

Federal Sentencing Guidelines

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I. INTRODUCTION

Despite the passage of almost two decades since the enactment of the United States Sentencing Guidelines (“U.S.S.G.”), issues relating to the sentencing guidelines continue to dominate Eleventh Circuit case law. This is no doubt due, at least in part, to the fact that by 2003, the guidelines had been amended 662 times.¹

Ambiguities within the guidelines regularly lead to differing interpretations of those guidelines among the circuit courts of appeals. These differing interpretations result in further guideline amendments aimed at reconciling the splits among the circuits. The amended guidelines result in new issues of first impression, new interpretations, and new splits among the circuits. The guidelines are amended again, and the cycle continues.

The year 2003 was just another chapter in this continuing saga. The United States Court of Appeals for the Eleventh Circuit was confronted with several issues of first impression that related in large part to guideline amendments. Many of the amendments became effective in 2001 but did not begin to surface in reported decisions until 2003.

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1. See U.S. SENTENCING GUIDELINES MANUAL app. C (2003).

II. CHAPTER ONE, PART B: GENERAL APPLICATION PRINCIPLES

General application principles, such as relevant conduct and retroactive guideline amendments, were addressed in several Eleventh Circuit cases in 2003. Recent guideline amendments, especially Amendment 599,² resulted in decisions of first impression in the Eleventh Circuit. Although the substance of these decisions may be more relevant to the particular guideline at issue, the procedural aspects and some of the general principles of the cases are discussed here.

A. U.S.S.G. Section 1B1.3: Relevant Conduct

U.S.S.G. section 1B1.3 allows courts to consider relevant conduct in calculating a defendant's sentencing guidelines.³ *United States v. Hunter*⁴ demonstrates the concept of reasonable foreseeability in the context of fraud conspiracy loss.⁵ Defendants in *Hunter* were three of nineteen runners who presented themselves to banks and cashed counterfeit checks.⁶ The three defendants cashed checks totaling less than \$15,000. However, the sentencing court held them accountable for the total actual loss from the entire scheme, which was approximately \$125,000. The court reasoned that it was reasonably foreseeable to defendants, as participants in a counterfeit check ring, that they participated in a scheme that entailed more than their own individual conduct. Thus, under U.S.S.G. section 2F1.1, the court enhanced defendants' sentence based on a \$125,000 loss.⁷

The Eleventh Circuit held that the district court erred in its attribution of the entire loss amount to the defendants.⁸ The court pointed out that under the relevant conduct guideline, a sentencing court must determine the scope of the criminal activity the defendant undertook before reaching the matter of reasonable foreseeability.⁹ In this regard,

2. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 599 (2003).

3. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2001).

4. 323 F.3d 1314 (11th Cir. 2003).

5. The court in *Hunter* used the 1998 version of the guidelines. *Id.* at 1316 n.1.

6. *Id.* at 1316-17. Defendants in *Hunter* were convicted of "conspiracy to make, utter, and possess counterfeit checks, in violation of 18 U.S.C. § 371." *Id.* at 1316.

7. *Id.* at 1318 (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998)). *Hunter* is also discussed in the sections of this Article relating to minor role (U.S. SENTENCING GUIDELINES MANUAL § 3B1.2), at *infra* notes 415-32 and criminal history calculations (U.S. SENTENCING GUIDELINES MANUAL § 4A1.2), at *infra* notes 528-52.

8. The court found that certain activity may or may not indicate an implicit agreement regarding other checks, so it remanded the case for "particularized findings" as to the extent of the agreement. 323 F.3d at 1321-22.

9. *Id.* at 1320.

the sentencing court should consider “any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.”¹⁰ However, the court cautioned that a defendant’s knowledge of a larger operation and agreement to perform a particular act do not constitute “acquiescence in the acts of the criminal enterprise as a whole.”¹¹ Rather, the government must present “evidence of sharing or mutuality from which an agreement in the larger criminal scheme can be inferred.”¹² The court held that the government in *Hunter* failed to produce such evidence.¹³ Additionally, one defendant, who joined the conspiracy after certain acts had been committed, could not be held accountable for conduct that occurred prior to his entry into the criminal undertaking.¹⁴

The Eleventh Circuit also addressed relevant conduct and reasonable foreseeability in *United States v. Pringle*.¹⁵ Defendant in *Pringle* was convicted in 1991 of conspiracy to commit a burglary and six robberies, some of which involved the use of firearms, in violation of the Hobbs Act,¹⁶ robbery of the Liberty Savings Bank, and use of a firearm during the robbery of the Liberty Savings Bank.¹⁷ The co-defendants used firearms during the robberies involved in the conspiracy, and the conspiracy base offense level was enhanced due to the use of those firearms. However, the use of a firearm during the Liberty Savings Bank robbery did not result in any enhancement. After the passage of Amendment 599, defendant sought a reduction of his sentence under 18 U.S.C. § 3582(c)(2).¹⁸ The district court denied the motion.¹⁹

On appeal the Eleventh Circuit addressed two questions.²⁰ First, defendant argued that the district court miscalculated his original sentence when it considered acts committed by the co-conspirators that

10. *Id.* at 1319-20 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2 (1998)).

11. *Id.* at 1320.

12. *Id.* at 1322.

13. *Id.*

14. *Id.* at 1320 (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2 (1998) (“A defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct”).

15. 350 F.3d 1172 (11th Cir. 2003).

16. *See* 18 U.S.C. § 1951 (1990).

17. 350 F.3d at 1174-75. The district court relied on 18 U.S.C. § 2113(a) and (d) (2000) and 18 U.S.C. § 924(c) (2000) for the convictions stemming from the robbery of the Liberty Savings Bank. *Id.* at 1175.

18. 18 U.S.C. § 3582(c)(2) (2000).

19. 350 F.3d at 1175.

20. *Id.* at 1174.

were not reasonably foreseeable to the defendant, contrary to U.S.S.G. section 1B1.3.²¹ Second, defendant argued that even if the acts were reasonably foreseeable, his sentence should have been reduced retroactively based on Amendment 599.²² The court in *Pringle* set forth a three-part analysis for determining whether the defendant “should be held accountable for his co-conspirators['] possession of a firearm during the robberies that formed the basis of [defendant’s] conspiracy conviction.”²³ Specifically, it must be determined

(1) if [defendant] was part of a jointly undertaken criminal activity, whether or not charged as a conspiracy; (2) whether the acts of [defendant’s] co-conspirators that took place after the robbery of Liberty Savings Bank were reasonably foreseeable to [defendant]; . . . [and if so] (3) whether Amendment 599 retroactively bars punishment for these acts.²⁴

As to the first prong of the test, the district court and the Eleventh Circuit agreed that there was sufficient evidence in the record to uphold the jury’s guilty verdict on the conspiracy count, which established that the defendant was a knowing and willful participant in the conspiracy.²⁵

The second prong—reasonable foreseeability—was established by the facts that defendant knew the full scope of his co-conspirators’ unlawful enterprise, including the fact that weapons were used, well before he joined the conspiracy.²⁶ The court also noted that

[t]he issue of whether [defendant] was involved in the planning or execution of the offenses for which he received a weapons enhancement is wholly separate from the issue of whether [defendant] could have reasonably foreseen that his co-conspirators would commit . . . subsequent offenses, and do so using firearms.²⁷

Having affirmed the district court’s findings that defendant was part of a jointly undertaken criminal activity and that the co-conspirators’ use of weapons was reasonably foreseeable to defendant, the Eleventh

21. *Id.*

22. *Id.*

23. *Id.* at 1176.

24. *Id.*

25. *Id.* at 1176-77.

26. *Id.* at 1178.

27. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2 (2002) (“the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical”).

Circuit turned to the applicability of Amendment 599, which was “a matter of statutory interpretation and an issue of first impression in this circuit.”²⁸ As discussed in the next section of this Article, the Eleventh Circuit found that the district court properly rejected the Amendment 599 argument because the defendant “received weapons enhancements only in connection with the robberies for which he did not receive 18 U.S.C. § 924(c) convictions.”²⁹

B. U.S.S.G. Section 1B1.10: Sentence Reductions Based on Amended Guidelines

U.S.S.G. section 1B1.10(a) provides that

“[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant’s term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2).”³⁰

Section 3582(c)(2) “allows a sentencing court to reduce a prisoner’s term of imprisonment, consistent with the factors set forth in 18 U.S.C. § 3553(a), where the defendant has been sentenced pursuant to a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 944(o).”³¹

Pringle was one of three Eleventh Circuit decisions published in 2003 that concerned an appeal from the denial of a motion to reduce a sentence filed under 18 U.S.C. § 3582(c)(2).³² All three cases—*United States v. Pringle*,³³ *United States v. Brown*,³⁴ and *United States v. Armstrong*,³⁵—agreed that Amendment 599 could be applied retroactively inasmuch as it was listed in U.S.S.G. section 1B1.10(c).³⁶ The court in *Pringle* explained: “Amendment 599 was enacted to clarify under what circumstances a weapons enhancement may be applied to an

28. *Id.* at 1176.

29. *Id.* at 1181.

30. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a) (2002). The amendments listed in section 1B1.10(c) are 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c) (2002).

31. *Pringle*, 350 F.3d at 1176 n.5.

32. *Id.* at 1174.

33. 350 F.3d 1172 (11th Cir. 2003).

34. 332 F.3d 1341 (11th Cir. 2003).

35. 347 F.3d 905 (11th Cir. 2003).

36. *Pringle*, 350 F.3d at 1178-81; *Brown*, 332 F.3d at 1343-46; *Armstrong*, 347 F.3d at 907-09.

underlying offense when the defendant has also received an 18 U.S.C. § 924(c)[³⁷] conviction, which provides separate punishment for the use or possession of a firearm in a violent crime.³⁸ Because that amendment is “commentary that interprets or explains a sentencing guideline, it is binding on federal courts.”³⁹ Of course, whether a sentence reduction is warranted in each case depends on the facts of each case, which is discussed in more detail in connection with the guideline amended by Amendment 599, U.S.S.G. section 2K2.4.⁴⁰

Because the defendant in *Armstrong* also sought application of two other amendments—Amendments 600 and 635, the court went into more detail on the procedural aspects of § 3582(c)(2) motions.⁴¹ As an initial matter, the district court in *Armstrong* ruled that defendant’s § 3582(c)(2) motion was not a successive habeas petition and was therefore not affected by the fact that defendant had previously filed unsuccessful motions for post-conviction relief under 28 U.S.C. § 2255.⁴² The Eleventh Circuit affirmed the district court’s ruling that “the existence of prior motions to amend the sentence is . . . not a bar to a motion under 18 U.S.C. § 3582(c)(2).”⁴³

The court in *Armstrong* then noted that for a sentence to be retroactively reduced under section 3582(c)(2), two requirements must be met.⁴⁴ First, there must be an amendment to the sentencing guidelines that would result in a guideline range lower than the range upon which the defendant was originally sentenced.⁴⁵ Second, the amendment must be listed under U.S.S.G. section 1B1.10(c).⁴⁶

Because Amendment 600 was not listed in section 1B1.10(c), the Eleventh Circuit found that the district court was correct in refusing to reduce defendant’s sentence based on that guideline.⁴⁷ Amendment 599, on the other hand, was listed in section 1B1.10(c) and therefore qualified as an amendment for reduction purposes.⁴⁸ However, the

37. 18 U.S.C. § 924(c) (2000).

38. *Pringle*, 350 F.3d at 1176 (citing *United States v. White*, 305 F.3d 1264, 1266 (11th Cir. 2002)); U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, amend. 599 at 70 (2002)).

39. *Pringle*, 350 F.3d at 1179 (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

40. See U.S. SENTENCING GUIDELINES MANUAL § 2K2.4 (2000).

41. *Armstrong*, 347 F.3d at 907-09.

42. *Id.* at 907; see 28 U.S.C. § 2255 (2000).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 907-08.

48. *Id.* at 908.

Eleventh Circuit affirmed the district court's finding that Amendment 599 did not apply factually in this case because defendant's "sentence imposed on the underlying offenses was not affected by [his] possession of firearms."⁴⁹

The bulk of the opinion in *Armstrong* focused on Amendment 635.⁵⁰ Although Amendment 635 is not listed in section 1B1.10(c), defendant argued that it should be applied retroactively because it was a clarifying amendment that was passed to clarify the commentary of U.S.S.G. section 3B1.2, and Eleventh Circuit precedent holds that clarifying amendments are retroactive.⁵¹ The Eleventh Circuit agreed with the defendant that Amendment 635 was a clarifying amendment, noting that by definition, "[c]larifying amendments do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline."⁵² Indeed, as the court noted, Amendment 635 has been applied retroactively when raised on direct appeal.⁵³ However, the court noted that the cases applying clarifying amendments retroactively had occurred in the context of a direct appeal or a post-conviction petition under 28 U.S.C. § 2255.⁵⁴ "While consideration of Amendment 635 as a clarifying amendment may be necessary in the direct appeal of a sentence or in a petition under § 2255, it bears no relevance to determining retroactivity under § 3582(c)(2)."⁵⁵ Section 3582(c)(2) is "a limited and narrow exception to the rule that final judgments are not to be modified."⁵⁶ That exception applies only when the "sentence of imprisonment was 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission' and §3582(b)."⁵⁷

The court in *Armstrong* joined several of its sister circuits in adopting a "bright-line rule that amendments claimed in § 3582(c)(2) motions may be retroactively applied *solely* where expressly listed under §1B1.10

49. *Id.*

50. *Id.* at 908-09.

51. *Id.* at 908 (citing, *e.g.*, *United States v. Anderton*, 136 F.3d 747, 751 (11th Cir. 1998); *United States v. Howard*, 923 F.2d 1500, 1504 (11th Cir. 1991); *United States v. Marin*, 916 F.2d 1536, 1538 (11th Cir. 1990); *United States v. Scroggins*, 880 F.2d 1204, 1215 (11th Cir. 1989)).

52. *Id.* at 908 n.7 (quoting *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998)).

53. *Id.* (citing *United States v. Boyd*, 291 F.3d 1274 (11th Cir. 2002)).

54. *Id.* at 908.

55. *Id.* at 908-09.

56. *Id.* at 909.

57. *Id.*

(c).⁵⁸ The Eleventh Circuit also agreed with those circuits that had specifically held that clarifying amendments were not an exception to this rule and could only be retroactively applied on direct appeal of a sentence or under a § 2255 motion.⁵⁹

III. CHAPTER TWO: OFFENSE CONDUCT

A. Part A: Offenses Against the Person

1. U.S.S.G. Section 2A3.2. In two cases in 2003, the Eleventh Circuit was called upon to decide which guideline to apply to convictions under 18 U.S.C. § 2422(b)⁶⁰ for using the mail or other means of interstate commerce to knowingly persuade, induce, entice, or coerce a minor “to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense,” or attempt to do so.⁶¹ The sentencing calculations for a § 2422(b) conviction begin with U.S.S.G. section 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).⁶² Section 2G1.1(c)(3), the cross-referencing provision, states:

If the offense did not involve promoting prostitution, and neither subsection (c)(1) nor (c)(2) is applicable, apply § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.⁶³

58. *Id. See, e.g.,* United States v. Perez, 129 F.3d 255, 259 (2d Cir. 1997); United States v. Wyatt, 115 F.3d 606, 608-09 (8th Cir. 1997); United States v. Drath, 89 F.3d 216, 218 (5th Cir. 1996); United States v. Thompson, 70 F.3d 279, 281 (3d Cir. 1995); United States v. Dullen, 15 F.3d 68, 70-71 (6th Cir. 1994); United States v. Avila, 997 F.2d 767, 768 (10th Cir. 1993).

59. *Armstrong*, 347 F.3d at 909 (citing *Drath*, 89 F.3d at 217; *Lee v. United States*, 221 F.3d 1335 (6th Cir. 2000) (unpublished decision)). The court in *Armstrong* found that the same ruling applied to defendant’s attempt to assert a request for a reduction of sentence under Amendment 500, which became effective on November 1, 1993. That amendment was not listed in § 1B1.10(c), but it had been determined to be a clarifying amendment. *Id.* at 909 n.9. The defendant did not assert Amendment 500 in his original § 3582(c)(2) motion, but sought to amend it after he had filed his appeal. The district court found that it lacked jurisdiction to review the request to amend the § 3582(c)(2) motion because the appeal had already been filed. *Id.* The Eleventh Circuit specifically stated that its holding applied to that amendment as well. *Id.*

60. 18 U.S.C. § 2422(b) (2000).

61. *Id.*

62. *See* U.S. SENTENCING GUIDELINES MANUAL app. A (2001).

63. U.S. SENTENCING GUIDELINES MANUAL § 2G1.1(c)(3) (2001).

The Eleventh Circuit in *United States v. Panfil*⁶⁴ addressed the difference between sexual acts, which invoke the harsher section 2A3.2, and sexual contact, which invokes section 2A3.4. The crucial question in *Panfil* was whether defendant's conduct—setting up a meeting with a law enforcement officer, who was posing as a minor girl, in an attempt to engage in oral sex with a minor—constituted an attempted sexual act or attempted sexual contact.⁶⁵ To determine definitions of a sexual act and sexual contact, the court turned to 18 U.S.C. § 2246(2) and (3) as the guideline commentary instructed.⁶⁶ Sexual act means “(B) contact between . . . the mouth and the vulva . . . (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”⁶⁷ Sexual contact means “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”⁶⁸

Based on these definitions, the court held that by attempting to have oral sex with a minor, defendant in *Panfil* attempted a “sexual act,” as opposed to “sexual contact.”⁶⁹ The court also noted that there was no conflict between sections 2A3.2 and 2A3.4 because the latter guideline excludes any conduct that is a “sexual act.”⁷⁰

The court also rejected the argument that the guideline for “sexual acts” could not apply because it required a showing that the defendant “unduly influenced” the victim, and here the victim was an undercover law enforcement officer who was not influenced.⁷¹ “In § 2A3.2, ‘victim’ is a term of art, defined in Commentary Note 1 to include either ‘an individual who . . . had not attained the age of 16 years’ or ‘an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.’”⁷² The court noted that in evaluating “undue influence” when the “victim” is a law enforcement

64. 338 F.3d 1299 (11th Cir. 2003).

65. *Id.* at 1300, 1302.

66. *Id.* at 1302 (referring to section 2A3.2, cmt. n.1 (2001)).

67. 18 U.S.C. § 2246(2) (2000).

68. 18 U.S.C. § 2246(3) (2000).

69. 338 F.3d at 1302-03.

70. *Id.* at 1303.

71. *Id.* at 1303-04.

72. *Id.* at 1303 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A3.2, cmt. n.1 (2001)).

officer, the court focuses on the conduct of the offender.⁷³ Hence, the court held that the district court did not err in applying U.S.S.G. section 2A3.2 to compute Panfil's sentence.⁷⁴

Likewise, in *United States v. Miranda*,⁷⁵ the Eleventh Circuit ruled that section 2A3.2 applied to defendant's conduct of using a computer to attempt to persuade a minor to engage in criminal sexual conduct.⁷⁶ In reversing the district court's application of section 2A3.4, the Eleventh Circuit discussed, at length, defendant's communications via the Internet with two police officers posing as twelve- and thirteen-year-old females, wherein defendant asked one would-be minor if she wanted to have sex and told the other would-be minor how to have sex.⁷⁷ According to the Eleventh Circuit: "The only reasonable construction of Miranda's words . . . is that he wanted to have sexual intercourse with [the persons he believed were minor girls], and, therefore, Miranda's conduct consisted of an attempted sexual act."⁷⁸

In so ruling, the Eleventh Circuit compared this case to *Panfil*, which was decided three months before *Miranda*.⁷⁹ Two differences were noted by the Eleventh Circuit.⁸⁰ First, there was even more evidence concerning Miranda's conduct than there was regarding Panfil's conduct.⁸¹ Second, different versions of section 2A3.2 were applied in the two cases.⁸² "*Panfil* addressed the 2001 version of § 2A3.2, whereas *Miranda* was sentenced under the 2000 version of § 2A3.2. Although the two versions of § 2A3.2 contain substantively different components, *Panfil's* discussion of the definition of 'sexual act' is still relevant because the definition of 'sexual act' remains unchanged."⁸³

The other issue in *Miranda*, an issue of first impression in the Eleventh Circuit, concerned the application of U.S.S.G. section 2A3.2(b)(2)(A)(i), which provides for a two-level specific offense enhancement if "the offense involved the knowing misrepresentation of a participant's [identity] to . . . persuade, induce, entice, or coerce the victim to engage

73. *Id.* (citing *United States v. Root*, 296 F.3d 1222, 1234 (11th Cir. 2002)).

74. *Id.* at 1304.

75. 348 F.3d 1322 (11th Cir. 2003).

76. *Id.* at 1332. See 18 U.S.C. § 2422(b). The 2000 edition of the United States Sentencing Guidelines was applied because *Miranda* committed the offense on October 30, 2001, two days before the effective date of the 2001 guidelines. 348 F.3d at 1323 n.1.

77. *Id.* at 1326-30.

78. *Id.* at 1331.

79. *Id.* at 1332; *Panfil*, 338 F.3d at 1303.

80. *Miranda*, 348 F.3d at 1332.

81. *Id.*

82. *Id.* at 1332 n.11.

83. *Id.*

in prohibited sexual conduct.”⁸⁴ The commentary explains that the person’s identity includes his name, age, occupation, gender, or status “with the intent to . . . persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct.”⁸⁵

The Government in *Miranda* appealed the district court’s refusal to apply this enhancement based on defendant’s misrepresentation of his age.⁸⁶ During his online exchanges, Miranda stated that he was thirty-five years old, whereas he was actually forty years old.⁸⁷ The Government claimed that Miranda’s understatement of his age was material because it was intended to improve his chances of having sex.⁸⁸

Noting that defendant told the arresting officers the wrong age at the time of arrest, the Eleventh Circuit held that the district court did not clearly err in holding that the defendant did not intend to induce a meeting by misrepresenting his age, even though the district court could have as easily reached the contrary conclusion.⁸⁹ Because of this finding, the court stated that it did not need to reach the issue of whether the five-year misrepresentation was material.⁹⁰

2. U.S.S.G. Section 2A4.1: Kidnapping, Abduction, Unlawful Restraint. In *United States v. Torrealba*,⁹¹ defendant was convicted of conspiracy to commit hostage taking,⁹² substantive hostage taking,⁹³ and using and carrying a firearm during and in relation to a crime of violence,⁹⁴ based on the kidnapping of a woman and her two children.⁹⁵ In sentencing the defendant to 220 months of imprisonment on the hostage taking counts,⁹⁶ the district court applied two enhancements found in U.S.S.G. section 2A4.1—one for an inchoate ransom

84. *Id.* at 1333 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A3.2(b)(2)(A)(i) (2000)). See also U.S. SENTENCING GUIDELINES MANUAL § 2A3.4(b)(4)(A) (2000) (containing similar language).

85. *Miranda*, 348 F.3d at 1333 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A3.2, cmt. n.5 (2000) (emphasis supplied by court)). See also U.S. SENTENCING GUIDELINES MANUAL § 2A3.4, cmt. n.6 (2000) (containing similar language).

86. *Miranda*, 348 F.3d at 1333-34.

87. *Id.* at 1333.

88. *Id.*

89. *Id.*

90. *Id.* at 1334.

91. 339 F.3d 1238 (11th Cir. 2003).

92. See 18 U.S.C. § 1203(a) (2000).

93. See *id.*

94. See 18 U.S.C. § 924(c) (2000).

95. 339 F.3d at 1239-40.

96. A 60-month consecutive sentence was imposed on the section 924(c) count. 339 F.3d at 1241 n.4.

demand under U.S.S.G. section 2A4.1(b)(1)⁹⁷ and one for permanent injury from beating under U.S.S.G. section 2A4.1(b)(2)(A).⁹⁸

The Eleventh Circuit affirmed the six-level ransom demand enhancement even though no demand was made.⁹⁹ Relying on Eleventh Circuit precedent¹⁰⁰ and guideline commentary,¹⁰¹ the court in *Torrealba* observed that the ransom enhancement is appropriate if it can be said with “reasonable certainty” that a ransom demand would have been made but for the defendant’s capture.¹⁰²

The Eleventh Circuit also rejected defendant’s argument that the district court should have applied the two-level enhancement found in section 2A4.1(b)(2)(B) for serious bodily injuries, rather than the four-level enhancement found in section 2A4.1(b)(2)(A) for “permanent or life-threatening bodily injur[ies].”¹⁰³ Relying on the guideline’s definitions of the terms “serious bodily injury” and “permanent or life-threatening bodily injury,”¹⁰⁴ the court determined that because of the use of the

97. U.S. SENTENCING GUIDELINES MANUAL § 2A4.1(b)(1) provides that “[i]f a ransom demand or a demand upon government was made, increase by 6 levels.” *Torrealba*, 339 F.3d at 1241 n.7 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A4.1(b)(1) (2002)).

98. *Id.* at 1240-41. U.S. SENTENCING GUIDELINES MANUAL § 2A4.1(b)(2) provides: “(A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.” *Id.* at 1241 n.8 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A4.1(b)(2) (2002)).

99. *Id.* at 1243-44.

100. *United States v. Ferreira*, 275 F.3d 1020 (11th Cir. 2001).

101. Specifically, Application Note Five to § 2A4.1 states that “[i]n the case of a conspiracy, attempt, or solicitation to kidnap, § 2X1.1 (Attempt, Solicitation or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty.” 339 F.3d at 1244 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A4.1, cmt. n.5 (2002)).

102. *Id.* at 1244-45.

103. *Id.* at 1245-46.

104. The court in *Torrealba* observed that the application notes to § 2A4.1 provide that “[d]efinitions of “serious bodily injury” and “permanent or life-threatening bodily injury” are found in the Commentary to § 1B1.1.” *Id.* at 1246 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A4.1, cmt. n.1 (2002)). The commentary to § 1B1.1 then defines these terms as follows:

“Permanent or life-threatening bodily injury” means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.1(g) (2002)).

“Serious bodily injury” means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty;

disjunctive in describing permanent *or* life threatening injuries, the four-level enhancement could be applied if the injuries were permanent, but not “terribly severe.”¹⁰⁵ In this case the victim’s “treating physician opined that her facial symmetry will never be the same as it was prior to the attack and that the nerve damage and scarring she suffered are likely permanent.”¹⁰⁶ These facts were deemed sufficient to warrant the four-level enhancement.¹⁰⁷

B. Part B: Basic Economic Offenses (Including Former Part F: Offenses Involving Fraud or Deceit)

U.S.S.G. section 1B1.11 requires the sentencing court to use the edition of the sentencing guidelines manual that is in effect on the date of sentencing, unless that version would violate the Ex Post Facto Clause,¹⁰⁸ in which case the court should use the edition that is in effect on the day the offense of conviction was committed.¹⁰⁹ Thus, even though U.S.S.G. section 2F1.1 was deleted and its provisions were consolidated into the amended version of section 2B1.1 in November 2001,¹¹⁰ various aspects of section 2F1.1 continued to appear in Eleventh Circuit decisions in 2003.¹¹¹ Because Chapter Two of the guidelines no longer contains Part F (Offenses Involving Fraud or Deceit), and because the cases involving section 2F1.1 are now relevant to guideline calculations under section 2B1.1, the 2003 cases addressing section 2F1.1 are discussed below in connection with Chapter Two, Part B (Basic Economic Offenses).

1. U.S.S.G. Sections 2B1.1 and 2F1.1: Loss Calculations. The general rules for determining fraud loss in conspiracy cases are discussed at length in connection with the relevant conduct guideline—U.S.S.G. section 1B1.3¹¹²—and *United States v. Hunter*.¹¹³

or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.1(i) (2002)).

105. *Id.* at 1246 (quoting *United States v. Price*, 149 F.3d 352, 354 (5th Cir. 1998)).

106. *Id.*

107. *Id.*

108. U.S. CONST. art. I, § 9, cl. 3.

109. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (2002).

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

111. See *infra* notes 112-40.

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

113. 323 F.3d 1314 (11th Cir. 2003), discussed *supra* at section IIA. of this Article.

Nonetheless, at least one important part of the *Hunter* holding bears repeating here because it clarifies the correlation between responsibility for the loss resulting from the fraudulent scheme and knowledge of the scheme.¹¹⁴ As explained in *Hunter*, “[a]ppellants’ mere awareness that [a co-conspirator] was involved in a much larger scheme is not enough to hold them accountable for the activities of the entire conspiracy.”¹¹⁵ Thus, a defendant cannot be held accountable for the entire loss caused by all acts of all of the members of a fraud ring just because that defendant knew he was part of the operation.¹¹⁶ “[T]he Guidelines establish that the fact that the defendant knows about the larger operation, and has agreed to perform a particular act, does not amount to acquiescence in the acts of the criminal enterprise as a whole.”¹¹⁷ Rather, the court must “first determine the scope of the criminal activity [the defendants] agreed to jointly undertake.”¹¹⁸

The Eleventh Circuit discussed other aspects of loss calculations in two other cases in 2003—*United States v. Yeager*,¹¹⁹ which addressed fraud loss calculations under U.S.S.G. section 2F1.1,¹²⁰ and *United States v. Machado*,¹²¹ which discussed theft loss calculations under U.S.S.G. section 2B1.1.¹²²

In *Yeager* defendant was convicted of mail fraud offenses related to distributing pharmaceuticals.¹²³ Defendant had a restricted right to distribute the pharmaceuticals, but he fraudulently diverted that product to non-authorized buyers. The sentencing court enhanced defendant’s sentence based on a loss estimate of \$687,000, which represented defendant’s profits on sales of drugs to unauthorized purchasers.¹²⁴

Noting that “[l]oss is the value of the money, property, or services unlawfully taken,”¹²⁵ the Eleventh Circuit ruled that the “money,

114. *Id.* at 1319.

115. *Id.* at 1321.

116. *Id.* at 1320.

117. *Id.*

118. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2 (1998)).

119. 331 F.3d 1216 (11th Cir. 2003). In *Yeager* the court vacated its prior March 12, 2003 opinion, 2003 WL 1056598, and substituted a new opinion on May 29, 2003, although it did not change the sentencing portion of its opinion. *Id.* at 13.

120. The court in *Yeager* used the 2000 version of the guidelines to avoid *ex post facto* concerns. *Id.* at 1224 n.2.

121. 333 F.3d 1225 (11th Cir. 2003).

122. The court in *Machado* used the 2000 edition of the guidelines. *Id.* at 1226.

123. 331 F.3d at 1219.

124. *Id.* at 1224-25.

125. *Id.* at 1225 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.8 (2000)).

property, or services” that were “unlawfully taken” in this case were “distribution privileges.”¹²⁶ Specifically, the court held that because defendant secretly acted as an unrestricted distributor of a drug, even though he had only been granted a restricted distribution right to certain low-price markets, the proper measure of fraud loss was the value of defendant’s “theft” from the drug supplier of an unrestricted distribution right.¹²⁷ Because the court concluded that the value was the equivalent of the profits made by defendant, the \$687,000 the defendant had made in wrongful profits was a reasonable estimate of the loss (*i.e.*, an estimate of what the supplier could have received but for the fraudulent middleman status of the defendant).¹²⁸

The decision in *Machado* focused on theft loss calculations.¹²⁹ Pursuant to U.S.S.G. section 2B1.1(b)(1), the defendant’s base offense level in a theft case is increased based on the amount of the loss occasioned by the stolen property involved in the offense.¹³⁰ The commentary to section 2B1.1 defines loss as “the value of the property taken, damaged, or destroyed.”¹³¹ The commentary goes on to explain that

“[o]rdinarily, when property is taken . . . the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.”¹³²

However, neither the guideline nor the commentary address whether the market value should be measured by the wholesale or the retail value.¹³³ Thus, the court in *Machado* confronted a question of first impression in the Eleventh Circuit regarding the theft loss calculation, that is, “whether district courts in applying U.S.S.G. § 2B1.1(b)(1) should measure the loss at the retail value or at the loss to the person from whom the goods were stolen[,]” which was the wholesale cost in this case.¹³⁴

126. *Id.*

127. *Id.* at 1225-26.

128. *Id.*

129. 333 F.3d at 1226-28.

130. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2000).

131. *Machado*, 333 F.3d at 1227 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.2 (2000)).

132. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n2 (2000)).

133. *Id.*

134. *Id.* at 1226. Defendant in *Machado* pleaded guilty to conspiracy to receive stolen goods related to the theft of a trailer containing approximately 132,000 pieces of women’s

The district court followed the approach of the Fifth and Eighth Circuits, which focused on the sentencing guidelines' goal of eliminating sentencing disparity among comparable offenses.¹³⁵ The court measured the loss by the retail value of the theft, rather than the wholesale value lost by the victim.¹³⁶ The Eleventh Circuit chose to follow the approach of the First, Sixth, Ninth, and Tenth Circuits which focused "on the particular facts of a case when determining the relevant market valuation[,]" rather than adopting "a universal retail value in calculating loss."¹³⁷ The Eleventh Circuit held that for purposes of computing the amount of the loss under U.S.S.G. section 2B1.1(b)(1), the value of stolen goods should be measured from the perspective of the victim.¹³⁸ Accordingly, the court reversed the district court's calculation of goods based on their retail value, where the goods were stolen from a wholesale dealer and were going to be resold wholesale.¹³⁹ The court noted the concerns about disparate sentencing results voiced in other circuits, but concluded: "Uniformity is no doubt a goal of the sentencing guidelines, but so too are the principles of fairness and accuracy. . . . Utilizing a retail value approach without considering the factual context of the case increases the possibility that some defendants may be over-sentenced for an offense."¹⁴⁰

2. U.S.S.G. Section 2B4.1 (Bribery) versus U.S.S.G. Section 2F1.1 (Fraud). In *United States v. Poirier*,¹⁴¹ defendants were convicted of money-and-property wire fraud in violation of 18 U.S.C. § 1343,¹⁴² as well as conspiracy,¹⁴³ as a result of their participation in a scheme to defraud Fulton County, Georgia, by corrupting the process by which the county selected an underwriter for a bond refunding project.¹⁴⁴ The Government appealed the district court's

underwear. *Id.* (citing 18 U.S.C. § 371 (2000)).

135. *Id.*

136. *Id.* (citing *United States v. Watson*, 966 F.2d 161, 163 (5th Cir. 1992); *United States v. Russell*, 913 F.2d 1288, 1292-93 (8th Cir. 1990)).

137. *Id.* at 1227 (citing *United States v. Hardy*, 289 F.3d 608, 613-14 (9th Cir. 2002); *United States v. Carrington*, 96 F.3d 1, 6 (1st Cir. 1996); *United States v. Williams*, 50 F.3d 863, 864 (10th Cir. 1995); *United States v. Warshawsky*, 20 F.3d 204, 213 (6th Cir. 1994)).

138. *Id.* at 1228.

139. *Id.*

140. *Id.*

141. 321 F.3d 1024 (11th Cir. 2003).

142. 18 U.S.C. § 1343 (2000).

143. *See* 18 U.S.C. § 371 (1997).

144. 321 F.3d at 1027-28. Defendants were also charged with honest-services wire fraud in violation of 18 U.S.C. § 1346, but the jury did not reach a verdict on that charge. *Id.* at 1028.

application of U.S.S.G. section 2F1.1(2000), which covered fraud and deceit, arguing that it should have applied the guideline for commercial bribery and kickbacks, U.S.S.G. section 2B1.4 (2000).¹⁴⁵

The Eleventh Circuit began its analysis of which guideline to apply by referring to the statutory index, which listed two possible guidelines for the offense of conviction (wire fraud).¹⁴⁶ The parties agreed that only one of those guidelines was applicable—section 2F1.1.¹⁴⁷ The commentary to section 2F1.1 specifically provides for the use of other guidelines in certain circumstances, such as for broad statutes (like mail or wire fraud statutes), which “are used primarily as jurisdictional bases for the prosecution of other offenses.”¹⁴⁸ In such cases, another guideline should be used “if ‘the indictment or information setting forth the count of conviction . . . establishes an offense more aptly covered by another guideline.’”¹⁴⁹ The court in *Poirier* concluded that defendant’s actual conduct (“giving and receiving money in exchange for the misappropriation of documents”) “more closely resembled a fraud achieved through bribery than a straight fraud.”¹⁵⁰ Because defendant’s conduct was “more aptly” covered by the commercial bribery guideline (section 2B1.4) than the fraud guideline (section 2F1.1), the Eleventh Circuit vacated

145. *Id.* at 1033. The Eleventh Circuit applied the 2000 version of the guidelines “because it was in effect at the time of sentencing and the version in effect at the time of the offense conduct is not more favorable to the defendants.” *Id.* at 1034 n.8 (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (2000)).

146. *Id.* at 1033.

147. *Id.* The parties and the court agreed that U.S. SENTENCING GUIDELINES MANUAL § 2C1.7 (2000) (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) did not apply. *Id.*

148. *Id.* at 1033-34 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. 14 (2000)). This provision distinguishes *Poirier* from other cases like *United States v. Saavedra*, 148 F.3d 1311 (11th Cir. 1998), in which the Statutory Index to the sentencing guidelines listed only one guideline for the offense conduct, and that guideline contained no applicable cross-references to other guidelines. *Id.* at 1315. The Eleventh Circuit vacated the sentence in *Saavedra* because “[t]here is no provision in the guidelines for borrowing base offense levels from other offense guidelines.” *Id.* at 1316.

The court in *Poirier* also noted that when the guidelines were amended so as to merge § 2F1.1 with § 2B1.1, Application Note 14 was abandoned, but § 2B1.1(c)(3) took its place. *Id.* at 1034 n.8. The new guideline specifies that: “If [certain conditions are not applicable and] the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), [courts should] apply that other guideline.” *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(c)(3) (2002)).

149. *Id.* at 1034 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.14 (2000)).

150. *Id.* at 1034-35 (quoting *United States v. Montani*, 204 F.3d 761, 769 (7th Cir. 2000)).

the sentence and remanded it with instructions to resentence the defendant using section 2B1.4.¹⁵¹

3. U.S.S.G. Section 2B6.1(b)(2): Enhancement for Business of Receiving and Selling Stolen Goods. In *United States v. Saunders*,¹⁵² defendant, who was convicted of possessing with intent to sell motor vehicles with altered vehicle identification numbers,¹⁵³ appealed the imposition of a two-level enhancement under U.S.S.G. section 2B6.1(b)(2)¹⁵⁴ for being “in the business of receiving and selling stolen property.”¹⁵⁵ As an initial matter, the Eleventh Circuit determined that the enhancement focused on “the defendant’s own activities,” and thus, the defendant (not just a co-conspirator) “must have received and sold stolen property” to trigger the enhancement.¹⁵⁶

The Eleventh Circuit then confronted the question of first impression concerning the proper test for applying that enhancement.¹⁵⁷ In the absence of any clarification of the enhancement or the definition of being “in the business” from the commentary, the Eleventh Circuit noted that section 2B1.1(b)(4) contained similar language.¹⁵⁸ That language generated a split among the circuits on the proper test for “whether a defendant, who was not the actual thief, was “in the business” or not” for purposes of the section 2B1.1(b)(4) enhancement.¹⁵⁹ The Fifth, Sixth, and Seventh Circuits used the “fence” test, which “requires proof

151. *Id.* at 1035-36.

152. 318 F.3d 1257 (11th Cir. 2003).

153. *See* 18 U.S.C. § 2321(a) (2000).

154. U.S. SENTENCING GUIDELINES MANUAL § 2B6.1(b)(2) (2001).

155. 318 F.3d at 1261. The court in *Saunders* relied on the sentencing guidelines manual that became effective on November 1, 2001. *Id.* at 1262 n.4. Defendant in *Saunders* was sentenced to eighteen months of imprisonment. *Id.* at 1262. The guideline range with the enhancement was eighteen to twenty-four months of imprisonment. The guideline range without the enhancement was twelve to eighteen months of imprisonment. *Id.* at 1262 n.2. Although that same sentence could have been imposed with or without the enhancement, the Eleventh Circuit agreed to consider the merits of the appeal because the district court “did not explicitly state that it would have sentenced [the defendant] to eighteen months regardless of the outcome of the enhancement dispute.” *Id.*

156. *Id.* at 1263 (quoting *United States v. Maung*, 267 F.3d 1113, 1119 (11th Cir. 2001)).

157. *Id.* at 1262-64.

158. *Id.* Section 2B1.1(b)(4) provides: “If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.” *Id.* at 1263 n.8 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(4) (2001)).

159. *Id.* at 1263 (quoting *Maung*, 267 F.3d at 1118). Courts “generally have agreed that a thief who sells goods that he himself has stolen is not ‘in the business of receiving and selling stolen property.’” *Id.* at 1263 n.7 (quoting *Maung*, 267 F.3d at 1118).

that the defendant was a person who bought and sold stolen property, and thereby encouraged others to commit property crimes.”¹⁶⁰ The First, Third, and Ninth Circuits (and perhaps the Second Circuit), employed the “totality of the circumstances” test, which uses a “case by case approach with emphasis on the “regularity and sophistication of a defendant’s [criminal] operation.””¹⁶¹ The Sentencing Commission resolved the split by revising the commentary to section 2B1.1, effective November 1, 2001, and adopting the totality of the circumstances approach.¹⁶²

“Although definitions that appear in one section of the guidelines ‘are not designed for general applicability,’ we may also look ‘on a case by case basis’ to similar words, phrases or terms used in other sections for help with interpretation.”¹⁶³ Given that the Sentencing Commission did not also revise section 2B6.1(b)(2) or use the same clarifying words in that section, the court declined to “draw directly” from the revised commentary to section 2B1.1 in construing section 2B6.1(b)(2).¹⁶⁴ Nonetheless, based on its own analysis, the Eleventh Circuit adopted the totality of the circumstances test, with “emphasis on the regularity and sophistication of a defendant’s operation.”¹⁶⁵ The court added that the defendant must personally receive and sell stolen property to qualify for the enhancement.¹⁶⁶

The Eleventh Circuit then turned to the facts of the case to apply the totality of the circumstances test.¹⁶⁷ Among the facts that demonstrated that defendant received and sold goods and acted as a “fence” were:

160. *Id.* at 1263 (quoting *Maung*, 267 F.3d at 1118 (citations omitted)).

161. *Id.* (quoting *Maung*, 267 F.3d at 1118 (citations omitted)).

162. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 at 182 (2001)).

After the amendment, the commentary instructs courts to consider a “non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property”:

(A) The regularity and sophistication of the defendant’s activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant’s activities encouraged or facilitated other crimes.

(D) The defendant’s past activities involving stolen property.

Id. at 1263-64 n.8 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.4).

163. *Id.* at 1264 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.2 (2001)).

164. *Id.*

165. *Id.* at 1265 (quoting *United States v. St. Cyr*, 977 F.2d 698, 703 (1st Cir. 1992)).

166. *Id.* at 1267.

167. *Id.* at 1269-73.

she actually conveyed title to stolen property and participated in transporting and delivering the vehicles to purchasers; some of the stolen vehicles were titled in the defendant's name; and she possessed the vehicles.¹⁶⁸ The evidence of the type of regularity and sophistication that justified imposition of the section 2B6.1(b)(2) enhancement included: the defendant's conduct spanned almost five years; the loss was \$259,204; and the scheme involved altering paperwork, registration in a state which avoided a title requirement, and the employment of at least one other co-conspirator.¹⁶⁹ Hence, the Eleventh Circuit affirmed the application of the enhancement in *Saunders*.¹⁷⁰

C. Part C: Offenses Involving Public Officials

U.S.S.G. section 2C1.3¹⁷¹ (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) is a guideline not often discussed in Eleventh Circuit case law. Indeed, it appears that *United States v. Hasner*¹⁷² is the only published Eleventh Circuit decision applying that guideline. Both defendants in *Hasner* were convicted of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, and mail fraud in violation of 18 U.S.C. § 1341.¹⁷³ Hasner was also convicted of money laundering in violation of 18 U.S.C. § 1957, and Fisher was convicted for making false statements in violation of 18 U.S.C. § 1001. The convictions arose out of a scheme in which defendant Hasner (the Chairman of the Palm Beach County Finance Authority) and defendant Fisher (a real estate agent/consulting firm owner) would earn secret fees as a result of a real estate deal involving the finance authority.¹⁷⁴ The district court relied on U.S.S.G. section 2C1.3 for the base offense level "because the gravamen of the misconduct was the concealment of Hasner's financial interest."¹⁷⁵ Dissatisfied with the sentencing ranges because they "trivialized" the misconduct, the district court imposed

168. *Id.* at 1270-73.

169. *Id.* at 1273.

170. *Id.*

171. U.S. SENTENCING GUIDELINES MANUAL § 2C1.3 (2002).

172. 340 F.3d 1261 (11th Cir. 2003).

173. *Id.* at 1264.

174. *Id.* at 1264-67.

175. *Id.* at 1268.

upward departures.¹⁷⁶ Both defendants and the Government appealed.¹⁷⁷

The Government argued that the district court should have applied section 2C1.7, instead of section 2C1.3, to determine the base offense level.¹⁷⁸ Defendant argued that the district court erred by imposing the four-level enhancement under Application Note Fifteen of U.S.S.G. section 2B1.1.¹⁷⁹ The Eleventh Circuit noted that the Statutory Index lists two guidelines as applicable to the statute of conviction (18 U.S.C. § 1341): section 2B1.1, which provides for a base offense level of six for various theft crimes, and section 2C1.7, which provides for a base offense level of ten for fraud involving the deprivation of the intangible right to the honest services of public officials.¹⁸⁰ Between the two, the Eleventh Circuit stated that section 2C1.7 was “the most applicable to the offense of conviction.”¹⁸¹

The court then noted that section 2C1.7 has a cross-referencing provision (subsection(c)(4)), which provides that, “if the offense is covered more specifically under section 2C1.3, the guideline section applicable to conflict of interest offenses,” then section 2C1.3 should be applied.¹⁸² Hence, because the offense primarily involved Hasner’s failure to disclose his conflicts of interest, the district court did not clearly err in applying section 2C1.3.¹⁸³ The Eleventh Circuit nonetheless vacated the sentence because the district court relied on section 2B1.1 to enhance it, despite the fact that section 2C1.3 has no cross-reference to section 2B1.1.¹⁸⁴

D. Part D: Offenses Involving Drugs

U.S.S.G. section 2D1.1—the guideline applicable to drug manufacturing, importing, exporting, trafficking, and possessing with intent to

176. *Id.* Defendant Hasner was sentenced to fourteen months of imprisonment. Defendant Fisher was sentenced to six months of imprisonment. Defendant Fisher’s guideline range with the enhancement was six to twelve months of imprisonment. The guideline range without the enhancement was zero to six months of imprisonment. *Id.* Although that same sentence could have been imposed with or without the enhancement, the Eleventh Circuit agreed to consider the merits of the appeal because the district court “did not explicitly say it would have imposed the same sentence without the enhancement.” *Id.* at 1276 n.6.

177. *Id.* at 1268.

178. *Id.* at 1276.

179. *Id.* at 1275-76.

180. *Id.* at 1276.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

commit these offenses, as well as attempting or conspiring to do so—contains several enhancements.¹⁸⁵ The Eleventh Circuit examined two such enhancements in 2003—the captain enhancement found in U.S.S.G. section 2D1.1(b)(2)(B) and the risk of harm to a minor enhancement contained in U.S.S.G. section 2D1.1(b)(5)(C).¹⁸⁶

In *United States v. Rendon*,¹⁸⁷ the Eleventh Circuit was called upon to determine what constitutes a “captain” for purposes of section 2D1.1(b)(2)(B), which provides for a two-level sentence enhancement “[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which . . . the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance.”¹⁸⁸ In *Rendon* defendant was in charge of a small speedboat, commonly called a “go-fast” boat, that was transporting drugs.¹⁸⁹ He argued that the term “captain” refers to the person listed as a captain on a ship’s manifest.¹⁹⁰ The Eleventh Circuit disagreed, noting that for purposes of the section 2D1.1(b)(2)(B) enhancement, other circuits have not adopted such a rigid definition of the term captain.¹⁹¹ Instead of giving an exact definition of “captain” for section 2D1.1(b)(2)(B) purposes, the Eleventh Circuit stated that “the facts of this case evidence that Rendon was the captain in an employment, navigational, and operational sense.”¹⁹² The facts noted by the Eleventh Circuit in support of this conclusion included: defendant had “identified himself as the captain to boarding Coast Guard personnel” and his co-defendants “considered him to be the

185. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2001).

186. The Eleventh Circuit also addressed section 2D1.1 in *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003), albeit indirectly. Defendant in *Pressley* appealed the denial of his motion for downward departure. *Id.* at 1208. One of the grounds for the motion was that the amount of drugs attributable to the defendant substantially overstated the seriousness of the drug offense. *Id.* at 1216-18. Because *Pressley* centered on the departure guideline, that case is discussed in the section of this Article discussing departures under Chapter Five, Part K of the United States Sentencing Guidelines, *infra* notes 608-42.

187. 354 F.3d 1320 (11th Cir. 2003).

188. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(2) (2001).

189. 354 F.3d at 1329.

190. *Id.*

191. *Id.* (citing *United States v. Senn*, 129 F.3d 886, 896-97 (7th Cir. 1997) (concluding that a defendant need only “act as” a captain to warrant sentence enhancement under section 2D1.1(b)(2)(B) and that no particular training or licensure is required to justify the designation); *United States v. Guerrero*, 114 F.3d 332, 346 (1st Cir. 1997) (rejecting defendant’s assertion that section 2D1.1(b)(2)(B) applies only to offense participants possessing “special navigational rank or skills”).

192. *Id.*

captain because he not only navigated the boat directly or indirectly and was the only crew member who knew its course, but also he had hired the crew and directed their operations on board.¹⁹³

The Eleventh Circuit also rejected defendant's argument that the drugs had to actually be imported for the enhancement to apply.¹⁹⁴ Noting that the general heading of section 2D1.1—Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy—indicates that the adjustments therein apply to substantive offenses, as well as attempt and conspiracy offenses, the court concluded that

when the factual predicate in § 2D1.1(b)(2)(B) is satisfied, the enhancement is appropriate. In this case, there was sufficient evidence that Rendon was captain of a vessel carrying a controlled substance and that he conspired to unlawfully import a controlled substance. It simply does not matter that his go-fast boat was stopped before the actual importation was completed.¹⁹⁵

The six-level sentencing enhancement set forth in U.S.S.G. section 2D1.1(b)(5)(C) was the court's focus in *United States v. Florence*.¹⁹⁶ That enhancement applies "[i]f the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent."¹⁹⁷ The application of that enhancement generated a question of first impression in *Florence*: "whether U.S.S.G. § 2D1.1(b)(5)(C), which provides for a six-level sentencing enhancement when the offense involved the manufacture of methamphetamine and created a substantial risk of harm to the life of

193. *Id.*

194. *Id.* at 1329-30.

195. *Id.* In affirming the application of the captain enhancement, the Eleventh Circuit distinguished *United States v. Chastain*, 198 F.3d 1338 (11th Cir. 1999), *cert. denied*, 532 U.S. 966 (2001). *Id.* at 1330-31 n.7. In *Chastain* the court reversed a two-level enhancement under section 2D1.1(b)(2)(A), which applies "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance." 198 F.3d at 1344; U.S. SENTENCING GUIDELINES MANUAL section 2D1.1(b)(2)(A)(2001). Although the general heading of section 2D1.1 included attempt and conspiracy offenses, the specific language in section 2D1.1(b)(2)(A)—"air carrier was used to import or export"—was held to mean a completed importation or exportation, not just an incomplete attempt. *Chastain*, 198 F.3d at 1353. The court observed that "[t]he factual predicate in § 2D1.1(b)(2)(A) was not met in *Chastain* because the defendant *had not used the plane to import* the controlled substance. In contrast, § 2D1.1(b)(2)(B) imposes the enhancement based on the *role* of the defendant in the subject importation or exportation." *Rendon*, 354 F.3d at 1331 n.7 (emphasis supplied by court).

196. 333 F.3d 1290 (11th Cir. 2003).

197. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(5)(C) (2001).

a minor, requires the sentencing court to identify a specific minor placed at risk of harm.”¹⁹⁸

In the absence of any Eleventh Circuit precedent construing section 2D1.1(b)(5)(C), the court looked to *United States v. Gonzalez*,¹⁹⁹ which analyzed a similar enhancement found in U.S.S.G. section 3C1.2 for “recklessly creat[ing] a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.”²⁰⁰ In *Gonzalez* the court upheld the imposition of the section 3C1.2 enhancement because

the defendant’s actions placed at substantial risk of harm persons residing on the street or persons who potentially could be present on the street. . . . Thus, *Gonzalez* indicates that a district court does not have to identify any specific person placed at risk when it imposes an enhancement under § 3C1.2.²⁰¹

The court in *Florence* held that the analysis in *Gonzalez* was applicable to section 2D1.1(b)(5)(C).²⁰² However, the court cautioned that “[a]lthough the district court is not required to identify a specific minor, it must still make a finding that the defendant’s actions placed a minor at risk.”²⁰³ The Eleventh Circuit then concluded that the district court’s findings—“that minors were staying at the hotel where Florence was manufacturing methamphetamine and that the fire occurred at approximately 1:00 A.M., an hour when hotel guests are normally in their rooms”—justified application of the enhancement.²⁰⁴

*E. Part G: Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity*²⁰⁵

Defendant in *United States v. Dodds*²⁰⁶ was convicted of knowingly possessing material that contained images of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and knowingly receiving obscene pictures, in violation of 18 U.S.C. § 1462.²⁰⁷ In sentencing defendant

198. 333 F.3d at 1291.

199. 71 F.3d 819 (11th Cir. 1996).

200. 333 F.3d at 1292-93 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3C1.2 (2001)).

201. *Id.* at 1293 (citing *Gonzalez*, 71 F.3d at 837).

202. *Id.*

203. *Id.*

204. *Id.*

205. The guidelines found in Chapter Two, Part G, were also discussed above in connection with Chapter Two, Part A: Offenses Against the Person.

206. 347 F.3d 893 (11th Cir. 2003).

207. *Id.* at 895.

pursuant to the section 1492 charge, the district court imposed the four-level enhancement under U.S.S.G. section 2G2.2(b)(3), which applies “[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence.”²⁰⁸

The Eleventh Circuit observed that U.S.S.G. section 2G3.1, which applies to convictions under section 1492, provides:

“If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or § 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.”²⁰⁹

The Eleventh Circuit went on to note that “[a]lthough the cross-reference in § 2G3.1 makes clear that either § 2G2.2 or § 2G2.4 should be applied if the offense is one ‘involving the sexual exploitation of a minor,’ it does not provide much guidance as to which guideline should be applied.”²¹⁰ The court therefore sought guidance from the text and history of the guidelines, as well as from a Seventh Circuit case, which indicated that “§ 2G2.2 was meant to punish crimes related to the trafficking of child pornography, while § 2G2.4 is reserved for punishing those who merely possess child pornography.”²¹¹ Accordingly, the Eleventh Circuit held that “when a district court applies § 2G3.1(c)(1)’s cross-reference, sentencing is appropriate under § 2G2.2 only if the government can show receipt with the intent to traffic.”²¹² Concerning the necessary proof, the court cautioned that intent to traffic will not usually be established by simply showing that the defendant possessed a large number of illegal images.²¹³ Although the Eleventh Circuit resolved the definition-

208. *Id.* at 900 n.10 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2001)). The Eleventh Circuit observed that “[t]he general rule is that a defendant is sentenced under the version of the Guidelines in effect on the date of sentencing, barring any *ex post facto* concerns.” *Id.* at 900 n.9 (citing *United States v. Bailey*, 123 F.3d 1381, 1403 (11th Cir. 1997)). Because U.S.S.G. section 2G2.2 and section 2G2.4 were recently amended, “the applicable guidelines are those that were in effect on the date of sentencing, and not the amended guidelines. In this discussion, we refer to the guidelines as they stood before they were amended.” *Id.*

209. *Id.* at 900-01 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G3.1(c)(1) (2001)).

210. *Id.* at 901.

211. *Id.* at 901-02 (citing *United States v. Sromalski*, 318 F.3d 748 (7th Cir. 2003); U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 372 (2003)).

212. *Id.* at 902.

213. *Id.* at 902 n.12.

al question, it was not prepared to handle the factual questions involved in applying the correct guideline in the first instance.²¹⁴ Hence, the Eleventh Circuit vacated the sentence and remanded the case to the district court for resentencing.²¹⁵

*United States v. Whitesell*²¹⁶ presented yet another definitional question of first impression in the Eleventh Circuit. Defendant was convicted of possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).²¹⁷ The appropriate sentencing guideline for that offense is U.S.S.G. section 2G2.4, which instructs the sentencing court to cross-reference section 2G2.1 “[i]f the offense involved causing, transporting, permitting, or offering . . . a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.”²¹⁸ Section 2G2.4 does not explain what conduct constitutes “causing” a minor to engage in sexually explicit conduct.²¹⁹ The Eleventh Circuit rejected the definition of causing developed by the First Circuit, which “requires that a defendant have physical contact with or personally photograph the victim.”²²⁰ Instead, the Eleventh Circuit adopted the dictionary definition of “causing,” that is: “producing an effect, result, or consequence” or “being responsible for an action or result.”²²¹ Applying that definition, the court held that the facts supported a finding that defendant “caused” a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct because the defendant boasted that he coaxed the victim into photographing herself over a period of time.²²² Thus, the Eleventh Circuit affirmed the imposition of a sentence enhancement under U.S.S.G. section 2G2.4(c)(1).²²³

F. Part K: Offenses Involving Public Safety—Firearms

1. U.S.S.G. Section 2K2.1(a)(6). Defendant in *United States v. Edmonds*²²⁴ was convicted of possession of a firearm with an obliterated

214. *Id.* at 902.

215. *Id.*

216. 314 F.3d 1251 (11th Cir. 2002).

217. *Id.* at 1252.

218. *Id.* at 1255 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.4(c)(1) (2000)).

219. *Id.*

220. *Id.* (citing *United States v. Chapman*, 60 F.3d 894, 900 n.8 (1st Cir. 1995)).

221. *Id.* (quoting WEBSTER'S II NEW COLLEGE DICTIONARY 177 (1995)).

222. *Id.* at 1256.

223. *Id.*

224. 348 F.3d 950 (11th Cir. 2003).

ed serial number²²⁵ and was sentenced pursuant to U.S.S.G. section 2K2.1.²²⁶ Defendant appealed the application of U.S.S.G. section 2K2.1(a)(6), which sets the base offense level at fourteen if the defendant was a “prohibited person at the time [he] committed the instant offense.”²²⁷ A “prohibited person” includes a person “who is an unlawful user of or addicted to any controlled substance.”²²⁸

The Eleventh Circuit affirmed the enhancement, holding that “[t]he Government presented reliable and specific testimony showing [that defendant’s] unlawful use of marijuana was regular, ongoing, and contemporaneous with the commission of the offense” of conviction.²²⁹ The court noted, though, that “the government does not have to prove the defendant was under the influence of a controlled substance at the time of his arrest. Instead, the government must show the defendant was an ‘unlawful user’ of a controlled substance during the same time period as the firearm possession.”²³⁰

2. U.S.S.G. Section 2K2.1(b)(4). In sentencing defendant for firearm-related offenses, the district court in *United States v. Ortiz*²³¹ found that defendant obliterated serial numbers from guns, thereby invoking the two-level enhancement under U.S.S.G. section 2K2.1(b)(4).²³² The Eleventh Circuit affirmed the district court’s finding based on the evidence in the record. In so ruling, the Eleventh Circuit also rejected the defendant’s claim that *Apprendi v. New Jersey*²³³ required a jury finding for application of a sentence enhancement under U.S.S.G. section 2K2.1(b)(4).²³⁴ The court reasoned that *Apprendi* did

225. See 18 U.S.C. § 922(k) (2000).

226. 348 F.3d at 951.

227. *Id.* at 953 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6) (2002)).

228. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6), cmt. n.6; 18 U.S.C. § 922(g)(3) (2000)). Without addressing the issue, the Eleventh Circuit assumed, for purposes of this appeal, that “unlawful user of” a controlled substance “refers to the ingestion and consumption of drugs, and not the selling of drugs.” *Id.* The court based this assumption on the fact that the parties made the same assumption. *Id.*

229. *Id.* at 951, 953 (relying on *United States v. Bernardine*, 73 F.3d 1078, 1082 (11th Cir. 1996) (holding that to be an “unlawful user of” marijuana a defendant’s use must be “ongoing and contemporaneous with the commission of the offense”).

230. *Id.* at 953.

231. 318 F.3d 1030 (11th Cir. 2003).

232. *Id.* at 1039.

233. 530 U.S. 466 (2000). In *Apprendi* the Supreme Court held, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

234. *Ortiz*, 318 F.3d at 1039.

not apply because defendant's statutory maximum was not increased by the guideline enhancement, and, in any event, Eleventh Circuit precedent has held that "*Appendi* does not apply to calculations under the Sentencing Guidelines."²³⁵

In *United States v. Adams*,²³⁶ the Eleventh Circuit addressed a question of first impression concerning the application of U.S.S.G. section 2K2.1(b)(4), which provides for a two-level sentence enhancement for offenses involving stolen firearms.²³⁷ The district court applied that enhancement in sentencing the defendant for possession of a stolen firearm in violation of 18 U.S.C. § 922(j).²³⁸ Seven other circuits had already dealt with the question of whether the application of the enhancement for possessing a stolen firearm constituted impermissible double counting when the offense of conviction involved a stolen firearm.²³⁹ The Eleventh Circuit decided to join the majority of its sister circuits in holding that the application of the two-level enhancement under subsection (b)(4) is appropriate unless the defendant's base offense level is determined under subsection (a)(7).²⁴⁰

The Eleventh Circuit explained that the defendant's base offense level was established by U.S.S.G. section 2K2.1(a)(2) because he committed the offense after sustaining at least two felony convictions.²⁴¹ The court observed that section 2K2.1 provides that if the base offense level is determined under section 2K2.1(a)(7), the two-level enhancement of section 2K2.1(b)(4) does not apply because the base offense level under section 2K2.1(a)(2) "takes into account that the firearm or ammunition was stolen."²⁴² While the guidelines specifically exempt "defendants whose base offense level is determined under subsection (a)(7), no such exception is created for defendants whose base offense level is determined under subsection (a)(2)."²⁴³ Section 2K2.1(a)(2) does not account for whether a firearm was stolen, but only for a defendant's criminal

235. *Id.*

236. 329 F.3d 802 (11th Cir. 2003).

237. *Id.* at 803.

238. *Id.*

239. *Id.* at 803-04.

240. *Id.* (citing *United States v. Goff*, 314 F.3d 1248, 1249-50 (10th Cir. 2003); *United States v. Raleigh*, 278 F.3d 563, 566-67 (6th Cir.), *cert. denied*, 535 U.S. 1119 (2002); *United States v. Shepardson*, 196 F.3d 306, 311-14 (2d Cir. 1999); *United States v. Hawkins*, 181 F.3d 911, 912-13 (8th Cir. 1999); *United States v. Brown*, 169 F.3d 89, 93 (1st Cir. 1999); *United States v. Luna*, 165 F.3d 316, 322-23 (5th Cir. 1999); *United States v. Turnipseed*, 159 F.3d 383, 385-86 (9th Cir. 1998)).

241. *Id.* at 804.

242. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.1, cmt. n.12 (2002)).

243. *Id.*

history.²⁴⁴ Consequently, the “plain language” of the sentencing guidelines undercut the defendant’s double-counting argument.

3. Amendment 599. Effective November 1, 2000, Amendment 599 changed the commentary to U.S.S.G. section 2K2.4.²⁴⁵ The three published Eleventh Circuit decisions addressing that amendment in 2003 have been discussed in connection with U.S.S.G. section 1B1.10, which provides for the retroactive application of Amendment 599 by way of a motion to reduce the sentence under 18 U.S.C. § 3582(c)(2). The substantive aspects of those cases, as they relate to the firearms guidelines found in Chapter Two, Part K, are addressed here.²⁴⁶

Amendment 599 was enacted to “clarify under what circumstances a weapons enhancement may properly be applied to an underlying offense when the defendant has also been convicted for the use or possession of a firearm pursuant to 18 U.S.C. § 924(c), which carries a separate and consecutive punishment for firearm use.”²⁴⁷ Amendment 599 “expands the commentary of U.S.S.G. § 2K2.4, which addresses the use of a firearm in relation to certain crimes.”²⁴⁸ The purpose of Amendment 599 is “to clarify under what circumstances defendants sentenced for

244. *Id.*

245. See U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 599 (2002).

246. Application Note Two to Section 2K2.1, as amended by Amendment 599, now provides:

If a sentence under this guideline [*i.e.*, 18 U.S.C. § 924(c)] is imposed in conjunction with a sentence for an underlying offense [*i.e.*, armed robbery], do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense [*i.e.* robbery]. A sentence under this guideline *accounts for any explosive or weapon enhancement for the underlying offense of conviction*, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the *underlying offense*, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2, amend. 599 (2002).

247. *Pringle*, 350 F.3d at 1179 (citing U.S. SENTENCING GUIDELINES MANUAL supp. to app. C at 70 (2002)).

248. *Armstrong*, 347 F.3d at 908 n.4.

violations of 18 U.S.C. § 924(c) . . . may receive weapon enhancements contained in the guidelines for those other offenses.”²⁴⁹

The Eleventh Circuit held that the retroactive amendment did not apply factually in *Armstrong* because defendant’s “sentence imposed on the underlying offenses was not affected by [his] possession of firearms.”²⁵⁰ In determining whether Amendment 599 applied in *Pringle*, the court turned to the language of the amendment.²⁵¹ The court also noted that Amendment 599 was adopted to avoid “duplicative punishment” and to “prevent ‘double counting’ for firearms use in any *one criminal event*.”²⁵² Thus, the amendment would allow for weapons enhancements for all robberies, except the robbery that served as the basis for the defendant’s § 924(c) conviction.²⁵³ Because the defendant “received weapons enhancements only in connection with the robberies for which he did not receive 18 U.S.C. § 924(c) convictions,” the Eleventh Circuit held that the district court properly rejected the Amendment 599 argument.²⁵⁴

Brown was the only case in which the Eleventh Circuit found that Amendment 599 applied retroactively.²⁵⁵ Defendant pleaded guilty to using or carrying a firearm “during and in relation to any crime of violence or drug trafficking crime,” in violation of 18 U.S.C. § 924(c), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).²⁵⁶

U.S.S.G. section 2K2.4 applied to sentencing of a section 924(c) offense; U.S.S.G. section 2K2.1 applied to sentencing of a section 922(g) offense.²⁵⁷ One of the specific offense characteristics of that guideline is found in section 2K2.1(b)(5), which adds four offense levels “[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.”²⁵⁸ The Eleventh Circuit held that under these circumstances, “the retroactively applicable

249. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL supp. to app. C at 70). *See also Pringle*, 350 F.3d at 1179.

250. *Armstrong*, 347 F.3d at 908.

251. *Pringle*, 350 F.3d at 1179-80.

252. *Id.* at 1180 (citing U.S. SENTENCING GUIDELINES MANUAL supp. to app. C at 70 (2002)) (emphasis supplied by court).

253. *Id.*

254. *Id.* at 1181.

255. *Brown*, 332 F.3d at 1342.

256. *Id.*

257. *Id.* at 1343.

258. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(5) (2002)).

Amendment 599 to the Sentencing Guidelines prohibits enhancing the sentence for the felon-in-possession count with the U.S.S.G. § 2K2.1(b)(5) specific offense characteristic for using a firearm in connection to another felony.”²⁵⁹

G. Part L: Offenses Involving Immigration, Naturalization, and Passports

1. U.S.S.G. Section 2L1.2: Unlawfully Entering or Remaining in the United States. The 2001 amendment to U.S.S.G. section 2L1.2 generated several cases of first impression in the Eleventh Circuit. Section 2L1.2 governs the sentencing of previously deported aliens who re-enter the United States illegally and are convicted under 8 U.S.C. § 1326.²⁶⁰ Section 2L1.2(a) provides for a base offense level of eight.²⁶¹ Under subsection (b), the sentence is then subject to enhancement if the prior deportation followed a felony conviction of a type specified in Section 2L1.2(b).²⁶²

Before 2001, U.S.S.G. section 2L1.2 required a sixteen-level enhancement if the defendant had previously been convicted “for an aggravated felony.”²⁶³ Effective November 1, 2001, Amendment 632 changed the guideline by establishing “more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant.”²⁶⁴ The current version of section 2L1.2(b) provides for the following enhancements:

259. *Id.* at 1342. In so ruling, the Eleventh Circuit noted that [p]rior to Amendment 599, the relevant portion of U.S.S.G. § 2K2.4 Application Note 2 provided that “[w]here a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use or discharge of an explosive or firearm . . . is not to be applied in respect to the guideline for the underlying offense.”

Id. at 1344 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2 (1998)). The Eleventh Circuit “interpreted the term ‘underlying offense’ to mean ‘crime of violence’ or ‘drug trafficking offense,’ the two explicit bases for a § 924(c) conviction.” *Id.* (quoting *United States v. Flennory*, 145 F.3d 1264, 1268-69 (11th Cir. 1998)). However, the court in *Brown* stated that “Amendment 599 abrogated *Flennory* to the extent that the new application note expanded the definition of underlying offense to include the relevant conduct punishable under U.S.S.G. § 1B1.3.” *Id.* at 1345 n.6.

260. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2002).

261. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2002).

262. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b) (2002).

263. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2000).

264. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, amend. 632 (2001).

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase, by 4 levels.²⁶⁵

Amendment 632 was adopted in response to concerns that section 2L1.2 resulted in “disproportionate penalties . . . because the breadth of the definition of ‘aggravated felony’ . . . means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault.”²⁶⁶

Despite the graduated enhancements developed to alleviate the concerns about different types of prior convictions receiving a blanket enhancement of sixteen levels, not all concerns were alleviated. For example, in *United States v. Ortega*,²⁶⁷ defendant appealed the district court’s denial of his motion for downward departure.²⁶⁸ As an initial matter, the Eleventh Circuit decided that it could review the district court’s decision because the district court refused to depart downward based on its belief that it lacked authority to do so.²⁶⁹

The Eleventh Circuit then examined whether the sentencing court lacked authority to depart downward after applying the sixteen-level enhancement under U.S.S.G. section 2L1.2 for a prior drug trafficking conviction.²⁷⁰ Defendant argued that the guideline failed to take into account the differences in the severity of aggravated felonies, such that

265. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2001).

266. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, amend. 632 (2001).

267. 358 F.3d 1278 (11th Cir. 2003).

268. *Id.* at 1279.

269. *Id.*

270. *Id.*

murder and drug trafficking were treated the same.²⁷¹ The Eleventh Circuit stated:

While the Sentencing Commission determined that it was not fair for someone convicted of simple assault to receive the same increase as someone convicted of murder, it also determined that a drug trafficking crime for which the sentence exceeded thirteen months was serious enough to warrant a sixteen level enhancement.²⁷²

The court also pointed out that “the Sentencing Commission specifically deleted the application note included in the 2000 Sentencing Guidelines that previously allowed for downward departures based upon seriousness of the aggravated felony.”²⁷³ Finding that “the mitigating circumstance” that the defendant sought to apply was adequately considered in the formulation of Amendment 632, the Eleventh Circuit dismissed the appeal because the district court correctly ruled that it did not have the authority to depart downward based on this factor.²⁷⁴

The Eleventh Circuit analyzed and interpreted some of the enhancements contained in the amended version of section 2L1.2(b) in six published decisions in 2003. Under section 2L1.2(b)(1)(A), seven categories of offenses invoke the sixteen-level enhancement.²⁷⁵ Three of these categories—drug trafficking offenses for which the sentence imposed exceeded thirteen months, crimes of violence, and alien smuggling offenses committed for profit—were addressed in published Eleventh Circuit cases in 2003.

A prior “drug trafficking offense” will justify a sixteen-level increase under section 2L1.2(b)(1)(A)(i), if the offense resulted in a sentence of more than thirteen months.²⁷⁶ If, however, it resulted in a sentence of thirteen months or less, it requires a twelve-level enhancement.²⁷⁷ For purposes of these enhancements, the guidelines define a “drug trafficking offense” as “an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of

271. *Id.*

272. *Id.* at 1280 (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2001)).

273. *Id.* at 1280 n.4 (comparing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 background (2000), with U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 background (2001)).

274. *Id.* at 1280 (citing U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2001)).

275. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2001).

276. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (2001).

277. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(B) (2001).

a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.²⁷⁸

The sixteen-level enhancement for a prior drug trafficking offense was discussed in two cases—*United States v. Madera-Madera*²⁷⁹ and *United States v. Orihuela*.²⁸⁰ The twelve-level enhancement was at issue in *United States v. Anderson*.²⁸¹ In *Madera-Madera* the prior drug offense was a Georgia state conviction for possession of more than twenty-eight grams of methamphetamine.²⁸² Even though the three-tiered Georgia statute called the offense “possession,” the Eleventh Circuit deemed it a “drug trafficking offense” because the Sentencing Commission “defined drug trafficking by the type of conduct prohibited by the state statute[,]” rather than by its elements.²⁸³ Thus, the Eleventh Circuit phrased the question as “whether the federal definition of drug trafficking in the Guidelines is satisfied by Georgia’s drug trafficking offense which punishes possession of a significant, designated quantity of drugs.”²⁸⁴ The court concluded that the Georgia statute does satisfy the drug trafficking definition “because Georgia’s three-tiered scheme treats an elevated amount of drugs as equivalent to an intent to distribute and thereby traffic.”²⁸⁵ The Eleventh Circuit reflected that this conclusion was consistent with the purpose of the 2001 amendments, which was “to ensure that those illegal alien defendants with *more severe* prior offenses received *more severe* sentences.”²⁸⁶

Likewise, in *Orihuela*, the court ruled, as a matter of first impression, that the federal offense of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. § 843(b),²⁸⁷ can support the sixteen-level enhancement under section 2L1.2(b)(1)(A)(i) if the underlying drug crime that was facilitated was a felony and the defendant received a sentence of at least thirteen months.²⁸⁸ Without any reported decisions on

278. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.1(B)(iii) (2001).

279. 333 F.3d 1228 (11th Cir. 2003).

280. 320 F.3d 1302 (11th Cir. 2003).

281. 328 F.3d 1326 (11th Cir. 2003).

282. *Madera-Madera*, 333 F.3d at 1230.

283. *Id.* at 1233.

284. *Id.*

285. *Id.*

286. *Id.* at 1234.

287. Section 843(b) provides, in pertinent part: “It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter.” See 21 U.S.C. § 843 (2000). The maximum penalty for this offense is four years imprisonment and a fine of not more than \$30,000. *Orihuela*, 320 F.3d at 1303 n.1 (citing 21 U.S.C. § 843).

288. 320 F.3d at 1303.

point, the Eleventh Circuit reached its conclusion in *Orihuela* by referencing decisions interpreting the substantially similar guideline definition of “controlled substance offense” under the career offender guideline, U.S.S.G. section 4B1.1, which has been uniformly held to include telephone counts.²⁸⁹ After noting that the Sentencing Commission amended the commentary to the career offender guideline to codify the decisions ruling that a telephone facilitation offense is a controlled substance offense,²⁹⁰ the court found it significant that the definition of a “drug trafficking offense” in U.S.S.G. section 2L1.2(b)(1) had not been similarly amended.²⁹¹ Nonetheless, this fact did not change the Eleventh Circuit’s holding.²⁹²

In *Anderson* the court was called upon to determine whether a *nolo contendere* plea with adjudication withheld qualified as “a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less” for purposes of the twelve-level enhancement under U.S.S.G. section 2L1.2(b)(1)(B).²⁹³ The court observed that the term “conviction” is subject to various definitions depending on the context.²⁹⁴ For example, “a plea of *nolo contendere* with adjudication withheld is not a conviction for purposes of 18 U.S.C. § 922(g)(1) because a *nolo contendere* plea is not a conviction under Florida law” and section 922 required that the term “conviction” be defined based upon state law.²⁹⁵

Because section 2L1.2 does not require reference to state law for the definition of “conviction,” federal law controls.²⁹⁶ Although the sentencing commission did not define “conviction” for purposes of section 2L1.2, Congress did define that term, as it is used in 8 U.S.C. § 1326, to mean:

[A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

289. *Id.* at 1304 (citing *United States v. Veal-Gonzales*, 999 F.2d 1326, 1328 (9th Cir. 1993); *United States v. Walton*, 56 F.3d 551, 555 (4th Cir. 1995); *United States v. Mueller*, 112 F.3d 277, 281-82 (7th Cir. 1997); *United States v. Williams*, 176 F.3d 714, 718 (3d Cir. 1999)). The definition of “controlled substance offense” for career offender purposes is contained in U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b) (2001). *See id.*

290. *Id.* at 1304 (citing U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 568).

291. *Id.*

292. *Id.* at 1305.

293. 328 F.3d at 1328 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(B) (2001)).

294. *Id.* at 1327-28.

295. *Id.* at 1327 (citing *United States v. Willis*, 106 F.3d 966, 967-69 (11th Cir. 1997)).

296. *Id.* at 1328 (citing *United States v. Mejias*, 47 F.3d 401, 403-04 (11th Cir. 1995)).

- (i) a judge or jury has found the alien guilty or *the alien has entered a plea of guilty or nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered *some form of punishment*, penalty, or restraint on the alien's liberty to be imposed.²⁹⁷

The Eleventh Circuit ruled that the definition of conviction set forth in section 1101(a)(48)(A), governs section 2L1.2(b).²⁹⁸ Hence, the court ruled that defendant's *nolo contendere* plea with adjudication withheld qualified for the twelve-level enhancement under section 2L1.2(b)(1)(B), "as long as some punishment, penalty, or restraint on liberty is imposed."²⁹⁹ Defendant's sentence of time served, which was twenty-two days of imprisonment, sufficed.³⁰⁰

The sixteen-level enhancement under section 2L1.2(b)(1)(A)(ii) for prior crimes of violence was the subject of *United States v. Hernandez-Gonzalez*³⁰¹ and *United States v. Fuentes-Rivera*.³⁰² For purposes of U.S.S.G. section 2L1.2(b)(1)(A), the guidelines define a "crime of violence" as follows:

"Crime of Violence"—

- (I) means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and
- (II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.³⁰³

The use of the conjunctive "and" to divide subsections I and II was at issue in *Hernandez-Gonzalez* and *Fuentes-Rivera*.³⁰⁴ These two cases serve as a reminder of the importance of preserving sentencing issues in the district court. Issues not objected to in the district court will only be reviewed for plain error on appeal. Under that standard, even if the guideline is misapplied, the Eleventh Circuit could still affirm the erroneous sentence. *Hernandez-Gonzalez* illustrates this problem.

297. *Id.* (quoting 8 U.S.C. § 1101(a)(48)(A) (2000) (emphasis added by court)).

298. *Id.* (citing *United States v. Zamudio*, 314 F.3d 517, 521-22 (10th Cir. 2002)).

299. *Id.*

300. *Id.*

301. 318 F.3d 1299 (11th Cir. 2003).

302. 323 F.3d 869 (11th Cir. 2003).

303. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.1(B)(ii) (2001).

304. *Hernandez-Gonzalez*, 318 F.3d at 1302; *Fuentes-Rivera*, 323 F.3d at 872.

In *Hernandez-Gonzalez* defendant's prior conviction was for obstruction of an officer.³⁰⁵ Defendant claimed that because the two subsections defining crime of violence are separated by "and" instead of "or," both subsections must be established to apply the sixteen-level enhancement.³⁰⁶ Because his offense only satisfied the first subsection, but was not listed in the second subsection, it could only be classified as an aggravated felony, which warranted an eight-level enhancement under section 2L1.2(b)(1)(C), as opposed to a crime of violence, which would warrant the sixteen-level enhancement under section 2L1.2(b)(1)(A)(ii).³⁰⁷ Without deciding whether defendant's argument had merit, the Eleventh Circuit concluded that the limitations of the plain error doctrine precluded relief.³⁰⁸ The court explained that "because the guideline is ambiguous and lacks judicial interpretation on this point, even if it was erroneously applied, the error could not have been plain."³⁰⁹ Thus, the sixteen-level enhancement was affirmed.³¹⁰

Defendant in *Fuentes-Rivera* made a similar argument, but he also objected at sentencing.³¹¹ His prior conviction was for first degree burglary.³¹² Although that offense did not include an element indicating the use of force, as required by the first subsection of the crime of violence definition in section 2L1.2, burglary was one of the enumerated offenses in the second subsection.³¹³ Because this was an issue of first impression in the Eleventh Circuit, the court looked to other circuits that had addressed the issue.³¹⁴ Consistent with those circuits, the Elev-

305. 318 F.3d at 1300.

306. *Id.* at 1301.

307. *Id.* at 1301-02.

308. *Id.* at 1302. To satisfy the plain error standard, "a party must demonstrate: (i) that there was error in the lower court's action, (ii) that such error was plain, clear, or obvious, and (iii) that the error affected substantial rights, i.e. that it was prejudicial and not "harmless." *Id.* at 1301 (quoting *United States v. Foree*, 43 F.3d 1572, 1578 (11th Cir. 1995)).

309. *Id.* at 1302.

310. *Id.*

311. 323 F.3d at 870-71.

312. *Id.* at 870 n.1 (citing CAL. PENAL CODE § 459 (West 2003) ("[e]very person who enters any . . . building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary")).

313. *Id.* at 871 (referring to U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.1(B)(ii)(I)-(II) (2001)).

314. *Id.* at 871-72 (citing *United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002) (rejecting argument that the offense of "sexual abuse of a minor" was not a crime of violence because it did not contain the physical-force element), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Rayo-Valdez*, 302 F.3d 314, 318-20 (5th Cir.), *cert. denied*, 537 U.S. 1095 (2002) (holding that all the offenses listed in Application Note 1(B)(ii)(II) were crimes of violence, regardless of their elements under various state laws).

enth Circuit held that the use of the word “and” between the two subsections of the definition of crime of violence did not mean that both subsections must apply to qualify the offense as a crime of violence.³¹⁵ The court explained that because subpart (I) of the commentary definition specifically referenced “burglary of a dwelling . . . despite its lack of an element regarding physical force, and because an alternative reading would render the subpart (II) mere surplusage, the district court did not err in determining that burglary of a dwelling was a ‘crime of violence’ for purposes of U.S.S.G. § 2L1.2(b)(1)(A)(ii).”³¹⁶

The enhancement in *United States v. Krawczak*³¹⁷ was based on the defendant’s 1994 conviction for alien smuggling in violation of 8 U.S.C. § 1324(a)(1)(B).³¹⁸ That subsection of the statute did not penalize alien smuggling for profit. Rather, a different subsection of the 1993 statute, 8 U.S.C. § 1324(a)(2)(B)(ii), prohibited smuggling an alien to the United States for the purpose of commercial advantage or private financial gain. Defendant in *Krawczak* was not charged with and did not plead guilty to violating that subsection. However, the district court relied on the presentence report for the prior conviction to rule that the offense was committed for profit, thereby requiring the sixteen-level enhancement.³¹⁹

In reversing, the Eleventh Circuit noted the general rule that “a sentencing court applying a statutory enhancement is . . . required to consider only the fact of conviction and the statutory definition of the prior offense.”³²⁰ The very narrow exception to this rule applies when “the judgment of conviction and the statute are ambiguous.”³²¹ Concluding that the statute and conviction in this case were not ambiguous, the Eleventh Circuit ruled that the district court should not have reviewed the underlying facts of the conviction.³²² Hence, the sixteen-level enhancement for alien smuggling for profit was reversed and the case was remanded with instructions that only the eight-level enhancement for an aggravated felony (alien smuggling without profit) could apply.³²³

315. *Id.* at 872.

316. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. 1(B)(ii) (2001)).

317. 331 F.3d 1302 (11th Cir. 2003).

318. *Id.* at 1303.

319. *Id.* at 1304-05.

320. *Id.* at 1306 (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

321. *Id.* (citing *United States v. Spell*, 44 F.3d 936, 939 (11th Cir. 1995)).

322. *Id.* at 1307.

323. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2001)).

2. U.S.S.G. Section 2L2.1. The only other alien-related guideline examined by the Eleventh Circuit in 2003 was U.S.S.G. section 2L2.1, which was applied in sentencing the defendant in *United States v. Singh*³²⁴ for possessing with intent to use or transfer five or more false identification documents.³²⁵ Pursuant to section 2L2.1(b)(2), “[i]f the offense involved six or more documents or passports,” graduated levels of enhancements apply depending on the number of documents or passports involved.³²⁶ In the absence of a definition of “documents” in section 2L2.1 and its application notes, the court in *Singh* was called upon to determine if the domestic drivers’ licenses, military identification cards, and United States government identification cards that were involved in the offense of conviction could be counted as documents for purposes of the guideline enhancement.³²⁷

The Eleventh Circuit rejected defendant’s position that the title of the guideline—Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport—limits the types of documents upon which the enhancement can be based.³²⁸ Instead, the court sided with the Government, which argued that the language of section 2L2.1(b)(2)—“[i]f the offense involved six or more documents or passports”—referred to the offense of conviction, thereby making any documents involved in that offense relevant for enhancement purposes.³²⁹

Defendant in *Singh* pleaded guilty to violating 18 U.S.C. § 1028(a)(3) and (a)(4), which criminalize various fraudulent activities relating to “identification documents.”³³⁰ The definition of “identification document” set forth in the statute of conviction is broad enough to encompass the drivers’ licenses and identification documents counted by the district court to reach the total of 100 or more for the nine-level enhancement.³³¹ Hence, the court affirmed the enhancement.³³²

324. 335 F.3d 1321 (11th Cir. 2003).

325. See 18 U.S.C. § 1028 (2000).

326. U.S. SENTENCING GUIDELINES MANUAL § 2L2.1(b)(2) (2002).

327. 335 F.3d at 1323.

328. *Id.* at 1324. “Because the language of § 2L2.1(b)(2) clearly resolves this issue, we reject Singh’s reliance upon the title of § 2L2.1 to support his restrictive definition of ‘documents.’ As we have noted before, ‘The Court will not look to the title of a guideline to explain what is quite clear in its text.’” *Id.* (quoting *United States v. Chastain*, 198 F.3d 1338, 1353 (11th Cir. 1999)).

329. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L2.1(b)(2) (2002)).

330. *Id.* (citing 18 U.S.C. § 1028(a)(3), (a)(4) (2000)).

331. An identification document is defined in the offense of conviction as:

a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government,

H. Part S: Money Laundering and Monetary Transaction Reporting

In 2002, U.S.S.G. section 2S1.1 (money laundering) played an important part in Eleventh Circuit sentencing guidelines decisions, especially in light of Amendment 635, which became effective in 2001.³³³ In 2003, however, only one published decision discussed the money laundering guideline—*United States v. Martin*.³³⁴ Although defendant in *Martin* was sentenced after the effective date of the money laundering guideline amendment, his offense was committed before that date. Therefore, the 1998 version, not the current version, of the guideline was applied.³³⁵ Because of the substantial difference between the two versions, the court noted the limited impact of its decision.³³⁶

The question in *Martin* was whether the district court properly calculated the “value of the funds” under U.S.S.G. section 2S1.1 in calculating the defendant’s offense level at sentencing.³³⁷ Pursuant to section 2S1.1(b) of the 1998 guidelines, the base offense level is increased on a graduated scale based on the amount of money laundered.³³⁸ “The commentary to section 2S1.1 states, ‘The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise.’”³³⁹

Defendant in *Martin* deposited \$380,050.08 in stolen funds in the bank and then wrote checks on that amount to obtain cash, cashiers’ checks, and certificates of deposit.³⁴⁰ In all, he engaged in ninety-seven separate monetary transactions flowing from this amount. The ninety-

political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

18 U.S.C. § 1028(d)(2) (2000).

332. 335 F.3d at 1325.

333. See, e.g., *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002); *United States v. Venske*, 296 F.3d 1284 (11th Cir. 2002); *United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002); *United States v. Schlaen*, 300 F.3d 1313 (11th Cir. 2002). See also U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 634 (2001).

334. 320 F.3d 1223 (11th Cir. 2003).

335. *Id.* at 1225 n.2.

336. *Id.* at 1227 n.3.

337. *Id.* at 1225.

338. *Id.* at 1225-26.

339. *Id.* at 1226 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2S1.1, cmt. background (1998)).

340. *Id.* at 1225.

seven money laundering transactions for which Martin was convicted totaled \$1,055,068.21.³⁴¹

The five-level increase set forth in section 2S1.1(b)(2)(F) was applied in *Martin* because the district court determined that the “value of the funds” was more than \$1 million but less than \$2 million. The district court reached this amount by adding together the ninety-seven monetary transactions for which the defendant was convicted.³⁴² Defendant challenged this calculation, arguing that the value of the funds means “the amount of money originally injected or infused into the money laundering scheme[,]” which, in this case, was the \$380,050.08 in stolen checks from which all the transactions flowed.³⁴³

The Eleventh Circuit rejected defendant’s argument, stating: “Each unlawful monetary transaction harms society by impeding law enforcement’s efforts to track ill-gotten gains.”³⁴⁴ By adding together each individual transaction, “the district court’s calculation accurately reflected the scope of the criminal enterprise.”³⁴⁵ In concluding that the district court properly interpreted “the value of the funds” under section 2S1.1 of the 1998 Sentencing Guidelines, the Eleventh Circuit observed that in light of the substantial changes effectuated by the 2001 guideline amendment, its holding did not apply to the “value of the laundered funds” in section 2S1.1(a)(2) of the 2001 guidelines.³⁴⁶ The court explained:

[A]lthough the district court properly aggregated the funds from layered transactions in determining the “value of the funds” under § 2S1.1(b)(2) of the 1998 Guidelines, it might be improper for a district court to do so when determining the “value of the laundered funds” under § 2S1.1(a)(2) of the 2001 Guidelines because § 2S1.1(b)(3) of the 2001 Guidelines provides for a two level increase for “sophisticated laundering.”³⁴⁷

I. PART T: OFFENSES INVOLVING TAXATION

The Eleventh Circuit addressed tax loss calculations under U.S.S.G. section 2T1.1 and section 2T12.1 in two cases in 2003. In *United States v. Patti*,³⁴⁸ defendant pleaded guilty to filing a false income tax

341. *Id.*

342. *Id.*

343. *Id.* at 1225-26.

344. *Id.* at 1227 (citing *United States v. Allen*, 76 F.3d 1348, 1369 (5th Cir. 1996)).

345. *Id.*

346. *Id.* at 1227 n.3.

347. *Id.*

348. 337 F.3d 1317, 1319 (11th Cir. 2003).

return,³⁴⁹ and conspiring to defraud the United States.³⁵⁰ The Eleventh Circuit addressed an issue of first impression concerning whether the tax loss can be calculated by aggregating the corporate and personal tax losses.³⁵¹ Noting a split in the circuits,³⁵² the Eleventh Circuit found support for its position upholding the aggregation of personal and corporate tax losses by quoting the commentary to U.S.S.G. section 2T1.1, which provided that “[i]f the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.”³⁵³

As further support for its position, the Eleventh Circuit noted that the guidelines were amended in 2001, at which time the Commission adopted the view taken by the Eleventh Circuit in *Patti*.³⁵⁴ Under the amended commentary to U.S.S.G. section 2T1.1, “[i]f the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together.”³⁵⁵ Based on the plain language of the commentary, the Eleventh Circuit found that the amendment was clarifying, rather than substantive.³⁵⁶ Specifically, the amended “commentary provides that it ‘clarifies the prior rule in Application Note 7 of §2T1.1 that if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.’”³⁵⁷

In *United States v. Delgado*,³⁵⁸ defendants were convicted and sentenced for engaging in an “alcohol diversion” scheme for the purpose of evading federal liquor taxes.³⁵⁹ Defendant appealed the district court’s loss calculation of \$681,519.15, claiming that there was no loss

349. See 26 U.S.C. § 7206(1) (2000).

350. See 18 U.S.C. § 371 (2000).

351. 337 F.3d at 1323.

352. *Id.* The court in *Patti* observed that the Second and Seventh Circuits refused to aggregate corporate and personal tax losses, finding that such aggregation would overstate the tax revenue lost. *Id.* (citing *United States v. Martinez-Rios*, 143 F.3d 662, 672 (2d Cir. 1998); *United States v. Harvey*, 996 F.2d 919, 920-22 (7th Cir. 1993)). The Sixth Circuit, on the other hand, held that such aggregation was appropriate to reflect the seriousness of the harm the defendant caused. *Id.* (citing *United States v. Cseplo*, 42 F.3d 360, 364-65 (6th Cir. 1994)).

353. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2T1.1, cmt. n.7 (2001)).

354. *Id.* at 1324.

355. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2T1.1, cmt. n.7 (2001)).

356. *Id.*

357. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL supp. to app. C at 191 (2001)).

358. 321 F.3d 1338 (11th Cir. 2003).

359. *Id.* at 1338.

because the government could have collected on the bond for the liquor shipments but chose not to do so.³⁶⁰

Under United States Sentencing Guidelines section 2T2.1(a) “the ‘tax loss’ is the amount of taxes that the taxpayer failed to pay or attempted not to pay.”³⁶¹ The Eleventh Circuit held that the district court correctly calculated that amount, and the fact that the government could have collected the unpaid taxes by enforcing its rights under a bond posted for the liquor shipments, but chose not to, was irrelevant.³⁶² The court explained that “the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights” or in protecting the public interest.³⁶³

J. PART X: CONSPIRACY

In *United States v. Anderson*,³⁶⁴ defendant was convicted of bid-rigging United States government contracts for the construction of water purification plants in Egypt, in violation of 15 U.S.C. § 1 (section one of the Sherman Antitrust Act), and conspiracy to defraud the United States, in violation of 18 U.S.C. § 371.³⁶⁵ The parties agreed that U.S.S.G. section 2X1.1 was the proper starting point for analyzing the conspiracy count.³⁶⁶ For the base offense level, section 2X1.1(a) refers to the “base offense level from the guideline for the substantive offense.”³⁶⁷ The dispute in *Anderson* arose as to what guideline was appropriate for the substantive offense—U.S.S.G. section 2F1.1 (fraud) or U.S.S.G. section 2R1.1 (bid-rigging).³⁶⁸ The district court opted for the fraud guideline and the Eleventh Circuit affirmed.³⁶⁹

The Eleventh Circuit reasoned: “The conviction in this case assumes Anderson committed fraud. Bid-rigging was merely a means to an end.”³⁷⁰ The court also observed that section 2R1.1 was not listed in the commentary to section 2X1.1 as a guideline that specifically covers

360. *Id.* at 1348.

361. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2T2.1(a) (2002)).

362. *Id.* at 1348-49.

363. *Id.* (quoting *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Fernon*, 640 F.2d 609, 612 (5th Cir. Unit B Mar. 1981)).

364. 326 F.3d 1319 (11th Cir. 2003).

365. *Id.* at 1322.

366. *Id.* at 1331.

367. See U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(a) (1995).

368. 326 F.3d at 1331. The court noted that prior to sentencing, in 2001, section 2F1.1 was deleted and consolidated into section 2B1.1. However, the parties consented to the use of the 1995 guideline manual. *Id.* at 1331-32 n.3.

369. *Id.* at 1331-32.

370. *Id.* at 1332.

conspiracies; hence, it was not mandatorily applicable.³⁷¹ Accordingly, because the object of the offense was fraud, section 2F1.1 was the proper guideline.³⁷² Nonetheless, the court added:

At the very least, we can conclude § 2F1.1 and § 2R1.1 equally apply to the conduct in this case. In such an event, we apply the provision that results in the greater offense level. USSG § 1B1.1 App. Note 5. In this case, § 2F1.1 results in a greater offense level than § 2R1.1.³⁷³

Defendants in *United States v. Puche*³⁷⁴ were convicted of conspiracy to commit money laundering under 18 U.S.C. § 1956(a)(3) & (h).³⁷⁵ The Eleventh Circuit held that the district court correctly relied on the base offense level for “promotion” money laundering under U.S.S.G. section 2S1.1(a)(1) where the jury found that defendants conspired to commit “promotion” and “concealment” money laundering, and the promotion money laundering yielded the higher base offense level.³⁷⁶ The Eleventh Circuit also held that the district court was correct in applying the specific offense characteristics that were established by the verdict, such as the amount of money involved during the time period the jury found that the defendants were part of the conspiracy.³⁷⁷

However, the court reversed the defendants’ sentence when the district court failed to apply the three-level reduction for uncompleted conspiracy offenses under U.S.S.G. section 2X1.1(b)(2) “because they had not completed or were not close to completing all the acts they believed necessary for the completion of the money laundering scheme, especially with regard to the six million dollars in future transactions.”³⁷⁸ Although defendants intended to complete the transactions as soon as possible, defendants still needed to take “crucial steps” such as paperwork and contacting agents.³⁷⁹ Thus, the failure to apply section 2X1.1’s three-level reduction was “clear error,” and the case was remanded “for the limited purpose of applying the three-level reduction of U.S.S.G. § 2X1.1(b)(2) and then resentencing within the resulting U.S.S.G. range.”³⁸⁰

371. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2X1.1, cmt. 1 (1995)).

372. *Id.*

373. *Id.* at 1332 n.4.

374. 350 F.3d 1137 (11th Cir. 2003).

375. *Id.* at 1141.

376. *Id.* at 1154-55 (citing U.S. SENTENCING GUIDELINES MANUAL §§ 2S1.1(a)(1)-(2) (2002)).

377. *Id.* at 1154.

378. *Id.* at 1155 (citing *United States v. Khawaja*, 118 F.3d 1454 (11th Cir. 1997)).

379. *Id.*

380. *Id.* at 1157.

IV. CHAPTER THREE: ADJUSTMENTS

A. *Part B: Role in the Offense*³⁸¹

Of the four role-related guidelines in Chapter Three, Part B, the two most commonly found in Eleventh Circuit case law provide for upward or downward adjustments depending on the defendant's aggravating or mitigating role in the offense— U.S.S.G. sections 3B1.1 and 3B1.2, respectively.³⁸² Out of the past five years, the only year that generated more Eleventh Circuit decisions on these two guidelines than 2003 was 1999—the year the Eleventh Circuit, sitting en banc, rendered *United States v. Rodriguez De Varon*.³⁸³

1. U.S.S.G. Section 3B1.1: Aggravating Role. U.S.S.G. section 3B1.1 provides for three tiers of aggravating role adjustments with graduated increases.³⁸⁴ The most aggravating role, warranting a four-level increase, applies “[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.”³⁸⁵ Next, a three-level increase applies “[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.”³⁸⁶ Finally, the least of the aggravating role enhancements, two levels, applies “[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity” other than that described in connection with the three and four-level increases.³⁸⁷

Because the defendant's role in the offense is a question of fact, the cases dealing with role adjustments are fairly fact specific. However, some general rules and factors must be considered in making the factual determinations. For example, in *Rendon*,³⁸⁸ the court noted that the following factors should be considered in determining whether the defendant occupied an aggravating role in the offense:

381. The victim-related adjustments set forth in Part A of Chapter Three are the only category of Chapter Three adjustments about which the Eleventh Circuit published no decisions in 2003.

382. See U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1, 3B1.2, 3B1.3, and 3B1.4 (2002).

383. 175 F.3d 930 (11th Cir. 1999) (en banc).

384. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2002).

385. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2002).

386. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(b) (2002).

387. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(c) (2002).

388. *Rendon* is discussed in the section analyzing the captain enhancement for purposes of U.S.S.G. section 2D1.1(b)(2)(B), at *supra* notes 185-204.

“(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 in planning or organizing the offense, (6) nature and scope of the illegal activity, and (7) degree of control and authority exercised over others.”³⁸⁹

For one defendant to be an organizer, leader, manager or supervisor, there must be other participants for him to organize, lead, manage, or supervise.³⁹⁰ The other participants in the offense must be “‘criminally responsible for the commission of the offense, but need not have been convicted.’”³⁹¹ Further, the court has recognized that

“[t]he 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,” and that “[b]ecause the district court must interpret the factors stated in the commentary, and must exercise its best judgment as to the application of the facts to these standards, its decision is entitled to one of deference on appeal.”³⁹²

Applying these general rules to the facts in *Rendon*, the court concluded that the district court did not clearly err in attributing a four-level organizer or leader role to defendant Rendon inasmuch as there were “at least eight people involved with the conspiracy over whom Rendon exercised leader and organizational control.”³⁹³ The court also ruled that the section 3B1.1(a) role enhancement did not result in double counting when the defendant was also enhanced for being a captain under section 2D1.1(b)(2).³⁹⁴ “‘Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together).’”³⁹⁵ Neither section 3B1.1 nor section 2D1.1(b)(2) gives any indication that the two sections cannot be applied cumulatively.³⁹⁶ Rather, “the two enhancements embody ‘conceptually separate notions relating to sentencing’ because they are designed for

389. *Rendon*, 354 F.3d at 1331-32 (quoting *United States v. Vallejo*, 297 F.3d 1154, 1169 (11th Cir.), *cert. denied*, 537 U.S. 1096 (2002)).

390. *Id.* at 1332.

391. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, cmt. n.1 (2002)).

392. *Id.* (quoting *Vallejo*, 297 F.3d at 1169 (internal citation omitted) (alteration in original)).

393. *Id.* at 1332-33.

394. *Id.* at 1333-34.

395. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. n.4 (2002); *United States v. Naves*, 252 F.3d 1166, 1168 (11th Cir. 2001)).

396. *Id.* at 1334.

two different purposes.³⁹⁷ The section 3B1.1 role enhancement applies based on the defendant's "relative culpability within a criminal organization."³⁹⁸ The section 2D1.1(b)(2)(B) captain enhancement, on the other hand, "addresses those who facilitate a drug smuggling operation by filling a critical position without which the operation likely would fail."³⁹⁹ Hence, the two enhancements are not mutually exclusive.⁴⁰⁰

The Eleventh Circuit ruled that the defendants in three cases—*Yeager*,⁴⁰¹ *Poirier*,⁴⁰² and *United States v. Perry*⁴⁰³—warranted the two-level role enhancement. In *Perry*, as in *Rendon*, the court was asked to decide whether the defendant could occupy two different roles.⁴⁰⁴ First, the court in *Perry* affirmed the imposition of the two-level role enhancement based on the facts that defendant "(1) actively recruited two individuals to transport drugs, (2) arranged one of those recruited individuals to transport cocaine, (3) directly paid at least one of those individuals for transporting cocaine, and (4) was, in turn, paid for his recruitment and supervision of individuals in that drug conspiracy."⁴⁰⁵

Notwithstanding the ruling on the leadership role enhancement, defendant in *Perry* challenged the denial of the minor role reduction.⁴⁰⁶ Although there was no Eleventh Circuit precedent on the issue, the court noted support in other circuits for the proposition that the aggravating and mitigating role adjustments are not mutually exclusive.⁴⁰⁷

397. *Id.* (quoting *United States v. Jackson*, 276 F.3d 1231, 1235 (11th Cir. 2001) (internal citation omitted)).

398. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, cmt. background (2002)).

399. *Id.*

400. *Id.*

401. 331 F.3d 1216 (11th Cir. 2003). *Yeager* is discussed earlier in this Article in connection with fraud loss calculations under U.S.S.G. section 2F1.1 (2000), at *supra* notes 108-40.

402. 321 F.3d 1024 (11th Cir. 2003). *Poirier* is discussed further under Chapter Two, Part B, regarding the interaction of U.S.S.G. section 2B4.1 (Bribery) and U.S.S.G. section 2F1.1 (Fraud), at *supra* notes 141-51; Chapter Three, Part B, regarding the abuse of position of trust adjustment, at *infra* notes 433-47; and Chapter Three, Part C, regarding obstruction of justice, at *infra* notes 448-97.

403. 340 F.3d 1216 (11th Cir. 2003).

404. *Id.* at 1217.

405. *Id.* at 1217-18.

406. *Id.* at 1218.

407. *Id.* (citing *United States v. Tsai*, 954 F.2d 155, 167 (3d Cir. 1992) ("Nothing in the Guidelines or in the enabling legislation, the Sentencing Reform Act, 18 U.S.C. §§ 3551 to 3585 (1988), compels [the] conclusion" that aggravating and mitigating roles cannot coexist); *United States v. Jackson*, 207 F.3d 910, 922 (7th Cir. 2000), *rev'd in part on other*

Observing that the government “inexplicably” failed to comment on the cases from other circuits that were cited in the defendant’s briefs, the Eleventh Circuit declined to reach the issue “without reasoned argument from the government.”⁴⁰⁸ Thus, the court remanded the case to the district court for consideration of the minor role arguments.⁴⁰⁹

In upholding the two-level enhancement in *Yeager*, the court rejected defendant’s argument that in a two-member conspiracy, both members cannot be leaders.⁴¹⁰

When a conspiracy involves only two participants, each participant can be a “organizer, leader, manager, or supervisor” in the criminal conduct when each participant takes primary responsibility for a distinct component of the plan and exercises control or influence over the other participant with respect to that distinct component of the plan.⁴¹¹

In *Poirier* the district court declined to apply the two-level role enhancement even though the evidence at trial clearly established that defendant supervised and managed at least one other participant in the criminal activity.⁴¹² “The district court did not find to the contrary, but instead simply and inexplicably failed to apply the enhancement. That was clear error.”⁴¹³ Therefore, the sentence was reversed and the case remanded for resentencing with instructions to apply the section 3B1.1(c) enhancement.⁴¹⁴

2. U.S.S.G. Section 3B1.2: Mitigating Role. Pursuant to U.S.S.G. section 3B1.2, a “minimal participant in any criminal activity” may receive a four-level guideline decrease,⁴¹⁵ while a “minor participant in any criminal activity” may receive a two-level guideline decrease.⁴¹⁶ Further, participants with roles that are between minor and minimal may warrant a three-level decrease.⁴¹⁷ As with almost every minor role case since 1999, the Eleventh Circuit cited *De Varon* in support of

grounds, 531 U.S. 953 (2000) (“Section 3B1.2 does not say that a manager or supervisor cannot be a minor participant; all that is required is that he be less culpable than most of the other participants”).

408. *Id.* at 1218-19.

409. *Id.* at 1219.

410. 331 F.3d at 1227.

411. *Id.*

412. 321 F.3d at 1036.

413. *Id.*

414. *Id.*

415. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(a) (2002).

416. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(b) (2002).

417. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2002).

its rulings in *United States v. Freixas*,⁴¹⁸ and *Hunter*.⁴¹⁹ In *De Varon* the Eleventh Circuit, sitting en banc, announced that the two legal factors that guide the district court in its fact-finding inquiry under U.S.S.G. section 3B1.2 are: “[f]irst and foremost, the district court must measure the defendant’s role against her relevant conduct, that is, the conduct for which she has been held accountable under U.S.S.G. § 1B1.3,” and second, “whe[n] the record evidence is sufficient, the district court may also measure the defendant’s conduct against that of other participants in the criminal scheme attributed to the defendant.”⁴²⁰

Based on these factors, in *Freixas*, the Eleventh Circuit affirmed the district court’s refusal to grant a minor role adjustment.⁴²¹ The court pointed out that Freixas’s role in the conspiracy, which included hooking up a computer and downloading forty-five stolen credit card numbers, was “no less significant” than the role of other co-conspirators.⁴²² In *Hunter*, on the other hand, the Eleventh Circuit vacated the district court’s denial of minor role sentence reductions.⁴²³ As noted in the relevant conduct portion of this Article (U.S.S.G. section 1B1.3), the court in *Hunter* remanded the case for resentencing because the district court did not make particularized findings regarding the scope of the defendants’ agreements as required by U.S.S.G. section 1B1.3(a)(1)(B).⁴²⁴ Because defendants’ roles must be measured against their relevant conduct, and because the case was remanded for redetermination of defendants’ relevant conduct, the Eleventh Circuit stated that it was “premature for [it] to rule on [the minor role] issue today.”⁴²⁵ Hence, the district court was directed to revisit the minor role ruling in light of *De Varon*.⁴²⁶

*United States v. Jeter*⁴²⁷ concerned a different aspect of a minor role. The court in *Jeter* held that a minor role sentence adjustment is not available to a defendant sentenced as a “career offender” under U.S.S.G.

418. 332 F.3d 1314 (11th Cir. 2003).

419. 323 F.3d at 1323. *Hunter* is also discussed in the sections of this Article relating to relevant conduct (U.S. SENTENCING GUIDELINES MANUAL § 1B1.3), at *supra* notes 3-29 and criminal history calculations (U.S. SENTENCING GUIDELINES MANUAL § 4A1.2), at *infra* notes 528-52.

420. 175 F.3d at 944-45.

421. 332 F.3d at 1321.

422. *Id.*

423. 323 F.3d at 1323.

424. *Id.*

425. *Id.*

426. *Id.*

427. 329 F.3d 1229 (11th Cir. 2003).

section 4B1.1.⁴²⁸ The court noted that section 4B1.1 specifically authorizes only an adjustment to the offense level for acceptance of responsibility.⁴²⁹ The court therefore rejected defendant's argument that the rule of lenity applied to authorize a minor role adjustment.⁴³⁰ "Because § 4B1.1, by its express terms, only authorizes an adjustment based on acceptance of responsibility, and does not mention the minor role adjustment, and since 'the inclusion of one implies the exclusion of others,' . . . the guideline is not ambiguous and the rule of lenity does not apply."⁴³¹ In so ruling, the Eleventh Circuit observed that its decision was consistent with the First, Third, Seventh, Eighth, and Ninth Circuits, "all of which have held that mitigating role adjustments do not apply in the career offender scenario."⁴³²

3. U.S.S.G. Section 3B1.3: Abuse of a Position of Trust.

U.S.S.G. section 3B1.3 allows for a two-level increase "[i]f the defendant abused a position of public or private trust, . . . in a manner that significantly facilitated the commission or concealment of the offense."⁴³³ This enhancement was addressed in two Eleventh Circuit cases in 2003.

In *United States v. Hall*,⁴³⁴ defendant, a pastor, was convicted of conspiracy to launder money. The district court enhanced his sentence for abuse of trust based on his status as a pastor.⁴³⁵ In reversing, the Eleventh Circuit stated that defendant's position as a pastor was "insufficient to support a determination that [defendant] occupied a position of trust with respect to the victims."⁴³⁶ The court explained that in fraud cases, the two situations in which a position of trust exists are: "(1) where the defendant steals from his employer, using his position in the company to facilitate the offense, and (2) where a

428. *Id.* at 1230.

429. *Id.*

While a career offender's criminal history category is always Category VI, § 4B1.1 indicates that with respect to the defendant's *offense level*, as distinguished from his criminal history category, "[i]f an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, [a court must] decrease the offense level by the number of levels corresponding to that adjustment."

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.1) (emphasis supplied by court).

430. *Id.*

431. *Id.* (quoting *United States v. Koonce*, 991 F.2d 693, 698 (11th Cir. 1993); (citing *United States v. Johnson*, 155 F.3d 682, 685 (3d Cir. 1998)).

432. *Id.*

433. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2002).

434. 349 F.3d 1320 (11th Cir. 2003).

435. *Id.* at 1324.

436. *Id.*

fiduciary or personal trust relationship exists with other entities, and the defendant takes advantage of the relationship to perpetrate or conceal the offense.”⁴³⁷ The facts of this case could only fall under the second situation.⁴³⁸ Because there was no fiduciary relationship, the applicability of the second situation depended on whether there was a personal trust relationship between the defendant and the victims.⁴³⁹ The court noted that the victims were not church members, and that there was no evidence of a pastor-clergy relationship.⁴⁴⁰ “Although [defendant] may have used his status as a pastor to develop the trust of investors, this does not demonstrate that [defendant] created a personal trust relationship with any of the victims.”⁴⁴¹ The court noted that there was no evidence from the testimony of the victims that defendant’s status as a pastor played a role in their investment decision; they just wanted to “double their money.”⁴⁴² The court therefore remanded for resentencing.⁴⁴³

In *Poirier*⁴⁴⁴ the Eleventh Circuit affirmed the enhancement for abuse of a position of trust under U.S.S.G. section 3B1.3 without much discussion.⁴⁴⁵ Defendant based his challenge to the enhancement on the fact that although he was hired to give the county independent financial advice, he did not have the authority to make the “final” decision on the award of the county’s business.⁴⁴⁶ The Eleventh Circuit found that this fact was not determinative: “Fulton County hired [defendant] to serve as a fair and unbiased financial advisor and put him in a position to do that. With that position came Fulton County’s trust, and [defendant] clearly abused it. The enhancement for abusing a position of trust was appropriate.”⁴⁴⁷

437. *Id.* (quoting *United States v. Garrison*, 133 F.3d 831, 837-38 (11th Cir. 1998)).

438. *Id.*

439. *Id.*

440. *Id.* at 1325-26.

441. *Id.* at 1325.

442. *Id.*

443. *Id.* at 1326.

444. *Poirier* is discussed further under Chapter Two, Part B, regarding the interaction of U.S.S.G. section 2B4.1 (Bribery) and U.S.S.G. section 2F1.1 (Fraud), at *supra* notes 141-51; Chapter Three, Part B, regarding the role adjustment, at *supra* notes 433-47; and Chapter Three, Part C, regarding obstruction of justice, at *infra* notes 448-97.

445. 321 F.3d at 1033.

446. *Id.*

447. *Id.*

C. *Part C: Obstructing or Impeding the Administration of Justice*

The Eleventh Circuit examined U.S.S.G. section 3C1.1, which provides for a two-level enhancement if the defendant obstructs or impedes the administration of justice, in six published decisions in 2003.⁴⁴⁸ Most of these cases dealt with the defendant providing false testimony or information during the district court proceedings. Although the cases involved some general similarities, the individual differences resulted in different outcomes.

For example, in *United States v. Hasner*,⁴⁴⁹ the Eleventh Circuit agreed that the enhancement is justified if the defendant committed perjury.⁴⁵⁰ Nonetheless, the court rejected the Government's appeal of the district court's refusal to apply the enhancement despite the Government's claim that the defendant lied under oath about three specific, material matters at trial.⁴⁵¹ "Although the government was able to impeach [defendant's] testimony, we cannot say that the inconsistencies required an upward adjustment."⁴⁵² The Eleventh Circuit explained that it was not in as good of a position as the district court to determine if the defendant committed perjury because it was relegated to a "cold, paper record."⁴⁵³ The district court, on the other hand, "is uniquely suited to make such a determination because it heard all the evidence and was able to observe a particular witness' demeanor and behavior on the witness stand."⁴⁵⁴

In a somewhat similar vein, the Eleventh Circuit declared in *United States v. Banks*⁴⁵⁵ that it was "not a fact finding body."⁴⁵⁶ However,

448. U.S.S.G. section 3C1.1 provides:

If (A) the 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, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2002).

449. 340 F.3d 1261 (11th Cir. 2003). *Hasner* is also in the section of this Article related to U.S. SENTENCING GUIDELINES MANUAL § 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation), at *supra* notes 171-84.

450. 340 F.3d at 1277 (citing *United States v. Hubert*, 138 F.3d 912, 915 (11th Cir. 1998)).

451. *Id.* at 1276-77.

452. *Id.* at 1277.

453. *Id.*

454. *Id.* (quoting *United States v. McDonald*, 935 F.2d 1212, 1219 (11th Cir. 1991)).

455. 347 F.3d 1266 (11th Cir. 2003).

456. *Id.* at 1271.

unlike in *Hasner*, the court in *Banks* did not affirm the district court.⁴⁵⁷ Rather, the Eleventh Circuit vacated the sentence and remanded the case for specific findings.⁴⁵⁸ Defendant in *Banks* lied about his true name to law enforcement during the course of the investigation, concealed his extensive criminal history, bonded out of custody under a false name, and committed new crimes while on bond.⁴⁵⁹ The commentary to section 3C1.1 states that the giving of a false name or identification at arrest will not ordinarily warrant the obstruction enhancement “except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense.”⁴⁶⁰

In applying the obstruction enhancement based on a defendant giving a false name at arrest, Eleventh Circuit *en banc* precedent requires that the sentencing court explain how the giving of the false name “significantly hindered the prosecution or investigation of the offense.”⁴⁶¹ The district court in *Banks* gave no such explanation.⁴⁶² Thus, the Eleventh Circuit concluded that it could not proceed with appellate review until after the sentencing court made findings as required by section 3C1.1 and Eleventh Circuit precedent.⁴⁶³ “For these reasons, we hold that it is not enough for the sentencing court to adopt the uncontested portions of the PSR, hear the defendant’s objections and the arguments of counsel, and recite its agreement with the arguments of the prosecutor and the recommendation of the PSR.”⁴⁶⁴

Notwithstanding this holding, the Eleventh Circuit proceeded to discuss and reject the Government’s argument that even without findings, the record supported the enhancement.⁴⁶⁵ The court explained that “neither [defendant’s] intent to obstruct justice, nor the potential that [the defendant] may have evaded investigation or prosecution, can constitute a significant hindrance because application note 5(a) explicitly states that the conduct must have ‘actually resulted’ in a hindrance.”⁴⁶⁶ Additionally, the court pointed out that the record

457. *Id.* at 1271-72.

458. *Id.* at 1272.

459. *Id.* at 1268.

460. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.5(a) (2002).

461. 347 F.3d at 1269 (quoting *United States v. Alpert*, 28 F.3d 1104, 1108 (11th Cir. 1996) (*en banc*)).

462. *Id.*

463. *Id.*

464. *Id.* (citing *Alpert*, 28 F.3d at 1108).

465. *Id.* at 1270-71.

466. *Id.* at 1270 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.5(a) (2002)).

left the court to speculate about whether the conduct had impeded the investigation or prosecution.⁴⁶⁷ “To show that [defendant’s] conduct actually resulted in a hindrance, the government must demonstrate how it fruitlessly spent investigation or prosecution resources due to [defendant’s] untruthfulness.”⁴⁶⁸ This, the government had not done.⁴⁶⁹ Moreover, the court determined that defendant’s commission of other crimes while out on bond was not proof of hindrance of the offense of conviction, noting that defendant was actually apprehended as a result of his commission of these crimes.⁴⁷⁰ The court therefore remanded the case for resentencing.⁴⁷¹

In *Poirier* the Government appealed the district court’s refusal to apply the obstruction enhancement based on false testimony.⁴⁷² Noting that the standard for reviewing the district court’s obstruction determination is clear error, the Eleventh Circuit stated that it would “not find clear error unless our review of the record leaves us ‘with the definite and firm conviction that a mistake has been committed.’”⁴⁷³ Unlike in *Hasner*, the court in *Poirier* found that this high standard was met because the defendants falsely testified at trial and before the Securities and Exchange Commission and encouraged another person to testify falsely.⁴⁷⁴ “In the face of all this evidence of obstruction, the sentencing court, without further explanation, simply said: ‘I find there is no willful attempt by either defendant to obstruct the investigation, nothing in the defendants’ conduct that would warrant an obstruction adjustment, so there will be no enhancement.’”⁴⁷⁵ The Eleventh Circuit thus ruled that the district court’s “inexplicable finding that defendants did not obstruct justice [was] clearly erroneous, and must be corrected on remand.”⁴⁷⁶

467. *Id.*

468. *Id.* at 1271.

469. *Id.* at 1271 n.3.

470. *Id.* at 1271.

471. *Id.* at 1272.

472. 321 F.3d at 1035-36. *Poirier* is discussed further under Chapter Two, Part B, regarding the interaction of U.S.S.G. section 2B4.1 (Bribery) and U.S.S.G. section 2F1.1 (Fraud), at *supra* notes 141-51; Chapter Three, Part B, regarding the role and abuse of position of trust adjustments, at *infra* notes 433-47.

473. *Id.* (citing *Coggin v. Commissioner*, 71 F.3d 855, 860 (11th Cir. 1996), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

474. *Id.*

475. *Id.* at 1036.

476. *Id.*

The obstruction enhancement in *Freixas*⁴⁷⁷ was also based on false testimony.⁴⁷⁸ When defendant pleaded guilty, she swore that she was guilty, was pleading guilty voluntarily, and understood the potential sentence she faced.⁴⁷⁹ Thereafter, she attempted to withdraw her plea, claiming that she was not guilty, had pleaded guilty at the behest of her attorney, and had done so only because of mistaken advice by counsel.⁴⁸⁰ “Simply stated, one of these accounts necessarily was dishonest, and the district court acted well within its discretion in crediting the former and discrediting [defendant’s] later disavowal of the voluntariness and intelligence of her guilty plea.”⁴⁸¹ Accordingly, the Eleventh Circuit affirmed, finding no clear error in the sentencing court’s determination that defendant provided materially false information to the court.⁴⁸²

In *United States v. Patti*,⁴⁸³ the district court applied the obstruction enhancement on three grounds.⁴⁸⁴ The Eleventh Circuit found that two of the grounds independently supported the enhancement, thereby making it unnecessary to address the third ground, which related to defendant’s statements to the media.⁴⁸⁵

The first ground for the obstruction enhancement in *Patti* was defendant’s willful feigning of incompetence, which postponed the trial and made the Government waste time and resources evaluating defendant’s competency.⁴⁸⁶ The Eleventh Circuit found that willfully faking incompetence in order to postpone trial and punishment is a proper basis for the obstruction enhancement and does not chill defendant’s willingness to raise competency issues.⁴⁸⁷

The second ground for the obstruction enhancement was defendant’s involvement in an attempted arson at his accountant’s office, which was intended to destroy documents relevant to the tax fraud.⁴⁸⁸ In upholding this ground for the enhancement, the Eleventh Circuit rejected

477. *Freixas* is also discussed in the portion of this Article analyzing cases addressing mitigating roles under U.S.S.G. section 3B1.2, at *supra* notes 415-32.

478. 332 F.3d at 1321.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Patti* is discussed in the portion of this Article dealing with tax loss calculations under Chapter Two, Part T, at *supra* notes 348-63.

484. 337 F.3d at 1324.

485. *Id.* at 1324-25 n.13.

486. *Id.* at 1325.

487. *Id.* (citing *United States v. Greer*, 158 F.3d 228, 237-38 (5th Cir. 1998)).

488. *Id.*

defendant's claim that the district court based its ruling on unreliable hearsay, that being, the testimony of one of the co-conspirators in the arson.⁴⁸⁹ Reliable hearsay may be considered at sentencing "as long as the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence."⁴⁹⁰ Finding that the district court properly relied on the co-conspirator's testimony about the arson, the Eleventh Circuit affirmed the application of the obstruction of justice enhancement under section 3C1.1.⁴⁹¹

The enhancement in the final obstruction case—*United States v. Rubio*⁴⁹²—was founded on defendant's assault of a Government witness following trial in retaliation for that witness's cooperation with the Government during the investigation and trial.⁴⁹³ Defendant argued that the assault did not obstruct or impede the investigation or prosecution of his case because it occurred after trial.⁴⁹⁴ The Eleventh Circuit responded that the commentary to section 3C1.1 "authorizes enhancement based upon any conduct which is prohibited by the obstruction of justice provisions of Title 18."⁴⁹⁵ Pursuant to 18 U.S.C. § 1513(b), "inflicting bodily injury on a witness with the intent to retaliate against that witness" is such prohibited conduct.⁴⁹⁶ Hence, the district court did not err in applying the section 3C1.1 enhancement.⁴⁹⁷

489. *Id.* at 1325-26.

490. *Id.* at 1326 (quoting *United States v. Anderton*, 136 F.3d 747, 751 (11th Cir. 1998)).

491. *Id.*

492. 317 F.3d 1240 (11th Cir. 2003).

493. *Id.* at 1244-45.

494. *Id.* at 1244.

495. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.4(i) (2002)).

496. *Id.* (citing 18 U.S.C. § 1513(b) (2000)).

497. *Id.* at 1244-45. The Eleventh Circuit reflected that even if the district court had erred, it would have been harmless because defendant was sentenced as a career offender, which raised his offense level to level thirty-four and made the obstruction enhancement irrelevant. *Id.* at 1245. Additionally, the Eleventh Circuit noted that the district court departed upward based on defendant's obstruction of justice because the career offender enhancement negated the impact of the obstruction enhancement. *Id.* The departure was based on U.S.S.G. section 5K2.0, "which authorizes such a departure if the sentencing court finds an aggravating factor not adequately taken into consideration" by the Sentencing Commission. *Id.* at 1245 n.2 (quoting *United States v. Regueiro*, 240 F.3d 1321, 1324 (11th Cir. 2001)). Defendant did not appeal that departure. *Id.*

D. Part D: Multiple Counts

In *United States v. Williams*,⁴⁹⁸ the court detailed the rules for grouping when there are multiple offenses of conviction.⁴⁹⁹ Generally speaking, “related charges” should be grouped together, which will result in a lower sentence than that which results when “charges arising from separate incidents” are grouped separately.⁵⁰⁰ “As a matter of law, a conspiracy to commit a substantive offense will almost always have the same victims as the commission (or attempted commission) of that substantive offense, and so the two should almost always be grouped together under § 3D1.2.”⁵⁰¹ The court explained that “[t]his result is essentially mandated by the commentary to the guidelines, which states, ‘When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).’”⁵⁰²

According to the district court in *Williams*, the conspiracy to rob an armored car and the attempt to rob that armored car required separate grouping because two different guards were wounded during the offense.⁵⁰³ The presentence report reasoned that one guard was the victim for the conspiracy and the other guard was the victim of the substantive offense.⁵⁰⁴ The Eleventh Circuit rejected this reasoning and reversed.⁵⁰⁵

The Eleventh Circuit’s decision hinged on the victim analysis.⁵⁰⁶ The court explained that the conspiracy and the attempt to rob the armored car could not be grouped together as the “same act or transaction” under U.S.S.G. section 3D1.2(a) because “a conspiracy is formed prior to the underlying offense it concerns and in a place other than where that offense is to be committed.”⁵⁰⁷ However, the court found that the conspiracy and the attempt could be grouped under section

498. 340 F.3d 1231 (11th Cir. 2003). In addition to the discussion of the grouping rules, the court’s in-depth analysis of the standards of review in sentencing appeals is well worth reading. *See id.* at 1234-44.

499. *Id.* at 1234-44.

500. *Id.* at 1233.

501. *Id.* at 1245.

502. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3D1.2, cmt. n.4 (2002)).

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.* at 1244-45.

507. *Id.* at 1244.

3D1.2(b) because they involve the “same victim” and were part of the same “common plan or scheme.”⁵⁰⁸

In concluding that both guards were the victims of both offenses, the Eleventh Circuit referred to the guideline commentary, which stated: “Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim.”⁵⁰⁹ The court characterized this as a “broad generalization,” as opposed to an “inflexible rule,” explaining that “[w]he[n] offenses such as the robbery and conspiracy at issue here equally harm multiple people, the guidelines do not force us to designate the ‘one real victim.’”⁵¹⁰ Rather, the primary purpose of the commentary is “to emphasize that ‘secondary victims,’ such as bystanders who may be traumatized at the sight of a crime, should not be counted as victims when grouping offenses under § 3D1.2.”⁵¹¹

In reversing the separate grouping of the offenses and remanding for resentencing, the *Williams* court noted that “[i]f the Government wanted to punish Williams separately for the harm he inflicted upon each individual [guard], it should have included two aggravated assault or attempted murder counts in the indictment.”⁵¹² Herein lies the important distinction between *Williams* and *Torrealba*,⁵¹³ the other 2003 Eleventh Circuit case that applied the grouping rules in the context of a conspiracy and substantive offense.

In *Torrealba* the defendant kidnapped a mother and two children and was convicted of conspiracy to commit hostage taking, substantive hostage taking, and using and carrying a firearm during and in relation to a crime of violence.⁵¹⁴ At sentencing the district court divided the conspiracy offense into three distinct groups based on the three victims, pursuant to U.S.S.G. section 1B1.2(d)⁵¹⁵ and section 3D1.2.⁵¹⁶ The

508. *Id.* at 1244-45.

509. *Id.* at 1245-46 (quoting U.S. SENTENCING GUIDELINE MANUAL § 3D1.2, cmt. n.2 (2002)).

510. *Id.* at 1246.

511. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3D1.2, cmt. n.2 (2002) (“The term ‘victim’ is not intended to include indirect or secondary victims”).

512. *Id.* at 1245.

513. *Torrealba* is also discussed at length in connection with U.S.S.G. section 2A4.1: Kidnapping, Abduction, Unlawful Restraint, at *supra* notes 91-107.

514. 339 F.3d at 1239.

515. U.S.S.G. section 1B1.2(d) provides that “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” *Id.* at 1241 n.6 (quoting U.S. SENTENCING GUIDELINE MANUAL § 1B1.2(d) (2002)).

Eleventh Circuit found it unnecessary to address grouping under 1B1.2(d) because it concluded that section 3D1.2 authorized separate grouping in this case.⁵¹⁷

Under section 3D1.2,

“a sentencing court may treat a conspiracy count as if it were 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.”⁵¹⁸

In upholding the application of section 3D1.2 in *Torrealba*, the court relied heavily on the existence of multiple kidnapping victims in deciding that “a conspiracy to take several hostages is a conspiracy to commit several substantive ‘offenses’ within the meaning of commentary note 8 to section 3D1.2.”⁵¹⁹ Thus, the court proclaimed, “whe[n] a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under § 3D1.2 into that same number of distinct crimes for sentencing purposes.”⁵²⁰

516. U.S.S.G. section 3D1.2 provides, in pertinent part:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Id. at 1241 n.6 (quoting U.S. SENTENCING GUIDELINE MANUAL § 3D1.2 (2002)).

517. *Id.* at 1242-44.

518. *Id.* at 1242 (quoting *United States v. Hersh*, 297 F.3d 1233, 1248 (11th Cir. 2002)).

519. *Id.*

520. *Id.* at 1243. The court quoted Application Note Eight as follows:

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently

E. Part E: Acceptance of Responsibility

U.S.S.G. section 3E1.1(a) provides for a two-level sentence reduction “[i]f the defendant clearly demonstrates acceptance of responsibility for his offense.”⁵²¹ An additional one-level reduction is authorized if the defendant meets the criteria set forth in subsection (b),⁵²² which was not addressed in any published Eleventh Circuit decision in 2003. The only Eleventh Circuit case to analyze section 3E1.1(a) in 2003 was *Rubio*.⁵²³ Defendant in *Rubio* was sentenced to 327 months of imprisonment for conspiracy to possess with intent to distribute and possession with intent to distribute approximately one kilogram of cocaine.⁵²⁴ The Eleventh Circuit rejected each of defendant’s challenges to that sentence, including the claim that he accepted responsibility for his offense and only proceeded to trial to contest the legal issue of the scope of the career offender guideline.⁵²⁵ In affirming the district court’s ruling that defendant had not accepted responsibility for his acts, the Eleventh Circuit observed that although the defendant initially offered to plead guilty, he later withdrew that offer.⁵²⁶ “He put the government to its proof and consistently attempted to minimize his role, despite videotaped evidence to the contrary.”⁵²⁷

V. CHAPTER FOUR: CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

A. Part A: Criminal History

In accordance with U.S.S.G. section 4A1.1, “prior sentences” are assigned a specified number of criminal history points depending on the type of crime and the length of the sentence.⁵²⁸ The total number of criminal history points determine the defendant’s criminal history category, which is used in determining the sentencing range under the

comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. *Id.* at 1242-43 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3D1.2, cmt. n.8 (2002) (emphasis supplied by the court)).

521. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2002).

522. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2002).

523. 317 F.3d 1240 (11th Cir. 2003). *Rubio* is also discussed in connection with U.S.S.G. section 3C1.1 (obstruction of justice), at *supra* notes 448-97, and U.S.S.G. section 4B1.2 (criminal history calculations), at *infra* notes 528-52.

524. 317 F.3d at 1241 (citing 21 U.S.C. § 841).

525. *Id.* at 1243-44.

526. *Id.* at 1244.

527. *Id.*

528. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2002).

federal sentencing guidelines.⁵²⁹ The guidelines define “prior sentence” as “any sentence previously imposed upon adjudication for guilt . . . for conduct not part of the instant offense.”⁵³⁰ The commentary explains that “[c]onduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct).”⁵³¹ The term “relevant conduct” is defined as including, among other things, “all acts and omissions committed . . . by the defendant that occurred during the commission of the offense of conviction, in preparation for that offense, or *in the course of attempting to avoid detection or responsibility for that offense.*”⁵³²

In *United States v. White*,⁵³³ the Eleventh Circuit was called upon to resolve a matter of first impression concerning the application of U.S.S.G. sections 1B1.3(a)(1) and 4A1.2(a)(1).⁵³⁴ When immigration officials went to arrest defendant on the charge of being in the United States illegally,⁵³⁵ defendant gave them a false name.⁵³⁶ Law enforcement officers found identification bearing that same false name when they searched defendant’s apartment. This discovery led to defendant’s state conviction and sentence for giving false information to the police. Defendant was also convicted in federal court for being in the United States illegally.⁵³⁷ At sentencing the district court opined that the state offense counted as a “prior sentence” for criminal history purposes because it was not related to the federal case. The district court based its opinion on the chronology of events recited above.⁵³⁸

To determine whether the state sentence was a “prior sentence” that counted for criminal history purposes, the Eleventh Circuit focused its attention on whether defendant’s conduct—giving a false name at the time of arrest on the instant federal charge of being in the United States illegally—constituted “an action taken to avoid detection or responsibility for” the instant federal offense.⁵³⁹ “Deciding whether an act was

529. See U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (2002).

530. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(1) (2002).

531. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.1 (2002).

532. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (2002) (emphasis added).

533. 335 F.3d 1314 (11th Cir. 2003).

534. *Id.* at 1316-17.

535. See 8 U.S.C. § 1326(b) (2000).

536. 335 F.3d at 1315.

537. *Id.* at 1315-16.

538. *Id.*

539. *Id.* at 1317 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (2002)). The court also addressed, for the first time, “the proper standard for reviewing a district court’s application of U.S.S.G. § 4A1.2 and § 1B1.3(a)(1) to the facts in light of *Buford v. United States*, 532 U.S. 59, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001).” *Id.* The court decided that clear error review was appropriate because “[d]eciding whether an act was committed

committed 'in the course of attempting to avoid detection or responsibility for [an] offense' is almost always a question of fact. It requires the sentencing judge to assess the defendant's intent for committing the additional crime."⁵⁴⁰

In vacating the sentence, the Eleventh Circuit stated that the sentencing court's chronological account did not allow the court "to make any inferences about [the defendant's] intent, which is the relevant inquiry in deciding whether the state false-information crime was an attempt to avoid detection for the federal crime."⁵⁴¹ The court emphasized that the federal crime at issue was "being in"—not just entering—the United States.⁵⁴² Thus, the focus had to be on whether defendant gave a false name to law enforcement "to avoid detection for *being in* the United States."⁵⁴³ Based on the facts of the case, the Eleventh Circuit concluded that the district court clearly erred in answering this question in the negative.⁵⁴⁴ Thus, the state conviction was relevant conduct, which meant it was not a "prior sentence" for purposes of U.S.S.G. section 4A1.2(a)(1), and could not be counted in calculating the defendant's criminal history.⁵⁴⁵

In *Hunter* there was no question but that the prior sentences qualified as "prior sentences" for purposes of U.S.S.G. section 4A1.2(a)(1).⁵⁴⁶ Rather, the focus of the decision in *Hunter* was whether, under U.S.S.G. section 4A1.2(a)(2), each sentence counted separately or whether the sentences could be treated as one sentence.⁵⁴⁷ "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c)."⁵⁴⁸ According to the commentary to section 4A1.2, "[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 of-

'in the course of attempting to avoid detection or responsibility for [an] offense' is almost always a question of fact." *Id.* at 1319.

540. *Id.* at 1319.

541. *Id.* at 1320.

542. *Id.*

543. *Id.* (emphasis added).

544. *Id.*

545. *Id.*

546. 323 F.3d 1314 (11th Cir. 2003). *Hunter* is also discussed in the sections of this Article relating to relevant conduct (U.S. SENTENCING GUIDELINES MANUAL § 1B1.3), at *supra* notes 3-29, and minor role (U.S. SENTENCING GUIDELINES MANUAL § 3B1.2), at *supra* notes 415-32.

547. 323 F.3d at 1323.

548. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (2002).

fense).⁵⁴⁹ If, on the other hand, the offenses that led to the sentences “(A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing,” then the prior sentences are considered related.⁵⁵⁰

Reflecting on the clarity of the commentary, the Eleventh Circuit pointed out that “[i]n determining whether cases are related, the first question is always whether the underlying offenses are separated by an intervening arrest. This inquiry is preliminary to any consideration of consolidated sentencing.”⁵⁵¹ Hence, even though the defendant was sentenced for two offenses on the same day, those sentences were not related because defendant was arrested for the two offenses on different days.⁵⁵²

B. Part B: Criminal Livelihood

1. U.S.S.G. Section 4B1.1: Career Offender. U.S.S.G. section 4B1.1 provides for significantly enhanced sentencing guidelines if the defendant meets the following three criteria, which qualify him for treatment as a career offender:

- (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 prior felony convictions of either a crime of violence or a controlled substance offense.⁵⁵³

Examples of crimes of violence include: “murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.”⁵⁵⁴ The test for determining whether other offenses are considered

549. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.3 (2002).

550. *Id.*

551. 323 F.3d at 1322-23 (citing *United States v. Duty*, 302 F.3d 1240, 1241-42 (11th Cir. 2002); *United States v. Gallegos-Gonzalez*, 3 F.3d 325, 327 (9th Cir. 1993); *United States v. Aguilera*, 48 F.3d 327, 330 (8th Cir. 1995)).

552. *Id.* at 1323. The Eleventh Circuit noted that the defendant’s reliance on *United States v. Dorsey* was misplaced because that case was based on a prior version of the commentary to U.S.S.G. section 4A1.2. *Id.* Prior to 1991, Application Note Three “arguably appeared to define all cases consolidated for sentencing as related.” *Id.* at 1323 n.5. However, Note 3 was amended in 1991 to make it clear that sentences separated by intervening arrests are never related. *Id.* (citing *Gallegos-Gonzalez*, 3 F.3d at 327-28 & n.2).

553. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

554. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. 1 (2002).

crimes of violence is whether: “(1) such other offense has as an element the use, attempted use, or threatened use of physical force against another; or (2) the conduct underlying the conviction involved the use of explosives or, by its nature, presented a serious potential risk of physical injury to another.”⁵⁵⁵

As a matter of first impression in the Eleventh Circuit, the court in *Rubio*⁵⁵⁶ held that the offense of driving under the influence (DUI) causing serious bodily injury is a crime of violence for purposes of the career offender classification.⁵⁵⁷ The court noted that several other circuits had reached the same conclusion.⁵⁵⁸ Additionally, the Eleventh Circuit referred to its prior ruling that “DUI causing serious bodily injury was a crime of violence under § 101(a)(43)(F) of the Immigration and Naturalization Act.”⁵⁵⁹

In *United States v. Adams*,⁵⁶⁰ defendant, who pleaded guilty to a drug charge, was classified as a career offender based on two prior convictions—in 1994 and 1997—for carrying concealed weapons.⁵⁶¹ Controlling Eleventh Circuit precedent classifies the offense of carrying a concealed weapon as a crime of violence for career offender purposes.⁵⁶² While the majority opinion in *Adams* did not revisit that precedent,⁵⁶³ the dissent questioned the wisdom and logic of that precedent, noted the circuit split on the issue, and recommended that the holdings, including all concealed weapon violations under the umbrella of career offender analysis, be reviewed by this court *en banc* under a plain error analysis.⁵⁶⁴ Additionally, the dissent in *Adams* called for

555. *Id.*

556. *Rubio* is also discussed in connection with U.S.S.G. section 3C1.1 (obstruction of justice), at *supra* notes 448-97, and U.S.S.G. section 3E1.1 (acceptance of responsibility), at *supra* notes 521-27.

557. 317 F.3d at 1243.

558. *Id.* (citing *United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995) (first-degree assault conviction for DUI causing serious injury); *United States v. Jernigan*, 257 F.3d 865, 866 (8th Cir. 2001) (negligent homicide while driving under the influence); *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000) (misdemeanor offense of driving under the influence); *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996) (killing a human being while driving under the influence).

559. *Id.* (citing *Le v. U.S. Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999)).

560. 316 F.3d 1196 (11th Cir. 2003).

561. *Id.* at 1197. The Eleventh Circuit issued published decisions in two cases entitled *United States v. Adams* in 2003. *United States v. David Adams*, 329 F.3d 802, 803 (11th Cir. 2003), is discussed in the section of this Article analyzing U.S.S.G. section 2K2.1(b)(4), at *supra* notes 231-44. The *Adams* involved in this career offender case is Bernard Adams.

562. *Id.* at 1197 (citing *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998)).

563. *Id.* at 1197 n.1.

564. *Id.* at 1199-1203 (Propst, J., dissenting).

en banc review of the Eleventh Circuit precedent restricting downward departures in career offender cases.⁵⁶⁵

Once a defendant is properly classified as a career offender, little can be done to ameliorate the severity of the ensuing sentence by way of adjustments or departures. For example, although the sentence can still be adjusted downward for acceptance of responsibility under U.S.S.G. section 3E1.1, a defendant who is sentenced as a career offender cannot, as a matter of law, receive a minor role reduction in his sentencing guidelines.⁵⁶⁶

In *Adams* the district court invited Eleventh Circuit review of its decision not to depart downward.⁵⁶⁷ The district court acknowledged its discretion to depart downward when the defendant's criminal history overrepresents the seriousness of his prior criminal offenses. However, the district court declined to do so, expressing confusion over what the appropriate standard was—*i.e.*, should it compare the defendant's criminal history to the "usual" defendant in category VI who has twelve criminal history points, or to other career offenders who have less than twelve points and only end up in category VI because of the career offender status.⁵⁶⁸

The Eleventh Circuit noted the general rule that if a district court recognizes its authority to depart downward and chooses not to do so, that decision is not reviewable on appeal.⁵⁶⁹ Notwithstanding, the Eleventh Circuit opted to review in this case because "while the district court raised an interesting legal question, it was the wrong question to ask on the facts of this case."⁵⁷⁰ The Eleventh Circuit never directly answered the district court's interesting legal question; rather, the appellate court explained that the district court erred in analyzing the motion for a downward departure under U.S.S.G. section 5K2.0, instead of U.S.S.G. section 4A1.3.⁵⁷¹ Because downward departures for overrepresentation of criminal history are expressly authorized under section 4A1.3, the district court should not have engaged in the unguided departure analysis applicable to section 5K2.0 departures.⁵⁷² "Unguided departures, which proceed under U.S.S.G. § 5K2.0, are those not explicitly provided for in the Guidelines—*i.e.*, they are departures for

565. *Id.* (Propst, J., dissenting).

566. *See Jeter*, 329 F.3d at 1230, which is discussed in connection with the minor role adjustment under U.S.S.G. section 3B1.2, at *supra* notes 415-32.

567. 316 F.3d at 1197-98.

568. *Id.*

569. *Id.* at 1198.

570. *Id.*

571. *Id.* at 1198-99.

572. *Id.*

cases falling outside the heartland created by, *inter alia*, the guided departures established by the Sentencing Commission in formulating the Guidelines.⁵⁷³

Regardless of the incorrect analysis, the Eleventh Circuit affirmed the district court's decision to not depart, stating that the court could not have departed under U.S.S.G. section 4A1.3 either because section 4A1.3 is concerned with "the pattern or timing of prior convictions."⁵⁷⁴ Defendant's 1994 and 1997 prior convictions were deemed not so remote in time as to warrant a departure, especially in light of the presence of intervening criminal behavior.⁵⁷⁵

VI. CHAPTER FIVE: DETERMINING THE SENTENCE

A. Part D: Supervised Release

In 2003 the Eleventh Circuit was called upon to review several conditions of supervised release. U.S.S.G. section 5D1.3 contains four classes of conditions of supervised release that a sentencing court may impose: (1) the mandatory conditions set forth in section 5D1.3(a); (2) the standard conditions recommended in section 5D1.3(c); (3) special conditions in section 5D1.3(d) and (e); and (4) any other conditions that a court may impose if the condition meets the requirements set forth in section 5D1.3(b).⁵⁷⁶

The Eleventh Circuit ruled that the supervised release conditions imposed in several cases were reasonable under the circumstances. For example, in *United States v. Zinn*,⁵⁷⁷ the court affirmed the following supervised release conditions, which were imposed on a defendant convicted of possessing child pornography: (1) that the defendant submit to polygraph testing, and (2) that the defendant obtain consent of the probation office to be able to gain access to the Internet.⁵⁷⁸ Likewise, in *United States v. Taylor*,⁵⁷⁹ the court ruled that it was reasonable to require a defendant convicted of using the Internet to encourage persons to engage in sexual activity with a minor to submit to the following conditions of supervised release: (1) submission to polygraph testing, (2) restrictions on Internet access, (3) registration as a sex offender, and (4)

573. *Id.*

574. *Id.* at 1199 (citing *United States v. Rucker*, 171 F.3d 1359, 1363 (11th Cir. 1999); *United States v. Phillips*, 120 F.3d 227, 232 (11th Cir. 1997)).

575. *Id.*

576. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (2002).

577. 321 F.3d 1084 (11th Cir. 2003).

578. *Id.* at 1093-94.

579. 338 F.3d 1280 (11th Cir. 2003).

a restriction on visiting places where children congregate.⁵⁸⁰ Similarly, in *United States v. Veal*,⁵⁸¹ the Eleventh Circuit affirmed a special condition of supervised release for a defendant convicted of transporting or shipping child pornography by computer, in violation of 18 U.S.C. § 2252(a)(1), which required the defendant to register with the State Sexual Offender Registration Agency.⁵⁸²

Not all conditions of supervised release survived Eleventh Circuit scrutiny. In *United States v. Ridgeway*,⁵⁸³ the Eleventh Circuit held that a condition of supervised release requiring a defendant who was convicted of possessing an unregistered firearm to refrain from “conduct or activities that would give reasonable cause to believe” that he had violated any criminal law was unduly vague and therefore not authorized by the Sentencing Guidelines.⁵⁸⁴ Accordingly, the court vacated this portion of the sentence.⁵⁸⁵

B. Part G: Implementing the Total Sentence of Imprisonment

1. U.S.S.G. Section 5G1.2. In *United States v. Davis*,⁵⁸⁶ the court answered a question of first impression in the Eleventh Circuit regarding U.S.S.G. section 5G1.2(d).⁵⁸⁷ That guideline states:

If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.⁵⁸⁸

Because the guidelines called for sentences that exceed the statutory maximum under any one count, the district court sentenced the defendants to consecutive sentences to achieve the applicable guideline sentence, believing that it had no discretion to do otherwise.⁵⁸⁹

Defendants in *Davis* pointed out that the Eleventh Circuit had “never *directly* addressed the question of whether the district court retains the

580. *Id.* at 1280-86.

581. 322 F.3d 1275 (11th Cir. 2003).

582. *Id.* at 1278-79.

583. 319 F.3d 1313 (11th Cir. 2003).

584. *Id.* at 1316-17.

585. *Id.*

586. 329 F.3d 1250 (11th Cir. 2003).

587. *Id.* at 1252.

588. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2002).

589. 329 F.3d at 1252.

discretion to sentence a defendant to concurrent terms of imprisonment when § 5G1.2(d) calls for consecutive terms of imprisonment.⁵⁹⁰ The Eleventh Circuit then took this opportunity to announce that it agreed with the majority of the other circuits that had answered the question.⁵⁹¹ As such, the court held that “the district court properly interpreted [section] 5G1.2(d) to require the imposition of consecutive sentences on Appellants whe[n] the sentence imposed on the [section] 841 count was less than the total punishment for Appellants’ aggregate convictions.”⁵⁹² The court recognized that the circuits were still split inasmuch as the Third and Fifth Circuits had ruled to the contrary.⁵⁹³

2. U.S.S.G. Section 5G1.3. Pursuant to U.S.S.G. section 5G1.3, the federal district court can run a federal sentence concurrent or consecutive to an unimposed state sentence on a pending case.⁵⁹⁴ This

590. *Id.* at 1253 (emphasis supplied by the court).

591. *Id.* (citing *United States v. Diaz*, 296 F.3d 680, 684-85 (8th Cir. 2002); *United States v. Price*, 265 F.3d 1097, 1109 (10th Cir. 2001); *United States v. Kentz*, 251 F.3d 835, 842 (9th Cir. 2001); *United States v. Angle*, 254 F.3d 514, 518-19 (4th Cir. 2001); *United States v. Page*, 232 F.3d 536, 544-45 (6th Cir. 2000)).

592. *Id.* at 1254.

593. *Id.* (citing *United States v. Velasquez*, 304 F.3d 237, 242-43 (3d Cir. 2002) (holding that the district court retained the discretion under 18 U.S.C. § 3854 to run sentences concurrently without departing even when section 5G1.2(d) applies); *United States v. Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001) (indicating that the application of section 5G1.2(d) is discretionary)).

A few months after publishing *Davis*, the Eleventh Circuit issued *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003), which noted and followed *Davis*. *Pressley* was sentenced to 360 months imprisonment under U.S.S.G. section 5G1.2, which requires a district court to run sentences consecutively in order to achieve the guidelines target sentence, which, in this case, was 360 months to life. *Pressley* is discussed in more detail in connection with departures under Chapter Five, Part K, at *infra* notes 608-42.

594. U.S.S.G. section 5G1.3 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 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 a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) The court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

guideline was addressed in two published Eleventh Circuit cases in 2003— *United States v. Andrews*⁵⁹⁵ and *United States v. McDaniel*.⁵⁹⁶

In *Andrews* defendant's supervised release was revoked and he was resentenced to twenty-four months of imprisonment.⁵⁹⁷ The only issue before the appellate court was "whether the district court had the authority to impose the 24-month sentence as consecutive to any *future* sentence imposed as a result of [the defendant's] underlying criminal conduct."⁵⁹⁸ Recognizing a circuit split concerning whether a district court has the authority to impose consecutive sentences for supervised release and for the underlying criminal conduct,⁵⁹⁹ the Eleventh Circuit held that it was bound to follow *United States v. Ballard*.⁶⁰⁰ In *Ballard* the court upheld a consecutive federal sentence that was imposed consecutively to an anticipated state sentence that had not yet been imposed.⁶⁰¹ The Eleventh Circuit refused to limit *Ballard* to its facts, ruling that under *Ballard*, the sentencing court had the authority to impose consecutive sentences and did not abuse its discretion in doing so here.⁶⁰² The court explained, however, that the state court still retains the power in this scenario to effectively overrule the federal court's decision.⁶⁰³

By this opinion, we conclude only that the federal court may control the federal sentence and whether a defendant will receive federal credit for the time served on his state sentence. . . . The fact that the federal district court elected to sentence Andrews to a consecutive federal

(2) The sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, 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.

U.S. SENTENCING GUIDELINES MANUAL § 5G1.3 (2002).

595. 330 F.3d 1305 (11th Cir. 2003).

596. 338 F.3d 1287 (11th Cir. 2003).

597. 330 F.3d at 1307-08.

598. *Id.* at 1306 (emphasis supplied by the court).

599. *Id.* (comparing *Romandine v. United States*, 206 F.3d 731 (7th Cir. 2000) (district court does not have such authority); *United States v. Quintero*, 157 F.3d 1038 (6th Cir. 1998) (same); *United States v. Clayton*, 927 F.2d 491 (9th Cir. 1991) (same), with *United States v. Hernandez*, 234 F.3d 252 (5th Cir. 2000) (district courts do have such authority); *United States v. Williams*, 46 F.3d 57 (10th Cir. 1995) (same); *Salley v. United States*, 786 F.2d 546 (2d Cir. 1986) (same)).

600. 6 F.3d 1502, 1504-10 (11th Cir. 1993).

601. 330 F.3d at 1306-07.

602. *Id.* at 1307.

603. *Id.* at 1307 n.1.

sentence by no means limits the sentencing options available to the state court.⁶⁰⁴

The Eleventh Circuit recognized its decisions in *Ballard* and *Andrews* in deciding *McDaniel*.⁶⁰⁵ The court in *McDaniel* held that the district court erred in ruling that it did not have the discretion to order the defendant's sentence to run concurrently with an unimposed sentence on pending state charges.⁶⁰⁶ Because the district court did have the authority to make a federal sentence concurrent to a state sentence not yet imposed for pending state charges, the sentence was vacated and the case was remanded for resentencing.⁶⁰⁷

C. Part K: Departures

The Eleventh Circuit departure decisions were unremarkable in 2003. The court iterated its oft-repeated rule that it will "not review a district court's refusal to grant a downward departure unless the court mistakenly believed that it lacked the authority to grant such a departure."⁶⁰⁸ That rule rang the death knell for the defendant in *Torrealba*,⁶⁰⁹ who appealed the district court's refusal to depart downward under U.S.S.G. section 5K2.0 "based on the extensive physical and sexual abuse that he suffered during his childhood at the hands of . . . his co-conspirator and the apparent mastermind of the kidnaping plot."⁶¹⁰ The district court acknowledged that it could depart, but stated that it would be inappropriate to do so under the facts of the case.⁶¹¹ This ended any appellate review of *Torrealba*'s departure claim.⁶¹²

604. *Id.*

605. 338 F.3d at 1287-88 (citing *Andrews*, 330 F.3d 1305; *Ballard*, 6 F.3d 1502).

606. *Id.*

607. *Id.* at 1288.

608. *Torrealba*, 339 F.3d at 1247 (quoting *United States v. Hansen*, 262 F.3d 1217, 1256 (11th Cir. 2001), citing *United States v. Mignott*, 184 F.3d 1288, 1290 (11th Cir. 1999)). See also *Adams*, 316 F.3d at 1197-99, which is discussed in connection with Chapter Four departures in the context of a career offender classification, at *supra* notes 553-75.

609. 339 F.3d at 1247.

610. *Id.*

611. *Id.*

612. *Id.* In a related context, the court observed that "[t]he application of § 3742(a) and the restraints it places on review of downward departure decisions is at most a collateral consequence of a guilty plea, just as it is at most a collateral consequence of conviction after trial." *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). Indeed, there appears to be no Eleventh Circuit or Supreme Court case that "requires a district court to inform the defendant during a guilty plea colloquy that he may or will be unable to appeal any refusal by the court to depart downward at sentencing." *Id.*

In two other cases, the court agreed to review the denial of the downward departure motions because the district court failed to recognize its authority to depart. For example, in *Anderson*, the court agreed with the defendant that the district court rejected the downward departure based on an erroneous belief that it lacked the authority to depart.⁶¹³ Although the district court judge said he did not think a prima facie case had been made for departure, which was not reviewable on appeal, the judge also opined that he lacked the authority to grant the departure.⁶¹⁴ “This statement opens the door to appellate review.”⁶¹⁵ The Government conceded that the district court was incorrect in its belief that it could not depart.⁶¹⁶ Nonetheless, the Government asked the court to affirm because, it argued, the departure was not warranted. Defendant, on the other hand, asked the court to order the district court to grant the departure.⁶¹⁷ The Eleventh Circuit accepted neither proposal.⁶¹⁸ Instead, the Eleventh Circuit expressed no view on the merit of the departure motion; it simply remanded the case to allow the district court to make the decision.⁶¹⁹

The Eleventh Circuit also reversed, in part, a district court’s determination that it lacked authority to depart from the sentencing guidelines range in *Pressley*.⁶²⁰ *Pressley* was sentenced to a total of 360 months of imprisonment because consecutive sentences were imposed under U.S.S.G. section 5G1.2 in order to achieve the sentence called for under the applicable guidelines, which was 360 months to life.⁶²¹ *Pressley* raised three grounds for downward departure: (1) the guidelines sentence overstated the seriousness of his drug offense; (2) the conditions of his presentence confinement were harsh; and (3) consecutive sentences resulting in more jail time than the statutory maximum violate the spirit of *Apprendi*.⁶²²

613. 326 F.3d 1333 (11th Cir. 2003). There are two published *Anderson* decisions in the Eleventh Circuit in 2003. The *Anderson* decision discussed here, in connection with departures, was also discussed in earlier in this article in connection with Chapter Two, Part X: Conspiracies, at *supra* notes 364-80.

614. 326 F.3d at 1332.

615. *Id.*

616. *Id.* at 1332-33.

617. *Id.*

618. *Id.*

619. *Id.*

620. 345 F.3d 1205, 1213-15 (11th Cir. 2003). *Pressley* was discussed earlier in this article in connection with U.S.S.G. section 5G1.2, at *supra* notes 620-36.

621. 345 F.3d at 1208.

622. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

After finding the district court believed that it lacked the authority to grant a departure, the court had to determine whether the district court's belief was based on legal error.⁶²³ "Deciding whether the district court was correct in a belief that it did not have authority to depart requires us to locate the boundaries of the district court's departure authority."⁶²⁴ The Eleventh Circuit noted that a decision to depart is threefold.⁶²⁵ First, the court must determine whether the facts take the case out of the heartland.⁶²⁶ Second, it must decide whether the proposed ground was adequately taken into account by the Sentencing Commission in formulating the guidelines.⁶²⁷ Third, the court must resolve whether the facts sufficiently exhibit a departure factor to support a departure.⁶²⁸

The Eleventh Circuit rejected the argument that "imposing consecutive sentences on the various counts would violate the spirit of *Apprendi*," especially given that the court had determined that *Apprendi* does not apply to the guidelines.⁶²⁹ Citing *Davis*, the court in *Pressley* reaffirmed that "imposition of consecutive sentences under section 5G1.2(d) is mandatory," although a "court may decline to impose consecutive sentences, even when required by section 5G1.2, if there are grounds for departing from the guidelines sentence."⁶³⁰ Nonetheless, the court found no such ground for departure under the facts of this case.⁶³¹ "We therefore hold that the mere operation of section 5G1.2 to increase the available aggregate sentence up to the guidelines' range, without more, does not render the case atypical."⁶³²

Likewise, the court rejected the argument that the sentence overstated the seriousness of defendant's crime because he was not a drug kingpin and the counts of conviction aggregated drug quantities in which he dealt over a period of time.⁶³³ Even assuming this could be a proper ground for departure, the court found that the defendant had not established that the factor was present to an exceptional degree.⁶³⁴

623. *Id.* at 1209.

624. *Id.*

625. *Id.* at 1209-11.

626. *Id.* at 1209.

627. *Id.* at 1210-11.

628. *Id.* at 1211.

629. *Id.* at 1213.

630. *Id.* at 1213-14 (citing *Davis*, 329 F.3d at 1253-54; *United States v. Perez*, 956 F.2d 1098, 1103 (11th Cir. 1992)).

631. *Id.*

632. *Id.* at 1215.

633. *Id.* at 1215-18.

634. *Id.*

However, the court held that the six years defendant spent in presentence confinement in a twenty-three-hour-a-day lockdown were “extraordinary” and provided a justifiable basis for departure.⁶³⁵ The court therefore remanded the case to give the district court an opportunity to exercise its discretion in determining whether to depart in light of the severity of the presentence confinement conditions.⁶³⁶

Unlike the courts in the other departure cases noted above, the district court in *United States v. Maung*⁶³⁷ granted a downward departure for an alien from Burma to bring the sentence—for exporting stolen cars—under one year.⁶³⁸ This sentence would not make defendant ineligible for asylum or face deportation to a country where, as a political refugee, he faced torture.⁶³⁹ In reversing, the Eleventh Circuit noted that contrary to the testimony of defendant’s expert witness, the reduction in defendant’s sentence would not automatically make him ineligible for withholding of removal.⁶⁴⁰ Although the district court was correct in believing that a sentence of more than one year would make the defendant ineligible for asylum, the Eleventh Circuit declared that this was not a valid basis for a downward departure.⁶⁴¹ Holding that “a sentencing court may not depart downward for the purpose of taking a crime out of the definition of an aggravated felony in order to shield the defendant from the immigration consequences Congress has decided should follow from commission of such crimes,” the court in *Maung* reversed the sentence and remanded with instructions to resentence the defendant without the downward departure.⁶⁴²

635. *Id.* at 1218-19.

636. *Id.*

637. 320 F.3d 1305 (11th Cir. 2003).

638. *Id.* at 1307.

639. *Id.*

640. *Id.* at 1307-08 & n.1.

641. *Id.* at 1308-10. The court dismissed as “dicta” caselaw recognizing alienage as a possible basis for departure. *Id.*

642. *Id.* at 1309-10. In so ruling, the court added one more thought:

The effect of permitting a downward departure on these grounds would be to favor aliens with more lenient sentences than citizens of this country who commit the same crime and have the same criminal history. That result would be more than a little odd especially since, in the only instances where they speak to the difference at all, the guidelines provide that harsher sentences should be imposed upon aliens in some circumstances.

Id. at 1309.

VII. CONCLUSION

The number of issues of first impression that arose in the Eleventh Circuit in 2003 is no doubt related, in large part, to the number of recent guideline amendments. Additional amendments to the guidelines, particularly guidelines implemented pursuant to the Protect Act, ensure that the cycle of interpretation, discrepancy, and guideline amendment will continue in the future. From a jurisprudential perspective, this continuing saga guarantees that the guidelines will be a predominant source of future litigation in the Eleventh Circuit.