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Andrea Wilson

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Federal Sentencing Guidelines

by Andrea Wilson*

I. INTRODUCTION

Whether the sentencing guidelines have finally become familiar enough for consistent application or because there were so few amendments last year,¹ there seem to be fewer dramatic and controversial Eleventh Circuit decisions regarding sentencing this year than in years past. The court took the opportunity to focus more closely on the process of sentencing itself rather than on the precise application of the guidelines.

The Court wrote extensively about the district courts' frequent failure to create a fully articulated record on which appellate review can be had. Expanding on its earlier requirement that district courts elicit and respond to objections to sentencing issues by the parties set forth in United States v. Jones,² the Eleventh Circuit criticized district courts for failing to follow Jones' simple conditions.³ In a similar vein, the Eleventh Circuit remanded a number of drug crime sentences because the district courts had not sufficiently supported their determinations of the appropriate quantities of drugs involved with facts on the record.⁴

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1. There were only six: amendments 503-509. Effective November 1, 1994.
2. See United States v. Jones, 899 F.2d 1097, 1097 (11th Cir. 1990), cert. denied, 498 U.S. 906 (1990), overruled on other grounds, United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993).
4. See United States v. Lawrence, 47 F.3d 1859, 1666 (11th Cir. 1995); United States v. Lee, 68 F.3d 1267, 1274 (11th Cir. 1995).
The burden these failed sentences create on the court is obvious; they have been remanded for new sentencing hearings and will undoubtedly be appealed again, only to take up more of the court's time and energy the second time around.

Naturally, the sentencing guidelines cannot be completely divorced from other more general sentencing issues, and the court addressed a number of those as well. These areas include the application of statutory minimum mandatory sentences based on drug quantities and on prior convictions.  

II. SIGNIFICANT NON-GUIDELINES ISSUES

A. Restitution

In United States v. Page, the district court ordered restitution jointly and severally among the defendants, but also stated that the restitution paid by one could not be applied to the restitution owed by another. The Eleventh Circuit discourages joint and several restitution obligations because of the natural differences in each defendant's ability to pay. The court, however, found that sentencing courts could not require joint and several responsibility and, at the same time, preclude payment by one to be credited to others because the "concepts are mutually exclusive."

In United States v. Schrimsher, the court held that a defendant can agree to restitution greater than the loss relating to the offense of conviction. The defendant was arrested in possession of three stolen cars, and he later pled guilty to one count of possession of a stolen motor vehicle. At sentencing, Schrimsher's attorney told the district court that even though "the plea agreement does not set out specifically that [Schrimsher] will agree to restitution [for the] three automobiles . . . we represented by stipulation [that Schrimsher] knew the cars were stolen . . . and he had the three cars so he is responsible for them." The court held that the defendant waived any objection and agreed to pay

6. 69 F.3d 482 (11th Cir. 1995).
7. Id. at 494.
8. Id.
9. Id.
10. 58 F.3d 608 (11th Cir. 1995).
11. Id. at 610.
12. Id. at 609.
13. Id. (brackets in original).
restitution for the three vehicles.\textsuperscript{14} Earlier, the court had remanded the case for reconsideration of the restitution order in light of the fact that the plea agreement did not contain a specific agreement for restitution greater than the single count of conviction.\textsuperscript{16}

B. Mandatory Minimum Sentences

Title 21 U.S.C. § 841(b)(1)(A), in conjunction with 21 U.S.C. § 851, requires a mandatory life sentence for a defendant convicted of a drug trafficking crime if the defendant has previously been convicted of more than two felony drug offenses and if the government has filed an information invoking the enhancement. Title 18 U.S.C. § 851(a)(2) provides that, "[a]n information may not be filed under this section . . . unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed."

In United States v. Brown,\textsuperscript{16} the defendant claimed that his sentence was improper because the prior convictions being used as the basis for the enhancement were charged by information, and he had not waived indictment.\textsuperscript{17} The Eleventh Circuit, deciding the question for the first time, agreed with other circuits and held that the case in which the enhanced penalty is being sought is the one that must be brought by indictment or by information with a waiver, not the prior convictions.\textsuperscript{18}

The enhanced sentence provision of 18 U.S.C. § 922(g), however, does not require that the defendant be put on notice the way other enhancement statutes do.\textsuperscript{19} According to United States v. Cobia,\textsuperscript{20} the enhancement is invoked automatically when the defendant enters a plea negotiation in which the government has specifically agreed not to seek enhanced penalties (although the government maintained that the enhancement might not be discretionary).\textsuperscript{21} The court, studying the legislative history of the provision, determined that Congress meant for

\textsuperscript{14} Id. at 610.
\textsuperscript{15} See United States v. Schrimsher, 58 F.3d 608, 610 (11th Cir. 1995).
\textsuperscript{16} 47 F.3d 1075 (11th Cir. 1996).
\textsuperscript{17} Id. at 1077.
\textsuperscript{18} Id. at 1077-78 (citing United States v. Espinosa, 827 F.2d 604 (9th Cir. 1987), cert. denied, 485 U.S. 968 (1988); United States v. Adams, 914 F.2d 1404 (10th Cir.), cert. denied, 498 U.S. 1015 (1990); United States v. Burrell, 963 F.2d 976 (7th Cir.), cert. denied sub nom. Henry v. United States, 506 U.S. 928 (1992); United States v. Trevino-Rodriguez, 994 F.2d 533 (8th Cir. 1993)).
\textsuperscript{21} 41 F.3d at 1475.
the enhancement to be mandatory and automatic and, therefore, refused to set aside the enhancement.22

III. 1995 AMENDMENTS

More than twenty-five new amendments went into effect November 1, 1995.23 The Commission added only two amendments to the list of those which can be applied retroactively.24 Amendment 505, passed in 1994, eliminates the first two sections of the drug table, limiting the offense level for drug cases to a maximum of 38.25 Amendment 516, which reduces the equivalent weight of marijuana plants, can be applied to defendants who have already been sentenced using procedures set out in U.S.S.G. § 1B1.10 and 19 U.S.C. § 3582(c)(2).26

A. Section 2A2.3 (Minor Assault)

Amendment 510 adds a four offense-level increase if “substantial bodily injury” was inflicted on a victim under sixteen and defines the term.27 This amendment corresponds to recent legislation regarding assaults against minors.28

B. Sections 2A3.1, 2A3.2, 2A3.3, and 2A3.4 (Sex Abuse)

Amendment 511 authorizes a departure if the victim was raped by more than one person or when the defendant has similar prior convictions.

C. Section 2B1.1(b) (Theft, Possession of Stolen Property, etc.)

Amendment 512 adds a cross-reference based on the role of weapons or drugs in the offense if calculation under other guidelines would result in a higher computation.

D. Section 2B5.1(b) (Counterfeit)

Amendment 513 adds a two offense-level increase if a dangerous weapon was possessed in connection with the offense.

22. Id. at 1475-76.
27. U.S.S.G. § 2A2.3.
E. Section 2D1.1(b) (Drugs)

Amendment 514 adds a two offense-level enhancement for distribution of drugs in jail. It also adds a cross-reference if the offense is simple possession in jail.

F. Section 2D1.1(b) (Drugs)

Amendment 515 provides a two offense-level reduction for defendants who meet the “safety valve” criteria of U.S.S.G. § 5C1.2 and 18 U.S.C. § 3553(f) if the base offense level calculation is 26 or higher. The decrease applies to the offense-level before any reductions for acceptance of responsibility, role in the offense, substantial assistance, etc.

G. Section 2D1.1(c) (Drugs)

Amendment 516 changes the equivalency of marijuana plants to 100 grams regardless of the number or the sex of the plants. This amendment is retroactive.

H. Section 2D1.1(c)(10) (Drug Table)

Amendment 517 changes the equivalency calculation for a number of drugs which are normally delivered in pill form to account for different methods of manufacture. The modification more fairly represents the actual amounts of controlled substances involved by counting the number of pills instead of the weight of the pills.

I. Section 2D1.1(c) (Drug Table)

Amendment 518 is an eight-part amendment changing numerous aspects of the drug table. First, the amendment supplies a definition of hashish and hashish oil to eliminate circuit splits. It next addresses the treatment of marijuana whose dampness makes it unusable without drying. Courts are instructed to approximate the weight in a usably dry form. The amendment also addresses the often-asked question, “when is a plant a plant?” The answer is, when it has “leaves and a readily observable root formation.” The amendment adds two drug

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29. Until now, if the case involved more than fifty marijuana plants, each was given a presumptive weight of one kilogram.
31. See United States v. Smith, 51 F.3d 980 (11th Cir. 1995).
32. United States v. Foree, 43 F.3d 1572, 1580 n.12 (11th Cir. 1995); Shields, 49 F.3d at 710 n.8.
equivalencies to the table, for khat and levo-alpha-acetylphenacetin (LAAM) and deletes LSD as a listed precursor chemical. It eliminates the distinction between D- and L-Methamphetamine, saying that L-Methamphetamine is really only a mistake and should be treated just like D-Methamphetamine since that is what defendants intend to make.\(^{33}\) Finally, the amendment addresses cases involving negotiated drug quantities by applying the negotiated amount unless the sale has been completed and the actual amount delivered is a more accurate reflection of the scope of the offense. The district courts are instructed not to include amounts that were negotiated but which the defendant "was not reasonably capable of providing."

J. Section 2D1.11(d) (Listed Precursor Chemicals)

Amendment 519 renames parts of the list and deletes references to LSD. It adds two other chemicals, Benzaldehyde and Nitroethane, and addresses the difference between ephedrine (purchased from chemical companies in a very pure form) and pills containing ephedrine (usually at very low dosages).

K. Section 2D1.12(a) (Lab Equipment Offenses)

Amendment 520 addresses those defendants who "had reasonable cause to believe" that the equipment was to be used to manufacture controlled substances, but not actual knowledge, by giving them a three offense-level reduction.

L. Section 2H1 (Offenses Involving Individual Rights), § 3A1.1 (Vulnerable Victim)

Amendment 521 deletes most of subpart H of Chapter Two. The offenses formerly covered by several different guidelines are now scored under the new section 2H1.1. A new offense for obstructing access to clinic entrances is now scored in this subpart.\(^{34}\) Offenses against the elderly are also addressed in the new section 2H1.1.

U.S.S.G. § 3A1.1 is completely rewritten and now includes a three offense-level enhancement for hate crimes. The Commission explains that much of the rewriting is to ensure that the provisions of section 2H and section 3A1.1 are not applied cumulatively.

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33. See United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995).
M. Section 2K2.1(a)(1) (Firearms)

Amendment 522 extensively rewrites the guideline and now provides the same increased offense level for semiautomatic firearms as for machine guns. It also addresses the misdemeanor of sale or transfer of a firearm to a minor. The felony of sale or transfer of a firearm to a minor having reasonable cause to believe that it was intended for use in a crime now has a minimum offense level of eighteen. The definition of "prohibited person" is broadened and certain Brady Act violations which are misdemeanors have a base offense level of six.

N. Section 2L1.2 (Unlawful Entry)

Amendment 523 authorizes a departure for defendants who have repeatedly reentered the country without having been convicted.

O. Section 2L2.1 (Trafficking in Immigration Documents)

Amendment 524 adds a four offense-level increase if the defendant had reason to believe that the documents would be used to facilitate a felony (other than an immigration violation), and authorizes a departure if the felony was "an especially serious type." It also provides a cross-reference to other guideline sections.

P. Section 2P1.2 (Contraband in Prisons)

Amendment 525 adds Methamphetamine to the list of prohibited substances and reflects the increased punishment for these crimes generally.

Q. Section 3A (Adjustments)

Amendment 526 adds subsection 3A1.4, International Terrorism, which provides a twelve-level enhancement to the offense level, with a minimum level of thirty-two and an automatic criminal history category increase to VI.

R. Section 3B1.4 (Using a Minor to Commit a Crime)

This section, which is completely rewritten by Amendment 527, adds a two-level increase to the offense level.

35. Id. § 922(x)(1).
36. Id. § 922(x)(1).
37. Id. § 922(s).
38. See also U.S.S.G. amend. 514 (Nov. 1, 1995).
S. Sections 4B1.1 and 4B1.2 (Career Offender)

The background commentary to this section is rewritten by Amendment 528 in response to a recent District of Columbia case and now specifically includes conspiracy offenses.  

T. Sections 5D1.1 and 5D1.2 (Supervised Release)

Amendment 529 makes the imposition of supervised release following incarceration more discretionary.

U. Section 5E1.1(a)(2) (Restitution)


V. Section 5K2.17 (High-Capacity, Semiautomatic Firearms)

Amendment 531 authorizes a departure when a semiautomatic firearm with a capacity of more than ten cartridges is used in a drug or violent offense. The Commission believes that semiautomatics now form the “heartland” of gun offenses because they are the weapon of choice in fifty to seventy percent of offenses. Congress apparently disagrees and has required increased punishment. The Commission tried to find a way to add an enhancement to only the worst offenders by applying it to high-capacity weapons and not the most common semiautomatics.

W. Section 5K1.18 (Violent Street Gangs)

Amendment 532 authorizes a departure for a defendant subject to statutory enhancement for participation in a gang.

X. Section 7B1.3(g)(2) (Revocation of Supervised Release)

Congress amended 18 U.S.C. § 3583(e)(3) by specifying that the maximum term of incarceration after a violation of supervised release on a Class A felony is five years. Title 18 U.S.C. § 3583(g) was also amended to delete the mandatory one-third imprisonment for drug violations. Amendment 533 enacts those changes. It still requires imprisonment for a violation based on drug possession, but leaves the length of the sentence to the court. It also requires revocation and

40. See also U.S.S.G. amend. 522 (Nov. 1, 1995).
incarceration if the defendant is in possession of a firearm or refuses to submit to drug testing. The amendment instructs that additional, though limited, supervised release can be imposed after incarceration on a previous violation of release.

Y. Section 5G1.3 (Defendants Serving Undischarged Sentences)

This section, which never worked well, is extensively rewritten by Amendment 535. It appears to provide district courts much greater discretion in determining when sentences can be imposed to run consecutively to, or concurrently with, previously-imposed sentences.

IV. 1995 ELEVENTH CIRCUIT SENTENCING GUIDELINE CASES

A. Generally

The court relied on a proposed guideline amendment to fashion a rule of law in United States v. Smith. Reversing an earlier holding that the entire weight of damp marijuana should be used to calculate the base offense-level, the court cited United States v. Cruz for the principle that proposed amendments can be used "as subsequent legislative history to interpret the meaning of prior Application Notes." The proposed amendment relied upon in Smith has since been enacted by Congress.

A recurring problem in federal sentencing is the correct preservation of objections to the sentencing procedure and to the sentence itself. The court set out certain requirements years ago in United States v. Jones. Jones requires that the sentencing court provide the parties ample opportunity to state their objections and the grounds for the objections on the record. If the district court complies but a party does not clearly state its grounds, the objections are waived. The standard of review on appeal is greatly reduced since a waived objection will only be reviewed for plain error.

42. 51 F.3d 980 (11th Cir. 1995).
43. 805 F.2d 1464, 1471 n.8 (11th Cir. 1986).
44. 51 F.3d at 981.
46. 899 F.2d 1097 (11th Cir. 1990), cert. denied, 498 U.S. 906 (1990), overruled on other grounds, United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993).
47. 899 F.2d at 1102.
48. Id.
In *United States v. Maurice*, the district court asked for objections after imposing sentence. Counsel for the defendant answered, "[W]e would reserve an objection as to the departure [based on prior convictions too old to count]." This explanation was not sufficiently clear to preserve the objection for appeal under *Jones*.

In *United States v. Page*, the district court ordered restitution without making the required findings regarding the defendant's ability to pay. Most of the defendants in the appeal did not raise the issue, but because it was common to all, the court addressed the question. In so doing, the court found that the requirements of *Jones* had not been met and remanded the case for further findings.

The district court, after imposing sentence, simply advised the defendant of her right to appeal without first asking for objections to the sentence or order imposing restitution. This obligation remained, despite a provision in the defendant's plea agreement that she "acknowledge[d] that the [c]ourt may order restitution as part of the sentence imposed in the instant case."

Similarly, the district court cannot simply adopt the factual findings in the presentence investigation report regarding ability to pay restitution because the report does not take objections or the arguments of parties into account.

Whether sentence enhancements for more than minimal planning and for an aggravating role in the offense can be applied together is an issue of first impression in this circuit addressed in *United States v. Stevenson*. The court noted that the vast majority of circuits have held that applying these enhancements together is not double counting while one circuit has held that it is impermissible. The court sided with the

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50. 69 F.3d 1553 (11th Cir. 1995).
51. Id. at 1557.
52. Id.
53. 69 F.3d 482 (11th Cir. 1995).
54. Id. at 492 (restitution is addressed in U.S.S.G. § 5E1.1).
55. Id.
56. Id. at 493.
57. Id. (brackets in original).
58. Id. at 494.
59. 68 F.3d 1292, 1292 (11th Cir. 1995).
majority, holding that because the two provisions "concern[] conceptually separate notions relating to sentencing," the application of both is permissible.\(^6\)

B. Chapter One—Introduction and General Application Principles

**U.S.S.G. § 1B1.3: Relevant Conduct.**\(^6\) In *United States v. Reese*,\(^6\) the court reversed drug sentences imposed under an incorrect application of the rules of relevant conduct.\(^6\) The district court had determined the drug quantity attributable to each defendant based on the drugs he or she actually had a part in distributing and also on the amount each defendant knew the organization as a whole distributed. In other words, each defendant was held accountable for the entire amount of drugs sold by the organization.\(^6\) The Eleventh Circuit, reviewing the recently amended language of U.S.S.G. § 1B1.3, held that a defendant may only be sentenced based on the drugs the defendant actually participated in selling and "other conduct that was reasonably foreseeable and within the scope of the criminal activity that the defendant agreed to undertake."\(^6\) Knowledge is no longer enough.

C. Chapter Two-Specific Offenses

1. **U.S.S.G. § 2A6.1: Threatening Communications.** This guideline calls for a six-level enhancement "[i]f the offense involved any conduct evidencing an intent to carry out [the] threat."\(^6\) In *United States v. Barbour*,\(^6\) the defendant travelled to Washington, D.C. hoping to kill the president and then himself. He was thwarted because the president was in Russia.\(^6\) Later, he told a neighbor of his plan.\(^6\) The defendant objected to the enhancement because the conduct upon

\(^6\) 68 F.3d at 1294.
\(^6\) Although the determination of drug quantities is largely dependent on the rules of relevant conduct detailed in U.S.S.G. § 1B1.3, most of those cases are more appropriately discussed in relation to the drug guideline, U.S.S.G. § 2D1.1, later in this article.
\(^6\) 67 F.3d 902, 902 (11th Cir. 1995).
\(^6\) *Id.* at 909.
\(^6\) *Id.* at 904-05.
\(^6\) *Id.* at 907 (emphasis in original).
\(^6\) 70 F.3d at 583.
\(^6\) *Id.*
which it was based occurred before he communicated his threat to
anyone.\footnote{Id. at 586.} The Eleventh Circuit, following other circuits,\footnote{Id. at 586-87 (citing United States v. Hines, 26 F.3d 1469 (9th Cir. 1994); United States v. Gary, 18 F.3d 1123 (4th Cir.), cert. denied, 115 S. Ct. 134 (1994)).} held that:

under certain circumstances pre-threat conduct may be used as
evidence to demonstrate a defendant's intent to carry out a threat.
Factors a district court should consider in determining the probative
value of pre-threat conduct include the following: the proximity in time
between the threat and the prior conduct, the seriousness of defen-
dant's prior conduct, and the extent to which the pre-threat conduct
has progressed towards carrying out the threat.\footnote{Id. at 587.}

2. U.S.S.G. § 2D1.1: Drugs—Marijuana. According to United
States v. Smith,\footnote{51 F.3d 980 (11th Cir. 1995).} the district court should approximate the usable
weight of damp marijuana.\footnote{Id. at 982.} The court withdrew an earlier opinion\footnote{Id. at 981.} agreeing with the Seventh\footnote{Id. (citing United States v. Garcia, 925 F.2d 170, 172-73 (7th Cir. 1991)).} and Tenth Circuits.\footnote{Id. (citing United States v. Pinedo-Montoya, 966 F.2d 591, 595-96 (10th Cir. 1992)).} The court relied on
a guideline amendment proposed by the Sentencing Commission which
calls for an approximation of the usable amount of marijuana which is
"too wet to be consumed without drying."\footnote{Id. (citing Proposed Amendments to the Federal Sentencing Guidelines, 56 CRIM. L. REP. (BNA) 2063, 2088, 2090 (Jan. 11, 1995)). This became Amendment 518 to the United States Sentencing Guidelines, effective November 1, 1995.}

The court refined the definition of marijuana in United States v.
Foree,\footnote{43 F.3d 1572 (11th Cir. 1995).} holding for the first time that for marijuana cuttings to be
plants within the meaning of the statute\footnote{Id. at 1574 (construing 21 U.S.C. § 841(b)).} and the sentencing guide-
lines,\footnote{Id. (construing U.S.S.G. § 2D1.1(c)).} there must be roots.\footnote{Id. (construing U.S.S.G. § 2D1.1(c)).} This holding is consistent with every
other circuit that has entertained the question.\footnote{See United States v. Burke, 999 F.2d 596 (1st Cir. 1993); United States v. Edge, 989 F.2d 871 (6th Cir. 1993); United States v. Delaporte, No. 94-1407 (7th Cir. 1994); United States v. Curtis, 965 F.2d 610 (8th Cir. 1992); United States v. Bechtol, 939 F.2d 603 (8th Cir. 1991); United States v. Carlisle, 907 F.2d 94 (9th Cir. 1990); United States v. Robinson, 35 F.3d 442 (9th Cir. 1994), cert. denied, 115 S. Ct. 1268 (1995); United States v. Eves, 932 F.2d 856 (10th Cir.), cert. denied, 502 U.S. 884 (1991).} Despite arguments
by the government suggesting that scientific testing could more precisely
define the term, the court held that "if it looks like a 'plant'... it is a plant" and found that marijuana must display "some readily observable evidence of root formation" to be called a 'plant'. This holding is significant because, although the guidelines call for the base offense level to be determined by the weight of marijuana, if there are fifty or more plants, each plant is presumed to weigh one hundred grams regardless of its actual weight.

By the same token, "dead, harvested root systems are not 'plants' within the meaning of 21 U.S.C. § 841(b) and the 'equivalency provision' of U.S.S.G. § 2D1.1(c)," according to United States v. Shields. When police searched the house in which the defendant was living, they found a number of live marijuana plants and a trash can full of dead, crumbling roots left over from previously-harvested plants. Relying on the decision in Foree, the court found that, "Foree... treats evidence of life as a necessary (but alone insufficient) prerequisite of 'planthood,' and its reasoning counsels rejection of the government's converse contention here that dead marijuana remains are plants simply because they have roots.

3. U.S.S.G. § 2D1.1: Drugs—Methamphetamine. Methamphetamine exists in two chemically and physiologically distinct forms: D-Methamphetamine and L-Methamphetamine. There is a corresponding difference in the way each is sentenced. The Eleventh Circuit has held that, because the nature of the substance invokes such a great sentence difference, the government must present evidence as to the type of methamphetamine. In United States v. Ramsdale, no evidence was presented to support the government’s burden, but the defendant failed to preserve an objection. The Eleventh Circuit held,

85. 43 F.3d at 1581.
86. Id. at 1580 (quoting United States v. Edge, 989 F.2d 871, 876-79 (6th Cir. 1993)).
87. U.S.S.G. § 2D1.1(c) (background commentary). The equivalency has been amended to eliminate this problem. See U.S.S.G. amend. 518 (Nov. 1, 1995).
88. 49 F.3d 707, 708 (11th Cir.), vacated, 63 F.3d 900 (1995). This opinion has been vacated pending en banc review, but its logic is persuasive. 63 F.3d 900 (11th Cir. 1995).
89. 49 F.3d at 708.
90. Id. at 710 (parenthesis in original).
91. See United States v. Carroll, 6 F.3d 735, 745 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994).
92. U.S.S.G. § 2D1.1, but see Amendment 518, effective November 1, 1995.
93. United States v. Patrick, 983 F.2d 206, 208 (11th Cir. 1993).
94. 61 F.3d 825, 831 (11th Cir. 1995).
noting a split in the circuits,\textsuperscript{95} that the distinction is so significant as to warrant review or suffer a "grave miscarriage of justice."\textsuperscript{96}

\textbf{4. U.S.S.G. § 2D1.1: Drugs—LSD.} Issues regarding the weight of LSD continue to flourish in the wake of \textit{Chapman v. United States},\textsuperscript{97} which held that the combined weight of LSD and its carrier medium should be used to determine the applicability of any minimum mandatory sentence under 21 U.S.C. § 841(b)(1)(A).\textsuperscript{98} After the decision in \textit{Chapman}, the sentencing commission amended the guideline to provide a fixed weight per dose of LSD in an attempt to focus the sentence on the amount of actual LSD rather than the weight of the carrier medium.\textsuperscript{99} Since the amendment, nearly all the circuits have decided whether the guidelines override the statutory mandatory minimum sentence. Most have held that they do not and that the \textit{Chapman} directive to weigh everything drives the mandatory minimum.\textsuperscript{100} Only two circuits have held that the guidelines take precedence.\textsuperscript{101} The Eleventh Circuit sided with the majority of circuits in \textit{United States v. Pope}.\textsuperscript{102} Now, if the entire weight of the seized contraband invokes a statutory mandatory sentence higher than that called for by the guidelines based on the specified weight-per-dose formula, the statutory minimum mandatory sentence applies.\textsuperscript{103} The court acknowledged that this holding is difficult to reconcile with recent Eleventh Circuit

\textsuperscript{95} Id. (citing United States v. Deninno, 29 F.3d 572 (10th Cir. 1994), cert. denied, 115 S. Ct. 117 (1995) (holding that the issue is not cognizable on appeal); United States v. Bogusz, 43 F.3d 82 (3d Cir. 1994), cert. denied, 115 S. Ct. 1812 (1995) (holding the opposite)).

\textsuperscript{96} Id. at 832 (quoting Bogusz, 43 F.3d at 90).


\textsuperscript{98} Id. at 468. LSD is a liquid and is usually painted on a paper "carrier" such as blotter paper or sheets of stamps. It is then marked and cut into small pieces containing a single dose of the drug. The weight of the carrier varies dramatically from case to case even though the actual amount of drug may be the same.


\textsuperscript{101} United States v. Mischik, 49 F.3d 512, 514 (9th Cir. 1995); United States v. Stoneking, 34 F.3d 651, 652, vacated and reh'g granted en banc, 60 F.3d 399 (8th Cir. 1995).

\textsuperscript{102} 58 F.3d 1567, 1570 (11th Cir. 1995).

\textsuperscript{103} Id. at 1572; see also U.S.S.G. § 5G1.1(b).
decisions such as *United States v. Munoz-Realpe*, and the issue may soon be decided by the Supreme Court.

5. **U.S.S.G. § 2D1.1: Drugs—Determining Drug Quantities.** Determining the quantity of drugs applicable to various defendants in drug conspiracies under U.S.S.G. § 2D1.1 is an issue that the court is constantly required to resolve. This year was no exception.

In *United States v. Lawrence*, the district court, following the advice of the probation office and the Assistant United States Attorney, engaged in a complicated and attenuated mathematical effort to determine the appropriate drug quantity to apply to each defendant. By relying on a few days of videotaped surveillance the court determined the average number of drug sales each day; by weighing the drugs seized in a small number of controlled buys the court selected an average weight per transaction; and, using the date that a particular defendant first appeared on videotape (and assuming that each was involved until the last date charged in the conspiracy), the court determined the number of days that each defendant was involved in the conspiracy. Then, by multiplying the average number of transactions per day by the average weight sold in each transaction and again by the number of days, the district court arrived at the overall quantity attributed to the defendant. The Eleventh Circuit found insufficient facts to support the findings made by the district court and remanded. The government presented little or no real evidence, and the district court never studied the surveillance tapes. In the end, there was no indication that the bizarre calculation yielded a reliable determination of drug quantities.

The court noted that "[a]lthough not as rigorous as the reasonable doubt or clear and convincing standards, the preponderance standard is not toothless. It is the district court's duty to ensure that the Government carries the burden by presenting reliable and specific evidence." The court added:

Moreover, while the Guidelines allow a district court to "consider 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," U.S.S.G. § 6A1.3(a) (Nov. 1, 1994), this relaxed evidentiary standard does not grant district courts a license to sentence a defendant in the absence of sufficient evidence when the defendant properly objects to a PSR's conclusory factual recitals. The necessity of requiring reliable evidence in support of the Government's conclusions is particularly manifest in cases such as this, where the quantity of drugs attributed to the defendant can have a marked impact on the length of his sentence.

The court next reviewed whether the district court had clearly erred in adopting the government's calculations. However, the probation reports "fail[ed] to reveal the sources of much of the information they contain[ed] and set forth several conclusions without providing the underlying facts. The government's "proffers consisted of perfunctory summaries" and videotapes which were evidence at the trials of other defendants. The court's disapproval of the sentencing process in this case is evident:

The district court heard no testimony on the quantity issue, did not require that any surveillance videotapes be entered into evidence at the hearings, and did not examine any physical evidence. As a result, there is no evidence from the sentencing hearings for us to review. Moreover, no trial evidence exists because none of the appellants went to trial.

The court also remanded the case of United States v. Lee because of insufficient factual findings regarding drug quantities in the court below.

6. U.S.S.G. § 2D1.1: Drugs—Guns and Drugs. U.S.S.G. § 2D1.1-(b)(1) requires a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed . . . ." The commentary which explains the enhancement suggests that "the adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The Eleventh Circuit holds that, once the government has established the presence of a gun

111. Id. at 1567.
112. Id.
113. Id. at 1568.
114. Id.
115. 68 F.3d 1267 (11th Cir. 1995).
117. Id. §§ 2D1.1, cmt. 3.
at the site of drug offenses, the burden to prove that it was not possessed in connection with the crime shifts to the defendant. In so holding, the court sided with a clear majority of circuits. In Hall the government presented only the fact that a gun was found in a dresser drawer near the usual implements of the drug trade. The court held that, "[o]nce the prosecution has shown by a preponderance of the evidence that the firearm was present at the site of the charged conduct, the evidentiary burden shifts to the defendant to show that a connection between the firearm and the offense is clearly improbable."

Later, in United States v. Hansley, the court followed Hall, finding that the enhancement applied where a firearm was found in the defendant's house along with cash and drug ledgers. Hansley objected to the enhancement but did not prove that the connection between the drug activity and the gun was clearly improbable.

This enhancement is likely to be applied with more and more frequency because of the recent Supreme Court opinion in Bailey v. United States. Bailey severely restricts the circumstances under which a conviction for using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime will stand by defining the word "use" much more restrictively than most circuits have previously. A conviction under 18 U.S.C. § 924(c) requires a five-year mandatory sentence consecutive to any sentence received for the underlying offense. The sentencing guidelines acknowledge that, where this mandatory sentence is applied, the two-level adjustment in section 2D1.1(b)(1) does not apply. Now, after Bailey, the number of convictions under 18 U.S.C. § 924(c) connected to drug convictions

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118. United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995).
119. See United States v. Cochran, 14 F.3d 1128, 1132 (6th Cir. 1994); United States v. Cantero, 995 F.2d 1407 (7th Cir. 1993); United States v. Corcimiglia, 967 F.2d 724, 728 (1st Cir. 1992); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989). Contra United States v. Khang, 904 F.2d 1213, 1229 (8th Cir. 1990).
120. Hall, 46 F.3d at 63. A search uncovered a large amount of cash in the drawer, scales, cocaine residue, and more cash in the same room. Id.
121. Id.
123. 54 F.3d at 716.
124. Id.
126. Id.
127. Id.
128. Id.
129. U.S.S.G. § 2K2.4, cmt. 2.
should drop dramatically. An increase in U.S.S.G. § 2D1.1(b)(1) applications should parallel that decline.

7. U.S.S.G. § 2G2.4: Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct. In United States v. Cole, the defendant was convicted of receiving a videotape depicting a minor engaged in sexually explicit conduct. A guideline enhancement applies when the child depicted is “prepubescent” or “under the age of twelve years.” Cole possessed a catalog offering tapes of children of various ages. Although he ordered a video tape of twelve- to fourteen-year-olds and sent enough money for only one tape, he included a note saying he wanted all the tapes available. The tape he was sent depicted a child under the age of twelve. The district court enhanced the sentence based on Cole’s statement of future intent to purchase more tapes, but the Eleventh Circuit held that the enhancement was improperly applied.

8. U.S.S.G. § 2K2.1: Firearms Offenses. U.S.S.G. § 2K2.1(b)(5) provides an upward adjustment in the sentencing guidelines if “the defendant used or possessed any firearm . . . in connection with another felony offense.” The defendant in United States v. Whitfield burglarized a residence, confronted a witness with a gun, and then committed another burglary. While in the second home, he was discovered by police in a posture they interpreted as a planned ambush. Whitfield claimed that the gun was part of the property he had taken from the burglaries and that he had not used or possessed it “in connection with” the burglaries. The Eleventh Circuit interpreted the phrase for the first time, relying on the law of other circuits. The court debated various standards for determining the nexus required between the gun

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131. 61 F.3d at 24 (in violation of 18 U.S.C. § 2252(a)(2)).
133. Id.
134. 61 F.3d at 25.
135. Id.
136. Id.
138. 50 F.3d at 947-48.
139. Id. at 948.
140. Id.
141. Id. (citing United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994); United States v. Gomez-Arrilliano, 5 F.3d 464 (10th Cir. 1993); United States v. Brewster, 1 F.3d 51, 54 (1st Cir. 1993); United States v. Thompson, 32 F.3d 1, 6-7 (1st Cir. 1994)).
and the underlying felony, but found that Whitfield's conduct, by any
standard, was sufficient to uphold the enhancement.\textsuperscript{142}

\textbf{D. Chapter Three—Adjustments}

1. \textbf{U.S.S.G. § 1B1.1(f): More Than Minimal Planning.} In \textit{United States v. Tapia},\textsuperscript{143} the defendants attacked a cellmate who was preparing to testify against the defendants' friend and used the phone in their cell to confirm the victim's role against the friend.\textsuperscript{144} The district court assessed a two-level increase based on more than minimal planning.\textsuperscript{145} The Eleventh Circuit remanded, finding that the crime was neither sophisticated nor elaborate and that the phone calls made just before the crime were not evidence of more than the usual planning for such a crime.\textsuperscript{146}

2. \textbf{U.S.S.G. § 3A1.1: Vulnerable Victim.} Several cases this year focused on the enhancement for vulnerable victims found in U.S.S.G. § 3A1.1. A two-level upward adjustment may be warranted "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct."\textsuperscript{147} Examples are included in the guideline.

The court held that the enhancement applies to telemarketers who targeted those with bad credit in \textit{United States v. Page}\textsuperscript{148} and to lenders who took advantage of a client's urgent need to leave the country in \textit{United States v. Thomas}.	extsuperscript{149} Both cases involved advance loan fee schemes, where the defendant pressured clients to advance a processing fee, promising in return to secure financing, but making no real effort to do so.\textsuperscript{150}

In \textit{Thomas}, the defendants secured a power of attorney from an army colonel before he left for duty in the Philippines.\textsuperscript{151} They knew that he would be gone for several years and convinced him that the power of

\textsuperscript{142} \textit{Id.} at 948-49.
\textsuperscript{143} 59 F.3d 1137 (11th Cir.), \textit{cert. denied}, 116 S. Ct. 546 (1995).
\textsuperscript{144} 59 F.3d at 1139.
\textsuperscript{145} \textit{Id.} at 1144.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} U.S.S.G. § 3A1.1(b).
\textsuperscript{149} 62 F.3d at 1335-36.
\textsuperscript{150} \textit{Page}, 69 F.3d at 482, 485; \textit{Thomas}, 62 F.3d at 1335-36.
\textsuperscript{151} \textit{Thomas}, 62 F.3d at 1342.
attorney was crucial to their quest for financing.\textsuperscript{152} He testified that they had misused the power of attorney and that he had been forced to borrow money at inflated interest rates in order to save his home from foreclosure.\textsuperscript{153} The defendants argued that they had not targeted the Colonel because of his vulnerability, rather his urgent need to leave the country arose only after the defendants had secured him as a client. Additionally, they argued he was a sophisticated investor who should have known better.\textsuperscript{154} The court found that:

The Thomases exploited the fact that [the Colonel] was vulnerable by using the power of attorney they had earlier obtained to garner two loans without his knowledge. These acts were sufficient to constitute the "targeting"—or "retargeting," as it may have been—of [the Colonel] as a victim in order to take advantage of his vulnerability, his absence. By the same token, the acts demonstrate that the Thomases actually knew that [the Colonel's] absence from the country made him vulnerable to their fraud, or to a continuation of it.\textsuperscript{155}

Explaining the breadth of this holding, the court quickly noted that, "[w]e hold only that in cases where the 'thrust of the wrongdoing' was continuing in nature, the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim."\textsuperscript{156}

The telemarketers in Page placed nationwide print ads offering loans to poor credit risks. When the victims phoned in, high pressure sales tactics focused on how difficult it was for the victim to find financing through conventional banks.\textsuperscript{157} The defendants may not have known in the beginning of their victims' vulnerability, but they soon learned of it and took advantage of it.\textsuperscript{158} The fact that some victims with good credit and no particular vulnerability were also taken in by the scam did "not absolve the defendants of their culpability . . . simply because, in casting out their net, they happened to ensnare and defraud some individuals who did not share this vulnerability."\textsuperscript{159}

An incarcerated informant, attacked by the defendants because of his cooperation, was properly considered a vulnerable victim according to

\begin{footnotes}
\item[152] \textit{Id.} at 1344.
\item[153] \textit{Id.} at 1342.
\item[154] \textit{Id.} at 1344.
\item[155] \textit{Id.} at 1345.
\item[156] \textit{Id.}
\item[157] \textit{Page}, 69 F.3d at 489-90.
\item[158] \textit{Id.} at 490.
\item[159] \textit{Id.} at 491-92.
\end{footnotes}
United States v. Tapia. The court reasoned that the victim's incarceration made it impossible for him to escape and was the reason he was targeted for the attack.

3. U.S.S.G. § 3B1.3: Abuse of Trust. The defendant in United States v. Terry was a police officer who, while in uniform and in his marked patrol car and monitoring police radio transmissions, drove by a park where a codefendant was conducting a drug transaction. The district court found that the protection, security, and surveillance that Terry's presence provided "significantly facilitated" the commission or concealment of the crime. The Eleventh Circuit agreed.

4. U.S.S.G. § 3E1.1: Acceptance of Responsibility. In United States v. Hromada, the defendant was arrested in late 1991 on marijuana charges. Within weeks of his release he tested positive twice for drug use, but never again during the next two years of release. The district court denied a reduction for acceptance of responsibility because of Hromada's drug use. The Eleventh Circuit upheld the decision, giving "great deference to" the district court's evaluation and finding that the district court had the better opportunity to evaluate the defendant's acceptance of responsibility. Not surprisingly, the court also agreed that a defendant who burdened the government with prosecuting a motion to suppress which would have, if successful, ended the prosecution and who then refused to plead guilty, was not entitled to a reduction for acceptance of responsibility. The defendant offered to enter a conditional plea of guilty after he lost the motion, but the government refused. The Eleventh Circuit found that the defendant's challenge to the evidence was an attempt "to avoid a determination of factual guilt and to thereby escape responsibility for his crime."
E. Chapter Four—Criminal History

1. U.S.S.G. § 4A1.2: Departures Based on Criminal History. Although the rules of Chapter Four prohibit the use of convictions which are remote in time from the offense of conviction, U.S.S.G. § 4A1.3 permits a departure based on those convictions when they are either similar to the offense of conviction or otherwise serious. In determining the extent of such a departure, the district court is instructed to begin with the criminal history category called for by application of the Chapter Four rules and then to score the remote convictions as though they were not precluded by the rules.

The defendant in Brown had been convicted of escape but three prior fraud convictions were too old to count. The district court found them to be “serious” nonetheless, and departed from category IV to category VI. The defendant complained that the court failed to consider the intervening criminal history category as a reasonable incremental measure of the under-representation of his criminal conduct, but the district court’s explanation in reaching category VI demonstrated that the court had not simply overlooked the intervening category.

In United States v. Maurice, the defendant had, over a period of more than a year, held himself out as an attorney practicing immigration law when he was not actually an attorney. He was convicted of mail fraud and of making false statements. Maurice had nine prior convictions too remote to score under U.S.S.G. § 4A1.2(e)(2) which would, if counted, have added seventeen criminal history points. The district court followed the formula recently added to the guidelines: add criminal history points to reach category VI (the highest criminal history category) and then add offense levels to reach a reasonable departure range. The result was a departure from category II to

173. U.S.S.G. § 4A1.3 (policy statement); see also United States v. Brown, 51 F.3d 233, 234 (11th Cir. 1995); United States v. Maurice, 69 F.3d 1553, 1558 (11th Cir. 1995).
174. Brown, 51 F.3d at 234.
175. Id.
176. Id.
177. 69 F.3d 1553, 1555 (11th Cir. 1995).
178. Id. at 1555.
179. Id.
180. Id. at 1555-56.
181. Id. at 1558 (construing U.S.S.G. amend. 460 (Nov. 1, 1992)).
category VI and a higher offense level, which the Eleventh Circuit upheld. 182

Near the end of the year, the Eleventh Circuit refined the procedure district courts must follow when making upward departures beyond category VI. In United States v. Dixon, 183 the defendant argued that before arriving at an appropriate departure, the district court must stop at each offense level along the upward path and find that it was not appropriate before moving on to the next higher level. 184 The Eleventh Circuit disagreed, holding that district courts:

need not explicitly discuss their reasons for bypassing incremental offense level sentencing ranges. Rather, the magnitude of these upward departures will be reviewed for reasonableness, based on findings by the district court as to (1) why the extent and nature of the defendant's criminal history warrants an upward departure from category VI, and (2) why the sentencing range within which the defendant is sentenced is appropriate to the case. 185

2. U.S.S.G. § 4B1.1: Career Offender. The Career Offender provision of the sentencing guidelines violates neither the due process nor the equal protection clauses of the Fifth Amendment, according to United States v. Brant. 186

Two cases presented related questions: whether conspiracy to commit a drug trafficking offense is a "controlled substance offense" and whether the attempt to commit a drug trafficking crime is a "controlled substance offense" as those terms are used to determine when prior convictions can be used to invoke the career criminal provisions of the guidelines. In United States v. Weir, 187 the court sided with the vast majority of circuits that conspiracy convictions could appropriately be used as a

182. Id.
183. 71 F.3d 380 (11th Cir. 1995).
184. Id. at 381.
185. Id. at 383.
186. 62 F.3d 367, 368 (11th Cir. 1995).
187. 51 F.3d 1031, 1031 (11th Cir. 1995), cert. denied, 116 S. Ct. 928 (1996); see also U.S.S.G. amend. 528 (Nov. 1, 1995).
basis for the enhancement. The court noted a small minority holding to the contrary.

Soon after the opinion in Weir, the court decided United States v. Smith, holding for the same reasons that the crime of attempted drug trafficking is also an appropriate enhancing conviction.

In United States v. Spell, the defendant was enhanced as a career offender based on a Florida conviction of burglary for which he received a four-year sentence. The district court relied on the charging document to determine that the defendant had been convicted of a crime of violence. In Florida, all burglaries which are second degree felonies punishable by up to fifteen years are crimes of violence, but those which are third degree felonies punishable by five years are not crimes of violence because they involve only unoccupied structures. Because he had only been sentenced to four years, it was possible that the defendant pled to a third degree (and therefore non-violent) burglary, but the district court did not consider this possibility. The court held that “a district court may not rely on a charging document without first establishing that the crime charged was the same crime for which the defendant was convicted.” The case was remanded for further findings.

This circuit had not squarely decided “whether a sentence of probation under a state deferral statute is a final ‘prior conviction’ for purposes of the sentence enhancement provisions of 21 U.S.C. § 841” until United


189. Weir, 51 F.3d at 1032 (citing United States v. Price, 990 F.2d 1267 (D.C. Cir. 1993); United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994)).


191. 54 F.3d at 693.

192. 44 F.3d 936 (11th Cir. 1995).

193. Id. at 940.

194. Id. at 938.

195. Id. at 939-40.

196. Id. at 940.

197. Id.

198. Id.
States v. Fernandez. The statute imposes a minimum mandatory sentence for defendants who have previously been convicted of a felony drug offense. Fernandez had earlier pled no contest, adjudication was withheld, and he was given a one-year probationary sentence. The court relied on earlier cases which held that similar sentences were prior convictions for purposes of invoking the career offender provision of U.S.S.G. § 4B1.1 and held that the sentence was also a conviction for purposes of the statutory enhancement.

3. U.S.S.G. § 4B1.4: Armed Career Criminal. Last year, the Supreme Court held in Custis v. United States that prior convictions used to enhance a sentence pursuant to 18 U.S.C. § 924(e)(1) cannot be attacked collaterally unless they were obtained in violation of the defendant's right to counsel. The Eleventh Circuit adopted that ruling in United States v. Gilley.

F. Chapter Five: Departures

In United States v. Williams, the defendant was convicted of carjacking. Two victims, Donaldson and Whitehead, were driving their truck when they realized they were being followed. In response, Donaldson loaded a pistol. When the truck stopped at an intersection, the defendant, who had been following the two, got out of his car and approached the truck. When the defendant pointed a gun inside the truck, Donaldson (the passenger) shot across Whitehead, hitting the defendant. Unfortunately, one of the shots also killed Whitehead. The district court departed from the sentencing guidelines pursuant to U.S.S.G. § 5K2.1 which permits a departure "if death resulted." Williams claimed that Whitehead's death was an unforeseeable consequence and an accident; the Court held that the departure was appropriate because "death was intentionally or knowingly risked."

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199. 58 F.3d 593, 599 (11th Cir. 1995).
200. Id.
201. Id.
202. Id. (citing United States v. Jones, 910 F.2d 760 (11th Cir. 1990); United States v. Garcia, 727 F.2d 1028 (11th Cir. 1984)).
204. Id. at 1739.
207. 51 F.3d at 1006. See 18 U.S.C. § 2119.
208. 51 F.3d at 1006.
209. Id. at 1012 (quoting United States v. White, 979 F.2d 539 (7th Cir. 1992)).
Ivan Leon Rojas was convicted for possession of an unregistered firearm. The sentencing court granted a downward departure because it was convinced that Rojas possessed explosives, automatic rifles, grenade launchers and machine guns in order to smuggle them to the Cuban resistance movement. The departure was based on U.S.S.G. § 5K2.11, which states:

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected. In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

Rojas first claimed that the harm the statute sought to prevent, the loss of life in the United States, was not the harm created by his crime because he did not intend the guns to be used on American soil. The government argued, and the Eleventh Circuit agreed, that the legislative history of the statute contradicts this claim. Citing cases in other circuits, the court held that the exceptions created by the departure are extremely limited and fairly well defined. They include gun collections, the protection of property, hunting and sport shooting. Rojas also argued that his actions sought to "avoid a greater harm" by assisting the anti-Castro movement. The majority held that neither reason was a valid basis for a departure and remanded for resenten-

210. United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995).
211. Id. at 1079.
212. Id. at 1080.
213. U.S.S.G. § 512.11.
214. 47 F.3d at 1079.
215. Id. at 1081.
216. Id. at 1082.
217. Id. at 1081. See United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993); United States v. Lam, 20 F.3d 999 (9th Cir. 1994); United States v. Warner, 43 F.3d 1335 (10th Cir.), cert. denied, 114 S. Ct. 1090 (1994).
218. Rojas, 47 F.3d at 1082.
Judge Fay wrote a compelling dissent arguing that America's constantly changing diplomatic policy toward Cuba presents a situation so unusual that the sentencing court should have discretion to consider it as a factor in fashioning a departure.230

In United States v. Thomas,221 discussed earlier in this article, the district court imposed a two-level upward departure pursuant to U.S.S.G. § 5K2.5 to account for the consequential damages of an advance fee fraud scheme.222 Using the formula set out in earlier circuit precedent,223 the court found that the departure was unwarranted.224 The court found that the Commission had intentionally excluded consequential damages from loss calculations in all but government procurement and product substitution cases,225 so a departure could only be supported if the damages were so great that they were “present to a degree substantially in excess of that which ordinarily is involved in the offense."226 In this case, the damages, which included accountant and attorney fees, travel expenses and the like, were “clearly typical of a crime of fraud” and could not support a departure.227

In United States v. Rodriguez,228 the defendant's guideline range was higher than the statutory maximum for his offense of conviction, even after adjustment for acceptance of responsibility.229 Although the district court wanted to reward Rodriguez for his acceptance, it believed it had no authority to do so under U.S.S.G. § 5G1.1(a).230 That guideline holds that where the statutory maximum is less than the guideline range, the sentence should be the statutory maximum.231 The statutory maximum for Rodriguez's two convictions were four years each (or 96 months)232 and the guidelines after the U.S.S.G. § 3E1.1(b) adjustment called for a range of 135 to 168 months.233 Rodriguez argued that this result nullified his acceptance of responsibility and that

219. Id.
220. Id. at 1082-83.
222. Id. at 1345.
223. Id. at 1346 (citing United States v. Wilson, 993 F.2d 214 (11th Cir. 1993)).
224. Id.
225. Id.
227. 62 F.3d at 1347.
228. 64 F.3d 638 (11th Cir. 1995).
229. Id. at 640.
230. Id. at 641 n.3.
231. Id. (construing U.S.S.G. § 561.1(a)).
232. Id. at 640.
233. Id.
the district court could have departed under the circumstances. The Eleventh Circuit held "that a district court has the discretion to reward a defendant's acceptance of responsibility by departing downward when section 5G1.1(a) renders section 3E1.1 ineffectual in reducing the defendant's actual sentence." Naturally, the court did not suggest that the departure should be granted, only that the district court had the authority to grant it. The court noted, however, that the district court seemed inclined to grant the departure on remand.

V. CONCLUSION

If the Eleventh Circuit had an easier 1995 because of the few guideline amendments in 1994, it was a short-lived vacation. The 1995 amendments are many and complex; and not easily interpreted. Likewise, the Supreme Court has opened Pandora's Box with its decision in Bailey. This is undoubtedly the most controversial decision rendered in a criminal case in some time and the flood of appeals filed in its wake has already begun.

The Eleventh Circuit will continue to hold the district courts to their obligation to base sentencings on competent and reliable evidence clearly apparent on the record, in order to reduce both the uncertainty of sentencing and the burden of successive appeals.

In the years since the sentencing guidelines took effect, the tremendous body of appellate law is finally becoming more stable. There are fewer circuit splits (largely because the Sentencing Commission often addresses them with guideline amendments), and fewer controversial decisions than in the past. If the goal of guideline sentencing is uniformity and predictability, then perhaps the goal is finally in sight.

234. Id. at 642.
235. Id. at 643 (agreeing with United States v. Cook, 938 F.2d 149 (9th Cir. 1991); United States v. Sayers, 919 F.2d 1321 (8th Cir. 1990); United States v. Martin, 893 F.2d 73 (5th Cir. 1990)).
236. Id. at 643.
237. Id. at 641 n.3.