SELECTED POST-BOOKER AND GUIDELINE APPLICATION DECISIONS FOR THE ELEVENTH CIRCUIT

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U.S. Sentencing Commission

March 2009

TABLE OF CONTENTS

Page

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

This document contains annotations to Eleventh Circuit judicial opinions addressing some of the most commonly applied federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent Eleventh Circuit jurisprudence on selected guidelines. The document is not a substitute for reading and interpreting the actual guidelines manual; rather, the document serves as a supplement to reading and interpreting the guidelines manual.

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

I. Reasonableness Review

A. General Principles

United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006). The court said "[w]e do not believe that any across-the-board prescription regarding the appropriate deference to give the guidelines is in order," and held that "a district court may determine, on a case-by-case basis, the weight to give the guidelines, 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 defendant's sentence."

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*, 128 S. Ct. 585 (2007). The court must first "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or *failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range*" (quoting *Gall*)(emphasis in *Livesay*). Secondly, the court must consider the substantive reasonableness of the sentence, applying an abuse-of-discretion standard. In this case, the court determined that the sentencing court committed "procedural *Gall* error" when it based the extent of a §5K1.1 departure (5 years' probation with 6 months of home detention from a guidelines range of 78-97 months' imprisonment) on an impermissible consideration. The "repudiation of the conspiracy," relied on by the court, is 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. Martinez, 434 F.3d 1318 (11th Cir.), *cert. denied*, 548 U.S. 918 (2006). The court rejected the government's argument that it had no jurisdiction to review a within-guidelines sentence for unreasonableness, holding that an unreasonable sentence would violate the law and therefore be subject to review under 18 U.S.C. § 3742(a)(1).

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008). The sentencing court summarized post-*Booker* case law, explained the two-step process of appellate review for procedural and substantive reasonableness of sentences outlined in *Gall,* and determined that the district court in this case had 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 months' imprisonment. Although recognizing that *Gall* rejected an appellate rule that requires "extraordinary" circumstances to justify a variance, the court focused on the language in *Gall* that obligates the district judge to "ensure that the justification is sufficiently compelling to support the degree of the variance," and that held that "a major departure should be supported by a more significant justification than a minor one." The court further held that a sentence may be substantively unreasonable if it fails to serve the purposes of sentencing in § 3553(a), or 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 "committed 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."

United States v. Talley, 431 F.3d 784 (11th Cir. 2005). The court set forth the following principles: (1) the court's 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 guidelines are "central to the sentencing process," and "ordinarily we would expect a sentence within the Guidelines range to be reasonable," and (5) the challenging party bears the burden of showing that the sentence is unreasonable.

B. Procedural Reasonableness

United States v. Bohannon, 476 F.3d 1246 (11th Cir.), *cert. denied,* 127 S.Ct. 2953 (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. Brown, 526 F.3d 691 (11th Cir. 2008). The court held that, in imposing a reasonable sentence, the district court need only acknowledge that it considered the § 3553(a) factors. It need not discuss each factor. Therefore, the court's failure to discuss the mitigating factors raised by the defendant did not mean that the court erroneously ignored or failed to consider them.

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 calculate correctly the guideline range.

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. Vazquez, __F.3d __, 2009 WL 331014 (11th Cir. 2009). The court upheld a sentence imposed pursuant to the career offender guideline against a claim that the district court procedurally erred by refusing to mitigate the defendant's sentence based on its disagreement with that guideline. The court referred to its earlier decision in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), *overruled on other grounds by Kimbrough v. United States*, 128 S. Ct. 558 (2007), where it had held that the district court impermissibly ignored Congress's policy of targeting recidivist drug offenders for more severe punishment when it sentenced the defendant based on its disagreement with section 4B1.1. The court rejected the defendant's claim in this case that *Williams* was no longer binding in light of *Kimbrough*, finding that *Kimbrough* actually supported the career offender portion of the decision in *Williams* because the Supreme Court had distinguished the guidelines' crack/powder ratio from §4B1.1 by noting that Congress did not explicitly direct the Commission to adopt the crack/powder ratio, whereas it specifically required the Commission to set guidelines sentences for serious recidivist offenders "at or near" the statutory maximum. The court adopted the reasoning of other circuits and also relied on its earlier decision, *United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008), holding that *Kimbrough* did not overrule prior circuit precedent prohibiting courts from considering sentence disparities cased by "fast-track" programs.

C. Substantive Reasonableness

United States v. Amedeo, 487 F.3d 823 (11th Cir.), *cert. denied*, 128 S. Ct. 671 (2007). The court upheld as reasonable an upward variance to 120 months' 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 defendant's claim that the sentencing court could not base the variance on factors it had already considered in imposing enhancements to the defendant's offense level under the guidelines, such as his abuse of trust in the attorney-client relationship under §3B1.3.

United States v. Anderson, 267 F. App'x 847 (11th Cir. 2008). The court held that it was proper for the sentencing court to consider factors such as the defendant's prompt payment of restitution and civil settlement with the SEC prior to learning of the criminal case, and a "genuine intent to make amends," so long as the justification for the variance is "sufficiently compelling" to support the degree of variance. In this case, where the downward variance was 18 months (from 18-24 months to probation), such factors were sufficient.

United States v. Clay, 483 F.3d 739 (11th Cir. 2007). The court upheld a variance of 60 months in a drug case on the basis of evidence of the defendant's extraordinary post-offense rehabilitation. The court determined that the sentencing judge had properly engaged in "objective risk assessment" in considering the § 3553(a) factors and calculating the defendant's risk of recidivism.

United States v. Crisp, 454 F.3d 1285 (11th Cir. 2006). The court vacated a sentence of 5 hours' 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 be based solely on factors pertinent to cooperation, and because the sentence 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. The guidelines range was 24 to 30 months before the substantial assistance departure and the downward variance.

United States v. Eldick, 443 F.3d 783 (11th Cir.), *cert. denied*, __U.S.__, 127 S. Ct. 671 (2006). The court clarified the distinction between a departure and a variance and affirmed the lower court's upward variance which was based on the seriousness of defendant's conduct and the breadth of harm to the victims.

United States v. Garcia, 284 F. App'x 719 (11th Cir. 2008). An upward variance from a range of 37-46 months to 60 months' imprisonment 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 defendant's arguments, and had a reasoned basis for the decision. The court's determination was not based on a personal disagreement with the applicable guideline nor on the court's personal views about illegal immigration; rather the sentence reflected the court's focus on respect for the law and deterrence under § 3553(a). *See also United States v. Perez*, 282 F. App'x 747 (11th Cir. 2008) (an upward variance to 84 months from a range of 36 months (the mandatory minimum), was reasonable in an alien smuggling case where the court had a reasoned basis for decision, grounded in the § 3553(a) factors).

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 "the district court gave specific, valid reasons" for imposing a below-guidelines sentence, including the defendant's age, minimal criminal history, and medical condition, all of which related to his "history and characteristics" under 18 U.S.C. § 3553(a)(1).

United States v. Lorenzo, 471 F.3d 1219 (11th Cir. 2006). The court held that a sentence imposed on a *Booker* remand that was based on post-sentence behavior did not comport with the requirements of section 3553(a). In so holding, the court rejected the defendant's argument that his post-sentencing behavior was properly considered under section 3553(a)(1) as part of his "history and characteristics." It held that considering post-sentence behavior contravened section 3553(a)(6) because it would create sentencing disparity between those defendants who were re-

sentenced and those who were not. It also held that considering such behavior would contravene section 3553(a)(5)(A), which requires consideration of Commission policy statements, in that §5K2.19 disallows departures based on post-sentence behavior.

United States v. Martin, 455 F.3d 1227 (11th Cir. 2006). The court held that a §5K1.1 departure to 7 days' imprisonment from a range of 108 to 135 months in a massive white collar fraud case was substantively unreasonable ("Martin's cooperation, while commendable and extremely valuable, is not a get-out-of-jail free card"), 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 "shockingly short," 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 and afford adequate deterrence, noting that Congress viewed deterrence as particularly important in the area of white collar crime.

United States v. McBride, 511 F.3d 1293 (11th Cir. 2007). The court held that a sentence of 84 months' imprisonment and 10 years of supervised release was not outside the range of reasonable sentences in a case where the defendant was convicted of distributing of child pornography, the offense involved 981 images and 45 videos, the guidelines range was 151-188 months, the statutory minimum was 5 years' imprisonment, and §5D1.2(b)(2) recommended the statutory maximum term of supervised release of life. The district court had discussed a number of the § 3553(a) factors, including the goal of protecting the public, and had found the defendant's history of abuse and abandonment to be one of the worst ever seen by the court. Unlike other sentences found unreasonable by the Eleventh Circuit, this one involved significant time in prison and a lengthy period of supervised release.

United States v. McVay, 447 F.3d 1348 (11th Cir. 2006). The court vacated a 60-month probationary sentence 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 to a range of 0 to 6 months.

United States v. Queen, 159 F. App'x 81 (11th Cir. 2005). "While, under *Booker*, the court could have taken [the appellant's] state custody into consideration, it chose not to do so, and the resulting sentence was not unreasonable solely because it failed to credit that time."

United States v. Turner, 474 F.3d 1265 (11th Cir. 2007), *cert. denied,* 128 S.Ct. 867 (2008). The court affirmed as reasonable an upward variance to 240 months' 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 defendant discussing the murder of federal agents with a coconspirator and her lack of remorse.

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 drivers' licenses to illegal immigrants endangered national security.

United States v. Shaw, __F.3d__, 2009 WL 510323 (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 of imprisonment to the statutory maximum sentence of 120 months, based on the egregiousness of the defendant's prior record which was described by the Eleventh Circuit as "long enough to require extra postage." The defendant argued that the court's 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 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 court also rejected the defendant's argument that the court relied too heavily on his recidivism, finding sufficient evidence in the record to indicate the court's reliance on other § 3553(a) factors.

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006). The court upheld as reasonable a downward variance from the career offender guideline (188 -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. 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 of the § 3553(a) factors, 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 and at sentencing the court discussed several of the § 3553(a) factors.

II. Departures

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*.

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*.

III. Specific Factors

A. Unwarranted Disparities - Fast Track

United States v. Castro, 455 F.3d 1249 (11th Cir. 2006). The court rejected the defendant's 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: "[a]ny 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 defendant's] 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." (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 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 "greater than necessary" to achieve purposes of sentencing solely because similarly-situated defendants in fast-track districts are eligible to receive lesser sentences).

United States v. Vega-Castillo, 540 F.3d 1235 (11th Cir. 2008). The court held that *Kimbrough v. United States,* __U.S.__, 128 S. Ct. 558 (2007), 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 court's 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 Commission's exercise of its characteristic institutional role.

B. Unwarranted Disparities - Co-defendants

United States v. Edinson, 209 F. App'x 947 (11th Cir. 2006).The court rejected the defendant's 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.

United States v. Garza, 220 F. App'x 924 (11th Cir.), *cert. denied*, 128 S. Ct. 167 (2007). Defendant's claim of unreasonableness based on co-defendant disparity was rejected because co-defendants, who pled guilty and cooperated with government, were not similarly situated to defendant.

United States v. Williams, 526 F.3d 1312 (11th Cir. 2008). The court rejected the

defendants' 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) ("Disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal").

IV. Procedural Issues

A. Sentencing Procedure Generally

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.

United States v. Brehm, 442 F.3d 1291 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 457 (2007). The court rejected the appellant's argument that "*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," and explained that the district court cannot ignore mandatory minimums because "*Booker* does not render application of individual guideline provisions advisory [and] because the district court remains obligated correctly to calculate the [g]uidelines range pursuant to 18 U.S.C. § 3553(f)(1)."

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005). The court held that by waiving any objections to the factual statements about his relevant conduct in the presentence report, the defendant thereby admitted those facts. *See also United States v. Gibson*, 434 F.3d 1234 (11th Cir.) (holding that the defendant admitted all of the facts in the PSR by failing to object to the report), *cert. denied*, 547 U.S. 1214 (2006); *United States v. Wade,* 458 F.3d 1273 (11th Cir. 2006) ("It is the law of the circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes ").

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. 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 defendant's admissions.

United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 615 (2007). 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, 1347-48 (11th Cir. 2006). The court relied on well-settled circuit precedent holding that "[r]elevant conduct of which a defendant was acquitted nonetheless may be taken into account at sentencing for the offense of conviction, as long as the government proves the acquitted conduct relied upon by a

preponderance of the evidence" (*quoting United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997)). The court further relied on the Supreme Court's pre-*Booker* decision upholding the use of acquitted conduct at sentencing, *United States v. Watts*, 519 U.S. 148, 154, 117 S. Ct. 633, 636 (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: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

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

United States v. Hill, 171 F. App'x 815 (11th Cir. 2006). "Post-*Booker*, we continue to review a district court's factual determinations for clear error."

United States v. Irizarry, 458 F.3d 1208 (11th Cir. 2006), aff'd, *Irizarry v. United States*, 128 S.Ct. 2198 (2008). The Supreme Court held that Rule 32(h) does not apply to variances [based on the district court's consideration of the § 3553(a) factors]. The due process concerns that motivated the Court in *Burns v. United States*, 501 U.S. 129, 111 S. Ct. 2182 (1991), to require notice when the guidelines were mandatory are not present under an advisory guidelines system. Rule 32(h), by its terms, applies only to departures and a "'[d]eparture' is a term of art under the Guidelines that refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.

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. Stevenson, 162 F. App'x 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 defendant's 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. 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.

B. Ex Post Facto

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. *See also United States v. Brown*, 526 F.3d 691 (11th Cir. 2008)(applying *Duncan* to reject the defendant's claim that retroactive application of a recent decision holding that 18 U.S.C. § 2422(b) (enticing a minor to engage in criminal activity) is a "crime of violence" for purposes of the career offender guideline violated his due process/*ex post facto* rights.

V. Plain Error

United States v. Curtis, 400 F.3d 1334 (11th Cir. 2005). The court determined that the defendant did not satisfy the third prong of the plain error test when the district court sentenced him to the maximum term of imprisonment permitted by the relevant guideline; the district court's action was inconsistent with any suggestion that it might have imposed a lesser sentence under an advisory system.

United States v. Ochoa-Garcia, 2007 WL 3120315 (11th Cir. Oct. 26, 2007). "Because 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." 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. 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.

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 defendant's criminal history appropriately, sentenced the defendant to the lowest possible sentence it could under the guidelines.

United States v. Sims, 161 F. App'x 849 (11th Cir. 2006). The court found that the appellant demonstrated plain error when the "district 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."

VI. Harmless Error

United States v. Cain, 433 F.3d 1345 (11th Cir. 2005). "Although 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 court's 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."

United States v. Dean, 517 F.3d 1224 (11th Cir. 2008). 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. 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 "unfettered discretion," only the discretion to reduce the sentence based on the defendant's substantial assistance.

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.

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). "The 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 defendant's favor ...."

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. Munoz, 430 F.3d 1357 (11th Cir. 2005). "[A] defendant may preserve a constitutional *Booker* objection in a number of ways, and need not object explicitly on constitutional or Sixth Amendment grounds. We will consider a defendant's *Booker* objection

on appeal where: '(1) the defendant's objection at trial invoked *Booker*, *Blakely*, or their direct predecessors; (2) the defendant objected that a fact relevant to a sentencing enhancement 'should go to the jury;' or (3) the defendant argued that a fact relevant to a sentencing enhancement must be proved beyond a reasonable doubt.'" (Citations omitted).

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 months imprisonment, but stated that if the guidelines had been declared unconstitutional, it would have imposed a sentence of six months.

VII. Prior Convictions

United States v. Brown, 526 F.3d 691 (11th Cir. 2008). The court rejected the defendant's claim that it was error under *Shepard v. United States*, 544 U.S. 13 (2005), to rely on his Ohio burglary convictions to enhance his sentence under the career offender guideline because the uncertified Ohio docket sheets obtained from the county clerk's website, relied on by the government, were not records of "conclusive significance." The court clarified that in determining the *fact* of a prior conviction, a court may consider any information, including reliable hearsay, without running afoul of the Sixth Amendment. If the statute under which the defendant was convicted is ambiguous, then, in applying the *Taylor* categorical approach *(Taylor v. United States*, 495 U.S. 575 (1990)) to determine whether the conviction constitutes a "crime of violence" under §4B1.2, *Shepard* limits the types of documents that may be relied upon. In *Brown*, there was no question that the defendant's prior convictions for aggravated burglary were "crimes of violence;" the only question was whether the government had adequately proven that he had in fact been convicted of such crimes. As to that question, *Shepard* did not control. The court relied on its earlier decision in *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005), holding that *"Shepard's* evidentiary restrictions are non-constitutional and apply only to the second stage of the sentencing court's determination of whether a prior offense constitutes a predicate offense for the imposition of the career offender enhancement."

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. Glover, 431 F.3d 744 (11th Cir. 2005). Whether a prior conviction is a crime of violence is a question of law for the court to decide.

United States v. Greer, 440 F.3d 1267 (11th Cir. 2006). "[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."

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005). The court reaffirmed the continuing validity of *Almendarez-Torres* and held that "because the prior-conviction exception remains undisturbed after *Booker*, a district court does not err by relying on prior convictions to enhance a defendant's sentence." *Accord United States v. Steed*, __F.3d__, 2008 WL 4831413 (11th Cir. Nov. 10, 2008).

United States v. Gibson, 434 F.3d 1234 (11th Cir.), *cert. denied*, 547 U.S. 1214 (2006). The court held that whether "prior 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." The court also held that the appellant admitted all of the facts in the PSR by failing to object to the report.

VIII. Waiver of Right to Appeal Sentence

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

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: 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. 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 "statutory maximum" 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 defendant's 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 defendant's appeal waiver. *See also United States v. Frye*, 402 F.3d 1123 (11th Cir. 2005) (Knowing and voluntary appeal waiver contained in the defendant's plea agreement barred the defendant's appeal from his sentence, challenging the district court's enhancement of his sentence using mandatory sentencing guidelines).

IX. 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.

X. 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 "plainly unreasonable" 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, 1318 (11th Cir. 2005). "*Booker* does not apply to revocation hearings because the supervised release provisions have always been advisory."

XI. Restitution

United States v. Williams, 445 F.3d 1302 (11th Cir. 2006). The court determined that *Booker* does not apply to restitution orders because such orders are authorized by the MVRA and explained that because the statute does not set an upper limit on the amount of restitution, a restitution order cannot be said to exceed the maximum provided by a penalty statute.

CHAPTER ONE: *Authority and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). Contrary to the defendant's 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. 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.

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 "did not charge a civil rights violation or given any indication that a civil rights violation was implicated."

United States v. Lowe, 261 F. App'x 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 which charged 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. (This commentary is currently codified in §2B1.1(c)(3)). The defendant's conduct in this case "more closely resembled a fraud achieved through bribery than a straight fraud" (citation omitted).

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. "There is no provision in the guidelines for borrowing base offense levels from other offense guidelines." Moreover, the concept of relevant conduct does not come into play until the correct offense guideline has been selected.

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

United States v. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court reversed the district court's 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) in that 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 Court of Appeals focused on the background commentary stating that §1B1.3 is designed to take account of "a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing," 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. 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. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. App'x 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 defendant's role in each was to locate a supplier for anhydrous ammonia and to cook the methamphetamine. The offenses occurred within four or five months of one another. The court held that the consistency in the type of drug, the defendant's 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 defendant's 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 "similarity, regularity and temporal proximity" between the offense of conviction and uncharged conduct).

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 defendant's sentence because "a verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard"—a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002). The defendant challenged a four-

level enhancement under §2G2.2(b)(3). The district court applied the enhancement because the defendant possessed sadistic images and he transmitted different child pornography for which he was convicted. Although the sadistic images were not transmitted, the four-level enhancement would apply pursuant to §1B1.3(a)(1), which provides, "Relevant conduct" includes "all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction . . . ," as long as he possessed the sadistic images at the same time he transmitted the other child pornography.

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 defendant's 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 within the defendant's statutory maximum.

United States v. Hunter, 323 F.3d 1314 (11th Cir. 2003). The defendants participated in a counterfeit corporate check cashing ring that operated 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 defendant's 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 defendants' relevant conduct because it did not make particularized findings regarding the scope of each defendant's agreement.

United States v. Ismond, 993 F.2d 1498 (11th Cir. 1993). Under § 1B1.3(a)(1), "a 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 reasonable foreseeable in connection with that activity. . . . Thus, to determine a defendant's liability for the acts of others, the district court must make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. . . . Once the extent of a defendant's 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 the defendant" (citations omitted).

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-conspirator's conduct (possessing a gun) must be reasonably foreseeable by the defendant.

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) (*en banc)*. *Apprendi* is implicated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the crime of conviction and has no application to, or effect on, cases where a defendant's sentence falls at or below that maximum penalty.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002). Application of a two-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. 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 defendant's role in uncharged conduct that was part of the "same course of conduct or common scheme or plan as the offense of conviction," under §1B1.3(a)(2).

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

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

United States v. Amedeo, 487 F.3d 823 (11th Cir.), *cert. denied*, 128 S. Ct. 671.(2007). In upholding the reasonableness of the district court's upward variance, the court cited 18 U.S.C. § 3661, analogous to §1B1.4, which places "[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 purposes of imposing an appropriate sentence."

United States v. Anderson, 267 F. App'x 847 (11th Cir. 2008). The court cited §1B1.4 (court may consider without limitation any information about the defendant's background, character, and conduct), suggesting that the sentencing judge can consider the "damage" to the defendant's reputation when contemplating a sentence.

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 district court, the 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, obtained from independent sources, and information separately gleaned from co-defendants is not barred from use at sentencing under §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. Armstrong, 347 F.3d 905 (11th Cir. 2003). The district court denied the defendant's 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 defendant's 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 "clarifying amendments" 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. "In undertaking the first step, only the amended guideline is changed. All other guideline application decision made during the original sentencing remain intact" (citation omitted). 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.

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 defendant's 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 court clearly considered those factors and set forth adequate reasons for refusing to reduce the sentence, including findings that the defendant's 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. Burns, 264 F. App'x 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 "subsequent" sentencing guideline amendment.

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 defendant's 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 he considered the appropriate guideline in setting the base offense level.

United States v. Melvin, __F.3d__, 2009 WL 2366053 (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 months' 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 months' imprisonment, arguing that under *Booker* and *Kimbrough v. United States,* 128 S. Ct. 558 (2007), all guidelines were advisory. The district court agreed and reduced the defendant's sentence to 75 months' 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).

United States v. Moore, 541 F.3d 1323 (11th Cir. 2008). The court upheld the district court's denials of appellants' § 3582(c)(2) motion to reduce their sentence based on the retroactive amendments, 706 and 713, reducing base offense levels in crack cocaine cases. Defendants were career offenders and, therefore, the amendment did not have the effect of lowering their guidelines ranges. "Where a retroactively applicable guideline amendment reduces a defendant's 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."

United States v. Thomas, 545 F.3d 1300-(11th Cir. 2008). The court upheld the district court's denial of appellant's § 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), that 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 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 defendant's guidelines range due to intervening change in the guidelines that raised the base offense level that

would be used to calculate the defendant's 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 defendant's offense, his base offense level would not be lowered by the retroactive crack cocaine amendment).

United States v. Williams, 549 F.3d 1337 (11th Cir. 2008). The court reversed the district court's grant of a sentence reduction under § 3582(c)(2) where the defendant had been 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. "[A] downward departure from this mandatory minimum does not constitute a waiver or dispensing of this new "guideline range" because a §5K1.1 motion "allows for a departure from, not the removal of, a statutorily required minimum sentence" (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. Williams, __F.3d__, 2009 WL 294325 (11th Cir. 2009). The district court granted the defendant's motion under § 3582(c)(2) based on the retroactive crack cocaine amendment and reduced the defendant's 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 court's 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. 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 or not 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. Aviles, 518 F.3d 1228 (11th Cir.), *cert. denied*, 129 S. Ct. 297 (2008). A defendant who is 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 defendants' 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 Court of Appeals relied on §1B1.11, comment.(n.2) which provides that the last date of the offense of conviction, not the last date of the defendant's 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. Bailey 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. 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 circuit's 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. Nguyen, 255 F.3d 1335 (11th Cir. 2001). Pursuant to Application Note 1 to §2A1.1, the district court lawfully departed downward where the defendant did not cause death intentionally or knowingly.

§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 "most appropriate" guideline for the defendant's "offense conduct." The defendant asserted that this guideline should not apply because his victim was fictitious. The court held that whether a victim is fictitious is irrelevant to the application of a federal statute or sentencing guideline prohibiting sexual conduct with a minor because defendants who attempt to have sex with fictional victims should be treated no differently than those who prey on actual victims. Application of the provision turns simply on the illegal purpose for the defendant's interstate

travel. *See also United States v. Vance*, 494 F.3d 985 (11th Cir. 2007)(Upholding enhancement where the defendant received the enhancement for unduly influencing a minor where he selected fictitious minors from a list provided by an undercover officer who told the defendant he would procure for him the fictitious minors for sex).

§2A3.2 Criminal Sexual Abuse of a Minor Under the Age of Sixteen (Statutory Rape) or Attempt to Commit Such Acts

United States v. Root, 296 F.3d 1222 (11th Cir. 2002). The defendant was convicted of attempting to persuade a minor to engage in criminal sexual activity and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor. The two-level enhancement under §2A3.2(b)(2)(B) for unduly influencing the victim to engage in prohibited sexual conduct was applied to the defendant who engaged in Internet chat room communications with an undercover law enforcement officer posing as a 13-year-old female. On appeal, the defendant challenged application of this enhancement by arguing that the victim was not a real person. The court noted that the Sentencing Commission specifically defined the term "victim" to include an undercover law enforcement officer as instructed in §2A3.2, Application Note 1. Further, the court interpreted the phrase "unduly influenced the victim" as focusing on the actions of the defendant, regardless of whether the victim was a real person or a hypothetical person. *See also United States v. Vance*, 494 F.3d 985 (11th Cir. 2007) (upholding enhancement where the defendant received the enhancement for unduly influencing a minor where he selected fictitious minors from a list provided by an undercover officer who told the defendant he would procure for him the fictitious minors for sex).

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Douglas, 489 F.3d 1117 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1875 (2008). While the sentencing judge found that the defendant did not point his weapon at the victim, the court found that he had used it "in connection with a verbal threat to intimidate her" and thus "otherwise used" the weapon beyond mere brandishing. The enhancement for "otherwise using" under §2A4.1(b)(3) was properly applied.

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

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 for 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 two-level enhancement would have been more appropriate. The Eleventh Circuit noted that the victim's 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, the district court did not err in determining that the victim's injuries were permanent or life-threatening, and that imposition of a four-level upward adjustment under §2A4.1(b)(2)(A) was appropriate.

§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.), *cert. denied,* 2008 WL 4522338 (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 defendant's 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. 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 defendant's sentence was enhanced under §2A6.1(b)(1) based on a week-long trip he took to Washington, D.C., 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) (same).

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

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

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 two-level enhancement under §2B1.1(b)(9)(C)(i) because the defendant's offense involved "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification." The defendant claimed that §2B1.1(b)(9)(C)(i) 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 victims' 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. Accordingly, a two-level enhancement was appropriate under §2B1.1(b)(9)(C)(I).

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 appeals court reversed and noted that "there is no damage that can be done beyond total destruction." Adding the cost of repairs along with the fair market value of the damaged items unduly inflates the loss figure.

United States v. Ekpo, 266 F. App'x 830 (11th Cir.), *cert. denied*, 129 S. Ct. 200 (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. 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 court can find a defendant intended to utilize the full face value of the checks in calculating loss when the defendant "fails to present countervailing evidence" as to loss.

United States v. Gupta, 463 F.3d 1182 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 2446 (2007). 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 "no loss" 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. Lee, 427 F.3d 881 (11th Cir. 2005). A person who is reimbursed for his or her loss may still count as a "victim" 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 "suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed" and could therefore be included as "victims" 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 "actual loss" 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 "that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods."

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 "exceeds the government's preponderance of the evidence burden otherwise applicable at sentencing."

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 "reliable and specific evidence," and failure to do so will render a loss calculation invalid. In this healthcare fraud case, the district court computed the loss amount based on the total amount billed to Medicare by the defendants, without evidence showing that such claims were not medically necessary. *But see United States v. Johnson*, 270 F. App'x 839 (11th Cir. 2008) (holding that a "reasonable estimate" of loss will satisfy the evidentiary requirements).

United States v. Pelle, 263 F. App'x 833 (11th Cir. 2008). The defendant's 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 kiosks themselves had no value.

United States v. Snyder, 291 F.3d 1291 (11th Cir. 2002). When calculating the monetary value of the victims' loss under the guidelines, substitution of the defendant's 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 defendant's 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.

United States v. Willis, __F.3d__, 2009 WL 514343 (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 FEMA's 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 defendant's intent to seek additional monies with respect to the all of the applications.

§2B3.1 Robbery

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 victim's 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. App'x 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. Dudley, 102 F.3d 1184 (11th Cir. 1997). On an issue of first impression, the Eleventh Circuit affirmed the district court's two-level enhancement under §2B3.1(b)(1) for property taken from a financial institution after the defendant's conviction for bank robbery. The court held that the Sentencing Commission sought to punish robbery of financial institutions and post offices more severely because those entities kept large amounts of readily available cash and were attractive targets. The defendant failed to bear the burden of demonstrating that the guideline provision was irrational.

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 four-level sentence enhancement pursuant to §2B3.1(b)(2)(D) could be applied for "otherwise us[ing]" 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 "otherwise used" means "the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." 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), *cert. denied*, 128 S. Ct. 1875 (2008)(While the sentencing judge found that the defendant did not point his weapon at the victim, the court found that he had used it "in connection with a verbal threat to intimidate her" and thus "otherwise used" the weapon beyond mere brandishing).

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 "you have ten seconds to hand me all the money in your top drawer. I have a gun. Give me the note back now." The defendant had no gun nor did he make an express threat to shoot the teller. At sentencing, the district court applied a two-level enhancement under §2B3.1(b)(2)(F) upon finding that the note constituted a "threat of death." The Eleventh Circuit determined that the enhancement for "threat of death" 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. Naves, 252 F.3d 1166 (11th Cir. 2001). The district court did not engage in impermissible double counting in applying a two-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 therefore adding two levels was double counting. The Commission intended to apply the two-level enhancement to the base robbery offense level of 22 for convictions under § 2119, and was, in effect, creating a higher base offense level of 22 for a conviction for carjacking.

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 "I have a gun, give me $500." Prior to a 1997 amendment to §2B3.1(b)(2)(F), the robbery guideline provided a two-level enhancement when a robbery involved an express threat of death. The Eleventh Circuit followed a minority view that would not have deemed the defendant's statement in this case to constitute an express threat of death. Subsequent to the defendant's robbery, §2B3.1(b)(2)(F) was amended to delete the term "express" 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.

United States v. Vincent, 121 F.3d 1451 (11th Cir. 1997). The district court did not err in applying a three-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 manager's 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.

United States v. Wooden, 169 F.3d 674 (11th Cir. 1999). As a matter of first impression in the Eleventh Circuit, the court of appeals held that a defendant's holding a handgun about one-half inch from a robbery victim's forehead and pointing it at him constituted an "otherwise use" of the weapon, and not merely a "brandishing" thereof, warranting a six-level enhancement under §2B3.1(b)(2)(B).

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

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 two-level enhancement

under §2B3.2(b)(5)(B) for "physical restraint"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 victims' 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.

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 "otherwise used." 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 defendant's 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.

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

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 defendant's burden to prove what direct costs should be subtracted from the net improper benefit figure. *See also United States v. Valladares,* __F.3d__*,* 2008 WL 4511309 (11th Cir. Oct. 9, 2008) (holding that the improper benefit in a healthcare kickback scheme is the net value conferred).

United States v. Ferreiro, 262 F. App'x. 240 (11th Cir. 2008). If the value of the bribe in question exceeds $5,000, the defendant's 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. 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 defense 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.

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 which charged 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. (This commentary is currently codified in §2B1.1(c)(3)). The defendant's conduct in this case "more closely resembled a fraud achieved through bribery than a straight fraud" (citation omitted).

*United States v. Valladares,*__F.3d__, 2008 WL 4511309 (11th Cir. Oct. 9, 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 "fraud achieved through bribery," rather than "straight fraud" (*quoting United States v. Poirer*, 321 F.3d 1024, 1034 (11th Cir. 2003).

§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 defendant's 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 "supported by the evidence and appropriate under . . . the guidelines."

§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. Maung, 267 F.3d 1113 (11th Cir. 2001). The defendant's 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 appellate court ruled that the enhancement could not apply because the defendant was not literally in the business of "receiving and selling" stolen property. The court vacated the enhancement.

United States v. Saunders, 318 F.3d 1257 (11th Cir. 2003). The court adopted the "totality of the circumstances" test for applying the enhancement under §2B6.1(b)(2) for being "in the business of receiving and selling stolen property," as opposed to the "fence" test which merely examines the defendant's operation to determine if stolen property was bought and sold and if the stolen property transactions encouraged others to commit property crimes. The "totality of the

circumstance" test involves a case-by-case approach, weighing all the circumstances, with particular emphasis on the regularity and sophistication of a defendant's operation. Nevertheless, at a minimum, a defendant must personally receive and sell stolen property to qualify for the enhancement. Under the "totality" test, the court then examines the regularity and sophistication of the "fence's" operation.

Part C Offenses Involving Public Officials and Violations of Federal Election Campaign Laws

§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. Siegelman, __F.3d__, 2009 WL 564659 (11th Cir. 2009). In sentencing the defendant, former Governor of Alabama who was convicted of bribery, honest services fraud and obstruction of justice, the district court upwardly departed pursuant to commentary to §2C1.1 (currently in Application Note 7), which suggests that a departure may be warranted where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, resulting in a loss of public confidence in state or local government. The Court of Appeals rejected the defendant's claim that the court departed based on the defendant's statements criticizing the prosecutors and their decision to selectively prosecute him. The Court of Appeals found no abuse of discretion in the court's upward departure made in order "to pressure the integrity of the judiciary and the confidence of the people of the state of Alabama in its elected officials."

Part D Offenses Involving Drugs

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

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the appellants' 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 "personal use." The Eleventh Circuit held that where the evidence showed that the defendant was involved in a conspiracy to distribute drugs, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." 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. Beasley, 2 F.3d 1551 (11th Cir. 1993). The court reversed the district court's findings regarding the drug quantity attributable to the defendant as clearly erroneous. In a drug conspiracy case, a sentencing court must make individualized findings as to the scope of

each defendant's criminal activity and the amount of drugs reasonably foreseeable to that defendant. The court failed to make such findings.

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

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The defendants were convicted of conspiracy to possess and distribute narcotics and possession of controlled substances with intent to distribute. The defendant was assessed a two-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 if the weapon is present, unless it is clearly improbable the weapon was connected with the offense. 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. Eggersdorf, 126 F.3d 1318 (11th Cir. 1997). The district court did not err in denying the defendant's 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 the amendment to the sentencing guideline to provide that each marijuana plant would be equivalent of 100 grams, instead of one kilogram, of marijuana.

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001). The district court did not commit clear error by making a two-level enhancement, pursuant to §2D1.1(b)(1), to the drug defendant's sentence based upon possession of a firearm of a codefendant 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-conspirator's possession to apply, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (b) the possession was in furtherance of the conspiracy, (c) the defendant was a member of the conspiracy at the time of possession, and (d) the co-conspirator's possession was reasonably foreseeable by the defendant.

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. App'x 161 (2005).. The court, relying on *United States v. Chitty*, 15 F.3d 159 (11th Cir. 1994), held that, in determining a defendant's 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. Price, 272 F. App'x 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 "clearly improbable." *See also United States v. Brooks*, 270 F. App'x 847 (11th Cir. 2008) (upholding firearm enhancement where the defendant was arrested shortly after a cocaine transaction and had a firearm in his possession), *cert. denied,* 129 S. Ct.352 (2008).

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997). The district court did not err in calculating the defendant's base offense level according to the guideline for crack rather than for cocaine hydrochloride. The district court's 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 "cooking" the cocaine with the informant, and that a codefendant, in the defendant's 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*, __F.3d __. 2008 WL 4595272 (11th Cir. Oct. 16, 2008) (holding that the district court clearly erred in attributing a quantity of crack cocaine to the defendant that was based on his intending 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. 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 when the court failed 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.

United States v. Reid, 139 F.3d 1367 (11th Cir. 1998). The district court's lack of findings on the record as to why it did not apply the two-level reduction directed by §2D1.1(b)(6) (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.

United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003). The appellate court affirmed the

district court's application of a two-level captain enhancement under §2D1.1(b)(2)(B). 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 he had hired the crew and directed their operations on board. The appellate court rejected the defendant's argument that the district court's 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).

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 court's 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.

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 defendant's 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. Shields, 87 F.3d 1194 (11th Cir. 1996)(en banc). The Eleventh Circuit, sitting en banc, upheld the district court's opinion 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 18 U.S.C. § 841 and §2D1.1 contain the phrase "involve marijuana plants," 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 defendant's argument that the district court should not have applied the equivalency provision of §2D1.1 because the dead plants were not "marijuana plants" within the meaning of the guidelines. An interpretation of

§2D1.1 which 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 defendant's 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. Smith, 127 F.3d 1388 (11th Cir. 1997). The district court did not err in enhancing the defendant's 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.

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. Zapata, 139 F.3d 1355 (11th Cir. 1998). The district court erred in "rounding up" its drug quantity calculations for purposes of determining the defendant's 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. Although 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. Because the rounding up was not based on any legal or factual support, the sentence was vacated and remanded for resentencing.

§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 defendant's 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 section 860 is a substantive criminal offense that must be charged, not a mere sentence enhancer for certain classes of more general drug offenses. The defendant's 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 defendant's 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[1]

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.

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 defendant embezzled funds through several fraudulent loans. The district court also erred in departing downward on the basis of "single act of aberrant behavior." The defendant's conduct was clearly not a single, "spontaneous and thoughtless act[,] rather than one which was the result of substantial planning." Whether "society has an interest" in incarcerating a particular defendant is a matter addressed by the guidelines generally, and is irrelevant to the question whether a particular defendant's conduct was in fact "aberrant" within the meaning of Chapter One, Part A.

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 defendant's errors and omissions insurer. The court of appeals 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. 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.

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

[1] Guideline deleted by consolidation with §2B1.1.

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. 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 induct a minor to engage in a prohibited sex act. The Eleventh Circuit upheld both enhancements. Reasoning that the first is directed at the defendant's intent, rather than any harm to an actual victim, the court held that the enchantment 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 "used" a computer to communicate with an undercover officer who he believed would procure children for sex).

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) 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 court should have applied the enhancement in §2G1.1(b)(1) for an offense involving prostitution, rather than the cross reference. Agreeing that the defendants' 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.

§2G1.3 **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**

United States v. Bohannon, 476 F.3d 1246 (11th Cir.), *cert. denied*, __U.S.__, 127 S. Ct. 2953 (2007). The defendant was convicted of violating 18 U.S.C. § 2422(b), and the applicable

guideline, §2G1.3, contains a cross-reference, directing that "[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." §2G1.3(c)(1). The court upheld the district court's application of the cross-reference, noting that it "is to be construed broadly," *see* §2G1.3, comment.(n.5(A)), and also noting that the term "offense" 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 court's finding that a preponderance of the evidence established that the defendant had the intent 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 **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**

United States v. Bohannon, 476 F.3d 1246 (11th Cir.), cert. denied, __U.S.__, 127 S. Ct. 2953 (2007). The sentencing court properly enhanced the defendant's 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 victim's age in a sting operation as age 15, the enhancement constituted impermissible "sentencing manipulation." The commentary expressly defines the term "minor" as including an undercover law enforcement officer representing to the participant that the officer had not attained the age of 18. §2G2.1, comment.(n.1). 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 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

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 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 four-level enhancement under §2G2.2(b)(3) based upon pornographic materials that portrayed sadistic conduct, because the defendant possessed photographs depicting the "subjection of a young child to a sexual act that would be painful." Finally, the five-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.

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 four-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 four-level enhancement was warranted under that subsection.

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 the 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, resulting in a higher sentence. The Eleventh Circuit held that when a district court applied §2G3.1(c)(1)'s 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 "received" the pornography with intent to traffic, and therefore to consider whether §2G2.2 or §2G2.4 applied.

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 "sadistic materials" at the same time he transmitted child pornography. Despite this, the sentencing judge increased the defendant's sentence by four levels pursuant to §2G2.2(b), which calls for a four level increase if "the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence." The court held that imposing a sentence enhancement without a supporting factual basis constitutes plain error and remanded for resentencing.

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

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.

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

United States v. Bender, 290 F.3d 1279 (11th Cir. 2002). If a defendant is more than a "mere possessor" of child pornography, has admitted that he sent and received child pornography, then it is appropriate to sentence the defendant under §2G2.2 rather than §2G2.4.

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 "items" under §2G2.4 providing for a two-level enhancement if the child pornography offense involved 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 "item" 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.

United States v. Lebovitz, 401 F.3d 1263 (11th Cir. 2005). The district court enhanced the defendant's sentence because he possessed large quantities of child pornography, §§2G2.4(b)(2) & (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 in two ways 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 "[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. 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 "causing" as used in §2G2.4(c)(1) "does not require a defendant to have physical contact

[2] Deleted by consolidation with §2G2.2

with or personally photograph the victim . . . ." 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 defendant's coaxing directly resulted in the victim photographing herself engaging in sexually explicit conduct.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

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 (*citing United States v. McQueen*, 86 F.3d 180 (11th Cir. 1996). The use of the cross-reference provides a measure or point of reference of the severity of offenses involving the administration of justice.

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 government's investigation or prosecution of the underlying offense.

§2J1.7 Commission of Offense While on Release[3]

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. Section 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his or her guilty plea.

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 three-level enhancement if the defendant commits a federal offense while on release. "18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act."

Part K Offenses Involving Public Safety

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

United States v. Adams, 329 F.3d 802 (11th Cir. 2003). The district court correctly applied a two-level enhancement to the defendant's sentence pursuant to §2K2.1(b)(4). On appeal, the

[3] This guideline was deleted and replaced by §3C1.3 effective November 1, 2006.

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 two-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 defendant's base offense level was not determined under subsection (a)(7). The court adopted the same reasoning as its sister circuits and held that the district court correctly applied the two-level enhancement.

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-conspirator's possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a "drug rip-off," the possession of the firearm could be imputed to the defendant.

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

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 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 "conviction" for calculating the defendant's base offense level under the guidelines.

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 four-level increase for possession of the firearm in connection with another felony offense. The district court also applied a three-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.

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 defendant's 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. 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 for the defendant 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 "prior conviction that receives any points under §4A1.1 (Criminal History Category)." Relying on *United States v. Walker*, 912 F.2d 1365 (11th Cir. 1990), the court concluded that the defendant's 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. Owens, 447 F.3d 1345 (11th Cir. 2006). The court determined that a prior felony conviction for possession of a unregistered firearm is a "crime of violence" that establishes an enhancement under 2K2.1(a)(4). The court was unmoved by the defendant's argument that mere possession of a firearm is not a "crime of violence" and joined with other circuit courts in noting that there was "a virtual inevitability that such possession will result in violence."

United States v. Rhind, 289 F.3d 690 (11th Cir. 2002). The defendants challenged a four-level enhancement under §2K2.1(b)(5) for possession of firearms, arguing that sufficient evidence failed to demonstrate that they possessed the firearms "in connection with" the underlying felony offense. The court interpreted "in connection with" 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.[4]

United States v. Simmons, 368 F.3d 1335 (11th Cir. 2004). The sentencing judge erred when he based his departure on §4A1.3 since a defendant sentenced under §2K2.4 shall not have his sentences enhanced by chapter 3 or chapter 4 of the guidelines. The court noted that Application Note 3 under §2K2.4 clearly states that chapters 3 and 4 do not apply for sentences under §2K2.4.

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 defendant's 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 under the ban. The appellate court held that the statutory exemption from prosecution for possession of semiautomatic assault weapons manufactured before enactment of 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. Williams, 431 F.3d 767 (11th Cir. 2005). The defendant argued that the enhancement under §2K2.1(c)(1) for the use of "any firearm" 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 "other" offense used to enhance under §2K2.1(c)(1). The court adopted the rule in the Eighth and Tenth Circuits that "any firearm truly means any firearm" 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 "relevant conduct" found in §1B1.3 when applying the enhancement at §2K2.1(c) for the use of a firearm "in connection with the commission of another offense."

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996). The appellate court affirmed the district court's calculation of the defendant's 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

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[4] In 2006, the Commission amended §2K2.1(b)(5) 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* Amendment 691, USSG App. C.

Procedures Act ("APA"). The appellate court disagreed, and held that "Federal courts do not have authority to review the Commission's 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."

United States v. Young, 261 F. App'x 237 (11th Cir. 2008). It is not an *ex post facto* violation to apply guidelines after an amendment where 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.

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

United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998). The district court did not err in denying Bazemore's 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 Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), 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 court's finding that Bazemore had aided and abetted his codefendant in "carrying" the weapon, and that he was therefore liable for the crime and his plea was properly accepted.

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) four-level enhancement for possession of a firearm in connection with another felony offense to defendant's 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 defendant's sentence because the §2K2.1(b)(5) enhancement applied to defendant's section 922(g) conviction and defendant's 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 five-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, and carjacking convictions of one defendant based on the fact that a codefendant brandished or possessed a weapon.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Aguilar-Ortiz, 450 F.3d 1271 (11th Cir. 2006). In a matter of first impression, the Court of Appeals 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 may be applicable to 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. 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 defendant's sentence was calculated did not provide it with authority to depart downward.

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 "conviction" 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 court's application of the enhancement.

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 section 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. 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. Christopher, 239 F.3d 1191 (11th Cir. 2001). The district court did not err in finding that the defendant's state conviction for shoplifting was an "aggravated felony" 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 "aggravated felony" includes certain misdemeanants who receive a sentence of one year.

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 sustaining an aggravated felony. The Eleventh Circuit found that the defendant's prior state conviction for menacing qualified as an "aggravated felony" 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. 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 defendant's sentence because his deportation occurred after the felony conviction for a "crime of violence." 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 "crime of violence." Because the Sentencing Commission included "burglary of a dwelling" in Application Note 1(B)(ii)(II)'s list of offenses, despite the fact that burglary, or at least "generic" 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 "crime of violence" under §2L1.2(b)(1)(A)(ii).

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 "crime of violence" under §2L1.2(b)(1)(A)(ii) but which does not constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43) because the defendant's sentence for that offense was less than one year of imprisonment. The Eleventh Circuit rejected the defendant's 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 defendant's, *see* §2L1.2, comment.(n.7), uses permissive, rather than mandatory, language.

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000). The district court enhanced the defendant's 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 years' probation. The circuit court stated that "aggravated felony" 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 "aggravated felony" under §2L1.2.

United States v. Lozano, 138 F.3d 915 (11th Cir. 1998). The defendant had been convicted for 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 §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.

United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007). The court determined that a violation of Florida Stat. § 784.045(1)(b), for aggravated battery on a pregnant woman was a "crime of violence" for the purposes of enhancement under §2L1.2(b)(1).

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 "aggravated felony" 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. 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 "prior crime of violence" unambiguously includes the burglary of a dwelling. Accordingly, either prior felony conviction supported the district court's imposition of the §2L1.2(b)(1)(A) enhancement.

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 "aggravated felony" 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 "sexual" in "sexual abuse of a minor" as found in "aggravated felony" indicates the perpetrator's intent in committing the abuse is to seek libidinal gratification and "sexual abuse of a minor" 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 "aggravated felony" under §2L1.2.

United States v. Phillips, 413 F.3d 1288 (11th Cir. 2005), *cert. denied*, 547 U.S. 1030 (2006). 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 "an 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," (§2L1.2, comment. (n.1(B)(iv))) and further states that "prior convictions of offenses counted under subsection (b)(1) include the offenses of . . . *attempting*, to commit such offenses." §2L1.2, comment. (n.5) (Emphasis added).

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 defendant's 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 "crime of violence" 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 "crime of violence." 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.

§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. 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 defendant's sentence because §2L2.1, involving counterfeit identification documents, more aptly characterized the offense conduct. The defendant's 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.

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 four-level increase if 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. 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 "criminalize conduct necessarily committed in connection with the admission or exclusion of aliens." The court thus upheld the enhancement.

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 "if top secret information was gathered or transmitted," instead of a base offense level of 37 which is appropriate "otherwise." 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 seven-level reduction of the base offense level if the defendant "escaped from a non-secure custody and returned voluntarily within 96 hours." 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 defendant's 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 four-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 defendant's 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 one-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 one-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 "non-starter." *Id.* at 1144-45. 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 "did not err in including in the volume of commerce affected all sales of the affected products between October 24, 1992, and December 31, 1992, which resulted in a figure that exceeded the threshold of $400,000." *Id.*

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

United States v. De LaMata, 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 jurors' verdict on that issue; moreover, it found that the money laundering here–separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conduct–was within the heartland of §2S1.1.

United States v. Melo, 259 F. App'x 248 (11th Cir. 2007). A six level increase for

laundering funds from drug trafficking is warranted under 2S1.1(b)(1) when the defendant is "put on notice" 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. Mullens, 65 F.3d 1560 (11th Cir. 1995). The district court did not err in calculating the amount of funds involved in the defendant's money laundering scheme. The defendant pled guilty to wire fraud, mail fraud and money laundering in relation to a "Ponzi" scheme. The defendant's 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 "Ponzi" scheme. The circuit court noted that when offenses are grouped pursuant to §3D1.2, a sentencing court is "required to consider the total amount of funds that it believed was involved in the course of criminal conduct." 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 ten-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. Hunerlach, 197 F.3d 1059 (11th Cir. 1999). The defendant pled guilty to filing false tax returns for three years, and the district court enhanced his sentence four levels pursuant to §2T1.1(b)(2) because it determined the total "tax loss" to be over $3 million, including the accrued interest and penalties. Because the commentary to §2T1.1 states that "tax loss" does not include interest and penalties, the Eleventh Circuit found for purposes of determining the base offense level for willfully evading payment of tax, the loss does not include interest and penalties, and vacated the defendant's sentence.

Part X Other Offenses

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

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 three-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 the $6 million in future transactions. The Eleventh Circuit noted that the intended laundering of $6.7 million required an eight-level increase under §2S1.1(b)(2)(1). This offense level, however, had to be reduced by three levels because 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 five-level increase. In contrast, the actual laundering of §714,500 would have resulted in a

four-level increase under §2S1.1(b)(2)(E). Hence, the five-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 defendants' sentences were vacated and remanded.

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.

§2X5.1 Other Felony Offenses

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The defendant was sentenced to ten years' 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 "a felony . . . for which no guideline expressly has been promulgated," §2X5.1, nor was a guideline promulgated for conspiracy to violate section 951. Because there was not a "sufficiently analogous guideline," §2X5.1 directs that the general purposes of sentencing under § 3553 control the district court's discretion. The district court properly considered the purposes of sentencing and recognized its obligation to "impose a sentence sufficient, but not greater than necessary, to comply with" those purposes. The Court of Appeals rejected the defendant's 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 court's 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 his client who he was representing on drug charges, finding that the client's 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. "Applying this enhancement is highly fact-specific and must take into account the totality of the circumstances" (citations omitted).

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 defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case 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. 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. 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 victim's 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 in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding that the defendants' attempt to exploit the victim's 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. App'x 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 lower court's conclusion that the police announced their presence before entering the residence where the defendant was located so that the defendant knew of the victim's 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 four-level increase for possession of the firearm in connection with another felony offense under §2K2.1. The district court also applied a three-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 Restraint of Victim

United States v. Hidalgo, 197 F.3d 1108 (11th Cir. 1999). The district court did not err by enhancing the defendant's 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 Terrorism

United States v. Garey, 546 F.3d 1359 (11th Cir. 2008). The defendant's offense level was increased by 12 levels and his criminal history category was increased from category III to category VI based on the presentence report's conclusion that he had been convicted of a felony that "involved or was intended to promote a 'federal crime of terrorism.'" The commentary defines a "federal crime of terrorism" by reference to 18 U.S.C. § 2332b(g)(5). §3A1.4, comment.(n.1). The defendant's 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).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Campa, 529 F.3d 980 (11th Cir. 2008). The district court erred in applying an enhancement under §3B1.1(b) based on a finding that the defendant was a manager or supervisor, in contravention of *United States v. Glover*, 179 F.3d 1300 (11th Cir. 1999), which held that management over the assets of a conspiracy is not sufficient to qualify a defendant for an aggravating role increase under § 3B1.1. The enhancement is inapplicable in the absence of a finding that the defendant exercised control or influence over at least one other participant in the crime. The government argued that there was evidence that supported the enhancement, but the court refused to assume that the district court would have made that finding, and it remanded the case for the district court to consider whether to apply the enhancement based on findings other than the defendant's management of assets.

United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000). The district court did not err in applying a two-level enhancement for defendant's role as a supervisor when he maintained control or influence over only one individual. The Eleventh Circuit found testimony that the defendant's 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.

United States v. Mesa, 247 F.3d 1165 (11th Cir. 2001). The defendant's 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. App'x 904 (11th Cir. 2008)(holding that the defendant was more than a mere supplier. 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 "otherwise extensive" drug distribution conspiracy); *United States v. White,* 270 F. App'x 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. Phillips, 287 F.3d 1053 (11th Cir. 2002). Abundant evidence supported the two-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 "take care of the details." 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. Suarez, 313 F.3d 1287 (11th Cir. 2002). A four-level enhancement for leadership role in drug conspiracy was proper because the defendant planned and organized hiding places, ordered co-conspirators, and was responsible for overseeing the distribution of drugs.

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 defendant's role in uncharged conduct that was part of the "same course of conduct or common scheme or plan as the offense of

conviction," under §1B1.3(a)(2).

§3B1.2 Mitigating Role

United States v. Rodriguez-DeVaron, 175 F.3d 930 (11th Cir. 1999) (*en banc*). Affirming the decision of the district court in denying the defendant's request for a minor role adjustment, a majority of the *en banc* Court of Appeals for the Eleventh Circuit announced the principles for determining whether a defendant qualifies for a "mitigating 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 defendant's base offense level and as the chief determinant of the defendant's role in the offense. If the defendant's 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 defendant's 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 "most other participants" 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 defendant's role in light of the relevant conduct for which he was held responsible and measured the defendant's role against the other participants in that relevant conduct which analysis revealed the defendant's integral role in the offense); *United States v. De La Garza*, 516 F.3d 1266 (11th Cir. 2008) (holding that the defendant's role as a mechanic servicing boats for a drug smuggling operation did not qualify as a "minor role").

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

Abuse of Trust

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 defendant's abuse of trust must "significantly facilitate the commission or concealment of the offense." In this context, "offense" must be read as "offense of conviction" in order to maintain consistency with the

definition of relevant conduct in §1B1.3(a).

United States v. Britt, 388 F.3d 1369 (11th Cir. 2004). The defendant, a part-time clerk for the Social Security Administration, pled guilty to conspiracy to unlawfully process Social Security cards. The district court applied an abuse of trust increase under §3B1.3, which the defendant challenged on appeal. The appellate court upheld application of the adjustment. The record evidenced that the defendant was not a closely supervised employee with little discretion. Rather, she had discretion to accept, reject, or report for further investigation documentary evidence submitted to her in support of applications for Social Security cards, and was so loosely supervised that she was able, over a period of more than four years, to approve fraudulent Social Security card applications without detection.

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. Hall, 349 F.3d 1320 (11th Cir. 2003), *aff'd on other grounds*, 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 defendant's 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 two-level enhancement under §3B1.3.

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999). The district court did not err in enhancing the defendant's 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 Happen's

accounts. Harness used his position to illegally divert Project Happen's funds and used his position to conceal his and his codefendants' fraudulent activities.

United States v. Linville, 228 F.3d 1330 (11th Cir. 2000). The district court properly enhanced the defendant's base offense level for abuse of position of trust even though the employer who "footed the bill" 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. 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. 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 "trusted" him in the colloquial sense but argued that he did not occupy a "position of trust." 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 "position of trust" as §3B1.3 defines that term; the Government's reading would extend to virtually every employment situation because employers "trust" their employees; the guideline does not intend coverage this broad.

United States v. Louis, __F.3d__, 2009 WL 485239 (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. Morris, 286 F.3d 1291 (11th Cir. 2002). The defendant was represented 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 defendant's 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 court's sentence.

United States v. Njau, 386 F.3d 1039 (11th Cir. 2005). 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 "participant" in the Social Securities fraud scheme. The appellate court held that this finding was not clearly erroneous, and supported the district court's three-level enhancement of the defendant's base offense level, 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. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced the defendant's 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 defendant's commission of the offense, only that the position facilitated this particular defendant's commission of it.

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.

Special Skill

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 encrypton and decryption, and civil engineering. The court rejected the defendant's 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 "special skill" for a defendant who acted as the pilot in a conspiracy to import marijuana. The defendant contended that the two-level enhancement for "special skill" did not apply to a person who flies airplanes only as a hobby. The circuit court found the commentary defines "special skill" as "any skill not possessed by members of the general public" which "usually requires substantial education, training or licensing" and does not distinguish between professionals and amateurs.

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998). The district court did not err in enhancing the defendant's 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. The remote locations of the VINs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical skill. Dismantling cars–not to mention abandoning them, recovering the shells, and then putting the cars back together–involves a combination of skills not possessed by the general public.

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 defendant's 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.

§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. 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 two-level enhancement to a defendant's 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. Amedeo, 370 F.3d 1305 (11th Cir. 2004). The court adopted the reasoning of other circuits in holding that obstructive conduct occurring before a formal investigation into the offense of conviction may support a §3C1.1 enhancement if it foreseeably related to that offense.

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 two-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 defendant's objection. The appeals court stated that adopting the PSR recommendation was not enough. A factual determination was needed to determine that the defendant's 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. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 543 U.S. 1110 (2005), *opinion reinstated*, 131 F. App'x 657 (11th Cir. 2005). The district court applied an obstruction of justice enhancement, predicated upon the defendant's 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 court's findings established the defendant's willful intent to provide false testimony.

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed 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. 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 "material to an official investigation," an enhancement for obstruction of justice was warranted.

United States v. Campa, 529 F.3d 980 (11th Cir 2008). The court rejected the defendant's 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. So long as the obstructive conduct occurred during the course of the investigation, prosecution or sentencing, the enhancement is proper.

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 agent's visit, appellant 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. Singh, 291 F.3d 756 (11th Cir. 2002). The defendant was convicted of telephone fraud in which he used local and long distance service providers to allow third-parties to make foreign calls, for which he collected a fee, and then he would relocate without paying the telephone service providers. The defendant challenged a perjury-based obstruction of justice enhancement, pursuant to §3C1.1. Here, the district court made the requisite specific factual findings necessary to support the obstruction of justice enhancement. The district court determined that the defendant lied regarding material matters, and the Eleventh Circuit held that this finding was not clearly erroneous.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000). The district court properly enhanced codefendant's 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 codefendant was responsible. The circuit court found that the codefendant did not request more specific findings of fact by the district court, and it was too late to complain in circuit court. Further, the circuit court found that detailed findings were not necessary.

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 client's account in Austria. The government had previously informed the defendant that all his client's 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 client's 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 defendant's own use. The Eleventh Circuit affirmed an obstruction of justice increase in the offense level for defendant's 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. Zlatogur, 271 F.3d 1025 (11th Cir. 2002). 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 two-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.

§3C1.2 Reckless Endangerment During Flight

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.

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 defendant's 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 "recklessly create[] a substantial risk of death or serious bodily injury to another person." The defendant's conduct, not that of the pursuing officers, must recklessly create the substantial risk of death or serious bodily injury to others. Since the defendant's flight by itself cannot be said to have recklessly created this level of risk, the district court erroneously imposed the enhancement.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002). The defendant appealed the district court's 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 as eight separate sentencing guidelines groups one count of conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors since 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 defendant's 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 defendant's conspiracy count into three separate groups under §3D1.2 based on three distinct victims.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

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

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The district court's determination of acceptance of responsibility is reviewed for clear error. Its determination that a defendant is not entitled to acceptance of responsibility will not be set aside unless the facts in the record clearly establish that a defendant has accepted personal responsibility. Because the district court determined that the defendant committed perjury at his sentencing hearing and that he only admitted to a minor part of his crimes, the district court properly refused acceptance of responsibility credit.

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.

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 defendant's 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 on which he was convicted. The defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility.

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 two-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 "come clean" or faced up to the full measure of his criminal culpability and is entitled to nothing under §3E1.1.

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 contested that point, arguing that he should not receive a criminal history point for that conviction because the offense occurred much earlier and the only reason he was sentenced in 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. 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.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The district court correctly applied one criminal history point under §4A1.1 for defendant's conviction 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 "presumptively invalid" and was therefore properly considered in the sentencing proceeding. The burden was on the defendant to lay a factual foundation for collateral review on the grounds that the state conviction was presumptively invalid, which he did not do.

§4A1.2 Definitions and Instructions for Criminal History

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 is a "guilty plea" within the meaning of §4A1.2(a)(4) of the guidelines.

Castillo v. United States, 200 F.3d 735 (11th Cir. 2000). The district court correctly refused to recalculate the defendant's 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 court's reversal of the defendant's conviction was not based on his innocence. Therefore, the defendant's prior conviction fell under the section of the guideline which states that convictions set aside "for reasons unrelated to innocence or errors of law" are to be counted.

United States v. Gass, 109 F.3d 677 (11th Cir. 1997). The district court relied on the defendant's prior juvenile conviction and sentence to increase the defendant's 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 and "expunged" the convictions pursuant to §4A1.2(j). The circuit court rejected the defendant's 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)'s "set aside" provision was synonymous with §4A1.2(j)'s "expungement" reference.

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. 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 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 defendant's offenses were not related for purposes of criminal history calculation.

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998). The district court erred in counting the defendant's 1986 six-month sentence to a community treatment center as a "sentence of imprisonment" 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. Shazier, 179 F.3d 1317 (11th Cir. 1999). The defendant served six months' 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 defendant's 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 "diversionary disposition" under §4A1.2(f) for which only one point should have been added to his criminal history. The Eleventh Circuit held that the "diversionary disposition" 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. 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 "separate conduct" under §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.

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

United States v. Dixon, 71 F.3d 380 (11th Cir. 1995). In an issue of first impression, the circuit court held that sentencing courts need not make step-by-step findings en route to the ultimate sentencing range 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 defendant's 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.

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 defendant's 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 defendant's contention that "similar misconduct" 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. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). In the defendant's 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 defendant's base offense level. The district court decided that while the 1988 prior conviction must be excluded from determining the criminal history category (CHC), 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 "relevant conduct" 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 "prior sentence" under §4A1.3 for purposes of a criminal history departure.

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 defendant's juvenile record to determine that upward departure was warranted.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in departing upward on the defendant's 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. Smith, 289 F.3d 696 (11th Cir. 2002). The district court relied upon an over-represented criminal history to justify a six-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 offender's criminal history category, and not on the vertical axis. The facts did not support the finding that the defendant's criminal history significantly over-represented the seriousness of the defendant's record.

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 defendant's criminal history the court must "explicitly consider" the next criminal history category up and make a determination as to whether that range is appropriate.

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 defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendant's classification as a career offender overstates the seriousness of his criminal history.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Archer, 531 F.3d 1347 (11th Cir. 2008). The court held that, in light of *Begay v. United States,* 128 S. Ct. 1581 (2008), the defendant's prior conviction for carrying a concealed firearm in violation of Florida Statute 790.01(2) was not a "crime of violence" 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 "violent felony" under 18 U.S.C. § 924(e) as "virtually identical" to the definition of "crime of violence" under §4B1.2.

United States v. Brown, 526 F.3d 691 (11th Cir. 2008). The court rejected the defendant's claim that it was error under *Shepard v. United States*, 544 U.S. 13 (2005), to rely on his Ohio burglary convictions to enhance his sentence under the career offender guideline because the uncertified Ohio docket sheets obtained from the county clerk's website, relied on by the government, were not records of "conclusive significance." The court clarified that in determining the *fact* of a prior conviction, a court may consider any information, including reliable hearsay, without running afoul of the Sixth Amendment. If the statute under which the defendant was convicted is ambiguous, then, in applying the *Taylor* categorical approach *(Taylor v. United States*, 495 U.S. 575 (1990)) to determine whether the conviction constitutes a "crime of violence" under §4B1.2, *Shepard* limits the types of documents that may be relied upon. In *Brown*, there was no question that the defendant's prior convictions for aggravated burglary were "crimes of violence;" the only question was whether the government had adequately proven that he had in fact been convicted of such crimes. As to that question, *Shepard* did not control. The court relied on its earlier decision in *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005), holding that *"Shepard's* evidentiary restrictions are non-constitutional and apply only to the second stage of the sentencing court's determination of whether a prior offense constitutes a predicate offense for the imposition of the career offender enhancement."

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 "conviction of two or more crimes charged on separate counts of one indictment or two or more incidents be consolidated for trial." The court determined that since the proper definition of "conviction" as used in §4B1.1 was governed by federal and not state law, the Georgia statute did not apply to the defendant's sentence. Further, under §4A1.2, Note 3, since the defendant's 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. Gay, 251 F.3d 950 (11th Cir. 2001). The Eleventh Circuit found that a state conviction for prior felony escape was properly treated as a crime of violence under section 4B1.2 for career offender purposes, even though the escape involved simply walking away from a non-secure facility. An escape conviction is an offense that involves conduct that presents a potential risk of physical injury to another because "even the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the escapee."

United States v. Gonsalves, 121 F.3d 1416 (11th Cir. 1997). The district court did not err in sentencing the 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. If 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 "offenses described in"–not "convictions obtained under"–those statutes.

United States v. Jackson, 199 F.3d 1279 (11th Cir. 2000). The district court did not err in finding defendant's 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 "presents a serious potential risk of physical injury to another." 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. 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. 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. Vazquez, __F.3d __, 2009 WL 331014 (11th Cir. 2009). The court upheld a sentence imposed pursuant to the career offender guideline against a claim that the district court procedurally erred by refusing to mitigate the defendant's sentence based on its disagreement with that guideline. The court referred to its earlier decision in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), *overruled on other grounds by Kimbrough v. United States*, 128 S. Ct. 558 (2007), where it had held that the district court impermissibly ignored Congress's policy of targeting recidivist drug offenders for more severe punishment when it sentenced the defendant

based on its disagreement with section 4B1.1. The court rejected the defendant's claim in this case that *Williams* was no longer binding in light of *Kimbrough*, finding that *Kimbrough* actually supported the career offender portion of the decision in *Williams* because the Supreme Court had distinguished the guidelines' crack/powder ratio from § 4B1.1 by noting that Congress did not explicitly direct the Commission to adopt the crack/powder ratio, whereas it specifically required the Commission to set guidelines sentences for serious recidivist offenders "at or near" the statutory maximum. The court adopted the reasoning of other circuits and also relied on its earlier decision, *United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008), holding that *Kimbrough* did not overrule prior circuit precedent prohibiting courts from considering sentence disparities cased by "fast-track" programs.

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 defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendant's 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 "serious drug offense[s]" 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 defendant's criminal history over the last 15 years dealt only with "small transactions for cocaine," and on that basis concluded that his criminal history category significantly over-represented the seriousness of the offense).

§4B1.2 Definitions of Terms Used in Section 4B1.1

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 "crime of violence." Section 4B1.2(a)(2) defines burglary as a crime of violence and the defendant argued that this is different from attempted burglary. The court of appeals 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.

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 "crime of violence" because it involves a risk of physical injury to others.

§4B1.4 Armed Career Criminal

McCarthy v. United States, 135 F.3d 754 (11th Cir. 1998). The district court found that the defendant's prior Florida drug convictions qualified as predicate "serious drug offenses" 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 guidelines' presumptive 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 court of appeals rejected the argument, finding that the district court properly considered the statutory maximum penalties.

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 the juvenile adjudication 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. 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. Harrison, __F.3d__, 2009 WL 395237 (11th Cir. 2009). The court held that, in light of *Begay v. United States,* 128 S. Ct. 1581 (2008) and *Chambers v. United States*, 129 S. Ct. 687 (2009), the defendant's prior conviction for fleeing or attempting to elude police, in violation of Fla. Stat. § 316.1935(2), is not a "violent felony" under the Armed Career Criminal Act . The court noted the increasing use of statistical data to aid courts in determining whether a particular offense falls within the residual clause of the statute, *i.e.*, whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another," and held that the government had not put forth any such evidence nor had its met its burden of showing that the crime at issue was "roughly similar in kind" to the other "purposeful, violent, and aggressive crimes enumerated in § 924(e)(2)(B)(ii)."

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 defendant's 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. This sentence was entirely the result of the defendant's recidivism. 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. In short, under controlling Supreme Court precedent, the court found no Eighth Amendment violation.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court set the defendant's 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 "if the defendant used or possessed the firearm . . . in connection with a crime of violence" and does not mention a conviction.

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 to be 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 "serious drug offense[s]" 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.

Part C Imprisonment

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

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 court's conclusion that the defendant did not satisfy his burden or persuasion to convince the court that he had provided truthful and complete information.

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 18 U.S.C. § 860, which necessarily includes a violation of section 841(a) or section 856. He argued that even though section 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 section 860, a defendant convicted and sentenced under this section is not eligible for application of the provision.

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, and 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 defendant's 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. Brownlee, 204 F.3d 1302 (11th Cir. 2000). The district court erred in finding that the defendant's 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 defendant's 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 defendant's final proffer was complete and truthful.

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 18 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-conspirator's 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 "safety valve" provision to the defendant because he could not satisfy the no-firearms requirement of §5C1.2. The Eleventh Circuit disagreed and held "possession" 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 defendant's accountability to his or her own actions and conduct that the defendant aided or induced. Second, if "possession" in §5C1.2 encompassed constructive possession by a co-conspirator, the safety valve provision's "induce another participant to [possess]" would be unnecessary.

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 government's assertion of dishonesty.

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 defendant's statement and that it found her disclosures incomplete and untruthful but applied the provision because "it apparently considered absence of knowledge on . . . critical points the government [wa]s interested in enough to apply the safety valve." 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. Garcia, 405 F.3d 1260 (11th Cir. 2005). The defendant sought a safety valve adjustment and submitted to debriefings before the 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 defendant's 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 defendant's 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. Orozco, 121 F.3d 628 (11th Cir. 1997). The district court did not err in sentencing the defendant to the statutory minimum without applying the safety valve. When the defendant has more than one criminal history point, the safety valve is unavailable, even though the defendant's criminal history category is Category I.

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

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

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

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 defendant's failure to object to the district court's lack of subject matter jurisdiction to order her deportation could not waive the issue, because subject matter jurisdiction is never waived.

United States v. Guzman, __F.3d__, 2009 WL 385612 (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 months' 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 tolled the term of 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 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 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 government's case during a removal hearing would have much the same effect, the imposed condition was not proper.

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997). The district court erred in requiring the defendant's deportation as a condition of supervised release. The court of appeals

held that 8 U.S.C. § 1229(a), the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), eliminated the district court's 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. 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 defendants' 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 defendant's financial resources and the defendant's 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 defendant's 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*.

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, based on the shooting of a man he allegedly shot in self-defense. 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 government's reliance on cases

holding that a sentencing court may consider acquitted conduct, stating that such cases are based on a sentencing court's powers, rather than the VWPA's scope as to authority to impose restitution.

United States v. Valladares, 544 F.3d 1257 (11th Cir. 2008). Restitution under the MVRA may be ordered for losses arising out of the defendant's relevant conduct (*citing United States v. Dickerson*, 370 F.3d 1330 (11th Cir. 2004).

§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 defendant's service of his full term of incarceration. As a result, the court of appeals could find no support for the district court's decision.

United States v. Price, 65 F.3d 903 (11th Cir. 1995). In a matter of first impression, the Eleventh Circuit held that §5E1.2, which imposes fines to pay for incarceration costs, is rationally related to the Sentencing Reform Act. The uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a rational means to assist the victims of crime collectively.

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, "[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."

§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 defendants' 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 years' imprisonment. For filming and distributing the films of that abuse, the district court sentenced the defendant to 15 years' 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 consecutively–rather than concurrently–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)

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 defendant's 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 defendant's 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 "reasons other than the nature of [his] substantial assistance." 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 government's 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. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the Government's cross-appeal, the appellate court held that the defendant's responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimer's and Parkinson's 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 court's unique "feel for the case," but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997). The district court erred in departing downward based on the defendant's civil forfeiture and his loss of his license to practice

medicine. The defendant's agreement in plea bargain not to contest the government's 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 defendant's 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 two-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. 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 defendant's 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 defendant's offense conduct did not fall outside of the heartland of typical perjury offenses.

United States v. Kapelushnik, 306 F.3d 1090 (11th Cir. 2002). The district court granted a downward departure to the defendant due to the defendants' 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. Miller, 78 F.3d 507 (11th Cir. 1996). The district court granted the defendant a seven-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 "trapped into supplying crack." 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 defendant's 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. 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 eight-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 defendant's employment history and family responsibilities were outside the heartland, and whether the defendant's motive for reentering the country was relevant to the determination to depart. First, the court noted that a sentencing court lacks the authority to treat a crime of violence as if it were not, in fact, a crime of violence. In other words, a sentencing court was 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 stated 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 defendant's employment history or family responsibilities that was so exceptional as to take this case outside the heartland. Finally, the defendant's argument that his motive for reentering the United States–supporting his family–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 defendant's 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. 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. 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. Therefore, these impermissible factors cannot combine to warrant a departure.

United States v. Stuart, 384 F.3d 1243 (11th Cir. 2004). The district court departed downward in part based upon the defendant's 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. Tomono, 143 F.3d 1401 (11th Cir. 1998). The district court erred in granting a three-level downward departure for "cultural differences." 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 considered 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 codefendant's sentence in state court would create system-wide disparities among federal sentences.

§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 defendant's 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 "substantially in excess" 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 defendant's conduct significantly disrupted the government's provision of Medicare benefits. The value of the laundered funds totaled over three million dollars. The Eleventh Circuit found the defendant's 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 26 U.S.C. § 5861 seeks to prevent the harms associated with the defendant's conduct and that the defendant's 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 defendant's conduct, and that the downward departure was inappropriate. The appellate court noted that the defendant's conduct did not fall into the "traditional" 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. 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 defendant's 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 defendant's 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 defendant's 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.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court departed downward based, in part, because it believed the defendant's judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and early treatment for an emotional or mental disorder. 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 defendant's drug addiction or mental and emotional condition made the case so extraordinary that it was outside the heartland. Moreover, §5K2.13 requires "significantly reduced" mental capacity to warrant such departure, and no such facts were in the record.

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), *cert. denied,* 128 S. Ct. 427 (2007).

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 court's rejection of a plea agreement based, in part, on the district court's 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 defendant's 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. Forbes, 888 F.2d 752 (11th Cir. 1989). The district court did not clearly err in denying defendant a minor-role reduction despite the parties' stipulation that he should receive one, citing USSG §6B1.4. *Accord United States v.* Diaz, 138 F.3d 1359, 1363 (11th Cir. 1998) (citing §6B1.4).

United States v. Strevel, 85 F.3d 501 (11th Cir.1996). The court reversed a district court's reliance on a stipulation of facts regarding the loss caused by the defendant's fraud that was contained in the parties' plea agreement, finding that such reliance, without any independent judicial determination of the loss amount, was "a clear violation of the plain language of the commentary" 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 "together with the results of the presentence investigation, and any other relevant information." §6B1.4, comment.

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 "plainly unreasonable" 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.