Interpreting “Use” of a Minor in § 3B1.4: The Benefits of Adopting a Uniform Hybrid Approach

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ABSTRACT

Sentencing enhancements are applied in a number of circumstances, one of which is the use of a minor in the commission of a crime. But the law is unsettled as to whether a defendant’s affirmative act is necessary for implementation of this particular sentencing enhancement under section 3B1.4. An alleged circuit split existed, with some circuits utilizing an affirmative act approach and other circuits utilizing a reasonable foreseeability approach. Recently, courts have been applying a hybrid approach that applies the sentencing enhancement when the defendant has affirmatively acted to use the minor in the crime, but in cases involving a conspiracy the enhancement may be applied if a co-conspirator’s use of the minor was reasonably foreseeable. This Comment argues for a widespread implementation of that hybrid approach. This Comment demonstrates that use of the hybrid approach is consistent with the language of section 3B1.4 and the applicable section 1B1.3(a) concerning the factors that determine the sentencing guidelines range, and it stays true to the purpose of deterring the use of minors in the commission of an offense.

I. INTRODUCTION

“I just don’t wanna play. I don’t wanna play no more, alright? I was thinking about going to school, over at Edmonson, ask if they’ll let me back in at the end of the semester.” Wallace said, indicating he wants to quit being a drug dealer in Avon Barksdale’s crew.

“What grade?” D’Angelo asked.

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“Ninth.”

“Ninth? . . . [Y]ou how old?”

“16.”

“16 . . . man, you supposed to be a junior by now.”

_The Wire_ frequently exposes viewers to adults utilizing minors to perform illegal acts. The most prominent example appears throughout the first season where minors are “employed” as drug dealers for Barksdale. This position places them in the lowest level of the drug dealing operation, the Pit. This role also places the minors in vulnerable and risky positions while the older and more experienced players are often in behind-the-scenes roles that minimize their risk of getting caught and prosecuted, and it is nearly impossible for the minors to quit their role in the drug dealing operation. The minors in these instances are habitually the scapegoats that ultimately face criminal charges if trouble arises, which senior players rely on to avoid detection and prosecution by the police. But if the senior players are caught, how should the use of minors in their crime affect their sentence?

Consider if Barksdale, the leader of the drug trafficking organization in _The Wire_, had been convicted and was facing sentencing. It is clear that many minors were utilized as drug dealers in his organization. As a result, could a two-level sentencing enhancement pursuant to section 3B1.4 of the U.S. Sentencing Guidelines for using a minor to commit a crime be applied to his sentence? The answer depends on the circuit in which the action took place since different approaches currently exist regarding the circumstances under which the sentencing enhancement of section 3B1.4 can be applied. _The Wire_ takes place in Baltimore, Maryland, which is located within the Fourth Circuit. In the Fourth Circuit, the drug leader, Barksdale, could only have received the sentencing enhancement for a minor’s participation in his drug organization if Barksdale affirmatively acted to involve the minor in the crime. Since Barksdale was careful not to involve himself directly with the dealings of the Pit, an affirmative act may be hard to find. However, if Barksdale had been located within one of the circuits that follows the

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2. _The Wire: Cleaning Up_ (HBO television broadcast Sep. 1, 2002) (Season One, Episode Twelve) (Wallace, after escaping the Pit and finding shelter at a relative’s home, returns and tries to get back into the game. However, his betrayal of leaving the drug dealing operation and ratting to the police gets him killed by the very people he used to call his friends.).
3. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (U.S. SENTENCING COMM’N 2014) (“If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.”).
other predominant approach to interpreting the sentencing enhancement, or a combined approach, he would receive the enhancement as long as he could reasonably foresee a co-conspirator’s use of a minor in the crime. It is much more likely the sentencing enhancement would be applied under this interpretation since Barksdale undoubtedly could reasonably foresee those minors being used by his subordinates.

This inconsistency in the application of section 3B1.4 throughout the circuit courts ultimately leads to varying and inequitable results. Many different approaches exist as every federal circuit court except the D.C. Circuit has now issued an opinion regarding the proper interpretation. It is an ideal time for the issue to be considered by the Supreme Court, clarified by the Sentencing Commission, or clarified by the circuit courts themselves once the cases with the necessary fact patterns are before them. Although scholars have phrased this as a circuit split, fifteen years have passed since that scholarship was published, and the issue has yet to be resolved.4 A few circuit courts have changed their approach to the subject in interesting ways that suggest cohesion is on the horizon, but unity still has not been achieved. The courts should adopt a universal interpretation based on the case law of the circuit courts which have combined the two approaches.

This Comment will begin in Part II by summarizing and analyzing the initial cases from each circuit that comprehensively grapple with the proper application of the sentencing enhancement of section 3B1.4 of the Sentencing Guidelines. It will then go on to summarize the circuits that have changed their approach in subsequent cases and the reasoning behind those changes. Understanding the initial reasons why each circuit embraced their specific approach and how they evolved from those initial analyses is important in understanding how to reconcile the differences in opinion regarding the language of section 3B1.4. Part III of this Comment will advocate for an interpretation of section 3B1.4 that reconciles the approaches, suggesting that the two approaches apply to two different situations that arise in sentencing, and a hybrid approach thoroughly accommodates each situation. Recent developments in the case law of the Second, Eighth, and Eleventh Circuits demonstrate that this hybrid approach is one that should be favored in the other circuits as well. Ultimately, this Comment will provide a unique and updated perspective and solution to the existing literature by arguing that two different sentencing situations can logically produce two distinct methods of applying the sentencing enhancement of section 3B1.4 that can coexist in a hybrid approach.

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II. UNDER WHAT CIRCUMSTANCES SHOULD THE SENTENCING ENHANCEMENT OF SECTION 3B1.4 APPLY?

Federal Sentencing Guidelines section 3B1.4, which imposes an enhancement for using a minor to commit a crime, was enacted pursuant to an enabling provision—“Solicitation of a Minor to Commit a Crime”—as part of the Violent Crime Control and Law Enforcement Act of 1994. Section 3B1.4 states, “[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.” The first application note to section 3B1.4 states, “Used or attempted to use’ includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.” Circuit courts have disagreed over what is necessary to apply this section 3B1.4 enhancement.

The discrepancies between the circuits and their approaches are due to the applicability of the language of section 1B1.3(a) in conjunction with section 3B1.4. Section 1B1.3(a) concerns the factors that determine the sentencing guidelines range, and it states:

[un]less otherwise specified, . . . adjustments in Chapter Three] shall be determined . . . in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy) . . . all acts and omissions of others that were . . . reasonably foreseeable in connection with that criminal activity.8

Specifically, there is a question of whether the language of “the defendant” in section 3B1.4 amounts to a focus on the individual actor and therefore qualifies as being “otherwise specified” as noted in section 1B1.3(a). If so, this distinguishes the application of section 3B1.4 from calculations based on a co-conspirator’s behavior and limits the application solely to acts of the defendant. For example, the Third Circuit has stated “In [the Third Circuit’s] view, § 3B1.4 ‘specifie[s]’ that ‘use of

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6 U.S. SENTENCING GUIDELINES MANUAL § 3B1.4.

7 U.S.S.G. § 3B1.4 cmt. n.1; see also Stinson v. United States, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”).

a minor’ enhancements be individualized, and thus not based on the acts of co-conspirators.”9 The countering viewpoint does not see that language of section 3B1.4 as being within the “otherwise specified.” Instead, that viewpoint reads section 1B1.3(a) alongside section 3B1.4 when determining whether or not to apply the sentencing enhancement, thereby stating that conspiracy situations activate the reasonable foreseeability requirement stated in section 1B1.3(a).10

Every federal circuit court except the D.C. Circuit has addressed this issue, and a consistent and cohesive agreement, although growing, has not yet been reached. The majority of the federal circuit courts, like the Third Circuit, have stated the enhancement applies when the defendant, by some affirmative act, helps to involve the minor in the crime.11 I will refer to this as the “affirmative act” approach. The minority view has seemingly advocated for a position consistent with the general theory of co-conspirator liability as laid out in Pinkerton v. United States.12 It has done this by giving reference to section 1B1.3(a) when defining “use” and by stating that the enhancement additionally applies when the defendant could reasonably foresee a co-conspirator’s use of a minor even if the defendant himself or herself did not personally engage the minor.13 I will refer to this as the “reasonable foreseeability” approach. A growing coalition of the circuits have begun applying both approaches under differing circumstances.14 This hybrid approach should be the model for the circuits moving forward.

A. Original endorsement of the “affirmative act” requirement

In their first published opinions regarding the interpretation of the word “use” as applied in the section 3B1.4 enhancement, eight of the circuit courts agreed that the enhancement only applied when the defendant affirmatively acted to engage the minor in the crime, which is

10 U.S.S.G. § 1B1.3(a).
11 See United States v. Mata, 624 F.3d 170, 175–76 (5th Cir. 2010) as revised (Nov. 15, 2010); Pojilenko, 416 F.3d at 247; United States v. Paine, 407 F.3d 958, 965 (8th Cir. 2005); United States v. Cummings, 18 F. App’x 135, 136–37 (4th Cir. 2001); United States v. Ramsey, 237 F.3d 853, 859 (7th Cir. 2001); United States v. Suitor, 253 F.3d 1206, 1210 (10th Cir. 2001); United States v. Parker, 241 F.3d 1114, 1120–21 (9th Cir. 2001); United States v. Butler, 207 F.3d 839, 849 (6th Cir. 2000).
12 328 U.S. 640 (1946) (holding that a defendant is liable for the reasonably foreseeable acts of his co-conspirators done in furtherance of the conspiracy); see Lockman, supra note 5, at 875–79 (summarizing Pinkerton as expanded upon by the Eleventh Circuit in United States v. McClain, 252 F.3d 1279 (11th Cir. 2001)).
13 See United States v. Lewis, 386 F.3d 475, 479–80 (2d Cir. 2004); McClain, 252 F.3d at 1287–88; United States v. Patrick, 248 F.3d 11, 27–28 (1st Cir. 2001).
14 See United States v. Rose, 496 F.3d 209 (2d Cir. 2007); United States v. Taber, 497 F.3d 1177 (11th Cir. 2007); United States v. Voegtlin, 437 F.3d 741 (8th Cir. 2006).
based on the language of, and commentary to, section 3B1.4. Among the eight circuits that initially adopted the affirmative act approach, adherence to the position has been quite strong. Disagreement had been limited to minor differences in interpretation concerning what constitutes an affirmative act. All eight agreed that a defendant must take affirmative steps to involve the minor in the offense for the section 3B1.4 enhancement to be applied. This subsection will summarize the initial opinions of each circuit to capture the subtle differences in their approaches.

The Sixth Circuit was the first court to adopt the “affirmative act” requirement in United States v. Butler.\(^{15}\) The court used a textual approach to reach its result and compared Section 3B1.4 of the Sentencing Guidelines to a similar provision that criminalized the use of juveniles in drug trafficking.\(^{16}\) This comparison, according to the Sixth Circuit, demonstrated that “in the criminal context, ‘using’ a minor to carry out criminal activity entails more than being the equal partner of that minor in committing a crime.”\(^{17}\) The Sixth Circuit articulated what became the “affirmative act” approach in Butler by stating that a defendant must do more than merely act as a partner in crime with a minor to constitute “use” of a minor under section 3B1.4.\(^{18}\) In Butler, the defendant had participated in a bank robbery with a minor as his partner.\(^{19}\) Although the two had worked together in robbing the bank, the district court failed to find the defendant had acted affirmatively to involve the minor in the crime beyond merely acting as a partner.\(^{20}\) Since the district court had not found the defendant had “directed, commanded, intimidated, counseled, trained, procured, recruited, or solicited” the minor’s participation in the crime, which is included in the meaning of “use” as directed by the commentary of section 3B1.4, the Sixth Circuit determined the defendant had not acted affirmatively to involve the minor in the crime.\(^{21}\)

In the Seventh Circuit, three cases decided within a timespan of three years developed the Circuit’s interpretation of section 3B1.4. The

\(^{15}\) 207 F.3d at 842.  
\(^{16}\) See Butler, 207 F.3d at 847–849 (analyzing 21 U.S.C.A. § 861 in its inquiry into the meaning of the provision) (“Finally, it is instructive to consider the analogous statutory provision criminalizing the use of juveniles in drug trafficking, which makes it unlawful for an adult to ‘knowingly and intentionally employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age’ to violate federal drug laws.”); see also DiChello, supra note 4 (conducting a comprehensive look at the Sixth Circuit’s textualist approach in interpreting the sentencing enhancement of section 3B1.4 in Butler).  
\(^{17}\) Butler, 207 F.3d at 848–49.  
\(^{18}\) Id. at 849.  
\(^{19}\) Id.  
\(^{20}\) Id.  
\(^{21}\) Id.
Seventh Circuit did not explicitly agree with the Sixth Circuit until its *United States v. Vivit* decision, which built upon precedent from two prior Seventh Circuit cases. Although the Seventh Circuit in *United States v. Benjamin* never explicitly used the language of requiring an “affirmative act,” *Vivit* cited *Benjamin* as interpreting the “use” requirement of section 3B1.4 to have been met when the defendant took an affirmative action to involve the minor in the crime. The Seventh Circuit in *Vivit* also cited *United States v. Brack* as a prior decision where it had required an affirmative act by the defendant before applying the enhancement. Despite the court’s reference to, and reliance on, these aforementioned cases in its review of the meaning of the word “use” in section 3B1.4, *Vivit* was the first instance in which the Seventh Circuit explicitly stated that the sentencing enhancement requires that the defendant perform an affirmative act to involve the minor in the crime.

The Seventh Circuit’s adoption of the “affirmative act” requirement seems to come from the Sixth Circuit’s decision in *Butler*. In *Vivit*, the defendant treated three minors for injuries suffered in automobile accidents and directed the minors to falsify their medical attendance records to assist him in committing fraud. The Seventh Circuit stated this act of directing the minors fell within the definition of “use” contemplated by section 3B1.4.

The Seventh Circuit explored the meaning of section 3B1.4 in more detail in *United States v. Ramsey* where it held the proper inquiry was “whether the defendant affirmatively involved a minor in the commission of an offense, regardless of whether the minor is a partner to the offense or is in a subordinate position.” The court further interpreted “affirmatively involve[ing] a minor” as “direct[ing], command[ing], encourage[ing] or recruit[ing]” the minor to commit the offense. The court in *Ramsey* also further interpreted and distinguished *Benjamin*’s holding by explaining that in *Benjamin* the court relied on the fact that only

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22 214 F.3d 908 (7th Cir. 2000).
23 Id.
24 116 F.3d 1204 (7th Cir. 1997).
25 *Vivit*, 214 F.3d at 920.
26 188 F.3d 748 (7th Cir. 1999).
27 *Vivit*, 214 F.3d at 920.
28 Id. ("[The defendant] ‘used minors in the commission of his crimes’ if his affirmative actions involved minors in his criminal activities").
29 Id.
30 Id.
31 Id.
32 237 F.3d 853 (7th Cir. 2001).
33 Id. at 860.
34 Id.
one defendant had been found to have conspired with a minor and therefore there was no need to examine who “used” the minor.\textsuperscript{35} The Seventh Circuit then went on to cite Vivit to explain how the holding in Benjamin did not eliminate the requirement that the defendant must affirmatively involve the minor in the offense.\textsuperscript{36} Ultimately, the Seventh Circuit held “regardless of whether the minor is a partner or a subordinate, the enhancement will be applied where the defendant affirmatively involved the minor in the commission of a crime.”\textsuperscript{37} Therefore, although it agreed with the Sixth Circuit in regards to its implementation of the affirmative act approach, it disagreed with the Sixth Circuit’s determination that mere partnership was not enough.

The Ninth Circuit first confronted the meaning of section 3B1.4 in United States v. Parker.\textsuperscript{38} In Parker, the defendant and a minor executed an armed bank robbery as partners.\textsuperscript{39} The Ninth Circuit held the section 3B1.4 sentencing enhancement was not warranted “in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery, beyond merely acting as his partner.”\textsuperscript{40} The fact that the defendant had conspired with the minor and profited from his involvement in the crime was not seen by the Ninth Circuit as sufficient to find he had acted affirmatively to involve the minor in the crime.\textsuperscript{41} The court believed finding otherwise would go against the plain meaning of the statute and the advisory note, which the Ninth Circuit saw as “clearly implying that only actions affirmatively taken to involve a minor in the offense will qualify under § 3B1.4.”\textsuperscript{42} In Parker, the defendant did not use or attempt to use the minor since he “did not command, encourage, intimidate, counsel, train, procure, recruit, solicit, or otherwise actively involve [the minor].”\textsuperscript{43}

Similarly, in United States v. Suitor,\textsuperscript{44} the Tenth Circuit stated “the two-level § 3B1.4 increase is only applicable if a defendant directs, trains, or in some other way affirmatively engages the minor participant in the crime of conviction.”\textsuperscript{45} The defendant admitted to conspiring with the minors to manufacture and utilize counterfeit checks.\textsuperscript{46} The

\textsuperscript{35} Id. at 859–60.
\textsuperscript{36} Id. at 860.
\textsuperscript{37} Id.
\textsuperscript{38} 241 F.3d 1114 (9th Cir. 2001).
\textsuperscript{39} Id. at 1120.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 1121.
\textsuperscript{43} Id.
\textsuperscript{44} 253 F.3d 1206 (10th Cir. 2001).
\textsuperscript{45} Id. at 1210.
\textsuperscript{46} Id. at 1209.
The district court relied on that admission as support for its decision to apply the two-level sentencing enhancement pursuant to section 3B1.4. The circuit court, however, noted that more than mere involvement in the conspiracy with the minors was needed in order for the sentencing enhancement to be applied. After clarifying the necessary requirements for applying the enhancement, the Tenth Circuit ultimately affirmed the district court’s application of the sentencing enhancement by finding the defendant used the minors in the commission of the crime by instructing them on which banks to visit, how to present the checks, and counseling them on how to behave if they were caught.

The Fourth Circuit in *United States v. Cummings* joined the affirmative act approach when it based its decision on the Seventh Circuit’s decision in *Ramsey*. Despite the fact that the Sixth, Ninth, and Seventh Circuits are generally seen as being on the same side of this circuit split, the Fourth Circuit seemingly rejected the affirmative steps requirement initially raised by the Sixth Circuit in *Butler* due to its “narrow approach.” Instead, the Fourth Circuit stated the term “encouraging” was what should be focused on in the definition of the term “use.” Applying that logic, the Fourth Circuit found the defendant had a special relationship with the minors that he involved in his scheme to develop and use counterfeit currency and that he encouraged and influenced the minors. Despite the initial refusal to use the affirmative act language, later Fourth Circuit decisions clarify that the Circuit’s reliance on *Ramsey* includes the requirement of an affirmative act in order to apply the enhancement.

The Eighth Circuit in *United States v. Paine* joined the affirmative act approach in stating that “[b]oth Application Note 1 and cases applying § 3B1.4 make clear the ‘used or attempted to use’ language requires the defendant to affirmatively involve or incorporate a minor into the commission of the offense.” In *Paine*, the defendant involved his minor son in the commission of an armed robbery and as a result received a sentencing enhancement pursuant to section 3B1.4. Since the defendant admitted to asking his son to accompany him on the robbery, the

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47 Id.
48 Id. at 1210 (“The evidence, therefore, must demonstrate more than the simple fact that [the defendant] was involved in a conspiracy with the minors.”).
49 Id.
50 18 F. App’x 135 (4th Cir. 2001).
51 Id. at 136–37.
52 Id.; see also id. at 136 n.3.
53 Id. at 137.
54 See, e.g. United States v. Feaster, 43 F. App’x 628, 632 (4th Cir. 2002).
55 407 F.3d 958, 965 (8th Cir. 2005).
56 Id. at 960.
Eighth Circuit was able to find an affirmative act and upheld the sentencing enhancement.\textsuperscript{57}

In \textit{United States v. Pojilenko}, the Third Circuit joined the affirmative act approach in requiring that “some affirmative act is necessary beyond mere partnership in order to implicate § 3B1.4.”\textsuperscript{58} In that case, the defendant served as a muscle man for a criminal enterprise and was convicted for his participation in a robbery that also involved a minor.\textsuperscript{59} Due to this minor’s involvement, the district court applied a section 3B1.4 two-level enhancement to the defendant’s sentence for the use of a minor.\textsuperscript{60} The Third Circuit agreed with the defendant that the use of the minor by other members of the conspiracy could not be accredited to the defendant, thereby rejecting the possibility of utilizing the “reasonable foreseeability” approach.\textsuperscript{61} Instead, it expanded slightly on what would constitute evidence of an affirmative act by stating that there was no evidence of the defendant engaging in an affirmative act “to direct, command, encourage, intimidate, counsel, train, procure, recruit or solicit” the minor.\textsuperscript{62} Because the defendant had only heard reference to the minor during a phone conversation, the Third Circuit determined that he had not engaged in an affirmative act to recruit or direct the minor.\textsuperscript{63}

The Fifth Circuit analyzed in \textit{United States v. Mata}\textsuperscript{64} whether applying section 3B1.4 was warranted when the defendant used the minor to assist in avoiding detection of the offense.\textsuperscript{65} The defendant had used her minor child and the minor children of a friend by having them in the car with her while she attempted to transport an undocumented immigrant over state lines in order to reduce suspicion regarding her planned illegal activity.\textsuperscript{66} Although this was not the first time the Fifth Circuit had addressed the issue of how to interpret what constitutes

\begin{thebibliography}{9}
\bibitem{57} Id. at 965–66.
\bibitem{58} 416 F.3d 243, 247 (3d Cir. 2005) (The Third Circuit further commented that “[t]o hold that any defendant who merely participated with a minor in a crime is subject to a two-level enhancement and would create, in effect, an across-the-board enhancement that would conflict with the notion that this enhancement is reserved for defendants who play a particular role in the offense.”).
\bibitem{59} Id. at 245.
\bibitem{60} Id.
\bibitem{61} Id. at 246.
\bibitem{62} Id.
\bibitem{63} Id. at 247.
\bibitem{64} 624 F.3d 170 (5th Cir. 2010).
\bibitem{65} Id. at 175.
\bibitem{66} Id. at 172, 175.
\end{thebibliography}
“use” under the enhancement in section 3B1.4. Each unpublished Fifth Circuit decision concerning section 3B1.4 had held that in order to be found to have involved the minor in the offense, the defendant had to have taken some affirmative action and the “mere presence of the minor at the scene of a crime” was not enough. An affirmative act, the Fifth Circuit ruled in Mata, includes intentionally using a minor to avoid detection by purposely bringing them along for the commission of the offense.

It is important to note the facts of the above cases, with the exception of Pojilenko, did not involve a conspiracy situation that would give rise to the possibility of utilizing the reasonable foreseeability approach. Therefore, many of the circuits were not considering use of the “reasonable foreseeability” approach simply because they had not yet had the opportunity to consider application of section 3B1.4 in the context of a conspiracy.

B. Original endorsement of the “reasonable foreseeability” approach

The “reasonable foreseeability” approach was initially followed by three of the circuit courts. These circuits advanced the Pinkerton logic by holding the enhancement is applicable if the defendant could reasonably foresee a co-conspirator’s use of a minor in the crime. This approach defines the word “use” in section 3B1.4 by referencing another section within the Federal Sentencing Guidelines, section 1B1.3(a), which provides, “[u]nless otherwise specified, . . . adjustments in Chapter Three [ ] shall be determined on the basis of . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” This subsection will summarize the first opinions of each of these three circuits that initially adopted the reasonable foreseeability approach when the factual circumstances were that the defendant was involved in a conspiracy to display how the circuits differed in their analyses. These opinions both defined these circuits’ position on when to apply the two-level sentencing enhancement of section 3B1.4 and allowed for the sentencing enhancement to be applied

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67 Sec, e.g., United States v. Zertuche, 228 F. App’x 462, 463 (5th Cir. 2007); United States v. Cuellar, 151 F. App’x 352 (5th Cir. 2005) (unpublished); United States v. Farias, 112 F. App’x 374, 374 (5th Cir. 2004); United States v. Gutierrez, 251 F.3d 156 (5th Cir. 2001); United States v. Ibarra-Sandoval, 216 F.3d 1079 (Table) (5th Cir. 2000).

68 Mata, 624 F.3d at 177.

69 Id. at 175–76.

70 Id. at 176–77.

71 328 U.S. 640 (1946) (establishing vicarious liability in conspiracy cases).

72 U.S.S.G. § 1B1.3(a).
when it was reasonably foreseeable that a co-conspirator would involve the minor in the crime.

The First Circuit initially confronted the application of the sentencing enhancement in an unpublished decision, *United States v. Medera-Castro.*[^73] However, its first published decision that interpreted section 3B1.4 was *United States v. Patrick.*[^74] In *Patrick,* the defendant had attempted to rely on evidence that the minors involved in the drug transactions worked for a co-conspirator and that no one had testified that he himself employed minors.[^75] However, since the defendant was convicted of conspiracy, the First Circuit held that the defendant’s sentence “could be enhanced based on his co-conspirators’ reasonably foreseeable use of juveniles to further the [organization]’s activities” and cited section 1B1.3(a)’s reasonable foreseeability language in support of that finding.[^76]

Initially, the Eleventh Circuit explicitly embraced the reasonable foreseeability approach when it faced a conspiracy case in *United States v. McClain*[^77] by stating in a jointly undertaken criminal activity, “[a]ny defendants who could have reasonably foreseen the use of a minor . . . are culpable under the plain language of sections 3B1.4 and 1B1.3(a)(1)(B).”[^78] In *McClain,* the Eleventh Circuit found the Sixth Circuit’s position in *Butler* to be factually inapposite.[^79] It held section 3B1.4 was applicable to “participants in a jointly undertaken criminal enterprise in which use of a minor was reasonably foreseeable,” and that co-conspirator’s recruitment of a minor to be involved in the defendant’s counterfeit check scheme was reasonably foreseeable to the defendant because he was the leader and because both he and his co-conspirator had been recruiting young people.[^80] No affirmative act existed in *McClain,* but the existence of a conspiracy allowed the court to still hold the defendant accountable for the minor’s use in the crime by utilizing the reasonable foreseeability approach.

[^73]: 187 F.3d 624 (1st Cir. 1998) (“[C]ontrary to appellant’s assertion in his brief, the two-level increase did not require a finding that a minor was used in the sales made by appellant himself. Instead, the question is whether the use of minors was a ‘reasonably foreseeable act[] . . . of others in furtherance of the jointly undertaken criminal activity.’ U.S.S.G. § 1B1.3(a)(1)(B).”).
[^74]: 248 F.3d 11 (1st Cir. 2001).
[^75]: *Id.* at 27.
[^76]: *Id.* at 27–28.
[^77]: 252 F.3d 1279 (11th Cir. 2001).
[^78]: *Id.* at 1288.
[^79]: *Id.* at 1287 (determining that the Sixth Circuit’s position was one of a strict liability application of section 3B1.4).
[^80]: *Id.* at 1288.
Lastly, the Second Circuit embraced the “reasonable foreseeability” language when interpreting section 3B1.4. The defendant in United States v. Lewis participated in a supervisory role in a drug distribution scheme in which a minor participated by selling drugs. The Second Circuit answered the issue of whether § 3B1.4 can be applied to increase the offense level of the leader of a conspiracy who was not directly involved with recruiting a minor, and did not have actual knowledge that such individual was a minor, but who nonetheless had general authority over the activities in furtherance of the conspiracy.

Following the reasonable foreseeability approach, the Second Circuit agreed that the enhancement was permitted. The court found the defendant could have reasonably foreseen that a minor could be used in the conspiracy because the defendant was an organizer and leader of the drug distribution ring and the environment was one in which adults and minors lived together in close proximity. Additionally, like the First and Eleventh Circuits, the Second Circuit held the intersection of section 3B1.4 and section 1B1.3(a)(1)(B) required this result.

The Second Circuit in Lewis also acknowledged the other circuit court cases that require a defendant to have taken affirmative steps to involve the minor in the crime in order for the application of the enhancement. The court stated those cases were inapplicable to the case at hand because they dealt with the question of what constitutes “use” as applied for the purposes of section 3B1.4 rather than the intersection of section 3B1.4 and section 1B1.3(a)(1)(B), which applies in situations of a conspiracy. Therefore, the Second Circuit in Lewis did not see itself as interpreting the meaning of the word “use,” but it saw the question of whether the sentencing enhancement should be imposed on co-conspirators who could have reasonably foreseen the involvement of the minor as a different issue entirely. Additionally, the Second Circuit did not share the concern of other circuits that such a conclusion would

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81 United States v. Lewis, 386 F.3d 475, 479–80 (2d Cir. 2004).
82 386 F.3d 475 (2d Cir. 2004).
83 Id. at 478–79.
84 Id. at 479.
85 Id. at 479–80.
86 Id.
87 Id. at 479 (citing McClain, 252 F.3d at 1287–88 and Patrick, 248 F.3d at 27–28).
88 Id. at 480.
89 Id.
90 Id.
lead to co-conspirators being strictly liable whenever a minor is involved in the conspiracy, regardless of the circumstances. This is because the “reasonable foreseeability” requirement compels the court to assess the factual circumstances of every case and co-conspirators that could not have reasonably foreseen the use of the minor in the conspiracy would not face the implementation of the enhancement.

C. Changes that have occurred in the circuits since their initial stance on the issue

Part 1 describes changes that have occurred in the reasoning of some of the affirmative act circuits regarding section 3B1.4 since their initial rulings. Overall, these eight circuits have continued to adhere to the affirmative act requirement, although hostility to the reasonable foreseeability approach has diminished in all but two circuits. Part 2 describes any changes that have occurred in the reasoning of the reasonable foreseeability circuits regarding section 3B1.4 and the move towards adopting the “affirmative act” language in a hybrid approach.

1. Changes that have occurred in the circuits that initially supported the affirmative action requirement of section 3B1.4

For the most part, the circuits that have taken the “affirmative act” position continue to apply this approach with little to no variation. The Sixth, Tenth, Fourth, Third, Seventh, and Fifth Circuits all continue to consistently interpret section 3B1.4 as requiring an affirmative action in their successive cases without any changes to this approach.

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91 Id.
92 Id.
94 See, e.g., United States v. Hopkins, 509 F. App’x 765, 779 (10th Cir. 2013); United States v. Pena-Hermosillo, 522 F.3d 1108, 1121 (10th Cir. 2008); United States v. Seanez, 221 F. App’x 773, 778 (10th Cir. 2007).
95 See, e.g., United States v. Gomez-Jimenez, 750 F.3d 370 (4th Cir. 2014); United States v. Feaster, 43 F. App’x 628 (4th Cir. 2002).
97 See United States v. Bowlin, 534 F.3d 654, 661–62 (7th Cir. 2008); United States v. Choiniere, 517 F.3d 967, 973–74 (7th Cir. 2008); United States v. Hall, 217 F. App’x 555 (7th Cir. 2007); United States v. Brazinski, 458 F.3d 666 (7th Cir. 2006); United States v. Perez-Martinez, 75 F. App’x 534, 537 (7th Cir. 2003); United States v. Hodges, 315 F.3d 794, 802 (7th Cir. 2003); United States v. Anderson, 259 F.3d 853, 863 (7th Cir. 2001); United States v. Rivera, 248 F.3d 677, 682 (7th Cir. 2001).
98 See, e.g., United States v. Smith, 822 F.3d 755, 764 (5th Cir. 2016); United States v. Powell, 732 F.3d 361, 381–82 (5th Cir. 2013).
In fact, the view among some of the circuits that a co-conspirator’s reasonably foreseeable use of a minor is sufficient to apply the section 3B1.4 enhancement was explicitly rejected by the Third Circuit in *Pojilenko*. In expressing its disagreement with the Eleventh Circuit, the court stated the language of section 3B1.4 enhancement is defendant-specific and “the structure of the Sentencing Guidelines compels the conclusion that the use of a minor enhancement must be based on an individualized determination of each defendant’s culpability.” The Third Circuit looked to the language in the introductory commentary of Part B of Chapter Three of the Sentencing Guidelines, which states, “[t]his Part provides adjustments to the offense level based upon the role the defendant played in committing the offense.” In its analysis, the Third Circuit placed emphasis on the words “the defendant” in the introductory language and the language in section 3B1.4. In addition, the Third Circuit pointed to a Fourth Circuit decision, *United States v. Moore*, to reach the same conclusion that each sentencing adjustment in Part B cannot be based on the actions of co-conspirators. As a result, the Third Circuit concluded “[t]he role in the offense provisions of Part B are clearly intended to distinguish between participants in an offense based on whether their particular roles make them more or less culpable than others who commit the same offense.” In quoting *Moore*, the Third Circuit also stated the very purpose of the provisions in Part B would be undermined if the defendant was found to be able to receive an enhancement even if the defendant himself or herself did not personally satisfy the requirements of that sentencing enhancement provision and only a co-conspirator satisfied them.

The Seventh Circuit was also directly confronted with the alleged circuit split in *United States v. Acosta*. The Seventh Circuit in *Acosta* chose to adhere to its initial position requiring an affirmative act, and

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99 United States v. Pojilenko, 416 F.3d 243, 248 (3d Cir. 2005) (“We have yet to rule on whether a co-conspirator’s reasonably foreseeable use of a minor can be attributed to other members of a conspiracy for purposes of applying an enhancement under § 3B1.4. We now hold that it cannot.”).

100 *Id.*


102 *Pojilenko*, 416 F.3d at 248.

103 29 F.3d 175, 179 (4th Cir. 1994) (“These roles in the offense provisions were designed to permit sentencing judges to make individualized distinctions among defendants engaged in a criminal enterprise.”).

104 *Pojilenko*, 416 F.3d at 248.

105 *Id.*

106 *Id.* at 248–49 (“The role in the offense provisions of Part B are clearly intended to distinguish between participants in an offense based on whether their particular roles make them more or less culpable than others who commit the same offense.”).

107 474 F.3d 999 (7th Cir. 2007).
it expressly rejected the reasonable foreseeability approach. In doing so, the Seventh Circuit became the second circuit after the Third Circuit to expressly reject the reasonable foreseeability approach. The Seventh Circuit additionally embraced the Third Circuit’s reasoning for its rejection of the extension of section 3B1.4’s reach through application of the reasonable foreseeability approach stating, “[the reasonable foreseeability approach] makes no sense in the context of the individualized enhancements set out in section 3B of the Guidelines, which seek to punish the particular behavior of individual members of a conspiracy.” Additionally, the Seventh Circuit noted an interesting point that the government had not noted “any case in which courts applied Pinkerton principles to the other enhancements listed in Part B of Chapter 3 of the Guidelines.”

However, despite the strong stance taken by the Third and Seventh Circuits, the Eighth Circuit has since applied the section 3B1.4 sentencing enhancement to conspiracy cases in which it found that it was reasonably foreseeable to the defendant that a co-conspirator would utilize a minor in a crime. These cases do not mean, however, that the Eighth Circuit has abandoned the “affirmative act” requirement. Rather, many subsequent Eighth Circuit cases continued to require that the defendant affirmatively act to involve the minor in the crime when the situation did not involve a conspiracy and a co-conspirator’s involvement of a minor in the crime. Additionally, the court in both United States v. Spotted Elk and United States v. Voegtlin discussed and upheld the affirmative act requirement while also applying the sentencing enhancement under the reasonable foreseeability approach. In Spotted Elk, the Eighth Circuit upheld a finding by the district court that “it was reasonably foreseeable to [the defendant] that other co-conspirators were using a certain child to sell drugs, to hold money, and to

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108 Id. at 1003.
109 Id. at 1002–03 (“Among our fellow circuits taking the ‘affirmative act’ position, only the Third has explicitly rejected the reasonably foreseeable test.”).
110 Id. at 1003.
111 Id.
113 See, e.g., United States v. Fisher, 861 F.3d 802, 805 (8th Cir. 2017); United States v. Williams, 590 F.3d 616, 619 (8th Cir. 2010); United States v. Jones, 612 F.3d 1040, 1048 (8th Cir. 2010); United States v. Tipton, 518 F.3d 591, 597 (8th Cir. 2008); United States v. Mentzos, 462 F.3d 830, 841 (8th Cir. 2006).
114 548 F.3d 641 (8th Cir. 2008).
115 437 F.3d 741 (8th Cir. 2006).
116 See Spotted Elk, 548 F.3d at 670–71 (“[F]or the adjustment to apply, a defendant must affirmatively involve or incorporate the minor into the offense, but a conspirator is accountable for all reasonably foreseeable acts of a co-conspirator undertaken in furtherance of the jointly undertaken criminal activity.”).
do other acts on behalf of the conspiracy,” and it also stated the defendant had sold cocaine directly to the minor.\footnote{117} In \textit{Voegtlin}, the Eighth Circuit applied the same reasonable foreseeability approach as laid out by the First, Second, and Eleventh Circuits by relying on the language of section 1B1.3.\footnote{118} It was reasonably foreseeable to the defendant that his co-conspirator would involve the minor since the defendant knew the minor had driven the co-conspirator on drug-related operations, knew that both the co-conspirator and the minor had bought pills for the defendant, and had directed the minor to incriminate someone else if he was arrested.\footnote{119}

Additionally, the Ninth Circuit in \textit{United States v. Goodbear}\footnote{120} considered “whether, for purposes of applying a § 3B1.4 enhancement, the use of a minor can be attributed to another for a misprision of felony offense” because the court believed that whether or not the enhancement was appropriate depended on the language of the misprision of felony statute.\footnote{121} The Ninth Circuit analyzed the language and commentary of the misprision of felony statute, section 2X4.1, which stated “any applicable specific offense characteristics” should be applied that were “known, or reasonably should have been known, by the defendant.”\footnote{122} The defendant’s husband had instructed both the defendant and her minor son to lie about the assault her husband committed against their young daughter.\footnote{123} The defendant in \textit{Goodbear} argued the district court misapplied the sentencing enhancement of section 3B1.4 as there was nothing to suggest she took an affirmative act to involve the minor son in the offense.\footnote{124} Ignoring the “affirmative act” requirement that was previously imposed by the Ninth Circuit, the court found there was no abuse of discretion in adding the section 3B1.4 enhancement because it was reasonably foreseeable to the defendant that a co-conspirator would use a minor.\footnote{125}

Therefore, the language of “reasonable foreseeability” was recognized by the Ninth Circuit in \textit{Goodbear}, although not because of section 1B1.3(a) as the First, Second, and Eleventh Circuits have endorsed, but rather because of the language of the offense statute. Yet, other Ninth

\begin{footnotes}
\item[117] 548 F.3d at 670–71.
\item[118] 437 F.3d at 747 (“A defendant convicted of conspiracy is accountable under the guidelines for all reasonably foreseeable acts of a co-conspirator taken in furtherance of the jointly undertaken criminal activity.”) (citing U.S.S.G. § 1B1.3).
\item[119] \textit{Id.}
\item[120] 676 F.3d 904 (9th Cir. 2012).
\item[121] \textit{Id.} at 910; U.S.S.G. § 2X4.1.
\item[122] \textit{Goodbear}, 676 F.3d at 911 (citing U.S.S.G. § 2X4.1).
\item[123] \textit{Id.} at 906–07.
\item[124] \textit{Id.}
\item[125] \textit{Id.} at 911.
\end{footnotes}
Circuit decisions issued after *Parker* and after *Goodbear* continued to apply the affirmative act approach in interpreting the sentencing guidelines. Nonetheless, the Ninth Circuit only seemed to apply the “reasonably foreseeable” language since it was utilized in section 2X4.1 of the felony misprision statute, so it does not necessarily see the issue in the same way as the “reasonably foreseeable” circuits have approached it through the Sentencing Guidelines. It is important to note, however, that the decision in *Goodbear* suggests the Ninth Circuit would at the very least reject the Third Circuit’s view that section 3B1.4 is defendant-specific and that the enhancement must only be based on the individualized determination of the defendant’s culpability. Additionally, the reasoning utilized by the Ninth Circuit in *Goodbear* followed a similar pattern to that of the reasonable foreseeability circuits by looking to another applicable statute and the notes of that statute, which directed the court to consider reasonably foreseeable acts. This is parallel to what the circuits that apply the reasonable foreseeability approach do when they look to the applicable section 1B1.3(a) and follow its mandates regarding conspiracy situations.

2. Changes that have occurred in the circuits that initially supported the reasonable foreseeability requirement of section 3B1.4

The First Circuit acknowledged the circuit split as recently as September 5, 2017 in *United States v. Corbett*, where the defendant who had been involved in a conspiracy was found to have used the minor by encouraging her drug sales activity, but there was no mention in the case of the *language* of requiring an affirmative act. However, with that acknowledgment, the court concluded that it did not need to address the supposed split since “the question of the enhancement’s applicability on these facts concerns only [the defendant]’s actions” rather than on a co-conspirator’s actions. In other words, in *Corbett* the court was not considering whether or not to continue to utilize the reasonable

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126 See, e.g., United States v. Gonzalez, 612 F. App’x 433, 436 (9th Cir. 2015); United States v. Flores, 725 F.3d 1028, 1039 (9th Cir. 2013); United States v. Esquivel-Castaneda, 548 F. App’x 420, 421 (9th Cir. 2013); United States v. Rodriguez-Quinones, 473 F. App’x 602, 602 (9th Cir. 2012); United States v. Eaton, 407 F. App’x 250, 250 (9th Cir. 2011); United States v. Garcia, 497 F.3d 964, 971 (9th Cir. 2007); United States v. Preciado, 506 F.3d 808, 810 (9th Cir. 2007); United States v. Sanchez, 241 F. App’x 406, 407 (9th Cir. 2007); United States v. Allen, 341 F.3d 870, 894 (9th Cir. 2003); United States v. Waters, 83 F. App’x 196, 197 (9th Cir. 2003); United States v. Quiros-Acosta, 53 F. App’x 450, 451 (9th Cir. 2002); United States v. Jimenez, 300 F.3d 1166, 1170 (9th Cir. 2002); United States v. Marinez-Arellano, 36 F. App’x 265, 266 (9th Cir. 2002); United States v. Castro-Hernandez, 258 F.3d 1057, 1060 (9th Cir. 2001).

127 870 F.3d 21 (1st Cir. 2017).

128 Id. at 32.

129 Id. at 34 n.16.
foreseeability approach regarding a co-conspirator’s use of a minor or to abandon that accepted method in favor of endorsing solely the affirmative act approach regardless of the circumstances. The other previous, but less-recent, First Circuit decision regarding the same issue continued to embrace and apply the reasonable foreseeability requirement in a conspiracy case.\textsuperscript{130} Although it has focused on the defendant’s actions and utilized reasoning similar to the language used by courts in requiring an affirmative act, the First Circuit is now alone in its refusal to adopt the language of the “affirmative act” requirement and in maintaining its sole support for the application of section 3B1.4 if it was reasonably foreseeable to a defendant that a co-conspirator would use a minor.

The Eleventh Circuit’s approach to this issue changed to utilize both methods in a hybrid approach, which highlights the confusion that needs to be addressed and resolved. For a while, the Eleventh Circuit continued to implement the reasonable foreseeability test in determining whether section 3B1.4 should apply.\textsuperscript{131} However, the Eleventh Circuit changed its position in \textit{United States v. Taber}.\textsuperscript{132} There, the Eleventh Circuit upheld the two-level adjustment pursuant to section 3B1.4 because the defendant had committed three affirmative acts to involve and encourage the minor in the offense: driving them to the scene of the crime, assisting the minor in entering the scene of the crime, and acting as a lookout for the minor.\textsuperscript{133} The Eleventh Circuit in \textit{Taber} acknowledged that \textit{McClain} was the previous authority on the application of section 3B1.4 in that circuit, but stated that “[b]ecause we did not have the opportunity to discuss the definition and scope of the terms “use” or “attempted to use” as they are employed in §3B1.4, it remains an open question in this circuit.”\textsuperscript{134} Therefore, the Eleventh Circuit viewed its \textit{McClain} holding—that the enhancement was applicable to participants in a jointly undertaken criminal enterprise in which use of a minor was reasonably foreseeable—as answering a different question than what the correct interpretation of the word “use” within the enhancement is when no conspiracy exists.

As a result, the Eleventh Circuit in \textit{Taber} joined the hybrid approach in holding that in order to apply the enhancement in a non-conspiracy case, an affirmative step to involve the minor in the commission

\textsuperscript{130} United States v. Mott, 26 F. App’x 8, 8–10 (1st Cir. 2001).
\textsuperscript{131} United States v. Hood, 246 F. App’x 611, 612 (11th Cir. 2007); United States v. Coyle, 154 F. App’x 173, 176 (11th Cir. 2005) (explicitly rejecting the defendant’s argument that the section 3B1.4 enhancement should not be applied because he never acted affirmatively to involve a minor and embracing the \textit{McClain} precedent).
\textsuperscript{132} 497 F.3d 1177 (11th Cir. 2007).
\textsuperscript{133} \textit{Id.} at 1178.
\textsuperscript{134} \textit{Id.} at 1180.
of the criminal activity is required.\textsuperscript{135} Interestingly, the court noted the same focus as the Third Circuit on the particular defendant-specific language in the introductory commentary to part B of chapter three in the guidelines. Despite acknowledging the division among the circuits over what type of affirmative act is required, the Eleventh Circuit did not weigh in on what it would consider to be sufficient.\textsuperscript{136} Instead, the court found the defendant’s three acts did encourage and help the minor to commit the crime, which was sufficient to find the defendant affirmatively involved the minor.\textsuperscript{137} Eleventh Circuit decisions after \textit{Taber} continued to apply the affirmative act requirement.\textsuperscript{138} However, the Eleventh Circuit did not abandon the reasonable foreseeability approach altogether. Rather, subsequent Eleventh Circuit cases applied precedent taking both approaches, distinguishing cases in which the defendant was involved in a joint criminal enterprise from those in which the defendant acted only with the minor.\textsuperscript{139}

The Second Circuit faced the issue of whether the application of the sentencing enhancement pursuant to section 3B1.4 was warranted again in \textit{United States v. Rose}.\textsuperscript{140} In \textit{Rose}, the defendant had orchestrated a kidnapping scheme that involved the assistance of a minor.\textsuperscript{141} In evaluating the appropriateness of the application of the sentencing enhancement, the court initially based its analysis on the reasonable foreseeability standard as laid out in \textit{Lewis}.\textsuperscript{142} The defendant in \textit{Lewis}, like the defendant in \textit{Rose}, had also conceived of and directed the crime.\textsuperscript{143} Since another person involved in the crime had encouraged the minor’s involvement by handing him a gun to utilize in the crime, the Second Circuit in \textit{Rose} determined that the defendant knew or could have reasonably foreseen the co-conspirator’s use of the minor to commit the robbery.\textsuperscript{144} Despite concluding that the evidence supported a finding that the defendant had used the minor to conduct his crime un-

\textsuperscript{135} \textit{Id.} at 1181 (“We join our sister circuits and hold that a § 3B1.4 adjustment is warranted only where the defendant takes some affirmative step to involve a minor in the commission of the criminal activity.”) (citing U.S.S.G. § 3B1.4).

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} See \textit{e.g.}, \textit{United States v. Cervante-Sanchez}, 659 F. App’x 530, 533 (11th Cir. 2016); \textit{United States v. Gerald}, 365 F. App’x 188, 193 (11th Cir. 2010); \textit{United States v. Grinnage}, 309 F. App’x 334, 337 (11th Cir. 2009); \textit{United States v. Futch}, 518 F.3d 887, 896 (11th Cir. 2008).

\textsuperscript{139} See \textit{United States v. Sanders}, 619 F. App’x 800, 803 (11th Cir. 2015); \textit{United States v. Hamilton}, 356 F. App’x 345, 349 (11th Cir. 2009).

\textsuperscript{140} 496 F.3d 209 (2d Cir. 2007).

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 213.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 213–14.
order that standard, the court also addressed and dismissed the defendant’s argument that the sentencing enhancement was only merited where a minor was being exploited, and in doing so it turned to the holdings in the Sixth and Ninth Circuits in Butler and Parker that require an affirmative act as guidance.\textsuperscript{145} After applying the standards of Butler and Parker, the court found the sentencing enhancement under section 3B1.4 was permissible because the defendant had “solicited, recruited, procured, trained, encouraged, and commanded [the minor],” which fits within the accepted definition of an affirmative act in the Sixth and Ninth Circuits.\textsuperscript{146} Therefore, in the conspiracy context of Rose, the Second Circuit found the requirements for implementing the sentencing enhancement were met under both the reasonably foreseeable approach and the affirmative act approach.

D. The current positions of the circuit courts regarding when to apply the sentencing enhancement under section 3B1.4

As of December 2017, all but one of the circuits that have faced the question of how to interpret the language of section 3B1.4 require that the defendant engaged in an affirmative act to involve the minor in the crime in order for the sentencing enhancement to be applied. The First Circuit is the only circuit who has yet to utilize the language of the affirmative act approach despite facing a case in which it applied the sentencing enhancement because of the defendant’s own actions where he “encouraged the minor’s drug activity.”\textsuperscript{147} Three circuits utilize a hybrid method and apply each approach when it is factually appropriate to do so: the Second, Eighth, and Eleventh Circuits. Although the Second and Eleventh Circuits did join the other circuits in the “affirmative act” camp, neither of the circuits abandoned the reasonable foreseeability approach entirely. These circuits still utilize it when they are faced with a conspiracy case because they see the two approaches as simply being two different methods that are suitable to use under different circumstances. The Eighth Circuit began by requiring the defendant to affirmatively act to involve the minor in the crime, but subsequently also began applying the sentencing enhancement to cases in which it was reasonably foreseeable to the defendant that the co-conspirator would involve the minor in the crime.

The Third and Seventh Circuits remain the only two circuits to explicitly reject the applicability of the “reasonable foreseeability” approach in conspiracy cases despite the language of 1B1.3(a) because

\textsuperscript{145} Id. at 214.
\textsuperscript{146} Id.
\textsuperscript{147} See United States v. Corbett, 870 F.3d 21, 32 (1st Cir. 2017).
they state the defendant-specific language of section 3B1.4 qualifies as being “otherwise specified.” It is unclear where the Fourth, Fifth, Sixth, and Tenth Circuits would side in this debate since they have yet to face a conspiracy situation in which the defendant could not be said to have affirmatively acted to involve the minor in the crime but could have reasonably foreseen the use of the minor by a co-conspirator. Although it has used “reasonable foreseeability” language, the Ninth Circuit did not do so in the same way as the other circuits because it did not base its analysis on the interrelation between sections 3B1.4 and 1B1.3(a). Nonetheless, the Ninth Circuit’s willingness to analyze the intersection of section 3B1.4 with another section in a similar manner suggests it does not adhere to the defendant-specific viewpoint and may be open to utilizing the “reasonable foreseeability” language if it faced a conspiracy case.

III. CIRCUIT COURTS SHOULD ADOPT A HYBRID APPROACH TO CREATE UNIFORMITY

Although it may seem as if the alleged circuit split is almost satisfactorily resolved in light of the trend toward a recognition of the affirmative act requirement in at least some circumstances and the increasing use of the hybrid approach in several circuits, an important conflict remains. This is especially true when one considers that the Eighth and Ninth Circuits have moved away from utilizing solely the affirmative action requirement once they were faced with a conspiracy case in which the co-conspirator utilized the minor in the crime. With some of the circuits outright rejecting the reasonable foreseeability approach, some using the affirmative action requirement and the reasonable foreseeability of a co-conspirator requirement in a hybrid approach, and some staying silent regarding the differences in opinion, a consistent method of deciphering section 3B1.4’s enhancement requirement is still needed to encourage consistency among the circuits.

While previous scholarship framed the court decisions as a circuit split and took different positions in favor of one reading of the language or another, it is not clear that the differences among the circuits regarding the interpretation of section 3B1.4 should even be described as a circuit split anymore. Rather, the disagreement in the interpretation of the language of section 3B1.4 and when to apply the sentencing enhancement of that section is simply because there are two different existing applications that apply to two different circumstances. Indeed, the question of whether section 3B1.4 should apply to the defendant based on his acts alone in a case where no conspiracy is charged differs

148 See DiChello, supra note 4; Lockman, supra note 5.
from the question of whether section 3B1.4 should apply to the defendant based on the activity of his co-conspirator in situations of a conspiracy.

The distinction between the section 3B1.4 interpretations is most evident in collaborative crimes in which one criminal might not have directly solicited a minor’s involvement, but he or she may have known of or should have reasonably foreseen the minor’s involvement. In that circumstance, should courts strictly adhere to the affirmative act requirement based on the defendant’s conduct alone, or does the language of 1B1.3(a) combined with section 3B1.4 suggest that courts can also use the reasonable foreseeability approach regarding a co-conspirator’s use of a minor? If this issue continues to be phrased as a circuit split, this is where the divide truly exists. Yet most of the courts have simply not been faced with a conspiracy charge that poses the question of whether or not to apply the reasonable foreseeability approach regarding a co-conspirator’s use of a minor. Had the circuit courts seen such conspiracy cases and subsequently rejected the reasonable foreseeability approach, then a more definitive circuit split would exist. Instead, the opposite has occurred when the circuits have been faced with such a case. Therefore, it is not genuinely a split, but rather one interpretation of the enhancement is further defined by the co-conspirator language of section 1B1.3(a).

The circuit courts are actually closer to a cohesive agreement regarding section 3B1.4 than possibly they themselves, or than previous scholarship on the issue, recognize. By looking to the advancements in the case law regarding the issue, two arguments arise that represent different possible approaches that circuit courts could adapt to finally achieve a uniform application of section 3B1.4. Either the approaches are at odds with one another and cannot co-exist under the language of the section, or the changes within the circuits as the case law progressed has demonstrated that rather than there being a circuit split, two plausible and reconcilable methods have emerged regarding application of the sentencing enhancement of section 3B1.4, and they can successfully be utilized under the appropriate factual circumstances.

First, this Comment will argue that both methods regarding application of the sentencing enhancement of section 3B1.4 can successfully be utilized under the appropriate factual circumstances, as demonstrated by the Second, Eighth, and Eleventh Circuits in their adaptation of a hybrid approach to the sentencing enhancement. It will then demonstrate that the hybrid approach is consistent with the statutory interpretation of section 3B1.4. Finally, this Comment will address why the rejection of the reasonable foreseeability approach entirely is unpersuasive in comparison with the hybrid approach and will address
concerns that could arise with full implementation of the hybrid approach.

A. The hybrid approach is favorable and should be adopted by the other circuits as they face applicable conspiracy cases

1. The changes of the Second, Eighth, Ninth, and Eleventh Circuits demonstrate that the two methods of interpreting section 3B1.4 can successfully and logically co-exist

Rather than looking at this issue as a circuit split, courts should view these interpretations as two different issues altogether that can coexist in a hybrid approach. Two of the circuits that followed the reasonable foreseeability approach have additionally adopted the viewpoint that the sentencing enhancement applies if the defendant affirmatively acted to involve the minor in the crime when there is no conspiracy charge. One circuit went in the opposite direction and applied the reasonably foreseeable approach in conspiracy cases in addition to the affirmative act approach when it is based only on the defendant’s actions. Rather than replacing one approach with another, these circuits all saw the two approaches as being compatible, and they have continued to implement this hybrid approach for many years since.

For example, the Eighth Circuit decided Paine in 2005, and it began the opinion by stating that “[b]oth Application Note 1 and cases applying § 3B1.4 make clear the ‘used or attempted to use’ language requires the defendant to affirmatively involve or incorporate a minor into the commission of the offense.” However, in later Eighth Circuit cases regarding conspiracy convictions, the court faced the different question of whether the enhancement could be applied to the defendant when a co-conspirator, rather than the defendant himself, used the minor in the offense. Just one year after Paine in 2006, the Eighth Circuit decided Voegtlin, and in 2008 it decided Spotted Elk. In both cases the court answered that question in the affirmative. In doing so, the Eighth Circuit began utilizing a hybrid approach, which it has effectively maintained for the last eleven years. The Eighth Circuit saw these two cases as being consistent with the precedent of Paine despite the change.

In 2004, the Second Circuit in Lewis saw the cases from the affirmative act approach as addressing the meaning of “use” as applied in section 3B1.4, but that the facts of Lewis were about the intersection of

149 United States v. Paine, 407 F.3d 958, 965 (8th Cir. 2005).
section 1B1.3(a) and section 3B1.4. The Second Circuit effectively introduced the idea of viewing the two approaches as separate considerations: one when the defendant is not involved in a conspiracy and one when the defendant has been convicted of a conspiracy. Three years later, in 2007, the Second Circuit decided *Rose* and used reasoning from both the affirmative act approach and the reasonable foreseeability approach to apply the sentencing enhancement in case involving a conspiracy. The two methods have coexisted for the last ten years as a hybrid approach to applying the section in the Second Circuit.

The Eleventh Circuit decided *McClain* in 2001 with a detailed analysis of why sections 1B1.3(a) and 3B1.4 result in an interpretation that “section 3B1.4 [was] applicable to participants in a jointly undertaken criminal enterprise in which use of a minor was reasonably foreseeable.” Six years later, in 2007, the Eleventh Circuit decided *Taber* and began applying the affirmative act approach to determine whether the defendant used the minor in the commission of the crime where no conspiracy was charged. For the last ten years, the Eleventh Circuit has maintained the hybrid approach, and it views the two approaches as two different considerations.

Additionally, in *Goodbear*, the Ninth Circuit recognized the “affirmative act” requirement but chose to apply the reasonable foreseeability approach based on the circumstances at hand. The court found there was no abuse of discretion in adding the section 3B1.4 enhancement because it was reasonably foreseeable to the defendant that a co-conspirator would use a minor. This is because a situation arose where the court could not find an affirmative action on behalf of the defendant, but it could apply the enhancement based on the fact that it was reasonably foreseeable that her husband would involve the minor in the offense. The changes in the Ninth Circuit’s case law have shown that the circuit is likely open to interpreting future conspiracy cases with the reasonable foreseeability approach. Rather than basing this on the relationship between sections 3B1.4 and 1B1.3(a), the Ninth Circuit relied on the language of the offense.

Yet it is reasonable to suggest that the Ninth Circuit would continue to reject the Third Circuit’s view that section 3B1.4 is defendant-specific and that the enhancement must only be based on the individualized determination of the defendant’s culpability. The Ninth Circuit

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151 United States v. Lewis, 386 F.3d 475, 480 (2d Cir. 2004).
152 United States v. McClain, 252 F.3d 1279, 1288 (11th Cir. 2001).
153 United States v. Taber, 497 F.3d 1177, 1181 (11th Cir. 2007).
154 United States v. Goodbear, 676 F.3d 904, 906–07 (9th Cir. 2012).
155 *Id.* at 911.
will likely endorse the hybrid approach’s understanding of implementing section 1B1.3(a) if faced with such a case since it has already deviated from solely utilizing the affirmative act requirement and used the “reasonable foreseeability” language. Although it would be preferable to have the Ninth Circuit explicitly adopt the reasoning behind the hybrid approach of looking to both sections 1B1.3(a) and 3B1.4 when determining the applicability of the sentencing enhancement in a conspiracy case for consistency purposes, the Ninth Circuit did determine that an affirmative act was not necessary. This determination is consistent with the reasoning of the circuits utilizing the hybrid approach and disputes the stance taken by the Third and Seventh Circuits.

Each circuit that uses the hybrid approach by applying the affirmative act approach for individual acts and the reasonable foreseeability approach for conspiracies has done so for a significant period of time—ten or more years—without any noticeable problems. These circuits have demonstrated that not only is the hybrid approach compatible with the statutory interpretation of the text, but that it also makes sense when considering the special treatment of conspiracy cases as reflected in Pinkerton. The variety of cases within the circuits with different factual circumstances demonstrate the reasons why courts would want to logically use each test.

2. The hybrid approach is consistent with the statutory interpretation of section 3B1.4

Each approach appears to be utilizing a canon of construction called in pari materia, which is defined as “on the same subject; relating to the same matter.”\textsuperscript{156} This canon of construction states that “statutes that are in pari materia may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”\textsuperscript{157} The circuits that employ the hybrid approach apply this canon of construction more faithfully.

If we accept the common interpretation that the defendant’s use of a minor requires an affirmative act in order for the sentencing enhancement of section 3B1.4 to apply, the question remains whether an affirmative act is also necessary in a conspiracy situation. The text of section 3B1.4 and its notes do not provide a clear answer to this question. Once we turn to the introductory commentary, as circuits utilizing the hybrid approach have done, we see that the defendant’s role in the offense is to be determined on the basis of all conduct within the scope of section 1B1.3. From there, it makes sense under in pari materia to then turn

\textsuperscript{156} In pari materia, BLACK’S LAW DICTIONARY (10th ed. 2014).
\textsuperscript{157} Id.
to the language of section 1B1.3, which states that in conspiracy situations, all acts of others in the conspiracy that were reasonably foreseeable are attributed to the defendant unless otherwise specified.

In fact, the viability of this hybrid approach is probably most clearly found in the reasoning of the Eleventh Circuit, which focused heavily on the introductory commentary to chapter three, part B, which states:

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant’s role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), i.e., all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.\(^{158}\)

If anything, this language supports the fact that the circuits implementing the hybrid approach are still focusing on the defendant’s role in the offense by carrying out the correct implementation of the enhancement under the special circumstances of a conspiracy, despite Acosta’s attempt to claim otherwise. The “unless otherwise specified” language does not stop 1B1.3(a)(B) from implementing a reasonably foreseeable test in situations of a conspiracy to determine whether the defendant should receive the sentencing enhancement because there is nothing in section 3B1.4 that otherwise specifies a direction to be taken when the defendant has been convicted of a conspiracy. Therefore, the reasonable foreseeability approach utilized in conspiracy situations under many other circumstances can and should be implemented in this way when determining the application of the sentencing enhancement of 3B1.4.

As McClain pointed out, Butler’s concern that the enhancement will be applied to all defendants “regardless of the roles they played in involving a minor in the crime”\(^{159}\) is unwarranted because the intersection of sections 3B1.4 and 1B1.3(a) still focuses on the defendant’s specific role in the conspiracy.\(^{160}\) If the defendant could not have reasonably foreseen the use of the minor, he will not receive the sentencing enhancement. Additionally, “the role the defendant played in committing the offense” certainly includes his or her role and responsibility in the conspiracy as directed by section 1B1.3(a) and when considering the


\(^{159}\) United States v. Butler, 207 F.3d 839, 848 (6th Cir. 2000).

\(^{160}\) United States v. McClain, 252 F.3d 1279, 1287–88 (11th Cir. 2001).
conspiracy logic behind the *Pinkerton* doctrine. The focus on only punishing the defendant’s culpability when applying the enhancement of section 3B1.4 is maintained with the utilization of the hybrid approach.

When the defendant has not been convicted of a conspiracy, the requirement that the defendant take an affirmative act to involve the minor in the crime is sensible. However, a conspiracy is an entirely different situation and is treated as such in other areas of the law through the rule of vicarious liability.\(^{161}\) It is apparent under section 1B1.3 that a defendant convicted of a conspiracy is responsible under the Sentencing Guidelines for all reasonably foreseeable acts of a co-conspirator taken in furtherance of the conspiracy. Therefore, a hybrid approach that applies the affirmative act requirement when it is the defendant alone and the reasonable foreseeability requirement when the defendant has been convicted of a conspiracy is the logical solution that should be embraced by the circuits going forward.

B. The Third Circuit and Seventh Circuit’s explicit rejection of extending the application of the sentencing enhancement is outdated and unpersuasive

An obvious counterargument exists in the precedent set by the Third Circuit and the Seventh Circuit since both have explicitly rejected the reasonable foreseeability approach even in the context of conspiracy cases. These circuits have faced situations where the enhancement could apply due to a co-conspirator’s use of a minor and rejected it. Although the Second, Eighth, Eleventh, and Ninth (to a certain extent) Circuits have demonstrated the possibility of embracing the defendant-specific language in the same opinion that employs the reasonable foreseeability approach, the Third Circuit in *Pojilenko* and the Seventh Circuit in *Acosta* dismiss this possibility by acknowledging that

the circuits that use the “reasonably foreseeable” test have ignored the words, “[u]nless otherwise specified,” which precede § 1B1.3(a)’s command to impute to defendants all reasonably foreseeable acts by co-conspirators. Section 3B1.4 *does* otherwise specify, the court stated; by its terms, it applies only if “the defendant used or attempted to use” a minor in the commission of the offense.\(^{162}\)


\(^{162}\) United States v. Acosta, 474 F.3d 999, 1003 (7th Cir. 2007) (citing United States v. Pojilenko, 416 F.3d 243, 248 (7th Cir. 2007)) (emphasis in original).
The use of the words “unless otherwise specified” in section 1B1.3(a) plays a large role in this analysis and rejection of the dual approach. In fact, as pointed out earlier, the viability of the reasonable foreseeability approach to section 3B1.4 seems to depend on the meaning of “unless otherwise specified” in section 1B1.3(a). If the defendant-specific language as described in the Third Circuit qualifies as being otherwise specified for the purposes of section 1B1.3(a), as *Acosta* suggested, then arguably the reasonably foreseeable approach should be abandoned altogether.

Therefore, it is rational to advocate that one could reject the hybrid approach and advocate for the sole use of the “affirmative act” view based on the Third Circuit’s analysis in *Pojilenko*. In *Pojilenko*, the Third Circuit rejected the reasonable foreseeability approach due to its view that the language of section 3B1.4 is defendant-specific, and the enhancement must be based on the individualized determination of the defendant’s culpability. However, the Third Circuit’s argument is unpersuasive for two main reasons. Despite the Third and Seventh Circuits’ claims, both interpretations are plausible and can in fact coexist because the reasonable foreseeability language as applied to a conspiracy still focuses on the defendant’s culpability. Additionally, the Third Circuit decided *Pojilenko* in 2005, and the Seventh Circuit decided *Acosta* in 2007. Since then, the other circuits have implemented the dual approach without being persuaded by these two circuits and without the problems that *Pojilenko* and *Acosta* were claiming would occur.

Additionally, if faced with such a situation in other circuits that currently adhere only to the affirmative act approach, it is hard to predict how they would reconcile the two methods of interpretation. The Eighth Circuit is the only other court so far to have faced such a case, and it embraced both methods of application by utilizing the hybrid approach rather than rejecting the reasonable foreseeability approach as the Third and Seventh Circuits chose to do. Once the other circuits face a conspiracy case, this adaptation by the Eighth Circuit, and the success of the hybrid approach in both that circuit and in the Second and Eleventh Circuits, could cause them to be less likely to be persuaded by the defendant-specific language argument that the Third and Seventh Circuits encourage.

It is important to note that the reasoning employed by the circuits that rejected the reasonable foreseeability approach describing the defendant-specific language in the introductory commentary to part B of chapter three in the Sentencing Guidelines was additionally embraced by the Eleventh Circuit in *Taber*, but that determination did not lead

the circuit to abandon the reasonable foreseeability requirement. This suggests cohesion could exist from a textualist standpoint as well, despite the advocacy of the Third Circuit and previous scholarship that argues to the contrary.\textsuperscript{164}

C. Allowing courts to utilize both interpretations in a hybrid approach does not grant too much power to the courts in applying sentencing enhancements

One might be concerned that the use of both approaches leaves the courts with an expansive amount of latitude to apply a sentencing enhancement. Perhaps allowing for the courts to apply the affirmative act approach when the defendant acted alone to involve the minor and allowing the courts to utilize the reasonable foreseeability approach when a conspiracy exists and the minor was used by the co-defendant grants too much power to the courts and places the defendant at an unfair disadvantage of having a much higher likelihood of receiving the sentencing enhancement. This is especially true if one views the sentencing guidelines as a method of restricting judicial discretion. Is there any situation under the dual approach in which the defendant would not face a sentencing enhancement if a minor was somehow involved in the crime? Arguably, yes if the defendant did not reasonably foresee his or her co-conspirator’s use of a minor. But, if one does not buy that argument, how should we feel about the greater likelihood of receiving a sentencing enhancement under section 3B1.4? Do the ends of discouraging the involvement of minors in crimes justify the means?

Determining the effect that a two-level sentencing enhancement would have on defendants varies greatly from case to case. The Sentencing Table used to determine the guideline range charts with the offense level (1-43) on the vertical axis and the criminal history category (I-VI) in the horizontal axis.\textsuperscript{165} The severity of the effect that two levels can have on a defendant’s sentence depends on the extent of the defendant’s criminal history and what the offense level would have been without the enhancement. With a higher criminal history or a higher initial offense level, a two-level enhancement pursuant to section 3B1.4 could increase the defendant’s sentence by many months. However, a defendant with a low criminal history level would likely not face much of a change in the length of his sentence with a sentencing enhancement of two levels unless the offense level was 14 or higher prior to the enhancement.

\textsuperscript{164} Pojilenko, 416 F.3d at 247–48; DiChello, supra note 4.

There has been evidence that criminals often age out of participating in criminal activity. If in many of these cases in which the possibility of applying the sentencing enhancement of section 3B1.4 the defendant is an older career criminal who demonstrates less of a likelihood of aging out of the criminal activities, perhaps a sentencing enhancement that increases time would provide a better deterrence. Is the marginal deterrence important enough to justify this limitation of liberty? If one is concerned with the defendant’s liberty, then an intent-based standard like the “affirmative act” requirement would be the favored approach. However, it is quite clear that the defendants who are utilizing minors in their crimes are doing so in an attempt to lower their own culpability, so perhaps the increased possibility of the sentencing enhancement being applied is a good thing in order to decrease the use of the minors, which is what was intended by the implementation of the sentencing enhancement in the first place. We might also think about conspiracy cases, often involving more experienced criminals, a bit differently. Furthermore, rejecting the reasonable foreseeability approach would imply that the defendant, if he or she had known, would not have allowed a minor to be used to commit the crime, which is highly unlikely.

Additionally, there are safeguards in place within the circuits’ holdings that limit this overreach of power. The hybrid approach does not require the sentencing enhancement to be applied in all circumstances. For example, the sentencing enhancement of section 3B1.4 is not applied every single time a co-conspirator utilizes a minor in the crime. There are situations in which the co-conspirator may have used a minor in the offense, but it is not reasonably foreseeable to the defendant for the co-conspirator to have done so. Under such circumstances, the defendant would not receive the sentencing enhancement.

D. The Sentencing Commission could clarify the desired approach with an edit to the introductory commentary of chapter 3

Alternatively, if one does not want to wait for the circuits to face a conspiracy case and begin applying the dual approach, the Sentencing Commission could potentially resolve this issue with an amendment to the introductory commentary to Chapter Three, Part B of 18 U.S.C. Explicit guidance from the Sentencing Commission, rather than a continuing effort by the courts to determine what the Commission meant by the language of section 3B1.4, would be beneficial in resolving this issue. Although an amendment to section 3B1.4 itself would of course be helpful, this would be an effective alternative. The introductory commentary currently reads:
This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant’s role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), i.e., all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants. 166

While the introductory commentary expressly mentions sections 3B1.1, 3B1.2, and 3B1.3, guidance to section 3B1.4 is noticeably missing and a direction that clarifies that the language of section 3B1.4 does not qualify as being “otherwise specified” could easily be added should the Sentencing Commission want to clarify its desire regarding interpretation of the section. Since this ostensibly minor change seems less likely to happen, it is even more imperative that the circuits take it upon themselves to implement the hybrid approach once they are faced with a fact pattern that allows them to do so.

IV. CONCLUSION

As it currently stands, the circuits are not implementing the two-level sentencing enhancement of section 3B1.4 in a consistent and cohesive manner. However, changes within the circuits since the initial interpretations of section 3B1.4 indicate that this is less of a circuit split than it has been previously characterized by some of the circuits and by the previous scholarship on the application of section 3B1.4. Rather, there are two existing approaches to determining whether or not to apply the two-level sentencing enhancement of section 3B1.4. The question therefore becomes whether there is a reason to sustain the two approaches in a hybrid manner or whether the circuits should abandon one approach in favor of the other. Since the circuits who have applied both approaches under differing circumstances have demonstrated the ability for the two approaches to successfully coexist as law, future circuits should follow a similar hybrid approach when faced with the proper conspiracy fact pattern.

Therefore, it is still beneficial for the circuits who consider conspiracy cases and currently only utilize the affirmative act approach to broaden their approach to include defendants who could have reasonably foreseen the use of the minor by the co-conspirator. Most circuits

that have yet to adopt the reasonable foreseeability approach in addition to the affirmative act approach have not yet been presented with a situation in which they are able to consider the question of whether to apply the enhancement based on the reasonably foreseeable use of a minor by a co-conspirator and adopt the dual approach. Three circuits have embraced this dual approach to interpreting the application of section 3B1.4 based on the facts of each individual case at hand, and it has already proven sustainable in the continued hybrid use of the approaches in cases for many years since. Continuing to apply the sentencing enhancement in this hybrid way will ensure cohesiveness among the circuits and stay true to the language of the Sentencing Guidelines under section 3B1.4 and, in conspiracy cases involving a co-conspirator’s use of a minor, section 1B1.3(a).