Federal Sentencing Guidelines

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by Andrea Wilson*

I. INTRODUCTION

Appeals attempting to resolve issues concerning the United States Sentencing Guidelines ("U.S.S.G.") continue to require much of the resources of the Eleventh Circuit Court of Appeals. The sentencing guidelines are the driving force behind thousands of prosecutions and appeals each year. However, the number of amendments to the guidelines has diminished in recent years, and the court seems to be free to do more fine-tuning than in the past.

II. OVERVIEW OF UNITED STATES SUPREME COURT CASES INTERPRETING THE SENTENCING GUIDELINES

Any review of circuit case law must begin where the circuit court itself begins its analysis: with a discussion of precedent issued by the highest court of the land. Two opinions rendered by the Supreme Court in recent years played prominent roles in Eleventh Circuit cases in 1997. Last year, the Supreme Court issued two more opinions that will begin to shape the rulings of the Eleventh Circuit very soon.

A. Koon and Bailey: Already Under Scrutiny

These cases have been discussed in this publication in the past; however, they are just now being interpreted by the appellate courts.

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Title 18, section 924(c) of the United States Code ("U.S.C.")\(^2\) prescribes a mandatory penalty for defendants who "use or carry" a firearm during the commission of a drug, or violent, felony. In *United States v. Bailey*,\(^3\) the Supreme Court defined the term "use or carry" more narrowly than many circuit courts had in the past. Because the application of the term is by nature fact-specific, circuit courts of appeals have been interpreting and applying *Bailey* ever since it was issued.

In *Koon v. United States*,\(^4\) the Supreme Court attempted to clarify the standard of review for departures from the sentencing guidelines. Henceforth, departures are to be reviewed for abuse of discretion.\(^5\) Whether a factor is the appropriate basis for a departure is a question of law, and an incorrect determination of a question of law is an abuse of discretion.\(^6\) This holding maintains the right of district courts to depart from the guidelines and limits appellate review of those departures. Thus, in considering departures, courts must apply a strict standard by asking the following questions:

1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make it a special or unusual case?
2) Has the Commission forbidden departures based on those features?
3) If not, has the Commission encouraged departures based on those features?
4) If not, has the Commission discouraged departures based on those features?

B. *Gonzalez* and *LaBonte*: Fodder for the Future from Two 1997 Opinions

Criminal defendants often find themselves charged in both state and federal venues for the same-offense conduct. Congress and the Sentencing Commission have put forth a great deal of effort trying to balance the problems raised by these twin prosecutions. In one case, *United States v. Gonzalez*,\(^8\) defendants had been convicted in New Mexico state courts for holding up undercover officers at gunpoint during a drug sting operation.\(^9\) New Mexico sentenced defendants to prison, but they were soon convicted in federal courts of drug and gun charges.

\(^5\) Id. at 91.
\(^6\) Id. at 100.
\(^7\) Id. at 95 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).
\(^8\) 117 S. Ct. 1032 (1997).
\(^9\) Id. at 1033.
stemming from the same conduct. They were convicted of violating 18 U.S.C. § 924(c) for use of a firearm during a violent felony, which requires a sixty-month mandatory sentence that "shall [not] . . . run concurrently with any other term of imprisonment." The district court read the statute literally and imposed the federal sentences consecutively to the state sentences. The Tenth Circuit, finding a more ambiguous interpretation of section 924(c), held that when there is a state sentence for the same conduct already in place, section 924(c) does not require the federal sentence to run consecutively.

A majority of the Supreme Court supported the district court's reading of the statute and held that the plain language of section 924(c) strictly prohibits a sentence under that subsection to be served concurrently with any state or federal sentence. Though this ruling seems clear enough, there are two strongly worded dissents. Justice Stevens was troubled that the majority's interpretation turned on the timing of the prosecutions—if the federal convictions had preceded the state convictions, there would have been no state sentence to run first, and the sentences could have been served concurrently. Justice Breyer, joined by Justice Stevens, added a different scenario—one in which the state has a statute identical to section 924(c). He believed this circumstance would create double jeopardy problems and treat certain federal offenders far differently from others. The majority refused to address these hypothetical situations, so the issue remains to be settled by the circuit courts of appeals. Practitioners should consider the implications when trying to resolve joint federal and state prosecutions, and they should carefully choose which forum takes the first shot at sentencing the defendant.

In *United States v. LaBonte*, the high Court invalidated an amendment that sought to define a critical term in the career offender

10. *Id.*
11. *Id.* (quoting 18 U.S.C. § 924(c)).
12. *Id.* at 1034. To be precise, the court ordered that the drug portion of the federal sentences be served concurrently. The sixty-month sentence attributed to the gun charges was to be served consecutively. *Id.*
13. *Id.*
14. *Id.* at 1035.
15. *Id.* at 1039 (Stevens, J., dissenting).
16. *Id.* at 1040 (Breyer, J., dissenting).
17. *Id.* at 1039. One of the primary goals of the federal sentencing guidelines is to reduce disparity among similarly situated defendants. See U.S.S.G. § 5G1.3.
18. See 117 S. Ct. at 1037.
Again, as has become the norm, there was a strong dissent by Justices Breyer, Stevens, and Ginsburg. To understand the holding, one must first understand the career offender enhancement provision of the sentencing guidelines, its background, its language, and its amendments.

As part of the original implementation of the guidelines, Congress ordered the Sentencing Commission to assure that certain career offenders receive a sentence of imprisonment at or near the maximum term authorized. Several statutes, most notably 21 U.S.C. § 841, contain a tiered sentencing scheme based first on the offense and second on the defendant’s prior record. For instance, the possession of five hundred grams of cocaine carries a five-year mandatory minimum for a defendant who has never been convicted of certain felonies. However, for that same offense, a defendant with one qualifying prior conviction is subject to a ten-year minimum mandatory sentence, and additional convictions lead to still higher mandatory penalties.

The Commission designed a guideline that applied increased offense levels based on the “offense statutory maximum” and then defined that term as “the maximum term of imprisonment authorized for the offense of conviction” but did not say whether the maximum term should include statutory enhancements based on criminal history. Appellate courts began to interpret maximum term to include all statutory enhancements. This was apparently not the result the Commission intended. Partly because the Commission was concerned about “double-counting” a defendant’s prior convictions, it amended the guideline to define “offense statutory maximum” as: “the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record.”

20. Id. at 1675.
21. Id. at 1679 (Breyer, Stevens, and Ginsburg, JJ., dissenting). It is interesting to note that Justice Breyer was once a Commissioner.
24. See id. § 841(b)(1)(B).
In deciding *LaBonte*, the Court was called upon to resolve consolidated appeals that had reached different results in the courts below. Each defendant had been sentenced as a career offender based on enhanced statutory penalties, and when the commission issued its retroactive amendment, each defendant moved to reduce his sentence. Defendants Hunnewell and Dyer were unsuccessful because the district judge hearing their cases found that the amendment ran afoul of 18 U.S.C. § 841(b)(1)(C) and 29 U.S.C. § 994(h). Defendant LaBonte was more successful. A different judge of the same district applied the amendment and reduced LaBonte's sentence. The appeals were consolidated and eventually made their way to the Supreme Court.

The Supreme Court holding was simple enough: "[W]e hold that the phrase 'at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender 'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account."

The dissenting Justices found that the terms were ambiguous and found that the Sentencing Commission had the authority to interpret those terms as it deemed appropriate. As one indication that the term "authorized" was ambiguous, the dissent maintained that the lengthy and complex discussion of policy and statutory construction contained in the majority opinion would not be necessary if the term were clear.

III. OPINIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN 1997

A. Cases of General Sentencing Application

Although most of the opinions discussed in this Article directly interpret the sentencing guidelines, there are a few other topics that are sufficiently related to the guidelines to merit discussion.

1. Waiver of the Right to Appeal. The enforceability of appellate waivers in plea agreements is one topic that merits discussion. More and more defendants are agreeing to waive their right to appeal in hope of sustaining an appeal of guideline and other issues. Since 1993, the Eleventh Circuit has been enforcing these waivers and dismissing

29. 117 S. Ct. at 1675.
30. Id. at 1676.
31. Id. at 1677.
32. Id. at 1679.
33. Id. at 1678-80 (Breyer, Stevens, and Ginsburg, JJ., dissenting).
34. Id. at 1683.
Waivers almost always contain some exceptions, such as in the case of a sentence above the statutory maximum, so it is almost always necessary for the defendant to brief the case before any action can be taken on the waiver. When a review of the issues raised by the defendant makes it clear that they were waived, the government routinely files a motion to dismiss the appeal. As a matter of course, the Clerk of the Eleventh Circuit has been carrying those motions with the case, effectively requiring the government to brief the case before the court has an opportunity to determine whether the motion to dismiss should be granted. The court, sympathetic to the undue hardship on the United States Attorney, suggested that prosecutors should ensure that all relevant parts of the record below are incorporated in the motion to dismiss and that "where it is clear from the plea agreement and the Rule 11 colloquy, or from some other part of the record, that the defendant knowingly and voluntarily entered into a sentence appeal waiver, that waiver should be enforced without requiring the government to brief the merits of the appeal." When Defendant Benitez in United States v. Benitez-Zapata was sentenced, the district judge advised him that he had the right to appeal even though Benitez had entered into an agreement that included an appellate waiver. Benitez tried to circumvent his appellate waiver by arguing that the court had created ambiguity by announcing that he had the right to appeal and that, therefore, he did not make the waiver knowingly. The Eleventh Circuit found no ambiguity or cause for confusion and dismissed the appeal.

2. Waiver of Objections to the Guidelines. Not only can defendants waive the right to appeal their sentences, they can also waive objections to the imposition of an upward departure from the guidelines and thereby foreclose the right to appellate review of errors in the departure. In United States v. Masters, defense counsel made valid, timely objections to the district court's departure. Masters himself, apparently frustrated with the sentencing process, told the sentencing judge that he wanted to be sentenced immediately without consideration of the objections. The Eleventh Circuit made it very clear that there

35. See United States v. Bushert, 997 F.2d 1350 (11th Cir. 1993).
36. See United States v. Buchanan, 131 F.3d 1005 (11th Cir. 1997).
37. Id. at 1008.
38. 131 F.3d 1444 (11th Cir. 1997).
39. Id. at 1446.
40. Id. at 1446-47.
41. 118 F.3d 1524 (11th Cir. 1997).
42. Id. at 1525-26.
was an obvious error resulting in a sentence that was ninety months higher than it should have been but that Masters knowingly waived the right to object. The court refused to apply the plain error doctrine.\textsuperscript{43}

3. Voluntariness of Pleas Thought to Reserve Appellate Issues. In at least one case, the court found that a plea based upon the belief that certain appellate issues were preserved for appeal was involuntary.\textsuperscript{44} Defendant thought he had entered a conditional plea preserving the right to appeal a perceived violation of his right to a speedy trial.\textsuperscript{45} Conditional pleas require the consent of the prosecutor and the approval of the court,\textsuperscript{46} and at the sentencing, the prosecutor said nothing. On appeal the government argued that the plea had not been conditional because the government had not approved it.\textsuperscript{47} The Eleventh Circuit agreed that the government's silence could not be interpreted as consent but found that the plea had been involuntary because the defendant was convinced he had entered a conditional plea.\textsuperscript{48}

4. Which Guideline Version Applies. Because the sentencing guidelines are frequently amended, there are always questions about which version should be applied in a given case. The general rule is that the court should apply the version in effect at the time of sentencing unless the version in effect at the time of the commission of the offense offers the defendant a better result.\textsuperscript{49} Complexities in the amendments make this a more complicated choice than the rule makes it seem, and the courts and Commission have adopted a “One Book Rule”: Courts are not to take guidelines from one version and combine them with guidelines from another version. District courts must determine which book applies and then employ it alone.\textsuperscript{50}

In \textit{United States v. Bailey},\textsuperscript{51} defendant committed offenses that spanned several years. He convinced the district court to use the version of the guidelines that was in effect at the time he committed most of his crimes by arguing that the “heartland” of his offenses was committed in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1526.
\item \textit{United States v. Pierre}, 120 F.3d 1153 (11th Cir. 1997).
\item \textit{Id.} at 1155.
\item \textit{FED. R. CRIM. P.} 11(a)(2).
\item \textit{120 F.3d} at 1155.
\item \textit{Id.} at 1156-57.
\item \textit{18 U.S.C.} § 3553(a)(4) (1994); \textit{U.S.S.G.} §§ 1B1.11(a), (b)(1).
\item See \textit{United States v. Lance}, 23 F.3d 343 (11th Cir. 1994).
\item 123 F.3d 1381 (11th Cir. 1997).
\end{enumerate}
\end{footnotesize}
the year preceding the termination of his criminal enterprise. The Eleventh Circuit held that "Bailey had fair notice that continuing his crimes . . . subjected him to the amended sentencing guidelines in effect when he committed the last of the crimes for which he was convicted" and remanded for resentencing under the harsher version in effect on the date of Bailey's last offense.

5. Sentences Imposed on Revocation of Probation or Supervised Release. In United States v. Proctor, defendant had been sentenced to the statutory maximum followed by supervised release. He was sentenced to a new term of imprisonment for a violation of his release and challenged that sentence on the ground that he had already served all the time the statute allowed. The Eleventh Circuit followed other circuit courts in holding that the sentence was proper.

Defendant in United States v. Woods was sentenced first for violating probation based on new-offense conduct with which he was later charged. He mounted a double jeopardy argument and said that the sentence on the substantive charges was the second punishment for the same conduct. The Eleventh Circuit disagreed and held that

revocation of probation for commission of a subsequent criminal offense does not constitute punishment for that criminal offense for purposes of double jeopardy; rather, revocation of probation constitutes a modification of the terms of the original sentence and implicates solely the punishment initially imposed for the offense conduct underlying that sentence.

B. U.S.S.G. Section 1B1.2: Applicable Guidelines

In many cases, just deciding which guideline to apply is problematic. The guidelines instruct courts to use the guideline that is "most applicable to the offense of conviction" with certain exceptions. Most offenses and their guidelines are listed in an index to the guidelines. However, some offenses are either so rare that no guideline has been

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52. Id. at 1403.
53. Id. at 1407.
54. 127 F.3d 1311 (11th Cir. 1997).
55. Id. at 1312.
56. Id. at 1313. See also United States v. Robinson, 62 F.3d 1282 (10th Cir. 1995); United States v. Wright, 2 F.3d 175 (6th Cir. 1993).
57. 127 F.3d 990 (11th Cir. 1997).
58. Id. at 991.
59. Id. at 992.
60. U.S.S.G. § 1B1.2 (a).
61. U.S.S.G. app. A.
promulgated, or they are not easily attributed to one particular guideline. Detailed instructions help with the selection process, but there is plenty of room for error.

In *United States v. Jackson (Willie)*, defendant was a police officer who wrongfully arrested a woman and took her money without correctly accounting for it. The woman was an FBI agent, and defendant was convicted of theft in violation of 18 U.S.C. § 641. The district court determined that there were also civil rights violations, which were more serious, and sentenced Jackson under the civil rights guideline, U.S.S.G. section 2H1.1. The Eleventh Circuit reversed, acknowledging that civil rights violations were never implicated in the charging documents and that there had been no plea agreement that might have stipulated to a harsher guideline. The court found that the facts in the indictment in this case did not support the application of section 2H1.1 but mentioned (without suggesting) the possibility of an upward departure.

In *United States v. Kuku*, the court again determined which guideline to apply, this time in the context of a conspiracy to produce false social security cards for illegal aliens. The district court applied U.S.S.G. section 2F1.1, Offenses Involving Fraud, rather than U.S.S.G. section 2L2.1, which pertains specifically to trafficking in immigration documents. The government argued that the ruling in *Jackson* prevents courts from looking at offense conduct to determine the applicable guideline. The court disagreed and distinguished *Kuku* from *Jackson* because the indictment in Kuku's case contained a sufficient factual basis from which to determine that the offense conduct actually involved trafficking in immigration documents. The court noted that this holding is consistent with a factually similar Ninth Circuit case.

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62. U.S.S.G. § 1B1.2 application notes.
63. 117 F.3d 533 (11th Cir. 1997).
64. Id. at 534.
65. Id. (citing 18 U.S.C. § 641 (1994)).
66. Id. at 535 (employing U.S.S.G. § 2H1.1(a)(2)).
67. Id. at 538.
68. Id.
69. 129 F.3d 1435 (11th Cir. 1997).
70. Id. at 1438.
71. 117 F.3d 533 (11th Cir. 1997).
72. 129 F.3d at 1439 n.9.
73. Id.
74. Id. at 1440 n.10 (citing United States v. Velez, 113 F.3d 1035 (9th Cir. 1997)).
C. U.S.S.G. Section 1B1.3: Relevant Conduct

A scheme to steal and chop Porsches in South Florida brought defendant in United States v. Fuentes before the Eleventh Circuit.\textsuperscript{75} Defendant had already been sentenced in state court for chopping three cars, which the court called the "state Porsches." He was serving two concurrent state sentences for this when he was indicted in federal court for conspiracy to run a chop shop. The federal grand jury alleged that the conspiracy occurred during dates that included all of Fuentes's criminal conduct.\textsuperscript{76} By omitting the state Porsches from the relevant conduct portion of the federal sentencing calculation, the district court attempted to impose a federal sentence consecutive to the state sentences.\textsuperscript{77} The Eleventh Circuit believed that the prosecutor "deliberately refrained from portraying Fuentes'[s] chopping of the 'state Porsches' as relevant conduct for one reason—to manipulate the application of the guidelines so that his federal sentence would run consecutively to the state sentences."\textsuperscript{78} It made no difference to the court that adding the three cars into the calculation did not change the sentencing range.\textsuperscript{79} The court held that "the 'fully taken into account' requirement of section 5G1.3(b) is satisfied when the undischarged term resulted from an offense that section 1B1.3 requires to be included as relevant conduct, regardless of whether the sentencing court actually took that conduct into account."\textsuperscript{80}

The court made two more significant comments. First, it noted that the government had dropped six substantive counts in reaching an agreement with Fuentes and that these counts could have been sentenced consecutively.\textsuperscript{81} Second, the court made it clear that the district court could consider an upward departure if it was convinced that one was appropriate.\textsuperscript{82}

D. U.S.S.G. Section 2B.3.1: Robbery

In United States v. Sawyer,\textsuperscript{83} the district court enhanced a bank robber's sentence under U.S.S.G. section 2B3.1(b)(3) for bodily injury

\textsuperscript{75} 107 F.3d 1515 (11th Cir. 1997).
\textsuperscript{76} Id. at 1517.
\textsuperscript{77} Id. at 1519.
\textsuperscript{78} Id. at 1523.
\textsuperscript{79} Id. at 1522.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 1526 n.18.
\textsuperscript{82} Id. at 1527.
\textsuperscript{83} 115 F.3d 857 (11th Cir. 1997).
because two bank tellers testified that they suffered psychological injury from the robbery. However, neither teller was physically injured, and neither had sought medical or psychological treatment. The Eleventh Circuit held that psychological injury to a victim ordinarily will not sustain an enhancement for serious bodily injury.

Defendant in United States v. Vincent committed a robbery by holding something to his victim's side. The victim never saw what it was and was unable to identify any particular type of weapon. Regardless of this, the Eleventh Circuit held that the district court correctly enhanced under U.S.S.G. section 2B3.1(b)(2)(E) for possession of a dangerous weapon.

**E. Part D: Drug Offenses**

1. **Continued Validation of the Sentencing Disparity Between Cocaine Powder and Crack.** Crack cocaine is sentenced one hundred times more severely than powder under the sentencing guidelines, a fact that has drawn constant attack. This year, the challenge came in United States v. Vasquez, which met with the typical result: the disparity was upheld.

2. **U.S.S.G. section 2D1.1(c), Note A and Application Note 1: “Mixture or Substance.”** Courts and the Commission have been loath to require complicated analyses of drug purity and quality, so they have required that drug mixtures be treated essentially as though they were made entirely of the drug. Thus, cocaine ready for consumption that contains "cut" is to be sentenced as though the entire substance is drug. However, courts have acknowledged that some "mixtures" are not mixtures at all and that the drug is unusable unless the foreign substance is removed. For example, calculating the entire weight of a suitcase made of cocaine mixed with fiberglass when the cocaine cannot be used without first eliminating the fiberglass is not permitted.

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84. Id. at 858 (citing U.S.S.G. § 2B3.1(b)(3)).
85. Id. at 859.
86. Id.
87. 121 F.3d 1451 (11th Cir. 1997).
88. Id. at 1452.
89. Id. at 1455.
90. U.S.S.G. § 2D1.1(c) (the drug quantity table).
91. 121 F.3d 622 (11th Cir. 1997).
92. See U.S.S.G. § 2D1.1 application n.1.
In United States v. Jackson (Nicholas), defendant possessed a block of cocaine that was ninety-nine percent powdered sugar. Witnesses testified that the package had probably been a brick of sugar with some cocaine on the outside to be used as a sample and that the entire package was a "rip-off." The district court counted the entire quantity as a mixture of cocaine. The Eleventh Circuit overturned that decision, relying on a previously stated approach that considers the marketability of the drug with and without the foreign substance. The court noted that this approach has been adopted by the Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits. Two courts have reached different results.

3. U.S.S.G. Section 2D1.1: Enhancement for Possession of Firearms During a Drug Crime. The drug guideline contains a two-level enhancement for possession of a firearm during a drug crime. In the case of a defendant who is also charged with a violation of 18 U.S.C. § 924(c) (making it a crime to "use or carry" a gun "during and in relation to" drug and violent felonies), the guideline enhancement is not applied because the gun count itself carries a minimum mandatory consecutive sentence. These terms had been read very broadly, resulting in hundreds, if not thousands, of defendants serving long minimum mandatory sentences. In Bailey v. United States, the Supreme Court defined the term "use or carry" more narrowly than ever before, and now these defendants are seeking resentencing in the district courts.

In United States v. Mixon, the Eleventh Circuit described the authority of district courts applying Bailey to recalculate the guidelines after a sentence reduction. After a district court sets aside an 18 U.S.C.

93. 115 F.3d 843 (11th Cir. 1997).
94. Id. at 843-44.
95. Id. at 844-45.
96. Id. at 845. More precisely, the court found that it was a mixture of five hundred grams or more. Id.
97. Id. at 846 (citing United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991)).
98. Id. at 847 (citing United States v. Palacios-Molina, 7 F.3d 49 (5th Cir. 1993); United States v. Johnson, 998 F.2d 1192 (7th Cir. 1993); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991)). The facts in Rodriguez and in Robins were similar to the facts here. See id. at 847-48.
99. Id. at 847 (citing United States v. Richards, 87 F.3d 1152 (10th Cir. 1996); United States v. Campbell, 61 F.3d 976 (1st Cir. 1995)).
100. See U.S.S.G. § 2D1.1(b)(1).
102. 115 F.3d 900 (11th Cir. 1997).
§ 924(c) conviction because of Bailey, it may increase the drug sentence calculation to account for the firearm sua sponte even though the drug counts may not be before the court.\textsuperscript{103}

Marlon Jermaine Smith was charged with drug offenses based on conduct occurring in late 1995.\textsuperscript{104} In January of 1996, while being arrested for the first charges, he was in possession of firearms and more drugs.\textsuperscript{105} He pleaded guilty to a count charging the 1995 offense, but the sentencing court added two offense levels for possession of a firearm based on the 1996 conduct.\textsuperscript{106} The court held that although the guidelines had once restricted such enhancements to “the offense of conviction,” after November 1991 the restriction no longer applied.\textsuperscript{107} In aligning itself with several other circuits, the court held that “the enhancement is to be applied whenever a firearm is possessed during conduct relevant to the offense of conviction.”\textsuperscript{108}

4. Recent Retroactive Amendments. Three recent amendments lowered the maximum base offense levels for drug offenses, refined the way that marijuana plants are counted, and clarified the method for calculating the weight of wet marijuana.\textsuperscript{109} All three amendments were made retroactive, and each has spawned appellate debate. Application of retroactive amendments is largely discretionary,\textsuperscript{110} and that has been the main thrust of the litigation.

In United States v. Brown (John),\textsuperscript{111} defendant was convicted of cocaine charges and sought to be resentenced under the lower maximum base offense level, but the district court refused to apply the amended sentencing table and stated its reasons for doing so. The Eleventh Circuit supported the district court decision and held that as long as the district court considers the statutorily required factors, the district court may refuse to apply the retroactive amendment.\textsuperscript{112}

\begin{footnotes}
\item[103.] Id. at 903.
\item[104.] United States v. Smith, 127 F.3d 1388 (11th Cir. 1997).
\item[105.] Id. at 1389.
\item[106.] Id.
\item[107.] Id. at 1389-90.
\item[108.] Id. at 1390 (citing United States v. Wetwattana, 94 F.3d 280 (7th Cir. 1996); United States v. Ortega, 94 F.3d 764 (2d Cir. 1996); United States v. Vital, 68 F.3d 114 (5th Cir. 1995); United States v. Roederer, 11 F.3d 973 (10th Cir. 1993); United States v. Falesbork, 5 F.3d 715 (4th Cir. 1993)).
\item[109.] U.S.S.G. app. C, amend. 505, 516, and 518 (Nov. 1994).
\item[110.] 18 U.S.C. § 3582(c)(2) (1994) requires courts to consider enumerated factors.
\item[111.] 104 F.3d 1254 (11th Cir. 1997).
\item[112.] Id. at 1255-56.
\end{footnotes}
In United States v. Cothran, defendant sought to have the number of marijuana plants he possessed readjudicated in hope of being resentenced as a result of the retroactive amendment that lowered the weight attributable to each plant. The district court correctly held that having previously determined the number of plants, the law of the case doctrine prevented re-examination of that issue. Because the number of plants drives the minimum mandatory sentence, the court reduced Cothran's sentence by only five months.

In United States v. Eggersdorf, another marijuana case, the court held that when "the language of the statutory minimum is clear and has been unaltered by Congress . . ., [t]he statute controls in the event of a conflict between the guidelines and the statute." Eggersdorf had relied on Eleventh Circuit precedent to argue that when Congress approves a guideline amendment that reduces guideline calculations below the minimum mandatory required by statute, Congress tacitly approves a reduction of the minimum mandatory sentence as well as the guideline. In Munoz-Realpe, the Eleventh Circuit held that when Congress approved a cocaine amendment to narrowly defined cocaine base and the amendment applied to a statute that contained no clear definition, Congress had "given its imprimatur to the new definition." The court refused to interpret Munoz-Realpe as broadly as Eggersdorf suggested and found that Munoz-Realpe filled a blank in the statutory definition that did not appear in the marijuana statute and that the amendment did nothing to alter the minimum mandatory sentence required by statute.

Discussing the district court's refusal to apply the retroactive amendment to Eggersdorf, the court held that "a district court commits no reversible error by failing to articulate specifically the applicability—if any—of each of the section 3553(a) factors, as long as the record demonstrates that the pertinent factors were taken into account by the district court."

113. 106 F.3d 1560 (11th Cir. 1997).
114. Id. at 1562.
116. 106 F.3d at 1583.
117. 126 F.3d 1318 (11th Cir. 1997).
118. Id. at 1320 (citing United States v. LaBonte, 117 S. Ct. 1673 (1997)).
120. Id. at 377.
121. 126 F.3d at 1321.
122. Id. at 1322. Like the defendant in Cothran, Eggersdorf stood to gain little. He had been sentenced to sixty-three months with a minimum mandatory sixty-month sentence. Id.
123. Id.
Finally, *United States v. Carter* is remarkable if for no other reason than that defendant appeared pro se and won. The district court had agreed that it was authorized to reduce Carter's marijuana sentence because it was based on the weight of wet marijuana, but it held that it would be impossible to make a reasonable calculation of the dry weight. The Eleventh Circuit found the district court's argument unpersuasive and remanded for resentencing based on an estimated dry weight of the marijuana.

**F. U.S.S.G. Section 2K: Firearms**

The court decided several significant cases concerning the application of the sentencing guidelines and minimum mandatory sentences to firearms offenses. The first of these cases was *United States v. Bristow.* This case presented a common factual scenario: defendant, a convicted felon, took a firearm to a pawnshop to leave it as collateral for a loan. Defendant sought a downward departure based on a number of factors relating to the relatively innocent and peaceful nature of the possession in this case. The district court concluded that it lacked the authority to depart; the appellate court agreed and applied the standard recently announced in *United States v. Koon.*

Two significant cases interpreted the sentence enhancement found in 18 U.S.C. §§ 922(g) and 924(e). In *United States v. Palazzi,* defendant was convicted under 18 U.S.C. § 922(g)(1) of being a felon in possession of a firearm. Palazzi had four prior violent felonies that led to a fifteen-year sentence pursuant to 18 U.S.C. § 924(e). Palazzi argued that his civil rights had been restored and those convictions could not be used to enhance his sentence. The court, finding that only some of Palazzi's civil rights had been restored, held that when the restoration of rights still prohibits the possession of firearms, the offense should be used as a predicate for enhancement.
Defendant in United States v. Drayton had previously pled nolo contendere to a violent felony in a state court of Florida, and he had been adjudicated guilty of that offense. In United States v. Willis, the Eleventh Circuit held that (at least in Florida) a plea of nolo contendere, when adjudication is withheld, does not result in a conviction. Comparing Drayton to Willis, the court in Drayton held “that a nolo contendere plea when adjudication is not withheld or when there is subsequently an adjudication of guilt is a conviction under Florida law which satisfied the requirement of the Armed Career Criminal statute.”

Similarly, the court held that convictions that have been set aside under the provisions of the Federal Youth Corrections Act are not expunged and should be used in calculating a defendant’s criminal history under U.S.S.G. section 4B1.1.

G. U.S.S.G. Section 2T1.1: Tax Evasion

Defendant in United States v. Barakat was the head of a county housing authority and became involved in a scheme to defraud the United States Department of Housing and Urban Development. Barakat was acquitted of mail fraud conspiracy but was convicted of tax evasion. The district court added three enhancements to his sentence, but the Eleventh Circuit struck two of the three. Not all need to be discussed here, but one is significant. U.S.S.G. section 2T1.1(b)(1) mandates an enhancement for failure to report more than ten thousand dollars of criminally derived money “in any year.” In Barakat, the issue required a more precise definition of “one year.” The court held that “for the purpose of applying [section] 2T1.1(b)(1), ‘year’ means taxable year.”

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134. 113 F.3d 1191 (11th Cir. 1997).
135. Id. at 1192.
136. 106 F.3d 966 (11th Cir. 1997).
137. Id. at 967.
138. 113 F.3d at 1193.
141. 130 F.3d 1448 (11th Cir. 1997).
142. Id. at 1449.
143. Id.
144. Id. at 1453.
145. Id. at 1454.
H. Chapter Three: Adjustments

1. U.S.S.G. Section 3B1.3: Abuse of a Position of Trust or Use of a Special Skill. Barakat was also significant for the court's discussion of the enhancement based on defendant's abuse of a position of public trust. Because he had been acquitted of the conduct directly relating to his public office (mail fraud conspiracy) and convicted only of tax evasion, defendant argued that the enhancement should not apply. Noting a split among the circuits, the court held that there must be a connection between the abuse of trust and the offense of conviction.

The Eleventh Circuit examined "use of a special skill" in United States v. Calderon. Defendants had captained a boat laden with cocaine from the Bahamas to South Florida. The Eleventh Circuit agreed that the skills needed to ply the high seas and land a boat in precisely the right spot for off-loading required a special skill. Defendants argued that no particular skill was involved; they even presented evidence that anyone could reach Florida from the Bahamas "by sailing toward the setting sun or by merely following beer cans."

2. U.S.S.G. Section 3C1.2: Reckless Endangerment During Flight. In United States v. Sawyer, a bank robbery case discussed earlier, defendant shot at a crowd while leaving the bank. In striking the enhancement for reckless endangerment, the court noted that the acts must occur while fleeing from law enforcement, not just while fleeing the crime.

3. U.S.S.G. Section 3E1.1: Acceptance of Responsibility. Determining whether a defendant has accepted responsibility for his conduct, which triggers a sentence reduction, has always been problematic. To add to the confusion, the guidelines permit either a two-
or three-level reduction, depending primarily on how quickly a defendant manifests his contrition.

In *United States v. Wright*, defendant faced firearms charges and presented a constitutional challenge to the statute. He had cooperated during his prosecution in other respects by consenting to be searched and by pleading guilty. The district court refused to adjust for acceptance of responsibility because it doubted the genuineness of defendant's belief that he was a member of a constitutionally protected militia. In reversing that decision, the appellate court found that

> [d]espite the multi-faceted nature of the inquiry and the wide latitude afforded sentencing courts under this section, there are limits to what a district court can consider as evidence inconsistent with acceptance of responsibility. An otherwise deserving defendant cannot be denied a reduction under [section] 3E1.1 solely because he asserts a challenge to his conviction that is unrelated to factual guilt.

The court was quick to note that frivolous legal arguments will forfeit the adjustment.

Another case construing the limits of the sentence reduction is *United States v. McPhee*. Defendant McPhee met the requirements for acceptance of responsibility, but there was some indication that he had tried to escape before his sentencing. The district court, trying to strike a balance, adjusted only two levels. The appellate court held that if a defendant qualifies for the two-level reduction and has done so timely, he also qualifies for the third level. It was important to the Eleventh Circuit that the district court in this case was not convinced that the escape attempt had really occurred.

I. U.S.S.G. Section 4B1.1: Career Offender

Cases requiring appellate courts to scrutinize the career offender enhancement fall like rain. This year, three cases in particular are noteworthy. In *United States v. Patton*, the court upheld the

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155. 117 F.3d 1265 (11th Cir. 1997).
156. Id. at 1267, 1274.
157. Id. at 1268, 1276.
158. Id. at 1275.
159. Id. at 1277.
160. 108 F.3d 287 (11th Cir. 1997).
161. Id. at 288.
162. Id.
163. Id. at 289-90.
164. Id. at 289.
165. 114 F.3d 174 (11th Cir. 1997).
application of both the career offender enhancement and the firearm enhancement from U.S.S.G. section 2K2.1. The court concluded that conveying a weapon in a federal prison is a crime of violence sufficient to trigger U.S.S.G. section 4B1.2.\textsuperscript{166}

In \textit{United States v. Bankston},\textsuperscript{167} the court determined that a prior plea of “Guilty but Mentally Ill” entered pursuant to Georgia law\textsuperscript{168} constitutes a conviction, and if it was for a violent felony, the conviction will trigger the career offender enhancement.\textsuperscript{169}

U.S.S.G. section 4A1.3 permits departures if the ordinary calculation of criminal history is inadequate. Prior convictions cannot be collaterally attacked in federal sentencing proceedings.\textsuperscript{170} In \textit{United States v. Phillips},\textsuperscript{171} the district court tried three times to depart downward from Phillips's career offender sentence, only to be reversed each time. Phillips had once been convicted of aggravated assault, which qualifies as a violent felony under the career offender provision. However, he had been given a very light sentence, and the district court obviously doubted Phillips's guilt of the offense.\textsuperscript{172} The Eleventh Circuit held that “[a] sentencing judge may not use the guideline to circumvent the rule prohibiting a collateral attack on a prior conviction in a sentence proceeding” and that prior lenient treatment may be a reason for an upward departure but it is not a valid basis for a downward departure.\textsuperscript{173}

\textbf{J. U.S.S.G. Section 5C1.2: The “Safety Valve”}

The law and the guidelines now permit an adjustment below statutory minimum mandatory sentences in certain drug cases based in large part on the defendant's very minimal prior record.\textsuperscript{174} There are several other factors to be considered in determining whether the reduction applies, but they are unimportant to this discussion.

In \textit{United States v. Orozco},\textsuperscript{175} defendant secured a downward criminal history departure that placed him in Category I, a requirement for the safety valve provision. Overturning the sentence, the Eleventh

\begin{enumerate}
\item \textsuperscript{166} Id. at 176-77.
\item \textsuperscript{167} 121 F.3d 1411 (11th Cir. 1997).
\item \textsuperscript{168} O.C.G.A. § 17-7-131 (1986). Other states allow similar pleas.
\item \textsuperscript{169} 121 F.3d at 1416.
\item \textsuperscript{170} See Custis v. United States, 511 U.S. 485 (1994); United States v. Roman, 989 F.2d 1117 (11th Cir. 1993).
\item \textsuperscript{171} 120 F.3d 227 (11th Cir. 1997).
\item \textsuperscript{172} Id. at 229-31.
\item \textsuperscript{173} Id. at 232.
\item \textsuperscript{175} 121 F.3d 628 (11th Cir. 1997).
\end{enumerate}
Circuit held "that a defendant is not eligible for the safety-valve provision if the defendant's criminal history category is Category I because of a downward departure when the defendant had more than one criminal history point."\textsuperscript{176} The court noted that two other circuits reached the same conclusion.\textsuperscript{177}

Everette Mertilus was convicted under 21 U.S.C. § 841 for using a telephone to facilitate a drug conspiracy.\textsuperscript{178} He sought relief from the minimum mandatory sentence by application of the safety valve.\textsuperscript{179} The court agreed that the safety valve applied even though 21 U.S.C. § 841 is not specifically mentioned in U.S.S.G. section 5C1.2 because the sentence was based on the underlying drug crime and the drug crime is listed in the guideline.\textsuperscript{180}

K. U.S.S.G. Section 5E1.1: Restitution

The power to impose restitution is not unlimited. In United States v. Khawaja,\textsuperscript{181} the IRS spent a great deal of money in a money-laundering sting by paying "commissions" to defendants. The Victim and Witness Protection Act,\textsuperscript{182} permits restitution, but the IRS cannot be considered a victim of money-laundering.\textsuperscript{183} The court noted that "instead of being defrauded, the IRS got what it paid for: the payment of commissions to [defendants] facilitated the illegal laundering transactions" leading to defendants' convictions.\textsuperscript{184}

L. U.S.S.G. Section 5K1.1: Substantial Assistance

The guidelines permit a departure to reward assistance to authorities rendered before sentencing. Rule 35(b) of the Federal Rules of Criminal Procedure ("Rule 35(b)") permits a similar reduction for assistance rendered after sentencing.\textsuperscript{185} In United States v. Alvarez,\textsuperscript{186} the court was asked to study the interdependence of these two provisions. Alvarez cooperated before sentencing but had not finished the job. The government gave him a choice between a reduction at sentencing or one

\begin{footnotes}
\textsuperscript{176} Id. at 629.
\textsuperscript{177} Id. at 630 n.9. See United States v. Resto, 74 F.3d 22 (2d Cir. 1996); United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995).
\textsuperscript{178} United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997); 21 U.S.C. § 841 (1994).
\textsuperscript{179} 111 F.3d at 873.
\textsuperscript{180} Id. at 874.
\textsuperscript{181} 118 F.3d 1454 (11th Cir. 1997).
\textsuperscript{183} 118 F.3d at 1460.
\textsuperscript{184} Id.
\textsuperscript{185} FED. R. CRIM. P. 35(b).
\textsuperscript{186} 115 F.3d 839 (11th Cir. 1997).
\end{footnotes}
later and told him that he could not have both, but it misunderstood that a Rule 35 motion is not to be granted based on conduct before sentencing. The Eleventh Circuit held that “Section 5K1.1 is used at sentencing to reflect substantial assistance rendered up until that moment. Rule 35(b) is used after sentencing to reflect substantial assistance rendered after sentencing. Thus, Rule 35(b) cannot be used to reflect substantial assistance rendered prior to sentencing as the government suggested to Alvarez.” Because it was apparent that the government’s misunderstanding of these principles led to Alvarez’s failure to secure the sentence reduction he deserved, the court remanded for resentencing.

IV. CONCLUSION

The court seems better able to concentrate on the details of the sentencing guidelines—defining more precisely the terms used in the guidelines and statutes—than it has in the past. Perhaps this is because the sheer volume of cases has leveled off. Perhaps it is because the court and district courts have become more comfortable with or more proficient at applying the guidelines. In any case, the federal sentencing guidelines will always create enough work to keep the courts and criminal law practitioners amply employed.

187. Id. at 840-41.
188. Id. at 842 (citations omitted).
189. Id.