APPENDIX A

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DHEADRY LOYD POWELL, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2021 U.S. App. LEXIS 1165
No. 20-3085 and No. 20-3142
January 15, 2021, Filed

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}(D.C. No. 2:05-CR-20067-JWL-1). (D. Kan.).United States v. Dheadry Loyd Powell, 2020 U.S. Dist. LEXIS 70335 (D. Kan., Apr. 21, 2020)United States v. Dheadry Loyd Powell, 2020 U.S. Dist. LEXIS 113554, 2020 WL 3545651 (D. Kan., June 30, 2020)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee (20-3085): Jared S. Maag, Office of the United States Attorney, Topeka, KS.
DHEADRY LOYD POWELL, Defendant - Appellant (20-3085), Pro se, Oxford, WI.
For UNITED STATES OF AMERICA, Plaintiff - Appellee (20-3142): James A. Brown, Jared S. Maag, Office of the United States Attorney, Topeka, KS; Scott C. Rask, Office of the United States Attorney, Kansas City, KS.
DHEADRY LOYD POWELL, Defendant - Appellant (20-3142), Pro se, Oxford, WI.

Judges: Before LUCERO, BACHARACH, and MORITZ, Circuit Judges.

Opinion

Opinion by: Nancy L. Moritz

Opinion

ORDER AND JUDGMENT*

Dheadry Powell, proceeding pro se,1 appeals his 40-year sentence. For the reasons explained below, we affirm.

Background

In 2005, Powell pleaded guilty to one count of conspiracy to distribute and possession with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846 and one count of money laundering in violation of 18 U.S.C. § 1956(h). At Powell's initial sentencing, the district court determined the drug quantity attributable to Powell and applied various enhancements. Ultimately, the district court calculated a total offense level of 48. But because the United States Sentencing{2021 U.S. App. LEXIS 2} Guidelines (U.S.S.G. or Guidelines) cap offense levels at 43, the district court lowered Powell's total offense level to 43 for purposes of sentencing. *See* U.S.S.G. ch. 5, pt. A, cmt. n.2 ("An offense level of more than 43 is to be treated as an offense level of 43."). This total offense level combined with Powell's criminal history resulted in an advisory Guidelines

sentence of life imprisonment. Accordingly, the district court sentenced Powell to life imprisonment for the conspiracy-to-distribute count and 20 years for the money-laundering count, both sentences to run concurrently.

In July 2017, Powell filed a motion for a reduced sentence. Specifically, he argued he was eligible for a reduction under 18 U.S.C. § 3582(c)(2) because certain amendments to the Guidelines lowered his base offense level. In response, the district court recalculated the drug quantity attributable to Powell and determined that he had a lower base offense level under the amended Guidelines. But, after applying the same enhancements from the original sentence, Powell's total offense level remained above 43. Because Powell's sentencing range remained unchanged, the district court concluded that Powell was ineligible for a reduction under § 3582(c)(2) and denied{2021 U.S. App. LEXIS 3} his motion.

Powell appealed. *See United States v. Powell*, 739 Fed. App'x 511 (10th Cir. 2018) (unpublished), *cert. denied*, 139 S. Ct. 1462, 203 L. Ed. 2d 699 (2019). He argued that the district court improperly calculated his total offense level by grouping his two convictions. *Id.* at 512. We acknowledged that each conviction had a different total offense level. *Id.* (noting total offense level for Powell's drug conviction was 42 and total offense level for his money-laundering conviction was 44). But we explained that the district court properly grouped the two convictions and correctly calculated the total offense level. *Id.* However, although we approved this method of calculating Powell's offense level, we determined that the district court should have dismissed Powell's motion seeking a reduced sentence for lack of jurisdiction. *Id.* Accordingly, we vacated the district court's order and remanded with instructions to dismiss for lack of jurisdiction. *Id.* at 512-13.

Following that appeal, in April 2019, Powell filed another motion in the district court, this one seeking to be resentenced under the Fair Sentencing Act of 2010 and the First Step Act of 2018. Powell argued that he was eligible for resentencing under these acts because they retroactively increased the threshold quantity of drugs necessary to{2021 U.S. App. LEXIS 4} convict a defendant under § 841(b)(1)(A)-Powell's statute of conviction for his drug conviction-and retroactively changed the statutory penalties for such convictions. Powell also repeated his argument that the district court improperly grouped his two convictions together when calculating his sentence under the Guidelines.

The district court agreed that Powell was eligible for resentencing under these acts, and it noted that Powell's "advisory [G]uidelines range remain[ed] life imprisonment." R. vol. 1, 347. But it concluded that Powell's attributable drug quantity corresponded to a new statutory maximum of 40 years imprisonment. *See* 21 U.S.C. § 841(b)(1)(B) (providing statutory maximum sentence). The district court also rejected Powell's argument about improper grouping, stating that "the Tenth Circuit has held that the sentencing judge in this case correctly calculated [Powell]'s sentence and that the [presentence investigation report] correctly calculated [his] advisory [G]uidelines range." App. vol. 1, 348. Accordingly, the district court resentenced Powell to the new statutory maximum of 40 years. Powell then filed Appeal No. 20-3085.

But in April 2020, before briefing in Appeal No. 20-3085, Powell filed another motion{2021 U.S. App. LEXIS 5} in the district court, this one seeking a reduced sentence. This motion again reiterated the same argument this court addressed and rejected in Powell's prior appeal-that the district court improperly calculated his total offense level by grouping the offenses. *See Powell*, 739 F. App'x at 512. Citing the law-of-the-case doctrine and noting our previous decision, the district court declined to reconsider Powell's arguments and denied his motion. Powell then filed another appeal, Appeal No. 20-3142.

Accordingly, Appeal No. 20-3085 and Appeal No. 20-3142 are now pending. Because both appeals concern the same sentence, we address both here.2

Analysis

I. Appeal No. 20-3085: Powell's Motion Seeking To Be Resentenced Under the First Step Act and Fair Sentencing Act

In appealing the district court's order on his April 2019 motion seeking to be resentenced, Powell argues that "[t]he district court abused it[]s discretion[] when [it] . . . used a statute . . . as a substitute for sentencing, instead of the [Guidelines]." Case No. 20-3085, Aplt. Br. 3. Liberally construed, we interpret this as an argument that the district court erred by failing to calculate his Guidelines range upon resentencing. *Cf. United States v. Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020) (stating that district{2021 U.S. App. LEXIS 6} court "must calculate the defendant's Guideline range" when revising sentence under First Step Act). But contrary to Powell's assertion, the district court did consider the Guidelines when determining Powell's sentence: It specifically stated that although Powell's "*advisory [G]uidelines range remains life imprisonment*," it was resentencing Powell to 40 years in accordance with the First Step Act and the 40-year statutory maximum newly applicable under that act. R. vol. 1, 347 (emphasis added). Thus, we do not agree that the district court failed to consider the guidelines.

And to the extent that Powell challenges the district court's omission of any explanation regarding its recalculation of the Guidelines range, we would find any such error harmless. *See United States v. Montgomery*, 439 F.3d 1260, 1263 (10th Cir. 2006) ("Harmless error is that which 'did not affect the district court's selection of the sentence imposed.'" (quoting *United States v. Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. 2005))). When resentencing under the First Step Act, the court applies the version of the Guidelines in place at the time of the original sentencing. *See Brown*, 974 F.3d at 1144. Under those Guidelines, there would be no change in Powell's base offense level. *See* U.S.S.G. § 2D1.1(a)(2) (2006) (setting base offense level for convictions under § 841(b)(1)(A)-(C) at 38). And Powell does not suggest{2021 U.S. App. LEXIS 7} that there could or would be any change in the enhancements leading to his ultimate offense level of 43 and further concedes his criminal-history category of IV. Accordingly, the district court properly concluded that the Guideline range remained life imprisonment, and any error in failing to explain that calculation is harmless.3

Because Powell makes no other challenge to the district court's order on Powell's April 2019 motion seeking to be resentenced under the Fair Sentencing Act and First Step Act, we affirm that order.

II. Appeal No. 20-3142: Powell's Motion Seeking a Reduced Sentence

Next, Powell argues-as he did in his April 2020 motion seeking a reduced sentence-that the district court miscalculated his total offense level. But, as the district court observed, Powell's position restates the same miscalculation arguments that we rejected in Powell's earlier appeal. *See Powell*, 739 F. App'x at 512. And the district court declined to reconsider these same arguments according to the law-of-the-case doctrine. Nevertheless, Powell contends that the district court should have applied an exception to the law-of-the-case doctrine and reached the merits of his arguments. *See United States v. Trent*, 884 F.3d 985, 995 (10th Cir. 2018) (discussing exceptions). Specifically,{2021 U.S. App. LEXIS 8} he argues that the allegedly errant offense calculation "worked a manifest injustice" and that "controlling authority has subsequently made a contrary decision of the [applicable] [l]aw." Case No. 20-3142, Aplt. Br. 3; *see also Trent*, 884 F.3d at 995.

Yet Powell offers no support for his conclusory assertion of manifest injustice. For example, he doesn't explain why it was unjust for the district court to reduce his life sentence to the mandatory maximum, nor does he explain how he could be entitled to a different sentence. Further, Powell fails to cite any authority-subsequent, controlling, or otherwise-that undermines our prior conclusion that

the district court correctly calculated Powell's offense level. We therefore determine that neither of Powell's purported exceptions apply and that the district court properly applied the law-of-the-case doctrine to deny Powell's motion for resentencing.

Conclusion

We affirm the district court's orders granting in part and denying in part Powell's April 2019 motion seeking to be resentenced under the Fair Sentencing Act and First Step Act and denying Powell's April 2020 motion seeking a reduced sentence. We also dismiss as moot his pending motions to add exhibits to{2021 U.S. App. LEXIS 9} his opening brief and to expedite his appeals.

Entered for the Court

Nancy L. Moritz

Circuit Judge

Footnotes

*

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

1

We liberally construe Powell's pro se filings. But we will not act as his advocate by, for example, formulating possible arguments or combing the record for support. *See Garrett v. Selby*, 425 F.3d 836, 840 (10th Cir. 2005).

2

Powell's notice of appeal in Appeal No. 20-3142 indicated his intent to also appeal the denial of two additional motions: a motion to recuse the district-court judge and a motion to appoint counsel. Notwithstanding Powell's notice, his opening briefs in both appeals address only his sentencing motions. Accordingly, we limit our consideration to those issues. *See Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) (applying to pro se litigant rule that "[a]rguments not clearly made in a party's opening brief are deemed waived").

3

When determining that Powell was eligible for resentencing, the district court resolved a dispute as to "whether a defendant's eligibility for a reduction [under the Fair Sentencing Act and First Step Act] is determined by a defendant's statute[ ]of[ ]conviction or whether it is determined by a defendant's actual conduct." R. vol. 1, 345. The court concluded that eligibility is determined by the statute of conviction. In doing so, it explained that even though the Tenth Circuit has not explicitly addressed this issue, "[e]very Circuit Court of Appeals that has addressed this issue . . . has adopted [the] statute-of-conviction theory." *Id.* Because Powell does not challenge the district court's reasoning on this issue, we express no opinion as to whether the district court properly adopted the statute-of-conviction theory.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

United States of America,

Plaintiff,

v. **Case No. 05-20067-01-JWL**

Dheadry Loyd Powell,

Defendant.

MEMORANDUM & ORDER

In 2007, defendant Dheadry Loyd Powell was convicted of conspiracy to distribute and possess with intent to distribute more than 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846, and of conspiracy to launder money, in violation of 18 U.S.C. § 1956(h). At that time, § 841(b)(1)(A) applied to an offense involving 50 grams or more of crack cocaine and permitted a maximum sentence of life. At sentencing, the district court,[1] adopting the findings in the Presentence Investigation Report (PSIR), attributed at least 1.5 kilograms of crack cocaine to Mr. Powell. After determining the applicable drug quantity and applying various enhancements, the court calculated a total offense level of 48, which was capped at 43 under the guidelines. Combined with a criminal history score of IV, Mr. Powell's guidelines range was life imprisonment. The court sentenced Mr. Powell to life imprisonment on Count I with a 20-year concurrent sentence on Count II.

[1] This case was recently reassigned to the undersigned judge.

In April 2018, the district court, in connection with Mr. Powell's motion to reduce his sentence based on Amendment 782, made supplemental calculations of drug quantity based on information contained in the PSIR. Specifically, the district court found that the quantity of crack cocaine attributable to Mr. Powell was 2.825 kilograms. The court then recalculated Mr. Powell's guidelines range using the amended guidelines and applying the same enhancements it applied at Mr. Powell's original sentencing. This calculation resulted in a total offense level of 43 and an advisory guidelines range of life imprisonment. The court, then, concluded that Mr. Powell was not eligible for a sentence reduction.

This matter is now before the court on two related motions filed by Mr. Powell—a motion for a sentence reduction under the First Step Act (doc. 181); and a motion for emergency release in compliance with the First Step Act (doc. 198). As will be explained, Mr. Powell's motion for a sentence reduction is granted in part and denied in part and his motion for emergency release is moot.[2]

Sentence Reduction

In 2010, Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). Section 2 amended § 841(b)(1)(A) (Mr. Powell's statute of conviction) by increasing

[2] In his motion for emergency release, Mr. Powell asserts in summary fashion that his immediate release under the First Step Act is also required because of his age, his desire to spend time with his family and the danger imposed by COVID-19. In reply to the government's response to this motion, Mr. Powell indicates his desire to withdraw the motion such that it should be deemed moot. The court, then, moots the motion. Nonetheless, to the extent Mr. Powell desires to seek compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), Mr. Powell must first exhaust his administrative remedies with the BOP. *See* First Step Act, § 603(b)(1); 18 U.S.C. § 3582(c)(1)(A).

the 50-gram threshold to 280 grams, and it similarly amended § 841(b)(1)(B)(iii) by increasing the threshold quantity from five to 28 grams. *See* 124 Stat. at 2372. The First Step Act of 2018 makes the provisions of the Fair Sentencing Act of 2010 retroactive. Pub. L. No. 115-391, 132 Stat. 5194 (2018). Section 404 of the First Step Act states in pertinent part:

> (a) DEFINITION OF COVERED OFFENSE. In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
> (b) DEFENDANTS PREVIOUSLY SENTENCED. A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

Id. § 404. Under the First Step Act, a defendant who committed a violation before August 3, 2010, and whose exposure at sentencing would have been different under Section 2 of the Fair Sentencing Act's revised quantity thresholds for cocaine base may be entitled to a reduced sentence based on the lower statutory sentencing ranges of the Fair Sentencing Act. *Id.*; *United States v. Martinez*, 777 Fed. Appx. 946 (10th Cir. Sept. 19, 2019). Relief under the First Step Act is discretionary. First Step Act, § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

As just noted, section 2 of the Fair Sentencing Act amended 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B) by increasing the 50-gram threshold to 280 grams, and amended § 841(b)(1)(B)(iii) by increasing the threshold quantity from five to 28 grams. *Dorsey v. United States*, 567 U.S. 260, 269 (2012); Pub. L. No. 111-220 § 2(a), 124 Stat. 2372, 2372. Mr. Powell, thus, contends that he is eligible for resentencing because his offense was "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair

Sentencing Act of 2010." Noting that he pled guilty to an offense involving 50 grams or more of crack cocaine, Mr. Powell maintains that, with the Fair Sentencing Act applied retroactively, he would have been subject only to the more relaxed penalty provisions of § 841(b)(1)(B), with its new threshold of twenty-eight grams and its statutory maximum of 40 years. *See* 124 Stat. at 2372. The government opposes the motion and contends that Mr. Powell is ineligible for resentencing. The government's argument turns on the fact that the sentencing judge attributed 2.8 kilograms of crack cocaine to Mr. Powell such that Mr. Powell still meets the threshold quantity for a violation of § 841(b)(1)(A) and is still subject to a statutory maximum of life. The parties' dispute, then, turns on whether a defendant's eligibility for a reduction is determined by a defendant's statute-of-conviction or whether it is determined by a defendant's actual conduct.

Every Circuit Court of Appeals that has addressed this issue (and the vast majority of district courts to do so) has adopted Mr. Powell's statute-of-conviction theory.[3] *See United States v. Wirsing*, 943 F.3d 175 (4th Cir. 2019); *United States v. McDonald*, 944 F.3d 769 (8th Cir. 2019); *United States v. Jackson*, 945 F.3d 315 (5th Cir. 2019); *United States v. Jones*, 2019 WL 4942365, at *3 (N.D. Ill. Oct. 8, 2019) (collecting cases and joining the "super majority" of district courts to conclude that the statute of conviction, not the defendant's actual conduct, controls eligibility under the FSA). In a detailed statutory analysis, the Fourth Circuit in *Wirsing* framed the issue:

> The statute only authorizes a court "that imposed a sentence for a covered offense" to reduce a defendant's sentence. First Step Act § 404(b), 132 Stat. at 5222. Accordingly, eligibility turns on the proper interpretation of a "covered offense."

[3] To be fair, this question was arguably more of an open question at the time the government filed its response brief in May 2019.

> A "covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010." *Id.* § 404(a), 132 Stat. at 5222 (citation omitted). In Defendant's view, the phrase "the statutory penalties for which" refers to "a Federal criminal statute." See Reply Br. at 4. The result of that interpretation would be that any inmate serving a sentence for pre-August 3, 2010 violations of 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii)—both of which were modified by Section 2 of the Fair Sentencing Act, see Fair Sentencing Act § 2(a), 124 Stat. at 2372—is serving "a sentence for a covered offense" and may seek a sentence reduction under the First Step Act. First Step Act § 404(b), 132 Stat. at 5222. We agree that this is the correct interpretation of the statute.

Wirsing, 943 F.3d at 185. In adopting the defendant's argument, the Circuit rejected the government's argument that "the statutory penalties for which" refers to "a violation" and that a violation, in turn, is determined by reference to the offense conduct attributable to the count at issue, rather than by reference to the conviction.

As explained by the Fourth Circuit in *Wirsing*, the "most natural reading" of the First Step Act's definition of "covered offense" is that "the statutory penalties for which were modified by" language refers to "a Federal criminal statute" rather than "a violation of a Federal criminal statute." *Id.* The Circuit relied on the "general rule of statutory interpretation . . . that modifiers attach to the closest noun; courts should not interpret statutes in such a way as to 'divorce a noun from the modifier next to it without some extraordinary reason.'" *Id.* The Circuit easily concluded that because "Federal criminal statute" appears closer to "statutory penalties for which" than does "violation," it is more natural to attach "penalties" to "statute" than to "violation." *Id.* Finally, the Fourth Circuit held "the rule of the last antecedent" was not overcome by other indicia of meaning and, moreover, that the legislative history supported the interpretation advocated by the defendant. *Id.* at 185-86. Ultimately, the Fourth Circuit adopted the "simple" statute-of-conviction theory over the "complicated and eligibility-limiting determination" urged by the government. *Id.* at 186.

The Fifth and Eighth Circuit have followed *Wirsing* and have held that the penalties clause modifies "Federal criminal statute" rather than "violation" such that whether an offense is "covered" depends only on the statute under which the defendant was convicted. *See Jackson*, 945 F.3d at 320; *McDonald*, 944 F.3d at 772 ("The First Step Act applies to offenses, not conduct . . . and it is McDonald's statute of conviction that determines his eligibility for relief."). The court believes that the Tenth Circuit, when faced with this question, will follow the lead of *Wirsing*. In fact, the *Wirsing* panel noted in its opinion that the Tenth Circuit "implicity" utilized the statute-of-conviction theory in *United States v. Martinez*, 777 Fed. Appx. 946 (10th Cir. Sept. 19, 2019). In *Martinez*, the Tenth Circuit held that the district court lacked jurisdiction to modify the defendant's sentence under the First Step Act because the defendant's statute of conviction, 21 U.S.C. § 841(b)(1)(C), was not modified by the Fair Sentencing Act. *Id.* at 947.

In sum, section 2 of the First Step Act modified the statutory penalties for the statute that Mr. Powell violated, and he committed the violation before August 3, 2010. Therefore, Mr. Powell's violation is a "covered offense" under the First Step Act. He is eligible for a reduction and his motion is granted to that extent. Under § 841(b)(1)(B), Mr. Powell is now subject to a statutory maximum of 40 years rather than life. Because his advisory guidelines range remains life imprisonment, the court will resentence Mr. Powell to the statutory maximum of 40 years. His motion, then, is denied to the extent he seeks a lower sentence. In that regard, Mr. Powell suggests in his reply brief that his money laundering conviction controls such that he is subject only to a statutory maximum of 20 years.[4] .

[4] In addition to his reply brief, Mr. Powell has sent a letter to the court reiterating his request for relief under the First Step Act. That letter has been filed as a supplemental reply.

Although the nature of his argument is not entirely clear, Mr. Powell appears to argue that the PSIR deemed the money laundering count as the "controlling" count under U.S.S.G. § 2S1.1 and, accordingly, that count also controls for sentencing purposes. But the fact that the PSIR appropriately grouped the two counts together—and determined that § 2S1.1 produced the highest offense level—for purposes of determining the base offense level under the guidelines does not mean that the drug count has no bearing on Mr. Powell's sentence or that § 841(b)(1)(A) somehow disappeared from the analysis entirely. To the extent Mr. Powell contends that § 841(b)(1)(A) is entirely absent from the PSIR, that is clearly not accurate. See PSIR p. 1, p. 23 ¶ 124. Moreover, the Tenth Circuit has held that the sentencing judge in this case correctly calculated Mr. Powell's sentence and that the PSIR correctly calculated Mr. Powell's advisory guidelines range. *United States v. Powell*, 739 Fed. Appx. 511 (10th Cir. Oct. 15, 2018). Those issues, then, cannot be revisited.

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. Powell's motion for a sentence reduction under the First Step Act (doc. 181) is **granted in part and denied in part** and Mr. Powell's motion for emergency release in compliance with the First Step Act (doc. 198) is **moot.**

IT IS FURTHER ORDERED BY THE COURT THAT Mr. Powell's sentence is reduced to the statutory maximum of 480 months. All other provisions of the judgment dated May 8, 2007 shall remain in effect.

IT IS SO ORDERED.

Dated this 21st day of April, 2020, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

APPENDIX C

transmission, or transporting or transferring property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956 or § 1957.

"*Sexual exploitation of a minor*" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

2. **Application of Subsection (a)(1).—**

(A) **Multiple Underlying Offenses.**—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) **Defendants Accountable for Underlying Offense.**—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) **Application of Chapter Three Adjustments.**—Notwithstanding §1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (*i.e.*, the laundering of criminally derived funds) and not on the underlying

offense from which the laundered funds were derived.

3. **Application of Subsection (a)(2).—**

(A) **In General.**—Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under §1B1.3(a)(1)(A)), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) **Commingled Funds.**—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

(C) **Non-Applicability of Enhancement.**—Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957.

4. **Enhancement for Business of Laundering Funds.—**