Selected Post-*Booker* and Guideline Application Decisions for the Eleventh Circuit

Prepared by
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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — ELEVENTH CIRCUIT

This document contains annotations to certain Eleventh Circuit judicial opinions that involve issues related to the federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate some relevant authorities involving the federal sentencing guidelines. The document is not comprehensive and does not include all authorities needed to apply the guidelines correctly. Instead, it presents authorities that represent Eleventh Circuit jurisprudence on selected guidelines and guideline issues. The document is not a substitute for reading and interpreting the actual *Guidelines Manual* or researching specific sentencing issues; rather, the document serves as a supplement to reading and interpreting the *Guidelines Manual* and researching specific sentencing issues.

ISSUES RELATED TO *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Gomes, 621 F.3d 1343 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1822 (2011), *abrogated on other grounds by Dorsey v. United States*, 132 S. Ct. 2321 (2012). *Booker* did not affect the mandatory nature of mandatory minimum sentences and, even though a court may have the authority to deviate from the 100:1 crack-to-powder ratio when fashioning a sentence pursuant to § 3553(a), the district court remains bound by the applicable mandatory minimum sentences in doing so. The Fair Sentencing Act of 2010 does not provide authority for a district court to impose a sentence below the statutory mandatory minimum, absent the defendantôs eligibility for safety-valve relief or a government-sponsored motion for reduction based on the defendantôs substantial assistance.

United States v. Castaing-Sosa, 530 F.3d 1358 (11th Cir. 2008). The court held that 18 U.S.C. § 3553(a) does not authorize a sentence below a statutory minimum and that post-*Booker*, district courts remain bound by statutes designating mandatory minimums.

United States v. Hill, 171 F. Appôx 815 (11th Cir. 2006). ñPost-*Booker*, we continue to review a district courtôs factual determinations for clear error.ò

United States v. Brehm, 442 F.3d 1291 (11th Cir. 2006). The court rejected the appellantôs argument that ñ*Booker* rendered the eligibility requirements for safety-valve relief advisory and permitted the district court to exercise its discretion to grant relief from the mandatory minimum sentence,ò and explained that the district court cannot ignore mandatory minimums because ñ*Booker* does not render application of individual guideline provisions advisory [and] because the district court remains obligated correctly to calculate the Guidelines range pursuant to 18 U.S.C. § 3553(f)(1).ò

United States v. Stevenson, 162 F. Appôx 907 (11th Cir. 2006). The court vacated a sentence imposed after a *Booker* remand because the sentencing court failed to grant the

defendant a hearing and afford him the opportunity to allocute at resentencing (*citing United States v. Taylor*, 11 F.3d 149 (11th Cir. 1994) (a defendantôs rights under Fed. R. Crim. P. 32 and 43, to be present at sentencing and to allocute, extends to a resentencing where the original sentence is vacated in its entirety on appeal and the case is remanded for resentencing)).

United States v. Chau, 426 F.3d 1318 (11th Cir. 2005). The Sixth Amendment right to a jury trial does not prohibit the sentencing court from making factual determinations that go beyond a defendantôs admissions.

United States v. Magluta, 418 F.3d 1166 (11th Cir. 2005). The court held that *Booker* did not invalidate §5G1.2, which requires that sentences run consecutively to the extent necessary to reach the punishment range set by the guidelines.

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005). The court held that the defendant admitted certain facts by waiving any objections to the factual statements concerning his relevant conduct contained in the presentence report. *See also United States v. Gibson*, 434 F.3d 1234 (11th Cir. 2006) (holding that the defendant admitted all of the facts in the PSR by failing to object to the report); *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006) (ñIt is the law of [the] circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes.ò).

B. Burden of Proof

United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006). The court held that ñthe preponderance-of-the-evidence standard, not the beyond-a-reasonable-doubt standard, still applies to Guidelines calculations after *Booker*, including the calculation of loss amounts.ò

C. Hearsay

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005). The court clarified that *Booker* did not change the rule that a sentencing court may base sentencing determinations on reliable hearsay.

D. Acquitted Conduct

United States v. Smith, No. 12-11042, -- F.3d --, 2013 WL 6728097 (11th Cir. Dec. 23, 2013). It did not violate the Sixth Amendment for the district court to consider acquitted conduct at sentencing, so long as it found by a preponderance of the evidence that the conduct had occurred. The Eleventh Circuit does not recognize an ñas appliedò Sixth Amendment challenge based on the facts of a particular case.

United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005). The court held that, even after *Booker*, sentencing courts can consider acquitted conduct as relevant conduct. *See also United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006). The court relied on well-settled circuit precedent holding that ñ[r]elevant conduct of which a defendant was acquitted nonetheless may be taken into account in sentencing for the offense of conviction, as long as the government

proves the acquitted conduct relied upon by a preponderance of the evidence.ò The court further relied on the Supreme Courtôs pre-*Booker* decision upholding the use of acquitted conduct at sentencing, *United States v. Watts*, 519 U.S. 148 (1997), and on 18 U.S.C. § 3661, on which *Watts* had relied, noting that only 18 U.S.C. §§ 3553(b)(1) and 3742(e) had been invalidated by *Booker*. Section 3661, still intact after *Booker*, provides: ñNo limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.ò

E. Prior Convictions

United States v. Greer, 440 F.3d 1267 (11th Cir. 2006). ñ[U]nless and until the Supreme Court specifically overrules *Almendarez-Torres*, we will continue to follow it. . . . To be sure, the Supreme Court has instructed us that in determining the nature of a prior conviction for ACCA purposes the trial judge may not look beyond the statutory elements, charging documents, any plea agreement and colloquy or jury instructions, or comparable judicial record. There is implicit in the *Shepard* rule, however, a recognition that if the nature of the prior conviction can be determined from those types of records, under existing law the trial judge may make the determination. There would be no point in restricting the sources that a judge may consider in reaching a finding if judges were barred from making it. *Shepard* does not bar judges from finding whether prior convictions qualify for ACCA purposes; it restricts the sources or evidence that a judge (instead of a jury) can consider in making that finding.ò

United States v. Gibson, 434 F.3d 1234 (11th Cir. 2006). The court held that whether ñprior convictions were felonies involving a controlled substance is a question of law to be answered by the court, not a question of fact to be found by the jury.ò The court also held that the defendant admitted all of the facts in the PSR by failing to object to the report.

United States v. Glover, 431 F.3d 744 (11th Cir. 2005), *abrogated on other grounds by Johnson v. United States*, 559 U.S. 133 (2010). Whether a prior conviction is a crime of violence is a question of law for the court to decide.

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005). The court upheld a sentence enhanced under the Armed Career Criminal Act even though the prior convictions were not alleged in the indictment or proved beyond a reasonable doubt.

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005). The court reaffirmed the continuing validity of *Almendarez-Torres* and held that ñbecause the prior-conviction exception remains undisturbed after *Booker*, a district court does not err by relying on prior convictions to enhance a defendantôs sentence.ò *Accord United States v. Steed*, 548 F.3d 961 (11th Cir. 2008).

F. Ex Post Facto

United States v. Wetherald, 636 F.3d 1315 (11th Cir.), *cert. denied*, 132 S. Ct. 360 (2011). The Eleventh Circuit joins with the D.C. Circuit in holding that the application of a harsher guideline range in place at the time of sentencing may implicate the *Ex Post Facto* Clause post-*Booker*. ñ[T]he application of the correct Guidelines range is of critical importance, and it cannot be said that the *Ex Post Facto* Clause is never implicated when a more recent, harsher, set of Guidelines is employed. But it is equally clear that we need not óinvalidate every sentence imposed after a Guidelines range has been increased after the date of the offense.ô Rather, we will look to the sentence as applied to determine whether the change created óa sufficient risk of increasing the measure of punishment attached to the covered crimes.ôò *See also United States v. Masferrer*, 514 F.3d 1158, 1163 (11th Cir. 2008) (ñHowever, if a more lenient guidelines sentence was in effect at the time of the offense, the Guidelines Manual applicable at the time of the offense must be applied to avoid an *Ex Post Facto* Clause violation.ò); *United States v. Kapordelis*, 569 F.3d 1291, 1314 (11th Cir. 2009) (ñPursuant to the *Ex Post Facto* Clause, if applying the Guidelines in effect at the time of sentencing would result in a harsher penalty, a defendant must be sentenced under the Guidelines in effect at the time when he committed the offense.ò).

United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005). The change to an advisory guidelines system does not violate the *Ex Post Facto* Clause because the defendant had sufficient warning that a judge would engage in fact-finding to determine his sentence and could impose up to a guidelines sentence.

II. Departures

United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005). Post-*Booker*, application of the guidelines includes consideration of any departures that may be warranted.

United States v. Magluta, 418 F.3d 1166 (11th Cir. 2005). The court held that it would continue to review upward departures for an abuse of discretion after *Booker*.

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). The court explained that whether a factor is a permissible ground for a downward departure is a question of law subject to *de novo* review after *Booker,* just as it was before *Booker*.

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast track

United States v. Vega-Castillo, 540 F.3d 1235 (11th Cir. 2008). The court held that *Kimbrough v. United States*, which did not discuss *Castro* or its progeny, did not expressly overrule those cases and, therefore, the court was bound by its narrow prior precedent rule to apply those cases. Moreover, the court held, the holdings of *Kimbrough* and *Castro* are

distinguishable because they dealt with distinct guideline provisions. Also, *Kimbrough* addressed the district courtôs discretion to vary based on a disagreement with a guideline, as opposed to a congressional policy, and *Kimbrough* also dealt with a guideline that did not exemplify the Sentencing Commissionôs exercise of its characteristic institutional role.

United States v. Castro, 455 F.3d 1249 (11th Cir. 2006). The court rejected the defendantôs argument that his sentence was unreasonable because the district court refused to vary from the guidelines range based on the lack of a fast-track program in the sentencing jurisdiction, holding: ñAny disparity created by section 5K3.1 does not fall within the scope of section 3553(a)(6). When Congress directed the Sentencing Commission to allow the departure for only participating districts, [via the PROTECT Act], Congress implicitly determined that the disparity was warranted. [The defendantôs] interpretation of section 3553(a)(6) conflicts with the decision of Congress to limit the availability of the departure to participating districts and erroneously elevates one factor above all others.ò (internal citations omitted). *See also United States v. Campos-Diaz*, 472 F.3d 1278 (11th Cir. 2006) (concluding that the disparity between districts caused by fast-track programs did not involve a suspect classification or otherwise infringe on a fundamental constitutional right). *Accord United States v. Arevalo-Juarez*, 464 F.3d 1246 (11th Cir. 2006) (vacating downward variance based on disparity created by §5K3.1 in light of *Castro)*; *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007) (same, and further observing that sentences imposed on defendants in districts without fast-track programs are not necessarily ñgreater than necessaryò to achieve purposes of sentencing solely because similarly-situated defendants in fast-track districts are eligible to receive lesser sentences), *overruled on other grounds by Johnson v. United States*, 559 U.S. 133 (2009).

2. Co-Defendants

United States v. Hill, 643 F.3d 807 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1988 (2012). In rejecting the defendantôs claim of unreasonableness based, in part, on the sentencing disparity between the defendantôs sentence and that of his co-conspirator, the court found that reasonable bases existed for the difference in the 127 month sentence received by defendant and the 5 month sentence received by his co-defendant for their involvement in mortgage fraud and money laundering scheme. The court explained that although the defendant and the co-defendant were both appraisers involved in the scheme, the defendant participated in more transactions than the co-defendant, the co-defendant did not profit from scheme, and the amount of loss was grossly overstated in the co-defendantôs criminal conduct compared to other defendants.

United States v. Williams, 526 F.3d 1312 (11th Cir. 2008). The court rejected the defendantsô claims of unreasonableness based on co-defendant disparity under § 3553(a)(6). The co-defendant who had received a lesser sentence pled guilty and provided substantial assistance to the government by testifying against one of the defendants at trial. *See also United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001) (ñDisparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appealò); *United States v. Docampo*, 573 F.3d 1091 (11th Cir. 2009) (holding that the defendant, who was prosecuted and found guilty by a jury in federal court, ñis not similarly situated, under section 3553(a)(6), to [his co-defendants], who were prosecuted in state court and pleaded guilty.ò).

United States v. Edinson, 209 F. Appôx 947 (11th Cir. 2006). The court rejected the defendantôs claim that his sentence was unreasonable under § 3553(a)(6) because his co-defendants were given lower sentences. Section 3553(a)6) is more concerned with unjustified differences across judges or districts than between co-defendants in a single case.

IV. Reasonableness Review

A. General Principles

United States v. Livesay, 587 F.3d 1274 (11th Cir. 2009). The Eleventh Circuit vacated the sentence imposed by the district court for a third time, holding that ñ*[a] sentence of probation for a high-ranking officer in a corporation where over a billion dollars of fraud was perpetrated on an unsuspecting work force and investing public is not reasonable*, given the criteria found in § 3553(a) for determining an appropriate sentence.ò Citing the § 3553(a) factor regarding the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment, the court stated that, ñwhen imposed upon a high-ranking corporate officer that helped bilk over a billion dollars from the companyôs innocent shareholders, a sentence devoid of any meaningful period of incarceration simply does not reflect these goals.ò Citing the § 3553(a) factor regarding the need for adequate deterrence, the court indicated that ñit is difficult to imagine a would-be white-collar criminal being deterred from stealing millions of dollars from his company by the threat of a purely probationary sentence, regardless of how much probation that person received.ò

United States v. Livesay, 525 F.3d 1081 (11th Cir. 2008). The court explained the two-step process of appellate review of sentences required after *Gall v. United States*, 552 U.S. 38 (2007). The court must first ñensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the [g]uidelines range, treating the [g]uidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or *failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range*ò (quoting *Gall*) (emphasis in *Livesay*). Secondly, the court must consider the substantive reasonableness of the sentence, applying an abuse-of-discretion standard. The court determined that the sentencing court committed ñprocedural *Gall* errorò when it based the extent of a §5K1.1 departure (5 yearsô probation with 6 months of home detention from a guidelines range of 78 to 97 monthsô imprisonment) on an impermissible consideration. The defendantôs ñrepudiation of the conspiracy,ò relied on by the court, was not a permissible §5K1.1 factor because it does not pertain to cooperation. The court committed further procedural error when it alternatively granted a downward variance and arrived at the same sentence without giving an adequate explanation that allowed for meaningful appellate review.

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008). The district court abused its discretion by imposing a substantively unreasonable sentence of probation on a defendant convicted of downloading at least 68 images of child pornography whose guidelines range was

97 to 120 monthsô imprisonment. While recognizing that *Gall* rejected an appellate rule that requires ñextraordinaryò circumstances to justify a variance, the Eleventh Circuit focused on the language in *Gall* that obligates the district judge to ñensure that the justification is sufficiently compelling to support the degree of the variance,ò and that held that ña major departure should be supported by a more significant justification than a minor one.ò The court further held that a sentence may be substantively unreasonable if it fails to serve the purposes of sentencing in § 3553(a), if the sentencing court weighed the § 3553(a) factors in a manner that yields an unreasonable sentence, or if it unjustifiably relied on any one factor or relied on impermissible factors. Applying these standards, the court concluded that the sentencing court ñcommitted a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.ò

United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006). The court said ñ[w]e do not believe that any across-the-board prescription regarding the appropriate deference to give the [g]uidelines is in order,ò and held that ña district court may determine, on a case-by-case basis, the weight to give the [g]uidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendantôs sentence.ò

United States v. Martinez, 434 F.3d 1318 (11th Cir. 2006). The court rejected the governmentôs argument that the appellate court lacked jurisdiction to review a within-guidelines sentence for reasonableness, holding that an appeal based on the unreasonableness of a sentence, ñwhether within or outside the advisory guidelines range, is an appeal asserting that the sentence was imposed in violation of law pursuant to [18 U.S.C. § 3742(a)(1)].ò

United States v. Talley, 431 F.3d 784 (11th Cir. 2005). The court held that (1) the courtôs review for reasonableness is deferential, (2) a sentence must achieve the purposes of sentencing set out in § 3553(a), (3) a sentence within the guidelines range is not *per se* reasonable, (4) but the guidelines are ñcentral to the sentencing process,ò and ñordinarily we would expect a sentence within the Guidelines range to be reasonable,ò and (5) the challenging party bears the burden of showing that the sentence is unreasonable.

B. Standard of Review

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008). After *Booker*, an appellate court applies a reasonableness standard of review to sentences, just as before *Booker* courts used an abuse-of-discretion standard to review sentencing departures. The appellate court ñmust measure órea sonablenessô against the factors outlined by Congress in 18 U.S.C. § 3553(a).ò

United States v. Winingear, 422 F.3d 1241 (11th Cir. 2005). The court held that the reasonableness standard does not apply to each individual decision made during the sentencing process, but instead applies to the final sentence.

C. Procedural Reasonableness

United States v. Bohannon, 476 F.3d 1246 (11th Cir. 2007). In conducting reasonableness review, the court does not apply the reasonableness standard to each individual decision made during the sentencing process, but instead reviews the final sentence for reasonableness.

United States v. Scott, 426 F.3d 1324 (11th Cir. 2005). The court held that nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors.

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). The court explained that, although sentencing courts are not bound to apply the guidelines, they must consult the guidelines and take them into account when sentencing; the consultation requirement, at a minimum, obliges the district court to correctly calculate the guideline range.

D. Substantive Reasonableness

United States v. McQueen, 727 F.3d 1144 (11th Cir. 2013). It was substantively unreasonable to sentence correctional officers convicted of violating prisonersô civil rights at more than 90% below the applicable guideline range. Defendants were found to have committed repeated acts of unprovoked physical violence against non-resisting inmates, including juveniles, and to have falsified records and lied to cover their behavior. The sentences did not comply with the 18 U.S.C. § 3553(a) factors requiring them to ñreflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.ò

United States v. Overstreet, 713 F.3d 627 (11th Cir. 2013). Having sustained the district courtôs preponderance-of-the-evidence finding that the defendant, convicted of being a felon in possession of a firearm, had murdered his wife, the court found that an upward variance to the 420-month statutory maximum was reasonable. Even though the district court did not find that the murder was relevant conduct for guidelines purposes (and did not find that the firearm of conviction was used in the murder), it was nonetheless entitled to take the murder into account in fashioning an appropriate sentence pursuant to § 3553(a).

United States v. Kuhlman, 711 F.3d 1321 (11th Cir. 2013). A sentence of time served for a $3 million healthcare fraud was substantively unreasonable. It constituted a downward variance of 57 months from the bottom of the guidelines range, and ignored the importance of the statutory goal of general deterrence. ñThe Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status.ò

United States v. McIntosh, 704 F.3d 894 (11th Cir. 2013). Pursuant to *Dorsey v. United States*, 132 S. Ct. 2321 (2012), which held that the more lenient penalties under the Fair Sentencing Act ñapply to the post-Act sentencing of pre-Act offenders,ò the Eleventh Circuit vacated a 120 month mandatory minimum sentence imposed on a defendant who was found guilty of possessing 5 or more grams of crack cocaine with intent to distribute in 2007, after the

court found he possessed approximately 20 grams. With the post-Act threshold of 28 grams needed to trigger the same 5 year mandatory minimum, the Eleventh Circuit vacated the sentence and remanded.

United States v. Early, 686 F.3d 1219 (11th Cir. 2012). The Eleventh Circuit upheld as substantively reasonable a 210 month sentence, over the undisputed 78 to 97 month guideline range. The defendant robbed three banks and attempted to commit bank robbery a fourth time over the course of two weeks, threatening the bank employees with a fake bomb. The circuit court agreed with the sentencing court that the guidelines did not adequately take into account the defendant's extensive criminal history, in which he had spent all but less than a year of his adult life in prison, or the "sustained nature of [his] criminal conduct." The district court had opined that the range "did not adequately account for the number of bank robberies that [the defendant] committed, since the range for one robbery would have been 57 to 71 months and only increased to 79 to 97 months as the result of three bank robberies."

United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011), *cert. denied*, 133 S. Ct. 29 (2012). The Eleventh Circuit vacated the defendantôs below-guideline range sentence for terrorism-related offenses as substantively unreasonable, citing the defendantôs criminal history, his risk of recidivism, and the district courtôs comparison of the case *sub judice* with other terrorism cases that the court of appeals considered inapposite. (The district court sentenced the defendant to 208 months of imprisonment; the applicable guideline range was 360 months to life imprisonment.)

United States v. Dean, 635 F.3d 1200 (11th Cir.), *cert. denied*, 132 S. Ct. 755 (2011). In the course of affirming a 30-year prison term for the producer of child pornography, the Eleventh Circuit found that applying the maximum statutory sentences for both the production charge under § 1466A and the possession charge under § 2252 consecutively was substantively reasonable where both maximum sentences were less than the guidelines recommendation. The court further recognized, in dicta, the distinction between ñthe first-time typical downloaderò of child pornography and an ñactive abuserò producing the material in considering the reasonableness of the sentence.

United States v. Irey, 612 F.3d 1160 (11th Cir. 2010) (en banc). The district courtôs imposition of a 210-month term of imprisonment upon a defendant convicted of engaging in sexual conduct with a minor for purpose of producing visual material, representing a downward variance of 150-months from the guidelines range, was substantively unreasonable. The Eleventh Circuit concluded that ñno downward variance from the guidelines range is reasonable in this case. Nothing less than the advisory guidelines sentence of 30 years, which is the maximum available, will serve the sentencing purposes set out in § 3553(a). We are left with the definite and firm conviction that it was substantively unreasonable, a clear error in judgment, an abuse of discretion, for the district court to conclude to the contrary.ò

United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009). The defendant was charged with three counts of violations of 18 U.S.C. § 2251 for persuading his stepdaughter to engage in sexually explicit conduct and one count of possession of child pornography. The guideline range

was life. Because this range exceeded the applicable statutory maximum for each count of conviction, the statutory maximum became the guideline sentence for each count. The district court imposed the statutory maximum sentence on each count, to run consecutively, pursuant to §5G1.2(d). This resulted in the imposition of a 1,200 month within-guideline sentence. Upholding this sentence as substantively reasonable, the court noted that ñ[c]hild sex crimes are among the most egregious and despicable of societal and criminal offenses.ò

United States v. Shaw, 560 F.3d 1230 (11th Cir. 2009). The court upheld as reasonable an upward variance in a felon-in-possession case from a guidelines range of 30 to 37 months to the statutory maximum of 120 months, based on the egregiousness of the defendantôs prior record, which the Eleventh Circuit described as ñlong enough to require extra postage.ò The defendant argued that the district courtôs decision was influenced by its erroneous prediction of his future dangerousness, and was not based on any empirical evidence establishing that non-violent repeat offenders tend to become violent. The circuit court held that there is no requirement that sentencing judges confine their considerations to empirical studies and ignore what they have learned from similar cases. The circuit court also rejected the defendantôs argument that the district court relied too heavily on his history of recidivism, finding sufficient evidence in the record to indicate the courtôs reliance on other § 3553(a) factors.

United States v. Garcia, 284 F. Appôx 719 (11th Cir. 2008). An upward variance from a range of 37 to 46 months to a sentence of 60 months in an alien smuggling case resulting in serious bodily injury was reasonable when the sentencing judge correctly calculated the guidelines range, considered all the relevant sentencing factors, articulated the reasons for variance in open court, considered the defendantôs arguments, and had a reasoned basis for the decision. The district courtôs determination was not based on a personal disagreement with the applicable guideline nor on the courtôs personal views about illegal immigration; rather the sentence reflected the courtôs focus on respect for the law and deterrence under § 3553(a).

United States v. Williams, 526 F.3d 1312 (11th Cir. 2008). The defendants did not meet their burden of showing that their sentences, which were above the guidelines range, were unreasonable simply because the sentencing court gave greater weight to one § 3553(a) factor, specifically the seriousness of the offense. The weight to be given to a particular factor is a matter committed to the discretion of the district court, which discussed several of the § 3553(a) factors at sentencing.

United States v. Anderson, 267 F. Appôx 847 (11th Cir. 2008). The court held that it was proper for the sentencing court to consider factors such as the defendantôs prompt payment of restitution and civil settlement with the SEC prior to learning of the criminal case, and a ñgenuine intent to make amends,ò so long as the justification for the variance is ñsufficiently compellingò to support the degree of variance. In this case, where the downward variance was from a guideline range of 18 to 24 monthsô imprisonment to three years of probation, such factors were sufficient.

United States v. McBride, 511 F.3d 1293 (11th Cir. 2007). The court held that a sentence of 84 monthsô imprisonment and 10 years of supervised release was not outside the range of reasonable sentences in a case where the defendant was convicted of distribution of child

pornography, the offense involved 981 images and 45 videos, the guidelines range was 151 to 188 months, the statutory minimum was 5 yearsô imprisonment, and §5D1.2(b)(2) recommended the statutory maximum term of supervised release for life. The district court discussed a number of the § 3553(a) factors, including the goal of protecting the public, and had found the defendantôs history of abuse and abandonment to be one of the worst ever seen by the court.

United States v. Amedeo, 487 F.3d 823 (11th Cir. 2007). The court upheld as reasonable an upward variance to 120 monthsô imprisonment from a guidelines range of 37 to 46 months in a case where the defendant pled guilty to a single count of distributing cocaine to a minor and where the facts were particularly egregious and the mitigating circumstances were limited. The court rejected the defendantôs claim that the sentencing court could not base the variance on factors it had already considered in imposing enhancements to the defendantôs offense level under the guidelines, such as his abuse of trust in the attorney-client relationship under §3B1.3.

United States v. Clay, 483 F.3d 739 (11th Cir. 2007). The court upheld a 60 month sentence (varying downward from a guideline range with a low end of 188 months) in a drug case on the basis of evidence of the defendantôs extraordinary post-offense rehabilitation. The court determined that the sentencing judge had properly engaged in ñobjective risk assessmentò in considering the § 3553(a) factors and calculating the defendantôs risk of recidivism.

United States v. Turner, 474 F.3d 1265 (11th Cir. 2007). The court affirmed as reasonable an upward variance to 240 monthsô imprisonment from a guidelines range of 51 to 63 months in a case where the defendant committed multiple offenses arising out of her role in the theft of over $250,000 from a U.S. Post Office. Despite the mitigating evidence presented, the sentencing court found that the guidelines sentence was not adequate to reflect the seriousness of the offense, which included the defendantôs discussing the murder of federal agents with a coconspirator and her lack of remorse.

United States v. Martin, 455 F.3d 1227 (11th Cir. 2006). The court held that a §5K1.1 departure to 7 daysô imprisonment from a range of 108 to 135 months in a massive white collar fraud case was substantively unreasonable (ñMartinôs cooperation, while commendable and extremely valuable, is not a get-out-of-jail free card.ò), and was based on a misinterpretation of §5K1.1(a)(4) (permitting consideration of whether a cooperator suffered injury or risked injury to himself or family). The sentence was also ñshockingly shortò and wholly failed to serve the purposes of sentencing in § 3553(a), *i.e.*, to account for nature and circumstances of offense, to reflect the seriousness of crime, or to afford adequate deterrence. The Eleventh Circuit further noted that Congress viewed deterrence as particularly important in the area of white collar crime.

United States v. Crisp, 454 F.3d 1285 (11th Cir. 2006). The court vacated a sentence of 5 hoursô incarceration in a bank fraud case as unreasonable because the district court allowed the need for restitution to skew its substantial assistance calculation, which should have been based solely on factors pertinent to cooperation, and because the ñsentence [did] not reflect the seriousness of the crime, promote respect for the law, [] provide just punishment for the offense, . . . [or] afford adequate deterrence to criminal conduct, [].ò The guidelines range was 24 to 30 months before the substantial assistance departure and the downward variance.

United States v. Gray, 453 F.3d 1323 (11th Cir. 2006). The court upheld a six-year sentence for distribution of child pornography as reasonable, even though the advisory guidelines range was 151 to 188 months, because ñthe district court gave specific, valid reasonsò for imposing a below-guidelines sentence, including the defendantôs age, minimal criminal history, and medical condition, all of which related to his ñhistory and characteristicsò under 18 U.S.C. § 3553(a)(1).

United States v. Valnor, 451 F.3d 744 (11th Cir. 2006). The court upheld an upward variance in a case where the defendant was convicted of conspiracy to produce false identification documents and the sentencing court reasoned that the sale of fraudulent driversô licenses to illegal immigrants endangered national security.

United States v. McVay, 447 F.3d 1348 (11th Cir. 2006). The court vacated a 60-month sentence of probation imposed after the Government moved for a §5K1.1 departure, in part because the district court departed based on nonassistance reasons, and in part because the court gave no reasons for its extraordinary departure from a guidelines range of 87 to 108 months.

United States v. Eldick, 443 F.3d 783 (11th Cir. 2006). The court clarified the distinction between a departure and a variance and affirmed the lower courtôs upward variance which was based on the seriousness of defendantôs conduct and the breadth of harm to the victims.

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006). The court upheld as reasonable a downward variance from the career offender guideline range (188 to 235 months) to a sentence within the range without the career offender enhancement (90 months), finding that the sentencing court gave specific valid reasons not based solely on its disagreement with the guidelines.

United States v. Queen, 159 F. Appôx 81 (11th Cir. 2005). District court would have been entitled, under *Booker*, to consider time that defendant had served in state custody. Nevertheless, the sentence imposed was not unreasonable solely because the district court failed to give credit for that time.

E. Plain Error / Harmless Error

1. Plain Error

United States v. Ochoa-Garcia, No. 07-11740, 2007 WL 3120315 (11th Cir. Oct. 26, 2007). ñBecause a claim of *procedural* unreasonableness is just the type of argument that readily may (and should) be raised in the district court, we agree with our sister circuits that, absent an objection in the district court, we will review such a claim for plain error only.ò The defendant failed to establish the third prong of plain error because he neither alleged nor showed that if the district court had expressly stated that it had considered § 3553(a), it would have imposed a lower sentence.

United States v. Sims, 161 F. Appôx 849 (11th Cir. 2006). The court found that the defendant demonstrated plain error when the ñdistrict court stated that, according to the guidelines, it was obligated to sentence [the defendant] to life imprisonment and that it might not have handed down that sentence if it were not so obliged.ò

United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005). The court held that the defendant demonstrated a reasonable probability that the district court would have imposed a lesser sentence when the court, after expressing its view that the guidelines sentence was too severe and did not treat the defendantôs criminal history appropriately, sentenced the defendant to the lowest possible sentence it could under the guidelines.

United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005). The court held that to show plain error the defendant must show a reasonable probability that if the district court had sentenced him under an advisory guidelines system, the court would have imposed a lesser sentence.

2. Harmless Error

United States v. Chirino-Alvarez, 615 F.3d 1344 (11th Cir. 2010). An error in applying the guidelines is harmless where the defendant received a statutory mandatory minimum sentence that was greater than the correct guidelines range.

United States v. Dean, 517 F.3d 1224 (11th Cir. 2008), *aff'd in part*, 556 U.S. 568 (2009). The court held that when a sentencing court states that it would impose the same sentence regardless of sentencing calculation errors, as long as that sentence is itself reasonable, the sentence will be upheld.

United States v. Keene, 470 F.3d 1347 (11th Cir. 2006). The sentencing court expressly stated that even if its interpretation and application of the guideline at issue in the case were wrong, it would still impose the same sentence via § 3553(a). ñThe one thing we add to the [alternative sentence] approach . . . is that the sentence imposed through the alternative or fallback reasoning of § 3553(a) must be reasonable. In determining whether it is reasonable we must assume that there was guidelines error - that the guidelines issue should have been decided in the way the defendant argued and the advisory range reduced accordingly - and then ask whether the final sentence resulting from consideration of the § 3553(a) factors would still be reasonable. Otherwise, we will not know whether any error in deciding the guidelines issue, in arriving at the advisory guidelines sentence, was truly harmless. The [alternative sentence] approach is, after all, an assumed error harmlessness inquiry. It has two components. One is knowledge that the district court would have reached the same result even if it had decided the guidelines issue the other way, and we know that in this case because the court told us. The other component is a determination that the sentence would be reasonable even if the guidelines issue had been decided in the defendantôs favor . . . .ò

United States v. Cain, 433 F.3d 1345 (11th Cir. 2005). ñAlthough a sentence at the top of the [g]uidelines range arguably suggests the district court would have imposed the same sentence under an advisory [g]uidelines system, the Government cannot rely on inference alone to

establish the district courtôs constitutional error was harmless beyond a reasonable doubt. Rather, to establish harmless constitutional error in a case where the defendant received a sentence at the maximum [g]uidelines range, which was not a statutory mandatory minimum sentence, the Government must at least point to a statement by the district court indicating it would have imposed the same or a higher sentence if it had possessed the discretion to do so.ò

United States v. Glover, 431 F.3d 744 (11th Cir. 2005). The court held that the government must do more than rely on a mid-guidelines range sentence to demonstrate harmless error; the government must point to something in the record that suggests that the district court would have imposed the same or a greater sentence had the court understood the guidelines to be advisory rather than mandatory.

United States v. Munoz, 430 F.3d 1357 (11th Cir. 2005). ñ[A] defendant may preserve a constitutional *Booker* objection in a number of ways, and need not object explicitly on constitutional or Sixth Amendment grounds.ò We will consider a defendantôs *Booker* objection on appeal where: ñ(1) the defendantôs objection at trial invoked *Booker*, *Blakely*, or their direct predecessors; (2) the defendant objected that a fact relevant to a sentencing enhancement óshould go to the jury;ô or (3) the defendant argued that a fact relevant to a sentencing enhancement must be proved beyond a reasonable doubt.ò (citations omitted).

United States v. Lee, 427 F.3d 881 (11th Cir. 2005). The court determined that harmless error was shown where the district court explicitly stated that it would impose the same sentence whether the guidelines were mandatory or advisory and expressly considered the § 3553(a) factors in composing its alternative, non-guidelines sentence.

United States v. Davis, 407 F.3d 1269 (11th Cir. 2005). The granting of a reduction in sentence pursuant to a §5K1.1 motion does not remove or render harmless any *Booker* error. A downward departure under §5K1.1 does not grant the court ñunfettered discretion,ò only the discretion to reduce the sentence based on the defendantôs substantial assistance.

United States v. Paz, 405 F.3d 946 (11th Cir. 2005). The court explained that it will review a preserved *Booker* argument *de novo* and reverse only if the error was harmful, and held that the government failed to show harmless error where the district court sentenced the defendant to ten monthsô imprisonment, but stated that if the guidelines had been declared unconstitutional, it would have imposed a sentence of six months.

F. Waiver of Right to Appeal

United States v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005). As part of his plea agreement, the defendant waived the right to appeal his sentence with certain limited exceptions: ñ(1) an upward departure, (2) a sentence above the statutory maximum, (3) a sentence in violation of the law apart from the sentencing guidelines, and (4) an appeal by the government.ò The appellate court held that the defendant waived the right to appeal on the basis of the *Apprendi/Blakely/Booker* issue since the issue did not fall within any of the listed exceptions. The term ñstatutory maximumò refers to the longest sentence that the statute which punishes the crime permits the court to impose, regardless of whether the sentence may be shortened because

of the principles involved in *Booker*. The defendantôs sentence did not exceed the statutory maximum, nor did he allege a violation of the law apart from the guidelines. Rather, the appeal asserted that the sentencing guidelines were unconstitutionally applied to the defendant. Thus, the appeal directly involved the application of the guidelines and fell squarely within the terms of the defendantôs appeal waiver. *See also United States v. Frye*, 402 F.3d 1123 (11th Cir. 2005) (holding that a knowing and voluntary appeal waiver contained in the defendantôs plea agreement barred the defendantôs appeal from his sentence, challenging the district courtôs enhancement of his sentence using mandatory sentencing guidelines).

United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005). The court held that an appeal waiver that includes the language ñexceeds the maximum permitted by statuteò is valid despite *Booker*.

V. Revocation

United States v. Sweeting, 437 F.3d 1105 (11th Cir. 2006). The court determined that because *Booker's* reasonableness standard is essentially the same as the ñplainly unreasonableò standard set forth in 18 U.S.C. § 3742(e)(4) for sentences imposed upon revocation of supervised release, the court will review those sentences for reasonableness.

VI. Retroactivity

United States v. Moreno, 421 F.3d 1217 (11th Cir. 2005). The court held that *Booker* is a judicial decision, not a retroactively applicable guideline amendment that can serve as the basis for a reduction in sentence under § 3582(c)(2).

Varela v. United States, 400 F.3d 864 (11th Cir. 2005). The court determined that *Booker* does not apply to cases on collateral review.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. De La Cruz Suarez, 601 F.3d 1202 (11th Cir. 2010). The defendant argued the district court had engaged in impermissible double counting by applying both a 2-level enhancement under §2L1.1(b)(6) and a 2-level enhancement under §3C1.2. The enhancement under §2L1.1(b)(6) was applied because the defendant had 36 individuals aboard a vessel designed for no more than 12, without available life jackets. The enhancement under §3C1.2 was applied for the different conduct of evading the Coast Guard during a two-hour high speed chase in the dark. The circuit court held these were separate acts of reckless conduct, and that the district court did not commit impermissible double counting in applying the enhancements.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). Contrary to the defendantôs double-counting argument, separate guideline sections apply cumulatively, unless the guidelines specifically direct otherwise, pursuant to Application Note 4 to §1B1.1. *See also United States v. Rendon*, 354 F.3d 1320 (11th Cir. 2003) (rejecting double counting claim and upholding application of enhancements for both captain of a vessel under §2D1.1(b)(2)(B) and organizer/leader under §3B1.1).

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001). Pursuant to §1B1.1(a), (b), and (d), in sentencing a defendant convicted of a racketeering conspiracy based on a predicate act of murder, the guidelines require the district court first to depart downward for lack of intent, then to apply the grouping rules to enhance the offense level, rather than applying the grouping rules to the original offense level and afterward making a downward departure.

§1B1.2 Applicable Guidelines

United States v. Lowe, 261 F. Appôx 235 (11th Cir. 2008). The defendant objected to the sentencing judge considering stipulations in his plea agreement as if the defendant had been convicted of additional counts based on those stipulations pursuant to §1B1.2(c). The defendant noted that he had not explicitly agreed to these facts and Application Note 1 states that:

> A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes.

The court concluded that this portion of Application Note 1 only applies to §1B1.2(a), and therefore the consideration of the stipulations by the sentencing judge were not in error.

United States v. Poirier, 321 F.3d 1024 (11th Cir. 2003). The court held that the district court improperly utilized the fraud guideline (former §2F1.1) instead of §2B4.1 which covers commercial bribery and kickbacks in this case charging a violation of 18 U.S.C. § 1343. Commentary in the fraud guideline specifically allows for the use of other guidelines in certain circumstances, such as in mail and wire fraud cases where relatively broad statutes are used primarily as jurisdictional bases for the prosecution of other offenses.[1] The defendantôs conduct in this case ñmore closely resembled a fraud achieved through bribery than a straight fraud.ò

United States v. Farese, 248 F.3d 1056 (11th Cir. 2001). Pursuant to §1B1.2(d) and *United States v. Ross*, 131 F.3d 970 (11th Cir. 1997), the sentence for a conspiracy conviction must be based on the object of the conspiracy (*i.e.*, money laundering) that can be proven beyond a reasonable doubt. Thus, if the guilty plea conviction does not establish the object of the conspiracy beyond a reasonable doubt, the matter must be remanded for the district court to make this determination.

[1] This commentary is currently codified in §2B1.1(c)(3).

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998). The district court erred in applying §2D1.2, applicable to drug offenses occurring near protected locations, such as schools, where the defendant was charged with violating 21 U.S.C. §§ 841 and 846, and not with 21 U.S.C. § 860 and he had not stipulated in a plea agreement to a violation of § 860. ñThere is no provision in the guidelines for borrowing base offense levels from other offense guidelines.ò Moreover, the concept of relevant conduct does not come into play until the correct offense guideline has been selected.

United States v. Jackson, 117 F.3d 533 (11th Cir. 1997). The court held that the sentencing court erred in applying §2H1.1, the guideline covering civil rights violations, rather than §2B1.1, the guideline for theft offenses, in a case where the defendant, a police officer, was convicted of theft and the indictment ñdid not *charge* a civil rights violation or give any indication that a civil rights violation was implicated.ò

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Valladares, 544 F.3d 1257 (11th Cir. 2008). Adjustments under chapter three of the guidelines, including an enhancement for role, are based on relevant conduct. The district court properly applied the role enhancement based on the defendantôs role in uncharged conduct that was part of the ñsame course of conduct or common scheme or plan as the offense of conviction,ò under §1B1.3(a)(2).

United States v. Aviles, 518 F.3d 1228 (11th Cir. 2008). The sentencing judge determined that the relevant conduct of members of an ongoing healthcare fraud conspiracy occurred at the beginning of the conspiracy, and concluded that an earlier version of the guidelines (in force at the genesis of the conspiracy) would apply rather than the guidelines in effect at the end of the conspiracy (citing the reasoning in *United States v. Peeples*, 23 F.3d 370 (11th Cir. 1994)). The Eleventh Circuit disagreed and remanded for resentencing, noting that in the present case involvement was constant and consistent and its continuation was reasonably foreseeable.

United States v. Williams, 431 F.3d 767 (11th Cir. 2005). The court determined that cross-referenced conduct must fall under the definitions of ñrelevant conductò found in §1B1.3 when applying the enhancement at §2K2.1(c) for the use of a firearm ñin connection with the commission of another offense.ò

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated by* 543 U.S. 1110, *opinion reinstated*, 131 F. Appôx 657 (11th Cir. 2005). The defendant contended that certain extrinsic activities were not relevant conduct because the events were too remote in time from the offense of conviction and were not part of a common scheme or plan with the offense of conviction. All of the offenses involved methamphetamine. The defendantôs role in each was to locate a supplier for anhydrous ammonia and to cook methamphetamine. The offenses occurred within four or five months of one another. The court held that the consistency in the type of drug, the defendantôs role in the offenses, and the proximity of the offenses supported the conclusion that the offenses were part of the same course of conduct. *See also United States v. Maxwell*, 34 F.3d 1006 (11th Cir. 1994) (in determining the relevant conduct to be considered in

calculating the defendantôs base offense level under §1B1.3(a)(2), *i.e.*, whether the uncharged conduct is part of the same course of conduct or common scheme or plan as the offense of conviction, the court must look to the ñsimilarity, regularity and temporal proximityò between the offense of conviction and uncharged conduct).

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court reversed the district courtôs upward departures based on its view that the conduct that formed the basis of such departures was not relevant conduct under §1B1.3(a)(2) because it was not part of the same course of conduct or common scheme or plan as the offense of conviction. The defendant pled guilty to a single count of distribution of cocaine to a person under 21 years of age, in violation of 21 U.S.C. § 859(a). The circuit court focused on the background commentary stating that §1B1.3 is designed to take account ña pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing,ò and held that the district court incorrectly considered conduct as the basis of departures that was sufficiently distinct from the offense of conviction such that it warranted separate charges.

United States v. Hunter, 323 F.3d 1314 (11th Cir. 2003). The defendants participated in a counterfeit corporate check cashing ring that operated for over three and a half years. The district court held each defendant responsible for the entire amount of loss under §1B1.3(a)(1)(B). On appeal, each defendant argued that the district court erred in attributing the entire amount of loss to him or her. The Eleventh Circuit held that the defendantôs knowledge about the larger operation, and his agreement to perform a particular act, does not amount to acquiescence to the conduct involved in the criminal enterprise as a whole. The court concluded that the district court erred in determining the defendantsôrelevant conduct because it did not make particularized findings regarding the scope of each defendantôs agreement.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002). Application of a 2-level enhancement for possession of a firearm by a co-conspirator under §2D1.1(b)(1) was proper as it was reasonably foreseeable for relevant conduct purposes under §1B1.3(a)(1)(B).

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001). Pursuant to §1B1.3(a)(1)(b), as clarified in *United States v. Gallo*, 195 F.3d 1278 (11th Cir. 1999), to apply a (gun possession) sentence enhancement based upon co-conspirator conduct, the co-conspiratorôs conduct (possessing a gun) must have been reasonably foreseeable by the defendant.

United States v. Harris, 244 F.3d 828 (11th Cir. 2001). The defendant pled guilty to two counts of drug trafficking in violation of 21 U.S.C. § 841. With a calculated drug quantity of 17.8 grams, the defendantôs base offense level was 12. The presentence report was prepared based on the total amount of drugs attributable to the defendant through all the transactions alleged in the indictment which resulted in a base offense level of 32. The district court ruled that *Apprendi* prohibited consideration of drug quantities beyond those involved in the offense of conviction. On appeal, the defendant argued that *Apprendi* applied to the relevant conduct provision of the guidelines. The Eleventh Circuit held that the relevant conduct provision did not violate *Apprendi* in this case because the relevant conduct calculations resulted in an increased sentencing guidelines range that fell below the defendantôs statutory maximum.

United States v. Cannon, 41 F.3d 1462 (11th Cir. 1995). The court held that acquitted conduct may be considered by a sentencing court in determining a defendantôs sentence because ña verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standardòð a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

United States v. Ismond, 993 F.2d 1498 (11th Cir. 1993). Under §1B1.3(a)(1), ña member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity . . . . Thus, to determine a defendantôs liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant . . . . Once the extent of a defendantôs participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation. If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports the amount of drugs attributed to a defendant.ò

§1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

United States v. Anderson, 267 F. Appôx 847 (11th Cir. 2008). The court cited §1B1.4 (ñcourt may consider without limitation any information about defendantôs background, character, and conductò), suggesting that the sentencing judge can consider the ñdamageò to the defendantôs reputation when contemplating a sentence.

United States v. Amedeo, 487 F.3d 823 (11th Cir. 2007). In upholding the reasonableness of the district courtôs upward variance, the court cited 18 U.S.C. § 3661, analogous to §1B1.4, which places ñ[n]o limitation . . . on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.ò

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). Section 1B1.4 is limited by 18 U.S.C. § 3553(a), and thus it is improper to sentence a defendant, in this case for refusing to cooperate, in order to accomplish a purpose not delineated in § 3553(a).

§1B1.8 Use of Certain Information

United States v. Pham, 463 F.3d 1239 (11th Cir. 2006). In a case of first impression under the guideline, the court held that when a defendant alleges a violation of §1B1.8 in the district court, the district court must make factual findings that are reviewed for clear error. The court further held that the use of information post-dating the agreement by the government to not use self-incriminating information, information obtained from independent sources, and information separately gleaned from co-defendants is not barred from use at sentencing by §1B1.8. In this case, the government met its burden of showing that evidence of the drug quantity attributable to the defendant was based on statements other than those of the defendant.

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

United States v. Hargrove, 732 F.3d 1253 (11th Cir. 2013). Even when a crack cocaine defendantôs original guidelines range was in part ñbased onò a statutory minimum, he may be eligible for a reduction in sentence based on 18 U.S.C. § 3582(c)(2) if his original sentence was above the statutory minimum. Only the lower end of the guidelines range ï that is, the statutory minimum itself ï is ñbased onò the statutory minimum, while the upper end of the guidelines range remains ñbased onò the drug quantity tables. Accordingly, such a defendant is eligible for a reduction to the statutory minimum, but no lower.

United States v. Hamilton, 715 F.3d 328 (11th Cir. 2013). At resentencing, the district court must determine what findings as to drug quantity it made at the initial sentencing, and cannot make new findings of fact contradictory to those findings, or rely on new evidence. It may, however, consult any of the materials that were before it at the original sentencing in order to resolve ambiguity or make more specific findings of drug quantity, so long as it does not contradict its original findings. If the court is unable to find facts sufficient to determine the defendantôs eligibility for relief, it lacks authority to grant the motion for a reduction in sentence, because the burden is on the movant to prove eligibility for § 3582(c) relief.

United States v. Hippolyte, 712 F.3d 535 (11th Cir. 2013). Where a retroactively applicable guideline amendment reduces a defendantôs base offense level, but does not alter the sentencing range upon which his or her sentence was based, a statutory reduction in sentence is not authorized. A reduction is not authorized if the amendment does not actually lower a defendant's applicable guideline range because of the operation of another guideline or statutory provision, such as a statutory mandatory minimum prison term. The Commissionôs adoption of Amendment 759, defining ñapplicable guideline range,ò was not intended to alter this rule, but rather was meant to resolve a circuit split about which specific departures were to be considered part of the sentencing range.

United States v. Colon, 707 F.3d 1255 (11th Cir. 2013). It was not error to apply both Amendments 750 and 759 (which limited the district courtôs discretion to reduce the defendantôs sentence based on Amendment 750) when neither amendment had been adopted until after defendantôs conduct occurred. The *Ex Post Facto* Clause is only violated by changes in the law that effect an overall increase in punishment from that in effect at the time the act to be punished occurred.

United States v. Liberse, 688 F.3d 1198 (11th Cir. 2012). The Eleventh Circuit found that section 3582(c)(2) gives the court the authority to reduce a sentence. The defendant, convicted of a conspiracy to distribute crack cocaine, had a guideline sentence of 121 to 151 months, above the applicable statutory mandatory minimum of 120 months. The government later filed a Rule 35(b) motion to reduce the sentence based on substantial assistance, and the sentence was reduced to 97 months. The defendant filed a motion for a sentence reduction, arguing that Amendment 750 lowered his guideline range to 70 to 87 months. The district court denied the motion. The Eleventh Circuit found that Amendments 750 and 759 would reduce his guideline range by lowering his base offense level, and stated that the district court erred when it

concluded that it lacked authority to reduce his sentence. Therefore, the court vacated the sentence and remanded.

United States v. Jackson, 613 F.3d 1305 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1677 (2011). The statutory safety-valve, 18 U.S.C. § 3553(f), cannot be applied when a defendantôs sentence is reduced downward pursuant to 18 U.S.C. § 3582(c).

United States v. Mills, 613 F.3d 1070 (11th Cir. 2010). A district court lacks jurisdiction to reduce a defendantôs sentence pursuant to 18 U.S.C. § 3582(c), even when an amendment to the guidelines has lowered the defendantôs otherwise-applicable guidelines range, if the defendant was sentenced on the basis of a mandatory minimum. *See also United States v. Glover*, 686 F.3d 1203 (11th Cir. 2012) (finding the holding in *Mills* applicable to this case, where defendant was sentenced based on a guidelines range of life because he was subject to a mandatory minimum as a result of prior felonies, stating ñafter Amendment 759 . . . a district court may lower a defendantôs sentence below the amended guidelines range only if the original sentence was below the original guidelines range because the defendant provided substantial assistance.ò)

United States v. Jules, 595 F.3d 1239 (11th Cir. 2010). The defendant moved for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(2) and an amendment to the sentencing guidelines. In denying the motion, the district court relied, *inter alia*, on a memorandum provided by the probation office that the defendant had not had the opportunity to review or contest. As a matter of first impression, the circuit court held that ñeach party must be given notice of and an opportunity to contest new information relied on by the district court in a § 3582(c)(2) proceeding.ò In reaching this conclusion, the circuit court relied on the Fifth Amendmentôs due process guarantee, policy statements in the guidelines, and similar decisions from the Fifth and Eighth Circuits.

United States v. Webb, 565 F.3d 789 (11th Cir. 2009). In a matter of first impression, the court held that there is no statutory or constitutional right to counsel for § 3582(c)(2) motions. The court noted that the other circuits to address this issue had reached the same conclusion. Quoting a Fifth Circuit case, the court stated that ña § 3582(c)(2) motion óis simply a vehicle through which appropriately sentenced prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines,ô rather than óa challenge to the appropriateness of the original sentence.ôò

United States v. Williams, 557 F.3d 1254 (11th Cir. 2009). The district court granted the defendantôs motion under § 3582(c)(2) based on the retroactive crack cocaine amendment and reduced the defendantôs sentence by three months without discussing the § 3553(a) factors as required under §1B1.10, comment n.1(B)(i) and *United States v. Vautier*, 144 F.3d 756 (11th Cir. 1998). Although the Eleventh Circuit had previously considered a district courtôs failure to adequately discuss the § 3553(a) factors only in cases where the motion to reduce was denied, it saw no reason why the same underlying rationale should not be applied in cases in which district courts grant such motions. Accordingly, the court vacated the sentence and remanded the case back to the district court.

United States v. Melvin, 556 F.3d 1190 (11th Cir. 2009). The court held that a district court is bound by the limitations on its discretion imposed by 18 U.S.C. § 3582 and the applicable policy statements of the Sentencing Commission. The defendant, whose original advisory guidelines range was 100 to 125 months, had been sentenced to 100 monthsô imprisonment. In a subsequent motion under section 3582(c)(2) based upon the retroactive crack cocaine amendment, the defendant argued for a sentence below the amended guidelines range of 84 to 105 monthsô imprisonment, arguing that under *Booker* and *Kimbrough v. United States*, 552 U.S. 85 (2007), all guidelines were advisory. The district court agreed and reduced the defendantôs sentence to 75 monthsô imprisonment. The government appealed and the Eleventh Circuit vacated the order reducing the sentence and remanded. In so doing, the Court agreed with the reasoning of other circuits that have held that *Booker* does not apply to motions to reduce sentence pursuant to section 3582(c)(2). The court further disagreed with the defendant, who claimed that *Kimbrough* could apply even if *Booker* did not, reasoning that the ruling in *Kimbrough* arose out of an original sentencing proceeding and neither mentioned nor addressed proceedings under section 3582(c)(2).[2]

United States v. Burns, 264 F. Appôx 767 (11th Cir. 2008). Because the defendant was sentenced *after* the effective date of the sentencing guideline amendment, he could not seek relief for resentencing under §3582(c)(2) based on a ñsubsequentò sentencing guideline amendment.

United States v. Williams, 549 F.3d 1337 (11th Cir. 2008). The court reversed the district courtôs grant of a sentence reduction under § 3582(c)(2) where the defendant was subject to a mandatory minimum sentence but had received a reduction for substantial assistance at his initial sentencing hearing. The Eleventh Circuit held that the §5K1.1 motion did not waive the mandatory minimum which was the guideline sentence and which made the retroactive crack cocaine amendment inapplicable to him. ñ[A] downward departure from this mandatory minimum does not constitute a waiver or dispensing of this new óguideline rangeôò because a §5K1.1 motion ñallows for a departure from, not the removal of, a statutorily required minimum sentenceò (citation omitted). The court further relied on the commentary in §1B1.10, indicating that the guidelines range for a defendant subject to a mandatory minimum would not be lowered by an amendment, even if the amendment would otherwise be applicable to him. *See* §1B1.10, comment. (n.1(A)).

United States v. Thomas, 545 F.3d 1300 (11th Cir. 2008). The court upheld the district courtôs denial of the defendantôs § 3582(c)(2) motion to reduce his sentence based on the retroactive Amendments 706 and 713, reducing base offense levels in crack cocaine cases. Thomas was an armed career criminal under 18 U.S.C. § 924(e). The reasoning in *United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008), which resulted in a denial of a similar motion because the defendants were career offenders, was fully applicable here. Thomas was not eligible for a reduction because application of the amendment did not have the effect of reducing his guidelines sentencing range, due to enhancement of his sentence under §4B1.4. *See also United*

[2] *See Dillon v. United States*, 130 S. Ct. 2683 (2010) (holding that *Booker* does not apply to proceedings under section 3582(c)(2) and that §1B1.10 is binding on courts reducing sentences under that provision).

States v. Berry, 701 F.3d 374 (11th Cir. 2012) (finding defendant not eligible for reduction under Amendment 750 because his guideline range for a crack cocaine offense was based on his status as a career offender under §4B1.1(b)); *United States v. James*, 548 F.3d 983 (11th Cir. 2008) (relying on *Moore* and *Thomas* and upholding denial of motion for reduction of sentence where retroactive application of crack cocaine amendment would not alter defendantôs guidelines range due to intervening change in the guidelines that raised the base offense level that would be used to calculate the defendantôs sentence pursuant to amendment 706, to a level above the base offense level used at his original sentencing); *United States v. Jones*, 548 F.3d 1366 (11th Cir. 2008) (upholding denial of motion for sentence reduction where, based on amount of crack cocaine involved in defendantôs offense, his base offense level would not be lowered by the retroactive crack cocaine amendment).

United States v. Moore, 541 F.3d 1323 (11th Cir. 2008). The court upheld the district courtôs denials of the defendantsô § 3582(c)(2) motions to reduce their sentences based on retroactive Amendments 706 and 713. The defendants were sentenced as career offenders and, therefore, the amendments did not have the effect of lowering their guidelines ranges. ñWhere a retroactively applicable guideline amendment reduces a defendantôs base offense level, but does not alter the sentencing range upon which his or his sentence was based, § 3582(c)(2) does not authorize a reduction in sentence.ò

United States v. Armstrong, 347 F.3d 905 (11th Cir. 2003). The district court denied the defendantôs request for a reduction of his sentence through the retroactive application of Amendments 599, 600, and 635. The Eleventh Circuit noted that Amendment 600 was not listed under §1B1.10(c), and, therefore, could not be retroactively applied. The court then noted that although Amendment 599 was listed under §1B1.10(c) and it qualified as an amendment for reduction purposes, it did not apply factually in the defendantôs case. Finally, the court held that consideration of Amendment 635 as a clarifying amendment claimed in § 3582(c)(2) motions can only be applied retroactively if expressly listed under §1B1.10(c). Furthermore, the court held that ñclarifying amendmentsò were no exception to this rule and may only be retroactively applied on direct appeal of a sentence or under a section 2255 motion. Amendment 635 was not listed under §1B1.10(c). Accordingly, the court affirmed the district court.

United States v. Bravo, 203 F.3d 778 (11th Cir. 2000). The district court must engage in a two-part analysis in considering a motion for reduction of sentence based on a retroactive guideline. It must first recalculate the sentence under the amended guideline, substituting the amended guideline range for the originally applied range, and then determine what sentence it would have imposed under that new range. ñIn undertaking [the] first step, only the amended guideline is changed. All other guideline application decisions made during the original sentencing remain intact.ò In determining whether to impose a sentence under the newly calculated range (the second step), the decision should be made in light of the factors in 18 U.S.C. § 3553(a). However, a sentence reduction under Section 3582(c)(2) does not constitute a *de novo* resentencing. *See also United States v. Douglas*, 576 F.3d 1216 (11th Cir. 2009) (concluding that, when ruling on a § 3582(c)(2) motion, ñthe district court must ensure that the record reflects that it considered the § 3553(a) factors in deciding to reduce a sentenceò).

United States v. Logal, 106 F.3d 1547 (11th Cir. 1997). The district court did not violate the *Ex Post Facto* Clause by looking to a sentencing guideline amendment, adopted after the completion of defendantôs offense, for guidance in determining the extent of his upward sentencing departure. The circuit court joined the majority of circuits in holding that the judge may consider guideline amendments that post-date the applicable guidelines in determining the degree of departure, provided that the judge consider the appropriate guideline in setting the base offense level.

United States v. Brown, 104 F.3d 1254 (11th Cir. 1997). In a case of first impression in the Eleventh Circuit, the court held that, in declining to apply retroactively an amendment to sentencing guidelines that would have lowered a defendantôs offense level for drug-related convictions, a district court was not required to present particularized findings on each individual factor listed in the statute governing resentencing. The district court clearly considered those factors and set forth adequate reasons for refusing to reduce the sentence, including findings that the defendantôs involvement in a crack cocaine conspiracy was significant, that he had lacked a legitimate job for nearly two years as he participated in the conspiracy, and that he failed to show remorse or acceptance of responsibility.

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995). The defendant was convicted of structuring financial transactions and conspiracy to structure financial transactions. On appeal, the defendant argued that he was eligible to be resentenced according to the amended version of §2S1.3, which provides a lesser base offense level. The court held that the district court, not the appellate court, should be the initial forum to exercise the discretion concerning whether an adjustment is warranted in light of an ameliorative amendment.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Colon, 707 F.3d 1255 (11th Cir. 2013). It was not error to apply both Amendments 750 and 759 (which limited the district courtôs discretion to reduce the defendantôs sentence based on Amendment 750) when neither amendment had been adopted until after defendantôs conduct occurred. The *Ex Post Facto* Clause is only violated by changes in the law that effect an overall increase in punishment from that in effect at the time the act to be punished occurred.

United States v. Aviles, 518 F.3d 1228 (11th Cir. 2008). A defendant convicted of a conspiracy that began before, but continued after, a guidelines amendment became effective may be sentenced based on the amendment without triggering any *Ex Post Facto* concerns unless the defendant can show that he affirmatively withdrew from the conspiracy prior to the effective date of the amendment. The district court erred in basing its selection of the proper *Guidelines Manual* on the dates of the defendantsô relevant conduct, rather than on the date that the conspiracy ended, and it improperly relied on an earlier case, *United States v. Peeples*, 23 F.3d 370 (11th Cir. 1994), which was factually distinguishable and in conflict with cases that preceded it. The Eleventh Circuit relied on §1B1.11, comment. (n.2), which provides that the last date of the offense of conviction, not the last date of the defendantôs relevant conduct, is the controlling date for *Ex Post Facto* purposes. The court remanded to the district court for a

determination of whether the defendants effectively withdrew from the conspiracy prior to the effective date of the guideline amendment.

United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997). The district court erred in sentencing the defendant under the *Guidelines Manual* in effect at the time he committed the majority of his crimes. ñBailey had fair notice that continuing his crimes in operating his firearms business subjected him to the amended Sentencing Guidelines in effect when he committed the last of the crimes for which he was convicted.ò The circuit court remanded for resentencing under the version of *Guidelines Manual* in effect when defendant committed last crime for which he was convicted.

United States v. Diaz, 26 F.3d 1533 (11th Cir. 1994). The defendant argued that the district court violated the *Ex Post Facto* Clause by refusing to grant him an acceptance-of-responsibility reduction based on the amended §3E1.1 commentary, which took effect after he was convicted, but before he was sentenced. In rejecting this argument, the circuit court held that the commentary to §3E1.1 merely confirms this circuitôs prior interpretation of §3E1.1; accordingly, it does not implicate *Ex Post Facto* concerns.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Julian, 633 F.3d 1250 (11th Cir. 2011). Section 924(j), pertaining to murder with a firearm in the course of a crime of violence and a drug trafficking crime, constitutes a separate offense (as opposed to a mere sentencing factor) that is not governed by the prohibition of concurrent sentences in section 924(c)(1)(D)(ii).

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001). Pursuant to Application Note 1 to §2A1.1,[3] the district court lawfully departed downward where the defendant did not intentionally or knowingly cause death.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Lebovitz, 401 F.3d 1263 (11th Cir. 2005). The defendant was convicted of traveling in interstate commerce with intent to have sex with a minor, and possessing child pornography obtained through interstate commerce. The district court ruled that §2A3.1 was the ñmost appropriateò guideline for the defendantôs ñoffense conduct.ò The defendant asserted that this guideline should not apply because his victim was fictitious. The court held that ñwhether a victim is fictitious is irrelevant to the application of a federal statute or sentencing guideline prohibiting sexual conduct with a minorò because ñdefendants who attempt to have sex with fictional victims should be treated no differently than those who prey on actual victims. Application of the provision . . . óturns simply on the illegal purpose; for the defendantôs interstate travel.ò

[3] This guidance is now set forth in Application Note 2(B).

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Belfast, 611 F.3d 783 (11th Cir. 2010). In a human rights prosecution, the district court did not err in using the kidnapping guideline, §2A4.1, where the victims were initially detained under lawful circumstances, but where ñthe extended length and nature of their detention, coupled with the utter lack of access to courts, attorneys, or any information about their arrest, rendered the duration of their imprisonment wholly unlawful.ò Moreover, the use of the kidnapping guideline, instead of other potentially applicable guideline provisions, ñis particularly appropriate in cases of torture . . . where there are repeated, severe physical assaults, and the victims are imprisoned in inhumane conditions that exacerbate the physical pain caused by the abuse.ò If the victim of the kidnapping is killed, and the killing is relevant conduct under § 1B1.3(a), the district court does not err in cross-referencing those murders with the first-degree murder guideline pursuant to §2A4.1(c).

United States v. Douglas, 489 F.3d 1117 (11th Cir. 2007), *abrogated on other grounds by Perry v. New Hampshire*, 132 S. Ct. 716 (2012). While the sentencing judge found that the defendant did not point his weapon at the victim, the court found that he had used it ñin connection with a verbal threat to intimidate herò and thus ñotherwise usedò the weapon beyond mere brandishing. The enhancement for ñotherwise usingò under §2A4.1(b)(3) was properly applied.

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003). The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count of using and carrying a firearm during and in relation to a federal crime of violence. On appeal, the defendant argued that the victim had suffered only serious bodily injuries, and that a 2-level enhancement would have been more appropriate. The Eleventh Circuit noted that the victimôs treating physician had stated that her facial symmetry would never be the same as it was prior to the attack, and that the nerve damage and scarring were likely permanent. The court concluded that, under these circumstances, ñthe district court did not [] err in determining that [the victimôs] injuries were ópermanent or life-threateningô, and that imposition of a 4 level upward adjustment under section 2A4.1(b)(2)(A) [] was appropriate.ò

United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001). A 6-level enhancement pursuant to §2A4.1(b)(1) applies where a written ransom demand was drafted but never delivered because it was ñreasonably certainò that the ransom note would have been delivered but for the defendantôs apprehension.

§2A5.2 Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle

United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008). The defendant, a flight attendant, was convicted of willfully and maliciously conveying false information consisting of a false bomb threat, in violation of 18 U.S.C. § 35(b), interfering with flight crew members by setting fire to an aircraft, in violation of 49 U.S.C. § 46504, willfully setting fire to a civil aircraft operated in interstate commerce, in violation of 18 U.S.C. §§32(a)(1) and 32(a)(7), and

knowingly and unlawfully using fire to commit a felony prosecutable in federal court, in violation of 18 U.S.C. § 844(h)(1). The court held that the district court did not clearly err in applying §2A5.2(a)(1), which has a base offense level of 30, if the offense involved intentionally endangering the safety of an airport or aircraft, and rejecting the defendantôs argument that his conduct involved only a reckless endangerment of the safety of the aircraft, thus meriting a base offense level of 18 under § 2A5.2(a)(2).

§2A6.1 Threatening or Harassing Communications

United States v. Sheppard, 243 F. Appôx 580 (11th Cir. 2007). The court concluded that conduct that involved additional threats made after the offense, rather than prior to or during the offense, should not trigger an enhancement under §2A6.1(b)(2).

United States v. Barbour, 70 F.3d 580 (11th Cir. 1995). The defendant was convicted of threatening the President of the United States based on statements he made to neighbors expressing his desire to kill the President. The defendantôs sentence was enhanced under §2A6.1(b)(1) based on a week-long trip he took to Washington, DC ten days before his conversation with his neighbor, during which he went to the Mall everyday with the intent to shoot the President while the President was jogging. The defendant contended that an enhancement for this conduct was improper because the conduct occurred before the threatening communication was made. The circuit court held that pre-threat conduct may be used to support an enhancement under §2A6.1(b)(1). *See also United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996).

Part B Basic Economic Offenses

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Loss Issues (§2B1.1(b)(1))

United States v. Bane, 720 F.3d 818 (11th Cir. 2013). In a healthcare fraud case, it was appropriate to include in the loss calculation the value of medical supplies that were actually given to patients for legitimate medical needs, when those goods were sold without required regulatory approval, and defendant fraudulently misrepresented that they had been approved. *See* §2B1.1 comment. (n. 3(F)(v)(III)).

United States v. Barrington, 648 F.3d 1178 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1066 (2012). In sentencing a defendant convicted of fraud offenses involving the changing of grades for college courses, the district court appropriately used the tuition value of each course credit to calculate intended loss under §2B1.1.

United States v. Mateos, 623 F.3d 1350 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1540 (2011). In a healthcare fraud conspiracy case, the district court did not err in finding that the defendant could reasonably foresee that an organization that submits fraudulent bills for treatments actually rendered would also submit fraudulent bills where no treatment was actually rendered.

United States v. Carrazana, 362 F. Appôx. 973 (11th Cir. 2010). In a conspiracy to commit healthcare fraud where the defendant worked at a medical clinic, the circuit court held that the defendant was responsible for the losses incurred even after he terminated his employment. Because the defendant ñmerely removed himself from the situation and ceased participationò but did not ñthwart or disrupt the objectives of the conspiracy,ò the defendant did not withdraw from the conspiracy when he quit his job.

United States v. Maxwell, 579 F.3d 1282 (11th Cir. 2009). Defendant was convicted of multiple counts of fraud for fraudulently inducing the award of municipal construction contracts by representing that a portion of the work would be done by small local businesses or businesses owned by the socially or economically disadvantaged, so as to meet the requirements of the Community Small Business Enterprise program (CSBE) and the Disadvantaged Business Enterprises program(DBE). The circuit court held that the CSBE and DBE are Government Benefits Programs under §2B1.1. Thus, the appropriate amount of loss should have been the entire value of the fraudulently secured contracts, and the district court clearly erred by calculating loss as the estimated profit earned on those contracts.

United States v. Willis, 560 F.3d 1246 (11th Cir. 2009). The defendant was convicted, *inter alia,* of filing false claims based on her submission of numerous fraudulent applications for FEMA aid after Hurricane Katrina. In order to expedite aid to victims, FEMA established a system whereby victims received an automatic initial payment of $2,000 and an additional automatic payment of $2,358 for rent or personal property damage. By taking additional affirmative steps, victims could receive as much as $26,200 in aid. The court upheld the attribution to the defendant by the district court of an intended loss amount based on the maximum of $26,200 for each fraudulent claim even though FEMAôs actual loss was considerably less. Because the government presented evidence that the defendant repeatedly sought more than the automatic disbursement amount with respect to some of the applications, it was reasonable for the district court to infer the defendantôs intent to seek additional monies with respect to the all of the applications.

United States v. Ekpo, 266 F. Appôx 830 (11th Cir. 2008). In a Medicare fraud where the defendant fraudulently secured payments from the government for motorized wheelchairs, the court concluded that the defendant should receive no credit for the value of the wheelchairs when calculating the loss because the defendant did not return any of the monies received and failed to present evidence that the beneficiaries would have been medically eligible to receive the wheelchairs provided.

United States v. Pelle, 263 F. Appôx 833 (11th Cir. 2008). The defendantôs loss calculation is not reduced by costs incurred in defrauding victims. In this case the defendant marketed and sold internet kiosks by deliberately and fraudulently fabricating the value of the

items and their profit potential to investors. The court refused to reduce the loss amount by the value of the kiosks, and additionally found that the kiosks had no value.

United States v. Medina, 485 F.3d 1291 (11th Cir. 2007). Even under an advisory system, a sentencing judge must make factual findings as to the amount of loss, based on ñreliable and specific evidence,ò and failure to do so will render a loss calculation invalid. In this healthcare fraud case, the district court erred by computing the loss amount based on the total amount billed to Medicare by the defendants, without evidence showing that such claims were not medically necessary. *See also United States v. Gupta*, 572 F.3d 878 (11th Cir. 2009) (the district court erred by not making specific factual findings on which to base the loss amount, and by just picking a figure, ñlike any jury would, about half way in betweenò the amounts argued by both parties).

United States v. Malol, 476 F.3d 1283 (11th Cir. 2007). In this case the jury determined that the loss in a wire fraud case exceeded $1 million. The defendant challenged the use of this amount in calculating his sentence, providing evidence of credits against this figure. The court rejected this argument and reasoned that when a jury makes a loss finding, it ñexceeds the governmentôs preponderance of the evidence burden otherwise applicable at sentencing.ò

United States v. Cedeno, 471 F.3d 1193 (11th Cir. 2006). The cost of repairing property can alternately be used to estimate loss as long as the cost does not exceed the fair market value of that property. In this case the sentencing judge included both the original fair market value of damaged custom watches and the costs to repair the watches in the calculation of loss. The circuit court reversed and noted that ñthere is no damage that can be done beyond total destruction.ò Adding the cost of repairs along with the fair market value of the damaged items unduly inflates the loss figure.

United States v. Gupta, 463 F.3d 1182 (11th Cir. 2006). Mere speculation as to the amount of loss without supporting evidence will not lead to a defensible loss calculation by a sentencing judge. The sentencing judge in this false Medicare claims case found that there was ñno lossò to the government. The appeals court reversed, stating that such a finding was not a reasonable estimate since the sentencing judge did not apply any relevant calculation to determine the actual or intended loss. Further, the gain to the defendant is an alternative means to calculate loss in cases where the actual or intended loss is impossible to calculate.

United States v. Grant, 431 F.3d 760 (11th Cir. 2005). The full face value of forged or counterfeit checks possessed by the defendant can be used to calculate loss. When a defendant possesses a stolen check, or photocopy of a stolen check, the sentencing court may find that the defendant intended to utilize the full face value of the checks to calculate loss where the defendant ñfails to present countervailing evidence.ò

United States v. Snyder, 291 F.3d 1291 (11th Cir. 2002). When calculating the monetary value of the victimsô loss under the guidelines, substitution of the defendantôs gain is not the preferred method because it frequently underestimates the loss. This case involved fraud by an executive in a publicly traded pharmaceutical company who misrepresented data showing the effectiveness of a drug. The stock rose when the false results were announced and then fell

dramatically after the fraud was revealed. The court held that it was error to base the offense level on the defendantôs gain and suggested that a more appropriate methodology would be to focus on the period between when the drug was announced as being effective and the days immediately following the announcement of the fraud.

Victim Table (§2B1.1(b)(2))

United States v. Rodriguez, 732 F.3d 1299 (11th Cir. 2013). It was clear error for the district court to find that an offense involved more than 50 victims based entirely on a ñsummary chartò proffered by the government, when there was no evidence or witness presented to explain the meaning or basis for the chart.

United States v. Bane, 720 F.3d 818 (11th Cir. 2013). In a healthcare fraud case, it was not error to include in the victim calculation the number of patients who received medical supplies for legitimate medical needs, when those supplies were sold without required regulatory approval, yet defendant fraudulently misrepresented that they had been approved. *See* §2B1.1 comment. (n. 3(F)(v)(III)).

United States v. Philidor, 717 F.3d 883 (11th Cir. 2013). It was not error to conclude that there were 250 or more victims of the offense when defendant had actually obtained that number of tax refunds from the IRS through the use of separate SSNs. The fact that the IRS had issued refunds created an inference that the SSNs corresponded to actual persons, and defendant had not provided contrary evidence. Nor was there a requirement that the court make a finding that each of the victims was living at the time of the offense; a victim of identity theft must be ñan actual (i.e., not fictitious) individual,ò but not necessarily a living person. §2B1.1 comment. (n.1).

United States v. Washington, 714 F.3d 1358 (11th Cir. 2013). It was error for the district court to apply the enhancement for 250 or more victims based solely on the governmentôs representations at the sentencing hearing. The district courtôs reliance on its earlier application of the enhancement to defendantôs co-conspirators was insufficient, because defendant had no opportunity to object or rebut the evidence prior to his own sentencing hearing, and he joined the conspiracy months after it began. On remand, the government was not entitled to present new evidence in support of the enhancement; it had been on notice of defendantôs objection and declined to do so at the initial sentencing.

United States v. Hall, 704 F.3d 1317 (11th Cir. 2013). The district court applied the 4-level enhancement at §2B1.1(b)(2)(B) because it found the offense involved more than 50 but less than 250 victims when she unlawfully transferred or sold identifying information of 141 people for co-conspirators to create fraudulent accounts. However, she argued that because the co-conspirators actually only used 12 of the victimsôpersonal identifying information to obtain fraudulent credit cards, the defendant argued that the 2-level enhancement at §2B1.1(b)(2)(A) was more appropriate. In an issue of first impression, the Eleventh Circuit held that the unauthorized transfer of identifying information does not involve the actual use of that information for a fraudulent purpose such that the person whose information was transferred is a victim under §2B1.1. The court found that for purposes of the guideline, a victim includes only those individuals whose means of identification was used. Because the defendantôs ñtransfer of

the personal identifying information, without more action, did not employ that information for the purpose for which the conspiracy was intended,ò the court concluded that transfer is not equivalent to the actual use. Therefore, those individuals other than the 12 for which personal identifying information was used to obtain fraudulent credit cards were not victims under §2B1.1(b)(2)B). The court vacated the sentence and remanded.

United States v. Lee, 427 F.3d 881 (11th Cir. 2005). A person who is reimbursed for his or her loss may still count as a ñvictimò for the purposes of enhancement under §2B1.1(b)(2). The court reasoned that even though the victims were eventually reimbursed in this case they ñsuffered considerably more than a small out-of-pocket loss and were not immediately reimbursed,ò and could therefore be included as ñvictimsò for the purposes of the enhancements in §2B1.1(b)(2). The court disagreed with a contrary ruling of the Sixth Circuit in *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005), noting that the decision failed to read the ñactual lossò provision in §2B1.1, Application Note 3(A)(i), together with Application Note 3(E), discussing credits against loss. The latter provision contains an inherent acknowledgment ñthat there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods.ò[4]

Sophisticated Means (§2B1.1(b)(10))

United States v. Bane, 720 F.3d 818 (11th Cir. 2013). In a healthcare fraud case, it was appropriate to apply the sophisticated means enhancement when the offense involved multiple corporations, required the creation of an ñintricate paper trail,ò and involved ñrepetitive coordinated conductò to conceal the offense. *See* §2B1.1 comment. (n.8(B)).

United States v. Cruz, 713 F.3d 600 (11th Cir.), *cert. denied*, 133 S. Ct. 2788 (2013). The application of the 2-level enhancement for possession of device-making equipment at §2B1.1(b)(11)(A)(i) was not error as applied to defendants convicted of violating 18 U.S.C. § 1029(a)(2) (trafficking in access devices or device-making equipment). The direction in §2B1.6 comment. (n. 2) not to apply additional Chapter Two enhancements for defendants sentenced under that guideline in conjunction with a sentence for the underlying offense applies only when the defendantôs conduct was limited to ñtransfer, possession, or use of a means of identification.ò Here, the defendantsô conduct included trafficking in device-making equipment, and the enhancement was applicable. The reference to ñrelevant conductò in the last sentence of this application note refers only to relevant conduct pertaining to the possession, transfer, or use of a means of identification, not the entire universe of relevant conduct.

United States v. Barrington, 648 F.3d 1178 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1066 (2012). The district court did not clearly err in applying a 2-level enhancement for using sophisticated means where the defendant and his co-conspirators used ñóa great deal of planning

[4] The Commission resolved this circuit split, in part, in the guideline amendments effective November 1, 2009, by broadening the definition of ñvictimò in identify theft cases. Application Note 4(E) to §2B1.1 states that, in a case involving means of identification, ñvictimò means ñany individual whose means of identification was used unlawfully or without authority.ò §2B1.1, comment. (n.4(E)).

and inside information,ôò including the use of computer keyloggers, to obtain university employeesô passwords to commit fraud offenses involving grade-changing.

Means of Identification (§2B1.1(b)(11))

United States v. Perez, 432 F. Appôx 930 (11th Cir. 2011). Following decisions by the First and the Eight Circuits, the Eleventh Circuit held that §2B1.6 (Aggravated Identity Theft) does not *per se* preclude application of the additional 2-level means of identification enhancement.

United States v. Auguste, 392 F.3d 1266 (11th Cir. 2004). The defendant was convicted of conspiracy to commit credit card fraud and credit card fraud, and she appealed from the sentence imposed. The district court added a 2-level enhancement because the defendantôs offense involved ñóthe unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification.ôò The defendant claimed that the enhancement should not apply because she used her own name on the credit cards and she used existing lines of credit rather than opening new ones. By getting her own name placed on the victimsô accounts, however, the defendant used one means of identification (account numbers) to obtain another (credit cards). Regardless of whether the credit cards were used in conjunction with a new line of credit she established or an existing one that belonged to a victim, the defendant had no authority to obtain the credit cards.

§2B1.6 <u>Aggravated Identity Theft</u>

United States v. Cruz, 713 F.3d 600 (11th Cir.), *cert. denied*, 133 S. Ct. 2788 (2013). The application of the 2-level enhancement for possession of device-making equipment at §2B1.1(b)(11)(A)(i) was not error as applied to defendants convicted of violating 18 U.S.C. § 1029(a)(2) (trafficking in access devices or device-making equipment). The direction in §2B1.6 comment. (n. 2) not to apply additional Chapter Two enhancements for defendants sentenced under that guideline in conjunction with a sentence for the underlying offense applies only when the defendantôs conduct was limited to ñtransfer, possession, or use of a means of identification.ò Here, the defendantsô conduct included trafficking in device-making equipment, and the enhancement was applicable. The reference to ñrelevant conductò in the last sentence of this application note refers only to relevant conduct pertaining to the possession, transfer, or use of a means of identification, not the entire universe of relevant conduct.

United States v. Perez, 432 F. Appôx 930 (11th Cir. 2011). Following decisions by the First and the Eight Circuits, the Eleventh Circuit held that §2B1.6 (Aggravated Identity Theft) does not *per se* preclude application of an additional 2-level enhancement under §2B1.1(b)(11).

§2B3.1 <u>Robbery</u>

Financial Institution or Post Office (§2B3.1(b)(1))

United States v. Dudley, 102 F.3d 1184 (11th Cir. 1997). On an issue of first impression, the Eleventh Circuit affirmed the district courtôs 2-level enhancement under §2B3.1(b)(1) for

property taken from a financial institution after the defendantôs conviction for bank robbery. The court held that ñthe Sentencing Commission sought to punish robberies of financial institutions and post offices more severely because those entities [kept] large amounts of readily available cash and [were attractive targets].ò The defendant failed to meet his burden of demonstrating that the guideline provision was irrational.

Otherwise Use a Firearm (§2B3.1(b)(2)(B))

United States v. Wooden, 169 F.3d 674 (11th Cir. 1999). As a matter of first impression in the Eleventh Circuit, the court concluded that a defendantôs holding a handgun about one-half inch from a robbery victimôs forehead and pointing it at him constituted an ñotherwise useò of the weapon, and not merely a ñbrandishingò thereof, warranting a 6-level enhancement under §2B3.1(b)(2)(B).

Otherwise Use a Dangerous Weapon (§2B3.1(b)(2)(D))

United States v. Miller, 206 F.3d 1051 (11th Cir. 2000). In an issue of first impression in the Eleventh Circuit, the court found that a 4-level sentence enhancement pursuant to §2B3.1(b)(2)(D) could be applied for ñotherwise us[ing]ò an object which appeared to be a dangerous weapon during the commission of an attempted robbery. The defendant pled guilty to armed bank robbery during which he lit the fuse of a device that appeared to be, but was not in fact, a bomb, and otherwise threatened a bank teller. The circuit court found the term ñotherwise usedò means ñthe conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.ò Because the defendant did not just display or brandish the fake bomb, but actually lit the fuse, explicitly threatening the teller, the court held the enhancement was properly applied. *See also United States v. Douglas*, 489 F.3d 1117 (11th Cir. 2007) (while the sentencing judge found that the defendant did not point his weapon at the victim, the court found that he had used it ñin connection with a verbal threat to intimidate herò and thus ñotherwise usedò the weapon beyond mere brandishing), *abrogated on other grounds by Perry v. New Hampshire*, 132 S. Ct. 716 (2013).

Brandish or Possess a Dangerous Weapon (§2B3.1(b)(2)(E))

United States v. Bates, 213 F.3d 1336 (11th Cir. 2000). The district court did not err in imposing sentencing enhancements under §2B3.1 for possession of a dangerous weapon and carjacking during the commission of the robbery. The defendant simulated possession of what appeared to be a dangerous weapon by reaching into his waistband. The victim teller perceived the defendant to be reaching for a weapon. Given these facts, the court upheld application of the weapon enhancement. The court also upheld the carjacking enhancement because the record established that the defendant demanded the victimôs car keys, grabbed his arm, and forced him into the house, and thus met the requirements for the enhancement by using force and violence or intimidation. *See also United States v. Moore*, 249 F. Appôx 751 (11th Cir. 2007) (upholding the weapon enhancement where the defendant repeatedly reaching into his pants left the impression on the victim teller that he may have had a dangerous weapon).

United States v. Vincent, 121 F.3d 1451 (11th Cir. 1997). The district court did not err in applying a 3-level enhancement for possession of a dangerous weapon during a robbery, pursuant to §2B3.1(b)(2)(E), even though the victim could not see the weapon. The defendant placed an object against the restaurant managerôs side and demanded that she give him the money she was carrying. She believed it was some type of weapon that was used to perpetrate a robbery.

Threat of Death (§2B3.1(b)(2)(F))

United States v. Murphy, 306 F.3d 1087 (11th Cir. 2002). During an unarmed robbery in Georgia, the defendant handed to a bank teller a note stating ñ[y]ou have ten seconds to hand me all the money in your top drawer. I have a gun. Give me the note back now.ò The defendant had no gun nor did he make an express threat to shoot the teller. At sentencing, the district court applied a 2-level enhancement under §2B3.1(b)(2)(F), finding that the note constituted a ñthreat of death.ò The Eleventh Circuit determined that the enhancement for ñthreat of deathò was properly applied. Although the defendant did not make an express threat of death, the amended version of §2B3.1(b)(2)(F) did not require an express threat to be made.

United States v. Summers, 176 F.3d 1328 (11th Cir. 1999). The defendant was convicted of robbing a bank, during which he told a teller ñIôve got a gun, give me $500.ò Prior to a 1997 amendment to §2B3.1(b)(2)(F), the robbery guideline provided a 2-level enhancement when a robbery involved an express threat of death. The Eleventh Circuit followed a minority view that would not have deemed the defendantôs statement in this case to constitute an express threat of death. Subsequent to the defendantôs robbery, §2B3.1(b)(2)(F) was amended to delete the term ñexpressò from the guideline. The court here concluded that this amendment represents a substantive change to the guidelines, rather than a clarification, and, therefore, may not be applied retroactively.

Abduction or Restraint of Victim (§2B3.1(b)(4))

United States v. Victor, 719 F.3d 1288 (11th Cir. 2013). The 2-level enhancement for restraint of a victim during a robbery ((b)(4)(B)) was properly applied when the defendant threatened a bank employee with what the employee believed to be a gun and ordered her not to leave the lobby. It was irrelevant that the defendant was not actually armed.

United States v. Whatley, 719 F.3d 1206 (11th Cir. 2013). The 4-level enhancement for abduction of a victim in the course of a robbery ((b)(4)(A)) was not properly applied when defendant had forced bank employees to move between different rooms within the bank building. §1B1.1 comment. (n. 1(A)) defines abduction as movement to a ñdifferent location,ò and the ordinary meaning of that term does not refer to different rooms within the same building.

Carjacking (§2B3.1(b)(5))

United States v. Naves, 252 F.3d 1166 (11th Cir. 2001). The district court did not engage in impermissible double counting in applying a 2-level increase in the base offense level under the robbery guideline for a violation of the carjacking statute, 18 U.S.C. § 2119. The Eleventh

Circuit disagreed with the defendant that the base offense level accounted for the level of culpability attributed to the offense of carjacking, and that adding two levels was therefore double counting. The ñCommission intended to apply the [2-level] enhancement to the base robbery offense level of 20 for convictions under § 2119,ò and was, in effect, creating a higher base offense level of 22 for a conviction for carjacking.

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Verbitskaya, 406 F.3d 1324 (11th Cir. 2005). The defendants were convicted of extortion charges and the district court applied an enhancement under §2B3.2(b)(3) because a firearm was ñotherwise used.ò The record contained evidence that the defendant grabbed a firearm from behind his back and told the extortion victim that if he did not send money to Switzerland, the defendant would shoot him. A police officer testified that on the night the victim reported the incident, the officer heard the crack of a gun while waiting outside the defendantôs condominium. The Eleventh Circuit found that the district court was within its discretion to find that the defendant used the firearm to make an explicit threat.

United States v. Vallejo, 297 F.3d 1154 (11th Cir. 2002). In this case of first impression for the Eleventh Circuit, the defendants challenged the application of a 2-level enhancement under §2B3.2(b)(5)(B) for ñphysical restraintò where the victims, during the robbery of a club, were initially grabbed and held against their will but eventually were free to leave. The defendants argued that the victimsô movements between the club and the restaurant next door demonstrated that they were not physically restrained as defined by the guidelines. The court concluded that the victims in this case were physically restrained because they had no alternative but to comply, and were effectively prevented from leaving the club, even if only for a short time. The fact that the victims were eventually free to leave did not mean that they were not physically restrained.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Valladares, 544 F.3d 1257 (11th Cir. 2008). The court held that the sentencing court properly utilized §2B4.1 where the evidence at trial established that the defendant bribed Medicare beneficiaries and doctors in order to obtain prescriptions that allowed pharmacies to submit fraudulent Medicare reimbursement claims. As a result, the case involved ñfraud achieved through bribery,ò rather than ñstraight fraud.ò

United States v. Ferreiro, 262 F. Appôx. 240 (11th Cir. 2008). If the value of the bribe in question exceeds $5,000, the defendantôs base offense level is to be increased pursuant to the table at §2B1.1(b)(1). This enhancement is based solely on the value of the bribe; whether the victim sustained a loss is not relevant to the inquiry.

United States v. Devegter, 439 F.3d 1299 (11th Cir. 2006). In a bribery case the amount of loss is the greater of either the bribe or the improper benefit conferred to the defendant. The improper benefit need only be estimated and the bribe amount should only be used when the

value of the improper benefit cannot be estimated. While direct costs, or the overhead that can be specifically identified as the costs of performing a contract, can be subtracted from the improper benefit amount to determine the loss, it is the defendantôs burden to prove what direct costs should be subtracted from the net improper benefit figure. *See also United States v. Valladares*, 544 F.3d 1257 (11th Cir. 2008) (holding that the improper benefit in a healthcare kickback scheme is the net value conferred).

United States v. Poirier, 321 F.3d 1024 (11th Cir. 2003). The court held that the district court improperly utilized the fraud guideline (former §2F1.1) instead of §2B4.1, which covers commercial bribery and kickbacks, in a case involving a violation of 18 U.S.C. § 1343. Commentary in the fraud guideline specifically allows for the use of other guidelines in certain circumstances, such as in mail and wire fraud cases where relatively broad statutes are used primarily as jurisdictional bases for the prosecution of other offenses.[5] The defendantôs conduct in this case ñmore closely resembled a fraud achieved through bribery than a straight fraud.ò

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The defendants were convicted of defrauding Medicare through a referral-kickback scheme; thus, §2B4.1 determined the base offense level. The kickbacks included equipment and lease payments. The defendants argued that because these payments were not received directly but instead went to a third party and because they were lawful remunerations, the payments could not count toward calculating the offense level. The only information supporting the calculations was in the PSR. In addition, the government relied on the language of the anti-kickback statute to support its argument that the defendant was liable for the full lease and equipment payments. The court ruled that although the district court did not clearly err by finding that the lease and equipment payments were in fact remuneration for referrals, it failed to make sufficient factual findings regarding the amount of loss. The case was remanded for further findings.

§2B5.3 Criminal Infringement of Copyright or Trademark

United States v. Lozano, 490 F.3d 1317 (11th Cir. 2007). In a case where the defendant sold counterfeit goods in both the United States and foreign markets, the court determined that calculating loss based on the retail value in the United States, even if the majority of the defendantôs sales were outside the United States, did not render the loss calculation invalid since the use of the retail value in the United States was ñsupported by the evidence and appropriate under . . . the guidelines.ò

§2B6.1 Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

United States v. Saunders, 318 F.3d 1257 (11th Cir. 2003). The court adopted the ñtotality of the circumstancesò test for applying the enhancement under §2B6.1(b)(2) for being ñin the business of receiving and selling stolen property,ò as opposed to the ñfenceò test which merely examines the defendantôs operation to determine if stolen property was bought and sold and if the stolen property transactions encouraged others to commit property crimes. The ñtotality of the circumstancesò test involves ñóa case-by-case approach, weighing . . . [all] the

[5] This commentary is currently codified in §2B1.1(c)(3).

circumstances, with particular emphasis on the regularity and sophistication of a defendantôs operation.ôò Nevertheless, at a minimum, a defendant must personally receive and sell stolen property to qualify for the enhancement. Under the ñtotalityò test, the court then examines the regularity and sophistication of the ñfenceôsò operation.

United States v. Maung, 267 F.3d 1113 (11th Cir. 2001), *abrogated on other grounds by Dolan v. United States*, 130 S. Ct. 2533 (2010). The defendantôs base offense level was enhanced by two levels because the district court concluded that the defendant was in the business of receiving and selling stolen property. The defendant argued the enhancement did not apply because he did not personally receive or sell stolen property, but instead merely transported stolen vehicles on behalf of others. Based on the plain language of §2B6.1(b)(2), the circuit court ruled that the enhancement could not apply because the defendant was not literally in the business of ñreceiving and sellingò stolen property.

Part C Offenses Involving Public Officials

§ 2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

United States v. White, 663 F.3d 1207 (11th Cir. 2011). The 4-level enhancement for elected public officials under §2C1.1(b)(3) is not impermissible double counting. ñBecause of the critical importance of representative self-government, a guideline that applies to any public official who betrays the public trust does not fully account for the harm that is inflicted when the trust that the official betrays was conferred on him in an election.ò (quotation marks and alterations omitted).

United States v. White, 663 F.3d 1207 (11th Cir. 2011). The district court did not err in applying a 16-level enhancement under §2C1.1(b)(2) based on the 1 million dollars in professional fees the briber received ñin returnò for payment to the defendant, despite the defendantôs argument that the briber would have been awarded the government contracts even without the bribes. The Eleventh Circuit held that the evidence was adequate to support the district courtôs finding, ñ[w]hatever the level of causation required under § 2C1.1(b)(2),ò because the defendant was given the payments in return for not exercising his ability to prevent the contracts from being awarded to the briber.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Base Offense Level (§2D1.1(a)(2))

United States v. Rodriguez, 279 F.3d 947 (11th Cir. 2002). The defendant can be sentenced under §2D1.1(a)(2), based upon death or serious bodily injury resulting from drug use, without violating due process or *Apprendi*, because *Apprendi* does not affect the district courtôs determinations under the sentencing guidelines, as long as the defendant is sentenced within the statutory maximum. Furthermore, intervening acts of others who failed to immediately call for help when they discovered the victim unconscious were insufficient to relieve the defendant of liability for a drug overdose, even assuming *arguendo* that an intervening cause of death could foreclose application of the death or serious bodily injury enhancement. The court thus did not decide whether an intervening cause exception to the enhancement exists because the defendant did not adduce facts entitling him to the benefit of such an exception.

Drug Quantity (§2D1.1(a)(5))

United States v. O'Neal, 362 F.3d 1310 (11th Cir. 2004), *vacated and remanded in light of Booker,* 543 U.S. 1107 (2005), *opinion reinstated,* 154 F. Appôx 161 (2005). The court, relying on *United States v. Chitty*, 15 F.3d 159 (11th Cir. 1994), held that, in determining a defendantôs penalty under 21 U.S.C. § 841(b)(1) for a violation of 21 U.S.C. § 846, the drug quantity must be reasonably foreseeable to that defendant where the effect of the quantity is to require the imposition of a statutory mandatory minimum sentence.

United States v. Ryan, 289 F.3d 1339 (11th Cir. 2002). On appeal, the defendant claimed the district court erred by refusing to instruct the jury on sentencing entrapment and challenged his sentencing drug quantity because it included the claimed entrapment amount. The court rejected the defendantôs claim for a sentencing entrapment instruction because there was not sufficient evidence of government inducement to require an instruction on sentencing entrapment. Furthermore, the court ruled, citing Application Note 12 to §2D1.1, that it was proper to base the drug quantity upon the drug amount that was agreed-upon to be sold.

United States v. Zapata, 139 F.3d 1355 (11th Cir. 1998). The district court erred in ñrounding upò its drug quantity calculations for purposes of determining the defendantôs offense level. The amount of marijuana attributable to the defendant was 44 pounds, which the district court determined would yield a base offense level of 18 based on between 20 and 40 kilograms of marijuana. However, the 44 pounds of marijuana actually converted to 19.9584 kilograms of marijuana, resulting in a base offense level of 16. The plain meaning of the guideline directs a base offense level of 16. ñAlthough sentencing may be based on fair, accurate, and conservative estimates of [drug quantities] attributable to a defendant, [it] cannot be based on calculations of drug quantities that are merely speculative.ò Because the rounding up had no legal or factual support, the court vacated the sentence and remanded.

United States v. Eggersdorf, 126 F.3d 1318 (11th Cir. 1997). The district court did not err in denying the defendantôs motion to reduce his sentence below the mandatory minimum. The circuit court held that the statute plainly stating that the five-year mandatory minimum sentence applied in cases involving 100 or more marijuana plants, regardless of weight, controlled over a guidelines amendment providing that each marijuana plant would be equivalent of 100 grams, instead of one kilogram, of marijuana.

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997). The district court did not err in calculating the defendantôs base offense level according to the guideline for crack rather than for cocaine hydrochloride. The district courtôs finding that the purpose of the conspiracy was to cook crack was amply supported by the record. The conversion of powder cocaine into crack not only was foreseeable by defendant, but was plainly within the scope of the criminal activity that he undertook. There was evidence that defendant had discussed ñcookingò the cocaine with the informant, and that a codefendant, in the defendantôs presence, had told the informant that he was in the business of making crack and needed high quality cocaine for that job. *See also United States v. Singleton*, 545 F.3d 932 (11th Cir. 2008) (holding that the district court clearly erred in attributing a quantity of crack cocaine to the defendant that was based on his intent to convert the powder cocaine found in his motel room to crack cocaine; agents had seized baking soda in the motel room that was clearly not sufficient to convert all of the seized powder into crack and there was no evidence to support a finding that the defendant intended to convert all of the powder into crack).

United States v. Shields, 87 F.3d 1194 (11th Cir. 1996) (en banc). The Eleventh Circuit, sitting en banc, upheld the district courtôs conclusion that a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense, as opposed to the weight of the marijuana. The circuit court noted that both the text of 21 U.S.C. § 841 and guidelines §2D1.1 contain the phrase ñinvolv[e] marijuana plants,ò but neither suggests that their application depends upon whether the marijuana plants are harvested before or after the growers are apprehended. The circuit court rejected defendantôs argument that the district court should not have applied the equivalency provision of §2D1.1 because the dead plants were not ñmarijuana plantsò within the meaning of the guidelines. An interpretation of §2D1.1 that depends upon the state of affairs discovered by law enforcement officers (*i.e.*, whether plants are live or have been harvested) contradicts the principle of relevant conduct. The circuit court stated that relevant conduct includes all acts and omissions committed by the defendant. If the defendantôs relevant conduct includes growing marijuana plants, the equivalency provision applies, and the offense level will be calculated using the number of plants.

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the defendantsô base offense levels under §2D1.1 based upon the total amount of marijuana seized during their arrests for conspiracy to manufacture and possess with intent to distribute marijuana plants, including amounts held for ñpersonal use.ò The Eleventh Circuit held that where the evidence showed that the defendant was involved in a conspiracy to distribute drugs, the ñdefendantôs purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy.ò Thus the marijuana intended for personal use by the defendants was properly included by the district court in determining their base offense levels.

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995). The district court committed plain error when imposing a sentence based upon D-methamphetamine rather than L-methamphetamine by failing to make the requisite findings as to the type of methamphetamine used in the offense. Because D-methamphetamine requires a significantly harsher sentence

under the guidelines than L-methamphetamine, the government bears the burden of production and persuasion as to the type of methamphetamine involved in the offense.

Firearm (§2D1.1(b)(1))

United States v. Carillo-Ayala, 713 F.3d 82 (11th Cir. 2013). Application of the 2-level §2D1.1(b)(1) enhancement for possessing a firearm during the course of a drug trafficking offense does not necessarily mean that the defendant possessed a firearm ñin connection with the offenseò within the meaning of the safety-valve guideline, §5C1.2(a)(2). Whether the firearm was possessed in connection with the offense depends on its proximity to drugs and its potential for facilitating the offense, such as by providing protecting, ñinstilling confidence in others,ò or being traded for drugs.

United States v. Villarreal, 613 F.3d 1344 (11th Cir. 2010). For purposes of §2D1.1(b)(1), the district court did not err in applying a 2-level enhancement because the defendant constructively possessed a firearm where the evidence showed that two semiautomatic firearms were on a table in a stash house ñcontrolledò by the defendant. Moreover, the district courtôs finding was further supported by evidence that the defendantôs drug collectors carried firearms, because the defendant ñcould have reasonably foreseen that his drug-debt collectors would use a firearm to collect payment in furtherance of the drug distribution conspiracy.ò

United States v. Price, 272 F. Appôx 823 (11th Cir. 2008). For the §2D1.1(b)(1) firearms enhancement to apply the government need not prove that the firearm was used to facilitate the distribution of drugs. The government need only prove that the firearm was in proximity of the drug trafficking offense and the burden is on the defendant to demonstrate that a connection between the offense and the weapon was ñclearly improbable.ò *See also United States v. Brooks*, 270 F. Appôx 847 (11th Cir. 2008) (upholding firearm enhancement where the defendant was arrested shortly after a cocaine transaction and had a firearm in his possession).

United States v. Timmons, 283 F.3d 1246 (11th Cir. 2002). When a defendant is convicted of an 18 U.S.C. § 924(c) offense as well as an underlying drug offense, the district court is precluded from applying a weapons enhancement pursuant to §2D1.1(b)(1).

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001). The district court did not commit clear error by making a 2-level enhancement, pursuant to §2D1.1(b)(1), to the defendantôs sentence based upon possession of a firearm of a co-defendant who had provided protection for and escorted them while they were transporting drugs and drug proceeds. For the §2D1.1(b)(1) firearms enhancement for the co-conspiratorôs possession to apply, ñthe government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of possession, *and* (4) the co-conspirator possession was reasonably foreseeable by the defendant.ò

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The defendant and others were convicted of conspiracy to possess and distribute narcotics and possession of controlled

substances with intent to distribute. The defendant was assessed a 2-level enhancement for the possession of a firearm during a narcotics-related offense. He contested the enhancement, claiming that the government did not demonstrate that the firearm found in the hotel room belonged to him or that it was connected to the underlying offense. The Eleventh Circuit stated to whom the firearm belonged was irrelevant because the defendant and his co-defendant had equal dominion over the hotel room where the gun was found. Further, the enhancement was properly applied because the guidelines state that it is to be applied ñif the weapon [is] *present*, unless it is clearly improbable that the weapon was connected with the offense.ò The gun was found in the hotel room directly under packaged bricks of marijuana, suggesting an active connection with the narcotics enterprise. *See also United States v. Hall*, 46 F.3d 62 (11th Cir. 1995) (once the government has shown proximity of the firearm to the site of the charged offense, the evidentiary burden shifts to the defense to demonstrate that a connection between the weapons and the offense is clearly improbable).

United States v. Smith, 127 F.3d 1388 (11th Cir. 1997). The district court did not err in enhancing the defendantôs base offense level for possession of a firearm in relation to a drug offense, even though he did not possess a firearm during the offense of conviction. The base offense level enhancement under the sentencing guidelines for possession of a firearm in relation to a drug offense is authorized if the weapon was possessed during the offense of conviction or during the related relevant conduct.

Aircraft (§2D1.1(b)(3)(A))

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999). The district court improperly applied a 2-level upward adjustment based on the defendantôs plan to use a private plane to import narcotics where no importation actually occurred. The Eleventh Circuit found that the plain language of the guideline uses the past tense in stating ñif the defendant unlawfully imported or exported a controlled substance . . . in which an aircraft other than a regularly scheduled commercial air carrier was usedò and clearly contemplates a completed event that did not occur in this case.

Pilot, Copilot, Captain, Navigator, Flight Officer, or Other Operation Officer (§2D1.1(b)(3)(C))

United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003). The court affirmed the district courtôs application of a 2-level captain enhancement under §2D1.1(b)(2)(B) (now found at §2D1.1(b)(3)(C) A federal grand jury returned a two-count superseding indictment charging the four-man crew of a go-fast boat with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine. The facts of the case evidenced that the defendant was the captain in an employment, navigational, and operational sense. The defendant identified himself as the captain to boarding Coast Guard personnel. Additionally, his codefendants testified that they considered him to be the captain because he not only navigated the boat directly or indirectly and was the only crew member who knew its course, but also because he had hired the crew and directed their operations on board. The circuit court rejected the defendantôs argument that the district courtôs application of both the captain enhancement under §2D1.1(b)(2)(B) and the organizer/leader enhancement under §3B1.1 was improper double

counting. The court stated that absent an instruction to the contrary, the adjustments from different guideline sections were applied cumulatively, and neither of the challenged guidelines included any language or commentary that suggested that they may not be applied cumulatively. Consequently, the district court did not err in concluding that the defendant qualified for enhancements under both §§2D1.1(b)(2)(B) and 3B1.1(a).

Safety Valve (§2D1.1(b)(16))

United States v. Reid, 139 F.3d 1367 (11th Cir. 1998). The district courtôs lack of findings on the record as to why it did not apply the 2-level reduction directed by §2D1.1 (applicable if the defendant meets the safety valve criteria) precluded meaningful appellate review. The evidence of record did not demonstrate that defendant did not qualify. The court of appeals vacated the sentence and remanded for further proceedings.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998). The district court erred in applying §2D1.2 to the defendantôs drug conviction because he was not charged with a violation of 21 U.S.C. § 860, selling drugs near a school. Section 2D1.2 establishes base offense levels for violations of 21 U.S.C. § 860. The court of appeals held that § 860 is a substantive criminal offense that must be charged, not a mere sentence enhancer for certain classes of more general drug offenses. The defendantôs uncharged but relevant conduct is irrelevant to determining which guideline is applicable to an offense; relevant conduct is properly considered only after the applicable guideline is selected, when the court is analyzing the various sentencing considerations within the guideline chosen. Thus, the defendantôs actual conduct was not the proper basis for applying §2D1.2, and the court should have applied §2D1.1, which establishes the base offense level for 21 U.S.C. § 841(a), the statute under which the defendant was convicted.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud and Deceit[6]

United States v. Daniels, 148 F.3d 1260 (11th Cir. 1998). The district court did not err by refusing to exclude from the loss calculations $81,250 paid to the victim by the defendantôs errors and omissions insurer. The circuit court noted that the partial reimbursement did not change the amount the defendant embezzled, but only substituted his insurance company as another victim.

United States v. Bald, 132 F.3d 1414 (11th Cir. 1998). The district court properly included as actual loss all credit card charges made by defendants, including unauthorized purchases returned for credit before detection.

[6] Deleted by consolidation with §2B1.1, effective November 1, 2001 (USSG App. C, amend. 617).

United States v. Bush, 126 F.3d 1298 (11th Cir. 1997). The district court erred in failing to apply the enhancement for more than minimal planning where the defendant embezzled funds through several fraudulent loans. The district court also erred in departing downward on the basis of a ñsingle act[] of aberrant behavior.ò The defendantôs conduct was clearly not a single, ñspontaneous and thoughtless act[,] rather than one which was the result of substantial planning.ò ñWhether ósociety has an interestô in incarcerating a particular defendant is a matter addressed by the Guidelines generally, and is irrelevant to the question whether a particular defendantôs conduct was in fact óaberrantô within the meaning of chapter one, part A.ò

United States v. Schlei, 122 F.3d 944 (11th Cir. 1997). The district court did not err in considering intended loss in calculating the defendantôs offense level, even though the defendant was caught in a government sting operation.

United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). The district court erred in calculating loss pursuant to §2F1.1. The defendant was convicted of possession and interstate transportation of stolen securities, bank fraud and attempted escape. The defendant argued on appeal that he deserved an evidentiary hearing to determine the number of bonds attributable to him and their value. The defendant further argued that the stolen bonds were worthless on their face. The circuit court ruled that the district court erred in failing to hold an evidentiary hearing to determine the actual number of bonds for which the defendant was responsible, and the face value of the bonds. The circuit court further ruled that for sentencing purposes the face value of bonds provides a reasonable quantification of the risk to unsuspecting buyers or lenders.

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

§2G1.1 Promoting A Commercial Sexual Act or Prohibited Sexual Conduct with an Individual Other than a Minor

United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012). The defendant was convicted of coercing a minor to engage in prostitution and transporting that minor with the intent that she engage in prostitution. The district court applied a 2-level enhancement after finding that the defendant had exerted undue influence on the minor. The defendant argued that the minor had engaged in prostitution prior to meeting him and therefore he did not unduly influence her. However, the Eleventh Circuit found that because the defendant was ten years older than the minor, the rebuttable presumption in §2G1.1(b)(4)(B) was met. In addition, the court found that other factors relied upon by the district court provided ample evidence of the undue influence, including that the minor had originally declined the defendantôs invitation, that he arranged to have her sent by bus to another city to work for another pimp, and that he brought her to the bus station and bought her a bus ticket.

United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004), *vacated at* 544 U.S. 902 (2005), *opinion reinstated*, 412 F.3d 1251 (11th Cir. 2005). The defendants were convicted of conspiracy to violate the Racketeering Influenced Corrupt Organizations Act, and of violations

of a host of other criminal statutes. The evidence at trial demonstrated that the defendants prostituted juvenile females, creating a system wherein the prostitutes were dominated by physical violence, among other things. When sentencing the defendants, the district court applied the §2G1.1(c)(2)[7] cross-reference, and used the guideline for criminal sexual abuse, §2A3.1, when sentencing the defendants. Challenging application of the cross-reference on appeal, the defendants argued that the district court should have applied the enhancement in §2G1.1(b)(1) for an offense involving prostitution, rather than the cross-reference. Agreeing that the defendantsô conduct satisfied both the enhancement and the cross-reference, the court nonetheless affirmed the sentence. The court reasoned that some overlap in the enhancement and the cross-reference does not offend the sentencing guidelines or any other law and held that a district judge confronted with such an overlap is not free to choose between the enhancement and the cross-reference but must apply the cross-reference.

United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004). The defendant made a deal online with a purported father to have sex with his minor daughter. The father was actually an undercover agent. The district court applied sentencing enhancements under §2G1.1(b)(2)(B) for an offense involving a victim between the ages of 12 and 16 and under §2G1.1(b)(5) for using a computer to induce a minor to engage in a prohibited sex act. The Eleventh Circuit upheld both enhancements. Reasoning that the first is directed at the defendantôs intent, rather than any harm to an actual victim, the court held that the enhancement applies whether the victim is real, fictitious, or an undercover agent. The court also upheld the computer enhancement even though the defendant did not directly induce the minor. The enhancement applies when a defendant communicates with the parents of the minor using a computer. *See also United States v. Vance*, 494 F.3d 985 (11th Cir. 2007) (upholding application of enhancement where the defendant ñusedò a computer to communicate with an undercover officer whom he believed would procure children for sex).[8]

§2G1.3 <u>Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor</u>

United States v. Jerchower, 631 F.3d 1181 (11th Cir. 2011). The guidelines amendment to §2G1.3 stating that the undue influence enhancement did not apply when the only ñminorò involved was an undercover officer was a clarifying, rather than substantive amendment, and therefore applied retroactively. The Eleventh Circuit noted that the amendment altered only the commentary, rather than the text of the guidelines itself, the amendment was by way of a supplement rather than an alteration to the existing commentary, and the amendment aimed to address a circuit split that arose from differing resolutions of conflicting language in the guidelines commentary.[9]

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[7] Effective November 1, 2004, this section was renumbered to §2G1.1(c)(1).

[8] The Commission has since amended the guidelines, effective November 1, 2009, with Amendment 732. The amendment, in part, changes the Commentary to §2G1.3 to specify that the ñundue influenceò enhancement ñdoes not apply in a case in which the only óminorô. . . involved in the offense is an undercover law enforcement officer.ò

[9] *See id.*

United States v. Bohannon, 476 F.3d 1246 (11th Cir. 2007). The defendant was convicted of violating 18 U.S.C. § 2422(b); the applicable guideline, §2G1.3, contains a cross-reference directing that ñ[i]f the offense involved causing . . . or offering . . . a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 . . . if the resulting offense level is greater than that determined above.ò §2G1.3(c)(1). The court upheld the district courtôs application of the cross-reference, noting that it ñis to be construed broadly,ò *see* §2G1.3, comment.(n.5(A)), and also noting that the term ñoffenseò as used in the cross-reference includes both charged and uncharged offenses (*citing United States v. Miller*, 166 F.3d 1153 (11th Cir. 1999)). The court found that the district courtôs finding that the defendant intended to offer and to take pictures of himself engaged in sexually explicit conduct with a minor was not clearly erroneous where the defendant had a digital camera in his car, as well as a history of photographing his sexual encounters.

§2G2.1 <u>Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production</u>

United States v. Aldrich, 566 F.3d 976 (11th Cir. 2009). The court held that ñthe plain meaning of ósexual contactô under U.S.S.G. § 2G2.1(b)(2)(A) and 18 U.S.C. § 2246(3) includes the act of masturbating.ò The court stated that ñ§ 2246(2)(D) clearly indicates that Congress used the phrase óany personô when it meant to include the offender himself, as well as another individual, and the phrase óanother personô when it meant to exclude the offender.ò

United States v. Bohannon, 476 F.3d 1246 (11th Cir. 2007). The sentencing court properly enhanced the defendantôs sentence pursuant to §2G2.1(b)(1)(B) which applies when the offense involved a minor who had not attained the age of 16 years. The court rejected the claim that because the undercover officer selected the victimôs age in a sting operation as age 15, the enhancement constituted impermissible ñsentencing manipulation.ò The commentary expressly defines the term ñminorò as including an undercover law enforcement officer representing to the participant that the officer had not attained the age of 18. The evidence showed that the defendant believed he was interacting with a 15-year old girl and that he knew the consequences of engaging in sexual activity with a minor of that age.

§2G2.2 <u>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; Possessing Material Involving the Sexual Exploitation of a Minor</u>

Trafficking Versus Possession

United States v. Dodds, 347 F.3d 893 (11th Cir. 2003). The defendant was found guilty 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. At sentencing, the PSR applied the cross reference in §2G3.1, and recommended that

the defendant be sentenced under §2G2.4. The district court sentenced the defendant under §2G2.2, which resulted in a higher sentence. The Eleventh Circuit held that when a district court applied §2G3.1(c)(1)ôs cross-reference, sentencing was appropriate under §2G2.2 only if the government could show receipt with the intent to traffic. The court further noted that merely showing that a defendant was in possession of a large number of illegal images would usually not be sufficient to imply an intent to traffic. Accordingly, the case was remanded to the district court to determine whether there was sufficient evidence to support the conclusion that defendant had ñreceivedò the pornography with intent to traffic, and therefore to consider whether §2G2.2 or §2G2.4 applied.[1]

United States v. Bender, 290 F.3d 1279 (11th Cir. 2002). The defendant argued that the district court erred in applying §2G2.2 (trafficking), rather than §2G2.4 (possession), specifically contending that enhancement under §2G2.2(b)(4) for sadistic material and distribution for gain did not apply because he merely possessed, as opposed to distributed, child pornography. Because the defendant received and transmitted child pornography via computer, the court held that §2G2.2 was properly applied. Moreover, the district court correctly applied a 4-level enhancement under §2G2.2(b)(3) based upon pornographic materials that portrayed sadistic conduct, because the defendant possessed photographs depicting the ñsubjection of a young child to a sexual act that would have to be painful.ò Finally, the 5-level enhancement under §2G2.2(b)(2) for distribution for gain applies if the distribution was for the receipt or expectation of receipt of a thing of value. Because the defendant traded child pornography in exchange for other child pornography, he distributed child pornography so that he would receive a thing of value.[2]

Distribution (§2G2.2(b)(3))

United States v. Vadnais, 667 F.3d 1206 (11th Cir. 2012). The district court erroneously applied the 5-level enhancement pursuant to §2G2.2(b)(3)(B) for distributing child pornography for the receipt or expectation of receipt of a thing of value. The defendant obtained child pornography via peer-to-peer software that had a default ñshareò setting, but that did not actually require the user to share files in order to download files. The Eleventh Circuit reasoned that, even if the defendant knew about the default ñshareò feature, that would establish only that he intended to distribute the files to other users. Because the software did not require that the defendant share files in order to receive them, his use of the software and presumed knowledge of the ñshareò feature standing alone ñshow nothing about what he expected in return, if anything,ò *Accord United States v. Spriggs*, 666 F.3d 1284 (11th Cir. 2012) (ñ[T]he mere use of a program that enables free access to files does not, by itself, establish a transaction that will support the five-level enhancement.ò).

United States v. Fulford, 662 F.3d 1174 (11th Cir. 2011). The defendantôs mere belief that the recipient of child pornography was under the age of 18 does not support the application

[1] Section 2G2.4 was deleted by consolidation with §2G2.2 effective November 1, 2004 (USSG App. C, Amend. 664).

[2] *Id.*

of a 5-level enhancement under §2G2.2(b)(3)(C) for distributing child pornography to a minor. Rather, the government must prove that the recipient was in fact a minor as defined in the commentary to §2G2.2, namely a person who was actually under the age of 18, or certain law enforcement officers who represent themselves or fictitious other persons to be minors.

United States v. Probel, 214 F.3d 1285 (11th Cir. 2000). The Eleventh Circuit held that the district court did not err in finding that the defendant did not have to act for a pecuniary interest or other gain in distributing child pornography to have his base offense level enhanced by five levels under §2G2.2(b)(2). The defendant pled guilty to distributing child pornography over the Internet to an undercover law enforcement officer without any pecuniary gain, and argued that the enhancement did not apply. The circuit court held that the plain language of the guidelines and the application notes do not require pecuniary or other gain for the enhancement to apply.

Sadistic and Masochistic Conduct (§2G2.2(b)(4))

United States v. Hall, 312 F.3d 1250 (11th Cir. 2002). The district court erred in not applying a 4-level enhancement for sadistic conduct where the image portrayed an adult male vaginally penetrating a young girl.

United States v. Caro, 309 F.3d 1348 (11th Cir. 2002). The defendant was convicted of possession, receipt, and transportation of child pornography. The defendant had in his possession on his computer 30,000 images of child pornography, including depictions of children from infants to teenagers engaged in sexual activity that showed very young children engaged in anal and vaginal intercourse with adult males and children in bondage or being tortured. The district court erred in refusing to apply a 4-level enhancement, pursuant to §2G2.2(b)(3), based on its reasoning that the government had to present expert medical evidence to support a finding that the images of child pornography the defendant possessed were sadistic, masochistic, or otherwise violent. The Eleventh Circuit noted that it had previously held that the act of anal and vaginal penetration of children between eight and eleven years of age would be considered sadistic, and that it had not imposed a requirement that the government must present expert testimony to support a §2G2.2(b)(3) enhancement. Accordingly, the court concluded that the 4-level enhancement was warranted under that subsection.

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002). The court found that no evidence was presented at trial to establish that the defendant possessed ñsadistic materialsò at the same time he transmitted child pornography. Despite this, the sentencing judge increased the defendantôs sentence by four levels pursuant to §2G2.2(b), which calls for a 4-level increase if ñthe offense involved material that portrays sadistic or masochistic conduct or other depictions of violence.ò The circuit court held that imposing a sentence enhancement without a supporting factual basis constitutes plain error and remanded for resentencing.

Pattern of Activity Involving the Sexual Abuse or Exploitation of a Minor (§2G2.2(b)(5))

United States v. Turner, 626 F.3d 566 (11th Cir. 2010). For purposes of §2G2.2(b)(5), the defendantôs past sexual abuse of a little girl ñnumerous timesò was sufficient to support the 5-level enhancement. Additionally, ñ[n]othing in § 2G2.2(b)(5) or its commentary suggests that the ópattern of activityô must be temporally close to the offense of conviction. Under the plain terms of the commentary, the only requirements for establishing a ópattern of activityô are two or more instances of sexual abuse or exploitation of a minor that are separate from one another.ò

§2G2.4 Possession of Materials Depicting a Minor Engaging in Sexually Explicit Conduct[10]

United States v. Lebovitz, 401 F.3d 1263 (11th Cir. 2005). The district court enhanced the defendantôs sentence because he possessed large quantities of child pornography, §§2G2.4(b)(2) and (b)(5)(C), because he used a computer to obtain his child pornography, §2G2.4(b)(3), and because he possessed child pornography with sadomasochistic images, §2G2.4(b)(4). The defendant contended that the district court double counted his possession of child pornography and use of a computer in obtaining child pornography. Reviewing the claim of double counting *de novo*, the Eleventh Circuit noted that ñ[a]bsent a specific direction to the contrary, we presume that the Sentencing Commission intended to apply separate sections cumulatively, and as a result, a defendant asserting a double counting claim has a tough task.ò Congress meant to increase the penalties provided for possession of greater quantities of child pornography when it enacted §2G2.4(b)(5). For that reason, the court concluded that the simultaneous application of §§2G2.4(b)(2) and 2G2.4(b)(5) is not impermissible double counting.

United States v. Whitesell, 314 F.3d 1251 (11th Cir. 2002). The defendant pled guilty and was convicted of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The defendant met the victim in an Internet chat room, and, during the course of their acquaintance, the victim sent him visual images of herself engaging in sexually explicit conduct. At sentencing, the district court applied the cross-reference under §2G2.4(c)(1) to §2G2.1 based on its finding that the defendant caused or permitted the victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The court found that the term ñcausingò as used in §2G2.4(c)(1) ñdoes not require a defendant to have physical contact with or personally photograph the victim . . . .ò The court concluded that the time frame in which the victim transmitted the pornographic photograph and the defendant made his boastful comments showed that the defendantôs coaxing directly resulted in the victim photographing herself engaging in sexually explicit conduct.

United States v. Bender, 290 F.3d 1279 (11th Cir. 2002). The defendant was more than a ñmere possessorò of child pornography because he admitted that he had transmitted, received, and traded child pornography. Thus it was appropriate to sentence the defendant under §2G2.2 (trafficking) rather than §2G2.4 (possession).

United States v. Harper, 218 F.3d 1285 (11th Cir. 2000). The district court correctly found that separate computer files on one computer disk counted as distinct ñitemsò under §2G2.4, providing for a 2-level enhancement if the child pornography offense involved

[10] Deleted by consolidation with §2G2.2, effective November 1, 2004 (USSG App. C, Amend. 664).

possessing ten or more items. The defendant pled guilty to one count of possession of child pornography when his probation officer found a computer zip disk containing 600 to 1,000 pictures involving the sexual exploitation of minors in more than ten files, and argued that the disk constituted only one ñitemò for sentencing purposes. The Eleventh Circuit held that a computer hard drive is more similar to a library than a book because a hard drive can store thousands of documents and visual depictions, and that each file within the drive is akin to a book or magazine.

§2G3.1 Obscenity: Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

United States v. Little, 365 F. Appôx 159 (11th Cir. 2010). In applying the §2G3.1(b)(1)(A) pecuniary gain enhancement to a sentence for distribution of obscene materials, the sentencing court is limited to consideration of relevant conduct. Here, the materials that may be considered are limited to those materials that have been found by the jury to be obscene according to standards of the district of conviction. As no evidence was presented showing the geographic location from which the pecuniary gain was derived, ñ[a]ppellantsô sentences are being increased for sales in areas that could have community standards that deem the [materials] not to be obscene.ò Thus the §2G3.1(b)(1)(A) enhancement was in error.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

United States v. Fletcher, 347 F. Appôx 507 (11th Cir. 2009). The defendant refused to testify at a co-defendantôs trial. The district court granted the governmentôs motion to compel Fletcher to testify pursuant to 18 U.S.C. §§ 6001 *et seq.* Fletcher refused to testify, and was found guilty of criminal contempt at a bench trial. At sentencing, the district court noted that the contempt guideline, §2J1.1, redirects to §2X5.1, which directs application of the most analogous offense guideline. The district court found that the most analogous guideline was that for being an accessory after the fact, §2X3.1, due to his motives for refusing to testify. The circuit court, however, found Fletcherôs conduct most analogous to obstruction of justice, and concluded that the appropriate guideline would be §2J1.2. Ultimately, however, the circuit court concluded that the district courtôs application of §2X3.1 was harmless error, because §2J1.2 provides for the application of §2X3.1 ñif the offense involved obstructing the investigation or prosecution of a criminal offense . . . .ò *But see United States v. Cohn*, 586 F.3d 844 (11th Cir. 2009) (holding that the district court erred by applying §2X5.1, ñother feloniesò in a criminal contempt case because criminal contempt cannot be classified as a misdemeanor or a felony but rather is an offense *sui generis*.).

§2J1.2 Obstruction of Justice

United States v. Newman, 614 F.3d 1232 (11th Cir. 2010). The district court did not err in applying the 3-level enhancement under §2J1.2(b)(2) for substantial interference with the administration of justice where the defendant removed a child in violation of a lawful state

custody order with the intent to circumvent the state courtôs custody determination. However, the district court erred in also applying the 2-level enhancement under §2J1.2(b)(3) upon finding that the offense was extensive in scope, planning, or preparation because, even though the offense lasted for eight years, ñthe duration of the offense is not equivalent to its óscopeôò for purposes of the enhancement.

United States v. Harrell, 524 F.3d 1223 (11th Cir. 2008). For the cross reference to the underlying offense to be applied, the obstruction of justice must have had the potential to disrupt the governmentôs investigation or prosecution of the underlying offense.

United States v. Brenson, 104 F.3d 1267 (11th Cir. 1997). The cross-reference provision in §2J1.2(c)(1) to §2X3.1 is mandatory when the offense involves obstructing the investigation or prosecution of a criminal offense, without any qualification and whether or not the defendant or anyone else was convicted of the underlying offense. The use of the cross-reference provides ña measure or point of reference for the severity of offensesò involving the obstruction of justice.

§2J1.7 Commission of Offense While on Release[11]

United States v. Bozza, 132 F.3d 659 (11th Cir. 1998). The district court did not err in imposing a sentencing enhancement for commission of an offense while out on bond pursuant to §2J1.7 without having notified the defendant of the enhancement prior to the entry of his guilty plea. ñ[S]ection 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his or her guilty plea.ò

United States v. Williams, 59 F.3d 1180 (11th Cir. 1995). The Sentencing Commission did not overstep its bounds in promulgating §2J1.7, which calls for a 3-level enhancement if the defendant commits a federal offense while on release. ñ18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act.ò

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

Base Offense Level (§2K2.1(a))

United States v. Vega, 392 F.3d 1281 (11th Cir. 2004). The defendant pled guilty to three counts of making false statements in connection with the purchase of firearms in violation of 18 U.S.C. § 924(a)(1)(A). At sentencing, the district court set the defendantôs offense level at an enhanced 18 because his offense involved an Action Arms UZI, a semiautomatic assault weapon. The defendant objected to the enhancement on the theory that it could only reach illegal UZIs--that is, UZIs manufactured after semiautomatic weapons were banned in 1994--and that the government had not proven that the UZI involved in the transaction at issue was an illegal one

[11] Guideline deleted and replaced by §3C1.3 effective November 1, 2006 (USSG App. C, amend. 684).

under the ban. The circuit court held that the statutory exemption from prosecution for possession of semiautomatic assault weapons manufactured before enactment of the Violent Crime Control Act did not exclude an enhanced base offense level for offenses involving such weapons. The court reasoned that the Sentencing Commission could rationally have decided to increase the penalty for supplying false information in connection with such a purchase, Congress clearly intended to single out and penalize semiautomatic weapons, and the risk to society when a person makes false statements regarding a semiautomatic firearm purchase does not hinge on the manufacture date of the weapon.

United States v. Jamieson, 202 F.3d 1293 (11th Cir. 2000). The defendant pled guilty to felonious possession of a firearm. The district court increased the defendantôs sentence pursuant to §2K2.1(a)(3) based on his possession of a Norinco semiautomatic rifle. The rifle was not one of the specifically banned firearms under the Violent Crime Control Act, and did not display two or more statutorily proscribed characteristics. Because the firearm was not specifically listed and did not display two of the characteristics of banned semi-automatic rifles, the circuit court vacated the sentence.

United States v. Fernandez, 234 F.3d 1345 (11th Cir. 2000). The defendant pled guilty to being a felon in possession of a firearm. The PSR set the base offense level at 24, in accordance with §2K2.1(a)(2), based on a finding that he had two prior felony convictions, including a conviction for carrying a concealed weapon to which the defendant pled *nolo contendere* but for which there was no adjudication of guilt. The defendant argued that this offense could not be used to determine his base offense level. The guidelines clearly state that if a prior conviction results in a criminal history point under §4A1.1, the conviction is to be considered a conviction under §2K2.1(a)(2). An offense that resulted in a plea of *nolo contendere* with no adjudication of guilt is to be included in the criminal history calculation of §4A1.1. Accordingly, the district court did not err in finding that a plea of *nolo contendere*, where an adjudication of guilt has been withheld, qualifies as a ñconvictionò for calculating the defendantôs base offense level under the guidelines.

United States v. Laihben, 167 F.3d 1364 (11th Cir. 1999). At sentencing, the district court included a 1995 New York robbery conviction as a prior felony conviction and accordingly assigned the defendant a base offense level of 20, pursuant to §2K2.1(a)(4)(A). On appeal, the defendant argued that the district court erred in calculating his offense level because he was convicted of the New York robbery after committing the federal crimes at issue in this case. The defendant further argued that his 1995 conviction was not a prior felony conviction under §2K2.1(a). The Eleventh Circuit noted that the commentary to §2K2.1 directed the sentencing court to count any ñprior conviction that receives any points under §4A1.1 (Criminal History Category).ò Relying on *United States v. Walker*, 912 F.2d 1365 (11th Cir. 1990), the circuit court concluded that the defendantôs 1995 sentence for robbery qualified for criminal history points for purposes of §4A1.1 because it was imposed prior to sentencing for the instant offense. Because it qualifies for criminal history points, it is therefore a prior conviction for purposes of §2K2.1(a).

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1997). The circuit court affirmed the district courtôs calculation of the defendantôs sentence pursuant to §2K2.1. The defendant

argued that §2K2.1, as amended, was invalid because it substantially increased the punishment level without adequately explaining the reasons for the changes as required by the Administrative Procedures Act (ñAPAò). The appellate court disagreed, and held that ñFederal courts do not have authority to review the Commissionôs actions for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned.ò

Lawful Sporting Purposes or Collection (§2K2.1(b)(2))

United States v. Caldwell, 431 F.3d 795 (11th Cir. 2005). Convicted of possession of a firearm by a felon, the defendant argued that he should have received a reduction in his offense level under §2K2.1(b)(2) for possession ñsolely for lawful sporting purposes or collection.ò The court disagreed and noted that the defendantôs conduct, namely trying to pawn his brotherôs sporting rifle, was not within the specific acts discussed under §2K2.1(b)(2), and the ñdefendant must possess the firearm *solely* for sporting purposes to qualify for a reduction.ò

Stolen Firearm (§2K2.1(b)(4)(A))

United States v. Adams, 329 F.3d 802 (11th Cir. 2003). The district court applied a 2-level enhancement to the defendantôs sentence pursuant to §2K2.1(b)(4). On appeal, the defendant argued that because he was charged with possession of a stolen firearm, enhancing the offense level based solely upon the stolen nature of the firearm constituted impermissible double counting. The Eleventh Circuit noted that although it had never addressed the issue of whether the application of the 2-level enhancement under §2K2.1(b)(4) constituted double counting when the offense of conviction involves a stolen firearm, other circuits had found the enhancement appropriate when a defendantôs base offense level was not determined under subsection (a)(7). The court adopted the same reasoning as other circuits and held that the district court correctly applied the 2-level enhancement.

Possession in Connection with Another Felony Offense (§2K2.1(b)(6))[12]

United States v. Young, 261 F. Appôx 237 (11th Cir. 2008). It is not an *Ex Post Facto* violation to apply guidelines after an amendment whereby the Commission clarified that the 4-level enhancement under §2K2.1(b)(6) for possession of a firearm in connection to another felony, applies when the firearm is part of the proceeds of a theft or burglary. The court determined that this is not a substantive change and does not prejudice the defendant.

United States v. Owens, 447 F.3d 1345 (11th Cir. 2006). The court determined that a prior felony conviction for possession of an unregistered firearm is a ñcrime of violenceò that

[12] This specific offense characteristic was redesignated as §2K2.1(b)(6) effective November 1, 2006. *See* USSG App. C. amend. 691. In 2006, the Commission also amended §2K2.1(b)(5) (now §2K2.1(b)(6)) to resolve a circuit split concerning the application of the enhancement for the use of a firearm in connection with a burglary and drug offense. In the case of a burglary offense, the enhancement applies to a defendant who takes a firearm in the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In the case of a drug trafficking offense, the enhancement applies where the firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. *See* USSG App. C, amend. 691.

establishes an enhancement under §2K2.1(a)(4). The court was unpersuaded by the defendantôs argument that mere possession of a firearm is not a ñcrime of violenceò and joined with other circuit courts in noting that there was a ñvirtual inevitability that such possession will result in violence.ò

United States v. Rhind, 289 F.3d 690 (11th Cir. 2002). The defendants challenged the application of a 4-level enhancement under §2K2.1(b)(5) for possession of firearms, arguing there was insufficient evidence demonstrating that they possessed the firearms ñin connection withò the underlying felony offense. The court interpreted ñin connection withò according to its ordinary meaning, including that the firearm does not have to facilitate the underlying offense. The court concluded that adequate facts supported the enhancement because while passing counterfeit currency while driving across several states, the defendants kept a disassembled handgun under the rear passenger seat and ammunition for the gun in the console between the front seats.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). The defendant was convicted of possession of a firearm by a convicted felon. The district court concluded that, during his arrest, the defendant had reached for his gun during the struggle with the arresting officers, thus justifying a 4-level increase for possession of the firearm in connection with another felony offense. The district court also applied a 3-level enhancement under §3A1.2(b) ñfor having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer.ò The Eleventh Circuit determined that both enhancements were properly applied and did not constitute impermissible double counting.

Cross Reference (§2K2.1(c))

United States v. Webb, 665 F.3d 1380 (11th Cir), *cert. denied*, 133 S. Ct. 292 (2012). The defendant pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Using §2K2.1, the district court determined that the 4-level enhancement for possessing the firearm in connection with a drug offense applied, producing an offense level of 18. Using the cross-reference provision of §2K2.1(c)(1)(A), the district court also calculated an offense level of 28 under §2D1.1, which included a 2-level enhancement for possession of a firearm during the drug offense. The district court imposed a sentence based on the higher offense level, which the defendant argued was impermissible double-counting for the involvement of the firearm. The Eleventh Circuit disagreed with this argument, concluding ñthat the application of § 2D1.1(b)(1) does not result in double counting at all,ò and that the district court properly calculated the defendantôs guideline range.

United States v. Williams, 431 F.3d 767 (11th Cir. 2005). The defendant argued that the enhancement under §2K2.1(c)(1) for the use of ñany firearmò in the commission of another offense should not apply because the weapon charged in the instant offense was different from the one used in the ñotherò offense used to enhance under §2K2.1(c)(1). The court adopted the rule in the Eighth and Tenth Circuits that ñany firearm truly means any firearmò and can apply to firearms not named in the indictment. However, the court also determined that cross-referenced conduct must fall under the definitions of ñrelevant conductò found in §1B1.3 when applying the

enhancement at §2K2.1(c) for the use of a firearm ñin connection with the commission of another offense.ò

United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995). The defendant pled guilty to making false statements to acquire firearms and possession of a firearm by a convicted felon. The defendant was involved in an attempted armed robbery in which her co-conspirator carried a gun. The district court applied the cross-reference provision in §2K2.1 which directs the court to sentence the defendant according to the guideline for the offense that the defendant committed while in possession of the firearm. The defendant argued on appeal that the cross-reference provision was not applicable because she did not possess a firearm in connection with the attempted armed robbery, because the plan did not include the use of weapons, because she did not have possession of a weapon during the attempted robbery, and because she did not know a firearm was present during her participation in the crime. The Eleventh Circuit applied the *Pinkerton* rule of conspirator liability to §2K2.1, holding that since the co-conspiratorôs possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a ñdrug rip-off,ò the possession of the firearm could be imputed to the defendant.

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Brown, 332 F.3d 1341 (11th Cir. 2003). The defendant pled guilty to two counts: 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). The issue on appeal was whether Amendment 599 and the current version of §2K2.4 precluded the application of a §2K2.1(b)(5)[13] 4-level enhancement for possession of a firearm in connection with another felony offense to defendantôs section 922(g) conviction for being a felon in possession of a firearm, when he was also sentenced for his section 924(c) conviction for using or carrying firearms during and in relation to a drug trafficking offense. The Eleventh Circuit held that the district court erred in enhancing defendantôs sentence because the §2K2.1(b)(5) enhancement applied to defendantôs section 922(g) conviction and defendantôs conviction under section 924(c) punished twice the same wrong of possessing a firearm in connection with the underlying felony of drug trafficking.

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001). The district court erred in applying a 5-level enhancement based on the brandishing or possession of a firearm by a codefendant, in light of an amendment to the guidelines. That amendment prohibits any weapon enhancement for the underlying offense if a codefendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under § 924(c). The effect of the amendment is that relevant conduct cannot be used to enhance the offense level for the Hobbs Act conspiracy, substantive Hobbs Act violations, or carjacking convictions of one defendant based on the fact that a codefendant brandished or possessed a weapon.

[13] This specific offense characteristic was redesignated as §2K2.1(b)(6) effective November 1, 2006. *See* USSG App. C. amend. 691.

Bazemore v. United States, 138 F.3d 947 (11th Cir. 1998). The district court did not err in denying Bazemoreôs 28 U.S.C. § 2255 motion to vacate his conviction for using or carrying a firearm in connection with a drug trafficking offense. Bazemore argued that the Supreme Courtôs decision in *Bailey v. United States*, 516 U.S. 137 (1995), *superseded by statute,* Pub. L. 105-386, 112 Stat 3469, *as recognized in Abbott v. United States*, 131 S. Ct. 18 (2010), meant that the conduct he pled guilty to, participating in a drug trafficking crime in which a codefendant carried a weapon, did not violate 18 U.S.C. § 924(c). The court of appeals upheld the district courtôs finding that Bazemore had aided and abetted his codefendant in ñcarryingò the weapon, and that he was therefore liable for the crime and his plea was properly accepted.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. McQueen, 670 F.3d 1168 (11th Cir.), *cert. denied*, 133 S. Ct. 225 (2012). The district court properly applied §2L1.1(b)(5)(A)ôs enhancement for discharging a firearm, where the defendantôs ñactions induced law enforcement to discharge their firearms because law enforcementôs response was a reasonably foreseeable result of [the defendantôs] conduct,ò and was thus relevant conduct attributable to the defendant under §1B1.3(a)(1)(A).

United States v. Zaldivar, 615 F.3d 1346 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 959 (2011). A defendant may be subject to an enhancement pursuant to §2L1.1(b)(7) even if his own conduct did not cause the personôs injury or death; the enhancement may be applied on the basis of the defendantôs relevant conduct under §1B1.3, where it was ñreasonably foreseeable to a defendant that his actions or the actions of any other member of the smuggling operation could create the sort of dangerous circumstances that would likely result in serious injury or death.ò

§2L1.2 Unlawfully Entering or Remaining in the United States

Drug Trafficking Offense (§2L1.2(b)(1)(A)(i))

United States v. Aguilar-Ortiz, 450 F.3d 1271 (11th Cir. 2006). In a matter of first impression, the court held that a prior conviction for solicitation to deliver cocaine did not qualify as a drug trafficking offense within the meaning of §2L1.2(b)(1)(B). Because the Florida statute at issue potentially covers a wide range of conduct including the solicitation of small quantities of drugs for personal use, the court rejected a categorical, or per se, basis for an enhancement for solicitation. Instead, the court held that an enhancement for drug solicitation will depend on the facts of the case. In this case, the defendant solicited a small quantity of drugs for personal use without the intent to distribute. Such conduct, the circuit court held, did not qualify as a drug trafficking offense within the meaning of §2L1.2(b)(1)(B).

United States v. Phillips, 413 F.3d 1288 (11th Cir. 2005). The court held that a prior conviction for attempted sale of a controlled substance qualified as a drug trafficking offense within the meaning of §2L1.2(b)(1)(A). The court cited guideline commentary as the basis for its decision, which defines a drug trafficking offense as ñan offense under federal, state, or local

law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession of a controlled substance with the intent to manufacture, import, export, distribute, or dispense,ò §2L1.2, comment. (n.1(B)(iv)), and further states that ñóprior convictions of offenses counted under subsection (b)(1) include the offenses of . . . *attempting*, to commit such offenses.ô §2L1.2, comment. (n.5) (emphasis added)ò.

United States v. Anderson, 328 F.3d 1326 (11th Cir. 2003). The defendant was convicted of illegal reentry after deportation. The defendant was deported in 1991 after he pleaded *nolo contendere* to a Florida felony drug offense. The district court imposed a 12-level enhancement pursuant to §2L1.2(b)(1)(B) because the defendant had been previously deported after a conviction. On appeal, the defendant argued that a *nolo contendere* plea with adjudication withheld did not qualify as a conviction within the meaning of §2L1.2(b)(1)(B). The Eleventh Circuit determined that the term ñconvictionò as used in §2L1.2(b) was governed by the definition set forth in § 1101(a)(48)(A) and included a *nolo contendere* plea with adjudication withheld as long as punishment, penalty, or restraint on liberty was imposed. Accordingly, the court upheld the lower courtôs application of the enhancement.

United States v. Lozano, 138 F.3d 915 (11th Cir. 1998). The defendant was convicted of cocaine distribution and deported in 1992. He was discovered in the United States in 1996 and pled guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). The court imposed a 16-level increase under then §2L1.2(b)(2) because the previous deportation was subsequent to an aggravated felony. The defendant argued the enhancement violated the *Ex Post Facto* Clause by punishing him for earlier conduct under a law and guideline not in effect at the time of the conduct. The court of appeals determined that no *Ex Post Facto* violation had occurred because the offense for which defendant was sentenced was being found in the United States after illegally reentering the country. At the time of the commission of that offense, the penalties were unambiguous.

Crime of Violence (§2L1.2(b)(1)(A)(ii))

United States v. Garza-Mendez, 735 F.3d 1284 (11th Cir. 2013). When interpreting the requirement in 8 U.S.C. § 1101(a)(43)(F) that an aggravated felony is a crime of violence for which the sentence imposed was ñat least one year,ò the proper measure is the length of the sentence actually imposed, regardless of any suspension of the sentence in whole or in part. A ñclarification orderò issued by a second state court judge years after the defendantôs original state sentence had been imposed does not alter the length of the sentence imposed for purposes of federal law. In addition, it was not an abuse of discretion for the district court to decline to depart downward based on application note 8, regarding downward departures based on a defendantôs ñcultural assimilationò to the United States, given the defendantôs extensive criminal history.

United States v. Diaz-Calderone, 716 F.3d 1345 (11th Cir. 2013). District court was correct to apply the modified categorical approach to Florida battery-upon-a-pregnant-victim statute, when ñbatteryò under Florida law requires only the slightest touching. The district court permissibly consulted a recording of the defendantôs state court plea hearing to determine that

the defendant admitted to facts establishing that he committed ñbatteryò through violent means. Application of the modified categorical approach does not require ñdifferent statutory phrases,ò one of which must be categorically a crime of violence. ***But see Descamps v. United States*, 133 S. Ct. 2276 (2013) (decided after *Diaz-Calderone*; holding that the modified categorical approach may not be applied to "missing element" statutes in attempts to narrow statutory language that is "categorically broader than the generic offense").**

United States v. Cortes-Salazar, 682 F.3d 953 (11th Cir. 2012). The defendantôs prior conviction for ñlewd assault actò under Florida law categorically involved sexual abuse of a minor and was thus a crime of violence for purposes of the 16-level enhancement under §2L1.2(b)(1)(A)(ii).

United States v. Rosales-Bruno, 676 F.3d 1017 (11th Cir. 2012). The Florida offense of false imprisonment ñencompasses several distinct crimes, some of which qualify as crimes of violence and others of which do not.ò Thus, using the modified categorical approach, the Eleventh Circuit concluded that the government did not introduce any appropriate records to support the district courtôs conclusion that the defendant was convicted of a portion of the offense that qualifies as a crime of violence. Accordingly, the district court erred in applying the 16-level enhancement under §2L1.2(b)(1)(A)(ii).

United States v. Romo-Villalobos, 674 F.3d 1246 (11th Cir.), *cert. denied*, 133 S. Ct. 248 (2012). The district court properly applied the 16-level enhancement under §2L1.2(b)(1)(A)(ii) on account of the defendantôs prior conviction for the Florida offense of resisting an offender with violence. That state offense is categorically a crime of violence for purposes of the enhancement because the Florida courts have held that violence is a necessary element of the offense.

United States v. Ramirez-Garcia, 646 F.3d 778 (11th Cir.), *cert. denied*, 132 S. Ct. 595 (2011). The North Carolina offense of taking indecent liberties with a child is a crime of violence for purposes of §2L1.2(b)(1)(A)(ii) (specifically, a sexual abuse of a minor offense listed in Application Note 1(B)(iii)) because the offense requires either the misuse or maltreatment of a minor for the perpetratorôs sexual gratification. The offense supports the enhancement, the Eleventh Circuit held, even though it does not necessarily require that the offender have physical contact with the minor.

United States v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010). Looking to sources such as the Model Penal Code and Blackôs Law Dictionary, the Eleventh Circuit held that the generic crime of aggravated assaultï which involves ña criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weaponòï is a crime of violence for purposes of §2L1.2. The Arizona statute under which the defendant had previously been convicted (Ariz. Stat. § 13-1204(A)(7) (1995)) prohibited a simple assault on a police officer and could be caused by reckless conduct. The circuit court held that this statute did ñnot substantially correspond to the elements of the generic offenseò and that thus, the defendantôs conviction under that statute was not a crime of violence under §2L1.2(b)(1)(A)(ii).

United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007), *overruled on other grounds by Johnson v, United States*, 130 S. Ct. 1265 (2010). The court determined that a violation of Fla. Stat. § 784.045(1)(b) for aggravated battery on a pregnant woman was categorically a ñcrime of violenceò for the purposes of enhancement under §2L1.2(b)(1).

United States v. Camacho-Ibarquen, 410 F.3d 1307 (11th Cir. 2005). The defendant challenged a 16-level enhancement under §2L1.2 for reentering the country after deportation following a conviction for a crime of violence. The defendant argued that the enhancement applies only to offenses for which the conviction occurred within the previous ten years. The Eleventh Circuit held that §2L1.2 has no time limit with regard to the date of conviction. Neither the text of the guidelines nor the application notes that follow state that a conviction must have occurred within a particular time period before the current offense for the §2L1.2 enhancements to apply. If the Sentencing Commission had intended to have a time limit for the convictions, there is no reason it would not have written an explicit time restriction in the guideline.

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005). The defendant argued that neither of his two prior felony convictions for unlawful sexual activity with certain minors and for burglary of a dwelling could be used to support the crime of violence enhancement under §2L1.2. The Eleventh Circuit affirmed his sentence, holding that the district court did not err in applying the 16-level enhancement. A felony conviction for unlawful sexual activity with certain minors qualifies as a crime of violence within the guidelines definition, either as sexual abuse of a minor or statutory rape. Moreover, the definition of ñprior crime of violenceò unambiguously includes the burglary of a dwelling. Accordingly, either prior felony conviction supported the district courtôs imposition of the §2L1.2(b)(1)(A) enhancement.

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004). The defendant was convicted of illegal reentry after deportation, and the court increased his offense level by 16 levels, determining that the defendantôs prior conviction for aggravated child abuse was a crime of violence. The defendant appealed, arguing that his Florida conviction for aggravated child abuse did not qualify as a ñcrime of violenceò under §2L1.2(b)(1)(A)(ii). Although the defendant conceded that the offense had as an element the use of physical force, he asserted that it did not qualify as a crime of violence because it was not listed as one of the enumerated offenses described in the second subpart of the guideline. Essentially, the defendant asserted that the construct of this guideline section required that the requirements of both subparts must be met before a prior conviction qualified as a ñcrime of violence.ò The court categorically rejected this argument, stating that it would render subpart (I) mere surplusage, because unless an offense were listed in subpart (II), it would never qualify as a crime of violence. It is enough that an offense either falls under the general definition in the first subsection or is included among the enumerated offenses in the second subsection to qualify for the 16-level enhancement.

United States v. Chavarriya-Mejia, 367 F.3d 1249 (11th Cir. 2004). The defendant pled guilty to reentry after deportation and received a 16-level crime of violence enhancement based on his prior conviction for statutory rape. The Eleventh Circuit agreed with the district court that statutory rape is a crime of violence. The guidelines section defined crime of violence to include forcible sex offenses, including sexual abuse of a minor. Regardless of whether the child consents, the law presumes that the physical contact aspects of statutory rape were not agreed to.

United States v. Fuentes-Rivera, 323 F.3d 869 (11th Cir. 2003). The defendant pled guilty to re-entry into the United States after a conviction in California for burglary in the first degree. Pursuant to §2L1.2(b)(1)(A)(ii), the district court enhanced the defendantôs sentence because his deportation occurred after the felony conviction for a ñcrime of violence.ò On appeal, the defendant argued that, since burglary under California law did not include the use, attempted use, or threatened use of physical force as an element of the offense, his 1995 conviction for first-degree burglary did not qualify as a ñcrime of violence.ò Because the Sentencing Commission included ñburglary of a dwellingò in Application Note 1(B)(ii)(II)ôs list of offenses,[14] despite the fact that burglary, or at least ñgenericò burglary, had never had as an element the use, attempted use, or threatened use of physical force against another, the Eleventh Circuit held that the district court did not err in determining that burglary of a dwelling was a ñcrime of violenceò under §2L1.2(b)(1)(A)(ii).

Aggravated Felony (§2L1.2(b)(1)(C))

United States v. Martinez-Gonzalez, 663 F.3d 1305 (11th Cir. 2011). Possession of a forged instrument with the intent to defraud is an aggravated felony under §2L1.2. For purposes of 8 U.S.C. § 1101(a)(43), as referenced in Application Note 3(A) to §2L1.1, an offense relates to forgery even if it does not involve the manufacture of forged instruments.

United States v. Gonzalez, 550 F.3d 1319 (11th Cir. 2008). The defendant was convicted of re-entry after deportation after a federal conviction for aiding and abetting a bank robbery which qualifies as a ñcrime of violenceò under §2L1.2(b)(1)(A)(ii), but which does not constitute an ñaggravated felonyò under 8 U.S.C. § 1101(a)(43) because the defendantôs sentence for that offense was less than one year of imprisonment. The Eleventh Circuit rejected the defendantôs claim that §2L1.2(b)(1)(A)(ii) only applies to crimes of violence that also qualify as aggravated felonies, and further noted that a 2008 amendment to the guideline that suggests that a departure may be warranted in a case such as defendantôs, *see* §2L1.2, comment.(n.7), uses permissive, rather than mandatory, language.

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001). The defendant pled guilty to illegally reentering the United States after being deported. Prior to his deportation, the defendant pled *nolo contendere* to a second degree state felony for a lewd, lascivious, or indecent assault or act upon or in the presence of a child. He argued that ñaggravated felonyò under §2L1.2 is ambiguous because it is not clear whether physical contact is a necessary element of the offense. The Eleventh Circuit held the term ñsexualò in ñsexual abuse of a minorò as found in ñaggravated felonyò indicates the perpetratorôs intent in committing the abuse is to seek libidinal gratification and ñsexual abuse of a minorò is therefore not limited to physical abuse. The district court thus did not err in holding that a violation of a state statute criminalizing sexual offenses not rising to the level of rape or sexual battery, but committed against children under 16 years of age, constituted an ñaggravated felonyò under §2L1.2.

[14] This list of offenses is now set forth in Application Note 1(B)(iii).

United States v. Drummond, 240 F.3d 1333 (11th Cir. 2001). The district court did not err in applying the 16-level enhancement for deportation after conviction of an aggravated felony. The Eleventh Circuit found that the defendantôs prior state conviction for menacing qualified as an ñaggravated felonyò for purposes of §2L1.2. Menacing is a crime of violence under the definition in the enhancement because menacing under the state law includes placing another in fear of physical injury, serious injury or death.

United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001). The district court did not err in finding that the defendantôs state conviction for shoplifting was an ñaggravated felonyò for purposes of §2L1.2. The defendant was given a 16-level enhancement for illegally reentering the United States after being deported following a conviction for misdemeanor shoplifting offenses. He was sentenced to 12 months but his sentence was suspended. Agreeing with other circuits, the circuit court found the language of the statute did not apply to only those crimes that are felony crimes by nature. Congress defined a term of art and ñaggravated felonyò includes certain misdemeanants who receive a sentence of one year.

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000). The district court enhanced the defendantôs sentence upon his guilty plea to illegally reentering the United States after his deportation. The defendant had been found guilty in state court for grand theft, third degree, and was sentenced to five yearsô probation. The circuit court stated that ñaggravated felonyò under the statute is defined in terms of the sentence actually imposed, and includes a theft offense only if the term of imprisonment imposed was at least a year. Had the defendant received a suspended sentence followed by probation, the enhancement may have been applicable. But when a court does not order a period of incarceration, the conviction is not an ñaggravated felonyò under §2L1.2.

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000). The defendant was found guilty after a bench trial for illegally entering the United States after being deported following a conviction in state court for attempted burglary and aggravated assault. The state sentence imposed was one to five years for the attempted burglary and three to ten years for the aggravated assault. The defendant was deported, however, after serving only seven months, and the district court suspended the rest of the sentence upon his deportation. He argued that this conviction was not an aggravated felony. The Eleventh Circuit held that the definition of ñaggravated felonyò under the enhancement in §2L1.2 referred to the term of imprisonment imposed and not the term actually served and affirmed the application of the enhancement.

United States v. Alfaro-Zayas, 196 F.3d 1338 (11th Cir. 1999). At sentencing, the defendant made an oral motion to depart downward on the grounds that the 1992 drug conviction overstated the seriousness of his criminal conduct because the conduct underlying that conviction and his classification as an aggravated felon was a $20 sale of cocaine base. The district court denied the motion, stating that it did not have the discretion to depart downward and that §4A1.3 did not apply. On appeal, the Eleventh Circuit determined that the district court correctly concluded that it was not empowered under §4A1.3 to depart downward from the offense level under §2L1.2. The court also concluded that the district court correctly noted that its disagreement with the policy under which the defendantôs sentence was calculated did not provide it with authority to depart downward.

§2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

United States v. Polar, 369 F.3d 1248 (11th Cir. 2004). The defendant was convicted of possessing a counterfeit United States ADIT stamp. He used the stamp to help aliens obtain Social Security cards. The district court applied §2L2.1(b)(3), which provides for a 4-level increase ñif the defendant knew, believed or had reason to believe that [the] passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving the violation of the immigration laws.ò The court held that fraudulently obtaining a Social Security card, even if for the purpose of perpetuating immigration fraud, was not a violation of the immigration laws. The court concluded that term includes only those laws that ñcriminalize conduct ónecessarily committed in connection with the admission or exclusion of aliens.ôò The court thus upheld the enhancement.

United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997). The district court erred in applying §2F1.1, the guideline for fraud, deceit and forgery, to calculate the defendantôs sentence because §2L2.1, involving counterfeit identification documents, more aptly characterized the offense conduct. The defendantôs conduct, encouraging and inducing aliens to reside in the United States, making false statements on applications for social security cards, and producing social security cards without lawful authority, arose from her participation in a conspiracy to unlawfully produce social security cards and sell them to illegal aliens.

Part M Offenses Involving National Defense and Weapons of Mass Destruction

§2M3.1 Gathering or Transmitting National Defense Information to Aid a Foreign Government

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The district court erred in selecting a base offense level of 42 under §2M3.1(a)(1) which applies ñif top secret information was gathered or transmitted,ò instead of a base offense level of 37 which is appropriate ñotherwise.ò The court did not find that top secret information was gathered or transmitted but based its decision on a finding that the object of the conspiracy was to obtain top secret information. The language of the guideline contemplated a completed event: the actual gathering or transmission of top secret information.

Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws

§2N2.1 Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

United States v. Kimball, 291 F.3d 726 (11th Cir. 2002). The defendant who was convicted of distributing a prescription drug without a prescription with the intent to defraud or mislead was found guilty of an offense that necessarily involved fraud and thus was properly sentenced under the fraud guideline, rather than under §2N2.1 dealing with any food, drug, biological product, device, cosmetic, or agricultural product.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). Under §2P1.1(b)(2), any defendant convicted of escape is entitled to a 7-level reduction of the base offense level if the defendant ñescaped from non-secure custody and returned voluntarily within [96] hours.ò If, while away from the facility, the defendant committed any offense punishable by a term of imprisonment of one year or more, the reduction does not apply, per §2P1.1(b)(2). The reduction was not applicable here because the defendant committed new offenses while away from the facility and did not return voluntarily.

Part Q Offenses Involving the Environment

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Perez, 366 F.3d 1178 (11th Cir. 2004). The defendant, the owner and operator of a business that hauled solid waste and vegetive debris, had his trucks dump waste at two protected wetlands sites that he owned. The district court applied an increase under §2Q1.3 for an offense involving a discharge without a permit. The defendant appealed, asserting that application of this enhancement constituted impermissible double counting. The Eleventh Circuit held that the increase was not double counting because the defendantôs base offense level under §2Q1.3 only accounted for the mishandling of environmental pollutants, and did not account for the permit element of his criminal conduct. The defendant also challenged imposition of the 4-level increase under §2Q1.3(b)(1) for an offense that otherwise involved a discharge, release or emission of a pollutant. The court rejected the defendantôs argument that the government must prove actual contamination for the enhancement to apply.

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

United States v. Giordano, 261 F.3d 1134 (11th Cir. 2001). The defendants were convicted of price-fixing. On appeal, the defendants argued that the 1-level enhancement under §2R1.1(b)(2) did not apply to them because: 1) the volume of commerce affected in the price fixing scheme was well below the $400,000 threshold necessary to trigger the application of the

1-level enhancement, instead of the government figures of $636,153.66 and $839,043.80 accepted by the district court; and 2) the conspiracy was a ñnon-starter.ò The court found that the district court based its volume of commerce calculation on sales during the period between October 24, 1992 and December 31, 1992, a period within which the court determined the conspiracy to be effective based on the evidence provided by the government. The appellate court concluded that because the conspiracy was effective during that period of time, the district court ñdid not err in including in the volume of commerce affected all sales of the affected products between October 24, 1992, and December 31, 1992,ò which resulted in a figure that exceeded the threshold of $400,000.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

United States v. Melo, 259 F. Appôx 248 (11th Cir. 2007). A 6-level increase for laundering funds from drug trafficking is warranted under 2S1.1(b)(1) when the defendant is ñput on noticeò when a narcotics dog alerts to funds early in the conspiracy and then the defendant launders subsequent funds from the same source.

United States v. De La Mata, 266 F.3d 1275 (11th Cir. 2001). The defendants were convicted of bank fraud, money laundering, false statements, false entries, and misapplication of bank funds. The district court grouped the offenses, then applied the guideline (§2S1.1) that produced the highest offense level, pursuant to §3D1.3(b). A defendant argued that the fraud guideline more fully captured the nature of his crimes, and that his money laundering, via bank fraud, was atypical for that crime. The Eleventh Circuit disagreed. It first noted that not applying the money laundering guideline would nullify the jurorsô verdict on that issue; moreover, it found that the money laundering hereï separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conductï was within the heartland of §2S1.1.

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). The district court refused to apply §2S1.1 to the defendantsô convictions under 18 U.S.C. § 1956, thereby reducing the defendantôs base offense level by ten levels in this case. The circuit court held that the jury found the defendants guilty of violating section 1956, and thus §2S1.1 must be applied. It rejected the district courtôs rationale that the gravamen of the defendantsô unlawful conduct was fraud and misapplication of RTC funds, holding that ñCongress intended to criminalize a broad array of money laundering activity, and included within this broad array is the activity committedò by the defendants. The circuit court remanded for further findings, however, with respect to the district courtôs second justification that the sentence reflected a downward departure under §5K2.11.

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995). The district court did not err in its calculation of the amount of funds involved in the defendantôs money laundering scheme. The defendant pled guilty to wire fraud, mail fraud and money laundering in relation to a

ñPonziò scheme. The defendantôs money laundering and fraud convictions were grouped pursuant to §3D1.2. On appeal, the defendant argued that the district court erred in determining the value of funds by considering the total amount of money collected in the ñPonziò scheme. The circuit court noted that when offenses are grouped pursuant to §3D1.2, a sentencing court is ñrequired to consider the total amount of funds that it believed was involved in the course of criminal conduct.ò The circuit court ruled that the amount of money collected by the defendant through fraud was co-extensive with the sums involved in the charged and uncharged money laundering counts, thereby warranting a 10-level enhancement for laundering in excess of $20 million.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax: Fraudulent or False Returns, Statements, or Other Documents

United States v. Snipes, 611 F.3d 855 (11th Cir. 2010). Section 2T1.1 does not conflict with 28 U.S.C. § 994(j), which calls for the Commission to insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment on a first offender who has not been convicted of a crime of violence or an otherwise serious offense. ñThe graduated penalty structure [of § 2T1.1] reflects the Sentencing Commissionôs assessment that a ógreater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics.ôò The Eleventh Circuit also rejected the defendantôs argument that § 2T1.1 should be disregarded under *Kimbrough* as lacking an empirical basis.

United States v. Wolfe, 367 F. Appôx 74 (11th Cir. 2010). The defendant challenged the district courtôs calculation of amount of tax loss because it included tax loss from the year 1998, which he claimed was barred by the six-year statute of limitations for tax conspiracies. The circuit court held that because 1998 fell within the defendantôs conspiracy to defraud the United States from 1992 to 2008, the district court did not commit error by including this tax loss in the loss amount. The circuit court held that the district court was permitted to consider relevant conduct ñregardless of the statute of limitations.ò

United States v. Clarke, 562 F.3d 1158 (11th Cir. 2009). The court held that the ñtax lossò for §2T1.1 purposes ñis the amount of loss the defendant intends to bring about, not the amount of loss to the government that actually results, and therefore, unclaimed deductions or other reductions in tax liability that are unrelated to the offense of conviction may not be used to offset the tax loss amount.ò The court also held that the ñdistrict court did not clearly err in finding that [the defendantôs] activity, which covered a three-year period and required intricate planning, involved the use of sophisticated means.ò

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The district court properly relied on *United States v. Thomas*, 8 F.3d 1552 (11th Cir. 1993), and applied §2M3.1, the guideline applicable to violations of 18 U.S.C. § 794, a statute that expressly covers both the gathering of national defense information to aid a foreign government and conspiracy to do so. Therefore, it was not error for the court to refuse to apply §2X1.1(a) because that guideline applies only when a conspiracy is not expressly covered by another guideline section.

United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The defendants were convicted of conspiracy to commit money laundering. The defendants argued that under §2X1.1(b)(2) they were entitled to a 3-level reduction in their sentence 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$6 million in future transactions. The Eleventh Circuit noted that the intended laundering of $6.7 million required an 8-level increase under §2S1.1(b)(2)(1). This offense level, however, had to be reduced by three levels because the defendants had not completed or were not close to completing all the acts they believed necessary to laundering the $6 million in future transactions. Thus, the application of §2X1.1(b)(2) resulted in a 5-level increase. In contrast, the actual laundering of $714,500 would have resulted in a 4-level increase under §2S1.1(b)(2)(E). Hence, the 5-level increase under §2X1.1(b)(2), the greater of the two offense levels, became the operative offense level for defendants. The court held that, as a proper application of the guidelines would result in a lower offense level for the defendants, the district court erred by not applying §2X1.1, and therefore the defendantsô sentences were vacated and remanded.

§2X5.1 <u>Other Felony Offenses</u>

See United States v. Cohn, 586 F.3d 844 (11th Cir. 2009), §2J1.1.

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The defendant was sentenced to ten yearsô imprisonment for his conviction for acting as an agent of a foreign government without notifying the Attorney General, in violation of 18 U.S.C. § 951, and to a five-year consecutive sentence for his conspiracy to violate section 951 and to defraud the United States, in violation of 18 U.S.C. § 371. Section 951 is ña felony . . . for which no guideline expressly has been promulgated,ò §2X5.1, nor was a guideline promulgated for conspiracy to violate section 951. Because there was not a ñsufficiently analogous guideline,ò §2X5.1 directs that the general purposes of sentencing under § 3553 control the district courtôs discretion. The district court properly considered the purposes of sentencing and recognized its obligation to ñimpose a sentence sufficient, but not greater than necessary, to comply withò those purposes. The circuit court rejected the defendantôs argument that the court erred in imposing a consecutive sentence and that it should have applied §5G1.3, applicable where a defendant is subject to an undischarged term of imprisonment.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court upheld the sentencing courtôs application of the vulnerable victim enhancement to a defendant lawyer, convicted of distributing cocaine to a person under 21 years of age, who had supplied cocaine to a client he was representing on drug charges, finding that the clientôs drug addiction rendered him unusually vulnerable to being supplied with drugs. The court noted that not every drug addict is a vulnerable victim within the meaning of §3A1.1. ñApplying this enhancement is highly fact-specific and must take into account the totality of the circumstances.ò

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). The district court applied the vulnerable victim enhancement because the bank tellers in a bank robbery were vulnerable victims. Although bank tellers are not automatically vulnerable victims by virtue of their position, here, the defendant selected the bank to rob because it was a rural bank with little law enforcement in the area. The enhancement thus applied.

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendantôs sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendantôs sentence based solely on victimôs membership in a more ñvulnerable classò of persons is not consistent with the purpose behind §3A1.1 because the vulnerable victim enhancement is intended to ñófocus[] chiefly on the conduct of the defendantô and should be applied only where ócthe defendant selects the victimô due to the victimôs perceived vulnerability.ò In this case, however, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995). The defendant argued on appeal that the district court erred in applying §3A1.1 because vulnerability for sentencing purposes is measured at the time of the commencement of the crime and the victimôs vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court ruled that the enhancement was properly applied because the defendants had ñtargetedò the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding that the defendantsô attempt to exploit the victimôs vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim where the thrust of the wrongdoing was continuing in nature.

§3A1.2 Official Victim

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. Appôx 657 (11th Cir. 2005). The defendant was convicted of drug trafficking, unlawful firearms possession, and attempting to kill an official in the

performance of official duties with intent to interfere therewith. The district court applied the official victim increase under §3A1.2. The defendant claimed that he was not aware of the official status of the police officer before shooting him. The Eleventh Circuit affirmed, holding that the record supported the district courtôs conclusion that the police announced their presence before entering the residence where the defendant was located so that the defendant knew of the victimôs status before shooting him.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). The defendant was convicted of possession of a firearm by a convicted felon. The district court concluded that during his arrest the defendant had reached for his gun during the struggle with the arresting officers, thus justifying a 4-level increase for possession of the firearm in connection with another felony offense under §2K2.1. The district court also applied a 3-level enhancement under §3A1.2(b) for having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer. The Eleventh Circuit determined that both enhancements were properly applied and did not constitute impermissible double counting.

§3A1.3 <u>Restraint of Victim</u>

United States v. Hidalgo, 197 F.3d 1108 (11th Cir. 1999). The district court did not err by enhancing the defendantôs offense level for restraint of victim even though the victim was a co-conspirator. The co-conspirator was suspected of betraying the other defendants and was restrained by the defendants. The Eleventh Circuit held the sentence was properly enhanced because the guideline contemplates the restraint of any victim, co-conspirator or otherwise.

§3A1.4 <u>Terrorism</u>

United States v. Garey, 546 F.3d 1359 (11th Cir. 2008). The defendantôs offense level was increased by 12 levels and his criminal history category was increased from category III to category VI based on the presentence reportôs conclusion that he had been convicted of a felony that ñinvolved or was intended to promote a ófederal crime of terrorism.ôò The commentary defines a ñfederal crime of terrorismò by reference to 18 U.S.C. § 2332b(g)(5). The defendantôs conduct met the definition but he claimed that the enhancement further required that the offense conduct transcend national boundaries. The court rejected that argument, noting that the 1996 and 1997 amendments to the guidelines removed any requirement that international terrorism be implicated by the offense of conviction. The court further relied on precedent affirming application of this enhancement to purely domestic conduct. *See United States v. Mandhai*, 375 F.3d 1243 (11th Cir. 2004) and *United States v. Jordi*, 418 F.3d 1212 (11th Cir. 2005).

United States v. Njau, 386 F.3d 1039 (11th Cir. 2004). The defendant recruited two other individuals to receive mailings of the Social Security cards that he had fraudulently arranged to be issued to illegal aliens, and recruited another individual to refer illegal aliens to him for Social Security numbers. The district court found that the defendant exercised supervisory authority over at least one other ñparticipantò in the Social Securities fraud scheme. The circuit court held that this finding was not clearly erroneous, and affirmed the district courtôs 3-level enhancement of the defendantôs base offense level pursuant to §3B1.1, notwithstanding the allegedly passive

nature of the roles played by these three individuals in providing a place for cards to be mailed or in referring aliens to the defendant.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002). A 4-level enhancement for leadership role in a drug conspiracy was proper because the defendant planned and organized hiding places, gave orders to co-conspirators, and was responsible for overseeing the distribution of drugs.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). Abundant evidence supported the 2-level enhancement for leadership role, pursuant to §3B1.1(c): The defendant did most of the planning and preparation for the bank robbery, including selecting the bank. The defendant first suggested the idea of a bank robbery, selected the bank, provided the guns, and agreed to ñtake care of the details.ò The defendant trained accomplices, diagramed the bank, and purchased a police scanner and monitored it from the getaway car during the robbery.

United States v. Mesa, 247 F.3d 1165 (11th Cir. 2001). The defendantôs sentence had previously been vacated by the Eleventh Circuit and remanded for a more specific finding of fact on whether the defendant was an organizer or leader in the offense. On remand, the district court made a series of specific findings of fact to show that the defendant was an organizer or leader. On a second appeal, the defendant argued that the findings of fact were clearly erroneous because they were not supported by the record. The circuit court found the evidence presented in the PSR and in testimony supported a finding of fact that the defendant controlled and directed the acts of several people involved in the drug conspiracy, including at least three people who stored and delivered cocaine for him, others who unloaded and prepacked vehicles, and at least one interpreter who translated during drug transactions. Therefore, the district court did not err in finding that he acted as an organizer or leader and the enhancement was properly applied. *See also United States v. Flowers*, 275 F. Appôx 904 (11th Cir. 2008) (holding that the defendant was more than a mere supplier because he exercised decision-making authority and had a high degree of participation in the conspiracy, as well as extensive control and authority over others in what the district court properly found to be an ñotherwise extensiveò drug distribution conspiracy); *United States v. White*, 270 F. Appôx 824 (11th Cir. 2008) (holding that the defendant arranged drug transactions, negotiated sales, and hired others to work for the conspiracy, and the district court did not err in concluding that the defendant was a manager or supervisor and that the criminal activity involved five or more participants or was otherwise extensive).

United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000). The district court did not err in applying a 2-level enhancement for defendantôs role as a supervisor when he maintained control or influence over only one individual. The Eleventh Circuit found testimony that the defendantôs girlfriend had to consult with him before she could agree to sell methamphetamine and taped telephone conversations indicating that the girlfriend would consult with the defendant who could be heard in the background were sufficient to support the enhancement.

§3B1.2 Mitigating Role

United States v. Rodriguez De Varon, 175 F.3d 930 (11th Cir. 1999) (en banc). Affirming the decision of the district court in denying the defendantôs request for a minor role adjustment, the Eleventh Circuit held that the first and most important assessment a sentencing court must make is whether the defendant played a minor or minimal role in the relevant conduct used to calculate the base offense level. The same conduct is used both to set the defendantôs base offense level and as the chief determinant of the defendantôs role in the offense. If the defendantôs relevant conduct and actual conduct are identical, the defendant cannot prove entitlement to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable. Second, the sentencing court may measure the defendantôs culpability in comparison to that of other participants in the relevant conduct. The district court should consider only the conduct of persons who are identifiable or discernible from the evidence and who were involved in the relevant conduct attributable to the defendant. The district court must determine that the defendant was less culpable than ñmost other participantsò in an average, similar scheme, rather than just less culpable than the other discernible participants in the present scheme, in order to be entitled to a minor role adjustment. Finally, the court held that a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled. *See also United States v. Boyd*, 291 F.3d 1274 (11th Cir. 2002) (holding that the district court did not err in denying role reduction where it properly analyzed the defendantôs role in light of the relevant conduct for which he was held responsible and measured the defendantôs role against the other participants in that relevant conduct which analysis revealed the defendantôs integral role in the offense); *United States v. De La Garza*, 516 F.3d 1266 (11th Cir. 2008) (holding that the defendantôs role as a mechanic servicing boats for a drug smuggling operation did not qualify as a ñminor roleò).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

Abuse of Trust

United States v. Cruz, 713 F.3d 600 (11th Cir.), *cert. denied*, 133 S. Ct. 2788 (2013). It was not error to apply the 2-level enhancement for abuse of trust, pursuant to §3B1.3 comment. (n.2(B)), when a defendant had used her position in order to obtain a means of identification. The specific language of application note 2(B) overcame the general requirement in application note 1 that a defendant have ñprofessional or managerial discretionò in order for the enhancement to apply.

United States v. Ghertler, 605 F.3d 1256 (11th Cir. 2010). Defendant pled guilty to eight counts of wire fraud. In the course of the fraud, defendant would impersonate high-level company officials and instruct company employees to transfer funds. The circuit court held that this alone was not sufficient to warrant an abuse-of-trust enhancement because in fact there was no relationship of trust between defendant and his victims, the presence of which is ñthe *sine qua non*ò of §3B1.3.

United States v. Louis, 559 F.3d 1220 (11th Cir. 2009). After summarizing in detail its precedents upholding application of the abuse-of-trust enhancement, the court held that the enhancement does not apply to a federally licensed gun dealer who makes an illegal sale to a convicted felon. Such firearms dealers are closely regulated and do not exercise the substantial discretion necessary for a position of public trust.

United States v. Hall, 349 F.3d 1320 (11th Cir. 2003), *aff'd sub nom. Whitfield v. United States*, 543 U.S. 209 (2005). The defendant was convicted of mail fraud and money laundering conspiracy. On appeal, the defendant argued that the district court erred by enhancing his sentence under §3B1.3 for abuse of position of trust due to his status as a pastor. The Eleventh Circuit noted that within the context of fraud it had found a position of trust to exist in two instances: 1) where the defendant stole from his employer, using his position in the company to facilitate the offense, and 2) where a fiduciary or personal trust relationship existed with other entities, and the defendant took advantage of the relationship to perpetrate or conceal the offense. The court noted that the instant case fell within the second situation, so to conclude that the defendant occupied a position of trust, the court had to find a personal trust relationship between the defendant and the victims. The defendantôs status as a pastor did not necessarily create a personal trust relationship between himself and the victims. With respect to the victims that the government presented, there was no personal trust relationship with the defendant so as to place him in a position of trust under the guidelines. Accordingly, the district court erred in applying a 2-level enhancement under §3B1.3.

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002). The defendant was represented to the victims by his co-conspirators as a professional trader and a licensed attorney. The Eleventh Circuit ruled that the enhancement cannot apply based solely on the representations of others. The defendantôs status as an attorney does not necessarily mean he abused a position of trust. Instead, it must be shown that the attorney-defendant occupied a particular position of trust in relation to the victims. The same fact-specific inquiry applies to financial advisors. More than discretion or control is required to justify the enhancement. Here, the fiduciary or trustee relationship necessary for a trader to abuse a position of trust with investors was not present and thus the enhancement did not apply, requiring reversal of the district courtôs sentence.

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The court held that a physician occupies a position of trust in relation to Medicare when that physician submits false claims or otherwise engages in fraud related to his or her position of trust. In this case the defendant was found to have abused that position of trust when he received kickbacks for patient referrals, even when the referrals were medically necessary and the defendant did not falsify patient records or submit fraudulent claims. The court concluded that the abuse-of-trust enhancement applied.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced the defendantôs sentence for violations of absentee voter laws by one level for abuse of a position of trust where the defendant was a county deputy registrar. The fact that a codefendant who did not hold the same position of deputy registrar was convicted of the same offenses does not mean the defendant could not have significantly facilitated the commission of any of her offenses through her position. The Eleventh Circuit found the guideline does not

require the position to be essential to a defendantôs commission of the offense, only that the position facilitated this particular defendantôs commission of it.

United States v. Linville, 228 F.3d 1330 (11th Cir. 2000). The district court properly enhanced the defendantôs base offense level for abuse of position of trust even though the employer who ñfooted the billò for the bank fraud, and not the bank, conferred that position of trust. The defendant used his signature authority given by his employer, a car dealership, to forge checks which he converted to his personal use. The circuit court concluded an enhancement for abuse of a position of trust is appropriate whenever the defendant was in that position with respect to the victim of the crime. Since the employer was also a victim, the enhancement was properly applied.

United States v. Ward, 222 F.3d 909 (11th Cir. 2000). The district court erred in applying the position of trust enhancement for an armed security guard who was not in a position of public or private trust. The circuit court held that because the security guard defendant had very little discretion in performing his duty and had no managerial authority, he was not in a position of trust sufficient to apply the enhancement.

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999). The district court did not err in enhancing the defendantôs sentence for abuse of a position of trust. While employed by the Red Cross, Harness was named director of Project Happen which was responsible for the distribution of HUD funds. This position gave Harness check signing authority over Project Happenôs accounts. Harness used his position to illegally divert Project Happenôs funds and used his position to conceal his and his codefendantsô fraudulent activities.

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). The district court erred in applying an enhancement for abuse of a position of trust where the defendant was convicted of Medicare fraud. The defendant, the owner and chief executive officer of a home healthcare provider, and her company did not report directly to Medicare but to a fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. Because of this removed relationship to Medicare, plus the intermediate review of the Medicare requests, the defendant was not directly in a position of trust in relation to Medicare.

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997). The district court erred in imposing the abuse of trust enhancement on the defendant because any abuse of his position at the Housing Authority was unrelated to the offense for which he was convicted, tax evasion. The court reasoned that the sentencing guidelines themselves say that the defendantôs abuse of trust must ñsignificantly facilitate the commission or concealment of the offense.ò In this context, ñoffenseò must be read as ñoffense of convictionò in order to maintain consistency with the definition of relevant conduct in §1B1.3(a).

United States v. Long, 122 F.3d 1360 (11th Cir. 1997). The district court applied a §3B1.3 enhancement for abuse of a position of trust. While employed as a food service foreman in the United States Penitentiary-Atlanta, defendant was arrested while attempting to carry 85.1 grams of cocaine into the prison. Long acknowledged that the Bureau of Prisons ñtrustedò him

in the colloquial sense but argued that he did not occupy a ñposition of trust.ò The Government countered that Long occupied a position of trust because prison officials did not search him when he entered the prison. The circuit court held that Long did not occupy a ñposition of trustò as §3B1.3 defines that term; the Governmentôs reading would extend to virtually every employment situation because employers ñtrustò their employees; the guideline does not intend coverage this broad.

Special Skill

United States v. De La Cruz Suarez, 601 F.3d 1202 (11th Cir. 2010). The district court did not err in applying a §3B1.3 enhancement by relying on testimony of a U.S. Coast Guard Officer regarding defendantsô ñspecial skillsò in trafficking illegal aliens. Defendant De La Cruz was able to outrun a Coast Guard vessel for two hours at night, after discarding his GPS and satellite phone. Even without the assistance of a GPS, he was able to navigate his vessel to a predetermined location in Cuba to pick up migrants. Defendant Vazquez was able to navigate a boat at night in the Florida Keys without lights, and possessed ñspecial skillsò in boat mechanics since he had installed a new engine to the vessel, was able to take apart boats, perform fiberglass work, and install fuel tanks. The circuit court held both defendantsô ñunique skillsò were not skills possessed by the general public and the enhancement was proper.

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The court upheld a special skill enhancement applied to a defendant who was convicted of conspiracy to gather and transmit national security information and who was specially trained in radio intelligence, radio and computer encryption and decryption, and civil engineering. The court rejected the defendantôs claim that his training was indistinguishable from his criminal conduct, finding that the defendant possessed legitimate skills that were turned to a criminal purpose.

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999). The district court did not err by applying an enhancement for ñspecial skillò for a defendant who acted as the pilot in a conspiracy to import marijuana. The defendant contended that the 2-level enhancement for ñspecial skillò did not apply to a person who flies airplanes only as a hobby. The circuit court found the commentary defines ñspecial skillò as ñany skill not possessed by members of the general publicò which ñusually requir[es] substantial education, training or licensingò and does not distinguish between professionals and amateurs.

United States v. Foster, 155 F.3d 1329 (11th Cir. 1998). The district court did not err in applying a §3B1.3 enhancement to the defendantôs sentence for use of a special skill where the defendant possessed the skill of printing and used the skill to significantly facilitate the commission of his counterfeiting crime. Although printing does not require licensing or formal education, it is a unique technical skill that clearly requires special training such as setting up and calibrating the machinery and assisting in the operation of the printing machines. The defendant had worked in a legitimate printing business for about a year and possessed such special skills which he used to facilitate the crime.

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998). The district court did not err in enhancing the defendantôs sentence under §3B1.3 for use of a special skill where the defendants

were convicted of altering or removing vehicle identification numbers from stolen automobile parts. ñ[T]he remote locations of the V.I.N.ôs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical skill. Dismantling carsï not to mention abandoning them, recovering the shells, and then putting the cars back togetherï involves a combination of skills not possessed by the general public.ò

§3B1.4 Use of a Minor To Commit a Crime

United States v. Futch, 518 F.3d 887 (11th Cir. 2008). The enhancement for use of a minor is only warranted when the defendant takes some affirmative step to involve a minor. In this case the defendant placed an infant on top of a package of cocaine in an attempt to conceal the drugs. The court ruled that the enhancement applied in such a case.

United States v. McClain, 252 F.3d 1279 (11th Cir. 2001). The Eleventh Circuit held that §3B1.4, which provides a 2-level enhancement to a defendantôs base offense level if he uses or attempts to use a minor in the commission of the crime, does not contain a scienter requirement. The circuit court further held that the enhancement could be applied to participants in any criminal enterprise in which the use of a minor was reasonably foreseeable, regardless of whether a given participant personally recruited or used the minor.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Williams, 627 F.3d 839 (11th Cir. 2010). The district court erred by *not* enhancing a sentence for obstruction of justice where the defendant gave perjured testimony at trial.

United States v. Wayerski, 624 F.3d 1342 (11th Cir. 2010). The defendants were properly subject to the enhancement for obstruction of justice under §3C1.1 where ñthey took numerous precautions to avoid detection,ò even though ñthey were not under arrest and did not know that they were under investigation at the time they took these precautions.ò There is no requirement that the defendantôs obstructive conduct occur after the commencement of an investigation, and the ñdefendantsô affirmative steps to prevent law enforcement from detecting their illicit activity and to impede any investigation show that they consciously acted with the purpose of obstructing justice.ò

United States v. Snipes, 611 F.3d 855 (11th Cir. 2010). Encouraging another person to avoid complying with a grand jury subpoena may be obstruction of justice.

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The court rejected the defendantôs claim that an enhancement for obstruction of justice was improper because the obstructive conduct, giving a false name to a magistrate at a pretrial detention hearing was part of the crime of espionage. Because the obstructive conduct occurred during the course of the investigation, prosecution or sentencing, the enhancement is proper.

United States v. Campbell, 491 F.3d 1306 (11th Cir. 2007). In a case where the defendant took records from a witness in his criminal case with the intent to conceal evidence ñmaterial to an official investigation,ò an enhancement for obstruction of justice was warranted.

United States v. Frasier, 381 F.3d 1097 (11th Cir. 2004). The defendant was being held in the county jail as a pretrial detainee, having been charged by the State of Florida with the bank robberies that led to his federal conviction. An FBI agent came to the jail and informed the defendant that the federal government was investigating the robberies and that he was a target of the investigation. Following the agentôs visit, the defendant attempted to escape from the jail. The district court applied a §3C1.1 increase because it found that the defendant had attempted to escape from a county jail to avoid federal prosecution. The defendant argued that the obstruction increase was inapplicable to him because no federal charges were pending at the time of the attempted escape. The Eleventh Circuit held that the district court properly applied the adjustment, because a federal agent had informed the defendant prior to his attempted escape that the federal government was going to prosecute him.

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court adopted the reasoning of other circuits in holding that obstructive ñconduct occurring before a formal investigation into the offense of conviction may support a § 3C1.1 enhancement if it foreseeably relate[d] to that offense.ò

United States v. Uscinski, 369 F.3d 1243 (11th Cir. 2004). The defendant withdrew for his own use about 1.5 million dollars from a clientôs account in Austria. The government had previously informed the defendant that all of his clientôs funds were drug-tainted and forfeitable to the government. When asked about the location of the money and purpose of the transfers, the defendant lied, stating that the money was to support his clientôs family. As a result, the government enlisted the help of foreign governments to trace the money and discovered that it had been used for the defendantôs own benefit. The Eleventh Circuit affirmed an obstruction of justice increase in the offense level for defendantôs tax evasion conviction. The court concluded that the defendant did not simply deny guilt, but rather concocted a false, exculpatory story that misled the government.

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. Appôx 657 (11th Cir. 2005). The district court applied an obstruction of justice enhancement, predicated upon the defendantôs testimony at his suppression hearing that he did not hear the police announce their presence. The district court expressly found that this testimony was false and that the defendant manipulated his testimony to avoid responsibility for any knowledge that law enforcement was entering the house. The Eleventh Circuit affirmed, concluding that the district courtôs findings established the defendantôs ñwillful intent to provide false testimony.ò

United States v. Banks, 347 F.3d 1266 (11th Cir. 2003). The defendant pled guilty to purchasing goods with credit cards issued to others, a violation of 18 U.S.C. § 1029. The defendant had given the police a false name upon arrest, a fact discovered after he bonded out. The PSR recommended a 2-level sentence enhancement under §3C1.1, obstruction of justice, for

providing materially false information to a law enforcement officer. The court adopted the PSR recommendation over the defendantôs objection. The circuit court stated that adopting the PSR recommendation was not enough. A factual determination was needed to determine that the defendantôs actions actually hindered the investigation and/or prosecution. It was not enough that the defendant intended to hinder, but that there had to be an actual obstructive effect before the enhancement could be applied. The sentence was vacated and the case remanded for further fact finding and resentencing.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed the application of an obstruction of justice enhancement, pursuant to §3C1.1, for threatening a witness where there was no finding that the threats were communicated to the witness. The issue was whether indirect threats made to third parties constitute obstruction absent a showing that they were communicated to the target. Recognizing a circuit split, the court held that indirect threats can warrant the enhancement where, as here, a United States Marshal testified that other inmates informed him that the defendant had made threats against him and another inmate, both of whom were witnesses against the defendant.

United States v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001). At the sentencing hearing, an agent testified regarding threats made by the defendant to an unindicted co-conspirator. On that basis, the district court applied the 2-level obstruction of justice enhancement, pursuant to §3C1.1. The Eleventh Circuit affirmed, ruling that the enhancement could be based on hearsay testimony, as long as it was sufficiently reliable.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced the defendantôs offense level for obstruction of justice by influencing an affiant to testify falsely and to identify material facts about which affiant testified falsely and for which the defendant was responsible. The circuit court found that the defendant did not request more specific findings of fact by the district court, and it was too late to complain on appeal. Further, the circuit court found that detailed findings were not necessary.

§3C1.2 <u>Reckless Endangerment During Flight</u>

United States v. Martikainen, 640 F.3d 1191 (11th Cir. 2011). The reckless endangerment enhancement under §3C1.2 ñdoes not apply unless the defendant is actually fleeing from a law enforcement officerò at the time he creates a substantial risk of death or serious bodily injury to others. Furthermore, the court noted that §3C1.2 is applicable only where the defendant knows he is fleeing from a law enforcement officer who is in pursuit of the defendant.

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004). The district court applied a reckless endangerment enhancement under §3C1.2, predicated upon the defendantôs flight from law enforcement officers. An agent who chased the defendant and tackled him to the ground sustained a sprain to his left finger. The Eleventh Circuit held that the enhancement was not properly applied because flight alone is insufficient to warrant an enhancement under this section. This guideline requires that the defendant ñrecklessly create[] a substantial risk of death or serious bodily injury to another person.ò The defendantôs conduct, not that of the pursuing

officers, must recklessly create the substantial risk of death or serious bodily injury to others. Since the defendantôs flight by itself cannot be said to have recklessly created this level of risk, the district court erroneously imposed the enhancement.

United States v. Cook, 181 F.3d 1232 (11th Cir. 1999). The two defendants before the court took part in a three-man robbery of a credit union. Soon after an unmarked police vehicle took up pursuit of the trio, the defendants exited their car. The third participant proceeded to drive at a high rate of speed until he collided with a police vehicle. The district court ruled that the chase was a reasonably foreseeable consequence of their conspiracy to rob the credit union and that the defendants could therefore be held accountable for it under §3C1.2. The court remanded for resentencing, instructing the district court to assess whether either defendant ñactively caused or procured the reckless behavior at issue.ò Accord *United States v. Johnson*, 694 F.3d 1192 (11th Cir. 2012) (vacating and remanding the defendantôs sentence, after agreeing with every other circuit and finding ñreasonable foreseeabilityò is not the test; pursuant to *Cook*, before the enhancement can be applied, the district court must make a specific finding that there must be a preponderance of evidence that ñthe defendant actively caused or procured the reckless behavior at issue.ò).

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Register, 678 F.3d 1262 (11th Cir. 2012). The defendantôs convictions for failure-to-pay-over employee tax withholdings and for filing false tax returns should have been grouped at sentencing under the guidelines. The defendantôs convictions arose out of his failure to pay over employee withholdings and the filing of a false return stating that taxes had already been withheld from his own income. Even though the offenses are referenced to different guideline provisions, the Eleventh Circuit reasoned that the offenses should be grouped because they were ñof the same general typeò and ñclosely relatedò on the facts of this case.

United States v. Keen, 676 F.3d 981 (11th Cir.), *cert. denied*, 133 S. Ct. 573 (2012). The district court erred in grouping the defendantôs fraud and bribery convictions (convictions he received in two jury trials but for which he was sentenced together) under §3D1.2(b) and (d). First, subsection (b) did not permit grouping because there was no indication that ñthe fraud and bribery countsï which involved different crimes occurring over three years apartï were ópart of a single course of conduct with a single criminal objective,ô let alone that they represented óessentially one composite harm to the same victim.ôò Second, subsection (d) did not permit grouping because offenses cannot be ñclosely relatedò when they ñtook place approximately three years apart, were not ócontinuing offenses,ô and were independent schemes that had no necessary connection with one another.ò

United States v. Jimenez-Cardenas, 684 F.3d 1237 (11th Cir. 2012). The Eleventh Circuit held that the district court properly refused to group the defendantôs illegal reentry and possession of a firearm by an illegal alien counts to calculate his offense level. Under §3D1.2(a)

and (b), the offenses did not have the same victim (or even an identifiable victim) and they each harmed distinct societal interests. Under §3D1.2(c), neither offense involved conduct that was a specific offense characteristic supporting an adjustment to the offense level of the other count. Finally, under §3D1.1(d), §2L1.2, the guideline applicable to the defendantôs illegal reentry offense, was not among the provisions listed in subsection (d), nor did §2L1.2 otherwise determine the offense level on the basis of aggregate harm.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed the district courtôs refusal to group his two counts of escape convictions under §3D1.2. Reviewing with due deference, the court noted that §3D1.2 provides four bases for grouping counts, but that the defendant did not specify on which grounds he relied. The court reviewed each basis and concluded that the district court did not err in declining to group the counts.

United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002). The district court erred in treating one count of conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors as eight separate guidelines groups, because only a single act of conspiracy was alleged against the defendant.

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003). The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count of using and carrying a firearm during and in relation to a federal crime of violence. At sentencing, the district court divided the defendantôs offense into three groups pursuant to §§1B1.2(d) and 3D1.2 based on the three victims. On appeal, the defendant argued that the district court erred by dividing his offenses into three distinct groups based on three victims pursuant to §§1B1.2(d) and 3D1.2. The Eleventh Circuit held that where a conspiracy involved 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 the same number of distinct crimes for sentencing purposes. Accordingly, the district court did not err in dividing defendantôs conspiracy count into three separate groups under §3D1.2 based on three distinct victims.

Part E Acceptance of Responsibility

§3E1.1 <u>Acceptance of Responsibility</u>

United States v. Williams, 627 F.3d 839 (11th Cir. 2010). The district court erred in awarding an adjustment for acceptance of responsibility because the defendant denied guilt ñin the face of evidence to the contraryò by withdrawing his guilty plea and maintaining factual innocence at trial ñdespite overwhelming evidence to the contrary.ò

United States v. Barner, 572 F.3d 1239 (11th Cir. 2009). The district court erred when it denied the defendant a 3-level reduction for acceptance of responsibility. The court concluded that this was one of those ñunusual case[s]ò in which the defendant went to trial, but ñconfessed to the factual elements of the crime of conviction.ò The court pointed out that the defendant

> had declined to plead guilty to the full indictment to pursue legal defenses as to the remaining counts-namely, that the conspiracy in which he participated was not a drug conspiracy, and that the Hobbs Act did not apply to his conduct. He was vindicated when the district court directed a verdict in his favor on Counts Two through Nine, and the jury acquitted him on Count One. Significantly, [the defendant] did not take the stand in his defense, and never denied having possessed the ecstasy.

The court remanded the case to the district court for reconsideration of the issue.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The district court properly refused to grant acceptance-of-responsibility credit upon finding that the defendant committed perjury at his sentencing hearing and that he only admitted to a minor part of his crimes.

United States v. Thomas, 242 F.3d 1028 (11th Cir. 2001). A defendant who pled guilty to unlawful possession of firearms by a convicted felon was not entitled to a 2-level reduction in his offense level for acceptance of responsibility when he forced the government to go to trial on two counts of possession with intent to distribute crack cocaine. The Eleventh Circuit agreed with other circuits and found that when a defendant indicted on multiple counts goes to trial on any of those counts and is therefore unwilling to accept responsibility for some of the charges, he has not really ñcome cleanò or faced up to the full measure of his criminal culpability and is entitled to nothing under §3E1.1.

United States v. Starks, 157 F.3d 833 (11th Cir. 1998). The district court did not err in refusing to grant defendant a reduction for acceptance of responsibility where defendantôs arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility. The court recognized that a defendant may, in rare situations, be entitled to a reduction for acceptance of responsibility even if he goes to trial, but here, the defendant denied having any fraudulent intent, an essential element of the charges of which he was convicted. The defendantôs arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility.

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997). The district court did not err in allowing only a 2-level reduction for the defendantôs acceptance of responsibility, as his guilty plea on the last count was not timely. The circuit court reasoned that ñwhen there are multiple counts of conviction, adjustment for acceptance of responsibility is applied after all the offenses have been aggregated pursuant to section 1B1.1. To be entitled to an adjustment a defendant must accept responsibility for each crime to which he is being sentenced.ò

United States v. Smith, 127 F.3d 987 (11th Cir. 1997). The district court did not err in considering the nature of the challenges to the presentence report in determining whether the defendant should receive a reduction for acceptance of responsibility. In his objections to the PSR, the defendant contended that he did not possess fraudulent intent with respect to both offense conduct and relevant conduct. These objections were factual, not legal, and amounted to a denial of factual guilt.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Adams, 403 F.3d 1257 (11th Cir. 2005). The offense conduct commenced no later than March 2, 2001. The defendant received one criminal history point for an August 1991 conviction. The defendant argued that he should not receive a criminal history point for that conviction because the offense occurred much earlier and the only reason he was not sentenced until August 1991 was because of a busy state court docket. The appellate court held that the district court properly assessed a criminal history point for that conviction. The plain language of §4A1.1 and its commentary does not recognize an exception to the ten-year rule due to a backlog in the state court system.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The district court correctly applied one criminal history point under §4A1.1 for the defendantôs convictions for driving with a suspended license and possessing marijuana, both misdemeanors, even though he was unrepresented by counsel when he pled guilty to those charges. The Eleventh Circuit agreed with the district court that the conviction was not ñpresumptively invalidò and was therefore properly considered in the sentencing proceeding. The burden was on the defendant to ñlay a factual foundation for collateral review on the grounds that the state conviction was ópresumptively [invalid]ôò, which he did not do.

United States v. Coeur, 196 F.3d 1344 (11th Cir. 1999). The district court did not err in applying §4A1.1 because the defendant committed the crime of being found in the United States after having been deported while he was serving another sentence, and not when he re-entered the United States. The defendant was found by INS in the United States while he was serving a sentence for possession of cocaine and resisting an officer. Because he was in jail on the date he committed the offense of being found in the country, the two point increase in his criminal history score was proper.

§4A1.2 Definitions and Instructions for Criminal History

United States v. Acuna-Reyna, 677 F.3d 1282 (11th Cir.), *cert. denied*, 133 S. Ct. 342 (2012). The district court did not err in assessing a criminal history point for the defendantôs prior uncounseled misdemeanor conviction for driving under the influence. Because the defendantôs prior conviction resulted in both a monetary fine and a sentence of probation, and because only the probationary portion of the sentence arguably violated the Sixth Amendment right to counsel, the district court was ñentitled to consider the conviction itself and corresponding monetary fine to be valid.ò

United States v. Wright, 607 F.3d 708 (11th Cir. 2010). In a case of first impression, the Eleventh Circuit addressed whether a term of imprisonment imposed upon revocation of community control qualifies as a term of imprisonment under §4A1.2(k). The defendant argued that the district court incorrectly calculated his criminal history category because community

control is not listed as a form of supervision under §4A1.2(k), and imprisonment imposed as a result of his violation of community control should not have been used to increase his criminal history category. The government argued that the district court properly calculated the defendantôs criminal history because the commentary to §§4A1.1 and 4A1.2 indicates that the forms of supervision listed are not exhaustive. The Eleventh Circuit held that despite minor differences, Floridaôs community control was sufficiently analogous to federal probation because they serve the same purpose (to promote rehabilitation), and are both alternative, community based methods of punishments with stated conditions and both require extensive government supervision. These similarities qualified community control as a similar form of release covered under §4A1.2 for the purposes of calculating a defendantôs criminal history category.

United States v. Coast, 602 F.3d 1222 (11th Cir. 2010). The circuit court held that when calculating criminal history, §4A1.2(k) applies to all convictions following the revocation of probation. The circuit court reasoned that ñthe Guidelines determine whether such a conviction will be counted in the criminal history calculation based on the *length* of the sentence imposed for its violation,ò regardless of whether the original sentence would have been excluded under §4A1.2(c)(1).

United States v. Hernandez-Martinez, 382 F.3d 1304 (11th Cir. 2004). The defendant asserted that the district court, in computing his criminal history, should have counted his two prior state felony convictions as a single conviction. The offenses were not separated by an intervening arrest, and the defendant pleaded *nolo contendere* to the offenses on the same day before the same judge and was sentenced to concurrent sentences. The offenses did, however, occur on different days and involved different victims. There was no formal consolidation order, the cases were assigned different docket numbers, the defendant received separate judgments, and he was represented by two different attorneys at sentencing. Given these facts, the Eleventh Circuit held that the district court did not clearly err in concluding that defendantôs offenses were not related for purposes of criminal history calculation.[15]

United States v. Gray, 367 F.3d 1263 (11th Cir. 2004). The defendant argued that the district court improperly included an uncounseled misdemeanor conviction in determining his criminal history. The district court had determined that the defendant had waived his right to counsel. The Eleventh Circuit ruled that the district court properly found that the defendant waived his right to counsel where the state court records conclusively established that the defendant executed a waiver of counsel and entered a plea to the charge.

United States v. White, 335 F.3d 1314 (11th Cir. 2003). The defendant gave a false name to an officer, after refusing to give his name to INS agents, and later pled guilty in state court to giving the police false information. He was then convicted in federal court of being in the United States illegally. At his sentencing hearing, the defendant objected to the assessment of two criminal history points for the false-information conviction, arguing that the conduct underlying that conviction was part of the relevant conduct for the instant offense. The district court concluded that the false-information conviction arose from ñseparate conductò under

[15] Effective November 1, 2007, the Commission amended §4A1.2. The amended guideline now states that multiple prior sentences are to be treated as a single sentence if the sentences ñresulted from offenses contained in the same charging instrumentò or ñwere imposed on the same day.ò *See* Amendment 709, USSG App. C.

§4A1.2. The Eleventh Circuit found that the fact that the defendant initially refused to give his real name to the INS agents was strong evidence that he gave a false name to local authorities to avoid detection for violating federal immigration laws. Consequently, the district court erred when it applied §4A1.2 and held that the false-information conviction arose from separate conduct.

Castillo v. United States, 200 F.3d 735 (11th Cir. 2000). The district court correctly refused to recalculate the defendantôs criminal history points after his prior state conviction had been reversed and subsequently *nolle prossed*. The circuit court held that although the guidelines state that sentences which result from convictions that have been reversed, vacated, or ruled unconstitutionally invalid are not to be counted pursuant to §4A1.2, the state courtôs reversal of the defendantôs conviction was not based on his innocence. Therefore, the defendantôs prior conviction fell under the section of the guideline which states that convictions set aside ñfor reasons unrelated to innocence or errors of lawò are to be counted.

United States v. Shazier, 179 F.3d 1317 (11th Cir. 1999). The defendant served six monthsô imprisonment for cocaine possession in Louisiana and a term of probation. After his probation expired, the defendant received a first-offender pardon from the state. The district court added two points to the defendantôs criminal history, pursuant to §4A1.1(b), for the six-month sentence. The defendant argued that the state pardon for this offense amounted to a ñdiversionary dispositionò under §4A1.2(f) for which only one point should have been added to his criminal history. The Eleventh Circuit held that the ñdiversionary dispositionò provision of the guidelines only applies to sentences not already counted in determining criminal history, and does not remove from consideration such sentences that are required to be counted. Since there is no indication in the guidelines that pardoned convictions are to be counted any differently than non-pardoned convictions and the six-month sentence was required to be counted under §4A1.1(b), the district court was correct in assessing the two points for the pardoned conviction.

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998). The district court erred in counting the defendantôs 1986 six-month sentence to a community treatment center as a ñsentence of imprisonmentò under §4A1.1(b). The circuit court concluded that a term of confinement in a community treatment center, like residency in a halfway house, is not a sentence of imprisonment.

United States v. Bankston, 121 F.3d 1411 (11th Cir. 1997). The district court did not err in concluding that a prior felony conviction based on a plea of guilty but mentally ill (GBMI), pursuant to Georgia law, can be used as predicate offense to establish career offender status under sentencing guidelines. The court of appeals examined Georgia law and found that a conviction based on the GBMI plea has the same force and legal effect as a conviction established by a plea of guilty and is therefore a ñguilty pleaò within the meaning of §4A1.2.

Gass v. United States, 109 F.3d 677 (11th Cir. 1997). The district court relied on the defendantôs prior juvenile conviction and sentence to increase the defendantôs criminal history score. The defendant argued that he should not have been assessed an additional three criminal history points for several prior bank robbery convictions because the Federal Youth Corrections Act (FYCA) set aside the convictions, rendering them ñexpungedò for purposes of §4A1.2(j).

The circuit court rejected the defendantôs argument and affirmed, holding that section 5021(a) of the FYCA did not entitle a defendant to have a conviction record expunged or destroyed. Additionally, the circuit court refused to find that section 5021(a)ôs ñset asideò provision was synonymous with §4A1.2(j)ôs ñexpungementò reference.

§4A1.3 Departures Based on Inadequacy of Criminal History Category (Policy Statement)

United States v. McKinley, 732 F.3d 1291 (11th Cir. 2013). A district court must use ñreliable informationò indicating that a defendantôs criminal history category is ñsubstantially underpresent[ed]ò in order to depart upwards based on §4A1.3. When a defendant had numerous convictions that had not been counted for criminal history purposes, spanning ñmost of his adult life,ò the district court did not abuse its discretion in departing upward.

United States v. Valdes, 500 F.3d 1291 (11th Cir. 2007). Under §4A1.3, if a sentencing judge wishes to depart upwards due to a defendantôs criminal history, the court must ñexplicitly considerò the next criminal history category up and make a determination as to whether that range is appropriate.

United States v. Jones, 289 F.3d 1260 (11th Cir. 2002). The defendant appealed an upward departure based upon the failure of his criminal history category to adequately reflect the seriousness of his past criminal conduct and the likelihood of recidivism. Reviewing uncounted juvenile adjudications, the Eleventh Circuit ruled that the district court did not abuse its discretion in considering the defendantôs juvenile record to determine that upward departure was warranted.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court relied upon an over-represented criminal history to justify a 6-level vertical downward departure. The district court departed vertically because §4B1.1 mandates that a career offender shall be Category VI without regard to the seriousness of the prior offenses. The Eleventh Circuit reversed, holding that criminal history departures are governed by §4A1.3 and not the general departure guideline, 5K2.0. Section 4A1.3 departures must be on the horizontal axis, reflecting the offenderôs criminal history category, and not on the vertical axis. The facts did not support the finding that the defendantôs criminal history significantly over-represented the seriousness of the defendantôs record.

United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). In this tax evasion case, the district court upwardly departed from Criminal History Category I to Criminal History Category III, based on criminal conduct that constituted relevant conduct already considered by the district court in calculating the defendantôs base offense level. The district court decided that while the 1988 prior conviction must be excluded from determining the criminal history category, it could be considered for the purposes of departing from the guidelines under §4A1.3. On appeal, the defendant challenged this criminal history departure on the grounds that the conduct involved in the prior conviction was part of the ñrelevant conductò of the instant offense. The court held that when a district court determines that the conduct underlying a conviction is relevant conduct to the instant offense, and considers it as a factor in calculating the base offense level, it cannot then

be simultaneously considered as a ñprior sentenceò under §4A1.3 for purposes of a criminal history departure.

United States v. Hernandez, 160 F.3d 661 (11th Cir. 1998). The defendant was convicted of concealing assets after seeking bankruptcy relief for himself and his two businesses. As one basis for an upward departure, the district judge cited the defendantôs failure to abide by an administrative settlement agreement arising out of claims that he failed to pay his employees minimum wage and overtime in violation of the Fair Labor Standards Act. The Eleventh Circuit rejected the defendantôs contention that ñsimilar misconductò must be criminal misconduct and held that the sentencing court did not abuse its discretion by concluding that the misconduct underlying the violation of the administrative settlement agreement was fraudulent in nature making it similar to the fraudulent conduct underlying the offense of conviction.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in departing upward on the defendantôs offense level because the criminal history category of VI did not adequately reflect the seriousness of his criminal history. The defendant had a total of 40 criminal history points, 27 more than necessary to put him in category VI.

United States v. Webb, 139 F.3d 1390 (11th Cir. 1998). The district court erred in concluding that it lacked the authority to grant a downward departure with respect to a defendant classified as a career offender. The court of appeals held that §4A1.3, which authorizes an upward or downward departure when the criminal history category does not adequately reflect the seriousness of defendantôs past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendantôs classification as a career offender overstates the seriousness of his criminal history.

United States v. Dixon, 71 F.3d 380 (11th Cir. 1995). In an issue of first impression, the circuit court held that ñsentencing courts need not make step-by-step findings en route to the ultimate sentencing rangeò when the court, pursuant to §4A1.3, departs above Criminal History Category VI. The court concluded that because the guidelines provide no objective criteria for determining how far down the offense level axis the sentencing court need travel in order to reflect accurately the defendantôs criminal history above category VI, the sentencing court must have discretion to determine the offense level that will correspond to the appropriate sentencing range for a given defendant. Criminal history departures above category VI will be reviewed for reasonableness, based on findings as to why an upward departure is warranted and why the particular sentencing range chosen is appropriate.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

Spencer v. United States, 727 F.3d 1076 (11th Cir. 2013). The Florida offense of third-degree child abuse, Fla. Stat. § 827.03(1), did not qualify as a ñcrime of violenceò for purposes of the career offender guideline. The offense is not categorically a crime of violence, because it prohibits either physical or mental injury to a child. The modified categorical approach could

not be applied in this case, because there was no admissible document or record indicating that the defendant had engaged in conduct posing a serious risk of *physical* injury to a child. Even assuming that the defendant had admitted to ñsexual activityò with a minor between 12 and 16 years of age, that alone did not demonstrate that he had admitted to violating the ñphysical,ò rather than ñmentalò injury, element of the statute.

United States v. Petite, 703 F.3d 1290 (11th Cir. 2013). The Eleventh Circuit found that a prior conviction for intentional vehicular flight from an authorized law enforcement patrol car, which penalizes willfully fleeing or attempting to elude a law enforcement officer who orders a motorist to stop while in a law enforcement vehicle with prominent jurisdictional markings, is a violent felony under the Armed Career Offender Act. Citing to *Sykes v. United States*, 131 S. Ct. 2267, 2271 (2011), where the Supreme Court found that a similar vehicle flight offense in Indiana that did not have as ñan element anything related to driving at high speed or operating the vehicle in a reckless mannerò was a violent felony for purposes of the Act, the Eleventh Circuit found that the offense ñpresents a serious potential risk of physical injury to anotherò and is a comparable offense to those enumerated by the Act. The court stated that the Supreme Court ñmade it clear that ó[r]isk of violence is <u>inherent</u> to vehicle flightò and concluded ñ[vehicle flight] presents more certain risk as a categorical matter than burglary.ò

United States v. Schneider, 681 F.3d 1273 (11th Cir. 2012). The ñFlorida offense of false imprisonment, even when accomplished secretly, produces a óserious potential risk of physical injury to anotherôò and therefore qualifies as a predicate offense under the Armed Career Criminal Actôs residual clause. The court reached this conclusion because ñFlorida false imprisonment, even when accomplished secretly, creates a likelihood of attempted escape or resistance by the victim.ò

United States v. Owens, 672 F.3d 966 (11th Cir. 2012). ñThe district court erred in enhancing [the defendantôs] sentence under the ACCA. The [defendantôs Alabama] convictions for rape in the second degree and sodomy in the second degree are not violent felonies under the elements clause of 18 U.S.C. § 924(e)(2)(b)(i) because they do not have as an element the use of violent physical force. The offenses are also not violent felonies under the residual clause of the ACCA because, under the categorical approach, they impose strict liability, and we cannot say that a violation of either typically involves ópurposeful, violent, and aggressive conduct.ôò (quoting *Begay v. United States*, 553 U.S. 137, 144-45 (2008)).

United States v. McGill, 618 F.3d 1273 (11th Cir. 2010). The defendantôs prior conviction for possessing a short-barrel shotgun in violation of 18 U.S.C. § 922(g) was not a violent felony under ACCA because it is not similar in kind to the ñuse of explosivesò or the other crimes listed in ACCAôs residual clause.

United States v. Rainer, 616 F.3d 1212 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 968 (2011). Defendantôs prior conviction of Alabamaôs offense of third-degree burglary was a violent felony under ACCA. Although the state statute did not establish a categorically violent felony because it punished, *inter alia*, burglary of vehicles, aircraft, and watercraft, the defendantôs charging documents revealed that the defendant was actually convicted of generic burglary and the conviction thus qualified as a violent felony for ACCA purposes.

United States v. Whitson, 597 F.3d 1218 (11th Cir. 2010). Defendant had a prior South Carolina conviction for conspiracy to commit strong-arm robbery. The district court considered this conviction a violent felony for purposes of §4B1.1. The circuit court disagreed, holding that *Begay* requires that the court look at the conspiracy alone. Since the state conspiracy statute did not require an overt act in furtherance of the conspiracy and there is no element of violence or aggression in the act of agreement, defendantôs prior conviction was not a violent felony.

United States v. Beckles, 565 F.3d 832 (11th Cir. 2009). The court held that where ñthe crime for which the defendant was convicted encompasses both conduct that constitutes a crime of violence and conduct that does not constitute a crime of violence,ò the district court can look to ñfactual findings on undisputed statementsò in the presentence report ñbecause they are factual findings to which the defendant has assented.ò Thus, the district court properly relied on information in the PSR indicating that the defendant possessed a sawed-off shotgun.

United States v. Archer, 531 F.3d 1347 (11th Cir. 2008). The court held that, in light of *Begay v. United States,* 553 U.S. 137 (2008), the defendantôs prior conviction for carrying a concealed firearm in violation of Fla. Stat. § 790.01(2) was not a ñcrime of violenceò for purposes of §§4B1.1 and 4B1.2, thereby abrogating its prior decision in *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998). The court noted that it has repeatedly read the definition of a ñviolent felonyò under 18 U.S.C. § 924(e) as ñvirtually identicalò to the definition of ñcrime of violenceò under §4B1.2.

United States v. Jeter, 329 F.3d 1229 (11th Cir. 2003). On appeal, the defendant argued that, pursuant to the rule of lenity, the district court should have granted him a minor role adjustment under §4B1.1. The Eleventh Circuit noted that the rule of lenity did not apply. The court held that minor role adjustments were not available to defendants under §4B1.1.

United States v. Duty, 302 F.3d 1240 (11th Cir. 2002). The district court did not err in sentencing the defendant as a career offender. The defendant had four prior felony drug convictions for which he entered guilty pleas in state court. He argued on appeal that the four prior convictions should be treated as one conviction pursuant to a Georgia statute, O.C.G.A. §17-10-7(d), which requires that ñconviction of two or more crimes charged on separate counts of one indictment [] or in two or more incidents [] [be] consolidated for trial.ò The court determined that since the proper definition of ñconvictionò as used in §4B1.1 was governed by federal and not state law, the Georgia statute did not apply to the defendantôs sentence. Further, under §4A1.2, Note 3, since the defendantôs prior state drug offenses were separated by intervening arrests, they were unrelated for sentencing purposes and thus should be treated as separate prior convictions for career offender purposes.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The rule that criminal history downward departures are limited to horizontal departures applies to career offender defendants.

United States v. Jackson, 199 F.3d 1279 (11th Cir. 2000). The district court did not err in finding defendantôs prior offense of possession of a fire bomb with intent to willfully damage any structure or property was a crime of violence under §4B1.2 because the offense entailed

conduct that ñpresents a serious potential risk of physical injury to another.ò The defendant argued the crime was not a crime of violence because it did not involve any threat to another person. The circuit court agreed the crime fit the definition because even if the structure or property were uninhabited, there was inherent risk to firefighters and innocent bystanders if the fire spread to occupied structures.

United States v. Webb, 139 F.3d 1390 (11th Cir. 1998). The district court erred in concluding that it lacked the authority to grant a downward departure with respect to a defendant classified as a career offender. The court of appeals held that §4A1.3, which authorizes an upward or downward departure when the criminal history category does not adequately reflect the seriousness of defendantôs past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendantôs classification as a career offender overstates the seriousness of his criminal history. *But see United States v. Rucker*, 171 F.3d 1359 (11th Cir. 1999) (holding that the district court erred in looking behind the drug convictions that qualified as ñserious drug offense[s]ò under the Armed Career Criminal statute and concluding that the offenses were so minor as to justify a downward departure); *United States v. Govan*, 293 F.3d 1248 (11th Cir. 2002) (holding that the district court erred when it found the defendantôs criminal history over the last 15 years dealt only with ñsmall transactions for cocaine,ò and on that basis concluded that his criminal history category significantly over-represented the seriousness of the offense).

United States v. Gonsalves, 121 F.3d 1416 (11th Cir. 1997). The district court did not err in sentencing defendants as career offenders based on prior state convictions. The defendants argued that the Commission went beyond the statutory authority in 28 U.S.C. § 994(h) by including state court convictions in this guideline. The court held that §4B1.1 does not exceed its statutory authority by including state court convictions in addition to federal convictions as permissible predicate offenses for career offender enhancement. ñ[I]f Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to óoffenses described inô not óconvictions obtained underô those statutes.ò

§4B1.2 <u>Definitions of Terms Used in Section 4B1.1</u>

United States v. Elliot, 732 F.3d 1307 (11th Cir. 2013). A defendantôs Alabama youthful offender adjudication, received for an offense committed when he was 20 years old, did not prevent the offense from counting as a crime of violence under §4B1.1(a). Pursuant to §4B1.2, comment. (n. 1), the relevant questions are whether the defendant was 18 or older at the time of the predicate offense, and whether he received a ñconvictionò within the meaning of federal law. The youthful offender adjudication was the equivalent of a *nolo contendere* plea followed by deferred adjudication, and the application note specifically provides that a *nolo* plea qualifies as a conviction for purposes of the career offender guideline.

United States v. Hall, 714 F.3d 1270 (11th Cir. 2013). The federal offense encompassing unlawful possession of a sawed-off shotgun, 26 U.S.C. § 5861(d), constitutes a crime of violence under §4B1.2 comment. (n. 1). Even though Eleventh Circuit precedent held that possession of a sawed-off shotgun was not a ñviolent felonyò under the Armed Career Criminal Act, a different

result was required under the career offender guidelines, because guidelines commentary specifically included possession of Title 26 firearms as crimes of violence.

United States v. Lee, 631 F.3d 1343 (11th Cir.), *cert. denied*, 131 S. Ct. 3036 (2011). Criminal conspiracy is only a ñcrime of violence,ò within meaning of the sentencing guidelines, if the conspiracy in itself involves conduct that is purposeful, violent, and aggressive. If the conspiracy does not require an overt act, then there is no such purposeful, violent, or aggressive conduct to make it a ñcrime of violence.ò

United States v. Harris, 586 F.3d 1283 (11th Cir. 2009). The Eleventh Circuit reviewed three Supreme Court cases, *James*, *Begay*, and *Chambers*, that dealt with the definition of violent felonies, and stated that the inquiry to determine whether a crime is a ñcrime of violenceò is ñvirtually identicalò to that to determine whether it is a ñviolent felony.ò Thus, the court concluded that its analysis in *United States v. Orisnord* is unchanged, and again held that a conviction for fleeing from a police officer at high speed in violation of Fla. Stat. § 316.1935(3)(a) is a crime of violence for the purposes of the career offender enhancement, primarily because the act of fleeing is active, purposeful, and willful, and involves a risk of serious injury as required for enhancement under §4B1.2.

United States v. Orisnord, 483 F.3d 1169 (11th Cir. 2007). As a matter of first impression, the court held that a prior conviction under Florida Stat. § 316.1935(3) for fleeing and eluding was a crime of violence for the purposes of the career offender enhancement. Felony fleeing is ñcrime of violenceò because it involves a risk of physical injury to others.

United States v. Gunn, 369 F.3d 1229 (11th Cir. 2004). The defendant challenged his classification as a career offender under §4B1.2(a)(2) because the district court interpreted attempted burglary as a ñcrime of violence.ò Section 4B1.2(a)(2) defines burglary as a crime of violence and the defendant argued that this is different from attempted burglary. The circuit court ruled that an uncompleted burglary does not diminish the potential risk of physical injury and upheld the classification of the defendant as a career offender.

§4B1.4 <u>Armed Career Criminal</u>

United States v. Proch, 637 F.3d 1262 (11th Cir. 2011). The Armed Career Criminal Act (ACCA) does not require separate indictments but it does require that the crimes be temporally distinct; thus, the government is required to show that the three previous convictions arose out of a separate and distinct criminal episode.

United States v. Sneed, 600 F.3d 1326 (11th Cir. 2010). The circuit court held that in light of the Supreme Courtôs decision in *Shepard v. United States*, sentencing ñcourts may not use police reports to determine whether predicate offenses under § 924(e)(1) were committed óon occasions different from one another.ôò In so holding, the circuit court determined that *Shepard* undermines the courtôs prior decision in *United States v. Richardson*, 230 F.3d 1297 (11th Cir. 2000), where the court approved of the use of police reports for § 924(e)(1) inquiries.

United States v. Harris, 608 F.3d 1222 (11th Cir. 2010). On remand for consideration in light of the Supreme Courtôs holding in *Johnson v. United States*, 559 U.S. 133 (2010), the Eleventh Circuit considered whether Harrisôs conviction under Fla. Stat. § 800.04(4) for sexual battery of a child under the age of 16 was a crime of violence for purposes of the Armed Career Criminal Act. Using the categorical approach discussed in *Begay* and *Chambers*, the circuit court held that the statute ñimposes strict liability and covers such a broad range of conduct, [that the court] cannot say that a violation of it typically involves ópurposeful, ñviolentò and ñaggressiveò conductôò and is therefore not a crime of violence under the residual clause of the ACCA.

United States v. Lee, 586 F.3d 859 (11th Cir. 2009). Defendant had a prior conviction for ñwalkaway escapeò under a New Jersey statute making it a felony to remove oneself without authorization from, or fail to return to, official detention. The Eleventh Circuit held that this did not qualify as a conviction for a violent felony under the Armed Career Criminal Act, as it was not ñsufficiently similar in kind or in degree of risk posedò to the enumerated offenses in the statute.

United States v. Robinson, 583 F.3d 1292 (11th Cir. 2009). A conviction under Ala. Code § 13A-12-213, which prohibits possession of marijuana for other than personal use, is a serious drug offense for purposes of the ACCA, even though the Alabama statute does not establish distribution as an element.

United States v. Ray, 346 F. Appôx 507 (11th Cir. 2009). The district court treated the defendantôs conviction for walkaway escape under the federal escape statute a ñcrime of violenceò for the purpose of the career offender provision of the guidelines. The Eleventh Circuit vacated and remanded for reconsideration in light of *Chambers*, 555 U.S. 122 (2009), decided while defendantôs appeal was pending, in which the Supreme Court determined that the failure to report for penal confinement is not a violent felony.

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005). The district court sentenced the defendant as an Armed Career Criminal under 18 U.S.C. § 924(e) based on its finding that his juvenile conviction of burglary in the first degree constituted a predicate violent felony. The Eleventh Circuit held that the district court properly considered the petition and judgment of the juvenile adjudication to determine whether it could count as a predicate conviction. A prior non-jury juvenile adjudication that was afforded all constitutionally required procedural safeguards can properly be characterized as a prior conviction.

United States v. Lyons, 403 F.3d 1248 (11th Cir. 2005). The defendant was convicted of being a felon in possession of ammunition. The defendant argued that his 235-month sentence constituted cruel and unusual punishment, in violation of the Eighth Amendment. The Eleventh Circuit upheld the sentence, reasoning that recidivism has long been recognized as a legitimate basis for increased punishment. The defendantôs category VI criminal history and the heightened total offense level required by §4B1.4(b) resulted in a guidelines sentencing range of 235 to 293 months. Thus, the court held, the sentence was entirely the result of the defendantôs recidivism. Since it is well-settled law that a longer sentence may be imposed on a recidivist based on his

criminal history, even if the offense of conviction is relatively minor in nature, the court found no Eighth Amendment violation.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court set the defendantôs base offense level at 34 under the armed career criminal provision, §4B1.4(b)(3)(A), even though the defendant had not actually been convicted of a crime of violence while he possessed the firearms. The defendant did not contest that he committed the aggravated assault and armed burglary and that those were crimes of violence, but argued that because he had not been convicted of the offenses, they should not be considered in sentencing him. The court of appeals rejected this argument, holding that as long as the government proves by a preponderance of the evidence that a crime of violence was committed in connection with the firearms possession, §4B1.4(b)(3)(A) applies regardless of whether the connected crimes led to a conviction. The court reasoned that the guideline states that 34 is the proper offense level ñif the defendant used or possessed the firearm . . . in connection with a crime of violenceò and does not mention a conviction.

McCarthy v. United States, 135 F.3d 754 (11th Cir. 1998). The district court found that the defendantôs prior Florida drug convictions qualified as predicate ñserious drug offensesò under 18 U.S.C. § 924(e), so as to subject him to a mandatory minimum as an armed career criminal. The defendant argued that, to determine whether his prior convictions were serious drug offenses, the court should have used the Florida guidelinesôpresumptive sentence range for each of the prior convictions, which was between three and one-half and four and one-half years, instead of the statutory maximum penalties. The circuit court rejected the argument, finding that the district court properly considered the statutory maximum penalties.

United States v. Cobia, 41 F.3d 1473 (11th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e) even though the government did not affirmatively seek such an enhancement. The defendant contended that the government must affirmatively seek the enhancement for a court to apply section 924(e) and that the application of section 924(e) was not mandatory. The circuit court rejected this argument and held that the plain language of section 924(e) establishes that the enhancement is mandatory. The circuit court joined the First and Tenth Circuits in holding that upon reasonable notice to the defendant and an opportunity to be heard, the section 924(e) enhancement should automatically be applied by courts to qualifying defendants regardless of whether the government affirmatively seeks such an enhancement.

United States v. Rucker, 171 F.3d 1359 (11th Cir. 1999). The defendant, charged with various drug offenses, had state convictions which both the government and defendant agreed qualified as predicates under the armed career criminal statute, 18 U.S.C. § 924(e). The district court, deeming the defendant just a small-time street dealer, concluded that the convictions were very minor and, on that basis, departed downward by three criminal history categories. On appeal, the Eleventh Circuit held that the district court erred in looking behind the drug convictions that qualified as ñserious drug offense[s]ò under the armed career criminal statute and concluding that the offenses were so minor as to justify a downward departure. The court found that it would make no sense to conclude that a sentencing court may not look behind the

fact of an unambiguous judgment in determining whether a prior conviction serves as a predicate serious drug offense but may do so to conclude whether a downward departure is warranted.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Carillo-Ayala, 713 F.3d 82 (11th Cir. 2013). Application of the 2-level §2D1.1(b)(1) enhancement for possessing a firearm during the course of a drug-trafficking offense does not necessarily mean that the defendant possessed a firearm ñin connection with the offenseò within the meaning of the safety-valve guideline, §5C1.2(a)(2). Whether the firearm was possessed in connection with the offense depends on its proximity to drugs and its potential for facilitating the offense, such as by providing protection, ñinstilling confidence in others,ò or being traded for drugs.

United States v. Valencia Vergara, 264 F. Appôx 832 (11th Cir. 2008). The defendant, who himself sustained second and third degree burn injuries during the commission of a drug offense, does not qualify for the safety-valve reduction because the provision does not apply in cases where ñserious bodily injury to *any person*ò [emphasis added] occurs.

United States v. Quirante, 486 F.3d 1273 (11th Cir. 2007). The provisions of the safety-valve are ñplainly mandatory.ò If the defendant meets the criterion the court ñshallò impose a sentence pursuant to the guidelines without regard to any statutory minimum sentence.

United States v. Milkintas, 470 F.3d 1339 (11th Cir. 2006). There is no burden on the government to solicit information from a defendant concerning meeting the safety-valve requirements.

United States v. Garcia, 405 F.3d 1260 (11th Cir. 2005). The defendant sought a safety valve adjustment and submitted to debriefings before sentencing. At sentencing, however, it became apparent to the defendant that he had not completely debriefed to the satisfaction of the government and he moved for a continuance of the sentencing. Believing that it lacked authority to continue the sentencing, the court declined his request for a continuance, and, ultimately, declined to give him safety-valve relief due to his failure to completely debrief prior to the commencement of sentencing. The Eleventh Circuit reversed, holding that a district court may continue a sentencing hearing to give a defendant an opportunity to debrief for the purpose of considering safety-valve relief, if the district court determines that the factual circumstances warrant a continuance. The court found that the circumstances in this case established good cause for the continuance. The defendant, a first time drug offender, spoke no English, and all translation was performed by an agent rather than an independent translator. Second, his counsel erroneously believed that the defendant had already made a sufficient statement to qualify for the safety-valve and that he had been assured by the government agents that they would follow up with additional debriefings. Third, and perhaps most importantly, there was no evidence that the

defendantôs failure to fully debrief prior to the commencement of the sentencing hearing was an attempt to mislead, manipulate, stall or delay.

United States v. Johnson, 375 F.3d 1300 (11th Cir. 2004). The defendant was convicted of cultivating 273 marijuana plants. At a debriefing session, he gave authorities a detailed analysis of cultivating marijuana. He refused to divulge information about the intended distribution of the marijuana he was growing, contending that information about distribution was unrelated to his offense of cultivation. After being denied a safety valve reduction, the defendant appealed. He argued that he provided all the information necessary because the scope of information he was required to disclose was properly defined with reference to the crime of cultivation. The Eleventh Circuit disagreed. Given the large number of plants, the district court reasonably inferred that he was growing the marijuana for distribution and properly determined that information about the intended distribution was related to the defendantôs offense of conviction. Thus, the court did not err by finding that Johnson failed to satisfy the full scope of disclosure required by the safety-valve provisions.

United States v. Acosta, 287 F.3d 1034 (11th Cir. 2002). The district court did not err in finding that the defendant was not entitled to safety valve relief. There was no error in the district courtôs conclusion that the defendant did not satisfy his burden of persuasion to convince the court that he had provided truthful and complete information.

United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000). The district court erred in finding that the defendantôs prior failure to truthfully disclose information related to his offenses precluded application of the safety valve provision. The Eleventh Circuit stated that §5C1.2 provides only one deadline for compliance and nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from relief. Therefore, a defendantôs lies and omissions will not, as a matter of law, disqualify him from safety valve relief so long as he makes a complete and truthful proffer no later than the commencement of the sentencing hearing. The court remanded the case for a determination by the district court on the factual question of whether the defendantôs final proffer was complete and truthful.

United States v. Bravo, 203 F.3d 778 (11th Cir. 2000). On his first appeal, the defendant claimed the district court erred by concluding that it lacked authority to depart from the guidelines or to apply the safety valve provision of §5C1.2. The defendant had been convicted of conspiracy to import cocaine; subsequent to his incarceration, Congress amended §2D1.1 and enacted §5C1.2. Upon rehearing, the sentencing court granted him the benefit of the §2D1.1 amendment, but did not apply the safety valve provision because it was not included in the list of amendments which may be applied retroactively under §1B1.10(c). The safety valve provision only applies where application of the guideline would result in imposition of a sentence lower than the statutory minimum of ten years. Because the defendantôs revised sentence after application of the §2D1.1 amendment was 168 months, the circuit court found whether the district court had jurisdiction to apply the safety valve provision was irrelevant.

United States v. Anderson, 200 F.3d 1344 (11th Cir. 2000). The district court correctly found the safety valve provision inapplicable to a defendant convicted for possession with intent

to distribute crack cocaine within 1,000 feet of a public elementary school, even though the conviction included a violation of a possession statute to which the safety valve provision applied. The defendant pled guilty to violating 21 U.S.C. § 860, which necessarily includes a violation of § 841(a) or § 856. He argued that even though § 860 does not trigger the safety valve, because he was also convicted under section 841, he was entitled to application of the provision. The circuit court held because the provision only applies to five statutes and does not include § 860, a defendant convicted and sentenced under this section is not eligible for safety valve relief.

United States v. Figueroa, 199 F.3d 1281 (11th Cir. 2000). The district court improperly applied the safety valve provision for a defendant who did not make a complete and truthful disclosure of her knowledge of the crime. The district court made statements clearly indicating it was not prepared to accept everything in the defendantôs statement and that it found her disclosures incomplete and untruthful but applied the provision because ñit apparently considered absence of knowledge on . . . critical points the government [wa]s interested in enough to apply the safety valve.ò The Eleventh Circuit held that the guideline does not permit a sentencing court to make any determination of the possible utility of the information possessed by the defendant.

United States v. Espinosa, 172 F.3d 795 (11th Cir. 1999). In determining the honesty of a defendant for purposes of applying the safety valve, the court must independently assess the facts and may not rely on the governmentôs assertion of dishonesty.

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999). The defendant was part of a drug conspiracy and was subject to a five-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(vii). His base offense level was enhanced pursuant to §2D1.1(b)(1) on the basis of a co-conspiratorôs possession of a firearm at one of the other grow houses. Despite the enhancement, his guidelines sentence would still have been below the statutory mandatory minimum. The sentencing judge held that the application of the §2D1.1(b)(1) firearm enhancement precluded the application of the ñsafety valveò provision to the defendant because he could not satisfy the no-firearms requirement of §5C1.2. The Eleventh Circuit disagreed and held ñpossessionò of a firearm for purposes of the safety valve provision does not include the reasonably foreseeable possession of a firearm by a co-conspirator that is sufficient to trigger the §2D1.1(b)(1) enhancement. First, Application Note 4 to §5C1.2 specifically limits the defendantôs accountability to his or her own actions and conduct that the defendant aided or induced. Second, if ñpossessionò in §5C1.2 encompassed constructive possession by a co-conspirator, the safety valve provisionôs ñinduce another participant to [possess]ò would be unnecessary.

United States v. Orozco, 121 F.3d 628 (11th Cir. 1997). The defendant had more than one criminal history point. The district court granted a downward departure and sentenced defendant in Criminal History Category I. The district court determined, however, that the defendant was nonetheless ineligible for safety valve relief because he in fact had more than one criminal history point. The Eleventh Circuit affirmed, pointing out that the plain language of both the safety valve statute and guideline state that a defendant may not have more than one criminal history point, and do not refer to criminal history categories at all.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Tome, 611 F.3d 1371 (11th Cir. 2010). The district court did not err in imposing, in connection with the defendantôs supervised release, a condition that he not use the Internet for a period of one year because he ñwas convicted of child sex offenses involving the Internet and then violated his initial supervised release conditions by using the Internet to contact other sex offenders.ò

United States v. Moran, 573 F.3d 1132 (11th Cir. 2009). As a matter of first impression, the court held that the district court is not required to notify the defendant before it decides to ñimpose special conditions of supervised release to address a defendantôs proclivity to sexual misconduct when the crime of conviction did not involve sexual activity.ò According to the court, the defendant knew that the district court would consider his criminal history when it imposed a sentence, and the defendant was not prejudiced by the lack of notice.

United States v. Guzman, 558 F.3d 1262 (11th Cir. 2009). The district court sentenced the defendant, who was convicted of being an alien found within the United States after having been previously deported, to six monthsô imprisonment to be followed by a one-year term of supervised release. A special condition of the supervised release was that, if the defendant were deported, he would report in writing to the probation office, within 72 hours of deportation, notifying the office of his current address. The court upheld this condition as satisfying the three criteria codified in 18 U.S.C. § 3583(d), including that the condition was reasonably related to the factors in 18 U.S.C. § 3553(a). Specifically, the requirement would confirm for the district court that the defendant remained in Mexico, thereby discouraging him from immediately re-entering the United States.

United States v. Okoko, 365 F.3d 962 (11th Cir. 2004). The district court previously tolled the supervised release period while the defendant was legally outside of the country. In 18 U.S.C. § 3624(e), Congress authorized the tolling of a period of supervised release in two circumstances: when the person is in prison for another crime, and for a violation of a supervised release before it expires. Congress did not include the period of time when the probationer is outside the country as a circumstance for tolling a period of supervised release. As a result, the district court did not have the authority to order the tolling of the term of supervised release and therefore did not have jurisdiction to find that the defendant violated his supervised release.

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000). The district court erred in imposing a condition of supervised release ordering the defendant not to seek relief from a deportation proceeding. The Eleventh Circuit held the district court lacked the authority to impose such a restriction because the Illegal Immigration Reform and Immigrant Responsibility Act divests the federal courts of jurisdiction in criminal proceedings to order deportation independently. Because preventing the defendant from raising a defense or challenging the

governmentôs case during a removal hearing would have much the same effect, the imposed condition was not proper.

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998). The district court erred in ordering judicial deportation as a condition of supervised release. The defendantôs failure to object to the district courtôs lack of subject matter jurisdiction to order her deportation could not waive the issue, because subject matter jurisdiction is never waived.

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997). The district court erred in requiring the defendantôs deportation as a condition of supervised release. The circuit court held that 8 U.S.C. § 1229(a), the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (ñIIRAIRAò), eliminated the district courtôs jurisdiction to order judicial deportation pursuant to 18 U.S.C. § 3583(d). The IIRAIRA provides that a hearing before an immigration judge is the exclusive procedure for determining whether an alien may be deported. Thus, section 3583(d) authorizes a district court to order that a defendant be surrendered to the INS for deportation proceedings in accordance with the Immigration and Naturalization Act, but it does not authorize a court to order a defendant deported. The court also held that the statutory change is applicable to all pending cases.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Edwards, 728 F.3d 1286 (11th Cir. 2013). First, the MVRA expressly prohibits consideration of a defendantôs finances in calculating the amount of restitution. Restitution must be ordered in the full amount of loss caused by the defendant. Second, it was not error for the district court to order restitution for conduct that was not the subject of the convictions, but was ñclosely relatedò to it and part of the same ñscheme, conspiracy, or pattern of criminal activity.ò Third, a district court is required to make specific findings that a particular victim was harmed by the defendantôs conduct before ordering restitution; when the victim was not the subject of a count of conviction, the district court should make such a finding at sentencing. Finally, when the district court had failed to make such a specific finding, the interest of the third-party victims meant that the appropriate remedy was to remand to allow the government to make a sufficient showing that the victims were entitled to restitution.

United States v. Singletary, 649 F.3d 1212 (11th Cir. 2011). In ordering restitution in a mortgage fraud scheme, the district court erred in failing to make findings as to the specific loans that the defendant fraudulently obtained and the amount of the actual loss attributable to those loans.

United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011). The Mandatory Restitution for Sexual Exploitation of Children Act, as set forth in 18 U.S.C. § 2259, ñlimits recoverable losses to those proximately caused by the defendantôs conduct.ò The Eleventh Circuit further noted that possession that ultimately resulted in notification to the victim through the National

Center for Missing and Exploited Children (NCMEC) constituted a proximate cause of the victimôs losses.

United States v. Valladares, 544 F.3d 1257 (11th Cir. 2008). Restitution under the MVRA may be ordered for losses arising out of the defendantôs relevant conduct.

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997). The defendant was convicted of possessing a firearm in a federal facility and acquitted of the charge of assault with intent to commit murder. The district court ordered the defendant to pay restitution to cover medical costs of the individual he shot. The government contended that this was permissible because sentencing judges may consider relevant conduct, even if the defendant is not found guilty beyond a reasonable doubt of that conduct. The circuit court rejected this argument. The Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3579-3580, prohibits restitution orders from considering harms arising from conduct for which the defendant was acquitted. The circuit court also rejected the governmentôs reliance on cases holding that a sentencing court may consider acquitted conduct, stating that such cases are based on a sentencing courtôs powers, rather than the VWPAôs scope as to authority to impose restitution.

United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997). The district court ordered restitution in the amount of $357,281 even though the defendant was indigent and not capable of making restitution in the full amount. In determining whether to order restitution and the amount, the sentencing court should consider the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, and the financial needs and earning ability of the defendant and the defendantsô dependants. The record revealed that both the prosecutor and the defense attorney agreed that the defendant was indigent and could not pay restitution at the time of sentencing. The appellate court held that although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, it may not order restitution in an amount that the defendant can never repay. Thus, the district court abused its discretion in ignoring the testimony concerning the defendantôs financial resources and the defendantôs ability to pay after release.

United States v. Logal, 106 F.3d 1547 (11th Cir. 1997). The district court did not err in voiding the defendantôs restitution order because the defendant committed suicide prior to his incarceration. In keeping with Eleventh Circuit precedent, the court adhered to the general rule that the death of a defendant during the pendency of his direct appeal renders both his conviction and sentence, including any restitution order, *void ab initio*.

§5E1.2 Fines for Individual Defendants

United States v. Gonzalez, 541 F.3d 1250 (11th Cir. 2008). The district court erred in imposing a fine where the defendant objected on the basis of his inability to pay and the presentence report concluded that he lacked the ability to pay a fine in addition to mandatory restitution. The court, without explanation, stated at the hearing that the defendant was able to pay a fine and imposed a fine of $250,000, which was three times the maximum provided in the guidelines.

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996). The district court erred in ordering that if the defendant served his full prison sentence, his fine would be waived. On appeal, the court held that the sentencing guidelines, with limited exceptions, require the imposition of a fine in all cases. The court noted that there is no exception in the guidelines for the expiration of a fine based on the defendantôs service of his full term of incarceration. As a result, the court of appeals could find no support for the district courtôs decision.

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Clark, 274 F.3d 1325 (11th Cir. 2001). Pursuant to statute, the defendant was subject to a mandatory minimum sentence of 20 years. The guideline sentencing range was calculated to be 168-210 months. The district court imposed a 150-month sentence. The Eleventh Circuit reversed, finding plain error. Section 5G1.1(c)(2) provides, ñ[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.ò

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Davis, 329 F.3d 1250 (11th Cir 2003). The district court interpreted §5G1.2(d) to require that defendantsô sentences run consecutively rather than concurrently so that the appropriate guidelines range could be achieved. On appeal, the defendants argued that the sentencing guidelines required the court to impose a concurrent sentence where the total punishment imposed on the 21 U.S.C. § 841 count was less than or equal to the highest statutory maximum. *See* §5G1.2(c). The defendants contended that sentencing courts were authorized to exercise alternative sentencing configurations to avoid manifest injustice and prejudice to the defendants. The Eleventh Circuit noted that it had never directly addressed the issue of whether a district court retains the discretion to sentence a defendant to concurrent terms of imprisonment when §5G1.2(d) calls for consecutive terms of imprisonment. The court joined the majority of its sister circuits and held that the imposition of consecutive sentences under §5G1.2(d) was mandatory.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Bidwell, 393 F.3d 1206 (11th Cir. 2004). The defendant sexually abused his daughter. He also filmed that abuse, and distributed those films. He was prosecuted in both state and federal court. For the sexual abuse, a Georgia state court sentenced the defendant to 30 yearsô imprisonment. For filming and distributing the films of that abuse, the district court sentenced the defendant to 15 yearsô imprisonment, which the court ordered to run consecutively to his state sentence. The defendant challenged his sentence on appeal, arguing that under §5G1.3, the district court erred in ordering his federal sentence to run consecutivelyï rather than concurrentlyï to his state sentence. The Eleventh Circuit held that §5G1.3(b) did not apply to the defendant because his state and federal crimes were substantively different. The videotaping of

sexual abuse of a minor is a different crime than the sexual abuse itself. Therefore, the state sentence was not fully taken into account when calculating the applicable offense level for the federal crime and the court had the discretion to impose consecutive sentences.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The Eleventh Circuit did not find reversible error where the district court refused to run a new sentence for an escape conviction concurrent with the sentence imposed for a prior conviction for another escape. The court determined that neither §5G1.3(a) or (b) applied. Thus, the district court had discretion to impose a consecutive sentence to achieve reasonable punishment, pursuant to §5G1.3(c).

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

See United States v. Crisp, 454 F.3d 1285 (11th Cir. 2006), Part IV(D).

See United States v. Williams, 549 F.3d 1337 (11th Cir. 2008), §1B1.10.

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). A sentencing court cannot depart from an advisory guidelines range for substantial assistance absent a motion from the government. Absent such a motion, the defendantôs assistance is not a permissible ground for a departure in calculating the advisory guideline range.

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000). The government did not violate the defendantôs due process rights when it did not file a motion to depart based on substantial assistance. Although the government conceded that the defendant had provided substantial assistance by participating in controlled drug buys and testifying against his supplier who was ultimately convicted, he was arrested for possession with intent to distribute cocaine base after testifying against his supplier. The defendant argued that the government could not refuse to file a §5K1.1 motion for ñreasons other than the nature of [his] substantial assistance.ò The Eleventh Circuit rejected this contention as contrary to circuit precedent and the broad grant of prosecutorial discretion recognized by the court. Review of the governmentôs refusal to file a §5K1.1 motion is limited to claims of unconstitutional motive. Because the defendant had not alleged an unconstitutional motive, the court affirmed.

§5K1.2 Refusal to Assist (Policy Statement)

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). The court stated that §5K1.2 prohibits upward departures based on the refusal to cooperate. Such refusal, however, can be considered when determining the sentence within the applicable guideline range.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Stuart, 384 F.3d 1243 (11th Cir. 2004). The district court departed downward in part based upon the defendantôs extraordinary post-offense rehabilitation.

Ordinarily, post-offense rehabilitation is taken into account by the §3E1.1 acceptance of responsibility reduction. While truly extraordinary post-offense rehabilitation may exceed the degree of rehabilitation contemplated by §3E1.1, and therefore justify a downward departure, any departure must occur along the horizontal axis for criminal history. Because the defendant was already in the lowest possible criminal history category on the horizontal axis, the court ruled that he was not eligible for a departure for post-offense rehabilitation.

United States v. Saucedo-Patino, 358 F.3d 790 (11th Cir. 2004). Following his deportation from the country after being convicted on a felony charge of burglary in a habitation with intent to commit aggravated assault, the defendant reentered the United States without authorization, only to be caught. At sentencing, the district court granted the defendant an 8-level downward departure under §5K2.0. The government appealed. The issues on appeal were whether the district court possessed authority to depart downward eight or more levels based on the nature of the underlying offense, whether the defendantôs employment history and family responsibilities were outside the heartland, and whether the defendantôs motive for reentering the country was relevant to the determination to depart. First, the court noted that ña sentencing court lacks the authority to treat a crime of violence as if it were not, in fact, a crime of violenceò and is thus categorically prohibited from departing downward where its only basis for doing so was the nature of the underlying offense. The court then noted that the guidelines expressly state that employment history and family responsibilities were not usually relevant in determining whether a sentence should fall outside the usual guideline range. In the instant case, there was no specific aspect of defendantôs employment history or family responsibilities that was so exceptional as to take this case outside the heartland. Finally, the defendantôs argument that his motive for reentering the United Statesï supporting his familyï did not involve an intent to commit further crimes and that it was appropriate for the district court to take this motive into account was without merit. The court noted that the defendantôs motive for reentering was irrelevant. All that matters in the instant case was that defendant entered without permission after being convicted of a felony. The court concluded that none of the factors used by the district court in formulating its downward departure could serve as a basis for a departure.

United States v. Kapelushnik, 306 F.3d 1090 (11th Cir. 2002). The district court granted a downward departure to the defendant due to the defendantsô post-adjudication voluntary restitution of stolen coins. After examining the record, the court concluded that there was no evidence to support that the defendants were responsible, either directly or indirectly, for the return of stolen coins. Therefore, a downward departure was not warranted.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). Under §5K2.0, a combination of factors, taken together, may take a case outside the heartland, thus warranting departure. Here, however, each of the factors identified by the district court to justify its downward departure were impermissible grounds for departure under §5K2.0. These impermissible factors cannot combine to warrant a departure.

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). The district court erred in granting a 3-level downward departure for ñcultural differences.ò The defendant, a Japanese national, was convicted of illegally importing turtles and snakes. He moved for a departure, alleging that because of the cultural differences between the United States and Japan, he was

unaware of the serious consequences of his actions, and that these differences constituted a factor not taken into consideration by the Sentencing Commission. The court of appeals found these grounds insufficient to take the case out of the heartland. The fact that the animals may or may not be endangered is already considered in the guideline. The guidelines that apply to illegal importation of wildlife necessarily contemplate that a portion of illegally imported wildlife will be imported by people from other countries, many of whom will have an imperfect understanding of United States customs law.

United States v. Willis, 139 F.3d 811 (11th Cir. 1998). The district court erred in departing downward in order to reconcile the disparity between federal and state sentences among codefendants. The court of appeals noted that permitting departure based on a codefendantôs sentence in state court would create system-wide disparities among federal sentences.

United States v. Searcy, 132 F.3d 1421 (11th Cir. 1998). The district court did not err in refusing to depart to reflect the theoretical sentence the defendant might have received had prosecution occurred in state court. The circuit court reasoned that allowing departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure, as federal sentences would be dependent on the practice of the state within which the federal court sits.

United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997). The district court erred in departing downward based on the defendantôs civil forfeiture and his loss of his license to practice medicine. The defendantôs agreement in plea bargain not to contest the governmentôs subsequent civil forfeiture action seeking $50,000 from the defendant as proceeds of his illegal drug activities was a prohibited factor that could not be the basis for downward departure under the sentencing guidelines. The defendantôs loss of his privilege to practice medicine as part of the plea agreement was not a basis for downward departure when sentencing him for federal drug offenses, where defendant received a 2-level sentence enhancement for using his special skills as a physician to facilitate commission of his crimes and for abusing the position of trust he held as a physician, and was able to commit his offenses because he had prescription-writing authority.

United States v. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the Governmentôs cross-appeal, the appellate court held that the defendantôs responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimerôs and Parkinsonôs diseases were not so extraordinary as to warrant a downward departure from the guidelines under §5K2.0. Family circumstances do not ordinarily justify a downward departure. The appellate court acknowledged the district courtôs unique ñfeel for the case,ò but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Miller, 78 F.3d 507 (11th Cir. 1996). The district court granted the defendant a 7-level downward departure on the grounds that the Commission failed to adequately consider the impact of §2S1.2(a) upon an attorney who derives knowledge of the source of the criminally derived property through a legitimate attorney-client relationship. *See* §5K2.0. The circuit court vacated the sentence due to the insufficient factual findings supporting

the departure and remanded with instructions for the district court to explicitly make factual findings as to the circumstances warranting a departure, to state whether these circumstances are considered by the guidelines and are consistent with the guidelines goals, and if a departure is deemed appropriate, to state reasons justifying the extent of the departure.

United States v. Miller, 71 F.3d 813 (11th Cir. 1996). The district court improperly departed downward by sentencing the defendant for conspiring to possess powder cocaine rather than crack, which was the substance delivered and charged in the indictment. The defendant argued that he was ñtrapped into supplying crack.ò The circuit court stated that the district court made no findings, and a careful review of the record did not reveal any mitigating circumstances justifying downward departure under §5K2.0. Furthermore, the court rejected the defendantôs entrapment argument and noted that sentencing entrapment is a defunct doctrine. The circuit court concluded that departure from the recommended sentencing range was neither reasonable nor consistent with the guidelines.

United States v. Holland, 22 F.3d 1040 (11th Cir. 1994). The defendant appealed from a civil judgment entered for his participation in a conspiracy to deprive certain individuals of their civil rights in violation of 42 U.S.C. § 1985. He filed perjured *in forma pauperis* papers, claiming that he did not own anything of value. He was subsequently indicted and convicted of several counts of criminal perjury. The district court departed downward *sua sponte* because it determined that §2J1.3 should not apply since the defendantôs perjury stemmed from a civil proceeding. The circuit court held that the perjury statute, 18 U.S.C. § 1621, does not distinguish between perjury committed during civil or criminal proceedings. Accordingly, the defendantôs offense conduct did not fall outside of the heartland of typical perjury offenses.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995). The defendant was convicted of conspiracy to commit mail and wire fraud and wire fraud stemming from the operation of a loan brokerage firm. The district court erred in departing upward based on the consequential financial damages to the victims beyond the amount they paid in advance fees to the defendant. The defendants argued on appeal that consequential damages should not have been used as a basis for upward departure because those damages were adequately considered in establishing the defendantôs guideline range. The circuit court agreed, ruling that the Sentencing Commission had expressly considered and rejected consequential damages as a factor in determining offense levels under the guidelines, except for government procurement and product substitution cases. The court noted that if the consequential damages in this case were ñsubstantially in excessò of what ordinarily is involved in an advance fee scheme case, then a departure may be warranted but then ruled that the consequential damages in this case did not warrant an upward departure.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Regueiro, 240 F.3d 1321 (11th Cir. 2001). The defendant pled guilty to conspiracy to defraud the United States, conspiracy to commit money laundering, and money laundering. The district court departed upward four levels when it concluded that the nature and scope of the defendantôs conduct significantly disrupted the governmentôs provision of Medicare

benefits. The value of the laundered funds totaled over three million dollars. The Eleventh Circuit found the defendantôs conduct disrupted governmental function because every time one of the nurses from the 100 groups he organized fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide care to eligible patients.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995). The district court erred in granting a downward departure under §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens. On appeal, the government argued that §5K2.11 seeks to prevent the harms associated with the defendantôs conduct and that the defendantôs subjective views of foreign policy may not serve as a basis for a sentence reduction. The appellate court agreed that section 5861 was intended to reach the harms connected with the defendantôs conduct, and that the downward departure was inappropriate. The appellate court noted that the defendantôs conduct did not fall into the ñtraditionalò departure categories for §5K2.11: hunting, sport shooting, and protecting the home. The circuit court further ruled that the sentencing guidelines clearly indicate that a defendant is not entitled to a downward departure because of a personal belief that the criminal action is furthering a greater political good.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court departed downward in part because it believed the defendantôs judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and early treatment for an emotional or mental disorder. The Eleventh Circuit reversed, explaining that these grounds are prohibited by §5H2.13 in all but extraordinary cases. The court concluded that the record was devoid of evidence that the defendantôs drug addiction or mental and emotional condition made the case so extraordinary that it was outside the heartland. Moreover, §5K2.13 requires ñsignificantly reducedò mental capacity to warrant such departure, and no such facts were in the record.

United States v. Miller, 146 F.3d 1281 (11th Cir. 1998). The defendant pled guilty to transporting through a commercial computer service images depicting child pornography. The district court departed downward for diminished mental capacity based on the defendantôs impulse control disorder. The court of appeals rejected the departure on several grounds. First, the facts of the case did not remove it from the heartland in that the harm in the offense is sustaining a market for child pornography, of which defendant was guilty. Second, according to the expert testimony presented, impulse control disorders are not unusual among those who collect child pornography, so this aspect of defendantôs personality did not separate him from other defendants. Finally, §5K1.13 requires that the diminished capacity be linked to the commission of the offense. It appeared that, at most, the defendantôs impulse disorder was

related to his viewing of adult pornography, and that his offense conduct was no more related to the impulse disorder than if he had robbed someone in order to use the proceeds to purchase adult pornography. The testimony failed to link the disorder to the offense, so no §5K2.13 departure was appropriate.

CHAPTER SIX: *Sentencing Procedures, Plea Agreements, and Victims' Rights*

Part A Sentencing Procedures

United States v. Prouty, 303 F.3d 1249 (11th Cir. 2002) (holding that failure to offer defendant right of allocution (as required currently by Fed. R. Crim. P. 32(i)(4)(A)(ii)) is plain error where court does not impose lowest possible sentence under the guidelines). *See also United States v. Dorman*, 488 F.3d 936 (11th Cir. 2007) (finding no violation of right of allocution or due process violation based on reliance on false or unreliable information at sentencing).

Part B Plea Agreements

§6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

United States v. Gamboa, 166 F.3d 1327 (11th Cir. 1999). The court upheld the district courtôs rejection of a plea agreement based, in part, on the district courtôs view that the agreement was unacceptable under USSG §6B1.2(a) because it did not adequately reflect the seriousness of the offenses committed by the defendant. Specifically, during the second day of trial, the government had offered to dismiss the charges of conspiracy to possess with intent to distribute methamphetamine and three related substantive counts if the defendant would plead guilty to the use of a communication facility in the commission of a drug trafficking offense. These charges subjected the defendant to a mandatory minimum of 20 years per count. Had the defendant been permitted to plead guilty, he would have been subject to a maximum four-year term of imprisonment. Moreover, the defendantôs offense conduct involved a substantial quantity of drugs, namely 2,134 grams of methamphetamine and 442 grams of marijuana. Relying on §6B1.2(a), the Eleventh Circuit held that the district court had not abused its discretion in refusing to accept the plea agreement.

§6B1.4 Stipulations (Policy Statement)

United States v. Strevel, 85 F.3d 501 (11th Cir.1996). The court reversed a district courtôs reliance on a stipulation of facts regarding the loss caused by the defendantôs fraud that was contained in the partiesô plea agreement, finding that such reliance, without any independent judicial determination of the loss amount, was ña clear violation of the plain language of the commentaryò to USSG §6B1.4(d) and required a remand for a proper determination of the amount. Section 6B1.4(d) states that the court is not bound by factual stipulations but may with the aid of the presentence report, determine the facts relevant to sentencing. The commentary goes further and provides that the court may not rely exclusively on such stipulations but must consider them ñtogether with the results of the presentence investigation, and any other relevant information.ò

United States v. Forbes, 888 F.2d 752 (11th Cir. 1989). The district court did not clearly err in denying defendant a minor-role reduction despite the partiesô stipulation that he should receive one, citing USSG §6B1.4. *Accord United States v. Diaz*, 138 F.3d 1359 (11th Cir. 1998).

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Carruth, 528 F.3d 845 (11th Cir. 2008). Affording the defendant the right of allocution applies in supervised release revocation proceedings as currently provided in Fed. R. Crim. P. 32.1(b)(2)(E), and the denial of such right constitutes plain error where the defendant did not receive the lowest possible sentence within the guidelines range.

United States v. Sweeting, 437 F.3d 1105 (11th Cir. 2006). The court determined that because *Booker's* reasonableness standard is essentially the same as the ñplainly unreasonableò standard set forth in § 3742(e)(4) for sentences imposed upon revocation of supervised release, the court will review those sentences for reasonableness.

United States v. White, 416 F.3d 1313 (11th Cir. 2005). *Booker* does not apply to revocation hearings because the supervised release provisions have always been advisory.

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Cook, 291 F.3d 1297 (11th Cir. 2002). The defendant argued that the district court erred by imposing a probation revocation sentence above the recommended imprisonment range in Chapter Seven of the *Guidelines Manual*. The Eleventh Circuit affirmed because 18 U.S.C. § 3553(a)(4)(B) requires a district court only to consider the Chapter Seven policy statements in determining a revocation sentence.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

See United States v. Prouty, 303 F.3d 1249 (11th Cir. 2002), Chapter 6, Part A.

See United States v. Carruth, 528 F.3d 845 (11th Cir. 2008), §7B1.3.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(e)

United States v. Proch, 637 F.3d 1262 (11th Cir. 2011), §4B1.4.

See United States v. Lee, 586 F.3d 859 (11th Cir. 2009), §4B1.1.

See United States v. Robinson, 583 F.3d 1292 (11th Cir. 2009), §4B1.1.

See United States v. Burge, 407 F.3d 1183 (11th Cir. 2005), §4B1.1.

See McCarthy v. United States, 135 F.3d 754 (11th Cir. 1998), §4B1.1.

See United States v. Cobia, 41 F.3d 1473 (11th Cir. 1995), §4B1.1.

See United States v. Rucker, 171 F.3d 1359 (11th Cir. 1999), §4B1.1.

21 U.S.C. § 851

United States v. Ladson, 643 F.3d 1335 (11th Cir.), *cert. denied*, 132 S. Cr. 534 (2011). ñ[T]he statutory language of § 851(a)(1) requires the Government to strictly comply with the service requirement before trial. The defendantôs actual notice of the Governmentôs filing of an information does not obviate the Governmentôs statutory obligation under § 851(a)(1) to serve a copy of the information on the defendant or his or her counsel before trial.ò

United States v. James, 642 F.3d 1333 (11th Cir.), *cert. denied*, 132 S. Ct. 438 (2011). Substantial compliance with colloquy requirement that defendant affirm or deny a previous conviction for enhancement purposes under 18 U.S.C. § 851 is sufficient where government satisfies the requirement that it file information with district court stating in writing the previous convictions to be relied upon and thereby timely apprises defendant of the underlying convictions to be considered to enhance his sentence. Further, any district court error in not strictly complying with procedural requirements by specifically asking whether defendant affirmed or denied prior convictions that served as basis for enhanced sentence is harmless where the prior convictions were clearly delineated and described in governmentôs required notice.

CONSTITUTIONAL CONSIDERATIONS

United States v. Farley, 607 F.3d 1294 (11th Cir. 2010). The defendant was convicted of knowingly crossing state lines with the intent to engage in a sexual act with a person under the age of 12 and of using a computer to knowingly attempt to entice a person under the age of 18 to engage in criminal sexual activity. Prior to sentencing, the district court ruled that as applied to the defendant, the 30-year mandatory minimum sentence was unconstitutionally cruel and unusual because it was grossly disproportionate compared to punishments for other crimes with similar or more severe conduct as well as compared to much lighter mandatory minimums for similar conduct under state law. The Eleventh Circuit rejected the district courtôs comparative analysis. In *Harmelin v. Michigan,* 501 U.S. 957 (1991), the Supreme Court held that an otherwise constitutional sentence is not made cruel and unusual simply because it is mandatory. The Supreme Court reasoned that the Eighth Amendment did not require strict proportionality between crime and sentence but forbids only extreme sentences that are grossly disproportionate

to the crime. The Eleventh Circuit applied the *Harmelin* gross disproportionality standard and held that Farleyôs sentence was not constitutionality disproportionate because Farleyôs crime was as bad or worse and his sentence was less severe than that in *Harmelin*, where the defendant was sentenced to life in prison without parole for possession of 672 grams of cocaine as a first time offender.