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Federal Sentencing Guidelines

by James T. Skuthan* and Rosemary T. Cakmis**

I. INTRODUCTION

The Eleventh Circuit decided several cases this past year covering a broad range of United States Sentencing Guidelines ("U.S.S.G.") issues.1 Two areas of particular concern were firearms and departures. Due to the 1995 Supreme Court decision in Bailey v. United States,2 several defendants had their firearm convictions vacated and were resentenced. Thus, the Eleventh Circuit in 1998 was faced with reviewing these resentencings to determine the applicability of guideline enhancements for firearms.

The court also decided several cases relating to downward departures based on cultural differences,3 a defendant's impulse control disorder,4 the over-representation of a career offender's prior record,5 and the

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3. United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998).
4. United States v. Miller, 146 F.3d 1281 (11th Cir. 1998).
5. United States v. Webb, 139 F.3d 1390 (11th Cir. 1998).
resolution of sentencing disparities when co-offenders receive a more lenient sentence in the state system.\textsuperscript{6} Although the holding in \textit{Koon v. United States}\textsuperscript{7} directs that a district judge's departure decision is subject to an abuse of discretion review, the court reversed most of the downward departure reductions in 1998. As departure requests get more creative, we can expect to see the Eleventh Circuit devoting more time each year to resolving departures in both directions.

\section*{II. 1998 Sentencing Guidelines Decisions From the Eleventh Circuit Court of Appeals}

\textbf{A. Chapter One: Introduction and General Application Principles}

\subsection*{1. U.S.S.G. Section 1B1.2: Actual Conduct}

Section 1B1.2 application note 3 provides the court may consider the actual conduct of a defendant in certain circumstances, even though that conduct is not an element of the offense. The Government tried to use this provision in \textit{United States v. Saavedra}\textsuperscript{8} to justify an enhancement under U.S.S.G. section 2D1.2, in which defendant had admitted that the drug offense occurred within one thousand feet of a school, but was not specifically charged under 21 U.S.C. § 860.\textsuperscript{9} The Eleventh Circuit rejected the actual conduct argument, noting that application note 3 explains:

\begin{quote}
the court may consider “actual conduct” in four situations: (a) when an offender stipulates certain facts in plea agreement, (b) when the court considers the applicability of certain offense characteristics within individual guidelines, (c) when it considers various adjustments, and (d) when it considers whether or not to depart from the guidelines for reasons relating to offense conduct.\textsuperscript{10}
\end{quote}

Although defendant admitted at the sentencing hearing that he sold drugs within one thousand feet of a school, the Eleventh Circuit held that the admission could not be used against him under the “actual conduct” prong of the guidelines because he never formally stipulated to this fact.\textsuperscript{11}

\begin{itemize}
\item \textsuperscript{6} United States v. Willis, 139 F.3d 811 (11th Cir. 1998).
\item \textsuperscript{7} 518 U.S. 81, 91 (1996).
\item \textsuperscript{8} 148 F.3d 1311, 1313 (11th Cir. 1998).
\item \textsuperscript{9} \textit{Id.} at 1313 (citing 21 U.S.C.A. § 860 (West Supp. 1998)). As discussed in more detail below, the Eleventh Circuit rejected the U.S.S.G. section 2D1.2 enhancement because defendant was not charged under section 860. \textit{Id.} at 1318.
\item \textsuperscript{10} 148 F.3d at 1318 (citing U.S.S.G. § 1B1.2 application n.3).
\item \textsuperscript{11} \textit{Id.}
\end{itemize}
2. U.S.S.G. Section 1B1.3(a)(1): Relevant Conduct

In United States v. Exarhos, the majority held that the district court erred in failing to consider reliable hearsay evidence showing that defendant stole other cars, which should have been included as relevant conduct under U.S.S.G. sections 2B6.1 and 2F1.1. The court held that the district court should have counted uncharged conduct directly involving the closely related thefts of motor vehicles.

3. U.S.S.G. Section 1B1.3(a)(2): Relevant Conduct

In United States v. Perulena, the court held that importation of marijuana that occurred almost a year before defendant joined the drug smuggling conspiracy was not conduct for which defendant could be held "otherwise accountable" under the sentencing guidelines. The importation of marijuana was beyond the scope of criminal activity that defendant agreed to jointly undertake with co-conspirators.

B. Chapter Two: Offense Conduct

1. Part D: Drug Offenses

a. U.S.S.G. Section 2D1.1: Crack Cocaine versus Powder Cocaine.

The sentencing disparity between crack and powder cocaine remains enormous. In United States v. Hanna, the court rejected another challenge to the 100:1 penalty ratio. Then, in United States v. Riley, the court held that the type of cocaine involved (crack versus powder) is a sentencing issue. Defendants in Riley were indicted for conspiracy to possess with intent to distribute crack and powder cocaine in violation of 21 U.S.C. § 841(a). The jury returned a general verdict of guilty. Neither defendant requested a special verdict on which substances were involved in the offenses. Defendants were then

12. 135 F.3d 723 (11th Cir. 1998).
13. Id. at 730.
14. Id.
15. 146 F.3d 1332 (11th Cir. 1998).
16. Id. at 1336-38.
17. Id.
18. 153 F.3d 1286 (11th Cir. 1998).
19. Id. at 1288-89. Pursuant to the drug quantity table, one gram of crack cocaine carries the same base offense level as one hundred grams of powder cocaine. U.S.S.G. § 2D1.1(c).
20. 142 F.3d 1254 (11th Cir. 1998).
21. Id. at 1256.
sentenced according to the amounts of powder and crack attributed to them by their presentence reports.\textsuperscript{23} On appeal, defendants challenged their sentences based on the absence of a special verdict or a finding beyond a reasonable doubt on whether the offenses involved powder cocaine or crack cocaine. Because defendants failed to preserve the issues in the district court, the appellate court applied the plain error analysis.\textsuperscript{24} The Eleventh Circuit held that under the law of that circuit, the indictment's use of "and" between crack and powder permits conviction for an offense involving either one.\textsuperscript{25} Relying on the recent Supreme Court decision in \textit{Edwards v. United States},\textsuperscript{26} the court then held that the district court could impose a sentence based on the amount of both crack cocaine and cocaine powder involved in defendants' offenses and that the district court was not required to find beyond a reasonable doubt whether defendants' conspiracy involved cocaine powder, crack cocaine, or both prior to imposing sentence.\textsuperscript{27}

\textbf{b. U.S.S.G. Section 2D1.1(b)(1): Enhancement for Possessing a Firearm During a Drug Offense.}\ Section 2D1.1(b)(1) provides for a two-level enhancement if a dangerous weapon (including a firearm) is possessed during a drug offense. In \textit{United States v. Trujillo},\textsuperscript{28} the Eleventh Circuit upheld a two-level firearm enhancement pursuant to Section 2D1.1(b)(1) for a defendant who had a gun in a leather pouch in his warehouse office next to the room where the cocaine was found.\textsuperscript{29} The enhancement in this case is interesting because the gun was found in a separate office area of the warehouse that did not contain any drugs. Defendant argued that because he had a concealed weapons permit, he could legally possess the gun.\textsuperscript{30} The court rejected this argument, finding that the gun was available to defendant in case something went wrong with the drug transaction.\textsuperscript{31} In other words, because defendant was using the gun for an illegal purpose, the fact that defendant had a concealed weapons permit was irrelevant.\textsuperscript{32}

\begin{itemize}
  \item 23. 142 F.3d at 1255.
  \item 24. \textit{Id}.
  \item 25. \textit{Id.} at 1256.
  \item 27. 142 F.3d at 1256-57.
  \item 28. 146 F.3d 838 (11th Cir. 1998).
  \item 29. \textit{Id.} at 847.
  \item 30. \textit{Id}.
  \item 31. \textit{Id}.
  \item 32. \textit{Id}.
\end{itemize}
This two-level enhancement has been especially troublesome in the wake of the United States Supreme Court decision in *Bailey v. United States*.\(^3\) Since the Court in *Bailey* defined the term "use" as found in 18 U.S.C. § 924(c),\(^4\) a number of section 924(c) convictions have been reversed. However, many of those cases also involved drug convictions that were not disturbed by the ruling in *Bailey*.

One example is *United States v. Oliver*.\(^5\) Prior to the Supreme Court decision in *Bailey*, defendants in *Oliver* had been convicted of federal drug offenses and of using a firearm in relation to a drug trafficking offense (18 U.S.C. § 924(c)). Defendants successfully challenged their section 924(c) convictions in light of *Bailey*. However, once the section 924(c) conviction was vacated, the Government moved for resentencing and requested a two-level upward adjustment based upon section 2D1.1(b)(1).\(^6\) The district court agreed with the Government and enhanced defendant's drug sentence after applying section 2D1.1(b)(1).\(^7\) Defendant appealed, arguing that the district court lacked jurisdiction to resentence him. The Eleventh Circuit affirmed, relying on *United States v. Mixon*.\(^8\) In *Mixon* the court held that "based on the language of § 2255 and the interdependence of the multiple counts for sentencing purposes," a district court has jurisdiction to recalculate a defendant's entire sentence, and such resentencing does not defeat the defendant's double jeopardy rights.\(^9\)

*United States v. Watkins*\(^10\) took the decision in *Mixon* one step further. In Watkins defendant was originally sentenced as an armed career criminal with regard to the count charging him with possessing three firearms.\(^11\) His armed career criminal status trumped any two-level enhancement on the drug count. After vacating defendant's sixty-month sentence under section 924(c) (and after considering his additional substantial assistance), the district court resentence defendant to twenty-four months more than the initial sentence imposed on the drug and section 924(e) counts, but thirty-six months less than his prior aggregate sentence (the total sentence for the section 924(e), drug and section 924(c) counts).\(^12\) The Eleventh Circuit held the district court

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35. 148 F.3d 1274 (11th Cir. 1998).
36. *Id.* at 1275.
37. *Id.*
38. *Id.* (citing United States v. Mixon, 115 F.3d 900 (11th Cir. 1997)).
40. 147 F.3d 1294 (11th Cir. 1998).
42. 147 F.3d at 1285-86.
had jurisdiction to resentence the defendant on the unchallenged drug and section 924(e) counts and that the resentencing did not violate defendant's double jeopardy or due process rights.\textsuperscript{43}

c. U.S.S.G. Section 2D1.2: Enhancement for Drugs within One Thousand Feet of a School. In \textit{Saavedra} defendant successfully challenged his two-level enhancement, pursuant to section 2D1.2, for selling drugs within one thousand feet of a school.\textsuperscript{44} The indictment alleged that defendant conspired with others to distribute controlled substances in Miami Springs, Florida.\textsuperscript{45} The indictment did not refer to 21 U.S.C. § 860 (possession with the intent to distribute drugs within one thousand feet of a school) and did not mention that defendant's criminal actions took place within one thousand feet of an elementary school. Nonetheless, the district court enhanced defendant's base offense level by two levels for selling drugs within one thousand feet of a school.\textsuperscript{46}

On appeal, the Eleventh Circuit reversed the trial court and held that section 2D1.2 was not an enhancement guideline and that the guideline enhancement applied only to those cases in which defendant was charged under section 860.\textsuperscript{47} Because the offenses in this case were charged under section 846 and section 841, the proper guideline was section 2D1.1.

2. Part F: Offenses Involving Fraud or Deceit

The decision of which guideline to apply can significantly affect the sentence, particularly in cases involving loss. The theft guideline, U.S.S.G. section 2B1.1, is seemingly more simple to apply. The fraud guideline, U.S.S.G. section 2F1.1, is more complicated and can render a more harsh result inasmuch as it implicates the intended loss as well as the actual loss.

In \textit{United States v. Tatum},\textsuperscript{48} the guideline application note relating to fraudulent contract procurement cases, not the theft guideline (section 2B1.1), was held to be applicable in sentencing defendant for conspiracy\textsuperscript{49} and making false statements\textsuperscript{50} for the purpose of influencing the

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} at 1297-98.
\item \textsuperscript{44} 21 U.S.C.A. § 860 (West Supp. 1998).
\item \textsuperscript{45} \textit{Id.} § 846 (1981 & Supp. 1998).
\item \textsuperscript{46} 148 F.3d at 1312-13 & n.2, 1314. For additional discussion of \textit{Saavedra}, see supra text accompanying notes 8-11.
\item \textsuperscript{47} \textit{Id.} at 1318.
\item \textsuperscript{48} 138 F.3d 1344 (11th Cir. 1998).
\item \textsuperscript{50} \textit{Id.} § 1007 (West Supp. 1998).
\end{itemize}
Federal Deposit Insurance Corporation ("FDIC") in the procurement of a management contract. Thus, the sentencing court was required to consider the actual loss suffered by FDIC and the loss intended by defendants, not merely the gross amount of funds connected with the crimes.

Similarly, in United States v. Bald defendant made unauthorized credit card purchases with her employer's credit card, which had been entrusted to her. Defendant argued that the loss figure should be the net loss after crediting defendant for returned merchandise because those credit card charges were reversed. The Eleventh Circuit disagreed and held that the return of the merchandise did not diminish the intended loss from the improper charges. The court cited section 2F1.1, application note 7, which states that "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used 'if it is greater than' the actual loss." In the instant case, the intended loss was greater than the actual loss.

In addition to dealing with intended loss, the fraud guideline is complicated by the concept of "more than minimal planning." In United States v. Daniels, defendant pleaded guilty to the crimes of embezzlement and false statements. On appeal defendant argued that his base offense level should not have been enhanced for more than minimal planning and that the district court should have reduced the amount of the loss by the amount reimbursed by his insurance carrier. The Eleventh Circuit disagreed. As to the loss amount, the court held that reimbursement does not change the amount defendant embezzled; it only substitutes the victim's insurance company as another victim. The court also upheld the enhancement for more than minimal planning, finding that the charged embezzlement occurred.
over a five-year period and constituted "repeated acts" over a period of time.\textsuperscript{64}

3. U.S.S.G. Section 2G2.2: Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

The trend in child pornography cases in the Eleventh Circuit seems to be toward increasingly harsh sentences. The court has upheld enhancements in these cases and reversed at least one downward departure.

In \textit{United States v. Tucker},\textsuperscript{65} defendant was convicted of transporting in interstate commerce material depicting minors engaged in sexually explicit conduct.\textsuperscript{66} At sentencing, his base offense level was enhanced four levels for material that portrayed sadistic or masochistic conduct, or other depictions of violence.\textsuperscript{67} The court stated intent is a necessary requirement for the four-level enhancement under this specific offense characteristic.\textsuperscript{68} Here, the sentencing court's finding of intent was supported by two types of evidence: (1) pictures of minors in bondage located on the hard drive of defendant's computer, and (2) Internet conversations showing that while looking for pictures, defendant stated that he was into "young action" and would "like to start trading" and documenting his trading of these images.\textsuperscript{69}

In \textit{United States v. Anderton},\textsuperscript{70} defendant was charged with possessing a sexually explicit videotape depicting a minor.\textsuperscript{71} The district court applied a five-level enhancement, finding that the specific offense characteristic of a defendant engaging in a pattern of activity involving the sexual abuse of exploitation of a minor applied.\textsuperscript{72} Defendant argued that the guideline pertained only to conduct occurring during the course of the offense of conviction.\textsuperscript{73} However, the Eleventh Circuit held that the 1996 guideline amendment was clarifying and that "[i]t is now well-settled in this circuit that "the sentencing court should consider clarifying amendments when interpreting the guidelines, even when

\textsuperscript{64} Id. at 1261 (quoting U.S.S.G. § 1B1.1 application n.1(F)).
\textsuperscript{65} Id. at 763 (11th Cir. 1998).
\textsuperscript{66} Id. at 763-64 (citing 18 U.S.C.A. § 2252(a)(1) (West 1984 & Supp. 1998)).
\textsuperscript{67} Id. at 764 (citing U.S.S.G. § 2G2.2(b)(3)).
\textsuperscript{68} Id. (citing United States v. Cole, 61 F.3d 24 (11th Cir. 1995)).
\textsuperscript{69} Id.
\textsuperscript{70} 136 F.3d 747 (11th Cir. 1998).
\textsuperscript{71} Id. at 748 (citing 18 U.S.C.A. § 2252(a)).
\textsuperscript{72} Id. at 750 (citing U.S.S.G. § 2G2.2(b)(4)).
\textsuperscript{73} Id.
sentencing defendants convicted before the effective date of the amendments.""

In another computer pornography case, United States v. Miller, the court reversed the district court's downward departure for "diminished mental capacity." The district court had based the departure on defendant's impulse control disorder. The appellate court held that this disorder did not take the case outside the heartland of cases, did not justify the downward departure, and was not linked to commission of the offense.

4. U.S.S.G. Section 2J1.7: Offenses Involving the Administration of Justice

In United States v. Bozza, the court interpreted the notice requirement for the consecutive sentence enhancement found in 18 U.S.C. § 3147 and U.S.S.G. section 2J1.7. Defendant's sentence was enhanced pursuant to those provisions because the charged offenses were committed while defendant was released on bond in an unrelated case. The Eleventh Circuit affirmed the sentence because defendant had notice of the enhancement prior to the sentencing hearing and had the opportunity to object. Aligning itself with the Tenth Circuit and rejecting the position of the Fifth Circuit, the Eleventh Circuit held that section 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting a guilty plea.

74. Id. at 751 (quoting United States v. Howard, 923 F.2d 1500, 1504 (11th Cir. 1991)) (quoting United States v. Marin, 916 F.2d 1536, 1538 (11th Cir. 1990)).
75. 146 F.3d 1281 (11th Cir. 1998).
76. Id. at 1283 (citing U.S.S.G. § 5K2.13).
77. Id. at 1284-85.
78. Id. at 1285-86.
79. 132 F.3d 659 (11th Cir. 1998).
80. Id. at 660.
82. 132 F.3d at 660.
83. See United States v. Browning, 61 F.3d 752 (10th Cir. 1995).
84. See United States v. Pierce, 5 F.3d 791 (6th Cir. 1993).
85. 132 F.3d at 661.
5. U.S.S.G. Section 2K2.1: Offenses Involving Public Safety—Firearms

United States v. Flennory offers a good lesson for those who are not thoroughly familiar with the cross-referencing of criminal statutes when doing guidelines calculations. In this firearm case, defendant pleaded guilty to one count of possession of a firearm by a convicted felon ("felon in possession") and to one count of using a firearm in relation to a drug trafficking offense. The Government dropped the three remaining counts—one count of possessing a firearm by a convicted felon and two counts of drug trafficking. At sentencing, defendant's base offense level on the felon in possession count was calculated pursuant to section 2K2.1(c)(1)(A). This guideline provides that if a defendant uses or possesses any guns with the commission or attempted commission of another offense, the base offense level of the other offense is applied if the resulting offense level is greater. Because two of the dismissed counts charged drug offenses, the probation office cross-referenced to the drug offenses to determine the offense level for the felon in possession count. The drug guidelines were then used to sentence defendant on the felon in possession count because they were greater than the applicable firearm guidelines. The court also imposed a five-year consecutive sentence on the section 924(c) charge. The Eleventh Circuit found it was proper to base the sentence on the entire amount of drugs involved in the offense even though the drug counts in the case were dismissed as part of the plea agreement.

In United States v. Paredes, the court found that the offense level for the felon in the possession conviction was properly enhanced under the specific offense characteristic of possessing a firearm in connection with another felony offense because the firearm in question was possessed in connection with a robbery.
6. U.S.S.G. Section 2L1.2: Offenses Involving Immigration, Naturalization, and Passports

Upon being convicted of re-entering the country following deportation,\(^9\) alien/defendant in *United States v. Lazo-Ortiz*\(^9\) received an enhanced sentence because of prior convictions for an “aggravated felony.”\(^9\) Even though the date of the “prior” offense in this case preceded the effective date of the statutory definition of “aggravated felony,” the Eleventh Circuit affirmed the sentence, holding that the guideline definition controlled the guideline enhancement.\(^\) \(^10\)

Similarly, in *United States v. Lozano*\(^1\) defendant was deported after being convicted of an “aggravated felony.”\(^\)\(^2\) He was later prosecuted for illegally re-entering the United States.\(^3\) Defendant challenged the “aggravated felony” enhancement for the illegal re-entry guideline under the Ex Post Facto Clause because the prosecution was not in effect when the prior aggravated felony was committed.\(^4\) The Eleventh Circuit rejected this challenge because defendant was being sentenced for the crime of illegal re-entry, and the penalties were unambiguous at the time of the commission of that offense.\(^5\)

C. Chapter Three: Adjustments

1. Part B: Role in the Offense

   a. U.S.S.G. Section 3B1.1: Managerial Role. The manager/organizer enhancement, found in section 3B1.1, is one of the few enhancements for which Eleventh Circuit case law is favorable to the defense.\(^6\) In *United States v. Glinton*,\(^7\) the Eleventh Circuit reversed the district court’s finding that defendant was a leader or organizer of five or more

\(^9\) 136 F.3d 1282 (11th Cir. 1998).
\(^9\) *Id.* at 1283 (citing U.S.S.G. § 2L1.2(b)(1)(A)). Pursuant to section 2L1.2 application note 2, the term “aggravated felony” is defined in 8 U.S.C.A. § 1101(a)(43) (West Supp. 1998).
\(^10\) 136 F.3d at 1286.
\(^1\) 138 F.3d 915 (11th Cir. 1998).
\(^3\) *Id.* § 1326(a).
\(^4\) 138 F.3d at 916 (citing U.S.S.G. § 2L1.2(b)(1)(A)).
\(^5\) *Id.* at 916-17.
\(^6\) See United States v. Glinton, 154 F.3d 1245 (11th Cir. 1998); United States v. Alred, 144 F.3d 1405 (11th Cir. 1998); United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1998); United States v. Yates, 990 F.2d 1179 (11th Cir. 1993).
\(^7\) 154 F.3d 1245 (11th Cir. 1998).
The court reiterated that the supervision or control of another person is an integral part of a managerial enhancement. A defendant who has only a "buyer/seller" relationship with his co-conspirators cannot be classified as a leader/organizer. Also, in Alred, a case in which defendant sold and occasionally "fronted" drugs to others, the court reversed the district court's four-level enhancement of defendant as an organizer, manager, or leader.

The impact of the managerial role adjustment is significant. Not only can the managerial adjustment result in a four-level increase, but it can also affect the applicability of other guidelines. For example, if a defendant is enhanced four levels for a managerial role, he is ineligible for a reduction under the guidelines "safety valve" provision. However, if the defendant meets all of the other safety valve criteria, the elimination of the managerial adjustment also makes the defendant eligible for the two-level safety valve reduction.

b. U.S.S.G. Section 3B1.2: Minor Role. In United States v. Campbell, the district court denied defendant's request for a mitigating role adjustment under section 3B1.2 for two reasons: (1) she had foregone job opportunities and knowingly imported drugs for money, and (2) as a courier, the court reasoned, defendant was a minor but important link in the drug smuggling scheme. Because both of these factors related solely to defendant's status as a drug courier, the Eleventh Circuit held that these factors were improper reasons for denying defendant a minor role reduction.

c. U.S.S.G. Section 3B1.3: Use of a Special Skill. In United States v. Foster, a case of first impression, the Eleventh Circuit held the act of "printing" counterfeit money constituted a "special skill" for section 3B1.3 enhancement purposes. The court recognized that while

108. Id. at 1260.
109. Id.
110. Id. (citing Lozano-Hernandez, 89 F.3d at 790).
111. 144 F.3d at 1421-22.
113. Id. § 5C1.2. A defendant is ineligible for a two-level "safety valve" reduction if the defendant is depicted an organizer, leader, manager, or supervisor of others in the offense. Id. § 5C1.2(4).
115. 139 F.3d 820 (11th Cir. 1998).
116. Id. at 821.
117. Id. at 822.
118. 155 F.3d 1329 (11th Cir. 1998).
119. Id. at 1332.
printing does not require a license or formal education, it is a unique technical skill that requires special training and that is not possessed by members of the general public.\textsuperscript{120} After finding that “printing” is a special skill, the court found (as required by the guideline) that the skill “significantly facilitated” the commission of the offense.\textsuperscript{121}

In \textit{United States v. Exarhos},\textsuperscript{122} the Eleventh Circuit also held the ability to find and obliterate vehicle identification numbers from cars and car parts warranted a two-level upward adjustment under the “special skill” provision of the guidelines.\textsuperscript{123} The court found that dismantling cars and reassembling them to facilitate distribution of the stolen cars and parts “involves a combination of skills not possessed by the general public.”\textsuperscript{124}

d. \textit{U.S.S.G. Section 3B1.3: Abuse of a Position of Trust.} The breach of trust cases decided in 1998 were factually complicated. In \textit{United States v. Garrison},\textsuperscript{125} the court reversed the breach of trust enhancement that had been imposed on the president of a home health agency who had submitted false cost reports to Medicare.\textsuperscript{126} The court first held that a Medicare provider is not, by its mere status, necessarily in a position of trust in relation to the Medicare program.\textsuperscript{127} The home health care agency in this case submitted cost reports to a fiscal intermediary, which was required to audit the reports to see if they were accurate. Further, defendant was not a financial expert, but rather a nurse-turned-entrepreneur. It was apparent that no one at the intermediary company looked to defendant for assurance on the accuracy of the financial reports.\textsuperscript{128} Second, the court held the abuse of trust enhancement could not stand because it covered the same conduct charged in the indictment.\textsuperscript{129}

In \textit{United States v. Mills},\textsuperscript{130} the court held the abuse of trust enhancement is “not appropriate unless the victim of the breach itself conferred the trust.”\textsuperscript{131} In this case defendants were convicted of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} 135 F.3d 723 (11th Cir. 1998).
\item \textsuperscript{123} \textit{Id.} at 730-31 (citing U.S.S.G. \textsection 3B1.3).
\item \textsuperscript{124} \textit{Id.} at 730.
\item \textsuperscript{125} 133 F.3d 831 (11th Cir. 1998).
\item \textsuperscript{126} \textit{Id.} at 853.
\item \textsuperscript{127} \textit{Id.} at 841.
\item \textsuperscript{128} \textit{Id.} at 841-42 & n.19.
\item \textsuperscript{129} \textit{Id.} at 842-43.
\item \textsuperscript{130} 138 F.3d 928 (11th Cir. 1998).
\item \textsuperscript{131} \textit{Id.} at 941 (citing Garrison, 133 F.3d at 844-46).
\end{enumerate}
\end{footnotesize}
submitting falsified documents to the government and mail fraud. The court held the Medicare-funded care provider owned by defendants did not occupy a position of trust vis-à-vis Medicare. Defendants could not be enhanced based on any breach of public trust by lying to Medicare. The United States was the only possible victim of the Medicare fraud crime committed by these defendants, who were majority shareholders in the Medicare-funded care provider. Thus, defendants’ abuse of their positions of private trust as officers of the provider was irrelevant to the breach of trust enhancement at sentencing.

2. U.S.S.G Section 3C1.1: Obstruction

In United States v. Hubert, the court upheld a two-level enhancement for obstruction of justice based upon defendant’s alleged perjury at his bond hearings and trial. In so doing, the court rejected defendant’s argument that the sentencing court did not make sufficiently detailed findings on the perjury. Rather, the court held that because the district court adopted the pre-sentence report, which spelled out the perjurious statements, detailed findings at the sentencing hearing were not necessary.


In United States v. Starks, the Government cross-appealed the district court’s finding that defendant accepted responsibility in accordance with section 3E1.1. Defendant cooperated with the government investigation but went to trial to preserve his legal position regarding the applicability of the antikickback provisions of the Social Security Act to his conduct. He admitted all the conduct prohibited by statute but denied having the intent to induce referrals, which

133. Id. § 1341 (West 1989 & Supp. 1998).
134. 138 F.3d at 941.
135. Id.
136. Id.
137. Id.
138. 138 F.3d 912 (11th Cir. 1998).
139. Id. at 915.
140. Id.
141. Id.
142. 157 F.3d 833 (11th Cir. 1998).
143. Id. at 835.
145. 157 F.3d at 840-41.
was an essential element of the crime. The Eleventh Circuit held that defendant's arguments at trial and on appeal amounted to a factual denial of guilt and, therefore, were inconsistent with acceptance of responsibility.

Based on similar reasoning, the Eleventh Circuit upheld the district court's denial of acceptance of responsibility in *United States v. Hernandez* because defendant admitted his guilt but not certain parts of his criminal conduct.

Although getting the first two points for acceptance of responsibility is no easy task, once that is accomplished, the third point appears to be easier. In *United States v. Johnson*, the Eleventh Circuit reversed the district court's denial of the third point for acceptance of responsibility. Although the district court indicated defendant had accepted responsibility, it only granted him a two-level reduction because of a sentencing dispute over the drug amount. The Eleventh Circuit reversed, holding that the district court could only limit its consideration of the third point to whether defendant timely provided information to the authorities or timely notified the authorities of his intention to plead guilty.

D. Chapter Four: Criminal History and Criminal Livelihood

1. Part A: Criminal History

   a. U.S.S.G. Section 4A1.1. Pursuant to the criminal history section of the federal sentencing guidelines, a prior conviction for which the defendant was sentenced to more than thirteen months incarceration is scored as three criminal history points. In *United States v. Glover*, the Eleventh Circuit ultimately reversed a sentence because defendant's prior state court conviction was improperly counted. Defendant in *Glover* had a prior conviction for which he received probation. He later violated probation and was sentenced to ninety days

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146. Id.
147. Id.
148. 160 F.3d 661 (11th Cir. 1998).
149. Id. at 667-68.
150. 132 F.3d 628 (11th Cir. 1998).
151. Id. at 631-32 (citing U.S.S.G. § 3E1.1).
152. Id. at 631.
153. Id. (citing United States v. McPhee, 108 F.3d 287, 289 (11th Cir. 1997)).
155. 154 F.3d 1291 (11th Cir. 1998).
156. Id. at 1296.
in jail. After serving the ninety-day sentence, defendant again violated probation and was sentenced to 364 days with credit for the days already served. The federal probation office counted the total sentence as 454 days and gave defendant three criminal history points because the total amount of time defendant was sentenced to was more than thirteen months. The Eleventh Circuit reversed and held that the district court erred in counting the ninety-day time period twice and that the total sentence imposed was 364 days.

The Eleventh Circuit also reversed the criminal history computation in United States v. Pielago. As a matter of first impression, the court held that a defendant's prior term of confinement in a community treatment center was not a "sentence of imprisonment" for purposes of determining his criminal history category under the federal sentencing guidelines. Thus, a defendant who serves his entire previous sentence in a community treatment center will only receive one criminal history point regardless of how much time he served at that facility.

b. U.S.S.G. Section 4A1.2(c)(1). Interpreting a prior record can be just as perplexing as counting the sentence. Pursuant to the guidelines, certain listed offenses, and those similar to them, are not included in a defendant's criminal history calculation. The offenses listed in this section include disorderly conduct, disturbing the peace, and failing to obey a police officer.

In United States v. Horton, defendant argued that his prior misdemeanor assault conviction should not have been scored in calculating his prior criminal history because that conviction was similar to the offenses of disorderly conduct, disturbing the peace, and failing to obey a police officer. The Eleventh Circuit disagreed, holding that simple assault was not similar to the offenses listed in section 4A1.2(c)-(1) and that the crime was properly scored in defendant's criminal history calculation at sentencing.

c. U.S.S.G. Section 4A1.3. Section 4A1.3 permits a court to depart downward or upward from a defendant's prescribed sentence "if reliable

157. Id. at 1292-93.
158. Id. at 1296.
159. 135 F.3d 703, 713 (11th Cir. 1998).
160. Id.
162. Id.
163. 158 F.3d 1227 (11th Cir. 1998).
164. Id. at 1227.
165. Id. at 1227-28.
information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.\textsuperscript{166} Until now, this provision seems to have been relied upon primarily to justify upward departures when the district court felt the defendant's criminal history was understated. For example, in \textit{United States v. Mellerson}\textsuperscript{167} the district court departed upward three levels from defendant's armed career criminal guideline\textsuperscript{168} and gave defendant a life sentence for possession of a firearm by a convicted felon.\textsuperscript{169} The district court reasoned that defendant's criminal history was understated.\textsuperscript{170} Despite the life sentence, the Eleventh Circuit found that the upward departure did not constitute an abuse of discretion.\textsuperscript{171}

However, such an upward departure must be based on reliable information. In \textit{United States v. Hernandez},\textsuperscript{172} the district court departed upward based on section 4A1.3, relying, in part, on defendant's arrest record as set forth in the pre-sentence report ("PSR").\textsuperscript{173} The PSR, however, did not specify the conduct giving rise to the arrests.\textsuperscript{174} The Eleventh Circuit held this was error.\textsuperscript{175}

The court in \textit{Hernandez} also upheld a departure from defendant's criminal history category based on defendant's violation of the Fair Labor Standards Act ("FLSA").\textsuperscript{176} Because defendant had been charged with deposit account fraud, the district court upwardly departed one criminal history level because defendant's violation of the FLSA constituted additional similar misconduct on the part of defendant.\textsuperscript{177} The Eleventh Circuit held that section 4A1.3(c) includes conduct other than criminal misconduct.\textsuperscript{178} The court found that "[b]ecause [defendant's] labor regulations violation was similar to the bankruptcy fraud, it was well within the court's power to consider this violation in departing upward."\textsuperscript{179}

\begin{footnotes}
\textsuperscript{166} U.S.S.G. § 4A1.3.
\textsuperscript{167} 145 F.3d 1255 (11th Cir. 1998).
\textsuperscript{169} 145 F.3d at 1256 (citing 18 U.S.C.A. § 922 (g)(1)).
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 1257.
\textsuperscript{172} 160 F.3d 661 (11th Cir. 1998).
\textsuperscript{173} Id. at 664-65.
\textsuperscript{174} Id. at 670.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 668-70.
\textsuperscript{177} Id. at 668.
\textsuperscript{178} Id. at 670.
\textsuperscript{179} Id.
\end{footnotes}
Although section 4A1.3 is often relied on to justify an upward departure, the Eleventh Circuit is not often faced with the situation of a downward departure under that section. Part of the reason for that is the general rule that a defendant may not appeal a district court's refusal to depart downward.\textsuperscript{180} In \textit{United States v. Webb},\textsuperscript{181} the record was ambiguous on whether the district court's decision to depart downward was based on its belief that it lacked the discretion to grant defendant's request for a departure.\textsuperscript{182} Thus, the Eleventh Circuit resolved this initial issue in favor of the defendant.\textsuperscript{183} The court in \textit{Webb} then held that section 4A1.3 authorizes the sentencing court to depart downward regardless of a defendant's status as a career offender under section 4B1.1.\textsuperscript{184}

2. Criminal Livelihood

a. \textit{U.S.S.G. Section 4B1.1: Career Offender}. The sentencing guidelines provide severe enhancements for career offenders and armed career criminals. The criteria for the career offender enhancement are that:

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.\textsuperscript{185}

Whether an offense is a crime of violence or a controlled substance offense within the meaning of this guideline has been addressed by the Eleventh Circuit in a number of different contexts over the years. In \textit{United States v. Hernandez},\textsuperscript{186} the court was asked how to determine whether the offense defendant was previously convicted of was a "controlled substance offense" as defined by section 4B1.1 when the prior conviction was ambiguous. The prior conviction did not indicate whether defendant had been convicted for the purchase or sale of drugs.\textsuperscript{187} The difference was critical because a conviction for purchasing drugs does not qualify as a controlled substance offense under the career offender

\textsuperscript{180} United States v. Baker, 19 F.3d 605, 614-15 (11th Cir. 1994).
\textsuperscript{181} 139 F.3d 1390 (11th Cir. 1998).
\textsuperscript{182} \textit{Id.} at 1394.
\textsuperscript{183} \textit{Id.} at 1396.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} U.S.S.G. \$ 4B1.1.
\textsuperscript{186} 145 F.3d 1433 (11th Cir. 1998).
\textsuperscript{187} \textit{Id.} at 1440.
The Eleventh Circuit held the district court should not retry the prior convictions and should be limited to examining easily produced and evaluated court documents, such as any helpful plea agreements or plea transcripts, any pre-sentence reports adopted by the sentencing judges, and any findings made by the sentencing judges. Here, the district court acted improperly in using arrest affidavits to resolve the ambiguity inasmuch as the inquiry should have concerned conduct for which defendant was convicted, not conduct for which he was arrested.

b. U.S.S.G. Section 4B1.4: Armed Career Criminal. Section 4B1.4(a) provides that “[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.” Section 924(e)(1) provides for a significantly enhanced sentence if the defendant violates 18 U.S.C. § 922(g) and has three previous convictions for “a violent felony or a serious drug offense, or both, committed on occasions different from one another.” A “serious drug offense” is defined to include “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.”

The Eleventh Circuit was called upon to further interpret “a serious drug offense” in McCarthy v. United States. Defendant in McCarthy was enhanced as an armed career criminal pursuant to 18 U.S.C. § 924(e). Some of defendant’s prior “serious drug offenses” included convictions under Florida law for selling cocaine. The statutory maximum penalty for the sale of cocaine under Florida law was fifteen years in prison. On appeal, defendant argued that he was sentenced pursuant to the Florida sentencing guidelines and that under the guidelines he could not have received more than the presumptive sentence of four-and-one-half years in prison. Thus, he argued, his prior convictions could not have been classified as “serious drug offenses” as that term is defined in section 924(e)(2)(A)(ii). The court of appeals
disagreed, holding that the “only true maximum sentence for the offense category is the statutory maximum.”

In *United States v. Pope*, defendant was convicted of possession of a firearm by a convicted felon. The district court refused to enhance defendant as an armed career criminal. It found that two of defendant’s burglary convictions, which were committed on the same night, but in two different buildings two hundred yards away from one another, should only count as one prior predicate offense under 18 U.S.C. § 924(e). The court of appeals reversed, holding that these two prior burglaries were committed “on occasions different from one another” within the meaning of the Armed Career Criminal Act.

In *Mellerson* the Eleventh Circuit interpreted section 4B1.4(b)(3)(A), which provides an additional offense level enhancement if a defendant uses or possesses a firearm in connection with a crime of violence or a controlled substance offense. The court held that to apply this guideline the Government need not prove defendant was convicted of the crime of violence or controlled substance offense. Rather, the Government need only prove by a preponderance of the evidence that defendant used or possessed a firearm in connection with a crime of violence or a controlled substance offense.

E. Chapter Five: Determining the Sentence

1. Part C: Imprisonment

In *United States v. Reid*, the Eleventh Circuit held the district court did not grant a complete and meaningful sentencing hearing on the issue of whether defendant was entitled to a safety valve reduction pursuant to section 5C1.2. In deciding not to apply the safety valve, the district court, without hearing argument of counsel, stated only that it did not apply in this case. The Eleventh Circuit opined that

196. *Id.* at 757.
197. 132 F.3d 684 (11th Cir. 1998).
198. *Id.* at 687.
199. *Id.*
200. *Id.* at 689.
201. *Id.* at 692 (quoting 18 U.S.C.A. § 924(e)(1)).
202. 145 F.3d at 1257-58. For additional discussion of *Mellerson*, see *supra* text accompanying notes 167-71.
203. 145 F.3d at 1258.
204. *Id.*
205. 139 F.3d 1367 (11th Cir. 1998).
206. *Id.* at 1368.
207. *Id.*
"[o]ther than this brief comment," there was nothing in the record on why the court concluded defendant did not qualify for a safety valve reduction.\textsuperscript{208} The court then remanded for resentencing because meaningful appellate review on the safety valve issue was precluded by the lack of any findings by the district court.\textsuperscript{209}

2. Part D: Supervised Release

A district court does not have jurisdiction to order deportation as part of supervised release.\textsuperscript{210} Because this issue relates to the district court's subject matter jurisdiction, the Eleventh Circuit can sua sponte reverse such a condition of supervised release.\textsuperscript{211} However, although the district court may not order deportation as a condition of supervised release, it may order that a defendant be surrendered to the Immigration and Naturalization Service for deportation proceedings in accordance with the Immigration and Naturalization Act.\textsuperscript{212}

3. Part E: Restitution

Guidelines restitution is directly related to the statutes governing restitution. On April 24, 1996, the Mandatory Victims Restitution Act ("MVRA") became effective.\textsuperscript{213} This new act, which replaced the Victim and Witness Protection Act ("VWPA"),\textsuperscript{214} dramatically changed the law concerning restitution. Under the VWPA, the sentencing court must determine whether a criminal defendant has the ability to pay restitution.\textsuperscript{215} Failure of the court to make such a determination will result in a reversal. In \textit{United States v. Fox},\textsuperscript{216} the district court imposed restitution under the VWPA without determining whether defendant had the ability to pay restitution.\textsuperscript{217} The Eleventh Circuit reversed because it did not appear from the record that defendant had sufficient financial resources to pay the restitution.\textsuperscript{218} Similarly, in \textit{Exarhos} the court

\begin{itemize}
  \item \textsuperscript{208} \textit{Id.}
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{United States v. Mejia}, 154 F.3d 1297, 1298 (11th Cir. 1998).
  \item \textsuperscript{211} \textit{United States v. Alborola-Rodriguez}, 153 F.3d 1269, 1272 (11th Cir. 1998).
  \item \textsuperscript{212} \textit{United States v. Biro}, 143 F.3d 1421, 1431 (11th Cir. 1998).
  \item \textsuperscript{215} 18 U.S.C.A. § 3580(a) (West 1985).
  \item \textsuperscript{216} 140 F.3d 1384 (11th Cir. 1998).
  \item \textsuperscript{217} \textit{Id.} at 1385.
  \item \textsuperscript{218} \textit{Id.} at 1386.
\end{itemize}
held that restitution may be imposed under the VWPA even if defendants are virtually indigent at the time of sentencing.\textsuperscript{219} However, the court remanded this case and directed the district court to reconsider the restitution order with regard to setting restitution in the amount that defendants could feasibly be expected to pay.\textsuperscript{220}

The MVRA does not require the sentencing court to determine a defendant's ability to pay before imposing restitution. In fact, under the MVRA the court must impose restitution in the full amount of the victim's losses regardless of defendant's ability to pay.\textsuperscript{221} This significant change in the law has spawned challenges to the applicability of the MVRA.

In United States v. Siegel,\textsuperscript{222} the Eleventh Circuit held that application of the MVRA to criminal conduct occurring before April 24, 1996, violated the Ex Post Facto Clause of the United States Constitution.\textsuperscript{223} Thus, the VWPA is still viable as it applies to all cases in which the criminal conduct occurred before April 24, 1996.\textsuperscript{224} This highlights the need to object to the imposition of restitution at sentencing and request that the district court make a determination on the defendant's ability to pay restitution in all cases where the criminal conduct occurred before April 24, 1996.

4. Part G: Implementing the Total Sentence of Imprisonment

The Eleventh Circuit dealt with the issue of concurrent versus consecutive sentences under section 5G1.3 in United States v. Blanc.\textsuperscript{225} In deciding whether two or more offenses are part of the same course of conduct or a common scheme as the offense of conviction, the court held that defendant's two fraud convictions were separate and distinct.\textsuperscript{226} Thus, consecutive sentences could be imposed for each offense pursuant to section 5G1.3(b). In so holding, the court found that the earlier fraud charge did not constitute relevant conduct under sentencing guidelines that would have mandated a concurrent sentence with the later fraud charge.\textsuperscript{227} The court further held that any activity that meets the relevant conduct definition must be fully taken into account when

\begin{footnotesize}
\begin{itemize}
\item 219. 135 F.3d at 732. For additional discussion of Exarhos, see supra text accompanying notes 12-14.
\item 220. 135 F.3d at 732.
\item 221. 18 U.S.C.A. § 3664(f)(1)(A).
\item 222. 153 F.3d 1256 (11th Cir. 1998).
\item 223. Id. at 1260.
\item 224. Id.
\item 225. 146 F.3d 847 (11th Cir. 1998).
\item 226. Id. at 854.
\item 227. Id.
\end{itemize}
\end{footnotesize}
determining whether the guideline governing the concurrent sentencing with prior undischarged term of imprisonment applies. 228

5. Part K: Departures

Perhaps in response to Koon v. United States,229 or perhaps just in response to the increasing severity of the sentencing guidelines, defendants have been presenting the Eleventh Circuit with creative new requests for downward departures. The Eleventh Circuit’s reaction has been generally conservative.

In Webb the court determined that a district court has the authority under section 4A1.3 to depart downward based on an overstated criminal history for a defendant who has been classified as a career offender.230 Although this was a matter of first impression in the Eleventh Circuit, all other circuits that have considered the issue have granted the departure.231

On another issue of first impression, the court ruled against a downward departure. In United States v. Willis,232 the court held the district court may not depart downward in order to reconcile the disparity between federal and state sentences among co-offenders.233

In Miller the court reversed another downward departure.234 In this computer pornography case, the district court found that defendant suffered from an impulse disorder that constituted diminished mental capacity under section 5K2.13.235 In finding that the facts of this case fell within the heartland of cases regulated by the sentencing guideline, the appellate court stated: “Many offenders commit crimes because they have poor impulse control. An impulse control disorder is not so atypical or unusual that it separates this defendant from other defendants.”236

The court also found that the facts of the case did not sufficiently link the disorder to the offense as required by section 5K2.13.237 The court

228. Id. at 851.
230. 139 F.3d at 1396. Although the departure in this case was pursuant to U.S.S.G. section 4A1.3, it is mentioned again in this section because it is indicative of the Eleventh Circuit’s trend in handling departures. For additional discussion of Webb, see supra text accompanying notes 181-84.
231. 139 F.3d at 1395.
232. 139 F.3d 811 (11th Cir. 1996).
233. Id. at 812.
234. 146 F.3d at 1286. For additional discussion of Miller, see supra text accompanying notes 75-78.
235. 146 F.3d at 1284.
236. Id. at 1285.
237. Id. at 1286.
reasoned: "The experts' testimony merely showed that the impulse control disorder explained (defendant's) interest in adult pornography, but it failed to establish that the disorder caused him to trade child pornography, which is the offense for which he was being sentenced." In reversing the departure, the court left open the question of "whether an impulse control disorder alone, not caused by a disorder affecting the ability to reason or process information, constitutes diminished capacity."239

In United States v. Sanchez-Valencia,240 defendant appealed the district court's refusal to depart downward based on "cultural assimilation" when sentencing a defendant for illegally re-entering the United States.241 The court of appeals affirmed, reiterating that a trial court's discretionary decision to depart downward is not appealable unless the refusal was based on an erroneous belief that the court did not have the statutory authority to depart from the guideline range.242

Conversely, in United States v. Tomono,243 a turtle smuggling case, the district court faced a creative departure request and granted a three-level downward departure that was based upon the "cultural differences" between the United States and Japan.244 The Eleventh Circuit vacated the sentence and remanded for resentencing.245 Although the appellate court did not foreclose any future downward departure based on cultural differences, it held that "[g]iven the record before us, we cannot say that the circumstances identified by the district court are significant enough to take this case out of the heartland of the guidelines."246 The dissent took a different approach, stating:

[t]he issue is whether the district court abused [its] discretion. I believe that the integrity and purpose of the sentencing guidelines require appellate courts to be slow to encroach on the discretion given to the sentencing courts . . . we should not substitute our own judgment unless a district court has abused its discretion.247

Although section 5K1.1 departures based on substantial assistance to the authorities have not been at the forefront of the 1998 Eleventh

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238. Id.
239. Id.
240. 148 F.3d 1273 (11th Cir. 1998).
241. Id. at 1274.
242. Id.
243. 143 F.3d 1401 (11th Cir. 1998).
244. Id. at 1403.
245. Id. at 1405.
246. Id. at 1404.
247. Id. at 1405 (Roney, J., dissenting).
Circuit decisions, their postsentencing corollary, motions for reduction of sentence under Federal Rule of Criminal Procedure 35(b), have been. In 1997 the Eleventh Circuit strictly construed these provisions as they relate to each other. In United States v. Alvarez, the Eleventh Circuit stated, "U.S.S.G. [section] 5K1.1 and Rule 35(b) work in tandem to give the Government two opportunities to reward a defendant's substantial assistance in the investigation or prosecution of others. Section 5K1.1 addresses cooperation before sentencing while Rule 35(b) addresses cooperation after sentencing." The court concluded, "Rule 35(b) cannot be used to reflect substantial assistance rendered prior to sentencing ...."

This problem was remedied effective December 1, 1998, when Rule 35 was amended to add: "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance." Now the Eleventh Circuit is strictly construing the one-year deadline on filing the Rule 35 motion. In United States v. Orozco, the court held that for any information which a cooperating defendant knows either before sentencing or within one year of sentencing, the Government must file the Rule 35 motion within one year of the defendant's sentencing. The court held that if the Government fails to file the Rule 35 motion within the one-year time period, the district court loses jurisdiction to entertain a Rule 35 motion after that point. Thus, in those cases in which the defendant promptly proffers substantial information to the Government either before sentencing or within the year after sentencing, if the Government does not file the Rule 35 within one year of sentencing, the defendant is unable to obtain relief.

F. Chapter Six: Sentencing Procedures and Plea Agreements

1. U.S.S.G. Section 6A1.3: Resolution of Disputed Factors

The Federal Rules of Evidence do not apply at sentencing as long as the information the court relies on is "reliable." Thus, many critical guidelines decisions are based on hearsay evidence. For example, in Anderton the court held the district court properly relied on a state child

248. 115 F.3d 839 (11th Cir. 1997).
249. Id. at 842.
250. Id.
251. FED. R. CRIM. P. 35(b).
252. 160 F.3d 1309 (11th Cir. 1998).
253. Id. at 1316-17.
254. Id. at 1317.
abuse investigator's hearsay testimony in departing upward on the basis of sexual exploitation of the minor because the sentencing court had found this testimony credible and reliable.\textsuperscript{256} In \textit{Exarhos} the court held the district court erred in failing to consider reliable hearsay evidence showing that defendant stole other cars, which should have been included as relevant conduct under sections 2B6.1 and 2F1.1.\textsuperscript{257}

G. \textit{Chapter Seven: Violations of Probation and Supervised Release}

In \textit{United States v. Quinones},\textsuperscript{258} defendant was sentenced to prison and a subsequent term of supervised release. While serving his prison term, he pleaded guilty to another crime in a different federal district and was sentenced to terms of imprisonment and supervised release that were to run concurrently with the first sentence of imprisonment and supervised release. Upon release, defendant committed another offense. Both terms of supervised release were revoked, and defendant was sentenced to eighteen months in prison for each violation. The terms of imprisonment, however, were ordered to run consecutively for a total sentence of thirty-six months.\textsuperscript{259} The Eleventh Circuit held that 18 U.S.C. § 3584(a)\textsuperscript{260} gave the district court the discretion to impose consecutive terms of imprisonment upon revocation of two concurrent terms of supervised release.\textsuperscript{261}

III. CONCLUSION

In 1998 the Eleventh Circuit was faced with many issues of first impression concerning the sentencing guidelines. With the increased application of sentencing enhancements, criminal defense practitioners are likely to continue to litigate creative avenues for less severe sentences in 1999.

\begin{itemize}
\item \textsuperscript{256} 136 F.3d at 751. For additional discussion of \textit{Anderton}, see supra text accompanying notes 70-74.
\item \textsuperscript{257} 135 F.3d at 730. For additional discussion of \textit{Exarhos}, see supra text accompanying notes 12-14, 219-20.
\item \textsuperscript{258} 136 F.3d 1293 (11th Cir. 1998).
\item \textsuperscript{259} Id. at 1294.
\item \textsuperscript{260} 18 U.S.C.A. § 3584(a) (West Supp. 1998).
\item \textsuperscript{261} 136 F.3d at 1295.
\end{itemize}