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Federal Sentencing Guidelines

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I. INTRODUCTION

Compared to the previous two years, the Eleventh Circuit issued relatively few published opinions relating to the United States Sentencing Guidelines ("U.S.S.G.") during 2000.[1] This decline could be the result of fewer guidelines cases being presented to the Eleventh Circuit or more guideline cases being disposed of in unpublished opinions.[2] An equally likely explanation, however, may be that the court has been inundated with cases involving the application of the landmark United States Supreme Court decision in *Apprendi v. New Jersey*.[3] Courts across the nation have been grappling with the ripple effects of the potentially far reaching applications of *Apprendi*.[4] This Article

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1. U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter "U.S.S.G."].

2. The Eleventh Circuit issues numerous unpublished decisions in criminal cases each term. However, these cases are not accessible through computer assisted legal research, such as Westlaw or Lexis.

3. 530 U.S. 466 (2000). In *Apprendi* the Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 484. This holding has been applied to numerous federal statutes, including 21 U.S.C. § 841. *See infra* Part IV.B.2.

4. From June 26, 2000 (when *Apprendi* was decided) through the end of 2000, almost 200 federal district and circuit court opinions were reported that cited *Apprendi*. Also, in

discusses some of those applications, including the effect of *Apprendi* on the guidelines in general,[5] on drug quantity calculations under U.S.S.G. § 2D1.1,[6] and on the career offender guideline.[7]

The published guidelines cases that the Eleventh Circuit considered in 2000 address the applicability of the guidelines,[8] relevant conduct calculations,[9] and the scope of resentencing based on retroactive guideline amendments.[10] The court also reviewed the guidelines applicable to various offenses, such as robbery, drugs, racketeering influenced in corrupt organizations (RICO), pornography, voter fraud, firearms, immigration, and money laundering.[11] In contrast to recent years, the cases involving the robbery guidelines[12] far outnumbered the cases involving other guideline provisions, including the drug guidelines.[13]

The court also interpreted some of the guideline adjustments, such as the defendant's role in the offense,[14] abuse of a position of trust,[15] obstruction of justice,[16] acceptance of responsibility,[17] and the safety valve.[18] Although the court only dealt with the criminal history chapter of the guidelines in a few cases, it issued some significant decisions regarding criminal history calculations[19] and the career offender enhancement.[20] The court dealt with fewer departure cases than in prior years. Nonetheless, the court followed the general trend established in recent years by affirming upward departures, reversing downward departures, and affirming district court decisions not to depart downward.[21] Additionally, the court rendered several decisions

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2000, the Supreme Court granted certiorari, vacated the decision below, and remanded 23 cases for further consideration in light of *Apprendi*. Five of these cases were from the Eleventh Circuit.

5. *See infra* Part II.
6. *See infra* Part IV.B.2.
7. U.S.S.G. § 4B1.1 (2000). *See infra* Part VI.B.
8. *See infra* Part II.
9. *See infra* Part III.A.
10. *See infra* Part III.B.
11. *See infra* Part IV.
12. U.S.S.G. §§ 2B1.1, 2B3.1 (2000). *See infra* Part IV.A.
13. U.S.S.G. § 2D1.1 (2000). *See infra* Part IV.B.
14. U.S.S.G. § 3B1.1 (2000). *See infra* Part V.A.
15. U.S.S.G. § 3B1.3 (2000). *See infra* Part V.B.
16. U.S.S.G. § 3C1.1 (2000). *See infra* Part V.C.
17. U.S.S.G. § 3E1.1 (2000). *See infra* Part V.E.
18. U.S.S.G. §§ 2D1.1(b)(6), 5C1.2 (2000). *See infra* Part VII.A.
19. U.S.S.G. §§ 4A1.1, 4A1.2 (2000). *See infra* Part IV.A.
20. U.S.S.G. § 4B1.1 (2000). *See infra* Part VI.B.
21. *See infra* Part VII.C.

relating to sentencing procedures[22] and plea agreements,[23] and guideline calculations in cases involving supervised release violations.[24]

II. APPLICABILITY OF THE GUIDELINES

Before addressing the cases in which the Eleventh Circuit applied specific guidelines, it is important to note two cases in which the Eleventh Circuit stated that the sentencing guidelines are not applicable. *United States v. Nealy*[25] involved the application of *Apprendi* in a drug case. Prior to deciding *Nealy*, the Eleventh Circuit held, in *United States v. Rogers*,[26] that "drug quantity in [21 U.S.C.] section 841(b)(1)-(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*."[27] However, in *Nealy* the court noted that the sentencing guidelines are not subject to the *Apprendi* rule.[28] Thus, the district court can consider relevant conduct to determine overall drug quantity in calculating the base offense level, even if the drug quantity involved in the relevant conduct is not pled in the indictment or proven beyond a reasonable doubt at trial.[29]

In *United States v. Chavez*,[30] the court noted that the offense of assault by striking, beating, or wounding within the territorial jurisdiction of the United States,[31] which carries a maximum penalty of six months imprisonment and a $5,000 fine, is a Class B misdemeanor.[32] The court then held that "[s]entences for Class B misdemeanors, such as the charged offense, are not subject to the Sentencing Guidelines and will not be disturbed on appeal unless 'they were imposed in violation of law (such as by exceeding statutory limits) or are plainly unreasonable.'"[33]

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22. *See infra* Part VIII.A.
23. *See infra* Part VIII.B.
24. *See infra* Parts VII.B. and IX.
25. 232 F.3d 825 (11th Cir. 2000).
26. 228 F.3d 1318 (11th Cir. 2000).
27. *Id.* at 1327. *Rogers* is discussed in more detail in connection with U.S.S.G. § 2D1.1, *infra* Part II.C.2., and the career offender enhancement, *infra* Part II.E.2.
28. 232 F.3d at 829 n.3.
29. *Id.*
30. 204 F.3d 1305, 1308-09 (11th Cir. 2000).
31. 18 U.S.C. § 113(a)(4) (1994).
32. The Eleventh Circuit held, as a matter of first impression, that the offense was a petty offense, which did not entitle defendant to a jury trial. 204 F.3d at 1310.
33. *Id.* (quoting United States v. Bichsel, 156 F.3d 1148, 1151 (11th Cir. 1998) (internal quotes omitted)).

III. CHAPTER ONE: INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

A. U.S.S.G. Section 1B1.3(a)(1)(B)—Relevant Conduct (Reasonably Foreseeable Acts of Others)

In addition to being accountable for one's own acts, U.S.S.G. section 1B1.3(a)(1)(B) holds defendants liable for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[34] As more fully discussed under the robbery guidelines section of this Article,[35] section 1B1.3(a)-(1)(B) was applied to hold a defendant liable for his accomplice's acts of carjacking and kidnapping in *United States v. Cover*.[36]

In *Cover* the district court found that the carjacking and kidnapping were reasonably foreseeable to defendant.[37] The district court reasoned that "pretty much anything that happens" when a defendant robs a bank "with firearms and with other people intending to do whatever is necessary to effect that robbery" is reasonably foreseeable to all the defendants.[38] In finding that this reasoning was "sound," the Eleventh Circuit rejected defendant's argument that his accomplice's carjacking and kidnapping were not foreseeable to him because he "had brought his car to the bank to be used as the getaway car."[39] The court explained that "[t]he fact that the co-conspirators agreed to a plan that did not involve carjacking or abduction does not preclude the district court from finding that carjacking and abduction were reasonably foreseeable if 'the original plan went awry' and the police became involved."[40] The court noted that "an act is reasonably foreseeable if it is 'a necessary or natural consequence of the unlawful agreement.'"[41]

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34. U.S.S.G. § 181.3(a)(1)(B).
35. *See infra* Part IV.A.3.
36. 199 F.3d 1270, 1274 (11th Cir. 2000).
37. *Id.* at 1274.
38. *Id.*
39. *Id.* at 1274-75.
40. *Id.* at 1275 (quoting United States v. Molina, 106 F.3d 1118, 1121-22 (2d Cir. 1997)).
41. *Id.* (quoting Pinkerton v. United States, 328 U.S. 640, 648 (1946)). *See also* United States v. Martinez, 924 F.2d 209, 210 n.1 (11th Cir. 1991).

B. U.S.S.G. Section 1B1.10—Reduction in Term of Imprisonment as a Result of Amended Guideline Range

In *United States v. Bravo*,[42] the Eleventh Circuit discussed the scope of the district court's authority in resentencing a defendant based on a retroactive sentencing guideline amendment.[43] This decision is important in light of the substantial guideline amendments that took effect in 2000.[44] In *Bravo* defendant was initially sentenced in 1993 for conspiracy to import cocaine.[45] The guidelines in effect at the time applied base offense level 40 for such offenses involving 897 kilograms of cocaine.[46] Thereafter, U.S.S.G. section 2D1.1 was amended to lower the base offense level from 40 to 38 for offenses involving more than 150 kilograms of cocaine.[47] Under U.S.S.G. section 1B1.10(c), this amendment was made retroactive. Additionally, after defendant was sentenced, Congress enacted the safety valve statute, 18 U.S.C. § 3553(f).[48] The safety valve statute was incorporated into U.S.S.G. section 5C1.2 but was not made retroactive.[49]

Based on the retroactive amendment to section 2D1.1, defendant filed a motion for a sentence adjustment pursuant to 18 U.S.C. § 3582(c)-(2).[50] Defendant also requested application of the newly enacted safety valve provision and a downward departure based on his extraordinary

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42. 203 F.3d 778 (11th Cir. 2000).

43. *Id.* at 779.

44. Sentencing guideline amendments 591 through 607 took effect November 1, 2000. *See* U.S. SENTENCING GUIDELINES MANUAL app. C (2000). Also, an "emergency" amendment, Amendment 590, took effect May 1, 2000. *Id.* These amendments affect several guideline provisions. Amendments 591, 599, and 606 are retroactive. *See* U.S.S.G. § 1B1.10(c) (2000).

45. 203 F.3d at 779.

46. *Id.* After three levels were deducted for acceptance of responsibility under U.S.S.G. § 3E1.1(a), defendant's total offense level was 37.

47. U.S.S.G. § 1201.1 (1995).

48. 18 U.S.C. § 3553(f) (1994 & Supp. 1999).

49. *See* U.S.S.G. § 1B1.10(c) (2000).

50. Section 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (1994).

medical condition that developed while he was incarcerated.[51] The district court reduced defendant's sentence based on the retroactive amendment to section 2D1.1 but found that it lacked jurisdiction to depart downward or to apply the safety valve.[52]

On appeal the Eleventh Circuit reviewed the two-part analysis that must be applied in reducing a sentence under section 3582(c)(2). "Initially, the court must recalculate the sentence under the amended guidelines, first determining a new base level by substituting the amended guideline range for the originally applied guideline range, and then using that new base level to determine what ultimate sentence it would have imposed."[53] In recalculating the guidelines, the commentary to U.S.S.G. section 1B1.10(b) only allows for the sentence to be reduced based on the amended guideline, and requires that "all other guideline application decisions [made during the original sentencing] remain unaffected."[54] The court then noted that "[t]he next step is for the court to decide whether, in its discretion, it will elect to impose the newly calculated sentence under the amended guidelines or retain the original sentence. This decision should be made in light of the factors listed in 18 U.S.C. § 3553(a)."[55] A defendant's need for medical care is

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51. 203 F.3d at 780. Defendant developed renal failure and was placed on dialysis in a prison medical center. *Id.*

52. *Id.*

53. *Id.*

54. U.S.S.G. § 1B1.10(b) cmt. n.2 (2000).

55. 203 F.3d at 781. Section 3553(a) provides:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to

one such factor, which the district court specifically considered in deciding to reduce defendant's sentence from 210 months to 168 months imprisonment.[56]

However, the Eleventh Circuit determined that the district court lacked jurisdiction to depart downward based on defendant's medical condition.[57] The court emphasized that a sentencing adjustment under section 3582(c)(2) is not a de novo resentencing.[58] Rather, other than the application of the amended guideline range, "*all* original sentencing determinations remain unchanged."[59] The only exception to this rule is that a downward departure from the original guideline range need not be reapplied to the amended guideline range because "a discretionary decision to permit a downward departure from the original guideline range 'is not a guideline application decision that remains intact when the court considers the new Guideline range.'"[60] The court declined to reach the question of whether, when resentencing a defendant under section 3582(c), the district court should also apply the safety valve statute if that statute was enacted after the original sentence.[61] The court noted that the safety valve statute only applies when the guidelines range is less than the statutory mandatory minimum.[62] Because defendant's revised sentence was greater than the statutory mandatory minimum, the safety valve statute was not applicable.[63] Additionally, the Eleventh Circuit held that section 3582(c) does not confer jurisdiction on the district court "to consider extraneous resentencing issues," such as an Eighth Amendment challenge to the sentence.[64]

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section 994(a)(3) of title 28, United States Code;
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (1994).

56. 203 F.3d at 781.

57. *Id.*

58. *Id.*

59. *Id.* (emphasis in original).

60. *Id.* at 781 n.5 (quoting United States v. Vautier, 144 F.3d 756, 761 (11th Cir. 1998)) (internal quotes omitted). Thus, in resentencing a defendant under section 3582(c), the district court need not re-impose a substantial assistance departure that had been applied at the original sentencing hearing. *Id.*

61. *Id.* at 781.

62. *Id.*

63. *Id.* at 781-82.

64. *Id.* at 782.

Instead, such a challenge must be raised in a collateral attack on the sentence under 28 U.S.C. § 2255.[65]

IV. CHAPTER TWO: OFFENSE CONDUCT

A. Part B: Robbery, Extortion, and Blackmail

1. U.S.S.G. Section 2B1.1(b)(4)(A)—More Than Minimal Planning. Under U.S.S.G. section 2B1.1(b)(4)(A), a two-level enhancement applies in robbery cases if the offense involves "more than minimal planning."[66] The commentary to U.S.S.G. section 1B1.1 explains that more than minimal planning involves "more planning than is typical for commission of the offense in a simple form."[67] More than minimal planning is present when the defendant commits "repeated acts over a period of time," except when the acts were clearly "opportune."[68] It may also be found when the defendant takes "significant affirmative steps" to conceal the offense.[69]

In *United States v. Ward*,[70] the court found that defendant's actions surrounding his two thefts warranted this enhancement.[71] Defendant planned his second theft in advance and took affirmative steps to conceal the offense.[72] Additionally, the court noted that "[a]lthough the commission of two thefts may not constitute 'repeated acts' and thereby be sufficient by itself to justify a more than minimal planning enhancement, the fact that [defendant] committed two thefts does weigh in favor of the enhancement."[73]

2. U.S.S.G. Section 2B3.1(b)(2)—Weapon Enhancements. In several cases, the Eleventh Circuit addressed enhancements that apply if a "firearm" or a "dangerous weapon" is involved in the commission of the robbery. U.S.S.G. section 2B3.1(b) provides for increasing levels of enhancements depending on the type of weapon used and the manner in which the weapon is used.[74] Under section 2B3.1(b)(2)(D), four levels

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65. *Id.*; 28 U.S.C. § 2255 (1994).
66. U.S.S.G. § 2B1.1(b)(4)(A) (2000).
67. *Id.* § 1B1.1 cmt. n.1(f).
68. *Id.*
69. *Id.*
70. 222 F.3d 909 (11th Cir. 2000).
71. *Id.* at 910.
72. *Id.*
73. *Id.* at 911.
74. Section 2B3.1(b)(2) provides:

are added if a dangerous weapon is "otherwise used," and under section 2B3.1(b)(2)(E), three levels are added if the dangerous weapon is "brandished, displayed, or possessed."[75] The four-level enhancement for otherwise using a dangerous weapon was applied in *United States v. Miller*.[76] Defendant in that case approached a bank teller, displayed two red sticks with a fuse, which "looked like a bomb," lit the fuse, asked the teller if she knew what the object was, and demanded money. When defendant was apprehended, law enforcement realized the object was inert.[77]

The Eleventh Circuit noted that the appeal presented a question of first impression for the court: "whether a four-level sentence enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(D) may be applied for 'otherwise us[ing]' an object which appeared to be a 'dangerous weapon' during the commission of an attempted robbery."[78] The court noted that the commentary to the guidelines specifically includes "an object that appeared to be a dangerous weapon" in the definition of a dangerous weapon in the context of the three-level enhancement for brandishing, displaying, or possessing a dangerous weapon.[79] The court saw no reason for a dangerous weapon to be interpreted differently for purposes of the four-level enhancement for otherwise using a dangerous weapon.[80] Thus, the court interpreted section 2B3.1(b)(2) "to treat uniformly objects appearing to be dangerous weapons as if they actually were dangerous weapons for sentence enhancement purposes, thereby maintaining the integrity of a substantive difference between section 2B3.1(b)(2)(D) and section 2B3.1(b)(2)(E)."[81] The court then concluded that defendant otherwise used a dangerous weapon when "he actually lit the fuse of the fake bomb while explicitly threatening the bank

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(A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

U.S.S.G. § 2B3.1(b)(2) (2000).

75. The definitions for these terms are found in U.S.S.G. § 1B1.1 cmt. n.1(g) ("otherwise used"), and U.S.S.G. § 1B1.1 cmt. n.1(c) ("brandished").

76. 206 F.3d 1051, 1052 (11th Cir. 2000).

77. *Id.* Because defendant did not object to the enhancement at sentencing, the Eleventh Circuit reviewed his challenge to the four-level enhancement "only for plain error to avoid manifest injustice." *Id.*

78. *Id.*

79. *Id.*; *see also* U.S.S.G. § 2B3.1(b)(2)(E) cmt. n.2.

80. 206 F.3d at 1053.

81. *Id.*

teller."[82] This conduct, much like "the cocking of a handgun," was more than mere brandishing, and constituted otherwise using the dangerous weapon under section 2B3.1(b)(2)(D).[83] Accordingly, the four-level enhancement was affirmed.[84]

In *United States v. Bates*,[85] the district court applied a three-level enhancement for possession of a dangerous weapon during the commission of a robbery.[86] Although defendant had no weapon during the robbery, the teller thought he did because he reached into the waistband area of his pants with his hand, "clearly implying and simulating the presence of a weapon."[87] The Eleventh Circuit referred to the commentary to section 2B3.1(b)(2)(E), which provides that "[w]hen an object that *appeared* to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(E)."[88] The Eleventh Circuit then noted that the "critical factor" in applying this enhancement "is whether the defendant intended the appearance of a dangerous weapon."[89] The court found that simulating possession of "what *appeared* to be a dangerous weapon" had the same potentially dangerous consequences as possession of a toy gun or an unloaded gun.[90] "If someone detects a toy gun, he may react to it with deadly force."[91] Thus, the court affirmed the imposition of the three-level enhancement "[b]ecause [defendant's] hand simulated possession of what appeared to be a dangerous weapon, and the victim teller perceived [defendant] to possess a dangerous weapon."[92]

In so ruling, the majority in *Bates* rejected defendant's argument that the two-level enhancement found in section 2B3.1(b)(2)(F) applied

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82. *Id.* at 1054.
83. *Id.*
84. *Id.*
85. 213 F.3d 1336 (11th Cir. 2000).
86. *Id.*
87. *Id.* at 1337.
88. *Id.* at 1337; U.S.S.G. § 2B3.1 cmt. n.2.
89. 213 F.3d at 1338.
90. *Id.* (emphasis in original).
91. *Id.* (citing United States v. Shores, 966 F.2d 1383, 1387 (11th Cir. 1992) ("possession of a toy gun, just as an unloaded gun, is considered possession of a dangerous weapon because of its potential to be dangerous")). *See also* United States v. Vincent, 121 F.3d 1451, 1452, 1455 (11th Cir. 1997) (section 2B3.1(b)(2)(E) enhancement applies when the "victim of a robbery was intimidated by the placing of a hidden object in her side," even though the victim did not see the object); United States v. Woods, 127 F.3d 990, 993 (11th Cir. 1997) (enhancement was based on the victim's perception that the defendant possessed a gun).
92. 213 F.3d at 1339.

because his actions constituted only a threat to the teller.[93] Defendant argued that by placing his hand in his pants, he was gesturing, as referenced in the commentary to that guideline.[94] However, the majority stated that the type of "gesturing" contemplated in section 2B3.1(b)(2)(F) "in no way simulates the possession of a dangerous weapon as required under subsection (E)."[95] One judge dissented on this point.[96] In expressing the view that section 2B3.1(b)(2)(F) applied to defendant's conduct, the dissent stated that section 2B3.1(b)(2)(E) and the cases interpreting it "require the presence of some object that can be perceived as a weapon."[97] The dissent then explained that, contrary to the majority opinion, the enhancement should be based on "an objective assessment of the evidence associated with the defendant," rather than "the subjective belief of the victim."[98]

In *United States v. Cover*,[99] the district court enhanced defendant's base offense level under U.S.S.G. section 2B3.1(b)(2)(C) for brandishing, displaying, or possessing a firearm during a robbery.[100] On appeal the government asserted that U.S.S.G. section 2B3.1(b)(2)(B) should have been applied because the firearms were "otherwise used," not merely "brandished, displayed, or possessed" during the robbery.[101] The court referred to the guideline commentary that defines "otherwise used" as "conduct [that did] not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon."[102] The commentary defines "brandished" as pointing or waiving a weapon or displaying it in a threatening manner.[103] The Eleventh Circuit found that "the use of a firearm to make an explicit or implicit threat against a specific person constitutes

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93. *Id.* at 1337.
94. *Id.* at 1339 n.1.
95. *Id.* (citing U.S.S.G. § 2B3.1 cmt. n.6).
96. *Id.* at 1340-41 (Bechtle, J., dissenting).
97. *Id.* at 1341.
98. *Id.* at 1342.
99. 199 F.3d 1270 (11th Cir. 2000).
100. *Id.* at 1272. Although defendant was also convicted and sentenced for using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), the Eleventh Circuit upheld the firearm enhancement for the robbery conviction based on the co-conspirators' possession of firearms during the robbery. *Id.* at 1278. This aspect of *Cover* and the recent guideline amendment that effectively overrules it are discussed in the section of this Article that addresses Chapter Two, Part K, and U.S.S.G. § 2K2.4 (2000). *See infra* Part VI.F.
101. 199 F.3d at 1278 (quoting U.S.S.G. §§ 2B3.1(b)(2)(B)- (C) (1999)).
102. *Id.* (quoting U.S.S.G. § 1B1.1 cmt. n.1(g) (1998)).
103. *Id.* (quoting U.S.S.G. § 1B1.1 cmt. n.1(c)). *See also* U.S.S.G. § 2B3.1 cmt. n.1 (1998) (referring to section 1B1.1 commentary in defining "otherwise used" and "brandishing").

'otherwise use' of the firearm."[104] The court then held that "the action of the unidentified co-conspirator in carjacking and abducting a motorist at gunpoint is sufficient to constitute 'otherwise use' of his firearm."[105] Thus, the five-level enhancement was reversed, and the case was remanded for application of the six-level enhancement under section 2B3.1(b)(2)(B).[106]

3. U.S.S.G. Section 2B3.1(b)(5)—Carjacking Enhancement. All three judges in *Bates* agreed that the district court properly applied an enhancement for carjacking during the commission of a robbery under U.S.S.G. section 2B3.1(b)(5).[107] Defendant argued that the guideline commentary, which does not require specific intent, is inconsistent with the carjacking statute,[108] which was amended to add specific intent as an element.[109] Thus, defendant argued that the "commentary lacks authority because it is inconsistent with the federal statute."[110]

The Eleventh Circuit found it unnecessary to resolve this conflict between the statute and the guideline for two reasons. First, the court stated that if the United States Sentencing Commission had intended the guideline definition to mirror the statute, it would have amended the guideline.[111] Second, the court noted that defendant had not been charged under the carjacking statute.[112] Rather, he was charged with bank robbery, and his sentence was enhanced for attempting a carjacking during the robbery.[113] Thus, the court decided it was irrelevant whether specific intent was required under the guideline

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104. 199 F.3d at 1278.

105. *Id.* at 1279.

106. *Id.*

107. 213 F.3d at 1339-40.

108. 18 U.S.C. § 2119 (1994 & Supp. 1999).

109. *Id.* at 1339. Based on the carjacking statute that was enacted in 1992, U.S.S.G. § 2B3.1(b)(5) cmt. n.1, defines carjacking as the "taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation." The carjacking statute was amended in 1994 by adding the language "with the intent to cause death or serious bodily harm." Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1796, 1970 (1994). The guideline definition of carjacking has not been amended to reflect the specific intent requirement of the statute. 213 F.3d at 1339.

110. 213 F.3d at 1339 (citing Stinson v. United States, 508 U.S. 36, 38 (1993) (holding "that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline")).

111. *Id.* at 1340.

112. *Id.*

113. *Id.*

"because the facts support both the guidelines definition and the statutory definition of carjacking."[114]

In *Cover* the district court enhanced defendant's sentence under U.S.S.G. sections 2B3.1(b)(4)(A) and 2B3.1(b)(5) based on the carjacking and kidnapping committed by an accomplice who escaped.[115] As discussed in the relevant conduct section of this Article,[116] the district court found that the carjacking and kidnapping were reasonably foreseeable to defendant in accordance with U.S.S.G. section 1B1.3(a)(1)-(B).[117] The Eleventh Circuit rejected defendant's argument that the carjacking and kidnapping were not reasonably foreseeable to him because he "had brought his car to the bank to be used as the getaway car."[118] The court explained that "[t]he fact that the co-conspirators agreed to a plan that did not involve carjacking or abduction does not preclude the district court from finding that carjacking and abduction were reasonably foreseeable if 'the original plan went awry' and the police became involved."[119] Thus, the enhancements were affirmed.[120]

4. U.S.S.G. Section 2B3.1(b)(7)—Amount of Loss. U.S.S.G. section 2B3.1(b)(7) applies various levels of enhancements for robbery offenses based on the amount of loss incurred by the victim. In *Cover* the court applied section 2B3.1(b)(7)(C) because it determined the amount of loss was more than $50,000 but less than $250,000.[121] The district court arrived at the amount of loss based on $12,740 retrieved from the conspirator who escaped and an estimated $100,000 that remained in the bank vault after the attempted robbery. Defendant challenged this amount of loss on two grounds.[122]

First, defendant argued that the district court erred by including money that remained in the bank vault and was not taken by the

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114. *Id.* The facts underlying the enhancement were that, after the robbery, defendant ran onto the porch of a residence, demanded the keys of the person sitting on the porch, grabbed the person by the arm, and forced him inside the house to get his car keys. When the person pulled a gun on defendant, defendant fled. *Id.* at 1337. The court found that these facts established that defendant attempted to take the person's car by force and violence or by intimidation. *Id.* at 1340.

115. 199 F.3d at 1274.

116. *See supra* Part III.A.

117. 199 F.3d at 1274.

118. *Id.* at 1275.

119. *Id.*

120. *Id.*

121. *Id.* at 1275-76.

122. *Id.*

robbers.[123] The Eleventh Circuit rejected this challenge, stating that under section 2X1.1,

> a defendant who partially completed an offense (i.e., only seized part of the money) will be held liable for the entire offense (i.e., the entire amount of money that the defendant attempted to seize) if "the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim."[124]

The Eleventh Circuit noted that the testimony showed defendant "entered the bank vault area with the two tellers who had the key and the vault's combination."[125] However, defendant left the vault area before the key was inserted into the lock or the combination was entered because the police arrived on the scene.[126] Thus, the Eleventh Circuit found that the funds remaining in the bank vault were properly included in the loss calculation because defendant "had completed all of the necessary acts to seize the funds in the bank vault and that, but for the intervention of the police, he would have successfully seized those funds."[127]

Second, defendant argued the evidence concerning how much money was in the vault was "too speculative."[128] The Eleventh Circuit relied on the guideline commentary that provides, "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."[129] Here, the bank manager testified that the minimum amount of money contained in the bank vault at the time of the robbery was $100,000.[130] This was sufficient to affirm the application of section 2B3.1(b)(7)(C).[131]

B. Part D: Drug Offenses

1. U.S.S.G. Section 2D1.1(b)(1)—Firearm Enhancement. In *United States v. Cooper*,[132] a two-level enhancement was applied, pursuant to U.S.S.G. section 2D1.1(b)(1), for possession of a firearm

123. *Id.*
124. *Id.* at 1275 (quoting U.S.S.G. § 2X1.1 cmt. n.4 (1998)).
125. *Id.* at 1276.
126. *Id.*
127. *Id.*
128. *Id.* at 1275.
129. *Id.* at 1276 (quoting U.S.S.G. § 2B1.1 cmt. n.3 (1998)).
130. *Id.*
131. *Id.*
132. 203 F.3d 1279 (11th Cir. 2000).

during a drug offense. Defendant challenged this enhancement by arguing that the government had not demonstrated the firearm belonged to him.[133] The Eleventh Circuit rejected this challenge, stating that even if the firearm belonged to the co-conspirator, it was found in a motel room over which both co-conspirators had equal dominion.[134]

Defendant also argued that the government did not prove the gun was actually connected to the drug offense.[135] However, the Eleventh Circuit noted that under the commentary to section 2D1.1, the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[136] The Eleventh Circuit stated the fact the weapon in this case was found in a motel room under packaged marijuana suggested "an active connection with the narcotics enterprise that [defendant] does not credibly rebut."[137] Thus, the Eleventh Circuit upheld the enhancement.[138]

2. U.S.S.G. Section 2D1.1(c)—Drug Quantity Calculations. For sentencing purposes in drug cases, drug quantity is the single most important factor. It significantly impacts the guidelines, as well as the statutory penalties. The statutory scheme of 21 U.S.C. § 841[139] essentially creates separate offenses for crimes involving different amounts of various drugs, each under a separate subparagraph.[140] Until the Supreme Court decided *Apprendi* on June 26, 2000, the

133. *Id.* at 1286.
134. *Id.*
135. *Id.*
136. *Id.* at 1287 (quoting U.S.S.G. § 2D1.1 cmt. n.3 (1997)).
137. *Id.*
138. *Id.*
139. 21 U.S.C. § 841 (1994 & Supp. 1999).
140. For example, the penalties for offenses involving cocaine base are as follows:

Subparagraph	Triggering Amount of Cocaine Base	Maximum Imprisonment	Mandatory Minimum	Supervised Release
§ 841(b)(1)(A)	50 grams or more	Life	10 years	5 years
§ 841(b)(1)(B)	more than 5 grams	40 years	5 years	4 years
§ 841(b)(1)(C)	anything not covered by (A) or (B)	20 years	none	3 years

Eleventh Circuit clearly held that drug quantity was a sentencing factor, not an element of the offense, even though the statutory maximum under section 841 depends on the amount of drugs involved in the offense.[141]

In *United States v. Hester*,[142] the defendant was convicted on five counts relating to the production and sale of marijuana. The district court imposed a twenty-year mandatory minimum sentence, which significantly exceeded the guideline range of imprisonment. At defendant's first sentencing hearing, the district court held him responsible for 2,924 marijuana plants. Under the version of U.S.S.G. section 2D1.1(c)(4) in effect at that time, the district court equated 1 kilogram per plant, which resulted in a guideline range of 240 to 262 months imprisonment. The statutory mandatory minimum sentence set forth in 21 U.S.C. § 841(b)(1)(A)(vii) was twenty years for more than one thousand plants, if the defendant had a prior conviction. After defendant was sentenced to 262 months imprisonment, the guideline was amended. The amendment, which applies retroactively, changed the weight calculation to one hundred grams per plant (or the actual weight of the plant if higher), regardless of the number of plants involved. Thereafter, defendant's conviction was affirmed, but his case was remanded for resentencing in light of the guideline amendment. On remand the district court noted that under the amendment, the defendant's guideline range was 108 to 135 months imprisonment, but the statutory mandatory minimum remained at twenty years imprisonment.[143]

In his second appeal, defendant challenged the imposition of the mandatory minimum sentence on two grounds. First, he asserted that the difference between the guideline range and the statutory mandatory minimum violated the Due Process and Equal Protection Clauses of the United States Constitution.[144] The court noted, "We need not determine Congress's justification for approving the Amendment; we need only examine the decision to evaluate whether it rests on a rational basis."[145] The court then determined that Congress's action in

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141. The Eleventh Circuit most recently affirmed this rule in *United States v. Hester*, 199 F.3d 1287, 1291 (11th Cir. 2000). In *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), the Eleventh Circuit overruled *Hester* to the extent that it held drug quantity was a sentencing factor, not an element of sections 841(b)(1)(A) and (B) offenses. *Id.* at 1327. Thereafter, the United States Supreme Court vacated *Hester* and remanded for further consideration in light of *Apprendi*. Hester v. United States, 121 S. Ct. 336 (2000).

142. 199 F.3d 1287 (11th Cir. 2000).

143. *Id.* at 1288-89.

144. *Id.* at 1289.

145. *Id.* at 1290.

approving the recalculation of marijuana plant weight for guidelines purposes, but not for the statutory mandatory minimum purposes, survives a rational basis review.[146] The court also noted that when the mandatory minimum exceeds the applicable guideline range, the mandatory minimum becomes the guideline sentence under U.S.S.G. section 5G1.1(b).[147] In rejecting defendant's equal protection argument, the court noted that "Congress must draw lines between classes of offenders and that those lines might appear arbitrary at the edges."[148]

In *Hester* defendant also challenged his sentence by arguing that the drug amount was an element of the offense that was not pled in the indictment or proven at trial.[149] The court rejected this argument, holding that drug amount was a sentencing factor, not an element of the offense.[150] Therefore, defendant could be sentenced to the statutory mandatory minimum under section 841(b)(1)(A).[151]

The United States Supreme Court vacated *Hester* and remanded for further consideration in light of *Apprendi*.[152] Furthermore, in *United States v. Rogers*,[153] the Eleventh Circuit overruled *Hester* to the extent it held that drug quantity is a sentencing factor, not an element of an offense charged under section 841(a).[154] The court in *Rogers* held that "drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*."[155] The court in *Rogers* then vacated defendant's sentence and remanded the case to the district court for resentencing under section 841(b)(1)(C), which applies to cases in which the indictment does not specify a quantity of drugs and the jury verdict convicts the defendant of a drug offense involving an undetermined quantity of crack cocaine.[156]

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146. *Id. See also* United States v. Marshal, 95 F.3d 700, 701 (8th Cir. 1996).

147. 199 F.3d at 1290 n.1.

148. *Id.* at 1290.

149. *Id.* at 1291.

150. *Id.* at 1291-92.

151. *Id.* at 1293.

152. Hester v. United States, 121 S. Ct. 336 (2000).

153. 228 F.3d 1318 (11th Cir. 2000).

154. *Id.* at 1328.

155. *Id.* at 1327 n.12. *Rogers* is discussed in more detail in connection with the career offender guideline U.S.S.G. § 4B1.1, *infra* Part VI.B.

156. 228 F.3d at 1329. In so doing, the court noted that the statutory maximum under section 841(b)(1)(C) was twenty years imprisonment, even though defendant had prior drug convictions. *Id.* Although section 841(b)(1)(C) allows for a thirty-year sentence of imprisonment if the defendant has a prior drug conviction, that enhancement does not automatically apply. As noted by the court in *Rogers*:

The Eleventh Circuit discussed drug quantity calculations in a different context in *United States v. Simpson*.[157] In *Simpson* the district court attributed 857.7 grams of crack cocaine to defendant in calculating his base offense level under U.S.S.G. section 2D1.1. Several sources of information were relied on to establish this total amount of drugs. On appeal defendant challenged three of the sources.[158] However, because he did not object in the district court, the Eleventh Circuit reviewed his challenge only for plain error.[159]

Defendant's first challenge concerned 600 grams of cocaine distributed in 1992. The conspiracy charged in the indictment did not begin until May 1996.[160] The Eleventh Circuit found that the 600 grams of cocaine was improperly attributed to defendant for sentencing purposes because it was the product of activity that "clearly falls outside the scope of the 1996 conspiracy for which [the defendant] was convicted."[161]

Next, defendant challenged 144 grams of cocaine attributed to him based on a witness' "vague" testimony. The witness testified that he had received quarter ounces of cocaine from defendant during an unknown period. He also could not remember how long or how frequently these distributions were made.[162] The Eleventh Circuit found that the district court erred in attributing 144 grams to defendant based on this vague and ambiguous testimony.[163] Finally, defendant challenged 28 grams of cocaine base that he allegedly distributed in late 1995, which was before the 1996 conspiracy began. The Government argued that

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> For a defendant's sentence to be enhanced under the provisions of section 841, the government must meet the requirements of 21 U.S.C. § 851. Section 851 provides that a recidivist enhancement may not be imposed for a jury conviction "unless before trial, . . . the United States attorney files an information with the court (and serves a copy of such information on the [defendant] or counsel for the [defendant]) stating in writing the previous convictions to be relied upon." We have consistently required strict compliance with the requirements of section 851.

Id. at 1328 (internal citations omitted). Thus, the *Rogers* court stated that defendant was not subject to the thirty-year sentence applicable under section 841(b)(1)(C) for defendants with a prior conviction, because his sentence was not imposed in accordance with the requirements of section 851. *Id.*

157. 228 F.3d 1294, 1300-02 (11th Cir. 2000).

158. *Id.* at 1300.

159. *Id.* at 1300-01. To establish plain error, a defendant must prove: (1) that an error occurred, (2) that the error is plain, and (3) that the error affects the defendant's substantial rights. *Id.* The courts have added a fourth criteria that requires correction of plain error only if the error "seriously affects [the] fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

160. *Id.* at 1301.

161. *Id.*

162. *Id.*

163. *Id.*

these drugs were properly considered as relevant conduct because they were sufficiently related to the conspiracy for which defendant was convicted.[164] The Eleventh Circuit noted that the uncharged conducted involved the "same parties as the charged conspiracy and was temporally connected to it."[165] Thus, the court concluded that "we cannot say the district court erred, let alone plainly erred, or that it resulted in a miscarriage of justice."[166]

Because of the district court's erroneous drug quantity calculations, the Eleventh Circuit found that defendant was entitled to a six-level reduction in his base offense level.[167] However, as discussed in connection with Chapter Five, Part K departures,[168] defendant ended up with a lengthier sentence because the court also reversed a downward departure.[169]

C. Part E: Racketeering Influenced and Corrupt Organizations Offenses

Under U.S.S.G. section 2E1.1, the base offense level for offenses involving racketeering influenced and corrupt organizations ("RICO") is the greater of either nineteen or "the offense level applicable to the underlying racketeering."[170] In *United States v. Yeager*,[171] the Eleventh Circuit addressed the proper method of applying a role enhancement in cases involving RICO offenses.[172] Rather than discussing *Yeager* under the section of this Article dealing with role enhancements,[173] it is discussed here because of its unique relevance to RICO offenses.

In *Yeager* the district court grouped the underlying racketeering activity into seven groups, one of which was drug offenses. The base offense level for the drug offenses was greater than nineteen and greater than the base offense level for the other six groups. Therefore, the court applied the base offense level found for the drug offenses. The court then added four levels for defendant's role in the offense under U.S.S.G.

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164. *Id.*
165. *Id.* at 1302.
166. *Id.*
167. *Id.* at 1303. The Eleventh Circuit held defendant responsible for 113.7 grams of crack cocaine, resulting in base offense level 32, instead of level 38, which the district court applied based on 857.7 grams. *Id.* at 1303-04.
168. *See infra* Part VII.C.
169. 228 F.3d at 1305.
170. U.S.S.G § 2E1.1(a)(2) (2000).
171. 210 F.3d 1315 (11th Cir. 2000).
172. *Id.*
173. *See infra* Part V.A.

section 3B1.1(a). On appeal defendant challenged the role enhancement, arguing that although the evidence established he was a leader or organizer of the overall RICO activity, the evidence did not establish that he was a leader or organizer in the drug offenses.[174] The Eleventh Circuit affirmed the role enhancement, finding that it had not been applied based on defendant's role in the drug conspiracy.[175] Rather, defendant's base offense level for the drug offenses, without consideration of the role enhancement, became defendant's base offense level for the overall RICO conspiracy under section 2E1.1.[176] Therefore, the district court properly applied the role enhancement for defendant's role in the overall RICO conspiracy to the base offense level for the RICO offenses.[177] In so ruling, the Eleventh Circuit determined that "the predicate-by-predicate approach of [U.S.S.G. section 2E1.1] applies . . . only for the purpose of establishing a RICO defendant's base offense level, and not for the purpose of applying the chapter 3 adjustments."[178]

D. Part G: Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

1. U.S.S.G. Section 2G2.2. In *United States v. Probel*,[179] defendant was convicted of one count of transporting child pornography. On appeal he challenged the five-level enhancement for distribution of child pornography imposed pursuant to U.S.S.G. section 2G2.2(b)(2).[180] In a case of first impression in the Eleventh Circuit, the court held that "pecuniary or other gain is not required for the enhancement to apply."[181] The Eleventh Circuit based its holding on the "plain lan-

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174. 210 F.3d at 1315-17. The court applied base offense level 32 for the drug offenses based on the amount of drugs involved, under U.S.S.G. section 2D1.1(c). The court then added two levels for the specific offense characteristic of possessing a weapon during the offense, under U.S.S.G. section 2D1.1(b)(1). *Id.* at 1316.

175. *Id.* at 1316-17.

176. *Id.*

177. *Id.* at 1317.

178. *Id.* at 1316 (quoting United States v. Damico, 99 F.3d 1431, 1438 (7th Cir. 1996)). Thus, a defendant's role in the offense needs to be viewed with regard to the overall RICO conspiracy, as opposed to being judged separately regarding each offense underlying the RICO conviction. *Id.*

179. 214 F.3d 1285 (11th Cir. 2000).

180. *Id.* at 1286.

181. *Id.* at 1288. In so holding, the Eleventh Circuit sided with the Second, Fifth, Sixth, and Eighth Circuits, and rejected the holding of the Seventh and Ninth Circuits that "pecuniary gain, albeit defined broadly, is required." *Id.* at 1290; *see also* United States v. Lorge, 166 F.3d 516, 518 (2d Cir. 1999); United States v. Canada, 110 F.3d 260, 263 (5th

guage of the Guidelines and the application notes."[182] However, on November 1, 2000, those guidelines and application notes were amended to clarify the interplay between distribution and pecuniary gain. The amended guideline provides various levels of enhancements depending on whether the distribution was for pecuniary gain, for a thing of value, or for something else.[183]

Cir. 1997); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998); United States v. Horn, 187 F.3d 781 (8th Cir. 1999); United States v. Black, 116 F.3d 198, 202 (7th Cir. 1997); United States v. Laney, 189 F.3d 954, 958 (9th Cir. 1999).

182. 214 F.3d at 1288. The court noted that section 2G2.2(b)(2) provides for an increase in the guideline level corresponding to the retail value of the material if the offense involved distribution. According to the Eleventh Circuit, "although the term 'distribution' is undefined," the commentary states that "'distribution' includes any act related to distribution for pecuniary gain including production, transportation, and possession with intent to distribute." *Id.* (quoting U.S.S.G. § 2G2.2 cmt. n.1). The court further noted that guideline commentary for general application principles provides that "the term 'includes' is not exhaustive." *Id.* (quoting U.S.S.G. § 1B1.1 cmt. n.2). The court then found that the enhancement applies not only to "defendants who distribute child pornography," but also to defendants "who are indirectly involved in distribution for profit, such as producers and transporters." *Id.* In giving this expansive reading to the guideline, the Eleventh Circuit stated that the term "distribution" is to be "given its ordinary meaning of 'to dispense' or 'to give out or deliver.'" *Id.* This "plain language" was found to not limit distribution to cases in which the defendant received pecuniary or other gain. *Id.* at 1289-90.

183. Amendment 592 amends U.S.S.G. section 2G2.2(b) by striking subdivision (2) in its entirety and inserting the following:

> (2) (Apply the Greatest) If the offense involved:
>
> (A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than 5 levels.
>
> (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
>
> (C) Distribution to a minor, increase by 5 levels.
>
> (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
>
> (E) Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels.

U.S.S.G. § 2G2.2(b), amend. 592, app. C (2000).

Amendment 592 also amends the commentary to section 2G2.2 by striking Application Note One in its entirety, and inserting, in pertinent part:

> 1. For purposes of this guideline —
>
> "Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.
>
> "Distribution for pecuniary gain" means distribution for profit.
>
> "Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-

In *United States v. McIntosh*,[184] defendant pled guilty to nine counts of interstate transportation of child pornography by computer. Defendant appealed the district court's refusal to group the counts under U.S.S.G. section 3D1.2(a) or (d).[185] The Eleventh Circuit relied on *United States v. Tillmon*[186] in rejecting the argument that grouping was required under section 3D1.2(a) because the counts "involved the same victim and the same act or transaction."[187] In *Tillmon* the Eleventh Circuit held that for purposes of section 3D1.2, "the primary identifiable victim of the transportation of child pornography is the minor depicted in the image."[188] Thus, the Eleventh Circuit held that defendant's "distribution of many pictures, involving different children, victimized each child separately."[189]

The Eleventh Circuit also affirmed the district court's decision to not group under section 3D1.2(d), which requires grouping when "'the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.'"[190] Concerning the first prong of the guideline, the Eleventh Circuit stated that although it had "doubts that [defendant's] offense behavior was ongoing or continuous in nature, we assume for present purposes that it was."[191] However, regarding the second prong, the court held that section 2G2.2 was not "written to cover trafficking in child pornography as an ongoing offense."[192] The Eleventh Circuit noted that section 3D1.2(d) lists certain offenses that are to be grouped and are not to be grouped under

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kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time . . . .

U.S.S.G. § 262.2, amend. 592, app. C. (2000).

184. 216 F.3d 1251 (11th Cir. 2000). Although *McIntosh* interpreted the guideline for grouping, U.S.S.G. section 3D1.2, it did so in the unique context of the child pornography guideline. Therefore, it is appropriately discussed in connection with the child pornography guideline, rather than the grouping guideline.

185. *Id.* at 1253.

186. 195 F.3d 640 (11th Cir. 1999).

187. 216 F.3d at 1253 (quoting U.S.S.G. § 301.2(a) (2000)).

188. *Id.* (quoting *Tillmon*, 195 F.3d at 645).

189. *Id.*

190. *Id.* (quoting U.S.S.G. § 301.2(d) (2000)).

191. *Id.*

192. *Id.*

that guideline.[193] Section 2G2.2(b)(4) is not listed under either category.[194] The court then noted that section 2G2.2(b)(4) provides for a five-level increase "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[195] However, the commentary specifically excludes trafficking from the definition of "sexual abuse or exploitation of a minor."[196] Thus, the court held that the guidelines do not contemplate grouping for such trafficking offense under section 3D1.2(d).[197]

2. U.S.S.G. Section 2G2.4. In *United States v. Harper*,[198] defendant was convicted of possession of child pornography. His base offense level was enhanced two levels under U.S.S.G. section 2G2.4(b)(2) for possession of more than ten items depicting child pornography. The enhancement was based on a computer zip diskette, which contained between six hundred and one thousand different pictures of minors. The pictures were in more than ten different files on the diskette.[199] Section 2G2.4(b)(2) provides for a two-level enhancement if "the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, . . . involving the sexual exploitation of a minor."[200] Defendant argued that the diskette was like a book or a magazine, which could contain many pictures, but was only counted as one "item" under the guideline.[201] The Eleventh Circuit disagreed, comparing the diskette to a library and the files contained thereon to books.[202] Thus, the court upheld the enhancement because "the separate computer files on one computer disk count as discrete 'items' under section 2G2.4(b)(2)."[203] This holding is consistent with the guideline amendment that went into effect November 1, 2000.[204]

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193. *Id.* at 1254.
194. *Id.*
195. *Id.*
196. *Id.* (quoting U.S.S.G. § 2G2.2 cmt. n.1 (2000)).
197. *Id.*
198. 218 F.3d 1285 (11th Cir. 2000).
199. *Id.* at 1286.
200. U.S.S.G. § 2G2.4(b) (2000).
201. 218 F.3d at 1287.
202. *Id.* (citing United States v. Fellows, 157 F.3d 1197, 1201 (9th Cir. 1998)).
203. *Id.*
204. Amendment 592 adds the following to U.S.S.G. section 2G2.4 cmt. n.2 (2000):

> For purposes of subsection (b)(2), a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.
>
> If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.

E. Part H: Offenses Involving Individual Rights

In *United States v. Smith*,[205] defendants were convicted on a number of counts relating to violations of the absentee voter laws in an election.[206] U.S.S.G. section 2H2.1 provides for various base offense levels depending on the type of conduct involved in the offense.[207] The district court applied section 2H2.1(a)(2), which calls for base offense level twelve "where forgery, fraud, theft, bribery, discrete, or other means are used to affect the vote of another person, or the vote another person was entitled to cast."[208] The Eleventh Circuit rejected defendants' argument that the base offense level should have been six under section 2H2.1(a)(3) because, according to the Eleventh Circuit, that subsection "addresses an individual who acts unlawfully only with respect to his own vote—an individual who accepts payment to vote, gives false information to establish his own eligibility to vote, or votes more than once in his own name."[209] Because defendants' offenses involved forging other voters' names on applications for absentee ballots and affidavits of absentee voters, the court found that section 2H2.1(a)(2) applied.[210]

F. Part K: Offenses Involving Public Safety

In *United States v. Fernandez*,[211] defendant was convicted of being a felon in possession of a firearm. Defendant's base offense level was calculated under U.S.S.G. section 2K2.1(a)(2), which provides for level twenty-four "if the defendant has 'at least two prior felony convictions

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U.S.S.G. § 2G2.4, amend. 592, app. C (2000).

205. 231 F.3d 800 (11th Cir. 2000).

206. *Id.* at 804.

207. Section 2H2.1 provides:

> (a) Base Offense Level (Apply the greatest):
>
> (1) 118, if the obstruction occurred by use of force or threat of force against person(s) or property; or
>
> (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
>
> (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

U.S.S.G. § 2H2.1 (2000).

208. 231 F.3d at 819 (quoting U.S.S.G. § 2H2.1).

209. *Id.*

210. *Id.*

211. 234 F.3d 1345 (11th Cir. 2000).

of either a crime of violence or a controlled substance offense.'"[212] On appeal defendant argued that one of his prior convictions, wherein he pled nolo contendere and adjudication was withheld, did not qualify as a conviction for purposes of section 2K2.1(a)(2).[213] The Eleventh Circuit disagreed, reasoning that any conviction that results in a criminal history point under U.S.S.G. section 4A1.1 counts as a conviction under section 2K2.1(a)(2), as well.[214] A conviction based on a plea of nolo contendere, when no adjudication of guilt is entered, is counted for criminal history purposes under U.S.S.G. section 4A1.2-(f).[215] Thus, the court concluded that a plea of nolo contendere, when adjudication is withheld, falls within the ambit of section 2K2.1(a)-(2).[216]

In *United States v. Jamieson*,[217] defendant was also convicted of possession a firearm by a convicted felon. However, the district court calculated his base offense level under U.S.S.G. section 2K2.1(a)(3),[218] which provides for level twenty-two "if the offense involved a firearm described in . . . 18 U.S.C. § 921(a)(30), and a defendant has one prior felony conviction of either a crime of violence or controlled substance offense."[219] Section 921(a)(30)(A)(i) describes semiautomatic assault weapons, which include "Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models)."[220] The evidence clearly estab-

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212. *Id.* at 1346 (quoting U.S.S.G. § 2K2.1(a)(2) (2000)). The term "crime of violence" is defined in U.S.S.G. section 4B1.2(a). The term "controlled substance offense" is defined in U.S.S.G. section 4B1.2(b) (2000).

213. *Id.* at 1346-47.

214. *Id.* (citing U.S.S.G. § 2K2.1(a)(2) cmt. n.5).

215. *Id.* at 1346.

216. *Id.* at 1347-48.

217. 202 F.3d 1293 (11th Cir. 2000).

218. *Id.* at 1295.

219. U.S.S.G. § 2K2.1(a)(3) (2000).

220. Under 18 U.S.C. § 921(a)(30) (1994), a "semiautomatic assault weapon" is defined as one of the nine specified firearms listed in section 921(a)(30)(A) or as a semiautomatic rifle that meets the requirements listed in section 921(a)(30)(B). Section 921(a)(30)(A) provides:

> The term "semiautomatic assault weapon" means —
> (A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as —
> (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);
> (ii) Action Arms Israeli Military Industries UZI and Galil;
> (iii) Beretta Ar70 (SC-70);
> (iv) Colt AR-15;
> (v) Fabrique National FN/FAL, FN/LAR, and FNC;
> (vi) SWD M-10, M-11, M-11/9, M-12;
> (vii) Steyr AUG;

lished that defendant's firearm, which was manufactured by Norinco, was not an illegal semiautomatic assault weapon.[221] Nonetheless, the district court concluded that all Norinco weapons fall within the ambit of section 921(a)(30).[222] The Eleventh Circuit disagreed, noting that section 921(a)(30)(A)(i) only bans certain types of Norinco weapons, such as Norinco Avtomat Kalashnikovs.[223] Defendant's firearm was not such a weapon.[224] Additionally, the court noted that section 921(a)-(30)(B) "only includes semiautomatic weapons, regardless of make, which display two or more proscribed characteristics."[225] Defendant's weapon did not display such characteristics. Therefore, section 2K2.1(a)(3) could not be applied.[226]

In *Cover* the district court enhanced defendant's robbery guidelines, under U.S.S.G. section 2B3.1(b)(2)(C), for brandishing, displaying, or possessing a firearm during a bank robbery.[227] Defendant challenged this enhancement on appeal based on U.S.S.G. section 2K2.4 because he was also convicted and sentenced for using a firearm in connection with a crime of violence under 18 U.S.C. § 924(c).[228] The commentary to section 2K2.4, which pertains to section 924(c) convictions, states: "Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm (e.g., § 2B3.1(b)(2)(A)-(F) (Robbery)) is not to be applied in respect to the guideline for the underlying offense."[229]

The Eleventh Circuit found that the district court erred by enhancing defendant's sentence based solely on his possession and use of the firearm that was punished by the section 924(c) sentence.[230] However, the court found the error was harmless because an alternative basis for enhancement existed.[231] The court explained that "[w]hile § 2K2.4

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and
(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

Id. § 921(a)(30)(A)(i)-(ix).

221. 202 F.3d at 1295.
222. *Id.*
223. *Id.* at 1295-96.
224. *Id.*
225. *Id.* at 1297.
226. *Id.*
227. 199 F.3d at 1273.
228. *Id.* at 1276-77. Because defendant did not raise this objection in the district court, it was reviewed for plain error on appeal. *Id.* at 1277.
229. U.S.S.G. § 2K2.4 cmt. n.2 (2000).
230. 199 F.3d at 1277.
231. *Id.*

does bar double counting, it does not bar 'enhancement for a separate weapons possession, such as that of a co-conspirator' where the defendant was convicted and sentenced for his own possession or use of a firearm."[232] Because defendant's co-conspirators possessed firearms during the robbery, the Eleventh Circuit upheld the section 2B3.1(b)(2) enhancement.[233]

On November 1, 2000, the guidelines were amended to preclude this result.[234] The commentary to section 2K2.4 now specifically provides that no weapon enhancement may be applied to the underlying offense guideline if "a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c)."[235] The amendment has been made retroactive.[236] Ergo, any defendant who previously received an enhanced sentence pursuant to section 2B3.1(b)(2) under these circumstances may be eligible for relief under 18 U.S.C. § 35-82.[237]

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232. *Id.* at 1277-78 (quoting United States v. Rodriguez, 65 F.3d 932, 933 (11th Cir. 1995)).

233. *Id.* at 1277.

234. U.S.S.G. § 2K2.4, amend. 599, app. C (2000). Amendment 599 adds, in part, the following commentary to section 2K2.4:

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

Id.

235. U.S.S.G. § 2K2.4 cmt. n.2 (2000).

236. *See id.* § 1B1.10(c).

237. *See* discussion under the section of this Article addressing U.S.S.G. section 1B1.10, *supra* Part IV.B.

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

U.S.S.G. section 2L1.2(b)(1)(A) applies a sixteen-level enhancement for a defendant who has been deported and illegally re-enters the United States following a criminal conviction for an aggravated felony.[238] Under 8 U.S.C. §§ 1101(a)(43)(F) and (G), "aggravated felonies" include crimes of violence and theft offenses "for which the term of imprisonment at least one year [*sic*]."[239] A footnote in the statute indicates that the word "is" should probably be inserted in the quoted language so the statute would read "for which the term of imprisonment is at least one year."[240]

In *United States v. Maldonado-Ramirez*,[241] defendant argued that the statute is ambiguous because of the missing language, and that the definition could apply to sentences imposed or sentences served.[242] The Eleventh Circuit reviewed the legislative history of the statute, other provisions within section 1101(a), and case law from other circuits.[243] The court then held that aggravated felonies, within the meaning of sections 1101(a)(43)(F) and (G), include convictions for crimes of violence and theft in which the full sentence imposed was at least one year, regardless of the time actually served in prison.[244]

The court also addressed the sixteen-level enhancement in *United States v. Guzman-Bera*.[245] Defendant was convicted of grand theft and sentenced to five years of probation at the time of his deportation. After he re-entered the United States, his probation was revoked, and he was sentenced to eighteen months in prison.[246] The Eleventh Circuit vacated the sixteen-level enhancement, holding that "when a defendant has simply been placed on probation and has not been sentenced to a prison term at the time of deportation and reentry, the 'aggravated felony' enhancement does not apply."[247]

The court in *Guzman-Bera* again looked at the missing language in 8 U.S.C. § 1101(a)(43)(G) and noted that it was arguable the statute referred to the "*authorized* term of imprisonment, even if not imposed,

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238. U.S.S.G. § 2L1.2(b)(1)(A) (2000).
239. 8 U.S.C. §§ 1101(a)(43)(F)-(G) (Supp. V 1999).
240. *Id.* § 1101(a)(43)(F) n.2.
241. 216 F.3d 940 (11th Cir. 2000).
242. *Id.* at 942-44.
243. *Id.*
244. *Id.* at 944.
245. 216 F.3d 1019 (11th Cir. 2000)
246. *Id.* at 1020.
247. *Id.*

or the term of imprisonment actually imposed."[248] However, the Eleventh Circuit held that "an aggravated felony is defined by the sentence actually imposed."[249] The court then determined that the sentence "actually imposed" was probation.[250] The court emphasized that defendant was not sentenced to eighteen months imprisonment until *after* he had been deported and had illegally reentered the United States.[251] Thus, the sixteen-level enhancement was inapplicable.[252]

H. Part S: Money Laundering

In *United States v. Thayer*,[253] defendant was convicted of conspiracy to engage in mail and wire fraud, wire fraud, mail fraud, money laundering conspiracy, and money laundering.[254] The Eleventh Circuit held that the district court correctly applied U.S.S.G. section 2S1.1, noting that the money laundering guideline was intended to "criminalize a broad array of money laundering activity, not just drug related offenses."[255]

V. CHAPTER THREE: ADJUSTMENTS

A. U.S.S.G. Section 3B1.1: Role in the Offense

The guidelines provide for upward or downward adjustments depending on the defendant's aggravating or mitigating role in the offense.[256] In 2000 the Eleventh Circuit did not publish any decisions discussing mitigating role adjustments. However, it did address the aggravating role adjustments in published decisions.[257]

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248. *Id.*

249. *Id.*

250. *Id.* at 1021.

251. *Id.* "Although his 1995 conviction may have become an aggravated felony after his reentry into the United States and he received the 18-month prison sentence, it was not one when he was deported and when he reentered the United States, and should have not have been used for enhancement purposes under U.S.S.G. § 2L1.2(b)(1)(A)." *Id.*

252. *Id.*

253. 204 F.3d 1352 (11th Cir. 2000).

254. *Id.* at 1354.

255. *Id.* at 1356 (citing United States v. Adams, 74 F.3d 1093, 1102 (11th Cir. 1996)).

256. U.S.S.G. § 3B1.1 (2000) (aggravating role); U.S.S.G. § 3B1.2 (2000) (mitigating role).

257. In addition to the two cases discussed in the text of this section of the Article, the court also addressed aggravating role adjustments in two cases that are discussed elsewhere in this Article because they are more relevant to the interpretation of other guidelines. For example, in *Yeager*, the defendant did not dispute the finding that he was an organizer or leader in the overall RICO conspiracy. Instead, the case focused on the

In *Smith*, a voter fraud case, the district court applied a four-level role enhancement under U.S.S.G. section 3B1.1(a), finding that each defendant was an "organizer or leader of criminal activity that involved five or more participants or was otherwise extensive."[258] Defendants argued that the evidence did not establish "their criminal activity, as distinguished from their First Amendment-protected political activity, was extensive," and the district court did not identify the five participants involved in the criminal activity.[259] The Eleventh Circuit rejected this argument because the district court adopted the presentence report's factual findings, and the presentence report identified the five participants and defendants' activities.[260]

In *United States v. Jimenez*,[261] the district court applied a two-level enhancement under section 3B1.1(c) to defendant's sentence because defendant was a supervisor of a conspiracy.[262] The Eleventh Circuit stated that although "being a drug supplier does not automatically make [a defendant] a 'supervisor' under the Guidelines, . . . the assertion of control or influence over only one individual is enough to support a § 3B1.1(c) enhancement."[263] The court found that the fact that defendant's girlfriend consulted with him when discussing drug transactions and before agreeing to sell drugs sufficient to establish that defendant asserted control or influence over her.[264] Thus, the Eleventh Circuit found that the role enhancement was not clearly erroneous.[265]

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proper method of applying the role enhancement in cases involving RICO offenses. 210 F.3d at 1316-17. Thus, *Yeager* is discussed in connection with the RICO guideline, U.S.S.G. § 2E1.1, *supra* Part IV.C.

In *United States v. Gordon*, 231 F.3d 750, 759 (11th Cir. 2000), *cert denied*, 60 U.S.L.W. 3575 (U.S. Feb. 26, 2001) (No. 00-8134), defendant challenged the role enhancement because it was based on hearsay statements, and the district court failed to make specific factual findings to support the enhancement. In resolving these challenges, the Eleventh Circuit focused on U.S.S.G. § 6A1.3. *Id.* at 759-61. Therefore, *Gordon* is discussed in connection with that guideline. *See infra* Part VIII.A.

258. 231 F.3d at 820 (quoting U.S.S.G. § 3B1.1(a) (2000)).

259. *Id.*

260. *Id.* at 820-21.

261. 224 F.3d 1243, 1250 (11th Cir. 2000).

262. Section 3B1.1(c) provides: "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity, other than described in (a) or (b), increase [the defendant's offense level] by 2 levels." 8 U.S.S.G. § 3B1.1(c) (2000).

263. 224 F.3d at 1251 (citing United States v. Yates, 990 F.2d 1179, 1182 (11th Cir. 1993); United States v. Glover, 179 F.3d 1300, 1302 (11th Cir. 1999)).

264. *Id.*

265. *Id.*

B. *U.S.S.G. Section 3B1.2: Abuse of Position of Trust*

In *Ward* the Eleventh Circuit reversed a two-level enhancement for abuse of a position of trust, under U.S.S.G. section 3B1.3.[266] Defendant used his position as a security guard to steal funds that were being transported in the armored car he was guarding.[267] The commentary to section 3B1.3 states that "a position of public or private trust [is] characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[268] The Eleventh Circuit noted that as a security guard, defendant "had very little discretion in performing his duty" and was "closely, albeit not constantly, supervised by his employer."[269] The court further noted that a security guard position is similar to an ordinary bank teller, hotel clerk, or mail carrier.[270] The commentary states that the enhancement does not apply to bank tellers or hotel clerks.[271] However, the commentary specifically notes that a postal service employee, who steals or destroys undelivered mail, is subject to the enhancement.[272] The court stated that in specifically applying the enhancement to mail carriers, notwithstanding the other commentary provisions, "the commission thought that otherwise mail delivery positions would not be covered."[273] No such provision was made for security guard positions. Thus, the Eleventh Circuit determined that such positions were excluded from the enhancement.[274]

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266. 222 F.3d at 913. U.S.S.G. § 3B1.3 (2000) provides for a two-level upward adjustment if "the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."

267. 222 F.3d at 909.

268. U.S.S.G. § 3B1.3 cmt. n.1.

269. 222 F.3d at 912-13.

270. *Id.* at 913.

271. U.S.S.G. § 3B1.3 cmt. n.1 states:

> The adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. The adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Id.

272. 222 F.3d at 913.

273. *Id.*

274. *Id.*

In *United States v. Linville*,[275] defendant was convicted on one count of conspiracy to commit bank fraud and four counts of bank fraud. On appeal he challenged the two-level enhancement for abuse of a position of trust, arguing that the bank was the victim of the bank fraud, and that the bank had not conferred a position of trust on him. Rather, his employer had conferred the position of trust on him by giving him signature authority, which he used to forge checks in committing the instant offenses.[276] The Eleventh Circuit noted that "[a]n abuse-of-trust enhancement is appropriate whenever the 'defendant [was] in a position of trust with respect to the victim of the crime' and abuses that position 'in a manner that significantly facilitate[s]' the offense."[277] Holding that "bank fraud may have more than one victim for U.S.S.G. § 3B1.3 purposes, and that victim status turns on the facts of the case," the court affirmed the enhancement based on the district court's finding that the employer was a victim of this offense.[278]

In *Smith* defendant was convicted of conspiring "to vote more than once in a general election by applying for and casting fraudulent absentee ballots in the names of voters without the voters' knowledge and consent" and with "conspiring to knowingly and willfully give false information as to a voter's name and address for the purpose of establishing the voter's eligibility to vote" in a general election.[279] The district court applied the abuse of trust enhancement to one defendant, who was a deputy registrar. The deputy registrar argued that her position could not have significantly facilitated the commission of the offense because her codefendant, who was not a deputy registrar, was convicted of the same offenses.[280]

The commentary to section 3B1.3 provides that "the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense."[281] The court explained that "[s]ignificant facilitation" occurs when "the person in the position of trust has an advantage in committing the crime because of

275. 228 F.3d 1330 (11th Cir. 2000).

276. *Id.* at 1331.

277. *Id.* (citing United States v. Garrison, 133 F.3d 831, 837 (11th Cir. 1998); U.S.S.G. § 3B1.3).

278. *Id.* Although the government had conceded error in this case, the court noted that it was "not required to accept such a concession when the law and record do not justify it." *Id.* at 1331 n.2.

279. 231 F.3d at 804-05.

280. *Id.* at 819.

281. U.S.S.G. § 3B1.3 cmt. n.1 (2000).

that trust and uses that advantage in order to commit the crime."[282] In rejecting defendant's argument, the Eleventh Circuit noted that the position of trust need not be "essential to a defendant's commission of the offense."[283] Ergo, the enhancement can apply to one defendant, but not to other defendants who commit the same offense without the use or abuse of the defendant's position.[284] The court then affirmed the enhancement because defendant's position as deputy registrar "significantly aided her commission of an offense for which she was convicted."[285]

C. *U.S.S.G. Section 3C1.1: Obstruction of Justice*

U.S.S.G. section 3C1.1 provides for a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction."[286] The commentary lists several examples of conduct to which the enhancement applies.[287] One example is when the defendant destroys or conceals material evidence or directs another person to do so.[288] However, the commentary adds that "if such conduct occurred contemporaneously with arrest," it will only warrant the enhancement if "it resulted in a material hindrance to the official investigation or prosecution of the instant offense."[289]

In *United States v. Garcia*,[290] defendant's offense level was enhanced under section 3C1.1 because he buried guns, instructed his secretary to remove and destroy evidence, and fled the country. Defendant challenged the enhancement, arguing that no federal investigation had been

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282. 231 F.3d at 819 (quoting United States v. Barakat, 130 F.3d 1448, 1455 (11th Cir. 1997)).

283. *Id.*

284. *Id.*

285. *Id.* at 820. The court explained that the deputy registrar "was convicted of offenses involving [another person's] vote, offenses which were dependant upon [the other person] having been registered to vote, and [the defendant] used her position as deputy registrar to bring that about (fraudulently)." *Id.* The court also rejected as "specious" defendant's argument that her position as deputy registrar was not a position of public trust. *Id.*

286. U.S.S.G. § 3C1.1 (2000).

287. *Id.* cmt. n.4.

288. *Id.* cmt. n.4(d).

289. *Id.*

290. 208 F.3d 1258, 1261 (11th Cir. 2000), *vacated by* Garcia v. United States, 121 S. Ct. 750 (2001) (the judgment of the Eleventh Circuit was vacated for reconsideration in light of *Apprendi*).

initiated at the time he committed said acts.[291] Additionally, he argued that his conduct "was not a hindrance because the investigation had abundant evidence from other sources."[292] The Eleventh Circuit rejected these arguments, noting that "[t]here is no requirement that defendant's obstructive acts occur subsequent to the formal commencement of an investigation."[293] The Eleventh Circuit explained that the "sentencing guidelines are not intended to create a formal date for the measurement of obstructive acts but rather, to distinguish those acts that are instinctively done in the heat of being caught engaged in the crime from those done before or after with cool calculation."[294] The court further found that "[t]he 'actual hindrance' test is only for those acts done at the time of arrest . . . . In short, the key to a finding of obstruction is the intention of the actor, not the actual success of his obstructive acts."[295]

In *Smith* defendant challenged the obstruction enhancement on appeal because the district court failed to make specific findings of fact.[296] The district court found that "[t]he evidence at trial presented or established, beyond a reasonable doubt that the Defendant Smith influenced Michael Hunter to give a false affidavit concerning material facts."[297] The Eleventh Circuit stated, "[w]hile it might have been preferable for the district court to identify the material facts about which Hunter testified falsely and for which Smith was responsible, . . . 'in the context of the record . . ., detailed findings were not necessary and would have been redundant.'"[298] The Eleventh Circuit then affirmed the sentence, noting that the district court indicated its finding was based on the evidence presented at trial, and it expressly adopted the factual statements in the presentence report, which discussed in detail defendant's actions that warranted the enhancement.[299] The Eleventh Circuit also noted that because defendant "did not request more specific findings of fact by the district court '[i]t is too late to now complain in this court.'"[300]

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291. *Id.* at 1262.

292. *Id.*

293. *Id.* Additionally, the court found that the record showed defendant was under investigation before the acts occurred. *Id.*

294. *Id.*

295. *Id.* (citing United States v. Rowlett, 23 F.3d 300, 305-06 (10th Cir. 1994)).

296. 231 F.3d at 820.

297. *Id.*

298. *Id.* (quoting United States v. Hubert, 138 F.3d 912, 915 (11th Cir. 1998)).

299. *Id.*

300. *Id.* (quoting United States v. Gregg, 179 F.3d 1312, 1317 (11th Cir. 1999) (internal quotes omitted)).

D. U.S.S.G. Section 3D1.2: Multiple Counts (Grouping)

The only published opinion in 2000 to discuss the application of U.S.S.G. section 3D1.2 is *McIntosh*.[301] In *McIntosh* the Eleventh Circuit discussed the grouping rules in the context of interstate transportation of child pornography by computer.[302] *McIntosh* is discussed under the section of this Article that addresses the child pornography guideline, U.S.S.G. section 2G2.2.[303]

E. U.S.S.G. Section 3E1.1: Acceptance of Responsibility

In *Garcia* defendant challenged the district court's refusal to adjust his guidelines downward for acceptance of responsibility under U.S.S.G. section 3E1.1.[304] The Eleventh Circuit held that although defendant had pled guilty, he had actively avoided responsibility "from the start to near the finish."[305] Defendant had destroyed evidence, hid from authorities, lived under an assumed name in another country, denied overwhelming identification evidence after he was arrested, and frivolously attempted to avoid extradition.[306] Thus, the Eleventh Circuit upheld the denial of acceptance of responsibility.[307]

In *Thayer* the district court also declined to apply the acceptance of responsibility adjustment. Defendant argued that the fact he went to trial was not a per se preclusion from receiving an acceptance of responsibility reduction.[308] The Eleventh Circuit agreed that "there is no bright line rule; instead, trial courts have discretion."[309] In exercising that discretion, the district court may consider the fact that a defendant went to trial.[310] In upholding the district court's decision to deny the reduction, the Eleventh Circuit noted that the district court judge "presided over the trial, was familiar with the position of the appellant during trial and could evaluate the sincerity of the 'acceptance of responsibility.'"[311]

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301. 216 F.3d at 1251.
302. *Id.* at 1253-54.
303. *See supra* Part IV.D.
304. 208 F.3d at 1262.
305. *Id.*
306. *Id.* at 1262-63.
307. *Id.* at 1263.
308. 204 F.3d at 1358 (citing United States v. Castillo-Valencia, 917 F.2d 494, 498 (11th Cir. 1990); United States v. Rodriquez, 905 F.2d 372, 373 (11th Cir. 1990)).
309. *Id.*
310. *Id.*
311. *Id.*

VI. CHAPTER FOUR: CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

A. Part A: Criminal History

In *United States v. Buter*,[312] defendant received three criminal history points under U.S.S.G. section 4A1.1(a) for each of the two sentences imposed on two state probation revocations. The state court had imposed concurrent terms of twenty-seven months imprisonment. However, defendant did not serve any time on these sentences. Rather, his imprisonment was ordered to run concurrent with a federal sentence that he had already completed.[313] The Eleventh Circuit held that these state court sentences did not constitute imprisonment for purposes of computing a defendant's criminal history category under section 4A1.1.[314] The court explained that under section 4A1.1, three criminal history points are added "for each prior sentence of imprisonment exceeding one year and one month."[315] U.S.S.G. section 4A1.2(b) defines "sentence of imprisonment" as "a sentence of incarceration."[316] The commentary states, in part, "To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence."[317] The court adopted a two-part test to determine whether a sentence qualifies for the three additional criminal history points.[318] First, the sentence must "exceed one year and one month."[319] Second, "some time [must] actually be served on that sentence."[320]

Applying this test, the court stated that defendant's twenty-seven month state sentences satisfied the first prong of the test, but not the second prong—he did not actually serve time on those sentences.[321] By giving defendant credit for the time he served on a prior unrelated federal case, the state court allowed him to walk "out of the state

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312. 229 F.3d 1077 (11th Cir. 2000).
313. *Id.* at 1078.
314. *Id.* at 1078-79.
315. *Id.* at 1078. Three points are added for a "prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a) (2000). Two points are added for a "prior sentence of imprisonment of at least sixty days." *Id.* § 4A1.1(b). One point is added for a prior sentence not counted under section 4A1.1(a) or (b). *Id.* § 4A1.1(c).
316. U.S.S.G. § 4A1.2(b) (2000).
317. *Id.* § 4A1.2 cmt. n.2.
318. 229 F.3d at 1078-79.
319. *Id.* at 1078 (quoting United States v. Brown, 54 F.3d 234, 239 (5th Cir. 1995)).
320. *Id.*
321. *Id.* at 1078-79.

courtroom a free man."[322] To assess criminal history points for such a sentence "would be penalizing [defendant] for something which the state authorities determined was not deserving of further incarceration."[323]

The Eleventh Circuit further supported its decision by reference to the way the guidelines treat suspended sentences, which only count as one criminal history point.[324] The court observed,

> It is patently unreasonable to punish a defendant by adding three points in the sentencing equation for a sentence which had no detrimental repercussions whatsoever, either in the past or in the future, but count only one point for a suspended sentence which, if revoked, could result in the defendant's imprisonment.[325]

In *Cooper* defendant challenged a criminal history point assessed for his misdemeanor convictions for driving with a suspended license and possessing marijuana. He argued that he was unrepresented by counsel when he pled guilty and was sentenced to one day in jail.[326] The Eleventh Circuit noted that "[g]enerally, this court does not allow a defendant to attack collaterally the constitutionality of a conviction for the first time in a sentencing proceeding."[327] Although defendant's misdemeanor convictions were uncounseled, the court noted that defendant had the burden "to lay a factual foundation for collateral review on the ground that the state conviction was 'presumptively void.'"[328] The Eleventh Circuit then found that the district court did not err when it assessed the additional criminal history point under U.S.S.G. section 4A1.1(c) because defendant had not met his threshold burden.[329]

In *Castillo v. United States*,[330] the defendant appealed the denial of his motion for post-conviction relief, filed pursuant to 28 U.S.C. § 2255. He requested that his criminal history be recalculated because two points were added as a result of a state court conviction that was reversed and then dismissed after his federal sentence was imposed.

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322. *Id.* at 1079.
323. *Id.* (citing United States v. Stewart, 49 F.3d 121, 125 (4th Cir. 1995)).
324. *Id.*
325. *Id.*
326. 203 F.3d at 1287.
327. *Id.* The court referred to U.S.S.G. § 4A1.2 cmt. n.6, which states "this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in the law." *Id.*
328. *Id.* (quoting United States v. Roman, 989 F.2d 1117, 1120 (11th Cir. 1993)).
329. *Id.*
330. 200 F.3d 735 (11th Cir. 2000).

Defendant relied on the commentary to U.S.S.G. section 4A1.2, which provides that if a conviction has been reversed, vacated, or ruled unconstitutional, the sentence is not calculated in computing the defendant's criminal history points.[331] However, the Eleventh Circuit pointed out that the commentary also provides that if a conviction is set aside "for reasons unrelated to innocence or errors of law," the sentence should be counted.[332] The Eleventh Circuit then noted that defendant's conviction in this case was set aside in a ruling that was adverse to defendant.[333] The fact that the state later dismissed the charges was deemed irrelevant by the court.[334] Thus, the Eleventh Circuit ruled that the district court could properly consider the conduct underlying the charges to which defendant had originally pled nolo contendere in determining defendant's criminal history score.[335]

B. Part B: Criminal Livelihood

Chapter Four, Part B, of the guidelines provides for three types of criminal livelihood enhancements—career offender,[336] criminal livelihood,[337] and armed career criminal.[338] In 2000 the only opinions by the Eleventh Circuit addressing criminal livelihood enhancements were in the context of the career offender. Although the court dealt with armed career criminal sentences in three cases,[339] the court discussed the statutory enhancement,[340] not the armed career criminal guideline.[341] Therefore, those cases are not discussed in this Article. However, the two career offender cases are discussed below.

In *United States v. Jackson*,[342] defendant challenged his career offender enhancement under U.S.S.G. section 4B1.1, arguing that one of the prior convictions the district court relied on was not a "crime of violence" under the definition provided by U.S.S.G. section 4B1.2(a).

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331. *Id.* at 736-37 (citing U.S.S.G. § 4A1.2 cmt. n.6 (2000)).
332. *Id.* at 737 (citing U.S.S.G. § 4A1.2 cmt. n.10 (2000)).
333. *Id.*
334. *Id.* at 738.
335. *Id.* (citing U.S.S.G. § 4A1.3 (2000)).
336. U.S.S.G. § 4B1.1 (2000).
337. *Id.* § 4B1.3.
338. *Id.* § 4B1.4.
339. *See* United States v. Lee, 208 F.3d 1306 (11th Cir. 2000); United States v. Reynolds, 215 F.3d 1210 (11th Cir. 2000); United States v. Richardson, 230 F.3d 1297 (11th Cir. 2000).
340. 18 U.S.C. § 924(e) (1994).
341. U.S.S.G. § 4B1.4.
342. 199 F.3d 1279 (11th Cir. 2000).

Defendant's prior conviction was for the state crime of possession of a fire bomb.[343] The Eleventh Circuit rejected the challenge, stating

> [A] person who intends to damage a structure or property by fire or explosion clearly participates in conduct that presents a serious potential risk of physical injury to others. Even assuming that the structure or property which is the target of a fire bomb is unoccupied, the fire or explosion creates a danger to others.[344]

The Eleventh Circuit also noted that section 4B1.2(a) specifically lists arson as a crime of violence.[345] According to the Eleventh Circuit, possession of a fire bomb is "nothing more than a subcategory of arson that presents at least the same potential risk of physical injury to another person as arson."[346] Thus, the Eleventh Circuit concluded that "the possession of a fire bomb with the intent to use it to willfully damage any structure or property by fire or explosion," as defined by the state statute, qualifies as a prior crime of violence for purposes of the career offender enhancement.[347]

In *Rogers* the Eleventh Circuit held that in drug cases brought under 21 U.S.C. §§ 841(b)(1)(A) or (B), drug quantity is an element of the offense that "must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*."[348] The court in *Rogers* then vacated defendant's sentence and remanded the case to the district court for resentencing under section 841(b)(1)(C), which applies whenever the indictment does not specify a quantity of drugs and the jury verdict convicts the defendant of a drug offense involving an undetermined quantity of crack cocaine.[349] In so doing, the court noted that the statutory maximum under section 841(b)(1)(C) is twenty years imprisonment.[350] This statutory maximum impacted the career offender enhancement.

U.S.S.G. section 4B1.1 provides for varying base offense levels depending on the "Offense Statutory Maximum." The commentary defines "Offense Statutory Maximum" as "the maximum term of

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343. *Id.* at 1280.
344. *Id.*
345. *Id.* at 1281.
346. *Id.*
347. *Id.*
348. 228 F.3d at 1327.
349. *Id.* at 1328.
350. *Id.* Although section 841(b)(1)(C) allows for a thirty-year sentence of imprisonment if the defendant has a prior drug conviction, the court held that the enhancement did not apply because defendant's sentence was not imposed in accordance with the requirements of 21 U.S.C. § 851. *Id.*

imprisonment authorized for the offense of conviction."[351] The higher the statutory maximum, the higher the base offense level.[352]

Defendant in *Rogers* was sentenced under the career offender provision relating to section 841(b)(1)(A).[353] Because section 841(b)(1)-(A) has a maximum term of life imprisonment, section 4B1.1(A) provides for base offense level thirty-seven. However, the Eleventh Circuit held that defendant was convicted under section 841(b)(1)(C), which has a statutory maximum penalty of twenty years imprisonment.[354] Section 4B1.1(C) calls for base offense level thirty-two if the statutory maximum is twenty years imprisonment. Thus, the Eleventh Circuit vacated the sentence and remanded for resentencing under the correct guideline, section 4B1.1(C), which relates to a statutory maximum of twenty years imprisonment.[355]

VII. CHAPTER FIVE: DETERMINING THE SENTENCE

A. *Part C: Imprisonment (Safety Valve)*

A defendant charged with a drug offense under 21 U.S.C. §§ 841, 844, 960, or 963 may receive a sentence below the statutory mandatory minimum penalty if he or she successfully complies with the five criteria outlined in U.S.S.G. section 5C1.2(1)-(5).[356] Additionally, if a defen-

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351. U.S.S.G. § 4B1.1 cmt. n.2 (2000).

352. The following chart sets forth the interplay between the statutory maximum penalties in 21 U.S.C. §§ 841(b)(1)(A)-(C) (1994 & Supp. 1999) and the corresponding base offense levels in U.S.S.G. sections 4B1.1(A)-(C).

Statute	Statutory Maximum	Guideline	Offense Statutory Maximum	Base Offense Level
§ 841(b)(1)(A)	life	§ 4B1.1(A)	life	37
§ 841(b)(1)(B)	40 years	§ 4B1.1(B)	25 years or more	34
§ 841(b)(1)(C)	20 years	§ 4B1.1(C)	20 years or more, but less than 25 years	32

353. U.S.S.G. § 4B1.1(A).

354. 228 F.3d at 1330.

355. *Id.*

356. U.S.S.G. § 5C1.2(1)-(5) (2000). The five criteria, as set forth in section 5C1.2, are:
(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

dant meets the criteria, he may recieve a two-level reduction if the offense level is twenty-six or greater.[357]

In *United States v. Anderson*,[358] the Eleventh Circuit dealt with the issue of whether a defendant can receive a safety valve reduction if he is convicted of possession with intent to distribute cocaine within 1,000 feet of an elementary school, pursuant to 21 U.S.C. § 860.[359] The applicable guideline for a section 860 offense is U.S.S.G. section 2D1.2. The Eleventh Circuit noted that section 2D1.2 has no provision comparable to the safety valve provision of section 2D1.1(b)(6).[360] The court then turned to the safety valve provision contained in U.S.S.G. section 5C1.2.[361] The court stated that although section 860 "necessarily includes a violation of either section 841(a) or section 856," section 860 is "a substantive criminal statute, not a mere sentence enhancer for section 841(a)."[362] Thus, the court held that because section 860 was not one of the specifically enumerated statutes to which the safety valve applied, a defendant convicted under section 860 is not eligible for the safety valve reduction pursuant to section 5C1.2.[363]

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(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Id.

357. U.S.S.G. § 2D1.1(b)(6) (2000).

358. 200 F.3d 1344 (11th Cir. 2000).

359. *Id.* at 1346.

360. *Id.* at 1347.

361. *Id.*

362. *Id.* (quoting United States v. Saavedra, 148 F.3d 1311, 1316 (11th Cir. 1998)).

363. *Id.* at 1347-48. The statutes specifically enumerated in U.S.S.G. section 5C1.2 are 21 U.S.C. §§ 841, 844, 960, and 963. It should be noted that a defendant convicted under section 860 is also subject to a two-level enhancement under U.S.S.G. section 2D1.2(a)(a) for selling drugs in a protected location, *e.g.*, within a 1,000 feet of an elementary school. Thus, such a defendant not only receives a two-level enhancement, but also is ineligible for the two-level reduction under the safety valve guideline. Also such a defendant is ineligible to receive a sentence below the minimum mandatory, unless the government files a substantial assistance motion pursuant to U.S.S.G. section 5K1.1 or Fed. R. Crim. P. 35.

In *United States v. Brownlee*,[364] the parties agreed that defendant had completely satisfied the first four criteria of the safety valve guideline. However, the Government argued that defendant had not satisfied the fifth criteria because, although defendant truthfully disclosed information relating to his drug offense immediately prior to the sentencing hearing, he had lied on numerous prior occasions.[365] The Eleventh Circuit rejected the Government's argument and held that 18 U.S.C. § 3553(f) and U.S.S.G. section 5C1.2 provide only one deadline for truthful disclosure.[366] The deadline is "not later than the time of the sentencing hearing."[367] Thus, defendant was entitled to safety valve relief because he made a truthful disclosure prior to the sentencing hearing.[368]

As in *Brownlee*, only the truthful disclosure requirement of the safety valve was at issue in *United States v. Figueroa*.[369] At sentencing the district court found that parts of defendant's statements were not credible.[370] Nonetheless, because the court found that defendant did not have more information regarding the leader of the drug operation charged in the case, the court applied the safety valve.[371] The district court based its decision on section 5C1.2(5), which indicates "the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."[372] The Government appealed, arguing that defendant's incomplete and untruthful disclosure during the sentencing hearing precluded the safety valve reduction.[373] The Eleventh Circuit reversed noting that a defendant who has no relevant or useful information can still get safety valve relief, but a defendant who is untruthful cannot.[374]

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364. 204 F.3d 1302, 1304 (11th Cir. 2000).

365. *Id.* at 1304.

366. *Id.* (citing U.S.S.G. § 5C1.2 (2000)).

367. *Id.* (quoting United States v. Schreiber, 191 F.3d 103, 106 (2d Cir. 1999)).

368. *Id.* at 1305.

369. 199 F.3d 1281 (11th Cir. 2000).

370. *Id.* at 1283. Specifically, the court noted that it was "not prepared to accept everything in [the defendant's] statement." *Id.* at 1283.

371. *Id.*

372. *Id.*

373. *Id.* at 1282-83.

374. *Id.* at 1283.

B. Part D: Supervised Release

In *United States v. Bull*,[375] defendant was convicted of using an unauthorized credit card. As a special condition of supervised release, the district court imposed mental health treatment for anger control because defendant had a history of anger-related problems.[376] Defendant challenged this condition on appeal, arguing that it was not reasonably related to the "nature and characteristics of his offense," as required by U.S.S.G. section 5D1.3(b).[377] Defendant's argument raised an issue of first impression in the Eleventh Circuit: whether the district court had authority to impose a condition of supervised release that was unrelated to the crime of which defendant was convicted.[378] In resolving the issue, the court reasoned that "the items listed in 5D1.3(b) are not necessary elements, each of which has to be present. They are merely factors to be weighed, and the conditions imposed may be unrelated to one or more of the factors, so long as they are sufficiently related to the others."[379] Hence, the court held that "[a]s a matter of

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375. 214 F.3d 1275 (11th Cir. 2000).

376. *Id.* at 1276.

377. *Id.* Section 5D1.3(b) provides:

> The court may impose other conditions of supervised release, to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

U.S.S.G. § 5D1.3(b) (2000). Section 5D1.3(d)(5), which pertains to mental health programs, states:

> (d) (Policy statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:
>
> . . . .
>
> (5) Mental Health Program Participation
>
> If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

U.S.S.G. § 5D1.3(d)(5) (2000).

378. 214 F.3d at 1276.

379. *Id.* at 1277 (quoting United States v. Johnson, 998 F.2d 696, 697 (9th Cir. 1993)).

law, the special condition imposed need not be related to each factor listed in section 5D1.3(b)."[380]

Turning to the facts of the case at hand, the Eleventh Circuit noted that defendant had a history of anger control problems.

> The special condition imposed by the court requiring [defendant] to participate in mental health treatment for anger and violence, if deemed appropriate by the probation officer, clearly relates to his history and characteristics. The condition is not so broad as to deprive [defendant] of any of his constitutionally protected liberties.[381]

Therefore, the district court did not abuse its discretion in imposing this condition.[382]

In *United States v. Chavez*,[383] the court stated that a mandatory term of supervised release is only required when the defendant is sentenced to a term of imprisonment.[384] Defendant in *Chavez* was sentenced to a term of probation with a special condition that he reside in a community corrections facility.[385] The Eleventh Circuit stated that the confinement in the half-way house did not constitute imprisonment.[386] Therefore, defendant was not subject to a mandatory term of supervised release.[387]

C. Part K: Departures

In 2000 the Eleventh Circuit followed the trend that it has set over the past few years. It affirmed upward departures, reversed downward departures, and affirmed district court decisions not to depart downward. However, unlike recent years, in 2000 the court only engaged in a detailed discussion of the substance of the departure at issue in one case.

In *Nealy*[388] the court held that the Government did not violate defendant's due process rights by refusing to file a motion to depart downward based on substantial assistance.[389] The Government conceded that defendant provided substantial assistance, but refused to file a motion for downward departure under U.S.S.G. section 5K1.1

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380. *Id.* at 1278.
381. *Id.*
382. *Id.*
383. 204 F.3d 1305 (11th Cir. 2000).
384. *Id.* at 1312.
385. 204 F.3d at 1309.
386. *Id.* at 1312-13.
387. *Id.* at 1312.
388. 232 F.3d 825 (11th Cir. 2000).
389. *Id.* at 831.

because after defendant provided the substantial assistance, he was again arrested for possession with intent to distribute drugs.[390] The court relied on section 5K1.1 and 18 U.S.C. § 3553(e) for the proposition that "the government has 'a power, not a duty, to file a motion when a defendant has substantially assisted.'"[391] The Eleventh Circuit held that its review of the Government's refusal to file a motion for downward departure based on substantial assistance was limited to claims of unconstitutional motive, which were not made in this case.[392]

In the rest of the departure cases, the Eleventh Circuit did not discuss the substance of the departures in detail. For example, in *Harper* defendant was convicted of possession of child pornography, and the district court departed upward one criminal history category, finding defendant's criminal history was underrepresented.[393] The Eleventh Circuit affirmed the upward departure "without further discussion."[394]

In *United States v. Gordon*,[395] defendant argued that the district court improperly relied on unreliable hearsay statements by his

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390. *Id.*

391. *Id.* (quoting Wade v. United States, 504 U.S. 181, 184 (1992)).

392. *Id.* In so holding, the court rejected the approach of the Eighth Circuit in *United States v. Anvalone*, 148 F.3d 940, 941 (8th Cir. 1998).

393. 218 F.3d at 1286 & n.1. Although the opinion does not state the basis of the departure, the reference to the criminal history being underrepresented indicates the departure was based on U.S.S.G. section 4A1.3. Nonetheless, *Harper* is discussed under Chapter 5, Part K, because it is indicative of how the Eleventh Circuit treated departures in 2000.

The Eleventh Circuit opinion also did not detail the facts underlying the upward departure. However, its recitation of the facts underlying the offense is insightful. The court noted that in 1989, defendant had been convicted of molesting his wife's minor niece repeatedly between 1983 and 1989 in two different counties. *Id.* at 1286. After he was paroled, his probation officer inspected his home and found the computer disk containing between 600 and 1,000 pornographic pictures of minors that formed the basis of the instant federal conviction for possession of child pornography. *Id.* Presumably, this is the criminal history that the court found was underrepresented.

394. *Id.* at 1286 n.1. The court cited 11th Cir. R. 36-1, which provides:

> When the court determines that any of the following circumstances exists:
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> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

395. 231 F.3d 750 (11th Cir. 2000).

codefendant to support an upward departure under U.S.S.G. sections 5K2.3 and 5K2.8, based on the victim's psychological injury and the severity of defendant's conduct.[396] The court found that the hearsay statements relied on by the district court to support this upward departure had sufficient indicia of reliability in that the codefendants' statements were consistent with each other and were corroborated.[397] The court also noted that although defendant had an opportunity to discredit these witnesses by calling them at sentencing, he failed to do so.[398]

A defendant in *Thayer* challenged the denial of a downward departure for diminished capacity, claiming that the district court misunderstood the diminished capacity guideline.[399] The Eleventh Circuit did not elucidate the district court's findings, but stated that it had reviewed them and concluded that the district court understood the guidelines, but found defendant did not suffer from diminished capacity.[400] Therefore, the Eleventh Circuit affirmed the district court decision not to depart downward.[401]

In *Bravo* defendant filed a motion for a sentence adjustment based on a retroactive guideline amendment.[402] He also asked the court to depart downward from the new sentence based on his medical condition.[403] The Eleventh Circuit upheld the district court's conclusion that "it lacked jurisdiction to depart downward because of [defendant's] medical condition to an extent greater than that authorized under [18 U.S.C. §] 3582(c) based on the amended guideline provision."[404]

In *Simpson* defendant was convicted of conspiracy to possess with intent to distribute cocaine base, two counts of distributing cocaine base,

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396. *Id.* at 759. Section 5K2.3 provides, "[i]f a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range." U.S.S.G. § 5K2.3 (2000).

Section 5K2.8 provides, "[i]f the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct." U.S.S.G. § 5K2.8 (2000).

397. 231 F.3d at 760.

398. *Id.* The court's holding, which also applied to the role enhancement, is discussed in more detail in connection with U.S.S.G. section 6A1.3, the subsection concerning the resolution of disputed factors. *See infra* Part VIII.A.

399. 204 F.3d at 1356.

400. *Id.*

401. *Id.*

402. 203 F.3d at 780. This case is discussed in detail under the section of this article relating to U.S.S.G. section 1B1.10. *See supra* Part III.B.

403. 203 F.3d at 780.

404. *Id.* at 781.

and two counts of carrying a firearm during a drug trafficking crime. The presentence report concluded that defendant's guideline range on the drug counts was 292 to 365 months imprisonment. He was also subject to consecutive sentences of five years and twenty years on the two firearm counts, under 18 U.S.C. § 924(c). Therefore, his minimum sentence was calculated at 592 months imprisonment.[405] The district court agreed with the calculations in the presentence report, but concluded that a 592-month sentence was "disproportionate to the gravity of the defendant's offenses" and reduced his sentence to a total of 352 months imprisonment.[406]

The Eleventh Circuit held that the district court did not have authority to depart downward from the mandatory sentencing provisions set forth in 21 U.S.C. §§ 841, 851, and 18 U.S.C. § 924(c)(1).[407] The Eleventh Circuit noted that "the relevant statutorily authorized mandatory minimum sentences exceeded the relevant Sentencing Guidelines range, and, therefore, took precedence over them. Moreover, the district court had no discretion to depart downward from the relevant statutory mandatory minimum sentences."[408] Although defendant's guidelines were less than the twenty-year mandatory minimum penalty under the drug statute, the Eleventh Circuit noted that "where a guideline range falls entirely below a mandatory minimum sentence, the court must follow the statutory minimum."[409] Therefore, the district court was required to sentence the defendant to twenty years imprisonment on the drug charges.[410] Additionally, the Eleventh

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405. 228 F.3d at 1297-98.

406. *Id.* at 1298. As discussed under the section of this Article relating to U.S.S.G. section 2D1.1, *supra* Part IV.B.2, defendant successfully appealed the district court's calculation of the quantity of drugs attributable to him. *Id.* at 1302. However, the government was also successful in its cross-appeal of the downward departure. *Id.*

407. *Id.* at 1302-1304. Section 841(b) provides for a sentence of not less than twenty years imprisonment if the defendant's offense involved fifty grams or more of a mixture or substance containing cocaine base and the defendant committed the offense after a prior conviction for a felony drug offense. 21 U.S.C. § 841(b) (1994 & Supp. 1999). The Government had filed the required enhancement notice under 21 U.S.C. § 851, thereby triggering the twenty-year mandatory minimum prison term. 228 F.3d at 1303. Under section 924(c)(1), a first conviction carries a mandatory term of five years imprisonment and a second conviction carries a term of twenty years imprisonment. Section 924(c)(1) requires that such sentences be imposed consecutively. *Id.* at 1304.

It should be noted that on November 13, 1998, 18 U.S.C. § 924(c) was amended to increase the penalty for a second or subsequent conviction to twenty-five years imprisonment.

408. 228 F.3d at 1302-03.

409. *Id.* at 1303. *See also* U.S.S.G. § 5G1.1.

410. 228 F.3d at 1304.

Circuit determined that defendant was required to serve a mandatory term of twenty-five years imprisonment on the firearms counts consecutive to the twenty-year sentence on the drug counts.[411] Because the district court had no discretion to depart downward in this case, the sentence was vacated and remanded for resentencing.[412]

VIII. CHAPTER SIX: SENTENCING PROCEDURES AND PLEA AGREEMENTS

A. Part A: Sentencing Procedures

U.S.S.G. section 6A1.3 allows the district court to rely on "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."[413] In *Gordon* defendant argued that the district court improperly relied on unreliable hearsay statements by his codefendant to support a role enhancement and an upward departure. Defendant also challenged the failure of the district court to make specific findings about the reliability of the hearsay statements.[414] The Eleventh Circuit rejected defendant's claims, noting that the district court had informed him the codefendants were prepared to testify at the sentencing hearing, but he failed to call them.[415] The court further found that the hearsay statements had sufficient indicia of reliability because the codefendants' statements were consistent with each other regarding defendant's role in the offense.[416] Concerning the challenge to the district court's failure to make specific findings on the reliability of the statements, the Eleventh Circuit distinguished its decision in *United States v. Lee*,[417] noting that "'[s]pecific findings on [the co-conspirator's] credibility are necessary before the district court can use this evidence as a basis for determining the base offense level in order to sentence' the defendant."[418] In contrast to the insufficient indicia of reliability in *Lee*, the evidence in *Gordon* was "materially consistent" concerning defendant's role and offense conduct.[419] "While it may be advisable and in some instances

411. *Id.* at 1304-05.
412. *Id.* at 1305.
413. U.S.S.G. § 6A1.3 (2000).
414. 231 F.3d at 759.
415. *Id.* at 759-60.
416. *Id.* at 760.
417. 68 F.3d 1267, 1276 (11th Cir. 1995).
418. 231 F.3d at 760.
419. *Id.* at 760-61.

necessary for a district court to make distinct findings regarding the reliability of hearsay statements used at sentencing, the absence of such findings does not necessarily require reversal or remand where the reliability of the statements is apparent from the record."[420]

B. Part B: Plea Agreements

In *Thayer* the Eleventh Circuit rejected defendant's claim that the government breached the plea agreement when it failed to request a lower offense level due in part to "super acceptance" of responsibility.[421] The court noted that "prior to sentencing, the government learned that [defendant] had underhandedly transferred assets to her daughter."[422] Applying the plain error standard of review because defendant did not object at sentencing, the Eleventh Circuit noted that defendant "never argues that the sentence imposed is unfair, rather she argues that she would be released sooner but for the sentence."[423] Thus, the court found that, under the plain error standard, "the breach of the plea agreement does not rise to the level of unjustly affecting a substantial right of the defendant."[424] Additionally, the Eleventh Circuit noted that the district court "possessed discretion to make independent findings and sentence accordingly."[425] Thus, the sentence was affirmed.[426]

In *United States v. Tyndale*,[427] defendant challenged the validity of his guilty plea on the basis of U.S.S.G. section 6B1.1(c) because his presentence report had not been completed at the time he entered the plea.[428] Under section 6B1.1(c), the court is required to "defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1."[429] The Eleventh Circuit rejected defendant's argument, stating "[a]lthough that guideline, in some circumstances, may require the court to defer its decision whether or not to *accept the plea agreement* until after having considered the presen-

420. *Id.* at 761.
421. 204 F.3d at 1356.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. 209 F.3d 1292 (11th Cir. 2000).
428. *Id.* at 1296.
429. U.S.S.G. § 6B1.1(c) (2000).

tence report, it does not say that the court must defer its decision whether to *accept the plea* until that time."[430]

IX. CHAPTER SEVEN: VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

In *United States v. Brown*,[431] the district court sentenced defendant to twenty-four months in prison on a violation of supervised release so that defendant could be housed in a comprehensive substance abuse treatment program. The court further directed that if such a treatment program was not available, defendant would not serve more than eleven months. The defendant appealed, contending that the district court abused its discretion in departing from the policy statements for violations of supervised release by imposing a twenty-four month sentence for the specific purpose of rehabilitation.[432] In affirming the sentence, the Eleventh Circuit reiterated that a district court "cannot impose an initial incarcerative sentence for the purpose of providing a defendant with rehabilitative treatment."[433] The court held, however, that the district court may consider a defendant's rehabilitative needs when imposing a sentence following a term of supervised release.[434]

Defendant in *Brown* also argued that the district court failed to consider the policy statements of Chapter Seven of the guidelines, which provided for a range of five to eleven months.[435] The Eleventh Circuit held that it was clear from the record that the sentencing court did consider the sentencing range because it noted the minimum and maximum advisory range during the sentencing hearing.[436] Thus, the court did not abuse its discretion by exceeding the range and sentencing defendant to the maximum penalty of twenty-four months in prison.[437]

In *United States v. Aguillard*,[438] the Eleventh Circuit dealt with two issues pertaining to a sentence imposed upon a violation of supervised

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430. 209 F.3d at 1296 (emphasis in original). The court also rejected defendant's challenge to his guilty plea due to the district court's failure to advise him that his sentence would be enhanced under U.S.S.G. section 2J1.7, as well as 18 U.S.C. § 3147. *Id.* at 1295. The court noted that "the failure to advise of a *Sentencing Guidelines* sentencing range is harmless error, as long as the defendant knew that the Sentencing Guidelines existed and that they would affect his sentence." *Id.*

431. 224 F.3d 1237 (11th Cir. 2000).

432. *Id.* at 1239.

433. *Id.* at 1240.

434. *Id.*

435. *Id.* at 1242.

436. *Id.*

437. *Id.* at 1242-43.

438. 217 F.3d 1319 (11th Cir. 2000).

release. Defendant violated her supervised release and was sentenced to twenty-four months imprisonment, which was the statutory maximum term of imprisonment upon revocation of the supervised release term. Defendant first argued that the two-year term of imprisonment was too severe and that the district court did not properly consider the nonbinding policy statements of Chapter Seven, which indicated a three- to nine-month range of imprisonment would have been appropriate.[439] The Eleventh Circuit reiterated that Chapter Seven guidelines are "merely advisory" and that the district court need only be aware of them and consider them when imposing a sentence.[440] Because the district court clearly mentioned the advisory guidelines and determined that they were inadequate under the circumstances, the Eleventh Circuit found it had sufficiently considered the guidelines before imposing the maximum statutory sentence.[441]

Defendant in *Aguillard* also argued that the district court erred in basing the length of the sentence on the prospects of her receiving drug rehabilitation.[442] Because defendant failed to object at sentencing, the Eleventh Circuit reviewed this issue only for plain error.[443] The court held that in light of the fact that neither the Supreme Court nor the Eleventh Circuit had ever resolved the issue, plain error could not exist.[444] Nonetheless, in affirming the sentence, the court also noted that the six circuits that had decided the issue had agreed it was not improper to consider the availability of rehabilitative programs in determining the length of the sentence upon a revocation of supervised release.[445]

In *United States v. Wiggins*,[446] the Eleventh Circuit was confronted with the same issue as was presented in *Aguillard*. The district court revoked defendant's supervised release and imposed a two-year sentence for the sole purpose of insuring defendant would undergo comprehensive drug abuse rehabilitation treatment. However, unlike the defendant in

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439. *Id.* at 1320.

440. *Id.* (quoting United States v. Hofierka, 83 F.3d 357, 361 (11th Cir. 1996)).

441. *Id.*

442. *Id.* at 1321.

443. *Id.* at 1320.

444. *Id.*

445. *Id.* The six cases cited by the Eleventh Circuit are: *United States v. Anderson*, 15 F.3d 278 (2d Cir. 1994); *United States v. McGee*, 85 F.3d 618 (4th Cir. 1996) (unpublished table decision); *United States v. Giddings*, 37 F.3d 1091 (5th Cir. 1994); *United States v. Jackson*, 70 F.3d 874 (6th Cir. 1995); *United States v. Harlow*, 124 F.3d 205 (7th Cir. 1997) (unpublished table decision); *United States v. Shaw*, 180 F.3d 920 (8th Cir. 1999).

446. 220 F.3d 1248 (11th Cir. 2000).

Aguillard, who had failed to object in the district court and was subject to the plain error standard of review, defendant in *Wiggins* preserved the issue in the district court.[447] Therefore, his sentence was reviewed for abuse of discretion.[448] Nevertheless, the Eleventh Circuit reached the same conclusion as it had in *Aguillard*, holding that "the district court did not abuse its discretion in considering the availability of drug treatment in imposing a sentence exceeding that recommended by Chapter Seven of the Guidelines."[449]

X. CONCLUSION

The decline in published Eleventh Circuit opinions addressing sentencing guideline issues in 2000 is likely an aberration that will not recur in 2001, especially given the number of guideline amendments that were enacted on November 1, 2000, and the evolving law applying *Apprendi*. It will be interesting to watch the Supreme Court's reaction to the cases that hold the guidelines in general are unaffected by *Apprendi*.[450] Although the majority opinion in *Apprendi* stated that the guidelines were not before the court,[451] the concurrence and dissent clearly indicate that the rule announced by the majority may one day result in the invalidation of the federal sentencing guidelines.[452]

447. *Id.* at 1248-49.
448. *Id.* at 1249.
449. *Id.*
450. *See, e.g., Nealy*, 232 F.3d at 829 n.3.
451. 530 U.S. at 497 n.21.
452. *Id.* at 523 n.11 (Thomas, J., concurring); *Id.* at 544 (Rehnquist, C.J., O'Connor, Kennedy, and Breyer, JJ., dissenting).