Giving Judge Tjoflat's Deference Analysis Its Due

JONATHAN D. COLAN*

I. INTRODUCTION

In *United States v. Williams*, Judge Gerald Bard Tjoflat sought to clarify the meaning of 18 U.S.C. § 3742(e)'s "due deference" standard and to fix, what he considered to be, the Eleventh Circuit's inconsistent application of this provision in federal criminal sentencing appeals.[1] Judge Tjoflat's mission failed. A review of the Eleventh Circuit's decisions applying § 3742(e), in the decade since Judge Tjoflat offered his analysis of the provision, shows that his approach to the statute's "due deference" standard has not been embraced by the circuit. Few subsequent cases have acknowledged his *Williams* analysis, and even fewer have applied it.[2] Judge Tjoflat considered the Eleventh Circuit's application of § 3742(e) to be "muddled,"[3] and more than ten years after his opinion, it is difficult to see any more clarity around § 3742(e). And yet, regardless of whether Judge Tjoflat's analysis has been embraced as a model for Eleventh Circuit criminal sentencing review, his analysis of *why* different levels of deference are due to district court decisions is

* Jonathan D. Colan is an Assistant U.S. Attorney in the Appellate Division of the United States Attorney's Office for the Southern District of Florida and an Adjunct Professor of Appellate Law at the University of Miami School of Law. The opinions expressed herein are the author's alone and do not reflect the views of the United States Attorney's Office, the United States Department of Justice, or the University of Miami School of Law.

1. *See generally* United States v. Williams, 340 F.3d 1231 (11th Cir. 2003).
2. *See infra* Part IV.
3. *Williams*, 340 F.3d at 1235.

worth the attention of those seeking to better understand and practice appellate law.

II. Federal Criminal Sentencing Appeals and 18 U.S.C. § 3742(e)

Section 3742 of Title 18 governs appellate review of federal criminal sentences. Among other things, it allows both the convicted defendant and the government to appeal sentences "imposed in violation of law" or "imposed as a result of an incorrect application of the sentencing guidelines."[4] Section 3742(e) provides that in determining whether a sentence was imposed in violation of law or due to an incorrect application of sentencing guidelines,

> [t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and . . . *shall give due deference to the district court's application of the guidelines to the facts*.[5]

Interestingly, Congress amended § 3742(e) to provide a *de novo* standard of review for applications of the guidelines to the facts in certain cases involving departures from the calculated guideline range.[6] These amendments left in place the general "due deference" standard with respect to other applications of the guidelines to the facts.[7] If in one category of appeals the appellate court is to "give due deference to the district court's application of the guidelines to the facts," but in other categories of appeals the appellate court is to "review de novo the district court's application of the guidelines to the facts," then Congress must have meant for the due deference standard to mean something dis-

4. 18 U.S.C. § 3742(a)(1)–(2), (b)(1)–(2) (2012). *See generally* U.S. Sentencing Guidelines Manual (2014) [hereinafter "guidelines" or "U.S.S.G."].

5. 18 U.S.C. § 3742(e) (emphasis added).

6. In the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter "PROTECT Act"], Congress amended § 3742(e) to provide a different standard of review for applications of the guidelines to the facts in cases that involved departures from the calculated guideline range. Thus, under the PROTECT Act's amendments to § 3742(e), the general "due deference" standard for applications of the guidelines to the facts still applies, "except with respect to determinations under subsection (3)(A) or (3)(B)." 18 U.S.C. § 3742(e) ("With respect to determinations under subsection (3)(A) [departures where the district court 'failed to provide the written statement of reasons'] or (3)(B) [departures based on suspect factors], the court of appeals shall review de novo the district court's application of the guidelines to the facts."). For a discussion regarding the extent to which appeals arguing that "the sentence departs to an unreasonable degree from the applicable guidelines range," 18 U.S.C. § 3742(e)(3)(C), have survived recent developments in federal sentencing review, see discussion *infra* notes 127–31 and accompanying text.

7. *See supra* note 6.

tinct from *de novo* review.[8] The problem that Judge Tjoflat noted in *Williams* is that the Eleventh Circuit did not seem to consistently decide what amount of deference was due. More than a decade later, the Eleventh Circuit is still troubled by this question.

Although, in the meantime, federal criminal sentencing has undergone a revolution, beginning with the United States Supreme Court's decision in *Apprendi v. New Jersey*,[9] continuing through *United States v. Booker*,[10] and resolving under *Gall v. United States*[11] and *Rita v. United States*,[12] the relevant portion of § 3742(e) has not been affected. In *Booker*, the Supreme Court held that the guidelines must have only an advisory role in a district judge's ultimate sentencing decision,[13] in order not to render the guidelines unconstitutional under *Apprendi*'s holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[14] Thus, a district court must first calculate a convicted defendant's *advisory* guideline sentencing range, and then exercise its discretion to decide what sentence, within a defendant's statutory minimum and mandatory range, is appropriate pursuant to the sentencing factors set forth in 18 U.S.C. § 3553(a).[15] The Supreme Court, in *Booker*, instructed that "appellate courts [are then] to determine whether the sentence [imposed] 'is unreasonable' with regard to [the factors set forth in] § 3553(a),"[16] which include a requirement that the sentencing court "consult [the] Guidelines and take them into account when sentencing."[17]

The appellate court's review of the district court's sentence is thus, itself, a two-step process, as explained in the subsequent case of *Gall v. United States*.[18]

> [F]irst, the appellate court "must . . . ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately

8. *See* 18 U.S.C. § 3742(e); *see also supra* notes 6–7 and accompanying text.
9. *See generally* 530 U.S. 466 (2000).
10. *See generally* 543 U.S. 220 (2005).
11. *See generally* 552 U.S. 38 (2007).
12. *See generally* 551 U.S. 338 (2007).
13. *See Booker*, 543 U.S. at 245.
14. *Id.* at 231 (citing *Apprendi*, 530 U.S. at 490).
15. *See id.* at 245 (holding that district courts are to "consider Guidelines ranges," but then "tailor the sentence in light of other statutory concerns," pursuant to 18 U.S.C. § 3553(a)).
16. *Id.* at 261.
17. *Id.* at 264 (citing 18 U.S.C. § 3553(a)(3)).
18. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

> explain the chosen sentence—including an explanation for any deviation from the Guidelines range."
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> . . . .
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> [Second, a]fter an appellate court has determined that "the district court's sentencing decision is procedurally sound," *Gall* directs that "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[19]

Although the Supreme Court in *Booker* referred to its "[e]xcision of § 3742(e),"[20] it is clear in context and from subsequent treatment, by the Supreme Court and the Eleventh Circuit, that § 3742(e)'s standards for reviewing initial sentencing decisions still apply. *Booker* only excised those portions of the statute in conflict with its holding that the ultimate sentence imposed by the district court, after calculating and consulting the guideline range, was to be reviewed for reasonableness under an abuse of discretion standard.[21]

For our purposes, what is significant is that in the course of going through this process, "[a]lthough the Sentencing Guidelines are no longer mandatory,"[22] the district court "must continue to consult the provisions of the Sentencing Guidelines"[23] and "calculate *correctly* the sentencing range prescribed by the Guidelines."[24] The appellate court's first step in reviewing the procedural aspect of the district court's sentencing decision includes a review of whether the district court erred in calculating the defendant's advisory guideline range.[25] Section 3742(e) governs the standards of review the appellate courts are required to use in examining the district court's guideline calculations.[26] This remains true even after the *Apprendi/Booker/Gall/Rita* sentencing reforms. As Justice John Paul Stevens explained,

> *Booker* excised the portion of § 3742(e) that directed courts of appeals to apply the *de novo* standard. Critically, we did not touch the

19. United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008) (quoting *Gall*, 552 U.S. at 51).

20. *Booker*, 543 U.S. at 260.

21. *See id.* at 260–61; *see also Gall*, 552 U.S. at 51.

22. United States v. Martinez, 584 F.3d 1022, 1025 (11th Cir. 2009).

23. United States v. Hamaker, 455 F.3d 1316, 1336 (11th Cir. 2006) (citing United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005)).

24. *Id.* (citing *Crawford*, 407 F.3d at 1178).

25. *See* United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008) ("The first step—aimed at addressing 'procedural' errors—highlights the continued importance of the Guidelines, and the *Booker* Court's intention that the 'continued use of the Guidelines in an advisory fashion would further the purposes of Congress in creating the sentencing system to be honest, fair, and rational.'") (quoting United States v. Talley, 431 F.3d 784, 787 (11th Cir. 2005)).

26. 18 U.S.C. § 3742(e) (2012).

> portions of § 3742(e) requiring appellate courts to "give due regard to the opportunity of the district court to judge the credibility of the witnesses," to "accept the findings of fact of the district court unless they are clearly erroneous," and to "give due deference to the district court's application of the guidelines to the facts."[27]

If the federal appellate courts are still required to determine whether the district courts procedurally erred by "failing to calculate (or improperly calculating) the Guidelines range,"[28] then § 3742(e)'s requirement that the appellate courts "give due deference to the district court's application of the guidelines to the facts"[29] must be applied as well. Judge Tjoflat's *Williams* decision accused the Eleventh Circuit of failing to apply the "due deference" provision consistently and offered a framework for its consistent application in future cases.

III. THE *WILLIAMS* DECISION

In *Williams*, the defendant pled guilty to conspiracy to commit an armored car robbery, attempt to commit an armored car robbery, and discharging a firearm in connection with the armored car robbery.[30] Williams and his co-defendant had driven up to an armored car, while its two drivers were restocking the money in an ATM, and began shooting at them.[31] When the two drivers returned fire, Williams and his co-defendant fled without completing the robbery.[32] The matter at issue in *Williams* was whether the conspiracy to commit robbery and the attempted robbery offenses should have been grouped, pursuant to U.S.S.G. Chapter 3, Part D,[33] for the purposes of determining Williams's guideline offense level or whether they should have been considered separately.[34] If his offenses were grouped and his guideline offense level determined pursuant to U.S.S.G. § 3D1.3 and § 3D1.4,[35] Williams's ultimate guideline imprisonment range would have been lower than if his offenses were not grouped.[36] Prior to Williams's sentencing in the district court, the United States Probation Office recommended

27. Rita v. United States, 551 U.S. 338, 361–62 (2007) (Stevens, J., concurring) (citing United States v. Booker, 543 U.S. 220, 261 (2005)). *See also Pugh*, 515 F.3d at 1188–89 (citing Justice Stevens's recognition of the continuity of appellate review under the new *Booker* reasonableness standard).

28. Gall v. United States, 552 U.S. 38, 51 (2007).

29. 18 U.S.C. § 3742(e).

30. United States v. Williams, 340 F.3d 1231, 1232–33 (11th Cir. 2003).

31. *Id.* at 1232.

32. *Id.* at 1233.

33. U.S.S.G. ch. 3, pt. D (2014).

34. *Williams*, 340 F.3d at 1233–34.

35. U.S.S.G. §§ 3D1.3 to 3D1.4.

36. *Williams*, 340 F.3d at 1234.

that the robbery conspiracy and attempted robbery offenses not be grouped, on the grounds that the two armored car drivers constituted separate victims.[37] Section 3D1.2 provided, in pertinent part, that "counts involving substantially the same harm shall be grouped together into a single Group":

> (a) When counts involve the same victim and the same act or transaction.
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.[38]

At sentencing, the district court denied Williams's objection to his offenses not being grouped, without explanation, and calculated a higher guideline imprisonment range than it would have if the offenses had been grouped.[39]

When Williams challenged the district court's calculation of his guideline imprisonment range on appeal, Judge Tjoflat, writing for the panel, noted that before the appellate court could address the substance of Williams's appeal, "it is first necessary to determine the appropriate standard of review."[40] He acknowledged that the Eleventh Circuit's prior precedent had appropriately applied the clear error standard to appellate review of factual findings by sentencing courts, but he stated that "[s]ection 3742's 'due deference' language has proven to be a source of great ambiguity within this circuit."[41] Judge Tjoflat considered the Eleventh Circuit's cases applying the "due deference" clause of 18 U.S.C. § 3742(e) to be, "to say the least, muddled."[42]

A. *Judge Tjoflat's Four Categories of Flawed Applications*

To prove that the Eleventh Circuit had "not implemented this provision in a wholly consistent manner," Judge Tjoflat's opinion categorized the four different ways the court had applied § 3742(e)'s due deference review of district courts' applications of the guidelines to sentencing facts.[43]

The first category of cases included those that simply ignored § 3742(e)'s due deference provision.[44] Judge Tjoflat cited examples of cases that treated questions regarding whether a particular guideline

37. *Id.*
38. U.S.S.G. § 3D1.2(a)–(b).
39. *Williams*, 340 F.3d at 1234.
40. *Id.*
41. *Id.* at 1234–35.
42. *Id.* at 1235.
43. *Id.* at 1235–37.
44. *See id.* at 1235.

applied to a particular set of facts as a question of law,[45] or as mixed questions of fact and law,[46] for which *de novo* review was appropriate. But even if Judge Tjoflat agreed that those cases ultimately applied the correct level of deference to the district courts' determinations, he faulted those cases for the manner in which they explained the bases for their decisions:

> Even if, in these cases, § 3742's due deference standard was interpreted to mean *de novo* review, it is both confusing and improper for a court of appeals, or the parties appearing before it, to fail to cite this statute (or a case interpreting this statute) in a sentencing guidelines appeal.[47]

Judge Tjoflat's second category of misapplications of § 3742(e) involved cases where the court had actually cited the relevant language from the statute, but then "nevertheless proclaim[ed] in sweeping terms that 'we review the district court's application of the Sentencing Guidelines *de novo*.'"[48] Judge Tjoflat had earlier "reject[ed] the notion that Congress intended § 3742's due deference standard to leave undisturbed our general *de novo* standard for reviewing issues concerning the application of the law to particular sets of facts."[49] Noting that established precedent already required *de novo* review of the application of the law to a given set of facts, Judge Tjoflat stated that "[t]his 'due deference' language was undoubtedly intended to require, at least in some cases, greater respect for district court holdings than is traditionally accorded under *de novo* review."[50] Judge Tjoflat was concerned that although *de novo* review was appropriate for particular applications of the guidelines to sentencing facts, those cases should "not be read as establishing a general proposition that due deference *always* means *de novo*."[51]

The third category of cases misapplying § 3742(e) equated the due deference standard with the clearly erroneous standard.[52] Judge Tjoflat identified that "[a]t least one of our cases . . . [holds] '[that appellate courts] review for clear error the district judge's application of the guidelines to the facts of the case.'"[53] More significantly, Judge Tjoflat

45. *Id.* (citing United States v. Shriver, 967 F.2d 572, 574 (11th Cir. 1992)).

46. *Id.* (citing United States v. Scroggins, 880 F.2d 1204, 1206 n.5 (11th Cir. 1989)).

47. *Id.*

48. *Id.* at 1236 (citing United States v. Ortiz, 318 F.3d 1030, 1036 (11th Cir. 2003) (internal citation omitted); United States v. Hall, 312 F.3d 1250, 1260 n.12 (11th Cir. 2002); United States v. Singh, 291 F.3d 756, 763 (11th Cir. 2002); United States v. Smith, 231 F.3d 800, 806–07 (11th Cir. 2000)).

49. *Id.* at 1235–36.

50. *Id.* at 1236.

51. *Id.* (emphasis added).

52. *See id.*

53. *Id.* at 1236 (quoting United States v. Calderon, 127 F.3d 1314, 1339 (11th Cir. 1997)).

placed the court's en banc decision in *United States v. Rodriguez de Varon*[54] in this category.[55] In *Rodriguez de Varon*, the en banc Eleventh Circuit held that "a district court's determination of a defendant's role in the offense is a finding of fact to be reviewed only for clear error."[56] The court then described the issue as "a fundamentally factual determination entitled to due deference and not a legal conclusion subject to *de novo* review."[57] To Judge Tjoflat, the court's language in these cases "suggest[ed] that the clear error and due deference standards were interchangeable for reviewing a district court's findings of fact."[58] As he had already explained, with respect to cases equating due deference with *de novo* review, Judge Tjoflat insisted that due deference cannot "*always* mean[ ] clear error" review.[59] Such a conclusion would be "contrary to the clear text of § 3742, which states that although a district court's factual determinations should be reviewed under a 'clear error' standard, its application of the law should be given only 'due deference.' "[60] Judge Tjoflat was determined that the court recognize that "[t]his deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent."[61]

Finally, Judge Tjoflat placed in a fourth category cases that seemed to create a separate level of review between *de novo* and clear error review.[62] Many of the court's cases, he noted, "set forth [the] general *de novo* standard for reviewing mixed questions of fact and law, then cite § 3742's 'due deference' standard for mixed questions involving application of the sentencing guidelines."[63] Judge Tjoflat considered the language of these cases "misleading on several grounds."[64] First, "they obscure the fact that," for these purposes, "the guidelines *are* the law."[65] Second, Judge Tjoflat explained, these cases "can be interpreted in two different ways, both of which are erroneous."[66]

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54. 175 F.3d 930 (11th Cir. 1999) (en banc).

55. *Williams*, 340 F.3d at 1236.

56. *Rodriguez de Varon*, 175 F.3d at 937.

57. *Id.* at 938.

58. *Williams*, 340 F.3d at 1236.

59. *See id.* (emphasis added).

60. *Id.*

61. *Id.*

62. *Id.* at 1236–37.

63. *Id.* For examples of cases in this fourth category cited by Judge Tjoflat, see *United States v. Yount*, 960 F.2d 955, 956 (11th Cir. 1992); *United States v. Geffrard*, 87 F.3d 448, 452 (11th Cir. 1996); and *United States v. Singh*, 291 F.3d 756, 763 (11th Cir. 2002).

64. *Williams*, 340 F.3d at 1237.

65. *Id.* Of course, Judge Tjoflat means, here, that the guidelines are the authoritative text being applied to the facts, not that the guidelines are statutes. "[A]lthough the [Sentencing] Guidelines have the 'force of law,' they are not statutes." Mungiovi v. Chi. Hous. Auth., 98 F.3d 982, 984 (7th Cir. 1996) (cited in United States v. Gilbert, 640 F.3d 1293, 1307 (11th Cir. 2011)).

66. *Williams*, 340 F.3d at 1237.

Judge Tjoflat wrote that these cases could "mean that we review *de novo* all mixed questions of fact and law, including questions involving application of the guidelines, but in the course of doing so we somehow accord the district court's ruling some special degree of deference."[67] This is a logical impossibility, Judge Tjoflat noted, because "it is definitionally impossible to give deference of any sort to a decision being reviewed *de novo*."[68] "Moreover," he added, "none of these cases explains how a *de novo* review involving 'due deference' to the district court would differ from a *de novo* review not involving such deference."[69]

Alternatively, Judge Tjoflat wrote, "[t]he only other possible interpretation is that while in general we review mixed questions of fact and law *de novo*, we apply a special, independent 'due deference' standard when the mixed question involves application of the sentencing guidelines."[70] Promising to explain the proper application of § 3742(e)'s "due deference" standard, Judge Tjoflat rejected the fourth interpretation, writing, "we do not believe that Congress intended the phrase 'due deference' to establish a new, independent standard of review."[71]

B. *Judge Tjoflat's Solution: Determine What Deference Is Due*

Judge Tjoflat sought "to harmonize our precedents concerning the proper standard of review for a district court's application of the sentencing guidelines to particular factual scenarios"[72] with this solution: § 3742(e)'s requirement that the appellate court give "due deference" to the district court's decision required the appellate court to determine what deference is due.[73] "When reviewing decisions involving the application of certain types of guidelines," he wrote, "no deference will be due a district court's rulings, effectively leading to *de novo* review."[74] On the other hand, when reviewing other types of guideline decisions, "an appellate court should accord the trial court's decisions a high degree of deference, reviewing those rulings under the substantive equivalent of a 'clear error' standard."[75]

Judge Tjoflat chided the Eleventh Circuit for "overlook[ing]"

67. *Id.* (citing as an example of this interpretation United States v. Hall, 312 F.3d 1250, 1260 n.12 (11th Cir. 2002)).
68. *Id.* at 1237.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 1238.
73. *See id.* at 1238–39.
74. *Id.* at 1238.
75. *Id.*

Supreme Court decisions demonstrating the application of § 3742(e)'s due deference requirement.[76] For example, in *Koon v. United States*,[77] the Supreme Court had written:

> The deference that is due depends on the nature of the question presented. The district court may be owed no deference, for instance, when the claim on appeal is that it made some sort of mathematical error in applying the Guidelines; under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance.[78]

Judge Tjoflat noted the Supreme Court's application of *Koon*'s "sliding scale" approach in *Buford v. United States*,[79] where the Supreme Court explained:

> The legal question at issue is a minor, detailed, interstitial question of sentencing law . . . . That question is not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline . . . . Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances.[80]

Judge Tjoflat concluded that "*Buford* shows us how to distinguish between guidelines requiring significant deference and those requiring no deference."[81]

> The two most important factors are: (1) whether the ruling depends on a wide range of facts that are more readily available to the district court than to the court of appeals, due to the district court's first-hand experience trying the case, and (2) whether the issue primarily involves a legal interpretation of a guideline (suggesting *de novo* review), or instead involves the application of a clearly-established, well-understood legal standard or principle to a detailed fact pattern (indicating "clear error" review).[82]

He credited the Eleventh Circuit with getting it right in certain past cases, such as when it recognized that the "deference due will depend upon whether the determination is primarily factual or legal."[83]

Judge Tjoflat then spelled out his framework for applying § 3742(e)'s due deference requirement:

> Where a determination turns primarily on the evaluation of facts

76. *Id.*
77. 518 U.S. 81 (1996) (cited in *Williams*, 340 F.3d at 1238).
78. *Id.* at 98.
79. 532 U.S. 59 (2001) (cited in *Williams*, 340 F.3d at 1238).
80. *Id.* at 65.
81. *Williams*, 340 F.3d at 1238–39.
82. *Id.* at 1239.
83. *Id.* (quoting United States v. Malgoza, 2 F.3d 1107, 1109 (11th Cir. 1993)).

> (such as a witness's credibility, intonation, and demeanor) that are more accessible to the district court than to the court of appeals, we will defer to the district court's application of the law to those facts and apply "clear error" review. Similarly, a case involving application of a fairly well-understood legal standard to a complex factual scenario will be considered "primarily factual," and be reviewed for clear error. Most other cases, in contrast, will be reviewed *de novo*.[84]

Judge Tjoflat stated that "[u]nless a case falls into one of the categories specified above, *de novo* review of the district court's application of the law to the facts of the case is generally appropriate."[85]

He then illustrated how his framework could be applied in other cases. For example, in a case where the appellate court "did not have to go far beyond the allegations contained in the indictment to affirm the district court's ruling" that the fraudulent submission of absentee ballots by a county's deputy registrar of voters involved an "abuse[ ] [of] a position of public or private trust," triggering a guideline enhancement pursuant to U.S.S.G. § 3B1.3, "there was no special need to defer to the district court's assessments, and *de novo* review was appropriate."[86] In cases that "turn primarily on the contents of the indictment and interpretation of the sentencing guidelines," no deference was due the district court's determination of which guideline applied, because, Judge Tjoflat explained, these are "areas for which we are not especially dependent on district courts."[87]

Conversely, according to Judge Tjoflat, clear error review is the amount of deference due applications of the guidelines to facts "based upon a variety of 'intangible' factors that a district judge is in a better position than [appellate judges] are to assess."[88] For example, while the facts about what a defendant said on the witness stand will be set forth in the trial transcript, "[a]n appellate court is not in a position to assess a defendant's demeanor, apparent sincerity, intonation, expression, gesticulations, and a wide range of other considerations that are pertinent in determining whether he has perjured himself."[89] Thus, in Judge Tjoflat's opinion, whether a defendant merited an obstruction of justice enhancement, pursuant to U.S.S.G. § 3C1.1, for perjuring himself at trial will generally be reviewed under a more deferential clear error standard of review.[90] Similarly, Judge Tjoflat noted that the appellate court had

84. *Id.*
85. *Id.*
86. *Id.* at 1239–40 (citing United States v. Smith, 231 F.3d 800, 819 (11th Cir. 2000)).
87. *See id.* at 1240.
88. *Id.*
89. *Id.*
90. *See id.* at 1240–41.

accorded "special deference" to district court determinations regarding the sincerity of a defendant's acceptance of responsibility, for purposes of applying U.S.S.G. § 3E1.1.[91]

Some cases, Judge Tjoflat explained, involve initial factual determinations that are dispositive of the ensuing application of the guidelines to the facts.[92] In such cases—for example, cases involving enhancements if the defendant possessed a firearm—"after reviewing the district court's factual findings for clear error, it is rather apparent whether or not a particular enhancement applies."[93] Judge Tjoflat stated that while the appellate court "must [still] review a district court's application of the guidelines to the facts, . . . [a]s a practical matter, . . . once we come to a conclusion as to the district court's factual findings, the question of the applicability of a guideline of this type practically answers itself."[94]

The Eleventh Circuit's en banc *Rodriguez de Varon* decision fits this pattern. Although the court had stated that "the ultimate determination of [the size of a defendant's] role in the offense is . . . a fundamentally factual determination entitled to due deference and not a legal conclusion subject to *de novo* review," Judge Tjoflat explained that the court's decision should more properly be understood as collapsing the initial factual determination and the subsequent application of the guidelines to the facts into one question.[95] Answering the factual question (whether the defendant played only a minor role in the offense) necessarily answers the legal question (whether the minor role guideline reduction applied).

What Judge Tjoflat felt was "critical to emphasize" was that "this type of analysis—essentially folding our legal conclusions into the district court's factual findings—is nothing more than a shorthand we use when we feel there is nothing to be gained by looking at a district court's application of a clear-cut principle to a particular set of facts."[96] In the "majority of cases, however," Judge Tjoflat asserted that there would be "some sort of legal determination to be made even after the fact-finding

91. *See id.* at 1241 (citing United States v. Brenson, 104 F.3d 1267, 1288 (11th Cir. 1997) ("We review the district court's decision as to acceptance of responsibility only for clear error."); United States v. Pritchett, 908 F.2d 816, 824 (11th Cir. 1990) ("The district court is in a unique position to evaluate whether a defendant has accepted responsibility for his acts, and the determination is entitled to great deference on review. Unless a court's determination is without foundation, it should not be overturned on appeal.")).

92. *See id.* at 1242.

93. *Id.*

94. *Id.*

95. *See id.* at 1242–43 (quoting United States v. Rodriguez de Varon, 175 F.3d 930, 938 (11th Cir. 1999)).

96. *Id.* at 1243.

is done," requiring the appellate court "to examine the district court's application of the law to the facts separately, according this determination the level of deference it is due under § 3742."[97]

Applying his framework to the *Williams* case, Judge Tjoflat reasoned that the question of whether Williams's robbery conspiracy and attempted robbery offenses should have been grouped together or considered separately was "primarily one of law rather than of fact."[98] Because "the charges of which the defendant was convicted are clearly set forth in the indictment," and the case "does not involve an overly complex or unique fact pattern," there was no need to accord any deference to the district court's application of the guidelines to the facts.[99] In *Williams*, the amount of deference due the district court's determination was none.[100] The appellate court reviewed the district court's decision not to group Williams's offenses *de novo*, decided that the district court's application of the guidelines to the facts of the case was incorrect, and remanded the case for resentencing.[101]

IV. The Post-*Williams* Landscape

In just over a decade since Judge Tjoflat authored the court's decision in *Williams*, only ten cases have specifically mentioned *Williams* and the due deference standard, and only eight discussed Judge Tjoflat's framework in any fashion—including one case that does so without specifically citing the statutory basis for *Williams* analysis[102] and one that merely cites the opinion as being dicta.[103] Few cases—as few as ten—even expressly cite 18 U.S.C. § 3742(e)'s due deference standard for reviewing the application of the guidelines to the facts, with or without a reference to *Williams*, depending on how generous one is in interpreting a nod in the statute's direction.[104] Many cases (mostly unpublished and

97. *Id.* (emphasis omitted).

98. *Id.* at 1244 (internal quotation marks omitted).

99. *Id.*

100. *See id.*

101. *See id.* at 1244–45.

102. *See* United States v. Rodriguez, 751 F.3d 1244, 1259–60 n.11 (11th Cir. 2014); *see also infra* notes 132–36 and accompanying text.

103. *See* Evans v. Stephens, 407 F.3d 1272, 1293 (11th Cir. 2005) (Carnes, J., concurring); *see also infra* notes 155–56 and accompanying text.

104. Several cases refer to related provisions of 18 U.S.C. § 3742(e), but not the provision at issue in *Williams*. The court's decision in *United States v. Pugh*, 515 F.3d 1179, 1188, 1190 (11th Cir. 2008), for example, cited § 3742(e) but referred to the Supreme Court's instruction in *Gall v. United States*, 552 U.S. 38, 51 (2007), that appellate courts "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." In *United States v. Saucedo-Patino*, the court noted that the PROTECT Act had replaced the due deference standard with *de novo* review with respect to challenges to departures based on certain applications of the guidelines to the facts. *See* 358 F.3d 790, 792 (11th Cir. 2004); *see also* United

without precedential value) discuss the application of the guidelines to the facts without reference to *Williams* or the statute, and these cases assign a variety of standards of review for examining such decisions.[105] The post-*Williams* landscape is as varied in its application of § 3742(e)'s due deference standard as the pre-*Williams* terrain. The following discussion categorizes the various approaches the Eleventh Circuit's post-*Williams* cases have taken and shows that Judge Tjoflat's framework has not taken root.

A. *A Few Cases Applying the* Williams *Framework as Intended*

Soon after the *Williams* opinion, a visiting judge, sitting by designation on an Eleventh Circuit panel that included Judge Tjoflat, introduced Judge Tjoflat's discussion of the applicable standard of review in *United States v. Banks*[106] by noting that "[i]n a sentencing guidelines appeal, we begin with 18 U.S.C. § 3742."[107] The opinion cited *Williams* and quoted Judge Tjoflat's observation: "[I]t is both confusing and improper for a court of appeals, or the parties appearing before it, to fail to cite this statute (or a case interpreting this statute) in a sentencing guidelines appeal."[108] *Banks* involved a defendant's challenge to his obstruction of justice enhancement, based on his giving a false name when he was detained during the investigation, which allowed him to obtain bond and temporarily evade law enforcement.[109] After expressly discussing the *Williams* framework, the *Banks* opinion explained that "because the operative facts were not in dispute, the district court was confronted with the necessity of deciding, as a matter of law, whether the undisputed facts triggered the enhancement for obstruction of justice."[110] The *Banks* panel thus "review[ed] this conclusion as a ruling on a question of law."[111]

Not long after, in *United States v. Pringle*,[112] a panel, not including Judge Tjoflat, stated that it "rel[ied] upon [the court's] lengthy analysis in *United States v. Williams*, which harmonized our precedents setting forth the proper standards for reviewing a district court's application of

States v. Kim, 364 F.3d 1235, 1239–40 (11th Cir. 2004) (addressing the PROTECT Act amendments).

105. *See, e.g.*, United States v. Fields, 608 F. App'x. 806, 812 (11th Cir. 2015) (clear error); United States v. Price, 272 F. App'x 823, 823–24 (11th Cir. 2008) (*de novo*).

106. 347 F.3d 1266 (11th Cir. 2003).

107. *Id.* at 1268.

108. *Id.* at 1268 (quoting United States v. Williams, 340 F.3d 1231, 1235 (11th Cir. 2003)).

109. *See id.* at 1267.

110. *Id.* at 1269.

111. *Id.*

112. 350 F.3d 1172 (11th Cir. 2003).

the sentencing guidelines."[113] Pringle's sentencing appeal challenged, among other things, whether certain acts by his bank robbery co-conspirators were reasonably foreseeable to him, and thus properly held against him at sentencing pursuant to U.S.S.G. § 1B1.3(a)(1)(B).[114] The panel noted that, under *Williams*, "the deference due when [it reviewed] a trial court's application of the sentencing guidelines depends on the nature of the question presented; questions of purely legal interpretation are subject to *de novo* review, while primarily factual determinations are governed by the clear error standard."[115] The panel then determined that "[t]he level of deference due with respect to this particular issue is great because it is one 'involving application of a fairly well-understood legal standard [i.e., reasonable foreseeability] to a complex factual scenario.' "[116]

In *United States v. Amedeo*,[117] a panel, not including Judge Tjoflat, displayed a mixed record in its use of *Williams*. The court cited a pre-*Williams* decision, *United States v. White*,[118] for the proposition that "[w]e review the district court's application of § 1B1.3(a) to the facts for clear error."[119] The *Amedeo* panel noted 18 U.S.C. § 3742(e)'s "due deference" standard for reviewing "the district court's application of the guidelines to the facts," and even recognized the distinction between that generally applicable standard and the PROTECT Act's "altered" standard of *de novo* review for applications of the guidelines to certain departure decisions.[120] Nevertheless, it did not cite *Williams* nor engage in any sort of *Williams* analysis before stating that clear error review applied to "the district court's application of § 1B1.3(a) to the facts."[121] The court later stated that the application of U.S.S.G. § 3A1.1(b)'s "vulnerable victim" enhancement "presents a mixed question of law and fact, which we review de novo," and that "[t]he district court's determination of a victim's 'vulnerability' is, however, essentially a factual finding to which we give due deference."[122] Like some of the cases dis-

113. *Id.* at 1177 (citation omitted).

114. *See id.* at 1175–78. Section 1B1.3 of the U.S. Sentencing Guidelines explains relevant conduct that can be considered to determine a defendant's guideline range. U.S.S.G. § 1B1.3.

115. *Id.* at 1177 n.8 (citing United States v. Williams, 340 F.3d 1231, 1239 (11th Cir. 2003)).

116. *Id.* at 1177 (citing *Williams*, 340 F.3d at 1239).

117. 370 F.3d 1305 (11th Cir. 2004).

118. 335 F.3d 1314 (11th Cir. 2003).

119. *Amedeo*, 370 F.3d at 1313 (citing *White*, 335 F.3d at 1319).

120. *Id.* at 1312–13 ("Under the [PROTECT] Act, we review de novo the district court's application of the Guidelines to facts in deciding whether a departure was based on a factor that: (1) advanced the objectives of federal sentencing policy; (2) was authorized under 18 U.S.C. § 3553(b) (detailing factors to be considered at sentencing); and (3) was justified by the facts of the case.").

121. *See id.* at 1313.

122. *Id.* at 1317 (quoting United States v. Arguedas, 86 F.3d 1054, 1057 (11th Cir. 1996)).

cussed below, if the court used the *Williams* framework to determine that clear error review was appropriate in this circumstance, it did not say so.

However, in the same opinion, the *Amedeo* panel expressly used the *Williams* framework to determine the appropriate standard for reviewing the district court's application of U.S.S.G. § 3C1.1's obstruction of justice enhancement.[123] Citing *Banks*, which followed the *Williams* framework, the panel stated that "special deference" is due to the district court's credibility determinations and thus clear error review would be appropriate if "the district court must make a particularized assessment of the credibility or demeanor of the defendant."[124] "'Conversely,'" the panel again quoted the *Banks* decision, "'where the defendant's credibility or demeanor is not at issue, and the defendant's conduct can be clearly set forth in detailed, non-conclusory findings, we review de novo the district court's application of the enhancement.'"[125] Applying this framework, the *Amedeo* panel concluded that "[t]he latter [de novo] standard of review applie[d] to this case."[126]

In *United States v. Simmons*,[127] an opinion authored by Judge Tjoflat, the court cited the *Williams* framework to help decide what deference was due the district court in determining whether it "'depart[ed] to an unreasonable degree from the applicable guidelines range,'" pursuant to 18 U.S.C. § 3742(e)(C)(3).[128] Citing § 3742(e), the court acknowledged that "we review the court's factual findings for clear error and their legal conclusions *de novo*," but that "[i]n reviewing mixed questions of fact and law, involving the application of the Guidelines to the facts of the case, we give 'due deference to the district court's application of the guidelines to the facts.'"[129] The court then quoted *Williams*'s explanation that the appellate court accords greater deference to determinations that "turn[ ] primarily on the evaluation of facts . . . more accessible to the district court" and to cases "involving application of a fairly well-understood legal standard to a complex factual scenario," which would be reviewed under a clear error standard, whereas in cases lacking "these special considerations . . . the district court decision is not

123. *See id.* at 1318.

124. *Id.* (citing United States v. Banks, 347 F.3d 1266, 1269 (11th Cir. 2003)).

125. *Id.* (quoting *Banks*, 347 F.3d at 1269).

126. *Id.*

127. 368 F.3d 1335 (11th Cir. 2004), *abrogated by* United States v. Wetherald, 636 F.3d 1315, 1320–23 (11th Cir. 2011).

128. *Id.* at 1341–42 (quoting 18 U.S.C. § 3742(e)(C)(3)). Note that § 3742(e)(C) is not one of the departure provisions subject to the PROTECT Act's *de novo* review amendment. *See supra* note 6.

129. *Simmons*, 368 F.3d at 1342 (quoting 18 U.S.C. § 3742(e)).

'due' any deference, and we apply a *de novo* standard of review."[130] Oddly, however, without further addressing the *Williams* framework, Judge Tjoflat concluded that "[b]y applying an incorrect legal standard in determining an appropriate sentence, the district court necessarily *abused its discretion*."[131]

The Eleventh Circuit most recently applied the *Williams* framework in its 2014 decision in *United States v. Rodriguez*, albeit, interestingly, without citing § 3742(e)'s due deference language.[132] In *Rodriguez*, the defendant challenged the district court's determination that she did not merit a minor-role guideline reduction pursuant to U.S.S.G. § 3B1.2, asserting that the district court "improperly applied a categorical rule that large-scale, sophisticated fraud cases are incompatible with defendants being eligible for minor role reductions."[133] She thus urged the appellate court to review the district court's minor-role determination *de novo* on the grounds that it "amounted to a legal interpretation of the sentencing guidelines rather than a factual determination."[134] The Eleventh Circuit panel (which did not include Judge Tjoflat) refused to apply *de novo* review, after having "determined that the district judge did not apply a categorical bar, but rather made an individualized fact finding as he was required to do by the guidelines."[135] The panel cited *Williams*'s application of *Buford* in holding "that clear error review is appropriate when the ruling involves 'the application of a clearly-established, well-understood legal principle to a detailed fact pattern' because 'the fact-bound nature of the decision limits the value of appellate court precedent.'"[136]

Judge Tjoflat's hard work in *Williams*, in which he unpacked the meaning of 18 U.S.C. § 3742(e)'s due deference standard, has thus resulted in five opinions applying his framework, one of which he wrote himself and several that seemed to apply it inconsistently at best.

B. *Cases Citing* Williams *But Not Expressly Applying Its Framework*

In a few other cases, the Eleventh Circuit has cited *Williams* but without applying its reasoning, or, at best, doing so without showing its work. The court has simply cited *Williams* in support of whatever stan-

130. *Id.* (quoting United States v. Williams, 340 F.3d 1231, 1239, 1241 (11th Cir. 2003)).
131. *Id.* (emphasis added).
132. *See* United States v. Rodriguez, 751 F.3d 1244, 1259 n.11 (11th Cir. 2014).
133. *See id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1260 n.11 (quoting United States v. Williams, 340 F.3d 1231, 1239 (11th Cir. 2003)).

dard of review it applied, without discussing how Judge Tjoflat's *Williams* framework led to that conclusion.

In *United States v. Murrell*,[137] after noting that "[t]he interpretation of a statute is a question of law subject to *de novo* review" and citing *Williams* for the proposition that "purely legal questions concerning use of the Sentencing Guidelines [are reviewed] *de novo*," the court cited § 3742(e) for the proposition that "[e]xcept in certain cases in which the lower court departs from the applicable Guideline range, we review a district court's application of the Guidelines to the facts with 'due deference.'"[138] The court engaged in no further analysis regarding what standard of review applied to the sentencing issues before it—specifically, whether the two-level sentence enhancement under U.S.S.G. § 2G1.1(b)(2)(B) for an offense involving a "victim" between the ages of twelve and sixteen "is justified where there is only a fictitious victim" and whether the two-level enhancement pursuant to U.S.S.G. § 2G1.1(b)(5) for using the Internet to "induce . . . a minor to engage in a commercial sex act" applies when the defendant does not communicate directly with a minor, but with an adult (such as an undercover officer posing as the parent of a minor).[139] The court did not utilize Judge Tjoflat's *Williams* analysis to determine whether these questions were "primarily factual"—requiring clear error review—or "primarily involve[d] legal interpretation[s] of [the] guideline[s]"—requiring *de novo* review.[140]

In *United States v. Davidson*,[141] the Eleventh Circuit noted, without reference to 18 U.S.C. § 3742(e), that it "gives due deference to the district court's application of the sentencing guidelines to the facts and reviews decisions of interpretation of the Federal Sentencing Guidelines to those facts *de novo*."[142] The court then cited *Williams* for the proposition that "this Court reviews *de novo* 'whether the district court applied the correct sentencing guideline (or subsection of a sentencing guideline) for the defendant's underlying conduct.'"[143] Without elaborating on its reasoning process, the court thus applied *de novo* review to the question of "whether the district court appropriately used [U.S.S.G.] § 2G2.4 rather than § 2G2.2 in determining the sentencing guideline range where the defendant had been convicted of *receipt* of child pornography . . . without any evidence that the defendant received the por-

137. 368 F.3d 1283 (11th Cir. 2004).
138. *Id.* at 1285 (citing *Williams*, 340 F.3d at 1234 n.8; 18 U.S.C. § 3742(e)).
139. *See id.* at 1288–89.
140. *See Williams*, 340 F.3d at 1239.
141. 360 F.3d 1374 (11th Cir. 2004).
142. *Id.* at 1376.
143. *Id.* (quoting *Williams*, 340 F.3d at 1240).

nography with an intent to traffic in the pornography."[144] It did not discuss whether the defendant's lack of intent to traffic in the materials he received was something for which the appellate court "did not have to go far beyond the allegations contained in the indictment to affirm the district court's ruling"[145] or that it depended on " 'intangible' factors that a district judge is in a better position than [appellate courts] are to assess."[146] It merely stated that there was "no such evidence [of an intent to distribute the materials] before the district court."[147] If the court used the analytical framework Judge Tjoflat laid out in *Williams* to determine the appropriate amount of deference that was due, it did not say so, nor did it explain how the factors set forth in *Williams* led to its conclusion.

C. *Cases Refusing to Apply the* Williams *Framework*

In *United States v. Miranda*,[148] issued approximately three months after *Williams*, a panel of the Eleventh Circuit, which did not include Judge Tjoflat,[149] dismissed as dicta his "interesting survey of case law from the Eleventh Circuit and United States Supreme Court addressing the appropriate 'due deference' under 18 U.S.C. § 3742(e) that courts are obliged to give to a sentencing judge's 'application of the guidelines to the facts.' "[150] Because "*Williams* involved only the question of how a court properly would group particular offenses for sentencing," the *Miranda* panel concluded that *Williams*'s holding was "necessarily limited to announcing the standard of review only for a challenge to the district court's grouping of a defendant's offenses."[151] The court announced that under the Eleventh Circuit's "well-established precedent regarding the standard of review in sentencing appeals," "[t]he district court's interpretation of the Guidelines is a question of law that this Court reviews *de novo*," while "a district court's finding regarding a defendant's intent is reviewed for clear error."[152] The court then used these standards to decide the case. It first held that the district court had erred when it applied U.S.S.G. § 2A3.4's "sexual conduct" offense level instead of § 2A3.2's "sexual act" offense level.[153] It then held, however, that as to U.S.S.G. § 2A3.2(b)(2)(A)(i)'s enhancement for "misrepresentation[s] made with the intent to . . . persuade [or] induce" a minor to

144. *See id.* at 1377.
145. *Williams*, 340 F.3d at 1239–40.
146. *Id.* at 1240.
147. *Davidson*, 360 F.3d at 1376.
148. 348 F.3d 1322 (11th Cir. 2003).
149. *Id.* at 1323.
150. *Id.* at 1330 n.8.
151. *Id.*
152. *Id.* at 1330.
153. *Id.* at 1332.

engage in prohibited sexual conduct, "we cannot say that the district court clearly erred" in finding no such intent.[154]

Judge Tjoflat's *Williams* analysis was also deemed mere dicta by Judge Ed Carnes in his concurring opinion in *Evans v. Stephens*.[155] Judge Carnes included the *Williams* decision in his list of examples where "dicta appears to be scattered across the opinions of this Court like wildflowers in a spring meadow."[156]

In *United States v. Rodriguez-Lopez*,[157] the two-judge majority acknowledged 18 U.S.C. § 3742(e)'s standard of review, but then concluded that the *Williams* analysis was inapposite.[158] The majority noted *Miranda*'s conclusion that Judge Tjoflat's *Williams* analysis was mere dicta before concluding that the *Williams* framework "concerns only the appropriate 'due deference' that we must accord a sentencing judge's application of the guidelines to the facts" and "in no way contradicts our *uniform* precedent, which 'requir[es] us to review district courts' factual findings under 'clear error' (or 'clearly erroneous') standard.' "[159] What was at issue in *Rodriguez-Lopez* was whether the district court had erred in applying a two-level enhancement, pursuant to U.S.S.G. § 2L1.1(b)(5), for the defendant's smuggling offense on the grounds that it "involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person."[160] Judge Rosemary Barkett argued in dissent that "[t]he majority fail[ed] to differentiate between the district court's factual findings of the events in question and the district court's separate determination that U.S.S.G. § 2L1.1(b)(5) applies."[161] Judge Barkett would have applied the *Williams* analysis and held that "because the pertinent facts can 'clearly be set forth in detailed, non-conclusory findings by the district court,' *de novo* review is appropriate."[162] The majority, however, was satisfied that the issue presented a factual question requiring clear error review,[163] without examining whether the "determination turns primarily on the evaluation of facts (such as a witness's credibility, intonation, and demeanor) that are more accessible to the district court" or "involv[es] application of a fairly

154. *Id.* at 1333–34.

155. 407 F.3d 1272, 1293 (11th Cir. 2005) (Carnes, J., concurring).

156. *Id.*

157. 363 F.3d 1134 (11th Cir. 2004).

158. *See id.* at 1137 n.2.

159. *Id.* (emphasis added) (discussing *Miranda*, 348 F.3d at 1330 n.8) (quoting United States v. Williams, 340 F.3d 1231, 1234 (11th Cir. 2003)).

160. *Id.* at 1134.

161. *Id.* at 1139 n.3 (Barkett, J., dissenting).

162. *Id.* at 1139 (quoting *Williams*, 340 F.3d at 1241).

163. *See id.* at 1137 n.2.

well-understood legal standard to a complex factual scenario."[164]

The court's opinion in *United States v. Rothenberg*[165] cited *Rodriguez-Lopez* and 18 U.S.C. § 3742(e) for the proposition that "in most cases, [the appellate court reviews] a district court's application of the guidelines to the facts with 'due deference.'"[166] The *Rothenberg* decision (authored by a district court judge sitting by designation)[167] then cited the pre-*Williams* decision in *White*,[168] also cited in *Rodriguez-Lopez*,[169] for the proposition that "the 'due deference' standard is, itself, tantamount to clear error review."[170] But that is not what the *White* decision had stated.

In *White*, issued about a month before *Williams*, the Eleventh Circuit noted the "confusion . . . concerning the proper standard for reviewing a district court's application of the Sentencing Guidelines to the facts."[171] The *White* panel discussed the Supreme Court's holding in *Buford*, itself relying on *Koon*, that "the deference that is due depends on the nature of the question presented."[172] *White* then concluded that the amount of deference that was due the district court's application of the guidelines to the facts, under the circumstances of that case, was clear error review.[173] The court in *White* did not hold that "due deference" was "tantamount to clear error review" in all cases.[174]

Nevertheless, in *Rothenberg*, the court did not cite or discuss the reasoning from either *Williams* or *Buford* before simply relying on *White* to equate due deference review with clear error review.[175]

The Eleventh Circuit followed this same approach in *United States v. Wilson*.[176] Citing *Rodriguez-Lopez* and *Rothenberg*, the panel (which did not include Judge Tjoflat) simply declared that "'due deference' . . . is 'tantamount to clear error review,'" and left it at that.[177] *Wilson* is the Eleventh Circuit's most recent published decision discussing the standard of review for the application of the guidelines to the facts as of the

164. *Williams*, 340 F.3d at 1239.
165. 610 F.3d 621 (11th Cir. 2010).
166. *Id.* at 624 (quoting *Rodriguez-Lopez*, 363 F.3d at 1136–37).
167. *Id.* at 623.
168. *Id.* at 624 (citing United States v. White, 335 F.3d 1314, 1318–19 (11th Cir. 2003)).
169. *Rodriguez-Lopez*, 363 F.3d at 1137.
170. *Rothenberg*, 610 F.3d at 624 (citing *White*, 335 F.3d at 1318–19).
171. *White*, 335 F.3d at 1317.
172. *See id.* at 1318 (citing Buford v. United States, 532 U.S. 59, 63–64 (2001); Koon v. United States, 518 U.S. 81, 98 (1996)).
173. *Id.* at 1318–19.
174. *But see Rothenberg*, 610 F.3d at 624 (citing *White*, 335 F.3d at 1318–19).
175. *Id.*
176. 788 F.3d 1298 (11th Cir. 2015).
177. *Id.* at 1317 (citing United States v. Rodriguez-Lopez, 363 F.3d 1134, 1136–37 (11th Cir. 2004); *Rothenberg*, 610 F.3d at 624).

date of this Article's publication, and, like *Rothenberg*, it was authored by a district court judge sitting by designation.[178] Although issued not long after the court had applied the *Williams* framework in *Rodriguez*,[179] *Wilson* followed *Rothenberg* in equating due deference review with clear error review.[180]

D. *A Seminal Case Treating the "Due Deference" Standard as Beside the Point*

Besides *United States v. Pugh*,[181] perhaps the Eleventh Circuit's most important post-*Booker/Gall* case addressing federal sentencing review is its en banc decision in *United States v. Irey*,[182] setting forth the post-*Booker/Gall* standard for reviewing federal criminal sentences. In *Irey*, the court noted that in the pre-*Booker* era, under § 3742(e) the appellate courts "accepted the district court's findings of fact unless they were clearly erroneous" and "gave 'due deference' to the district court's application of the guidelines to the facts."[183] The court then noted that the PROTECT Act's amendments to the standards of review were applicable to certain departures from the guideline range[184] and to *Booker*'s purported "excision of § 3742(e)."[185] The court stated that "with subsection (e) gone [the statute] no longer specified the standard of review" for criminal sentencing appeals.[186] The court's focus, however, was on how the substantive reasonableness of the district court's ultimate sentencing decision should be reviewed, and its statement must be read in that context.[187] As discussed earlier,[188] the Supreme Court's "excision" of § 3742(e) must be read as striking only those portions that conflicted with its holding that the guidelines were now to be considered advisory and that appellate courts were required to review only the ultimate sentences imposed for substantive reasonableness. The en banc Eleventh Circuit's *Irey* decision explained how substantive reasonableness review equated with the familiar abuse of discretion standard: "A district court's sentence need not be the most appropriate one, it need only be a reasonable one. We may set aside a sentence only if we determine, after giving

178. *Id.* at 1304.

179. *See* United States v. Rodriguez, 751 F.3d 1244, 1259 n.11 (11th Cir. 2014).

180. *Wilson*, 788 F.3d at 1317.

181. *See* 515 F.3d 1179, 1190 (11th Cir. 2008) (explaining *Gall v. United State*'s two-step procedural and substantive review process, 552 U.S. 38, 51 (2007)).

182. *See* 612 F.3d 1160 (11th Cir. 2010) (en banc).

183. *Id.* at 1182.

184. *See id.* at 1182–83; *see also supra* note 6.

185. *Id.* at 1183; *see also supra* notes 22–29 and accompanying text.

186. *Id.*

187. *See id.* at 1188–91.

188. S*ee supra* note 27 and accompanying text.

a full measure of deference to the sentencing judge, that the sentence imposed truly is unreasonable."[189]

Judge Tjoflat wrote an opinion concurring and dissenting in part with the court's general approach to reviewing the substantive reasonableness of federal sentences.[190] In the meat of his opinion, Judge Tjoflat broke down the federal sentencing process into its component parts, from the district court's initial process to review by the appellate court.[191] He accused both the district court and the Eleventh Circuit of failing to focus on the individual steps involved in post-*Booker* sentencing and in failing to recognize the particular standards of review required for each individual step,[192] describing the Eleventh Circuit's review of the ultimate sentence imposed as tantamount to *de novo* review.[193] Interestingly, he did not refer to his *Williams* framework when describing how the relevant step in the sentencing and review process should work:

> Step one required the district court to determine the Guidelines sentencing range for the case. This determination is vulnerable to attack on two fronts: the district court's factual findings and its application of the Guidelines to the facts. If the factfindings are clearly erroneous, the district court abused its discretion. If the factfindings survive clear error review, the question becomes whether the court erred in applying the Guidelines to the facts. If in doing so the court made an "identifiable legal mistake" in interpreting the Guidelines or if it "clear[ly] err[ed]" in applying them, the court abused its discretion and the sentence must be vacated and the case remanded.[194]

Judge Tjoflat, himself, cited not to his own *Williams* decision but to the earlier *White* decision, where the court had held that *in that case* the deference that was due was clear error review.[195]

E. *Cases Reviewing Applications of the Guidelines to the Facts Without Referencing* Williams *or 18 U.S.C. § 3742(e)*

A myriad of cases—too many to survey here—mention the court's standard for reviewing applications of the guidelines to the facts without

189. *Irey*, 612 F.3d at 1191.

190. *Id.* at 1226 (Tjoflat, J., concurring in part and dissenting in part).

191. *See id.* at 1243–51.

192. *See id.* at 1253, 1254 n.74 (noting the district court's failure to "follow the sentencing hearing procedure I have outlined" and the appellate court's "confusion regarding the proper way to review sentences").

193. *See id.* at 1261–62 (concluding that the appellate court's "approach amounts to *de novo* review in the guise of abuse of discretion").

194. *Id.* at 1250.

195. *Id.* (citing United States v. White, 335 F.3d 1314, 1317–19 (11th Cir. 2003)); *see supra* notes 173–74 and accompanying text.

expressly referring to either *Williams* or § 3742(e). Most of these cases are unpublished and without precedential value.[196] Some of the cases assert that the appellate court "review[s] de novo the district court's application of the sentencing guidelines to the facts."[197] Some simply state that the appellate court reviews "a district court's application of the guidelines to the facts with due deference."[198] Some equate due deference review with clear error review.[199] Both *Garcia-Sandobal* (applying due deference review)[200] and *Turner* (equating due deference review with clear error review)[201] cite *Rothenberg* in support of their respective standards of review.

If Judge Tjoflat hoped that his *Williams* decision would harmonize the Eleventh Circuit's "muddled"[202] review of applications of the guidelines to the facts, he must be disappointed.

V. Conclusion

Eleven years after Judge Tjoflat offered his *Williams* framework to reconcile the Eleventh Circuit's various approaches to due deference review of applications of the United States Sentencing Guidelines to the facts, it is clear that his framework has not been embraced. Regardless of whether a body of law has developed applying the framework, however, practitioners may still find it useful. Judge Tjoflat's discussion of why particular district court decisions warrant *de novo* or clear error review clarifies some of the underlying premises of appellate law resulting in the different standards of review. The idea that the level of deference due a trial court decision varies with whether the decision is primarily legal or primarily factual applies far beyond the realm of federal sentencing appeals. Judge Tjoflat clarified the types of considerations that guide the appellate courts in determining whether various complex or nuanced questions will be deemed primarily legal or primarily factual, and which standard of review will thus be utilized to resolve the cases before them.

An understanding of Judge Tjoflat's *Williams* framework can help

196. *See supra* note 105.

197. United States v. Cubero, 754 F.3d 888, 892 (11th Cir. 2014); *accord* United States v. Register, 678 F.3d 1262, 1266 (11th Cir. 2012); United States v. Jackson, 586 F. App'x 545, 547 (11th Cir. 2014).

198. United States v. Garcia-Sandobal, 703 F.3d 1278, 1282 (11th Cir. 2013); *accord* United States v. Cruz-Camacho, 588 F. App'x 886, 888 (11th Cir. 2014).

199. *See* United States v. Turner, 626 F.3d 566, 571–72 n.2 (11th Cir. 2010); *accord* United States v. Manduley, 585 F. App'x 1001, 1004 (11th Cir. 2014).

200. *Garcia-Sandobal*, 703 F.3d at 1282 (citing United States v. Rothenberg, 610 F.3d 621, 624 (11th Cir. 2010)).

201. *Turner*, 626 F.3d at 571–72 n.2 (citing *Rothenberg*, 610 F.3d at 624).

202. United States v. Williams, 340 F.3d 1231, 1235 (11th Cir. 2003).

lawyers, especially those less familiar with appellate practice, focus on the precise nature of the decisions being challenged in particular cases when trying to determine the proper standard of review. "There is perhaps no more important consideration . . . for the practitioner to use to analyze and present an issue than the standard of review the appellate court will apply to each issue before it."[203] The advice of the late Chief Judge John Goldbold has entered Eleventh Circuit lore: "Unless counsel is familiar with the standards of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect."[204] Judge Tjoflat's exegesis on the reasons why a particular standard of review is appropriate for a precise question on appeal deserves attention, even if his framework has not been generally adopted for use in federal criminal sentencing appeals. Ultimately, a skillful appellate practitioner can use Judge Tjoflat's analysis to help persuade the appellate court why a more or less deferential standard of review should apply to a particular case.

203. Harvey Sepler, *Appellate Standards of Review*, FLORIDA APPELLATE PRACTICE § 6.1 (The Florida Bar, 9th ed. 2014).

204. *See* Roberta G. Mandel, *Understanding the Art of Appellate Advocacy: Why Trial Counsel Should Engage Experienced Appellate Counsel as a Matter of Professional Responsibility and Legal Strategy*, 81 FLA. B.J. 45, 48 (2007) (quoting John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 811 (1976)).