI. CHAPTER FIVE: DETERMINING THE SENTENCE

### A. *Part C: Imprisonment—Safety Valve*

In *United States v. Acosta*,<sup>451</sup> the district court refused to apply the safety valve provision found in U.S.S.G section 5C1.1 based on its

---

443. *Id.* at 1242.

444. U.S. SENTENCING GUIDELINES MANUAL § 4B1.4(b)(3)(A), (c)(2).

445. 302 F.3d 1226 (11th Cir. 2002).

446. *See* 18 U.S.C. §§ 922(g), 924(e) (2000).

447. 302 F.3d at 1227.

448. *Id.* at 1227-28.

449. *Id.* at 1228.

450. *Id.*

451. 287 F.3d 1034 (11th Cir. 2000), *cert. denied*, 123 S. Ct. 321 (2002).

conclusion, following an evidentiary hearing, that defendant was not truthful when he was debriefed by law enforcement.<sup>452</sup> The Eleventh Circuit affirmed, noting that the evidence concerning whether defendant “cooperated fully with arresting officers” was conflicting and that “[t]here was no error in the district court’s evaluation of [defendant’s] demeanor and testimony, nor in its conclusion that [defendant] did not satisfy his burden of persuasion to convince the court that he had provided truthful and complete information.”<sup>453</sup>

*B. Part G: Implementing the Total Sentence of Imprisonment*

**1. U.S.S.G. section 5G1.2.** In *United States v. Pendergraft*,<sup>454</sup> the Eleventh Circuit noted a technical error in the district court’s sentencing of a defendant to a single sentence for multiple counts of conviction.<sup>455</sup> “When sentencing on multiple counts, the Sentencing Guidelines require the district court to divide the sentence among the counts and to specify whether the sentences on each count are to run consecutively or concurrently.”<sup>456</sup> Thus, the Eleventh Circuit remanded defendant’s case for resentencing on two counts.<sup>457</sup>

**2. U.S.S.G. section 5G1.3.** Under 18 U.S.C. § 3584(a), “[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.”<sup>458</sup> In determining whether to run a sentence consecutively, the district court must consider a number of factors, including “the nature and circumstances of the offense and the history and characteristics of the defendant,” as well as the sentencing guidelines and policy statements.<sup>459</sup>

U.S.S.G. section 5G1.3 deals with whether a sentence should be consecutive or concurrent to an undischarged term of imprisonment. That guideline, which was addressed in two appeals in 2002, provides:

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service

---

452. *Id.* at 1038.

453. *Id.*

454. 297 F.3d 1198 (11th Cir. 2002).

455. *Id.* at 1212.

456. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 (2000)).

457. *Id.* at 1212-13.

458. *See* 18 U.S.C. § 3584(a) (2000).

459. *See id.* § 3553(a)(1), (4), (5).

of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.<sup>460</sup>

In *United States v. Bradford*,<sup>461</sup> the defendant challenged the district court's refusal to run his sentence for two escapes concurrently with a sentence on a prior conviction for another escape.<sup>462</sup> The Eleventh Circuit held that section 5G1.3(a) did not apply because defendant committed the escape offenses at issue while he was serving a term of imprisonment but before he was convicted and sentenced for the third escape.<sup>463</sup> Nor did section 5G1.3(b) apply because the third escape "was not fully taken into account in the determination of the offense level for the instant offense."<sup>464</sup> Because neither of the first two subsections of section 5G1.3 applied, the district court had discretion to impose the sentence concurrently or consecutively.<sup>465</sup> Affirming the district court's decision to impose consecutive sentences, the Eleventh Circuit noted that the record reflected that the district court considered the factors set forth in 18 U.S.C. § 3553(a) in determining that the consecutive sentence was appropriate.<sup>466</sup>

In *United States v. Morales-Castillo*,<sup>467</sup> defendant was convicted of an aggravated felony in state court, sentenced to probation, and thereafter deported. Subsequently, while still on probation, he was found in the United States without the permission of the Attorney General. As a result, his state probation was revoked, and he was sentenced to nine years in prison; he was also charged in federal court with illegally re-entering the United States.<sup>468</sup>

---

460. U.S. SENTENCING GUIDELINES MANUAL § 5G1.3 (2001).

461. 277 F.3d 1311 (11th Cir.), *cert. denied*, 123 S. Ct. 304 (2002).

462. *Id.* at 1316.

463. *Id.* at 1316-17 (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(a)).

464. *Id.* at 1317 (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(b)).

465. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c)).

466. *Id.*

467. 314 F.3d 561 (11th Cir. 2002).

468. *Id.* at 562. *See* 8 U.S.C. § 1326(a), (b)(2) (2000).

Following his guilty plea on the illegal re-entry charge, the district court sentenced him to seventy-one months of imprisonment, consecutive to the state sentence. On appeal, defendant argued that his federal and state sentences should have been concurrent because his undischarged term of state imprisonment resulted from an offense that was fully taken into account in determining the offense level for the federal illegal re-entry sentence.<sup>469</sup>

In finding that section 5G1.3(b) did not apply in this case, the Eleventh Circuit pointed out that the sixteen-level enhancement, applied to defendant's federal sentence because he re-entered the United States after having been deported following an aggravated felony conviction, would have been applied regardless of whether his state probation was revoked.<sup>470</sup> Therefore, his undischarged state imprisonment was not fully considered in determining his offense level for illegal re-entry.<sup>471</sup> The Eleventh Circuit further found that defendant's sentence was properly determined under section 5G1.3(c), noting that under application note six thereof, a consecutive sentence is appropriate if "the defendant was on federal or state probation . . . at the time of the instant offense, and has had such probation . . . revoked."<sup>472</sup>

Additionally, the Eleventh Circuit rejected defendant's alternative argument that the district court should have exercised its discretion and imposed a concurrent sentence.<sup>473</sup> The Eleventh Circuit declined to address the question of whether a consecutive sentence is mandatory under application note six, which has generated a split among the circuits.<sup>474</sup> Instead, the court affirmed because it found no evidence that the district court thought it was required to impose a consecutive sentence; rather, the district court chose to do so because of defendant's criminal history.<sup>475</sup>

### C. Part K: Departures

As in previous years, in 2002 the Eleventh Circuit addressed several departures under Chapter Five, Part K. One such case was *United*

---

469. 314 F.3d at 562-63.

470. *Id.* at 563-64 (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2002)).

471. *Id.* at 564.

472. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.6).

473. *Id.*

474. *Id.* at 564 & n.2.

475. *Id.* at 564.

*States v. Hersh*,<sup>476</sup> which is also discussed in connection with multiple object conspiracies and grouping rules.<sup>477</sup>

In *Hersh* the district court erroneously applied the grouping rules found in Chapter Three, Part D of the guidelines to arrive at a sentence of 105 years for various charges involving sex with minors and child pornography.<sup>478</sup> Nonetheless, the Eleventh Circuit found that the error was harmless because the district court stated that if it was reversed on appeal, it would impose the same sentence by granting an upward departure.<sup>479</sup>

In reviewing the district court's "prophylactic" upward departure, the Eleventh Circuit noted that when a district court makes a vertical departure, as opposed to a horizontal departure, it is not required to explicitly explain why it bypassed each incremental offense level.<sup>480</sup> The Eleventh Circuit then discussed each of the reasons the district court relied on in announcing its "prophylactic" upward departure of ten levels.<sup>481</sup>

First, the district court relied on the "serious nature of [defendant's] twenty-year history of sexual predation, abuse and exploitation," noting that this ground justified the departure even though the sentence had already been enhanced under section 2G2.2(b)(4) based on the sexual abuse and exploitation of minors.<sup>482</sup> The commentary to section 2G2.2 specifically allows for an upward departure in addition to the five-level section 2G2.2(b)(4) enhancement when "that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved."<sup>483</sup> After discussing the district court's detailed discussion of defendant's sexual history, the Eleventh Circuit found the departure appropriate on this ground.<sup>484</sup>

Second, the district court noted that the victims were extraordinarily vulnerable.<sup>485</sup> Although the district court had already considered the multiple vulnerable victims in its guideline calculations, the Eleventh

---

476. 297 F.3d 1233 (11th Cir. 2002).

477. See discussion *supra* Parts II.A., IV.D.

478. 297 F.3d at 1236, 1248.

479. *Id.* at 1250.

480. *Id.* at 1251.

481. *Id.* at 1251-55.

482. *Id.* at 1251.

483. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2, cmt. n.2 (1998)). Although the court in *Hersh* applied the 1998 version of the guidelines, the commentary relied upon here also appears in the 2001 version. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2, cmt. n.2 (2001).

484. 297 F.3d at 1252.

485. *Id.*

Circuit concluded that such was an appropriate basis for an upward departure under U.S.S.G. section 5K2.0 because the guidelines did not adequately reflect the vulnerability of the victims.<sup>486</sup>

Third, the district court discussed disregarded counts of conviction as an additional basis of departure, noting that if its grouping decision was reversed, one of the counts would not be used in the sentencing process.<sup>487</sup> The Eleventh Circuit also upheld this ground for departure because it is specifically allowed for in the guidelines.<sup>488</sup> Thus, in light of its determination that the prophylactic upward departure was valid, the Eleventh Circuit affirmed the sentence.<sup>489</sup>

In sentencing defendants for various offenses related to the transportation and sale of stolen goods,<sup>490</sup> the district court in *United States v. Kapelushnik*<sup>491</sup> departed downward two levels based on defendants' post-adjudication, voluntary return of stolen goods. In the government's appeal, the Eleventh Circuit declined to address whether, as a matter of law, post-adjudication, voluntary restitution is a permissible basis for a downward departure under section 5K2.0 because it concluded that there was no evidence to support the district court's finding that defendants were responsible for the restitution.<sup>492</sup> The Eleventh Circuit noted that the only indication in the record that defendants were responsible for returning the stolen property was defense counsel's allegations at sentencing.<sup>493</sup> However, "such allegations are an insufficient basis upon which to grant a downward departure."<sup>494</sup> Thus, the sentences were vacated, and the case was remanded for resentencing without the downward departure.<sup>495</sup>

---

486. *Id.* at 1252-53 (citing *United States v. Melvin*, 187 F.3d 1316 (11th Cir. 1999)).

487. *Id.* at 1253.

488. *Id.* at 1253-54 (citing U.S. SENTENCING GUIDELINES MANUAL § 3D1.4, cmt. background (1998)).

489. *Id.* at 1254-55. The district court also discussed a fourth reason for the departure: the likelihood of recidivism. *Id.* at 1251 n.27. The Eleventh Circuit, however, noted that a horizontal departure under U.S.S.G. section 4A1.3 requires a detailed analysis that the district court did not make. *Id.* Regardless, the Eleventh Circuit found that "the invalidity of the district court's proposed departure on this ground is not fatal to the entire departure" in light of the other valid grounds for departure. *Id.*

490. See 18 U.S.C. §§ 371 (conspiracy to transport stolen goods), 2314 (transportation of stolen goods), 2315 (sale and possession of stolen goods).

491. 306 F.3d 1090 (11th Cir. 2002).

492. *Id.* at 1092, 1095.

493. *Id.* at 1095.

494. *Id.* (citing *United States v. Tomono*, 143 F.3d 1401, 1404 (11th Cir. 1998); *United States v. Onofre-Segarra*, 126 F.3d 1308, 1310-11 (11th Cir. 1997)).

495. *Id.*

In *United States v. Schlaen*,<sup>496</sup> defendants were convicted of several money-laundering charges<sup>497</sup> but acquitted of conspiracy to commit money-laundering<sup>498</sup> and failure to file an internal revenue service form.<sup>499</sup> At sentencing, the district court departed downward six levels under section 5K2.0, finding that the offense was outside of the heartland of the money-laundering guideline<sup>500</sup> because the money-laundering was incidental to defendants' avoidance of the transaction reporting requirements.<sup>501</sup>

The district court gave five reasons for granting the departure. The first three reasons were that defendants did not find out that the funds came from drug trafficking until they completed the first transaction; they did not know how much of the money came from drug trafficking; and they were lured into the operation prior to learning that the money was derived from drug trafficking.<sup>502</sup> The Eleventh Circuit found that these three reasons conflicted with the verdict because the money-laundering convictions could not have been obtained without a finding that defendants were aware of the drug trafficking.<sup>503</sup> “[A] district court cannot use the post-trial sentencing process to call a jury’s verdict into question.”<sup>504</sup>

The Eleventh Circuit also rejected the district court’s fourth reason for the departure, namely, defendants did not use the money-laundering to further criminal acts.<sup>505</sup> The court recognized that U.S.S.G. section 5K2.9 provides for an upward departure when there is a “criminal purpose.”<sup>506</sup> The fact that the Sentencing Commission considered criminal purpose as a basis for an upward departure was found to reflect that the Sentencing Commission “adequately considered the effect that a criminal purpose had on a defendant’s culpability.”<sup>507</sup> Additionally, the Eleventh Circuit noted that “[i]n doing so, [the Sentencing Commission] concluded that, while the presence of a criminal purpose might

---

496. 300 F.3d 1313 (11th Cir. 2002).

497. See 18 U.S.C. § 1956(a)(3)(C) (2000).

498. See *id.* § 1956(a)(3)(C), (h).

499. 300 F.3d at 1315. See 26 U.S.C. § 6050I(f)(1)(A), (C) (2000).

500. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (1998).

501. 300 F.3d at 1317.

502. *Id.* at 1318.

503. *Id.* (citing 18 U.S.C. § 1956(a)(3)(C), (c)(7)(B)(i)).

504. *Id.* (quoting *United States v. Costales*, 5 F.3d 480, 488 (11th Cir. 1993)).

505. *Id.* at 1318-19.

506. *Id.*

507. *Id.* at 1319.

warrant an upward departure, the absence of a criminal purpose does not warrant a downward departure.”<sup>508</sup>

The fifth and final factor relied on by the district court in *Schlaen* was that defendants kept internal records of their cash transactions.<sup>509</sup> In rejecting this factor as well, the Eleventh Circuit noted that the Sentencing Commission was aware that “efforts to conceal a crime could alter the sentencing equation,” as evidenced by the two-level enhancement for sophisticated concealment found in the tax evasion guideline<sup>510</sup> and the two-level enhancement for use of sophisticated means in the 2001 version of the money-laundering guideline.<sup>511</sup> Having thus found that each of the factors relied upon by the district court in granting the downward departure were improper, the Eleventh Circuit vacated the downward departure and remanded the case for resentencing.<sup>512</sup>

The Eleventh Circuit also reversed the downward departure in *United States v. Caro*.<sup>513</sup> The court agreed with the government that defendant “failed to carry his burden of proving that, due to his sexual addiction, he committed the offenses while suffering from a significantly reduced mental capacity;” that the defendant’s sexual addiction and collection of child pornography to medicate that addiction was not sufficiently different from impulse control disorder, which has been rejected as a basis for a downward departure; and that the case did not fall outside the heartland of cases because defendant’s expert admitted that defendant’s condition was not atypical of other persons who collect and are addicted to collecting child pornography.<sup>514</sup> Finding that this case was not outside the heartland of cases, the Eleventh Circuit concluded that the district court abused its discretion in departing downward under U.S.S.G. section 5K2.13.<sup>515</sup>

Likewise, the Eleventh Circuit reversed the six-level downward departure in *United States v. Smith*<sup>516</sup> that was based on the nonviolent nature of defendant’s criminal history, his diminished capacity, and the disparity between his sentence and that of other offenders.<sup>517</sup>

---

508. *Id.* (citing *United States v. Godfrey*, 22 F.3d 1048, 1056 (11th Cir. 1994)).

509. *Id.*

510. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(b)(2) & cmt. background (1998)).

511. *Id.* at 1319 n.2 (citing U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(b)(3) (2001)).

512. *Id.* at 1319-20.

513. 309 F.3d 1348, 1352-53 (11th Cir. 2002).

514. *Id.*

515. *Id.* at 1353.

516. 289 F.3d 696 (11th Cir. 2002).

517. *Id.* at 708.

After rejecting the criminal history ground for the departure, which is discussed in connection with section 4A1.3,<sup>518</sup> the court turned to the diminished capacity ground.<sup>519</sup>

The district court believed defendant's "judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and 'early treatment for an emotional or mental disorder.'"<sup>520</sup> In finding this to be an improper basis for departure, the Eleventh Circuit noted that the guidelines prohibit a departure based on such offender characteristics.<sup>521</sup>

The Eleventh Circuit further stated that the record did not reflect defendant's drug addiction or mental and emotional condition, which were "so extraordinary as to take [the case] out of the 'heartland'" and support a departure under section 5K2.0.<sup>522</sup> Moreover, a departure for reduced mental capacity under section 5K2.13 is not allowed when "the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants."<sup>523</sup> Thus, the Eleventh Circuit found that defendant's "disabilities, separately or in combination, were insufficient as a matter of law to support a departure from the guideline range on the basis of diminished capacity."<sup>524</sup>

The Eleventh Circuit also rejected the district court's reliance on disparity in the sentences of defendant and other offenders as a basis for departure.<sup>525</sup> The Eleventh Circuit ruled that based on its precedent, sentencing disparity, as a matter of law, is an inappropriate basis to depart under section 5K2.0.<sup>526</sup>

As a final matter, the Eleventh Circuit noted that a section 5K2.0 departure is possible in the "extraordinary case that, because of a combination of such [ordinarily irrelevant] characteristics or circumstances, [the case] differs significantly from the "heartland" cases covered by the guidelines . . . , even though none of the characteristics or circumstances individually distinguishes the case."<sup>527</sup> However, the

---

518. See discussion *supra* Part V.A.2.

519. 289 F.3d at 713.

520. *Id.* (quoting *United States v. Smith*, 125 F. Supp. 2d 486, 491 (S.D. Fla. 2000)).

521. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-6; *Id.* Ch. 5, pt. H, introductory cmt. (1998)).

522. *Id.* at 714.

523. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.13).

524. *Id.*

525. *Id.*

526. *Id.* (citing *United States v. Chotas*, 968 F.2d 1193, 1197-98 (11th Cir. 1992)).

527. *Id.* at 714-15 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, cmt. background).

Eleventh Circuit found that this was not such a case given that none of the individual bases for a departure were permissible grounds for a section 5K2.0 departure.<sup>528</sup> Thus, the sentence was vacated, and the case was remanded for resentencing.<sup>529</sup>

#### VII. CHAPTER SIX, PART A: SENTENCING PROCEDURES

In *United States v. Quintana*,<sup>530</sup> defendant appealed the district court's refusal to consider his motion for a downward departure because it was untimely under a local court rule.<sup>531</sup> In affirming, the Eleventh Circuit noted that under the sentencing guidelines, federal district courts are urged to "adopt procedures to provide for . . . the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute."<sup>532</sup> The Eleventh Circuit found that the local rule in this case represented "a reasonable effort to ensure that challenges to the proposed application of the guidelines be identified prior to the sentencing hearing."<sup>533</sup>

The Eleventh Circuit also noted that the local rule in *Quintana* did not conflict with Eleventh Circuit precedent that requires "district courts to permit the parties to fully articulate any objections they have to the sentence or the manner in which the court pronounced it."<sup>534</sup> The Eleventh Circuit found that the local rule and Eleventh Circuit precedent addressed "different aspects of the sentencing process."<sup>535</sup> Rather than requiring that the district courts allow argument on new objections or motions, which were not timely filed in the first place, Eleventh Circuit precedent "simply requires that courts give parties the opportunity (1) to articulate any novel objections to the sentence or the sentencing procedure; and (2) to resolve any properly filed objections to the PSI or prehearing motions."<sup>536</sup>

---

528. *Id.* at 715.

529. *Id.*

530. 300 F.3d 1227 (11th Cir. 2002).

531. *Id.* at 1229. See Rule 88.8(6), Local Rules of the United States District Court for the Southern District of Florida, which mandates that motions for departures be filed no later than five days before the sentencing proceeding.

532. 300 F.3d at 1230 (quoting U.S. SENTENCING GUIDELINES MANUAL § 6A1.2 (2001)).

533. *Id.*

534. *Id.* (quoting *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990), *overruled in part on other grounds by United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993)).

535. *Id.*

536. *Id.* (citing *Jones*, 899 F.2d at 1102).

## VIII. CHAPTER SEVEN: VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

In *United States v. Cook*,<sup>537</sup> defendant faced a statutory maximum penalty of ten years in prison and a guideline range of four to ten months in prison at her original sentencing hearing. However, the district court placed her on three years of probation, warning her that she would receive the “maximum jail time” if she violated probation.<sup>538</sup> After her probation was modified based on numerous violations, defendant again violated probation and was sentenced to twenty-four months in prison with no supervised release.<sup>539</sup> Defendant appealed this sentence on two grounds.

First, defendant in *Cook* argued that the sentence should not have exceeded the original guideline range of four to ten months of imprisonment.<sup>540</sup> The Eleventh Circuit rejected this argument based on the 1994 amendment to 18 U.S.C. § 3562(a)(2), which the court held does not limit a sentence imposed upon a revocation of probation to the sentence available at the time of the initial sentencing.<sup>541</sup>

The Eleventh Circuit further noted that the introduction to Chapter Seven, which states that a court may revoke probation and “impose any other sentence that initially could have been imposed,” did not support defendant’s argument that the 1994 amendment to § 3565 did not expand the authority of the sentencing court to sentence a probation violator to more than the guideline range available at the time of the initial sentencing.<sup>542</sup> The court found that this introductory statement was part of Chapter Seven and was not binding but merely advisory.<sup>543</sup>

Second, defendant argued that the district court erred in sentencing her to more than the sentencing range of five to eleven months of imprisonment set forth in Chapter Seven of the guidelines.<sup>544</sup> The Eleventh Circuit also rejected this argument, noting that the guideline ranges for probation revocation sentences are not binding on the courts.<sup>545</sup> Because the sentencing court was only required to consider

---

537. 291 F.3d 1297 (11th Cir. 2002).

538. *Id.* at 1298.

539. *Id.* at 1299.

540. *Id.*

541. *Id.* at 1299-1300.

542. *Id.* at 1301 n.6 (quoting U.S. SENTENCING GUIDELINES MANUAL Ch. 7, pt. A(2)(a) (2000)).

543. *Id.*

544. *Id.* at 1300-02.

545. *Id.* at 1301 (citing U.S. SENTENCING GUIDELINES MANUAL Ch. 7, pt. A(1), (3)(a); *Id.* § 7B1.4).

the policy statements found in Chapter Seven of the guidelines in determining defendant's sentence, which the court did in this case, the Eleventh Circuit held that there was no error in sentencing defendant beyond the range recommended in the guideline.<sup>546</sup>

#### IX. ALLOCUTION

In two cases that are not directly related to any particular guideline, the Eleventh Circuit discussed allocution as it generally relates to the guidelines. In *United States v. Quintana*,<sup>547</sup> the Eleventh Circuit found that defendant had not established that he was entitled to resentencing under the plain error standard of review when the district court did not give him an opportunity to allocute in violation of Federal Rule of Criminal Procedure 32(c)(3)(C).<sup>548</sup> In *United States v. Prouty*,<sup>549</sup> on the other hand, the Eleventh Circuit found that the failure to afford defendant his right to allocution warranted reversal under the plain error standard of review.<sup>550</sup> The key difference between *Prouty* and *Quintana* is the sentence imposed.

In *Quintana* the Eleventh Circuit noted that defendant could not establish a manifest injustice because he could not have received a lower sentence if he had been allowed to allocute given that he was sentenced to the lowest term of imprisonment permitted under the guidelines.<sup>551</sup> In *Prouty* defendant was sentenced to the high end of the guideline range.<sup>552</sup> The possibility of a lower sentence under the guidelines in *Prouty* warranted a finding of manifest injustice.<sup>553</sup>

#### X. CONCLUSION

In 2002 sentencing guideline issues continued to constitute an important part of Eleventh Circuit case law. Two possible reasons for this trend are the amendments to the guidelines and new Supreme Court cases.

The United States Sentencing Commission regularly amends the sentencing guidelines. Between 1988 and November 1, 2002, 646 amendments to the federal sentencing guidelines have taken effect.<sup>554</sup>

---

546. *Id.* at 1302 (citing 18 U.S.C. § 3553(a)(4)(B) (2000)).

547. 300 F.3d 1227 (11th Cir. 2002).

548. *Id.* at 1231-32.

549. 303 F.3d 1249 (11th Cir. 2002).

550. *Id.* at 1251-53.

551. 300 F.3d at 1231-32.

552. 303 F.3d at 1252.

553. *Id.* at 1253.

554. See U.S. SENTENCING GUIDELINES MANUAL, app. C (2002).

Thirty-eight of these amendments became effective in the past two years—ten on November 1, 2002<sup>555</sup> and twenty-eight in 2001.<sup>556</sup> With new amendments come new challenges to the interpretation of the guidelines.

Additionally, Supreme Court case law on nonguideline issues tends to generate appeals that include guideline questions. For example, many criminal defendants challenged not only their drug and firearm convictions but also the drug and firearm guidelines based on the principles announced in *Apprendi v. New Jersey*.<sup>557</sup> Similarly, after the Supreme Court found part of the child pornography statute to be unconstitutional in *Ashcroft v. Free Speech Coalition*,<sup>558</sup> many defendants appealed their child pornography convictions, as well as the guidelines applied in sentencing them for those convictions.

In light of the constant amendments to the guidelines and the ever-evolving Supreme Court jurisprudence, parties will no doubt continue to find creative new ways to challenge the application of various guidelines. Because of such challenges, guidelines cases will most likely continue to be an important part of Eleventh Circuit case law in the years to come.

---

555. *See id.* app. C, amends. 637-646.

556. *See id.* app. C, amends. 609-636 (2001).

557. 530 U.S. 466 (2000).

558. 535 U.S. 234 (2002).