

1st Circ. Ruling Widens Split Over Sentencing Enhancements

By **Sarah Sulkowski** (May 28, 2025)

White collar defense counsel know that the application of even a single sentencing enhancement under the U.S. sentencing guidelines can have a significant impact on a defendant's sentencing range, and thus their final sentence.[1] Accordingly, any change in the scope of a guideline enhancement can provide a crucial arrow in a defense attorney's quiver.



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On Feb. 13, the U.S. Court of Appeals for the First Circuit switched sides in a circuit split over just such an issue: namely, whether a role adjustment under Chapter 3 of the guidelines can be based on the reasonably foreseeable acts of co-conspirators or, instead, only on a defendant's own conduct.

This development, and the concern for appropriately individualized sentencing that animated it, echo U.S. Supreme Court Justice Ketanji Brown Jackson's call in March for the guidelines to treat similarly situated white collar defendants similarly.[2]

At issue in *U.S. v. Salvador-Gutierrez*[3] was whether the defendant, who pled guilty to Racketeer Influenced and Corrupt Organizations Act conspiracy, was subject to a two-point enhancement under Section 3B1.4 of the sentencing guidelines.

That section provides: "If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels."

The government and the U.S. Probation Office contended that, in the conspiracy context, Section 3B1.4's "upward adjustment may be determined based on a defendant reasonably foreseeing a co-conspirator's use of a minor in furtherance of the conspiracy." [4]

The government and the probation office based their interpretation on the First Circuit's 2001 decision in *U.S. v. Patrick*, [5] which held that a Section 3B1.4 enhancement could be premised on a Pinkerton-esque theory of liability derived from Section 1B1.3, [6] which includes acts of co-conspirators within the definition of relevant conduct unless another guideline dictates otherwise. Section 1B1.3 states that, "unless otherwise specified," sentencing adjustments would be based on the following:

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were —

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for

that offense, or in the course of attempting to avoid detection or responsibility for that offense.[7]

In short, under Section 1B1.3, an enhancement may generally be based on the reasonably foreseeable conduct of others engaged in a joint enterprise with the defendant. Thus, prior to the Salvador-Gutierrez decision, courts in the First Circuit could enhance a defendant's sentence by two levels if any of the defendant's co-conspirators foreseeably used a minor to commit the crime. U.S. Courts of Appeals for the Second, Eighth and Eleventh Circuits have reached the same conclusion.[8]

In Salvador-Gutierrez, however, the First Circuit, sitting en banc, overruled Patrick, holding that Section 3B1.4 applies only where the defendant himself used a minor in the commission of the crime.

In doing so, the First Circuit sided with the U.S. Courts of Appeals for the Third, Sixth, Seventh, Ninth and Tenth Circuits, which have reached similar holdings.[9]

These courts have reasoned that the enhancements set forth in Part B of Chapter Three of the guidelines, including Section 3B1.4, "are clearly intended to distinguish between participants in an offense based on whether their particular roles make them more or less culpable than others who commit the same offense," as articulated by the Third Circuit in its 2005 decision in U.S. v. Pojilenko.[10]

This circuit split has implications for other role enhancements set forth in Chapter 3, as well as for adjustments under other guidelines. For example, the Salvador-Gutierrez court noted similarly defendant-focused language in the commentary to Section 2K2.1, pertaining to unlawful possession of firearms and ammunition; and Section 2K2.6, pertaining to unlawful possession of body armor.[11]

Of particular interest to white collar defense counsel may be the implications for Section 3B1.3, "Abuse of Position of Trust or Use of Special Skill." This guideline, like those referenced in the Salvador-Gutierrez ruling, uses defendant-specific language: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels." [12]

And, indeed, at least two federal courts of appeals have held that a Section 3B1.3 enhancement cannot be based on a co-conspirator's status or conduct.[13] Salvador-Gutierrez and its ilk add further weight to this argument.

Other similarly worded guidelines susceptible to this argument include Section 2B1.1(b)(10), [14] which considers whether a defendant relocated or played a role in relocating a fraudulent scheme to a separate jurisdiction; Section 2B1.1(b)(17)(A), [15] which considers whether the defendant received more than \$1 million from a financial institution as a result of theft, embezzlement or fraud; and Section 2B4.1(b)(2)(A), which considers the same with regard to commercial bribery offenses.

In seeking to limit the application of these guidelines to a defendant's own conduct, counsel should emphasize the Sentencing Commission's intent to limit these enhancements to those defendants who are "generally ... viewed as more culpable." [16] Courts may also be receptive to a plain-language argument focusing on the use of the phrase "the defendant" in these guidelines, instead of the more common focus on "the offense." [17]

Finally, the depth of this circuit split, with three circuits on one side and now six on the other, may presage Supreme Court review in the not-too-distant future. White collar practitioners would do well to watch this space for further developments.

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[1] *United States v. McCormick*, 773 F.3d 357, 359 (1st Cir. 2014); see also, e.g., *United States v. Beltran*, 467 F. App'x 669, 670 (9th Cir. 2012) (observing that single enhancement "significantly increased the Guidelines range to which Beltran was exposed"); *United States v. Freeze*, 784 F App'x 203, 206 & n.6 (5th Cir. 2019) (noting 7.5-year difference between high end of sentencing range without enhancement and low end of range after single enhancement was applied); *United States v. Garcia-Juarez*, 421 F.3d 655, 659 (8th Cir. 2005) (holding error in applying single enhancement was not harmless, as it "would have significantly increased Garcia-Juarez's Guidelines range").

[2] See Luc Cohen, Karen Freifeld, and Chris Prentice, *US Supreme Court Justice Jackson Calls for Revisiting Sentencing Guidelines*, Reuters (Mar. 6, 2025), available at <https://www.reuters.com/legal/us-supreme-court-justice-jackson-calls-revisiting-sentencing-guidelines-2025-03-06/>.

[3] — F.4th —, 2025 WL 484961 (Feb. 13, 2025).

[4] *Id.* at *3 (quotation marks omitted).

[5] 248 F.3d 11 (1st Cir. 2001).

[6] "Pinkerton liability is a type of vicarious liability that allows members of a conspiracy to be held liable for reasonably foreseeable substantive offenses committed by coconspirators in furtherance of the conspiracy." *United States v. Woods*, 14 F.4th 544, 552 (6th Cir. 2021) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

[7] U.S.S.G. § 1B1.3(a).

[8] See *United States v. Lewis*, 386 F.3d 475, 480 (2d Cir. 2004) ("The [§ 3B1.4] sentencing enhancement may be imposed on co-conspirators who did not themselves use or attempt to use minors[, but] only if those co-conspirators could have reasonably foreseen that minors would be used by others in their conspiracy."); *United States v. Voegtlin*, 437 F.3d 741, 747 (8th Cir. 2006) ("Even though Sanders [the minor] interacted directly with Downs during the course of the conspiracy, the district court did not err by concluding that it was reasonably foreseeable to Voegtlin that Sanders would have done so."); *United States v. McClain*, 252 F.3d 1279, 1288 (11th Cir. 2001) ("If use of a minor in furtherance of the jointly undertaken criminal activity was not foreseeable to certain defendants, those defendants will not receive the two-level enhancement. Any defendants who could have reasonably foreseen the use of a minor, however, are culpable under the plain language of

sections 3B1.4 and 1B1.3(a)(1)(B).").

[9] See *United States v. Pojilenko*, 416 F.3d 243, (3d Cir. 2005) ("We hold that the Pinkerton principles of Section 1B1.3(a) should not be used in applying the use of a minor provisions of § 3B1.4."); *United States v. Butler*, 207 F.2d 839, 849 (6th Cir. 2000) ("The district court did not find that Retic directed, commanded, intimidated, counseled, trained, procured, recruited, or solicited Harden's participation in the bank robbery. . . . Accordingly, Retic's case is remanded to the district court for resentencing [without application of the § 3B1.4 enhancement]."); *United States v. Acosta*, 474 F.3d 999, 1003 (7th Cir. 2007) ("Since Acosta did not personally 'use' a minor in committing the offense, the district court's decision to apply this enhancement must be vacated."); *United States v. Parker*, 241 F.3d 1114, 1120 (9th Cir. 2001) ("We hold that a defendant's participation in an armed bank robbery with a minor does not warrant a sentence enhancement under § 3B1.4 in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery, beyond merely acting as his partner."); *United States v. Sutor*, 253 F.3d 1206, 1210 (10th Cir. 2001) ("Pursuant to the sentencing guidelines, the two-level § 3B1.4 increase is only applicable if a defendant directs, trains, or in some other way affirmatively engages the minor participant in the crime of conviction. The evidence, therefore, must demonstrate more than the simple fact that Sutor was involved in a conspiracy with the minors.").

[10] *Pojilenko*, 416 F.3d at 248; see also *Butler*, 207 F.3d at 848 (holding that, under the contrary reading, "if numerous adult defendants participated in a crime along with a minor, every single one of the adult defendants would be subject to the two-level enhancement, regardless of the roles they played in involving the minor in the crime. Such a result would ostensibly render the characterization of § 3B1.4 as a 'role in the offense' adjustment a misnomer"); *Acosta*, 474 F.3d at 1003 ("Pinkerton liability makes no sense in the context of the individualized enhancements set out in section 3B of the Guidelines, which seek to punish the particular behavior of individual members of a conspiracy."); *Parker*, 241 F.3d at 1121 ("If Congress meant to punish persons who committed an offense that in any way involved a minor, it would have provided so explicitly instead of employing the 'used or attempted to use' language.").

[11] 2025 WL 484961, at *12.

[12] U.S.S.G. § 3B1.3.

[13] See *United States v. Morris*, 286 F.3d 1291, 1295 (11th Cir. 2002) ("By their very nature, the role in the offense adjustments cannot be based upon the actions of co-conspirators.") (quotation marks omitted); *United States v. Moore*, 29 F.3d 175, 178 (4th Cir. 1994) ("Even if § 1B1.3 did extend to a co-conspirator's status, we would still hold that abuse of trust is not attributable to co-conspirators because the abuse of trust provision falls under an exception to § 1B1.3. Section 1B1.3 expressly provides that it does not apply to a guideline provision if otherwise specified by that provision. It is clear that § 3B1.3 specifies that abuse of trust enhancements be individualized, not based on the acts of co-conspirators.") (quotation marks and brackets omitted).

[14] "If (A) "the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials . . . increase by 2 levels."

[15] "If . . . the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the [theft, embezzlement, or fraud] offense,

increase by 2 levels."

[16] Moore, 29 F.3d at 179 (quotation marks omitted) (quoting U.S.S.G. § 3B1.3, cmt (Background); accord *Pojilenko*, 416 F.3d at 248 ("[T]he use of a minor enhancement must be based on an individualized determination of each defendant's culpability."); *Morris*, 286 F.3d at 1295-96 (same).

[17] See, e.g., *United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir, 2016) ("The plain language of the Guideline controls when it (1) is not ambiguous and (2) produces a result that is not absurd.") (quotation marks and brackets omitted); *United States v. Mingo*, 340 F.3d 112, 114 (2d Cir. 2003) ("Where, as here, the language of the Guidelines provision is plain, the plain language controls."); *United States v. Dotson*, 324 F.3d 256, 259 (4th Cir. 2003) (relying on the "plain language" of U.S.S.G. § 2G2.2(b)(5) in holding that, "[h]ad the Sentencing Commission intended to limit the scope of the enhancement to defendants who forwarded notices or advertisements, it could easily have done so by referring to the defendant in the text of the guideline" rather than focusing on the offense).