Federal Sentencing Guidelines

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by Andrea Wilson*

I. INTRODUCTION

In 1984, Congress mandated the creation of the United States Sentencing Commission composed of presidential appointees to create guidelines for a comprehensive sentencing scheme. As a result, the United States Sentencing Guidelines ("U.S.S.G.") have been in effect since November 1, 1987, and apply to all federal criminal offenses committed since that date.

In principle, guideline sentencing should be simple. Courts should arrive at a sentencing range using calculations that first consider the criminal conduct being sentenced and then the criminal history of the offender. In practice, however, the guidelines are difficult to understand, impossible to apply evenhandedly, and frequently difficult to predict. Hundreds of changes have added to the confusion. As a result, sentencing guidelines appeals now comprise the bulk of the caseload of the Eleventh Circuit Court of Appeals.

The offense conduct side of the equation considers the defendant's actual criminal conduct along with adjustments based upon the defendant's role in the offense, acceptance of responsibility, and obstruction of justice. The most complicated concept is the consideration of conduct which is outside the charged offense, but still factored as

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"relevant conduct." Despite several overhauls, U.S.S.G. section 1B1.3 is still impossible to apply consistently.

Criminal history calculations, though less complicated than those for offense conduct, remain difficult. Courts must weight prior convictions based on the prior sentence, recency, and other factors. Designations like Career Offender and Armed Career Criminal boost the sentence range to at or near the statutory maximum for the offense sentenced.

Yearly amendments have resulted in over five hundred changes in sentencing law. Usually in May, the United States Sentencing Commission writes guideline amendments and submits them for congressional approval. Congress can reject amendments, alter them, or take no action. Historically, Congress takes the latter course and the amendments automatically become effective the following November 1.

In 1994, facing challenges to its quorum, the Commission passed only six material amendments during the ordinary amendment cycle (a record low). An emergency amendment prompted by the Violent Crime Control and Law Enforcement Act of 1994 exempts first offenders from the application of mandatory minimum sentences.

Two Supreme Court opinions affect guideline sentencing this term. In Nichols v. United States, the Court held that uncounselled misdemeanors which did not result in sentences of incarceration can nevertheless be used to calculate criminal history. In Custis v. United States the court held that there is no right to collaterally attack prior state convictions in federal sentencing proceedings under the Armed Career Criminal Act, except for prior convictions that were obtained in violation of the defendant's right to counsel. The Supreme Court
hinted that defendants might attack the constitutionality of prior convictions on other grounds through habeas corpus actions.16

The Eleventh Circuit often takes a progovernment approach when resolving sentencing questions. For instance, the court has held that written waivers of the right to appeal can be enforced, even though a defendant could not have known what his sentence would be at the time he agreed to the waiver.17

II. 1994 AMENDMENTS

A. Section 1B1.3: Relevant Conduct

The concept of relevant conduct generates enormous discrepancy in federal sentencing, largely because the terms in the guideline are vague and difficult to apply. The Commission issued two revisions in 1994.18

1. Jointly Undertaken Activity. The Commission attempted to clarify the term “jointly undertaken activity” by adding that relevant conduct does not include the activity of members of a conspiracy occurring before the defendant joined (even if the defendant was aware of the conduct).19 However, the modification allows the inclusion of this conduct if “some unusual set of circumstances” warrants a departure.20

2. Same Course of Conduct. The Commission revised Application Note 9 to U.S.S.G. section 1B1.3, which lists factors used to determine when multiple offenses constitute the “same course of conduct,” and therefore, are included in relevant conduct, to permit the court to consider “the degree of similarity of the offenses, the regularity (repetitions) of the offense, and the time interval between the offenses.”21 Incorporating language from a Ninth Circuit case,22 the amendment states that:

[w]hen one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of

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16. Id. at 1737-38.
19. Id.
20. Id.
21. Id.
conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity.  

B. Section 1B1.10 (policy statement): Retroactivity of Amended Guideline Range

When a court resentsences a defendant because of a favorable change in the guidelines, it must recalculate only the amended guideline, leaving other calculations unchanged. For example, a defendant resentenced because of the new method of calculating the weight of LSD will not be able to benefit from the additional reduction for acceptance of responsibility. The Eleventh Circuit previously adopted the "One Book Rule." This amendment seems to overturn that rule.

C. Section 2D1.1: Drug Quantity Table

The amendment lowers the highest base offense level to thirty-eight instead of forty-two. A departure, however, is authorized if the quantity of drugs is at least ten times that required for level thirty-eight.

D. Section 4B1.1: Career Offenders

The amendment clarifies the term "offense statutory maximum," used to determine the base offense level to mean the statutory maximum before the application of any enhancements based on prior record.

E. Section 5G1.2: Sentencing on Multiple Counts

Multiple terms of supervised release run concurrently even though the statute may require the terms of incarceration to be served consecutively.

F. Section 5G2.0 (policy statement) and Section 5H: Grounds for Departure

The Commission has added a departure based on a combination of offender characteristics which by themselves would not ordinarily be

27. United States v. Lance, 23 F.3d 343, 344 (11th Cir. 1994). Sentences are calculated using the more lenient of the guidelines in effect at the time of the offense or at the time of sentencing. Id. at 344.
III. THE VIOLENT CRIME CONTROL & LAW ENFORCEMENT ACT OF 1994

The 1994 Crime Bill, effective since September, radically changed criminal law. It created nearly sixty new federal crimes punishable by the death penalty and increased the existing penalties for dozens of other offenses. The Commission reacted immediately to a mandate in the bill by creating a guideline to address the “Safety Valve” provision. The crime bill contains several major revisions particularly relevant to guideline sentencing.

A. Three Strikes, You're Out—Mandatory Life Sentences for Certain Violent Felons

A defendant convicted of a “serious violent felony” and who has sustained at least two previous violent felony convictions, or one serious violent felony conviction and one serious drug offense conviction (as long as each prior conviction was “committed after the defendant’s conviction of the preceding offense) shall be sentenced to life imprisonment.

The term “serious violent felony” is predictably comprehensive. It includes carjacking, extortion, arson, and firearms use, as well as certain assaults and attempts or conspiracies to commit these offenses. Also included are offenses punishable by ten years or more involving “the use, attempted use, or threatened use of physical force against the person of another or that, by [their] nature, [involve] a substantial risk that physical force against the person of another may be used in the course of committing the offense.” The law exempts some felonies including certain robberies and arson, but the definitions are vague. For example, the term excludes arson “if the defendant establishes by clear

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33. Id.
35. Id. § 3559(c)(1) (Supp. VI 1994).
36. Id.
37. Id. § 3559(c)(2)(F)(i).
38. Id. § 3559(c)(2)(F)(ii).
39. Id. § 3559(c)(3).
and convincing evidence that . . . the offense posed no threat to human life . . . .”  

Three Strikes enhancement requires an information filed by the United States Attorney pursuant to Title 21, Section 51(a) of the United States Code (“U.S.C.”). Otherwise, the guidelines apply without the mandatory life sentence (although virtually any offender who qualifies for this provision will be a career offender under U.S.S.G. section 4B1.1 or an Armed Career Criminal under U.S.S.G. section 4B1.4). A predicate conviction overturned because of actual innocence requires resentencing without the enhancement.

B. Relief for Elderly Long-Term Inmates

The Bureau of Prisons can release any inmate who is at least seventy years old and who has served at least thirty years in prison for the current offense if the Bureau determines that the inmate is not a danger to any person or the community. This change will not affect the sentencing guidelines but reflects the growing number of inmates serving mandatory life sentences and the long-term problems an aging prison population poses.

C. The Safety Valve: Relief for First-Time Offenders Facing Mandatory Minimum Sentences in Drug Cases

Mandatory drug sentences can be waived under certain circumstances for first offenders. The sentencing court must give the government an opportunity to make a recommendation and must make certain findings:

1. The defendant has no more than one criminal history point as calculated under the sentencing guidelines;

2. “The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon” nor cause another defendant to do so.

40. Id. § 3559(c)(3)(B)-(B)(i).
43. Id. § 4B1.4.
44. 18 U.S.C. § 3559(c)(4).
45. Id. § 3559(c)(7).
46. Id. § 3582(c)(1)(A) (Supp. VI 1994).
47. Id. § 3553(f).
48. Id. § 3553(f)(1).
49. Id. § 3553(f)(2).
50. Id.
3. The offense did not involve death or serious bodily injury;\textsuperscript{51} 
4. "The defendant was not an organizer, leader, manager, or supervisor"\textsuperscript{52} as those terms are used in the sentencing guidelines,\textsuperscript{53} and did not engage in a continuing criminal enterprise;\textsuperscript{54} 
5. The defendant truthfully provides all pertinent information regarding the offense to the government at a time no later than sentencing.\textsuperscript{55}

 Obviously, this provision is full of potential loopholes. For instance, though the government is compelled to listen to the defendant,\textsuperscript{56} it may be impossible to persuade the government of the defendant's truthfulness. Similarly, terms like leader, organizer, and credible threats of violence, most of which are imported from the guidelines, will spawn a whole new generation of challenges.

 Congress required the Sentencing Commission to implement this provision, requiring that the lowest term of imprisonment be at least twenty-four months in a case which otherwise would call for a five-year mandatory minimum.\textsuperscript{57} The Commission added a new guideline effective September 23, 1994.\textsuperscript{58} It eliminates the mandatory minimum, but the sentencing ranges, which are driven by the mandatory sentences, remain the same.\textsuperscript{59}

 IV. 1994 ELEVENTH CIRCUIT CASES

 A. Chapter One

 Although other circuits had already adopted the “one book rule,"\textsuperscript{60} the Eleventh Circuit held for the first time that “district courts may not use sections from different versions of the Guidelines but must use one

\begin{footnotes}
\footnote{51}{Id. § 3553(f)(3).}
\footnote{52}{Id. § 3553(f)(4).}
\footnote{53}{U.S.S.G. § 3B1.1.}
\footnote{55}{18 U.S.C. § 3553(f)(5).}
\footnote{56}{Id. § 3553(f)(5).}
\footnote{58}{U.S.S.G. § 5C1.2.}
\footnote{59}{Id.}
\footnote{60}{See United States v. Boula, 997 F.2d 263 (7th Cir. 1993); United States v. Warren, 980 F.2d 1300 (9th Cir. 1992), cert. denied, 114 S. Ct. 397, 126 (1993); United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991), cert. denied, 499 U.S. 968 (1991); United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990).}
version of the Guidelines in its entirety.\textsuperscript{61} This Article previously discussed how a 1994 amendment might affect that holding.\textsuperscript{62}

1. Section 1B: Relevant Conduct. The determination of relevant conduct is fact-specific by nature. In \textit{United States v. Chitty}, the court restated the test which determines whether a defendant should be held accountable for the acts of co-conspirators.\textsuperscript{63} "A conspirator is responsible for conspiracy activities in which he is involved, and for drugs involved in those activities, and for subsequent acts and conduct of co-conspirators, and drugs involved in those acts or conduct, that are in furtherance of the conspiracy and are reasonably foreseeable to him."\textsuperscript{64}

Chitty rented a house on a large farm and allowed the house to be used to stash one shipment of marijuana for one night in 1987. Although his co-conspirators continued to import marijuana by air, dropping it over farm land just as he had, Chitty was not aware of any continuing drug activity.\textsuperscript{65} The court found that only the amount of marijuana that Chitty was directly involved with (the only marijuana of which he was aware) could be used against him in determining the appropriate guideline range.\textsuperscript{66} This ruling also affected the statutory sentence since the smaller quantity of marijuana no longer triggered an enhanced mandatory minimum sentence.\textsuperscript{67}

In \textit{United States v. Maxwell},\textsuperscript{68} the defendant had been convicted of conspiracy to distribute dilaudid and distribution of less than one ounce of cocaine (which had been sold in place of dilaudid when that substance was unavailable).\textsuperscript{69} The district court sentenced him based on the dilaudid, the cocaine, and an additional amount of cocaine that a witness said he had sold for Maxwell at a different time apart from the conspiracy.\textsuperscript{70} The court found error in including the additional cocaine because it forced an overbroad definition of relevant conduct.\textsuperscript{71} The court adopted the tests of two other circuits, holding that "when illegal conduct . . . [exists] in "discrete, identifiable units" apart from the

\begin{footnotesize}
\begin{enumerate}
\item Lance, 23 F.3d at 344.
\item See supra note 18.
\item 15 F.3d 159 (11th Cir. 1994).
\item Id. at 162 (citing United States v. Beasley, 2 F.3d 1551, 1561 (11th Cir. 1993); United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993)).
\item Id.
\item Id.
\item Id. at 162-63.
\item 34 F.3d 1006 (11th Cir. 1994).
\item Id. at 1008-09.
\item Id. at 1010.
\item Id. at 1011.
\end{enumerate}
\end{footnotesize}
offense of conviction, the Guidelines anticipate a separate charge for such conduct," thus requiring sentencing courts to study the "similarity, regularity, and temporal proximity between the offense of conviction and the uncharged conduct." Following the Seventh and Ninth Circuits, the Eleventh Circuit requires sentencing courts to consider "whether there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a single course of conduct rather than isolated, unrelated events that happen only to be similar in kind."

B. Chapter Two: Specific Offense Guidelines

1. Section 2B3.1: Robbery. A two level enhancement applies "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." In United States v. Jones, the defendant and his accomplices forced bank employees into a safe room and ordered them to lie down. The defendants closed the door and left. The defendant argued that there had been no physical restraint, presumably since he had not physically touched the victims. The court held that the enhancement was properly applied because the presence of handguns forced the victims to comply just as though they had been tied or locked up. The court noted that "Jones and his accomplices restricted their victims' mobility and capacity to observe events [in order] to facilitate the robbery."

A discussion of the "heartland" of bank robberies exists in the two opinions the court issued in United States v. Omar. The court found that the number of robbers involved (in this case, four) as well as the number and kind of firearms they carried (three were armed, one with

72. Id. at 1010-11 (citing United States v. Hahn, 960 F.2d 903, 909 (9th Cir. 1992)).
73. Id. at 1011 (citing United States v. Sykes, 7 F.3d 1331, 1335 (7th Cir. 1993)).
74. Id. (citing Hahn, 960 F.2d at 909-10).
75. U.S.S.G. § 2B3.1(b)(4)(B). Physical restraint is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up." Id. § 1B1.1 (application instructions).
76. 32 F.3d 1512 (11th Cir. 1994).
77. Id. at 1518-19.
78. Id. at 1519.
79. Id.
80. U.S.S.G. ch. 1, pt A, intro. cont. 4(b) states that "the Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases." A case outside the heartland may warrant a departure. Id.
81. 24 F.3d 1356 (11th Cir. 1994), modifying, United States v. Lnu, 16 F.3d 1168 (11th Cir. 1994). The cases refer to the same defendant. "Lnu" is usually a contraction of "last name unknown" and the Court probably decided to use the name "Omar" instead.
an Uzi) constitute factors outside the heartland and can justify an upward departure.\footnote{24 F.3d at 1357.} On the other hand, death threats to an assistant manager and the public danger of a daytime bank robbery constitute factors which are not atypical and cannot sustain a departure.\footnote{Lnu, 16 F.3d at 1170-71.}

2. Section 2C1.1: Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right. This guideline calls for an eight level enhancement if the official being bribed occupies a "high-level decision-making or sensitive position."\footnote{U.S.S.G. § 2C1.1(b)(2)(B).} In United States v. Lazarre,\footnote{14 F.3d 580 (11th Cir. 1994).} the defendant (an activist working on behalf of detained Haitian immigrants) attempted to bribe an Immigration and Naturalization Service assistant district director who reported the crime to the Justice Department and cooperated.\footnote{Id. at 581.} The assistant district director possessed discretion to review detainees for parole eligibility and set bond for those who were eligible.\footnote{Id. at 581-82.} The court analogized his authority to that envisioned by the enhancement:

[The assistant district director's] discretion is similar to that given a supervisory law enforcement official or a prosecuting attorney or even a judge setting bail. Each of those officials must work within certain confines. They are guided by specific policies and are restrained to a degree by rules and regulations. But these jobs involve the exercise of substantial discretion; and each enjoys sufficient autonomy to implement established guidelines and make substantive decisions based on the unique circumstances of individual cases.\footnote{Id. at 582.}

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

a. Section 2D1.1(c): Definition of "Cocaine Base." The statute which provides a much harsher penalty for the importation of cocaine base than for cocaine hydrochloride does not define the term "cocaine base."\footnote{21 U.S.C. §§ 952(a), 960(b) (1988).} The guideline provision, U.S.S.G. section 2D1.1(c),\footnote{U.S.S.G. § 2D1.1(c) (definitions following drug quantity table).} does define the term. In 1993 the guideline was amended to read: "Cocaine
base,' for the purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.\textsuperscript{91}

In \textit{United States v. Munoz-Realpe},\textsuperscript{92} the defendant was convicted of importing ‘. . . ‘cocaine base in a liquid form,’ which could not be used without further processing . . .’\textsuperscript{93} The government argued that even if the substance failed the guideline definition, it was still cocaine base for purposes of the statutory mandatory minimum sentence.\textsuperscript{94} The defendant argued that the substance was not cocaine base either under the statute or the guidelines.\textsuperscript{95} The court held, in an unprecedented merging of the guidelines and the United States Code, that the guideline definition applies, and therefore the ‘cocaine base in liquid form’ was not really cocaine base under the statute.\textsuperscript{96} The court reasoned that because Congress approves the guidelines and amendments to them, Congress approved the guideline’s definition of cocaine base, since ‘[t]here is no reason . . . to assume that Congress meant for ‘cocaine base’ to have more than one definition.’\textsuperscript{97}

However, because the 1993 amendment is substantive rather than clarifying,\textsuperscript{98} it cannot be applied retroactively. In \textit{United States v. Camacho},\textsuperscript{99} the defendant was convicted of smuggling liquid cocaine (not crack) which had been painted onto place mats.\textsuperscript{100} Although Camacho was sentenced before the amendment became effective, he argued that it should be applied to him on appeal under the rule stated earlier in \textit{United States v. Howard}.\textsuperscript{101} Camacho lost.\textsuperscript{102}

\textbf{b. Determination of Drug Quantity.} When sentencing drug conspirators in \textit{United States v. Bush},\textsuperscript{103} the court reiterated the two step process which must be employed:

\begin{itemize}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} 21 F.3d 375 (11th Cir. 1994).
\item \textsuperscript{93} \textit{Id.} at 376.
\item \textsuperscript{94} \textit{Id.} at 377.
\item \textsuperscript{95} \textit{Id.} at 376.
\item \textsuperscript{96} \textit{Id.} at 376-77.
\item \textsuperscript{97} \textit{Id.} at 378.
\item \textsuperscript{98} U.S.S.G. amend. 187 (1993).
\item \textsuperscript{99} 40 F.3d 349 (11th Cir. 1994).
\item \textsuperscript{100} \textit{Id.} at 351.
\item \textsuperscript{101} \textit{Id.} at 354 (citing \textit{United States v. Howard} 923 F.2d 1500, 1504 (11th Cir. 1991)).
\item The appellate court will consider intervening clarifying amendments even though they were not in effect at the time of sentencing. \textit{Id.}
\item \textsuperscript{102} \textit{Id.} at 355.
\item \textsuperscript{103} 28 F.3d 1084 (11th Cir. 1994).
\end{itemize}
To determine the quantity of drugs attributable to a defendant for sentencing purposes, the district court must first make individualized findings concerning the scope of criminal activity undertaken by the defendant. The court is then to determine the quantity of drugs reasonably foreseeable in connection with that level of participation.\(^\text{104}\)

Ambiguity in the presentence report and factual findings regarding drug quantity can result in a remand for further determinations. In *United States v. Perez-Tosta*,\(^\text{106}\) the presentence report attributed the entire quantity of the cocaine conspiracy to the defendant Rojas, but added that it was “doubtful that the defendant realized the quantity of contraband he was transporting . . . .”\(^\text{106}\) The sentencing court made no specific findings (nor did counsel for the defendant ask for an individualized determination), and the appellate court found an insufficient factual basis for the quantity used in Rojas’ calculation.\(^\text{107}\)

4. **Section 2F1.1. Fraud and Deceit.** U.S.S.G. section 2F1.1(b)(3)-(B)\(^\text{108}\) mandates a two level enhancement if the crime violates any judicial order, etc.\(^\text{109}\) In a fraud involving the defendant’s concealment of assets during bankruptcy,\(^\text{110}\) violation of a judicial order is presumed even though no specific order has been entered.\(^\text{111}\)

5. **Section 2X3.1: (Accessory After the Fact).** U.S.S.G. section 2C1.1, bribery, extortion,\(^\text{112}\) cross references the guideline for Accessory After the Fact if the “offense was committed for the purpose of concealing, or obstructing justice in respect to another criminal offense.”\(^\text{113}\) U.S.S.G. section 2X3.1\(^\text{114}\) is essentially an enhancement which applies when “the offense involved obstructing the investigation or prosecution

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104. *Id.* at 1087 (citing United States v. Beasley, 2 F.3d 1551, 1561 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2751 (1994)).
105. 36 F.3d 1552 (11th Cir. 1994).
106. *Id.* at 1564.
107. *Id.*
109. *Id.*
111. United States v. Bellew, 35 F.3d 518, 520 (11th Cir. 1994). The forms a bankruptcy petitioner files are tantamount to judicial orders. *Id.* at 520.
112. U.S.S.G. § 2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Law.
113. *Id.* § 2C1.1(c)(2).
114. *Id.* § 2X3.1(1).
of a criminal offense ...."115 In United States v. Pompey,116 the court upheld the application of this enhancement even though the underlying offense was a state prosecution.117

6. Section 2S1.1(a)(1): Money Laundering and Monetary Transaction Reporting. Following the Second Circuit,118 the court held that U.S.S.G. section 2S1.1(a)(1),119 with its base offense level of twenty-three, applies to both substantive convictions under 18 U.S.C. § 1956(a)(1)(A)120 and conspiracies to violate that subsection.121 The defendant argued that the conspiracy for which she was convicted carried a base offense level of twenty since it was not a substantive offense.122

C. Chapter Three

In United States v. Alpert,123 a fractured appellate court found no obstruction of justice.124 The defendants, while engaging in preindictment plea negotiations, left town without contacting their attorneys or leaving a forwarding address.125 Months later they were found in California using false identities and continuing to commit the same type of fraud for which they were ultimately convicted.126 The majority held that the "U.S.S.G. Section 3C1.1 enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more."127 The court did not preclude enhancement for obstruction of justice, but instead, remanded the case for more precise findings in the district court.128

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115. Id.
116. 17 F.3d 351 (11th Cir. 1994).
117. Id. at 353-54. The defendant bribed a DEA agent to fix a state prosecution of the defendant's son. Eventually the defendant, his son, and accomplices were indicted federally and the defendant pled guilty to the bribery charge. Id. at 352.
119. U.S.S.G § 2S1.1(B)(1).
121. United States v. Acanda, 19 F.3d 616, 619 (11th Cir. 1994).
122. Id.
123. 28 F.3d 1104 (11th Cir. 1994).
124. Id. at 1107.
125. Id. at 1106.
126. Id.
127. Id. at 1107.
128. Id. at 1108.
The defendant in *United States v. McConaghy* argued that U.S.-S.G. section 3E1.1, which provides an additional base offense level reduction if the defendant “timely notifies authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently . . .” is unconstitutional. He suggested that forcing a speedy plea violated his right to effective assistance of counsel by preventing thorough investigation and thoughtful preparation. The court found that “not every burden on the exercise of a constitutional right and not every encouragement to waive such a right is invalid,” and found the guideline constitutional on its face.

The government argued that whether the government has begun to prepare for trial determines timeliness of the notice. The court refused to define a bright line rule, noting that the government could interview just one witness many weeks before trial and effectively preclude the application of the guideline in almost every case, or defense counsel could become ill and fail to investigate, depriving the defendant of the benefit of the guideline. The district court had not addressed the timeliness of McConaghy’s notification of his intention to plead and the court remanded the case for further findings of fact. Clearly, the issue of timeliness differs case by case, and appellate courts will review district courts’ findings only for clear error.

In *United States v. Pace*, the court held that using marijuana a few days before pleading guilty demonstrates a lack of acceptance of responsibility. The defendant argued that since the guideline requires only that a defendant accept responsibility “for his offense,” other criminal activity not related to the offense of conviction (using

129. 23 F.3d 351 (11th Cir. 1994).
131. 23 F.3d at 352 n.1.
132. Id. at 352.
133. U.S. CONST. amend. VI.
134. 23 F.3d at 352-53.
135. Id. (quoting Corbitt v. New Jersey, 439 U.S. 212, 219 (1978)).
136. Id.
137. Id.
138. Id. at 353-54.
139. Id. at 354.
140. Id. at 353.
141. Id. at 352 (citing United States v. Rodriguez, 959 F.2d 193 (11th Cir. 1992)).
142. 17 F.3d 341 (11th Cir. 1994).
143. Id. at 343.
144. U.S.S.G. § 3E1.1(a).
D. Chapter Four: Criminal History

1. Section 4B1.2: Career Offender. In determining whether a prior conviction is a "controlled substance offense" as that term is used in the guidelines,\(^{147}\) district courts must look only at the elements of the offense and not at the facts underlying the conviction.\(^{148}\) The court had previously applied this rule when determining whether a prior conviction was a "crime of violence" and for the first time extended it to controlled substance offenses as well.\(^{149}\)

2. Section 4B1.4: Armed Career Criminal. The Supreme Court held that the crime of felon in possession of a firearm is not a violent felony for purposes of the career offender enhancement under U.S.S.G. section 4B1.1.\(^{150}\) The Eleventh Circuit extended that premise and held that felon in possession is not a violent felony for purposes of the sentencing enhancement mandated by Title 18, Section 924(e) of the United States Code\(^{151}\) or the guideline enhancement in U.S.S.G. section 4B4.1.\(^{152}\)

E. Chapter Five: Implementation of Sentence and Departures

1. Notice. In Burns v. United States,\(^ {153}\) the Supreme Court held that the district court could not impose an upward departure from the guidelines without "reasonable notice that it is contemplating [a departure] ... on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government."\(^ {154}\) In United States v. Valentine,\(^ {155}\) the govern-
ment filed a motion for an upward departure based on factors it considered "atypical." The district court rejected the reasons given by the government, including one the government added at sentencing, and departed instead based on a reason enunciated by the court for the first time at the sentencing hearing. The Eleventh Circuit rejected the departure, holding that contemporaneous notice is insufficient and advance notice is required.

2. Departures. The holding in United States v. Baker instructs district courts to fully articulate the reasons for downward departures or suffer a remand for that purpose. In United States v. Chavarria-Herrara, the government filed a motion for a substantial assistance departure under U.S.S.G. section 5K1.1 and Federal Rule of Criminal Procedure 35(b). The district court departed far below the level recommended by the government and the government appealed. The defendant objected that the government had no authority to appeal a sentence reduced under Federal Rule of Criminal Procedure 35(b) but the Eleventh Circuit held otherwise, noting a split among the circuits. The court next determined that Federal Rule of Criminal Procedure 35(b) permits a reduction only for substantial assistance, and since the district court relied on other reasons, the court remanded the case.

United States v. Aponte, a very confusing opinion, also concerns substantial assistance departures from minimum mandatory sentences. Aponte pleaded guilty to use of a firearm during the commission of a drug trafficking conspiracy and faced a mandatory minimum sen-

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156. Id. at 396-97.
157. Id. at 397.
158. Id. at 398.
159. 19 F.3d 605 (11th Cir. 1994).
160. Id. at 616.
161. 15 F.3d 1033 (11th Cir. 1994).
163. Fed. R. Crim. P. 35(b) which permits reduction of sentence, including reduction below a minimum mandatory sentence, for cooperation and substantial assistance rendered within one year of sentencing. Id.; 15 F.3d at 1034.
164. 15 F.3d at 1034.
165. Id. at 1035.
166. Id. The First Circuit held there is no statutory authority for a government appeal of a sentence reduced under Fed. R. Crim. P. 35(b). See United States v. McAndrews, 12 F.3d 273, 277 (1st Cir. 1993).
167. 15 F.3d at 1037.
168. 36 F.3d 1050 (11th Cir. 1994).
The court apparently held that the starting point for departures is the base offense level which encompasses the minimum mandatory sentence, without regard to such Chapter Three adjustments as acceptance of responsibility or role in the offense. The court applied the rule set out in *Chavarria-Herrara*, holding that departures for substantial assistance cannot be based on any factor other than the defendant's substantial assistance. The court held that the appropriate starting point for a substantial assistance departure is the first base offense level which contains the minimum mandatory and that the sentencing reduction supposedly must be based only upon the quality and quantity of the defendant's cooperation. Other factors such as role in the offense and acceptance of responsibility must be ignored. This result seems absurd and may be founded in the facts of the case which are not fully recited in a very short opinion.

The guidelines recognize a departure for diminished mental capacity. There is also a departure based on substantial assistance, but it requires a motion filed by the government. In *United States v. Munoz-Realpe* the district court attempted to blend the two, finding that the defendant's diminished mental capacity prevented him from rendering substantial assistance of a quality or quantity that the government could reward with the required motion. The district court departed downward by two levels. The appellate court rejected the departure explaining that the diminished capacity departure applies only to cases where it contributed to the offense itself, not to the defendant's ability to render substantial assistance afterward. The court reaffirmed its position that a substantial assistance departure can only be made with the government's consent and motion.

169. Id. at 1051.
170. Id. at 1052.
171. 15 F.3d 1033.
172. 36 F.3d at 1052. The rule, to this point, applied only to resentencing under Fed. R. Crim. P. 35. Aponte makes clear that the rule applies to all sentencing departures based on substantial assistance. Id.
173. Id.
174. Id.
176. Id. § 5K2.1.
177. 21 F.3d 375 (11th Cir. 1994).
178. Id. at 379.
179. Id.
180. Id. at 380.
181. Id. at 379-80.
The holding in *United States v. Dailey* \(^{182}\) makes clear that interstate travel with intent to carry on the unlawful activity of extortion \(^{183}\) is a crime of violence, and therefore the sentencing court cannot consider a departure based on diminished capacity pursuant to U.S.S.G. section 5K2.13. \(^{184}\) The court noted a conflict among the circuits and left it unresolved. \(^{185}\)

On the other hand, the court in *Dailey* found that a departure based on the victim’s provocation is permissible under U.S.S.G. section 5K2.10 \(^{186}\) even though the offense is violent. \(^{187}\) The court also found that the victim-based departure was reasonable in this case because the victim had defrauded Dailey and his family of tens of thousands of dollars. \(^{188}\)

V. OTHER SENTENCING ISSUES

Naturally, the court addressed important sentencing issues which do not involve specific guidelines. *Stinson v. United States*, which stems from the Eleventh Circuit, serves as one of the most significant Supreme Court cases regarding the federal sentencing guidelines. \(^{189}\) In that case the court held that the commentary to the guidelines is ordinarily binding. \(^{190}\) Specifically, the court held that the sentencing guidelines commentary which clarifies that the crime of felon in possession of a firearm is not a crime of violence is binding and remanded the case to the Eleventh Circuit for action consistent with that position. \(^{191}\) The Eleventh Circuit reluctantly complied. \(^{192}\)

In *United States v. Morse*, \(^{193}\) the court held that Federal Rule of Criminal Procedure 11 \(^{194}\) does not require the trial court to advise a defendant that he or she may become ineligible for federal benefits as the result of a plea. \(^{195}\) Rule 11 requires district courts to advise defendants regarding substantial rights but not of all possible collateral

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182. 24 F.3d 1323 (11th Cir. 1994).
184. 24 F.3d at 1325; U.S.S.G. § 5K2.13.
185. 24 F.3d at 1327.
187. Id.
188. Id. at 1328.
189. 113 S. Ct. 1913 (1993).
190. Id. at 1915.
191. Id. at 1920.
192. United States v. Stinson, 30 F.3d 121 (11th Cir. 1994).
193. 36 F.3d 1070 (11th Cir. 1994).
194. FED. R. CRIM. P. 11.
195. 36 F.3d at 1072.
consequences of a plea. Eligibility for federal benefits, like the possibility of deportation and ineligibility for parole, is a collateral matter. In United States v. Taffe, the defendant pleaded guilty to use of a firearm during, and in relation to, crimes of violence and drug trafficking, among other things. The statute requires an enhanced mandatory sentence of thirty years consecutive to the sentence imposed in the underlying crime if the defendant used a silencer or other specified device. The gun Taffe carried was an AK-47, itself subject to a five year mandatory sentence, but a codefendant carried an Uzi with a silencer. One count of the indictment to which Taffe pleaded guilty named all the weapons used in the offense, including the Uzi, and the Eleventh Circuit held that in entering this plea, "Taffe made a legally binding admission of responsibility for the use of the silencer during the course of his offense." The court added that, "Taffe cannot now challenge as improper a sentence that directly reflects the facts to which he pled guilty." Note also that a codefendant pleaded guilty to a different indictment, and the court subjected him to only the five year mandatory consecutive provision. Taffe raised an equal protection argument for the first time on appeal. The court, finding no manifest injustice, declined to consider the issue.

In United States v. Hernandez, the court found error in the district court’s refusal to hold an evidentiary hearing on a motion to reduce sentence pursuant to Federal Rule of Criminal Procedure 35. The defendant’s plea agreement obligated the government to bring the defendant’s cooperation to the sentencing court’s attention. The government filed a Rule 35 motion asking for a sentence reduction and

196. Id.
197. United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985).
198. Holmes v. United States, 876 F.2d 1545, 1548 (11th Cir. 1989).
199. 36 F.3d at 1072.
200. 36 F.3d 1047 (11th Cir. 1994).
201. Id. at 1048 (in violation of 18 U.S.C. § 924(c) (Supp. 1994)).
203. Id.
204. 36 F.3d at 1049.
205. Id.
206. Id.
207. Id. (citing United States v. Eaves, 849 F.2d 363, 365 (8th Cir. 1988)).
208. Id. at 1049 n.3.
209. Id.
210. 34 F.3d 998 (11th Cir. 1994).
211. Id. at 1001.
212. Id. at 1000.
evidentiary hearing, but for security reasons did not detail the extent or nature of the defendant's cooperation.\textsuperscript{213} The district court denied the motion without a hearing, and the defendant appealed.\textsuperscript{214} The appellate court held that since the government was obligated to inform the sentencer of the nature and extent of the cooperation, and the motion itself did not satisfy that obligation, failure to hold a hearing "forced a breach of the plea agreement."\textsuperscript{215}

The sentencing scheme which punishes crack cocaine offenses at approximately one hundred times the rate for powder cocaine once again survived a constitutional attack. In \textit{United States v. Harden},\textsuperscript{216} the court held that crack is more addictive and dangerous than powder, and there is no evidence that either Congress or the Commission enacted the unequal penalties for a discriminatory purpose.\textsuperscript{217}

Although the career offender provision of the guidelines imposes limits on the age of prior convictions used to invoke enhanced sentences,\textsuperscript{218} the statute enhancing sentences for drug offenses does not.\textsuperscript{219} In \textit{United States v. Hudacek},\textsuperscript{220} the court held that any prior felony drug conviction, no matter how old, can qualify for the statutory enhancement.\textsuperscript{221}

The preservation of objections to the presentence report and the impact of U.S.S.G. Chapter Seven (Violations of Probation and Supervised Release) were both addressed in \textit{United States v. Milano}.\textsuperscript{222} The defendant had been convicted of drug offenses and cooperated with the government. At the original sentencing hearing, the defendant abandoned his objections to the presentence report (including the drug quantity calculation) because it was apparent that he would be sentenced to probation.\textsuperscript{223} When the defendant violated his probation by continuing to sell drugs, his attorney attempted to revive the original objections.\textsuperscript{224} The government successfully argued that the previous

\begin{footnotesize}
\begin{enumerate}
\item Id. at 999-1000.
\item Id. at 1000.
\item Id. at 1001.
\item Id. at 602.
\item U.S.S.G. § 4A1.2(e).
\item 24 F.3d 143 (11th Cir. 1994).
\item Id. at 146.
\item 32 F.3d 1499 (11th Cir. 1994).
\item Id. at 1500.
\item Id.
\end{enumerate}
\end{footnotesize}
waiver was valid and the objections could not be renewed at the subsequent revocation proceeding.\textsuperscript{226}

The district court sentenced the defendant to 151 months which was the bottom of the original guideline range and far above the roughly 50 month sentence called for by Chapter Seven of the guidelines.\textsuperscript{226}

Chapter Seven is drafted as a series of policy statements which are intended "to provide guidance" to sentencing courts.\textsuperscript{227} The Eleventh Circuit has long held that these policy statements are advisory only and not binding on district courts.\textsuperscript{228} The court addressed the possible impact that \textit{Stinson}\textsuperscript{229} might have on this position. Although \textit{Stinson} holds that policy statements and commentary are binding unless they violate the Constitution or federal statute, the court distinguished the Chapter Seven policy statements and maintained that they are strictly advisory.\textsuperscript{230} This is the position of the majority of circuits throughout the country.\textsuperscript{231}

VI. \textbf{STANDARDS OF REVIEW}

The constitutionality of a sentencing statute is entitled to de novo review.\textsuperscript{232}

The application of law to sentencing issues is reviewed de novo while factual findings are reviewed for clear error.\textsuperscript{233}

Courts must review de novo the application of a particular guideline to the facts of a case.\textsuperscript{234}

Courts review an enhancement for more than minimal planning for clear error.\textsuperscript{235} (But see below.)

An enhancement for obstruction of justice is a mixed question of law and fact. Courts review findings of fact for clear error and review the

\begin{itemize}
\item 225. \textit{Id.} at 1501.
\item 226. \textit{Id.} at 1502.
\item 228. United States v. Thompson, 976 F.2d 1380, 1381 (11th Cir. 1992).
\item 229. 113 S. Ct. 1913 (1993).
\item 230. 32 F.3d at 1503.
\item 231. See United States v. Anderson, 15 F.3d 278 (2d Cir. 1994); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994); United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994); United States v. Levi, 2 F.3d 842 (8th Cir. 1993); United States v. Forrester, 19 F.3d 482 (9th Cir. 1994). \textit{But see} United States v. Lewis, 998 F.2d 497 (7th Cir. 1993).
\item 232. United States v. Harden, 37 F.3d 595 (11th Cir. 1994) (citing United States v. Osburn, 955 F.2d 1500, 1503 (11th Cir.), \textit{cert. denied}, 113 S. Ct. 290 (1992), and \textit{cert. denied}, 113 S. Ct. 223 (1992)).
\item 234. \textit{Id.}
\item 235. United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989).
\end{itemize}
application of law to those facts de novo. However, meaningful appellate review requires carefully articulated findings of fact from the courts below.

Drug quantities for sentencing purposes must be proven only by a preponderance of the evidence. The government bears the burden to establish drug quantities. Courts review for clear error a district court's determinations regarding drug quantities.

Courts must review for clear error whether drugs have appropriately been aggregated under the rules of relevant conduct "in considering as 'part of the same course of conduct or part of a common scheme or plan as the count of conviction' conduct which exists in 'discrete, identifiable units' apart from the offense of conviction."

Courts review for clear error the determination of a defendant's acceptance of responsibility.

The question of whether to reduce a guideline calculation based on the defendant's minor role in the offense is a determination of fact reviewed for clear error.

The court should employ a plenary review to a district court's decision regarding whether a departure is authorized.

There exists a three-part analysis used to review departures. First is the issue of whether the Commission adequately considered the reason relied on for the departure in drafting the guidelines. Whether the Commission adequately considered the factor is reviewed de novo. Second, if the Commission did not adequately consider the factor, the question of whether reliance on the factor is consistent with the goals of

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239. United States v. Taffe, 36 F.3d 1047, 1050 (11th Cir. 1994); United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993).
240. 36 F.3d at 1050; United States v. Alston, 895 F.2d 1362, 1369 (11th Cir. 1990).
241. United States v. Maxwell, 34 F.3d 1006, 1011 (11th Cir. 1994) (citing Hahn, 960 F.2d at 909-10).
243. 21 F.3d 375, 380 (11th Cir. 1994).
the guidelines should be reviewed.247 Third, if the factor is consistent with the goals of guidelines sentencing, the reasonableness of the departure itself is reviewed.248

VII. CONCLUSION

The sentencing guidelines have taken on a life of their own. Despite the fact that guideline sentencing issues clog the dockets of the Eleventh Circuit Court of Appeals, and inmates serving guideline sentences are flowing into (but not out of) federal prisons, there is no end in sight. Although 1994 produced the fewest and least drastic amendments ever, the Commission now operates with a full staff and certainly perceives the new Republican Congress as an ally.

The Eleventh Circuit, which at times seems to chafe at the restrictions the guidelines demand,249 often adopts the most restrictive interpretation of guideline principles.250 On the other hand, the court has rendered several opinions (particularly in drug cases) which may reflect its displeasure with the strictness and harshness of the sentencing scheme.251

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247. 956 F.2d at 1557.
248. Id.; 920 F.2d at 1573. See also United States v. Godfrey, 22 F.3d 1048, 1053 (11th Cir. 1994).
249. See United States v. Stinson, 943 F.2d 1268 (11th Cir. 1991); 957 F.2d 813 (11th Cir. 1992); 30 F.3d 121 (11th Cir. 1994).
250. See Aponte, 36 F.3d 1050 (11th Cir. 1994); Chavarria-Herrera, 15 F.3d 1033 (11th Cir. 1994); Dailey, 24 F.3d 1323 (11th Cir. 1994); Taffe, 36 F.3d 1047 (11th Cir. 1994).
251. See Chitty, 15 F.3d 159 (11th Cir. 1994); Maxwell, 34 F.3d 1006 (11th Cir. 1994); Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994).