Federal Sentencing Guidelines

Deborah R. Jordan
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The rule of law governing sentencing in the federal courts is becoming more and more of an intellectual exercise; one that may be interesting to the academics, but is confusing and frustrating to the individuals affected by the process. A review of the decisions issued in 1996 by the Court of Appeals for the Eleventh Circuit, as well as those of the United States Supreme Court, confirms this trend to intellectualize the sentencing process.

Most people who are confronted by the criminal justice system have strong emotions attached to the experience. Crime victims have suffered unjustly and want to see someone pay for their suffering. They want to be made whole. The defendants have been accused of doing something reprehensible, have been arrested and forced into court, have had to deal with attorneys, and have suffered the ruination of their families and normal lives. Given the emotional nature of the experience for the nonprofessionals involved in the sentencing, it is not far-fetched to conclude that these people are not pleased with intellectual answers to their questions. For example, only an academician could be satisfied with the explanation that the quantity of LSD involved in the case is considered to be one weight for purposes of determining the sentencing

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guideline range, but is a different weight for purposes of determining the minimum mandatory sentence that may trump the guidelines.

The intellectual aspects of sentencing require the sentencing participants to follow two sets of competing rules at the same time, to pretend that sentencing is both uniform and uniformly individualized, and to negotiate agreements that could be undermined by the third-party probation officer that prepares the presentence report. This Article reviews the Eleventh Circuit and Supreme Court sentencing guideline decisions of 1996. The decisions that support the above thesis are discussed first, followed by a review of the other significant decisions of the year.

I. DUAL RULES

Both the Supreme Court and the Eleventh Circuit decided cases in 1996 in which they distinguished between the law applicable to sentencing guideline determinations and the law applicable to other sentencing statutes. In Neal v. United States,1 the Supreme Court held that the 1993 amendment to the United States Sentencing Guidelines that created a per-dose method for calculating the weight of LSD is applicable only to determining the weight for application of the sentencing guidelines.2 The per-dose method is not applicable to determine the weight of LSD for application of a statutory mandatory minimum sentence.3

Also on the subject of the interplay between mandatory minimum sentences and the sentencing guidelines, the Supreme Court decided Melendez v. United States.4 Melendez pleaded guilty to a drug charge and cooperated with the government in exchange for the government’s filing of a section 5K1.15 motion for downward departure from the sentencing guideline range based on the defendant’s substantial assistance to the government. Melendez faced a statutory mandatory minimum sentence of ten years and a sentencing guideline range of 135 to 168 months. As promised, the government moved for a downward departure from the sentencing guideline range based on the defendant’s assistance. The motion cited section 5K1.1 but did not cite 18 U.S.C. § 3553(e), which permits a sentence below the mandatory minimum on motion by the government based on substantial assistance of the

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2. Id. at 769.
3. Id.
5. U.S.S.G. § 5K1.1.
defendant. The trial court sentenced Melendez to the mandatory minimum of ten years imprisonment.6

The Supreme Court rejected Melendez's argument that section 5K1.1 created a "unitary" motion system based upon the substantial assistance of the defendant. The Court held that section 5K1.1 governed departures from the guideline range and provided guidance for determining the sentence below the mandatory minimum sentence once a motion pursuant to section 3553(e) was filed.7 Section 5K1.1, however, does not authorize a sentence below the mandatory minimum unless the government specifically moves for that pursuant to 18 U.S.C. § 3553(e), and not just for a downward departure pursuant to section 5K1.1.8

_Melendez_ teaches two lessons. The general lesson is once again that attorneys must be alert at all times to the interplay between non-guideline law and guideline law. The more specific lesson is that attorneys must negotiate for plea agreements involving the defendant's cooperation with the government with the full understanding of whether the promised reward will be a motion for departure under 5K1.1 alone, or will also cite 18 U.S.C. § 3553(e).

Similarly, but on a completely different subject, the Eleventh Circuit held in _United States v. Mikell_9 that a defendant who is subject to a statutory sentence enhancement under 21 U.S.C. § 841 may challenge the constitutionality of an earlier conviction that is the basis for the enhancement. Mikell had alleged that his counsel on his earlier conviction had a conflict of interest because he represented both Mikell and a codefendant. Mikell claimed that he was denied the effective assistance of counsel as a result of counsel’s conflict. However, the district court refused to permit the collateral attack in reliance on _United States v. Roman_.10 In _Roman_, the Eleventh Circuit had ruled _en banc_ that for purposes of determining a defendant's criminal history category under the sentencing guidelines, a prior state conviction may not be attacked as unconstitutional unless the defendant alleges that his state conviction was wholly unounselled.11 On appeal, the panel in _Mikell_ held that _Roman_ did not affect the statutory system imposed by 21 U.S.C. § 851, which allows constitutional attacks on prior convictions used as a basis for sentence enhancement under section 841.12

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7. _Id._ at 2061.
8. _Id._
9. 102 F.3d 470, 477 (11th Cir. 1996).
10. 989 F.2d 1117 (11th Cir. 1993) (en banc).
11. _Id._ at 1120.
12. 102 F.3d at 477.
The decisions in *Melendez, Neal*, and *Mikell* point out the imperative for attorneys: Be aware at all times of the dual rules governing sentencing in federal court. Attorneys must be mindful of the rules governing sentencing under the guidelines, as well as the rules governing sentencing under statutes apart from the guidelines.

II. SENTENCING THAT IS UNIFORM IN ITS INDIVIDUALIZATION

The Supreme Court set the standard of review for sentencing departures in *Koon v. United States*. In that case, the Supreme Court reviewed the sentences of the detectives that were acquitted in state court, and then convicted in federal court, in connection with the car chase and videotaped beating of Rodney King. The Court held for the first time that departures should be reviewed for an abuse of discretion. The Court explained that the wrong determination of a question of law is an abuse of discretion. The question of whether a factor is a proper one upon which to base a departure is a question of law. The Court in *Koon* found that the trial court had abused its discretion in part. This decision was better for defendants than the Ninth Circuit’s *de novo* ruling had been. The Ninth Circuit had rejected the departure completely.

The trial court sentenced Stacy Koon and Laurence Powell each to thirty months. That sentence was derived after the court departed eight levels from the original range of seventy to eighty-seven months. The court departed five levels because “the victim’s wrongful conduct contributed significantly to provoking the offense behavior.” Then the court departed another three levels based on a combination of four factors: (1) the defendants would most likely be targets of abuse in prison; (2) the defendants would not only lose their positions as police officers, but would have significant employment consequences in the field of law enforcement; (3) the defendants had been subjected to successive state and federal prosecutions; and (4) the defendants were nonviolent, not dangerous, and unlikely to engage in future criminal conduct.

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14. *Id.* at 2041-43.
15. *Id.* at 2043.
16. *Id.* at 2048.
17. *Id.* at 2047.
18. *Id.* at 2051-53.
19. *Id.* at 2043.
20. *Id.* at 2042.
21. *Id.*
The Ninth Circuit conducted a *de novo* review of "whether the district court had authority to depart," and rejected the departure completely.\(^{22}\)

The Supreme Court's decision in *Koon* attempted to maintain the illusion that the sentencing guidelines actually result in consistent and uniform sentencing practices from case to case across the country. The good news from *Koon* is that the Supreme Court affirmed the trial court's discretion to depart from the guideline range, and limited appellate courts to a review for abuse of discretion. As pointed out in *Koon*, the guidelines offer specific considerations that should be bases for departure in the unusual case, other considerations that should not be bases for departure except in the extraordinary case, and some factors that may never be considered bases for departure. As to the remaining factors that counsel may conceive, the guidelines are silent, meaning that if the factor puts the case outside the "heartland" of cases for that offense, it may be a basis for departure.\(^{23}\)

Prior to the Supreme Court's decision in *Koon*, the Eleventh Circuit employed a three-step review of departures. First, the Eleventh Circuit reviewed *de novo* the question of whether the proffered basis was a proper ground for departure, then the court reviewed the factual support for the departure for clear error, and finally the court reviewed the extent of the departure for reasonableness.\(^{24}\) The court decided several departure cases in 1996 based on pre-*Koon* law.\(^{25}\)

Since *Koon*, the Eleventh Circuit has affirmed a departure based on a factor encouraged by the guidelines. The conviction in *United States*
v. Bernal was for exporting a gorilla and an orangutan from the United States to Mexico. Defendants were conservationists whose purpose in exporting the animals was for breeding and exhibition. The district court departed downward pursuant to section 5K2.11 because the conduct of defendants did not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue." That law is meant to protect endangered species and these defendants shared that mission. The Eleventh Circuit rejected the government's appeal.

The court also affirmed an eight-level upward departure based on a combination of reasons in United States v. Taylor. The three factors that took the case outside the norm for an offense of sending threatening communications were that the offense involved twenty years of harassment, resulted in public embarrassment for the victims, and continued even after judges ordered it to stop. Even with the departure, the sentence was well below the statutory maximum. The court approved both the bases for departure and the extent of the departure.

III. NEGOTIATING AGREEMENTS WITHOUT CONTROL OVER THE PRESENTATION TO THE COURT

Closely connected to the illusion that sentences are meted out uniformly is the reliance on the United States Probation Office to prepare an independent and unbiased presentence report. As there is variation in prosecutors and defenders, so too is there variation in probation officers. But aside from the difference in the way individual officers carry out their responsibilities in preparing a presentence report, the entire concept that the probation officer will be independent is flawed. The probation office must get its information about the offense somewhere, and that somewhere is from the prosecutor and the investigating agents. One example of how this can cause problems is seen when a prosecutor reaches a plea agreement with the defendant that limits the "bad" facts. When this happens, the agent, who is caught up in the case he developed, is not always pleased. The agent can feed information to the probation officer that undermines the agreement reached by the prosecutor. Although the prosecutor may explain to the probation officer that the contested information is not supported by

26. 90 F.3d 465 (11th Cir. 1996).
27. Id. at 467.
28. Id.
29. 88 F.3d 938 (11th Cir. 1996).
30. Id. at 946-47.
sufficient evidence to put forward, the probation officer has been tainted by the information.

The Eleventh Circuit addressed the effect of sentencing stipulations in several opinions in 1996. In a succinct per curiam decision in United States v. Strevel, the court brought home the insignificance of stipulations between the parties when it comes to sentencing decisions. Pointing out the policy statement directly addressing the situation, the court held that a district court may not rely solely on the stipulation of the parties to find a fact—in this case, the amount of loss under section 2F1.1(b)(1)—but must consider also the results of the presentence investigation and other relevant information. The opinion does not explain why the defendant appealed the district court's decision, which accepted the stipulation of the parties, and it is doubtful the defendant could argue in favor of a different result given his stipulation. However, the opinion is significant because it points out the error of either party putting too much faith in stipulations.

Not only must the court base its sentencing findings on more than the stipulation of the parties, the court must also ignore a stipulation that violates the guidelines. The court reiterated this policy in passing in United States v. Dean. Dean is an interesting decision because the Eleventh Circuit held that district courts may modify plea agreements reached pursuant to Rule 11(e)(1)(B). In Dean, the court sua sponte reduced the agreed forfeiture amount on a finding that the amount was otherwise out of proportion with the offense, and therefore in violation of the Excessive Fines Clause. The government argued that the court could not modify the agreement, and especially that portion of the agreement dealing with the amount of the forfeiture, but had to accept or reject the agreement in its entirety.

On the other hand, the Eleventh Circuit also upheld the parties' obligations to abide by their plea agreement. In United States v. Taylor, the court allowed the defendant to withdraw his plea upon a finding that the government breached the plea agreement. In an oral plea agreement, the government promised Taylor that it would recommend a sentence of ten years "based upon the entire facts of the

31. 85 F.3d 501 (11th Cir. 1996).
32. U.S.S.G. § 6B1.4(d) & notes.
33. 85 F.3d at 502.
34. 80 F.3d 1535, 1542 (11th Cir.), modified on other grounds, 87 F.3d 1212 (11th Cir. 1996).
36. U.S. CONST. amend. VIII.
37. 77 F.3d 368, 369 (11th Cir. 1996).
At sentencing, however, the government undermined that promise by arguing in favor of sentencing guideline determinations that put the sentencing range above ten years. Though the government then paid lip service to its promise by "recommending" a ten-year sentence, the recommendation was meaningless in that context. The court sentenced Taylor to 151 months, which was the bottom of the sentencing range.

On appeal, the Eleventh Circuit held that the only reasonable interpretation of the government's promise was that it included a promise not to advocate a position to the court that would require a sentence longer than ten years. Because the government's breach of the plea agreement would be reflected in its objections attached to the presentence report, the court concluded that the remedy for the breach would be to allow the defendant to withdraw his plea rather than to allow a new sentencing.

IV. OTHER SIGNIFICANT DECISIONS

Some underlying concepts, such as the standard of proof and the concept of "relevant conduct," pertain to every sentencing under the guidelines. The standard of proof at sentencing is lower than at a criminal trial. Instead of proof beyond a reasonable doubt, sentencing issues need only be determined by a preponderance of the evidence. In addition, the Rules of Evidence do not apply, and the court may consider any evidence, including hearsay, so long as it bears minimal indicia of reliability. The Eleventh Circuit addressed the quantum of evidence required for a sentencing guidelines determination in several 1996 decisions. In United States v. Agis-Meza, the district court extrapolated the amount of marijuana involved by converting both the empty marijuana wrappers and the cash seized at a stash house into amounts of marijuana. The Eleventh Circuit reversed because there was no evidence that the cash and the wrappers were not related to the same

38. Id. at 369.
39. Id. at 370.
40. Id.
41. Id. at 372.
42. E.g., United States v. Agis-Meza, 99 F.3d 1052, 1055 (11th Cir. 1996).
43. E.g., United States v. Bernardine, 73 F.3d 1078, 1080-81 (11th Cir. 1996).
44. Agis-Meza, 99 F.3d at 1058; Bernardine, 73 F.3d at 1078; United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996); United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1996); United States v. Strevel, 85 F.3d 501 (11th Cir. 1996); United States v. King, 87 F.3d 1255 (11th Cir. 1996).
45. 99 F.3d 1052.
transaction and thus involved the same marijuana.\textsuperscript{46} The inference that the cash represented payment for the marijuana that had been in the wrappers was just as likely as the inference that the cash was from a separate transaction. Thus, the district court's finding was not supported by a preponderance of the evidence and was reversed.\textsuperscript{47}

Under the sentencing guidelines, defendants are sentenced based not just on the offense of conviction, but also on all "relevant conduct."\textsuperscript{48} Relevant conduct includes all acts in furtherance of the offense, as well as the foreseeable acts of others engaged in jointly undertaken criminal activity.\textsuperscript{49} The Eleventh Circuit joined the five other circuits that have decided the issue and held that the statute of limitations is no bar to consideration of relevant conduct.\textsuperscript{50}

Although the decision does not cite the relevant conduct provision, the holding in \textit{United States v. Luiz}\textsuperscript{51} is premised on that provision. The court sealed up an apparent loophole raised by its prior decision in \textit{United States v. Otero}.\textsuperscript{52} In \textit{Otero}, the court had held that the three factors that determine whether another person's possession of a firearm can be attributed to the defendant are that: (1) the possessor was charged as a coconspirator; (2) the coconspirator possessed the firearm in furtherance of the conspiracy; and (3) the defendant was a member of the conspiracy at the time the coconspirator possessed the firearm.\textsuperscript{53} In \textit{Luiz}, the court held that the first factor in \textit{Otero}, that the possessor be charged as a coconspirator, was dicta and that it is sufficient if the district court finds that the possessor was a coconspirator whether charged or not.\textsuperscript{54}

In addition to these broad decisions, the court addressed significant issues involving specific guidelines sections. Those decisions are discussed below.

\begin{itemize}
\item[46.] \textit{Id.} at 1055. The Presentence Investigation Report stated that the 89 wrappers and $362,950 translated into approximately 161.48 and 170 kilograms of marijuana respectively. \textit{Id.} at 1054 n.2.
\item[47.] \textit{Id.} at 1055.
\item[48.] U.S.S.G. § 1B1.3.
\item[49.] \textit{Id.}
\item[50.] United States v. Behr, 93 F.3d 784, 785-86 (11th Cir. 1996) (citing United States v. Silkowski, 32 F.3d 682, 688 (2d Cir. 1994); United States v. Lokey, 945 F.2d 825, 840 (5th Cir. 1991); United States v. Pierce, 17 F.3d 146, 150 (6th Cir. 1994); United States v. Neighbors, 23 F.3d 306, 311 (10th Cir. 1994); United States v. Wishnefsky, 7 F.3d 254, 266-57 (D.C. Cir. 1993)).
\item[51.] 102 F.3d 466 (11th Cir. 1996).
\item[52.] 890 F.2d 366 (11th Cir. 1989).
\item[53.] \textit{Id.} at 367.
\item[54.] \textit{Luiz}, 102 F.3d at 466.
\end{itemize}
A. Substantial Assistance—Section 5K1.1

The Eleventh Circuit has thrown a new twist into the already one-sided system for downward departures based on the defendant's cooperation with the government pursuant to guideline section 5K1.1. Only the government has the authority to move the court for a downward departure based on the defendant's substantial assistance to the government. The defendant cannot make the motion, and the court cannot depart on that basis on its own initiative. The court has the discretion to grant or deny the motion, and, if granted, to decide by how much to reduce the defendant's sentence. The Eleventh Circuit held in United States v. Luiz that the district courts may consider factors unrelated to the defendant's assistance in deciding to deny the motion to depart and in reducing the extent of the departure to something less than that recommended by the government. However, in deciding to grant the departure, and in determining the extent of a departure, the court is limited to considering factors related to the defendant's assistance. Thus, the district court cannot increase the departure based on the defendant's good prison conduct and relative culpability, but it can reduce the departure based on the court's perception that the government's charging decision was lenient.

Attorneys should be prepared to object to a court's departure "policy" on the correct basis should the occasion arise. In United States v. Cosgrove, the district court had explained its policy, to be applied to the three defendants in that case as well as all future defendants, that when the government moves for a downward departure under section 5K1.1, the court would take the bottom of the guideline range and reduce it by one-third to arrive at the ultimate sentence. In Cosgrove, the government had recommended different degrees of departure for the three defendants based on their varying levels of culpability as well as their respective levels of assistance. The recommended sentences ranged from sixty months to eighty-four months. The district court sentenced

56. 102 F.3d 466, 470 (11th Cir. 1996).
57. Id. at 469.
58. See United States v. Manella, 86 F.3d 201, 204 (11th Cir. 1996) (motion for reduction of sentence pursuant to FED. R. CRIM. P. 35(b)) (discussing United States v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994)).
59. Luiz, 102 F.3d at 469-70. The court rejected the government's motions for a five-level reduction for each of the two defendants and granted only a three-month reduction for one defendant and no reduction for the other. Id. at 468.
60. 73 F.3d 297, 301-02 (11th Cir. 1996).
61. Id. at 299.
all three defendants to one hundred months each. The Eleventh Circuit cited a Third Circuit opinion, *United States v. King,* 62 which held that the practice of applying a policy rather than an individualized determination violated the provision of section 5K1.1 which requires the court to consider the listed factors in determining the extent of the departure. 63 The Eleventh Circuit questioned the use of a policy, but did not rule on its legality because none of the defendants had objected to the policy as violative of section 5K1.1. 64 The decision may reach the court again by way of these defendants' motions under 28 U.S.C. § 2255, or when a sentencing policy is properly objected to in the district court prior to appeal.

One last note regarding section 5K1.1 motions: Be warned of one more thing a defendant can do to hurt his sentencing prospects. In *United States v. Carlson,* 65 the government filed a section 5K1.1 motion on behalf of a defendant who pleaded guilty. The motion specified that the defendant's assistance to the government was predicated on his availability as a witness in the future and warned that the motion would be withdrawn if the defendant perjured himself, obstructed justice, or otherwise misled the court during sentencing, because these acts would render him useless as a witness. 66 After the motion was filed, the defendant, acting against the advice of his counsel, filed a pro se motion in which he asserted his innocence and moved to withdraw his guilty plea. The government moved to withdraw the section 5K1.1 motion because the defendant's motion to withdraw his guilty plea rendered him useless as a witness. The district court did not allow the defendant to withdraw his guilty plea but permitted the government to withdraw its section 5K1.1 motion. The Eleventh Circuit affirmed. 67

B. Acceptance of Responsibility—Section 3E1.1

A motion to withdraw a guilty plea can do a lot of damage if it is not granted. In *Carlson,* discussed above, it resulted in the loss of a section 5K1.1 motion. In *United States v. McCarty,* 68 it resulted in the loss of a downward adjustment for acceptance of responsibility under section 3E1.1. The defendant in *McCarty* moved to withdraw his guilty plea, claiming that he was innocent and that he had been impermissibly

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62. 53 F.3d 589, 590-92 (3d Cir. 1995).
63. 73 F.3d at 502.
64. Id.
65. 87 F.3d 440 (11th Cir. 1996).
66. Id. at 447.
67. Id.
68. 99 F.3d 383 (11th Cir. 1996).
pressured into pleading guilty by his lawyer. The district court found
that the defendant was ably represented and had knowingly and
voluntarily entered a guilty plea.\textsuperscript{69} The court did not permit him to
withdraw his plea.\textsuperscript{70} At sentencing, the court did not award
the defendant a two-level reduction for acceptance of responsibility. The
district court found, and the Eleventh Circuit agreed, that the defen-
dant's protestations of innocence in connection with the motion to
withdraw his plea and again at sentencing precluded the adjustment.\textsuperscript{71}

Just as it seems obvious that protestations of innocence at sentencing
are not conducive to a finding that the defendant has accepted responsi-
bility for his illegal conduct, it also seems obvious that a defendant does
not have to waive all legal objections to the presentence report in order
to accept responsibility. The Eleventh Circuit adopted this latter point
in \textit{United States v. Smith}.\textsuperscript{72} Smith pleaded guilty to running a check-
kiting scheme. During the scheme, he deposited checks totaling
$458,500, but withdrew only $35,500 of that amount. Smith admitted
all of this and his lawyer argued in an objection to the presentence
report and at sentencing that based on these facts the amount of loss
should be $35,500.\textsuperscript{73}

The district court reduced Smith's offense level by two points for
acceptance of responsibility under section 3E1.1(a), but withheld the
third point under section 3E1.1(b). The third point is given when a
defendant timely provides complete factual information to the govern-
ment about the offense, or timely notifies the government of his
intention to plead guilty, thereby allowing the government to avoid
preparing for trial. Smith claimed that he timely provided information
and timely notified the government he would plead guilty. The Eleventh
Circuit held that the court could not deny Smith a reduction for
acceptance of responsibility because his lawyer "objected to the
presentence report on legal grounds."\textsuperscript{74} The court remanded for
the district court to determine whether Smith had provided complete
information to the government, thus meriting the third point under
3E1.1(b).\textsuperscript{75}

In connection with a sentencing for possession of a firearm by a
convicted felon, the Eleventh Circuit held in \textit{United States v. Coe}\textsuperscript{76} that

\textsuperscript{69} \textit{Id.} at 386.
\textsuperscript{70} \textit{Id.} at 385-86.
\textsuperscript{71} \textit{Id.} at 387.
\textsuperscript{72} 106 F.3d 350 (11th Cir. 1996).
\textsuperscript{73} \textit{Id.} at 351.
\textsuperscript{74} \textit{Id.} at 352.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} 79 F.3d 126, 128 (11th Cir. 1996) (per curiam).
brandishing the gun and pulling its trigger were relevant conduct that
the defendant must truthfully admit or not falsely deny in order to
receive a downward adjustment for acceptance of responsibility. There
are two significant aspects to this decision. The less troubling of these
is that the defendant did not deny pulling the trigger, but said that he
did not remember doing so. Even so, the district court found that this
was a lack of acceptance of responsibility in light of the defendant's
initial denials of brandishing the gun and pulling its trigger.\(^7\)

The more troubling aspect of the Coe decision is its broad interpreta-
tion of what conduct the defendant must admit for acceptance of
responsibility. The court held that all conduct that forms a part of the
relevant conduct must be admitted or not falsely denied.\(^8\) The court
refused to limit this to conduct that affects the application of the
guidelines or even to conduct that is material. This should be discussed
and limited in future decisions. It is not clear from the decision how the
situation arose in which the defendant spoke about his conduct involving
pulling the trigger. Application note 1(a) to section 3E1.1 states that the
defendant may remain silent as to his relevant conduct apart from the
offense of conviction.

The Eleventh Circuit reaffirmed its holding that a defendant may not
receive a downward adjustment for acceptance of responsibility if he
receives an upward adjustment for obstruction of justice under section
3C1.1.\(^9\) The foundation for this rule is application note 4 to section
3E1.1, which states that an obstruction adjustment will usually preclude
an acceptance adjustment, but that there may be extraordinary cases
where both adjustments apply. That was not the case in Arguedas,
where the defendant lied multiple times about the conduct of his
coconspirators after he pleaded guilty.\(^8\)

C. Drug Offenses—Section 2D1.1

The court issued several opinions in 1996 concerning the guidelines for
drug offenses under section 2D1.1. In a case of first impression in the
Eleventh Circuit, the court held that the drug quantity used to
determine the base offense level for manufacturing or possessing drugs
with the intent to distribute them should include any amount of drugs
possessed solely for personal use.\(^8\) The court's rationale is that drugs

\(^7\) Id. at 127.
\(^8\) Id.
\(^9\) United States v. Arguedas, 86 F.3d 1054, 1059-60 (11th Cir. 1996) (citing United
States v. Kramer, 943 F.2d 1543, 1547 n.4 (11th Cir. 1991)).
\(^8\) Arguedas, 86 F.3d at 1059-60.
\(^8\) United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996).
possessed for personal use are part of the same course of conduct or common scheme as drugs intended for distribution.\(^8^2\)

The *en banc* court in *United States v. Shields*\(^8^3\) rejected the panel's holding that only live plants should be counted as marijuana plants under section 2D1.1. The *en banc* court held that "a defendant who has grown and harvested marijuana plants should be sentenced according to the number of plants involved" even if the plants are already harvested and dried when found.\(^8^4\)

The court once more upheld the validity of the sentencing ratio of 100:1 for crack versus powder cocaine.\(^8^5\) This most recent decision rejected the argument that the underlying statute, 21 U.S.C. § 841, and the sentencing guidelines are ambiguous because cocaine and cocaine base are chemically the same substance. The court relied on the legislative history for its finding that the harsher penalties are meant to apply to the crack or rock form of cocaine base.

In *United States v. Tokars*,\(^8^6\) the court held that a defendant who was convicted of a drug offense based solely on his role in laundering money should be sentenced under the guidelines governing drug offenses rather than those governing money laundering. In addition, the quantity of drugs could be estimated by extrapolation from the amount of money laundered.

D. Amount of Loss—Section 2F1.1(b)(1)

The severity of the sentence for certain offenses, such as fraud, increases with the value of the property involved. Under the guideline for offenses involving fraud, the sentence is increased in increments for all frauds involving over two thousand dollars.\(^8^7\) However, it is not always simple to know how much money was involved in an offense. The Eleventh Circuit addressed the calculation of the amount of loss in several decisions in 1996. In both *United States v. Calhoun*\(^8^8\) and *United States v. Toussaint*,\(^8^9\) the court rejected defendants' arguments that the loss amount should be zero because there was no actual loss. When the intended loss is higher than the actual loss, the intended loss will determine the sentence. The court in *Toussaint* specifically held

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82. Id. at 209-10.
83. 87 F.3d 1194 (11th Cir. 1996), rehearing 49 F.3d 707 (11th Cir. 1995), vacated by 65 F.3d 900 (11th Cir. 1996).
84. 87 F.3d at 1195.
86. 95 F.3d 1620, 1542 (11th Cir. 1996), cert. denied, 117 S. Ct. 1328 (1997).
88. 97 F.3d 518 (11th Cir. 1996).
89. 84 F.3d 1406 (11th Cir. 1996).
that there need not be any actual loss before intended loss may be
considered.²⁹

The court also addressed the method for determining the amount of
loss in a Ponzi or pyramid scheme.³⁰ The Eleventh Circuit accepted the
district court's detailed analysis of the exact loss to each victim who lost
money. The defendant argued that the loss should be based on the loss
to the group as a whole, so that the loss amount would be offset by the
amount of money some participants "earned" above their investment
amount. This suggestion was rejected, but the court remained flexible,
saying that the exacting calculations performed by the district court
need not be performed in each case.³²

E. Role in the Offense—Sections 3B1.1, 3B1.2

In United States v. Fernandez,³³ Fernandez was sentenced based on
his participation in a conspiracy to possess with intent to distribute 25
kilograms of cocaine. Some of Fernandez's coconspirators were involved
in a conspiracy that involved 308 kilograms of cocaine. Fernandez
received a downward adjustment based on his minor role in the
conspiracy, but appealed because he sought a larger downward
adjustment as a minimal participant in the conspiracy.³⁴ Fernandez's
argument that his role was minimal was based on his conduct with
respect to the 308 kilogram conspiracy rather than just the 25 kilogram
conspiracy upon which his base offense level was determined. The
Eleventh Circuit held that "the conspiracy on which a defendant's base
offense level is founded is the relevant conspiracy for determining role
in the offense."³⁶

F. Obstruction of Justice—Section 3C1.1

The Eleventh Circuit decided a number of cases in 1996 involving the
adjustment for obstruction of justice.³⁷ For example, in United States

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²⁹. Id. at 1407.
³⁰. United States v. Orton, 73 F.3d 331 (11th Cir. 1996).
³¹. Id. at 334.
³². United States v. Orton, 73 F.3d 331 (11th Cir. 1996).
³³. 92 F.3d 1121, 1122 (11th Cir. 1996).
³⁴. See U.S.S.G. § 3B1.2(a) & (b) (offense level reduced by two levels for minor role or
four levels for minimal role).
³⁵. Fernandez, 92 F.3d at 1123; see also United States v. Holley, 82 F.3d 1010 (11th
Cir. 1996) (similar argument and result, though defendant's offense level should have been
based on the larger conspiratorial amounts).
³⁶. U.S.S.G. § 3C1.1. See, e.g., United States v. Paradies, 98 F.3d 1266 (11th Cir.
1996); United States v. Taylor, 88 F.3d 938 (11th Cir. 1996); United States v. Geffrard, 87
F.3d 448 (11th Cir.), cert. denied, 117 S. Ct. 442 (1996); United States v. Arguedas, 86 F.3d
1054 (11th Cir. 1996); United States v. Hatney, 80 F.3d 458 (11th Cir.), cert. denied, 117
the court held that the defendant's lies regarding his assets during a pretrial hearing on the appointment of counsel warranted an adjustment for obstruction of justice because it affected an issue under determination. And in United States v. Taylor, the court upheld an obstruction enhancement based on the defendant's prolonged refusal to provide handwriting exemplars and attempt to disguise his writing when he finally provided the writing samples.

G. Criminal History—Chapter 4

Of the Eleventh Circuit's 1996 decisions regarding criminal history, the most significant is United States v. Frazier. There, the court held over dissent that a conviction under Florida's statute barring the sale of any substance in lieu of a controlled substance was a controlled substance offense for purposes of applying the career offender provision, section 4B1.1. The dissent characterized the offense as a fraud rather than a controlled substance offense.

In an interesting case also involving criminal history, the court engaged in a thorough analysis to determine whether the defendant's prior conviction in state court for robbery, which was listed as an overt act in his indictment for a drug conspiracy, should be considered as relevant conduct. The decision carried significant weight because if the robbery was relevant conduct, it could not be used to determine the defendant's criminal history. In the end, the court concluded that the robbery was not relevant conduct and could be used in the criminal history calculation. The result was softened by the district court's decision to allow the defendant's federal sentence to run concurrently with the unexpired term of his state sentence on the robbery.

V. CONCLUSION

Given the number of issues subject to appeal under the sentencing guidelines, the courts will continue to write numerous opinions on the

97. 79 F.3d 123, 126 (11th Cir. 1996).
98. 88 F.3d 938, 944 (11th Cir. 1996).
100. 89 F.3d 1501 (11th Cir. 1996).
101. Id. at 1505.
102. Id. at 1509-10.
103. United States v. Johnson, 87 F.3d 1257 (11th Cir. 1996).
104. Id. at 1260.
guidelines each year. And, given the complexity of the guidelines and related statutes governing sentencing, these decisions may well continue the trend of making sentencing more and more of an intellectual exercise. As a result, practitioners will be well advised to keep abreast of the latest developments as they engage in the intellectual exercise required at sentencing, even as the lay people touched by sentencings are frustrated by the seeming inconsistencies created by these complexities.