

Statement of the
Federal Public and Community Defenders
submitted to the
United States Sentencing Commission

March 10, 2000

Submitted by
Jon Sands
Assistant Federal Public Defender
Phoenix, Arizona

TABLE OF CONTENTS

Introduction	1
Amendment 1 (Implementing NET Act)	4
Amendment 2 (Repromulgation of Telemarketing Fraud Amendment)	21
Amendment 3 (Implementing Prevention of Children from Sexual Predators Act of 1998)	22
Amendment 4 (Implementing Methamphetamine Trafficking Penalty Enhancement Act of 1998)	37
Amendment 5 (Implementing Identity Theft and Assumption Deterrence Act)	45
Amendment 6 (Implementing Wireless Telephone Protection Act)	58
Amendment 7(Firearms Amendments)	64
Amendment 8 (Circuit Conflicts)	
Part A (Aberrant Behavior)	74
Part B (Choice of Offense Guideline)	83
Part C (Bankruptcy Fraud)	102
Part D (Postconviction Rehabilitation)	110
Part E (Sentencing If Plea Agreement Calls for Dismissal of Counts)	124
Amendment 9 (Technical and Conforming Amendments)	130

INTRODUCTION

Federal Public and Community Defender Organizations, which operate under the authority of 18 U.S.C. § 3006A, exist to provide criminal defense services to defendants in federal criminal cases who are unable to afford counsel. Defender Organizations now operate in more than 70 federal judicial districts. We appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons who are charged with often-prosecuted offenses, like drug trafficking and fraud, as well as persons who are charged with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with street crime, like murder, and persons charged with suite crime, like embezzlement.

Congress has directed in 28 U.S.C. § 994(o) that certain entities, including the Federal Public and Community Defenders, “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” In addition, that provision directs us to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines. The Federal Public and Community Defenders are pleased to comment upon

the proposed amendments published by the Commission, but before turning to the specific proposals, we have several general observations.

Congress did not intend the Sentencing Reform Act of 1984 to divest federal judges of their sentencing discretion. Congress did not view the purpose of sentencing guidelines, and other provisions enacted by that legislation, to be to turn federal judges into calculators. The congressional goal was not to do away with discretion, but to guide it. “The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”¹ The Supreme Court underscored this in *Koon*:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.²

The Commission must keep this in mind when evaluating the proposed amendments, particularly amendments related to departures. As the Supreme Court stressed in *Koon*, “A district court’s decision to depart from the Guidelines . . .

¹S. Rep. No. 98-225, 98th Cong., 1st Sess. 52 (1983).

²*Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 2053 (1996).

embodies the traditional exercise of discretion by a sentencing court.”³ We hope that when the Commission takes up proposals that relate to departures, the Commission will decide to draft language that helps federal judges to exercise sentencing discretion rather than language that denies them sentencing discretion. We believe that federal judges can be trusted to exercise discretion wisely.

The manner in which federal judges have been exercising sentencing discretion is noteworthy. Federal judges are sentencing at the bottom of the guideline range and below the guideline range far more often than they sentence at the top of the guideline range or above. The Commission’s own data shows that, of the cases in which sentence is imposed within the guideline range, the sentence is at the bottom of the range 60.3% of the time and is at the top of the range 15.3% of the time.⁴ When it comes to departing, leaving aside the 19.3% of the cases in which there is a substantial-assistance departure, sentencing courts depart below the guideline range 17 times as often as they depart above the guideline range.⁵ This means, to us at least, that the federal judges who impose sentence find the guideline ranges to be too high. Whenever there is an increase in the guideline ranges, a consequence is that sentences falling at the bottom of the

³518 U.S. at 98, 116 S.Ct. at 2046.

⁴U.S. Sentencing Comm’n, 1998 Sourcebook of Federal Sentencing Statistics 59 (table 29). The 1998 Sourcebook is the most recent Sourcebook available.

⁵*Id.* at 51 (figure G). Downward departures for other than substantial assistance occur in 13.6% of the cases; upward departures occur in 0.8% of the cases.

guideline range are higher than before and departures will have to be greater to get to the sentence that the departing court believes to be appropriate. Regrettably, most of the proposals under consideration will drive the guideline ranges even higher.

We believe that the Commission made the correct decision in limiting the number of proposed amendments it would take up during this cycle. The members of the Commission took office last Fall, at a time when the Commission in years past had done a considerable amount of work on amendments for the next cycle. There was simply not enough time available for the Commission to undertake work on a large number of proposed amendments and still do the kind of job that the members of the Commission want to do, and that Congress and the bench and bar expect the Commission to do. Despite having limited the number of proposed amendments it would take up, the Commission is confronted with a large number of issues to look at. Many of the issues are not ripe for resolution. Many are peripheral to the main thrust of the proposed amendment and seem to derive from a penchant to resolve, at once, every issue for all time. In that regard, we would remind the Commission of Mr. Justice Holmes' observation that the life of the law has not been logic, but experience. We urge the Commission to resolve those matters on which it must act and those matters for which there is sufficient research and information to enable the Commission to make informed choices that reflect experience.

AMENDMENT 1

Amendment 1 sets forth three options for implementing the No Electronic Theft (NET) Act.⁶ Section 2(g) of the NET Act directs the Commission to ensure that the guideline range of a crime against intellectual property is “sufficiently stringent” to deter such a crime. In addition, section 2(g) directs that the guidelines “provide for the consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.” The Federal Public and Community Defenders recommend that the Commission adopt option 3 with some changes.

Three Examples

For purposes of simplifying comparisons, we will use three examples throughout our comments on amendment 1. One example involves a case in which there is pecuniary gain to the defendant but no pecuniary loss to the direct victim. A second example involves a case in which there is no pecuniary gain to the defendant but there is a pecuniary loss to the direct victim. A third example involves a case in which there is both pecuniary gain to the defendant and pecuniary loss to the direct victim.

In the first example, a street vendor sells counterfeit copies of a Rolex watch that has a manufacturer’s suggested retail price of \$3,000 but that is generally discounted and can readily be purchased for \$2,400. The street vendor sells 125 counterfeit copies for \$20 each, making the vendor’s gross pecuniary gain \$2,500. For reasons discussed below, there is no pecuniary loss to Rolex.

⁶Pub. L. No. 105-147, 111 Stat. 2678 (1997).

In the second example, an internet surfer pays \$50 to a legitimate retailer for a software program. That program is widely available, and the purchase price paid by the public averages \$50 per copy. The internet surfer makes it available on the internet for downloading without cost, and 50 people download the program. The price paid for a downloaded copy of the program is zero, and the internet surfer has no pecuniary gain. For reasons discussed below, the manufacturer (the copyright owner of the software program) has sustained a pecuniary loss.

In the third example, a compact-disk pirate has access to sophisticated equipment that permits her to make high-quality copies of compact disks. She makes copies of a copyrighted audio disk that retails generally for \$13 and sells 200 of them at \$5 each. The seller has a gross pecuniary gain (\$1,000), and the manufacturer (the copyright owner of the audio disk) has sustained a pecuniary loss.

Background

The Commission addresses offenses involving criminal infringement of a copyright or trademark in § 2B5.3. That guideline has a base offense level of level 6, which is increased by using the loss table in the fraud guideline. The amount calculated under § 2B5.3 is “the retail value of the infringing items.”⁷ The goal of the formula in § 2B5.3 is not to determine the pecuniary “loss” caused by the offense or the pecuniary

⁷The “infringing items” are “the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).” U.S.S.G. § 2B5.3, comment. (n.1).

gain to the defendant from the offense, although that can be the effect of the formula.

The formula in § 2B5.3 does not use the *price* of the infringing items, but the retail value of those items. The retail value of the infringing items may or may not be equivalent to the price of those items or to the price of the infringed items. The retail value of the infringing items and the price of the infringing items are the same in the watch example. The value of a counterfeit copy of that Rolex watch is not the retail value of a legitimate Rolex watch. The value is what the item (a counterfeit copy) actually sold for in the marketplace – in this instance \$20, the price paid to the defendant. The retail value of the infringing items in the watch example, therefore, is \$2,500 (125 items times the value of \$20 per item). The gross pecuniary gain to the defendant is also \$2,500.

In the compact-disk example, the retail value of the infringing item is the same as the retail price of the infringed item. Because of the high quality of the illegitimate compact disks, the retail value is what an authentic compact disk actually sold for in the marketplace, the retail price of \$13 per disk. The retail value of the infringing items, therefore, is \$2,600 (200 disks times \$13, the retail value of a disk). The gross pecuniary gain to the defendant is less than the \$2,600 retail value of the infringing items – \$1,000 (200 disks times \$5, the price for which the defendant sold a disk).

Similarly, in the software program example, the retail value of the infringing item is the same as the price of the infringed item. The price paid by the downloaders of the

infringing program is zero (it costs nothing to download from the internet). The retail value of each infringing item (the downloaded program) is \$50, what it would have cost in the marketplace to have obtained a legitimate copy of the program. Thus, the retail value of all the infringing items \$2,500 (50 copies times \$50, the retail value of a program). The pecuniary gain to the defendant is zero.

The retail value of the infringing items formula will overstate the pecuniary loss to the direct victim, usually by a substantial amount. This is true for two reasons. First, not every person who bought an illegitimate item would have bought the real thing. Second, the victim's pecuniary loss is not the victim's gross gain from the items that would have been sold. The victim had costs (such as manufacturing and marketing costs) in producing the item. The victim's pecuniary loss is gross gain minus those costs.

The watch example illustrates the first reason. The 125 persons who bought a counterfeit copy of the Rolex watch undoubtedly believe that they are not getting the real item. In all likelihood, those persons do not have the means or desire to pay the full amount for the real Rolex watch, and none of them would have. Although the retail value of the infringing items is \$2,500, because none of the buyers would have bought the real thing, Rolex has not suffered a pecuniary loss.

In both the software-program and compact-disk examples, however, at least some of the persons obtaining the illegitimate item would have bought the real thing. The

higher the percentage of persons who would have done so, the greater will be the pecuniary loss. In addition, the profit per item will affect the pecuniary loss. The greater the profit per item, the higher the pecuniary loss.

Assume that the manufacturer of the software program spends \$25 a copy to develop, produce, and market the program. The net pecuniary gain (profit) to the manufacturer of the software program, therefore, is \$25 per copy sold. If every person who downloaded the program without cost would have bought a legitimate version of the program, the manufacturer of the program would have had a profit (net pecuniary gain) of \$1,250 (50 items times \$25 profit per item). The pecuniary loss to the manufacturer caused by the offense, therefore, is \$1,250, the profit the manufacturer would have made from the sale of 50 copies of the program. If instead only 40 downloaders would have bought the program, the manufacturer's lost profit is \$1,000 (40 items times \$25 profit per item) and the pecuniary loss to the manufacturer is \$1,000. If, as probably is the case generally, the profit percentage is not that high, the pecuniary loss is lower. Thus, if the profit per item is \$10, the manufacturer's lost profit (the pecuniary loss to the manufacturer) would be \$500 (50 items times \$10 profit per item) if all 50 downloaders would have bought the program and \$400 if 40 downloaders would have bought the program (40 items times \$10 profit per item).⁸

⁸The results are the same in the compact disk example. If 90% of the price of a compact disk goes to produce and market the disk, the profit per disk is \$1.30 (10% of \$13). If all of the buyers of the illegitimate disk would have bought the real thing – an

The Options

Option 1

Option 1 would replace the current formula with a general formula and a special formula for use with convictions under 18 U.S.C. § 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances). The general formula would be “the retail value of the infringed items multiplied by the quantity of infringing items” In the watch example, that formula yields the amount of \$300,000 (125 illegitimate items times the retail value of \$2,400).⁹ In the software-program example, the formula yields \$2,500 (50 illegitimate items times \$50), and in the compact-disk example, the formula yields \$2,600 (200 illegitimate items times \$13). For offenses under 18 U.S.C. § 2319A, option 1 retains, but rewords, the current formula.¹⁰

unlikely assumption given the price difference between the illegitimate and legitimate disks – the pecuniary loss to the manufacturer would be \$26 (200 items time \$1.30). If half of the buyers of the illegitimate disk would have bought the real disk, the manufacturer lost 100 sales (50% of 200 illegitimate items). The pecuniary loss to the manufacturer in that circumstance would be \$13 (100 items times \$1.30).

⁹Option 1 retains the concept of “retail value” from the current guideline. Thus, even though the real watches have a retail price of \$3,000 each, that is not their retail value because the real watches generally can be bought, legitimately, for \$2,400.

¹⁰Offenses under 18 U.S.C. § 2319A involve unauthorized (“bootlegged”) sound recordings of live musical performances for which there has been no commercial release of a legitimate recording of the performance. The general formula will not work in such a case because there is no “infringed item” and therefore no “retail value of the infringed items.”

Option 2

Option 2 also proposes a general formula and a special formula for offenses under 18 U.S.C. § 2319A. The general formula is similar to the general formula in option 1, except that “average retail price” is used instead of retail value, which equates to average retail price. The result under the general formula in option 2, therefore, would mirror the result under the general formula in option 1. The special formula for offenses under 18 U.S.C. § 2319A is the price of the infringing item times the number of infringing items, the same formula as in option 1.

Option 2 also would add two new enhancements. One enhancement would add two levels “if the offense involved online electronic infringement,” and the other would add two levels (with a floor of level 13) “if the offense involved a reasonably foreseeable risk to public health or safety.” Finally, option 2 would provide for a two-level reduction (but not to lower than level 6) if (1) the offense was not committed for commercial purpose or private financial gain, or (2) the general formula is used and “the offense involved greatly discounted merchandise.”

The formula in option 2 yields the same results as the formula in option 1. In the watch example, the amount calculated is \$300,000. In the software-program example, the amount calculated is \$2,500, and in the compact-disk example the amount calculated is \$2,600. The two-level reduction in option 2 for “greatly discounted merchandise”

would apply in the watch example.¹¹

Option 3

Option 3, unlike its options 1 and 2, would increase the base offense level from level 6 to level 8. Option 3 would require the sentencing court to calculate the “infringement amount,” which new commentary would define as “the approximate pecuniary harm to the copyright or trademark owner caused by the offense.” New commentary would set forth a general formula and a special formula for calculating that amount.

The general formula would apply in four types of cases – cases in which (1) the infringing item is substantially identical to the infringed-upon item in quality and performance (as in the software-program and compact-disk examples); (2) the retail value of the infringing item is difficult to determine without unduly complicating or prolonging sentencing or is impossible to determine; (3) the offense involves illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511; and (4)

¹¹The formula in option 2, like the formula in option 1, greatly overstates the harm from the offense in the watch example. There has been no pecuniary harm to Rolex or others and, as discussed later, no unquantifiable harm (such as injury to Rolex’s reputation). The two-level reduction in option 2 does not adequately adjust for the overstatement of the harm from the offense that results from the formula. Using the defendant’s gross pecuniary gain (\$2,500) would result in a one-level increase from the fraud table. Using the amount determined by option 2’s formula – \$300,000 – results in an eight-level increase from the fraud table. Deducting two levels for “greatly discounted merchandise” makes the net effect of the fraud table increase six levels. The result is that the vendor in the watch example is treated as if he had obtained \$70,000 to \$120,000 (the amounts that yield a six-level increase under the fraud table).

“the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.” The general formula would be “the retail value of the infringed item, multiplied by the number of infringing items.” New commentary would define “infringed item” to mean “the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.” The definition of “infringing item” is retained from the current guideline.

The special formula would apply to offenses under 18 U.S.C. § 2319A and to other offenses not covered by the general formula. The special formula is “the retail value of the infringing item, multiplied by the number of infringing items” (the current formula).

In the software-program example, the general formula results in an infringement amount of \$2,500 (50 infringing items times \$50, the retail value of an infringed item). The general formula results in an infringement amount in the compact-disk example of \$2,600 (200 infringing items times \$13, the retail value of an infringed item).

The special formula is used to calculate the infringement amount in the watch example because the quality and performance of the counterfeit watches are not “identical to, or substantially indistinguishable from, the infringed item.” The special formula results in an infringement amount of \$2,500 (125 infringing items times \$20, the

retail value of an infringing item).

Option 3 also seeks comment upon four possible enhancements and one possible reduction. The enhancements would increase the offense level by two levels for (1) distributing an infringing item before the infringed item has been commercially released; (2) the purchaser believed the item purchased was the real thing; (3) “the offense involved the manufacture, importation, or uploading of infringing items” (which would call for the increase with a floor of level 12); and (4) “the offense involved the conscious or reckless risk of serious bodily injury” (which would call for the increase with a floor of level 13). The reduction – of two levels (but not to a level below either level 6 or level 8 (to be decided)) – would apply if the offense was not committed “for commercial advantage or private financial gain.” The Commission seeks comment upon whether any or all of these specific offense characteristics should be adopted even if the Commission chooses option 1 or 2.

The following chart shows the relationship in the three examples between pecuniary loss, gross pecuniary gain to the defendant, and the amount to be used in applying the fraud table that is derived from the formulas in the present guideline and in each of options 1, 2, and 3.

	Watch	Software	CD
Direct pecuniary loss	0	\$1,250	\$26

Gross gain to defendant	\$2,500	0	\$1,000
Current guideline	\$2,500	\$2,500	\$2,600
Option 1	\$300,000	\$2,500	\$2,600
Option 2	\$300,000	\$2,500	\$2,600
Option 3	\$2,500	\$2,500	\$2,600

Our Recommendations

The Formula

Congress has directed the Commission to ensure that the guidelines “provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed” (i.e., the infringed-upon item). In evaluating the three proposed formulas, we have considered whether each formula produces a result that fairly indicates the harm from the offense, as well as whether the formula is likely to be difficult to apply. With regard to the latter consideration, we are satisfied that all three of the proposed formulas will not be unduly difficult to apply.

With regard to fairness of result, each of the three proposed formulas yields an amount that at least equals and can significantly overstate the gross pecuniary gain to the defendant. Each of the three proposed formulas yields an amount that overstates – sometimes to a considerable degree – the pecuniary loss to the direct victim.

It is clear, however, that the complete harm from an offense may not be fully

reflected by either the gross pecuniary gain to the defendant or the pecuniary loss to the direct victim. As the Commission's staff report has noted, however,

it is difficult to establish a simple, generally applicable rule that will accurately and fully measure the harm caused by the wide variety of offenses sentenced under guideline § 2B5.3. The economists with whom the Team spoke agreed that, even in the context of civil litigation concerning the narrower issue of pecuniary damage to a particular property holder, measuring the amount of damage is an inexact science. No simple formulas exist, and courts routinely hear time-consuming, conflicting and highly technical expert testimony. The practical realities of the sentencing process necessitate a simpler, more easily workable approach.¹²

We believe that option 3 is the most sharply-focused of the three options and best accounts for the harm that is not readily quantifiable. Option 3, although nuanced, is straightforward and not difficult to apply.

There is no difference among the options in their treatment of the software and compact-disk examples – cases in which there has been an actual pecuniary loss to the copyright or trademark owner. The options differ in their treatment of the watch example, in which there is no pecuniary loss to the copyright or trademark owner. Both

¹²U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 19 (Feb. 1999).

Options 1 and 2 grossly exaggerate both the pecuniary loss to the direct victim and the gross pecuniary gain to the defendant. There is no need for overstating either the pecuniary loss or the gross pecuniary gain because in this kind of offense the unquantifiable harm is virtually nil. The street vendor has not deprived Rolex of any sales, so there is little, if any, harm to others (such as the people who supply materials to Rolex, the workers at the Rolex factory, and the shipping company that Rolex uses to send its watches to wholesalers and retailers). There would seem to be little, if any, harm to Rolex's reputation among those who are able to buy a Rolex watch. Indeed, the watch example offense is probably the kind of offense of least concern to those who sought the legislation. Option 3's treatment of such cases is the most realistic and fair.

Base Offense Level and Specific Offense Characteristics

Option 3 would both increase the base offense level (from level 6 to level 8) and add four new enhancements. We believe that the general, across-the-board increase in the base offense level is not justified. The proposed new enhancements, for the most part, are focused and increase punishment for conduct deserving of additional punishment.

The reason given in the request for comments for the increase in the base offense level is to bring § 2B5.3 more in line with the fraud guideline, § 2F1.1. Both guidelines have a base offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in a great majority of fraud

offenses.” The analogy to a fraud offense, however, is inapt. The person who pays \$20 for a \$3,000 Rolex watch has not been defrauded. Neither has the person who downloads, at no cost, a software program that sells for \$50. Those persons are not innocent victims. The analogy to fraud is appropriate if the defendant deceives the buyer into thinking that the item being purchased is authentic and not a counterfeit copy. There is a specific enhancement proposed for such conduct for such circumstances, and that enhancement takes care of the matter more directly and fairly.

The analogy to the more-than-minimal-planning enhancement in the fraud guideline also is inapt. We think that the better analogy is to the enhancement for the use of sophisticated means that formerly was in the tax-evasion guideline and was added (as a temporary, emergency amendment) to the fraud guideline by amendment 587. The concept of more-than-minimal planning is broad and has been troublesome to the Commission. The Commission has defined the term “more than minimal planning” to mean “more planning than is typical for commission of the offense in a simple form. . . . ‘More than minimal planning’ is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune.”¹³ The congressional concern with copyright and trademark infringement has not been so much that wrongdoers have engaged in repeated acts over a period of time. Rather, the concern seems to have been more that the widespread availability of computers and

¹³U.S.S.G. § 1B1.1, comment. (n. 1(f)).

high-end electronic equipment increases the risk to copyright and trademark owners and makes offenses more difficult to detect.¹⁴

The proposed new enhancements address directly important congressional concerns about infringement cases. If they are added to § 2B5.3, an increase in the base offense level would be redundant, unnecessary, and not justified on policy grounds.

We find the proposed two-level enhancement in option 3 for distributing an infringing item before the commercial release of the infringed items to be appropriate. Such activity can cause lost sales of a magnitude that cannot be gauged with accuracy and also may harm the reputation of the owner of the intellectual property.¹⁵ We do not object to the two-level enhancement (with a floor of level 13) if the offense involved the conscious or reckless risk of serious bodily injury. We expect that the enhancement will be applicable infrequently.

We believe that the enhancement for manufacturing, importing, or uploading infringing items is appropriate. The enhancement recognizes that manufacturers and importers are more culpable than sellers and that the widespread use of computers

¹⁴See U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 18-19 (Feb. 1999).

¹⁵For example, the infringing item may be an early version of a video game that has bugs that the manufacturer removed from later versions. Nevertheless, reports of the game's poor performance circulated by those who obtained the early version may harm the reputation of the company putting out the legitimate version of the game and make people reluctant to buy the later version, even though the bugs have been fixed.

increases the risk of harm to the owners of intellectual property. We believe that this enhancement is appropriate. However, if there is to be an enhancement for manufacturing, importing, or uploading, then there should be a reciprocal reduction (or an encouraged departure) for an offense not committed for commercial advantage or private financial gain.

We believe that the proposed enhancement of two levels if the purchaser of an infringing item actually believed that the item was authentic should be reduced to one level. There would seem to be two bases for that enhancement. The first basis is lost sales of the infringed item. A buyer who is seeking the authentic item, but is deceived into buying a counterfeit, obviously would have bought the authentic item.¹⁶ The second basis is that the buyer is not complicit in the offense and may be harmed as well, harm that is not otherwise captured by the guideline. The buyer of the \$20 Rolex watch or a person who downloads a free copy of a software program that is sold commercially for \$50 knows something illegal is afoot – they are neither innocent nor victims (especially in the case of the downloaders). That the downloaders cannot get upgrades or technical support from the manufacturer for lack of proof of purchase is not particularly troublesome. The downloaders knew that there was something questionable about the deal, and in any event did not pay anything for the copy of the program downloaded.

¹⁶See U.S. Sentencing Comm'n, Policy Development Team Report, No Electronic Theft Act 25-26 (Feb. 1999) (discussing palmed-off goods).

We believe that the lost sales are adequately accounted for by the formula and do not require an extra boost in the offense level. As indicated earlier, the amount calculated will be higher the greater the percentage of persons who would have bought the real item. Even if every deceived buyer would have bought the authentic item, the formula in option 3 adequately captures the lost sales because the retail value of the infringed item is used.¹⁷

We think that the second basis – harm to an innocent buyer – is not otherwise captured by the formula or other proposed enhancements, but we think that that factor is better accounted for by a one-level enhancement – or in the alternative by adding commentary indicating that an upward departure would be warranted.

We recommend that the Commission adopt option 3 with our suggested changes. Option 3 would not present unusual problems in application, and it produces a result that best reflects the actual harm from and infringement offense.

¹⁷Assume, for example, that a defendant sells 500 copies of a video tape of a motion picture, which is sold by legitimate commercial retailers at an average price of \$15. The copies are of high quality, and the defendant markets the infringing copies as authentic. The defendant charges \$14 per copy. All of the buyers of the defendant's tapes believe that what they are buying is legitimate, and they would have paid an extra dollar to get a legitimate tape had they known that what they were buying was not a legitimate tape. The gross pecuniary gain to the defendant is \$7,000 (500 infringing copies times the \$14, the price at which the defendant sold a copy). Assuming that the profit for an authentic tape is \$2 per tape, the actual pecuniary loss to the owner of the copyright on the tape is \$1,000 (500 copies times \$2 profit per item). The infringement amount under option 3 is \$7,500 – more than seven times the pecuniary loss.

AMENDMENT 2

Amendment 2 would repromulgate as a permanent amendment the provisions of amendment 587, which the Commission promulgated as a temporary amendment under the authority of section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520. The Federal Public and Community Defenders do not agree with all of the changes made by amendment 587, and we believe that the Commission should revisit that amendment. The Commission, however, has not undertaken the work necessary to enable it to make an informed reevaluation of amendment 587. The Commission's options, therefore, are to (1) repromulgate amendment 587 or (2) fail to comply with the congressional mandate. Under the circumstances, the Commission has no choice but to repromulgate amendment 587.

AMENDMENT 3

Amendment 3 responds to the Protection of Children from Sexual Predators Act of 1998.¹⁸ Sections 502 through 507 of that Act give a number of directives to the Commission.

Part A

¹⁸Pub. L. No. 105-314, 112 Stat. 2974.

Part A of amendment 3 responds to the creation of the a offense, 18 U.S.C. § 1470, which prohibits the transfer of obscene materials to minors.¹⁹ Part A also responds to a directive to clarify the term "distribution of pornography," so the distribution enhancement applies for both monetary remuneration and non-pecuniary interest.²⁰

Part A would list § 2G3.1 in the Statutory Index as the offense guideline recommended for an offense under section 1470. Part A also would modify the distribution enhancement in § 2G3.1(b)(1) to apply if the distribution was (1) for pecuniary gain; (2) for the receipt or expectation of receipt of anything of value, but not for pecuniary gain; or (3) to a minor. Finally, part A would add a two-level enhancement to § 2G3.1(b)(1) that applies if the offense involved the knowing transfer of obscene materials to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

An issue for comment asks whether § 2G3.1(b)(1) should continue to use the loss table in the fraud guideline. We recommend that the enhancement continue to use the loss table. The current enhancement is clear and allows for uniform increases for large-scale commercial enterprises. A graduated punishment with increases for the most serious offenders is a proper function of the guidelines. The proposed encouraged

¹⁹*Id.* at § 401, 112 Stat. 2979.

²⁰*Id.* at § 506, 112 Stat. 2981.

upward departure for large-scale commercial enterprises could result in increased litigation and sentencing disparities.

The proposed § 2G3.1(b)(1)(B) would apply to distribution for the receipt or expectation of receipt of a thing of value (but not for pecuniary gain) and is consistent with the congressional directive.²¹ We do not oppose § 2G3.1(b)(1)(B), but we recommend that the Commission make two modifications to it.

First, we recommend that proposed § 2G3.1(b)(1)(B) be modified to call for a three-level enhancement, instead of a five-level enhancement. We think that a three-level enhancement if the distribution is for value other than pecuniary gain is better policy. Proposed § 2G3.1(b)(1)(B) is intended to apply broadly and will apply to individuals who engage in conduct that is significantly less harmful than the conduct to which the five-level enhancement of proposed § 2G3.1(b)(1)(A) applies. Proposed § 2G3.1(b)(1)(A) applies if the defendant has distributed for profit. For proposed § 2G3.1(b)(1)(B) to apply, the defendant only needs an expectation that "anything of valuable consideration" will be received. Individuals who have exchanged a few pictures in a quid pro quo transaction should not receive the same enhancement as a defendant who is selling pictures for profit. The Commission can recognize the difference by changing the five-level enhancement in proposed § 2G3.1(b)(1)(B) to a three-level enhancement.

²¹*Id.*

Our second recommendation is that it should be made clear that proposed § 2G3.1(b)(1)(B) is limited to quid pro quo transactions or understandings. We therefore recommend that the commentary to § 2G3.1 be amended to state that a quid pro quo transactions must be shown in order for the enhancement of § 2G3.1(b)(1)(B) to apply. This would reduce unnecessary litigation and indicate that the enhancement requires proof of more than a hope of receiving something of value. Thus, if there is an understanding that "I will give you my pictures if you give me yours," the enhancement will apply. If the defendant gave the pictures with unilateral hope of possibly receiving pictures from the recipient in the future, the enhancement would not apply.

Our recommendation could be effectuated by modifying the proposed definition of the term "distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain." We suggest deleting "transaction" from that definition and inserting in lieu thereof "quid pro quo transaction or understanding." The following shows the proposed definition with our modification (new text in italic):

“Distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain’ means any *quid pro quo transaction or understanding*, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.”

Our proposed modification would clarify, but not limit, the intended broad application of

proposed § 2G3.1(b)(1)(B).

We do not oppose proposed § 2G3.1(b)(1)(C), which responds to the enactment of the new offense in 18 U.S.C. §1470. A five-level increase for any distribution to an individual below the age of consent with an additional two-level increase if the distribution was to induce the individual to engage in prohibited.

Proposed § 2G3.1(b)(1)(C) applies to distribution to a minor, which proposed new commentary would define as “an individual who has not attained the age of [18] years.” The brackets indicate that the Commission is seeking comment on the appropriate age to use in the definition. We believe that the appropriate age to use is 16, the age of consent.²² Making proposed § 2G3.1(b)(1)(C) applicable to individuals under the age of sixteen would avoid the confusion of whether to apply the two-level enhancement for distribution to entice the minor to engage in "prohibited sexual conduct," if the sixteen or seventeen year old can legally consent to the conduct and the conduct would not be a federal crime. Limitation the enhancement to minors under the age of 16 years also would be consistent with the application of other sexual-abuse guidelines. For example, § 2A3.1(b)(2) and § 2A3.4(b)(1) both have increases for sexual abuse when the victim is under 16 years of age. While it may still be a crime to distribute obscene material to an individual who is more than 16 years of age, the harm to the teenager, who is of the age of consent, would be minimal in comparison to the

²²See 18 U.S.C. §§ 2241(c), 2243(a), (c), 2244(a), 2246(1)(D).

distribution of a younger child.

We recommend that the Commission adopt the proposed definition of the term “minor” using the age of 16. If the Commission adopts our recommendation, the proposed definition would read: “Minor” means an individual who has not attained the age of 16 years.” Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

An issue for comment in part A asks whether there should be an additional enhancement in proposed § 2G3.1(b)(1) to apply to distribution of obscene matter that does not involve distribution (1) for pecuniary gain, (2) for anything of value, or (3) to a minor. We oppose adding such an enhancement. Given the intended broad application of proposed § 2G3.1(b)(1), an additional enhancement for any distribution of obscene matter between adults would be tantamount to raising the base offense level of § 2G3.1. A simple exchange between adults without the expectation of any gain or getting anything of value in return is currently appropriately accounted for in the guidelines.

Part B

Part B of amendment 3 invites comment on whether and how the Commission should amend the guidelines to cover a new offense that prohibits the use of the mail or any facility or means of a interstate commerce knowingly to transmit identifying information about a minor with intent to entice, encourage, offer, or solicit anyone to

engage in prohibited sexual activity (18 U.S.C. § 2425). Part B would amend the Statutory Index to list § 2G1.1 (promoting prostitution or prohibited sexual conduct) as the guideline ordinarily applicable to an offense under 18 U.S.C. § 2425. We do not oppose doing that.

Section 2G1.1 contains three cross references, and many of the offenses that begin at § 2G1.1 end up being sentenced under another offense guideline. We recommend adding a fourth cross reference, which would take the sentencing court to § 2A6.1 (threatening or harassing communication) if the underlying conduct is not intended to induce sexual activity but to threaten or harass the victim or victim's family. For example, during a neighborhood feud, the defendant posted information on the internet about a neighbor's minor daughter and her fictional willingness to perform illegal sex acts. The defendant's intention was to harass the neighbor's family, not to foster illegal sexual activity with the daughter. In such a situation, § 2A6.1 would be the more appropriate guideline.

Part C

There is a two-level enhancement under § 2G2.4(b)(2) "if the offense involved possessing ten or more . . . items, containing a visual depiction" Part C of amendment 3 would amend the commentary to § 2G2.4 (possession of child pornography) to clarify if an individual computer file is "item" for purposes of the enhancement in § 2G2.4(b)(2). The proposed amendment is consistent with the existing

case law, and we do not oppose promulgating the amendment as drafted.

Part C also seeks comment upon whether to base the enhancement of § 2G2.4(b)(2) upon the number of visual depictions. We believe the Commission should not do so. As a practical matter, it would be difficult to quantify the amount of visual depictions and their harm. How would an enhancement compare "visual depictions" in a book or magazine to those in a film or video tape? Additionally, ten "visual depictions" from ten separate sexual acts would represent a greater harm than a hundred "visual depictions" from one sexual act. How many "visual depictions" are on a 15-minute film? Would a 20-minute film of one sexual act with one child be counted less than a 15-minute film with three different sexual acts and four children? Given these inherent difficulties, we believe the current clear guideline is the best approach. If the sentencing court determines that a guideline sentence is inadequate, the sentencing court can weigh the type and quantity of the items and the number of sex acts and "visual depictions" involved and depart.

Part D

Part D of amendment 3 addresses the congressional directive to clarify that the term "distribution of pornography" applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest.²³ The proposed amendment modifies the

²³Protection of Children from Sexual Predators Act of 1998, § 506, Pub. L. No. 105-314, 112 Stat. 2981.

distribution enhancement in the pornography trafficking guideline, § 2G2.2(b)(2), to apply if the distribution of child pornography was (1) for pecuniary gain; (2) for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain; or (3) to a minor. Part D also would add a two-level enhancement if the offense involved the knowing transfer of child pornography to a minor to persuade, induce, entice, coerce, or facilitate the transport of, that minor to engage in prohibited sexual conduct.

For the reasons stated in our comments on part A, we do not oppose the addition of an enhancement for the distribution of child pornography for the receipt or the expectation of the receipt of a thing of value, but not for pecuniary gain. Again for the reasons stated in our comments on part A, we recommend that § 2G2.2(b)(2)(B) be modified. We believe the commentary to § 2G2.2 should be modified in the same way that we suggested modifying the commentary to § 2G3.1, to clarify that the enhancement applies only to quid pro quo understandings or transactions. The enhancement would then apply in the cases that most concern Congress and the courts, the bartering of child pornographic material. We agree that the child pornographic material is a “thing of value” and if received in a bartered exchange for other child pornographic material, an enhancement should apply.

Also for the reasons stated in our comments on part A, we believe that § 2G2.2(b)(2)(B) should be a three-level enhancement. Those defendants who engage in the distribution of child pornography for profit, the heartland of § 2G2.2(b)(2)(A), are

more pernicious than individuals who are simply trading pictures, the heartland of § 2G2.2(b)(2)(B). The guidelines should reflect the graduated harm to society.

For the reasons stated in our comments on part A, there should not be an additional enhancement for an adult who transfers child pornography and receives or expects to receive nothing in return. The simple transfer of child pornography between adults with no expectation of gain is already appropriately accounted for in § 2G2.2. The proposed additional enhancement would be tantamount to an increase of the base offence level because all defendants would be subject to at least one enhancement under § 2G2.2(b)(2).

We believe, for the reasons set forth in our comments on part A, that § 2G2.2(b)(2)(C), the proposed five-level enhancement for the distribution of pornography to a minor, should be limited to distribution to individuals who are not at least 16 years old. An enhancement for distribution to individuals under the age of 16 would be consistent with other enhancements in the sexual abuse guidelines and with the age of consent. Society has recognized the increased maturity of individuals who are 16 and 17 year old – they can work, operate automobiles, and consent to engage in sex. Thus, the transfer of child pornography to a 16- or 17-year old, by itself, does not warrant a five-level increase. Additionally, the two-level increase for the distribution of child pornography to entice a child to engage in prohibited sexual conduct is only appropriate if the child is not yet 16 years old. If the definition of minor uses age 18, the definition

will be inconsistent with the offenses in 18 U.S.C. ch. 109A (sexual abuse), which do not proscribe consensual sex with an individual who is at least 16 years old. Our proposed modification would eliminate confusion and be consistent to other sexual abuse enhancements in the guidelines.

We also believe, again for reasons set forth in our comments on part A, that the cross reference to the fraud guideline should not be deleted from § 2G2.2(b)(2)(A). Section 2G2.2(b)(2)(A) addresses the problem of large-scale distribution for profit. The current cross reference is clear and applies a uniform, graduated penalty that increases with the size of the illegal operation.

Part E

Part E of amendment 3 responds to the congressional directive to provide for an appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the applicable provision of law . . . to engage in any prohibited sexual activity.”²⁴ Part E also responds to a congressional directive that calls for an appropriate enhancement if the defendant knowingly misrepresented the actual identity of the defendant with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child of an age specified in the applicable provision of law . . . to engage in any prohibited sexual

²⁴*Id.* at § 503, 112 Stat. 2980.

activity.²⁵

Part E would add a two-level enhancement in the sexual abuse guidelines, § 2A3.1 through § 2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, § 2G1.1. That enhancement would apply in either of two circumstances. First, the enhancement would apply if the offense involved the use of a computer, or other means, to contact the minor electronically, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in prohibited sexual conduct. Second, the enhancement would apply if the offense involved the knowing misrepresentation of a criminal participant's identity, to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct. The enhancement as proposed in part E treats these two factors as alternative grounds for applying the enhancement. The description of part E, however, indicates that the Commission "could chose to provide separate cumulative enhancements for these two types of offense conduct."

The proposed enhancement for use of a computer is in direct response to a congressional directive. As noted in the staff report, the legislative history indicates that one of the main purposes of the Act was to increase the punishment for child stalking on

²⁵*Id.* at § 504, 112 Stat. 2981.

the internet.²⁶ Congress was greatly concerned about the increased access to children provided by computer links to the internet.²⁷ The core purpose of the enhancement is to increase punishment for pedophiles who troll the internet for victims.

We do not oppose a two-level enhancement if a computer or other internet access device is used to locate children. The computer has facilitated their molestation in such circumstances. However, the proposed enhancement is too broad. As written, the enhancement would apply to the 19-year old who calls his 14-year old girlfriend to tell her his parents are out of the house and to come over, and to the 20-year old soldier who emails his 15-year old girlfriend. Congress did not intend for the enhancement to apply for simply using a telephone or when the individuals already know each other. Congress was concerned with the older defendant, who uses the internet to meet and gain access to a child.

For the reasons stated in our comments on parts A and D, any enhancement for use of a computer or other internet access device should not apply when the victim is more than 16-years old. This would consistent with the age of consent otherwise recognized in 18 U.S.C. ch. 109A (sexual abuse). Due to the increased maturity and mobility of individuals who are 16- and 17-years old, the computer does not provided a

²⁶Sexual Predators Act Policy Team, U.S. Sentencing Comm'n, *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998*, at 36 (Jan. 24, 2000).

²⁷*See id.*

greater access to older teenagers. They can drive, shop, play, and work on their own. Younger children tend to be home bound and under greater adult supervision. Thus, the computer provides increased access to young children that was not available before the advent of the internet.

We do not oppose a two-level enhancement for knowingly misrepresenting identity with the requisite intent, if that is an alternative basis for application of the enhancement. We believe the proposed language is ambiguous, however, because it does not define misrepresentation of identity with particularity.

The enhancement for misrepresentation of identity should only apply if the defendant makes an affirmative misrepresentation that is material. For example, it is common on the internet for individuals not to use their actual names but to go by pseudonyms. Such pseudonyms, because they are known in the relevant community as not being an actual representation of identity, should not be deemed a knowing misrepresentation. Likewise, a misrepresentation of description should call for application of the enhancement only if it misleads the other party as to identity. For example, a 45-year old man identifying himself as a 15-year old boy should receive enhancement. A 25-year old man who describes himself as muscular, but who is actually flabby, should not receive the enhancement. We will be happy to work with the Commission to develop language that appropriately describes the conduct that should be covered by the enhancement.

For the above reasons, we recommend that proposed §§ 2A3.1(b)(6), 2A3.2(b)(2), 2A3.3(b)(1), 2A3.4(b)(4), and 2G1.1(b)(4) be modified to state as follows (language we suggest be deleted is struck through; suggested new language in italic):

If *with intent* to persuade, induce, entice, coerce, or facilitate the transport of, a minor to engage in prohibited sexual conduct, the offence involved: (A) the use of a computer, or other *internet access device*, to communicate with ~~the~~ *such minor*, or (B) the knowing misrepresentation of a participants identity, increase by [2] levels.

We also recommend the definition of “minor” use 16 as the age. If the Commission adopts our recommendation, the definition would read: “Minor’ means an individual who has not attained the age of 16 years.” Adoption of that definition will eliminate confusion and unnecessary litigation, promote uniformity within the guidelines, and reduce unwarranted disparities in sentencing.

We believe that using a computer and misrepresentation of identity are both directed at the same problem – gaining access to children. For that reason, we believe they should not be cumulative enhancements. For example, under the rape guideline, § 2A3.1, there is no additional harm if a defendant use a computer and misrepresented his identity because that guideline already accounts for nonconsensual sex and the defendant is already receiving an enhancement for his means of access to the victim.

If the Commission decides to make the enhancement cumulative, the only offense

for which there might be justification is an offense covered by § 2A3.2. Only in § 2A3.2 is it possible for the use of computer and the misrepresentation of identity to address different harms and without double counting. If the misrepresentation of identity affected the issue of consent in a § 2A3.2 case, but not to the extent of making the offense a rape covered by § 2A3.1, an increased sentence may be appropriate. We believe, however, that such cases are better dealt with by way of departure. We believe that a single enhancement with alternative grounds for applying the enhancement is the better policy.

Part E seeks comment on whether the misrepresentation of identity should be added to the enhancement in § 2G2.1(b)(3) that applies if a computer is used to solicit a minor's participation in sexually explicit conduct to produce sexually explicit material. It would seem to be a logical, consistent, and appropriate application of the guidelines and response to the congressional directives to do so. However, the use of a computer basis should be limited to using the computer to entice the child and not to creating the sexually explicit material. An enhancement for the knowing misrepresentation for a participant's identity would not be appropriate, consistent, or logical if it were added § 2G2.2, the guideline for trafficking in material involving the sexual exploitation of a minor. By definition, offenses sentenced under § 2G2.2 involve the trafficking of child pornography, not the inducing, enticing, coercing, persuading, or facilitating the transportation of a child to engage in prohibited sexual conduct. The proposed

enhancement of § 2G2.2(b)(2)(C), which would require a seven-level increase for any distribution of child pornography to a child with the intent to induce, entice, or persuade that child to engage in prohibited sexual conduct, will adequately punish those individuals who distribute child pornography with prurient intent to children.

AMENDMENT 4

Amendment 4 contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998.²⁸ That Act reduced the quantity of actual methamphetamine and methamphetamine mixture that triggers both the five- and ten-year mandatory minimum prison terms. The Federal Public and Community Defenders support option 1.

Background

Shortly after Congress established a guideline-based sentencing system in the Sentencing Reform Act of 1984, and even before the Commission had drafted the initial set of guidelines, Congress enacted five- and ten-year mandatory-minimum penalties for drug-trafficking offenses.²⁹ These penalties applied to certain drugs, such as cocaine, heroin, and marijuana, and were based on the quantity of “a mixture or substance

²⁸Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

²⁹Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2.

containing a detectable amount” of the drug. Thus, the mandatory-minimum penalties enacted by Congress were determined by congressional evaluation of two factors, the nature of the drug (it takes 500 grams of cocaine to qualify for a five-year mandatory minimum but only 100 grams of heroin) and the quantity of the mixture (one grams of LSD qualifies for a five-year mandatory minimum, and 10 grams qualifies for a ten-year mandatory minimum).

Congress did not require that the Commission adopt the congressional evaluation of either the relative severity of the drugs or the amount of punishment to be assigned to a given amount of a drug. The Commission was not prevented from introducing another factor – purity of the drug (a factor that the Parole Commission had used, and continues to use, when deciding release dates for persons convicted of drug offenses).³⁰ The Commission, however, when constructing the drug quantity table, decided to use the congressional factors and the congressional evaluations of relative severity and quantity.³¹

The Commission set at offense level 26 the quantity of a mixture containing a given drug that was subject to a five-year mandatory minimum. Thus, for example, the drug quantity table assigns offense level 26 to an offense involving 500 grams of a

³⁰See 28 C.F.R. § 2.20.

³¹See U.S.S.G. § 2D1.1, comment. (backg'd). *See generally* Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50 (1990).

mixture containing cocaine. For a criminal history category I offender, that results in a guideline range of 63-78 months. The Commission set at offense level 32 the quantity of a mixture containing a given drug that was subject to a ten-year mandatory minimum. The drug quantity table, therefore, assigns offense level 32 to an offense involving 10 grams of LSD. For a criminal history category I defendant, that results in a guideline range of 121-151 months. Using the starting points of offense levels 26 and 32, and the quantities assigned to those levels, the Commission expanded the table upwards and downwards to provide for offenses that involved greater or lesser quantities of the drug.³²

The Commission, as noted above, could have taken a different approach. The Commission could have developed an empirically-based guideline. After gathering data and information from a wide variety of sources, the Commission – free from the emotions and passions of the political arena – could have independently determined the appropriate factors to us to determine the severity of a drug-trafficking offense.

The statutory penalty structure for methamphetamine, enacted in 1988 – unlike

³²For drugs for which Congress did not enact a mandatory minimum, the Commission set offense levels using the congressional factor of the weight of a mixture or substance containing that drug. The Commission assigned offenses levels to some such drugs by their relationship to drugs for which there was a mandatory minimum. Schedule I and II hallucinogens were treated like LSD, for example. For a drug not dealt with in that manner, the Commission considered the nature of the other substances in the drug's category, the drug's potential for abuse, and the statutory maximum. *See id.* at 54-55.

the statutory penalty for all other drugs except PCP – distinguishes between methamphetamine and methamphetamine mixtures.³³ For methamphetamine, only the quantity of pure methamphetamine is used to determine if the mandatory minimum applies; with the latter, the quantity of the mixture containing the methamphetamine is used.³⁴ The following chart shows the mandatory-minimum quantities as originally established in 1988.³⁵

³³Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g), 102 Stat. 4378. *See* 21 U.S.C. § 841(B)(1)(a)(iv), (b)(iv) (PCP penalties).

³⁴For example, assume that a mixture weighing 100 grams contains methamphetamine of 25% purity. For purposes of determining if a mandatory minimum applies, the court would use 100 grams of a methamphetamine mixture and 25 grams of methamphetamine.

In 1990, Congress became concerned about “ice,” a crystalline form of methamphetamine that typically was 80-90% pure and could be smoked. The Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4912, directed the Commission to increase punishment for offenses involving ice. The Commission responded by treating ice as pure methamphetamine, even though ice is not pure methamphetamine. U.S.S.G. App. C, amend. 370.

³⁵Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g), 102 Stat. 4378. The chart shows the ten-year quantity for a methamphetamine mixture as one kilogram, even though the Anti-Drug Abuse Act of 1988, by mistake, sets 100 grams as the ten-year quantity. The Crime Control Act of 1990, Pub. L. No. 101-647, § 1202, 104 Stat. 483, corrected the mistake by changing 100 grams to one kilogram. (The caption of § 1202 of the Crime Control Act of 1990 is “Correction of an Error Relating to the Quantity of Methamphetamine Necessary to Trigger a Mandatory Minimum Penalty.”)

Methamphetamine Quantities Originally Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	100 grams	1 kilogram

Congress revised the methamphetamine penalties in the Methamphetamine Trafficking Penalty Enhancement Act of 1998 by reducing the quantity that triggers the mandatory minimums.³⁶ This chart shows the mandatory-minimum quantities after the change made by that Act:

Methamphetamine Quantities Now Triggering Mandatory Minimum

	5-year Mandatory	10-year Mandatory
Actual Methamphetamine	5 grams	50 grams
Methamphetamine Mixture	50 grams	500 grams

For purposes of the drug quantity table, the Commission has distinguished between “methamphetamine” and “methamphetamine (actual).” The term “methamphetamine” does not have the statutory meaning of pure methamphetamine but means a mixture or substance containing methamphetamine. The term

³⁶Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

“methamphetamine (actual)” means pure methamphetamine. For example, a 100 gram mixture of 20% pure methamphetamine constitutes, for guideline purposes, 100 grams of methamphetamine and 20 grams of methamphetamine (actual).³⁷ As noted above, the Commission places at level 26 the minimum quantity necessary to trigger a five-year mandatory minimum and at level 32 the minimum quantity necessary to trigger a ten-year mandatory minimum. This chart shows how the guidelines presently treat methamphetamine quantity:

Guideline Quantities for Offense Levels Corresponding to Mandatory Minimums

	Level 26	Level 32
Actual Methamphetamine	10 grams	100 grams
Methamphetamine Mixture	50 grams	500 grams

The guidelines, therefore, already use statutory quantities for mixture containing methamphetamine. The guidelines, however, do not use the statutory quantities for pure methamphetamine.

³⁷Because the statutory terms and the guideline terms differ, there can be confusion unless the context in which the term is used is specified. For example, 25 grams of “methamphetamine” means, for statutory purposes, 25 grams of pure methamphetamine and means, for guideline purposes, 25 grams of a mixture containing methamphetamine.

Our Recommendations

The Options

Amendment 4 has two options. Option 1 would amend the drug quantity table to conform the actual methamphetamine quantity to the levels set by the Methamphetamine Trafficking Penalty Enhancement Act of 1998. Option 2 would significantly alter the treatment of methamphetamine by requiring that the quantity for all methamphetamine offenses be based upon actual methamphetamine. For cases in which the purity is unknown or undeterminable, option 2 would presume a standard purity that would be set forth in the commentary.³⁸

Option 1 brings the guidelines into harmony with the statutory provisions and is the simplest way to comply with the congressional mandate. Option 2 would abandon the congressional distinction between pure methamphetamine and methamphetamine mixtures. If adopted, option 2 will produce situations in which the guideline sentence will be trumped by the mandatory minimum.³⁹ In addition, option 2 requires the

³⁸Option 2 would continue to treat ice as if 100% pure methamphetamine.

³⁹For example, the defendant is accountable for a 50 gram mixture containing methamphetamine at a 5% purity. Under option 2, the quantity used is 2.5 grams (5% of 50), which yields an offense level of 20. Assuming that there are no adjustments and the defendant is in criminal history category I, the applicable guideline range would be 33-41 months. Under 21 U.S.C. § 841(b)(1)(B)(viii), however, the mandatory minimum is 60 months because 50 grams of a methamphetamine mixture is involved.

Commission to formulate a presumptive purity for cases in which the purity is unknown or cannot be determined – no easy task. Should there be a single national standard, representing the average purity of all methamphetamine seized throughout the country? Should there be a standard by judicial circuit, by judicial district, by region of the country, or by state, representing the average purity of all methamphetamine seized within that area? Any of those approaches will under-punish defendants in areas where the purity is highest and over-punish defendants in areas where purity is lowest. In computing the average, how far back should the Commission (or court) look – 6 months, one year, three years, or more? Should the standard be to presume that the purity is the same as the purity of any mixture for which the purity is known and for which the defendant is accountable and look only to another standard if the purity is unknown for the entire quantity for which the defendant is accountable?

We believe that the Commission should adopt option 1. However, we also believe that the Commission ought to undertake a comprehensive reexamination of the drug quantity table and reconsider whether the drug quantity table should be tied to the congressionally-determined quantities that trigger mandatory minimums.

Issue for Comment

It is difficult to comment about the need to change the drug equivalency table in § 2D1.11 with respect to phenylacetone/P2P possessed for manufacturing methamphetamine. Nothing in the *Guidelines Manual* explains how the present ratio

was set and how the ratio for phenylacetone/P2P possessed for manufacturing methamphetamine should relate to the ratios for actual methamphetamine and methamphetamine mixture.⁴⁰ The same is true with respect to the chemicals listed in the chemical equivalency table of § 2D1.11. We do not see a need at this time to recalculate the equivalencies for phenylacetone/P2P possessed for manufacturing methamphetamine in the drug equivalency table of § 2D1.1 or to change the chemical quantity table of § 2D1.11 for chemicals listed in that table that are used to manufacture methamphetamine.

AMENDMENT 5

Amendment 5 presents two options for implementing the Identity Theft and Assumption Deterrence Act of 1998⁴¹ and several issues for comment.

Background

The Identity Theft and Assumption Deterrence Act of 1998 amended 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents and

⁴⁰At present, one gram of actual methamphetamine is equivalent to 10 kilograms of marijuana, one gram of methamphetamine mixture is equivalent to 2 kilograms of marijuana, and one gram of phenylacetone/P2P (when possessed for manufacturing methamphetamine) is equivalent to 416 grams of marijuana. If option 1 is adopted, the actual methamphetamine equivalency for one gram becomes 20 kilograms of marijuana.

⁴¹Pub. L. No. 105-318, 112 Stat. 3007.

information). Section 1028(a)(7) makes it an offense knowingly to transfer or use, without authorization, another person's "means of identification," with intent to commit, or to aid the commission of, a federal offense or a state felony.⁴² A "means of identification" is defined in section 1028(d)(3) to be, in essence, personal data about an individual.⁴³ Thus, it is an offense for A to use B's personal data (such as name, social security number, and date of birth) to obtain a credit card in B's name with the intention of using that credit card to make purchases that A will not pay for. By providing B's personal data to the credit card issuer A has used, without authorization, a "means of identification."⁴⁴

The Act directs the Commission to "review and amend" the guidelines "to provide an appropriate penalty for each offense under" 18 U.S.C. § 1028.⁴⁵ The Act also directs the Commission, in carrying out this task, to consider seven specific factors, as well as "any other factor that the United States Sentencing Commission considers to

⁴²Enacted by *id.* at § 3.

⁴³"[T]he term 'means of identification' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual" 18 U.S.C. § 1028(d)(3). The definition lists as examples a name, social security number, date of birth, fingerprint, and an electronic serial number or other number or signal identifying a specific telecommunications instrument or account. *Id.*

⁴⁴The credit card is a means of identification under 18 U.S.C. § 1028(d)(3) because it contains information (name and account number) that can be used, in conjunction with other information, to identify a specific individual.

⁴⁵Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 4(a), 112 Stat. 3007.

be appropriate.”⁴⁶

The offense guideline applicable to violations of section 1028 is § 2F1.1, the fraud guideline, which has a base offense level of 6. Of the seven separate enhancements in the fraud guideline, the ones that would seem to be applicable to nearly all identity-theft offenses are the enhancements for loss (from one to 18 levels), for more-than-minimal planning or defrauding more than one victim (two levels), and for use of sophisticated means (two levels with a floor of level 12).

The Options

Option 1

Option 1 would add a new enhancement to the fraud guideline. The enhancement – two levels with a floor of levels 10-13 (the level to be decided) – would apply in two circumstances. The first circumstance is that the offense involved use of “identifying information” of an “individual victim” to make an “unauthorized identification means” of that victim. The option defines “identifying information” to be “means of identification” as that term is used in section 1028 – i.e., personal data about another person. The option defines “unauthorized identification means” to be “any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as

⁴⁶*Id.*

part of, that unauthorized identification means.”⁴⁷ This enhancement would apply to A in the above example because A, without authorization, used B’s personal data to get an unauthorized identification means (the credit card).

The second circumstance in which the enhancement applies is if the offense involved possession of five (number to be decided) or more “unauthorized identification means.” This enhancement would apply to A in the above example if A had obtained five credit cards by using the personal data of other persons without authorization.

Option 2 also would add commentary indicating that “an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.” The new commentary sets forth two examples. One is that the individual victim is wrongly arrested or denied a job because of the defendant’s offense, and the other is that the defendant made numerous unauthorized identification means of a single individual victim, to the extent that the defendant “essentially assum[ed] and liv[ed] under that victim’s identity.”

Option 2

⁴⁷There may be a problem with the definition as presently drafted. The definition seems to contemplate that the unauthorized identification means is something tangible (the information must appear “on, or as part of,” something), but nothing tangible is mentioned in the definition. We think the intended definition probably is something like “*a tangible item that contains any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means.*”

Option 2 would add two new enhancements to the fraud guideline. The first new enhancement – two levels with a floor of 10 or 12 (to be decided) – applies if the offense involved (A) harm to an individual’s reputation or credit standing, inconvenience related to the correction of records or restoration of an individual’s reputation or credit standing, or similar difficulties; and (B) the harm, inconvenience, or difficulties were “more than minimal.” The proposed new commentary does not define “more than minimal” but does state that “neither an individual’s speculation about potential harm to his or her reputation or credit standing nor a single, negative credit entry that was corrected in a short time would qualify for the 2-level adjustment under this subsection, but a showing of multiple, negative credit entries or a poor credit rating would.”

The other new enhancement – two levels – applies if the offense involves the production or transfer of six or more “identification documents,” “false identification documents,” or “means of identification.” That enhancement does not apply, however, if the offense level is enhanced for loss. The option does not define “identification document” and “means of identification,” but those terms are defined in section 1028. We assume that the statutory definition would apply.⁴⁸ An “identification document” is a document issued by a government that is of a type commonly accepted for the purpose

⁴⁸If the Commission were to adopt this option, we suggest that commentary be added either specifically adopting the statutory definition or providing a different definition for use with the fraud guideline.

of identifying an individual – a driver’s license, for example.⁴⁹

The new commentary does not define the term “false identification document” and neither does section 1028. The lack of a definition in the new commentary renders the term ambiguous. Does the term “false” mean that the item wrongly purports to be something issued by a government (e.g., a card containing truthful personal data that someone has constructed to look like a state driver’s license) or that the information contained on something actually issued by a government is not true (e.g., defendant A uses B’s name, address, and other personal information to obtain from the state a driver’s license that uses A’s picture but contains B’s personal information).⁵⁰

Recommendations

The Options

We do not believe that the Commission should decide the matter at this time. There does not appear to have been many prosecutions under this new offense, so there is little real-world experience for the Commission to draw from. Drafting a guideline

⁴⁹18 U.S.C. § 1028(d)(2).

⁵⁰The definition of “identification document” in section 1028(d)(2) centers on the issuer of the document; indeed, the definition does not require that the information on the identification document be truthful or accurate. A driver’s license issued to someone that contains the wrong address and date of birth, for example, is still an identification document under section 1028(d)(3). We believe that the term “false identification document” probably should be understood to mean something that purports to have been issued by a government but has not been. If the Commission adopts this option, the meaning of the term “false identification document” should be clarified.

under these circumstances may create problems down the road that could be avoided by waiting a bit to learn about the cases being brought.⁵¹

This concern is enhanced in this instance because one of the new enhancements in option 2 – harm to reputation – applies not only to identity-theft offenses, the offenses that the Identity Theft and Assumption Deterrence Act of 1998 is concerned with. The enhancement potentially applies to most offenses sentenced under the fraud guideline. We are not aware of the need for such a sweeping enhancement.

We believe the appropriate action in this instance is to postpone final action on the identity-theft changes to the text of the fraud guideline so that the Commission can study the matter further. Congress, however, must be assured that the Commission is

⁵¹The money-laundering guideline is an example of what should be avoided. The Commission formulated the money laundering guidelines with certain expectations.

The relatively high base offense levels for money laundering were premised on the Commission’s anticipation that prosecutors would address “money laundering activities [that] are essential to the operation of organized crime,” and would apply the money laundering sentencing guidelines to those offenses where the financial transactions “encouraged or facilitated the commission of further crimes” or were “intended to . . . conceal the nature of the proceeds or avoid a transaction reporting requirement.”

U.S. Sentencing Comm’n, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report 3-4 (Sept. 18, 1997). The Commission, unfortunately, found that its expectations did not come to pass. “[M]oney laundering sentences are being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the money laundering guidelines were first formulated.” *Id.* at 7.

not ignoring the congressional mandate. We recommend, if the Commission decides to defer action on enhancements to the fraud guideline, that the Commission, as an interim measure, add encouraged-departure language to the commentary to the fraud guideline. The language would be tailored to offenses under section 1028(a)(7). We suggest: “If the defendant is convicted under 18 U.S.C. § 1028(a)(7) and that offense results in harm not adequately taken into account by the guidelines, an upward departure may be warranted.”

If the Commission does not decide to study the matter further, the Federal Public and Community Defenders prefer option 1 and recommend that the Commission make the floor for the enhancement level 10. We also recommend that the number of unauthorized identification means be set at five. The enhancement in option 1 would focus on offenses that involve manufacturing – the approach taken in the proposed amendment to phone-cloning offenses – and on offenses in which the conduct indicates that there is trafficking going on. We think that focus is appropriate.

Both options 1 and 2 seek to enhance for the larger-scale offenses, but option 1 does so more effectively. Option 1 targets those who manufacture unauthorized means of identification and those who possess five or more unauthorized means of identification. Option 2 not only sweeps too broadly but also is not as well-drafted. For example, option 2 would call for a two-level enhancement if the offense involved the transfer of six or more means of identification. A person who applies for a driver’s

license provides personal data (such as name, address, and date of birth) to the state employee empowered to issue the license. Each item of information would seem to be a “means of identification” (a name, number, or other information that alone or in conjunction with any other information, [may be used] to identify a specific individual”). If so and if the person provides six items of personal data, there has been a “transfer” of six “means of identification” – thereby qualifying for application of the enhancement – even if that transfer leads to the acquisition of only one driver’s license. This is not the kind of activity that should qualify for a two-level enhancement.

We oppose the other enhancement in option 2, which adds two levels and sets a floor of level 10 or 12 (to be decided) if the offense involves more-than-minimal harm to reputation or credit standing or more-than-minimal inconvenience related to correcting records. In our judgment, this enhancement also sweeps too broadly. The enhancement is not limited to identity-theft offenses, but would apply to all fraud offenses. The Identity Theft and Assumption Deterrence Act of 1998 did not call for an across-the-board increase in fraud sentences, and the Commission has published nothing suggesting that there is a need for such an enhancement for all fraud offenses. Regrettably, every fraud offense can have an unfavorable impact on the victim’s reputation and credit standing. Even if the victim’s pecuniary loss is minimal so that there is no impact on the victim’s credit standing, the victim’s reputation may suffer because the victim fell for a

scam that most people saw through.⁵²

Issues for Comment

Our general observation about all of the issues for comment in amendment 5 is that the Commission needs more data about identity-theft cases before drafting an identity-theft enhancement. We repeat our earlier recommendation that the Commission continue to study identity theft and, as an interim step, add encouraged departure language to the commentary to the fraud guideline.

The first issue for comment is directed at option 1. The issue presented is whether there should be an additional enhancement for the number of victims involved.⁵³ We believe that the number of unauthorized identification means is a better measure than the number of victims and that the Commission should wait and see what the experience is with the enhancement before doing anything else. The enhancement in the form presented in option 1 may work satisfactorily, but if it does not, the Commission can modify it in a future cycle.

The second issue for comment is whether an enhancement similar to that in option 1 should be added to the theft, money laundering, or tax fraud guidelines. We think that

⁵²The use of “more than minimal” is also unfortunate. It sets a very low standard that, given the experience with “more than minimal planning,” will be applied with great frequency – not just in identity-theft offenses but in all fraud offenses.

⁵³The enhancement under option 1 applies if the offense involved “possession of [5] or more unauthorized identification means.” All five of the unauthorized identification means can be of one individual.

it would be premature to add a similar enhancement to those guidelines.

The applicable offense guideline in Appendix A for a section 1028 offense is the fraud guideline. Although that designation in Appendix A is not dispositive (at least at present), we would expect the fraud guideline to be the starting point in nearly every instance. Some identity-theft offenses may end up in other guidelines. The commentary to the fraud guideline, for example, indicates that § 2L2.1 or § 2L2.2, which deal with immigration offenses, can be used for a section 1028 offense if “the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status” Further, there may be an atypical case that would justify the sentencing court, under §1B1.2 selecting another offense guideline.

We do not believe that the theft, money laundering, or tax fraud guidelines will be used for a section 1028 offense frequently enough to justify adding an identity-theft enhancement to those guidelines. The sentences under the money laundering guideline are sufficiently long, in any event, that there should be little concern about the severity of punishment for a defendant convicted of money laundering as well as identity theft.

The third issue for comment is whether the Commission, in lieu of amending chapter two, should add a chapter three adjustment that would apply in every instance when there has been unauthorized use of an “identification means.” We think a chapter

three adjustment does not respond to the congressional concern as well as option 1.

Option 1 is preferable because the Commission has attempted, as best it can given what is known, to tailor option 1 to the characteristics of identity-theft offenses prosecuted under section 1028.

The fourth issue for comment is whether, in lieu of amending chapter two, the Commission should add to chapter five an encouraged departure for unauthorized use of a identification means. We believe that an encouraged departure would comply with the congressional mandate, at least as an interim step. As indicated above, we believe this to be the appropriate course of action at the present time. Because we view the encouraged departure language as an interim step, we think that it would be better to put the language in the commentary to the fraud guideline.

The fifth issue for comment relates to presumed loss. Should the presumption that the loss from a stolen credit card is \$100 be revised to (1) increase the amount and (2) cover any "access device"? The term access device is defined in 18 U.S.C. § 1029 (e)(1) to mean

any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a

transfer of funds (other than a transfer originated solely by paper instrument).

This matter is barely tangential to the congressional directive in the Identity Theft and Assumption Deterrence Act of 1998, and we recommend that the Commission make neither change.

The loss presumption is used in the theft guideline to set a floor and is used only if there is no other way to determine the intended loss.⁵⁴ We believe that the determination of intended loss is best left to the sentencing court's discretion. The goal is to determine as accurately as possible the amount of loss intended. What was intended must be inferred from all of the facts and circumstances considered under the relevant conduct rules. The presumed amount is used only if the preponderance of the evidence does not indicate a greater amount. We believe that the amount presently used as the presumed loss is appropriate for all purposes.

The sixth issue for comment concerns whether there should be an offense-level enhancement if the defendant has been convicted previously of a similar offense. We recommend against such an enhancement. The proper place for consideration of prior criminal conduct is in determining the criminal history score and in determining if there should be a departure under § 4A1.3 based upon the adequacy of the criminal-history category. The scoring of criminal history in chapter four is largely determined by the

⁵⁴“The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card.” U.S.S.G. § 2B1.1, comment. (n. 4).

likelihood of recidivism.⁵⁵ We believe it would be unfair double counting to include an enhancement in the offense guideline for prior convictions of a nature similar to the instant offense.

AMENDMENT 6

Amendment 6 offers two options in response to a directive in the Wireless Telephone Protection Act.⁵⁶ Amendment 6 also sets forth several issues for comment.

Background

The Act directs the Commission to “review and amend” the guidelines, “if appropriate,” to provide “an appropriate penalty for offenses involving the cloning of wireless telephone (including offenses involving an attempt or conspiracy to clone a

⁵⁵See U.S.S.G. ch. 4, pt. A, intro. comment. (The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, *e.g.*, age and drug abuse, for policy reasons they were not included here at this time”). See also U.S. Sentencing Comm’n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987) (“The criminal history score used in the guidelines is comprised of five items that address the frequency, seriousness, and recency of the defendant’s prior criminal history. . . . The particular elements that the Commission selected have been found empirically to be related to the likelihood of further criminal behavior and also are compatible with the purposes of just punishment”).

⁵⁶Pub. L No. 105-172, § 2(e), 112 Stat. 53 (1998).

wireless telephone).”⁵⁷ The Commission must consider a number of specified factors, as well as “any other factor that the Commission considers to be appropriate.”⁵⁸

Every cellular telephone has two identifying numbers, the ESN and the MIN. The ESN is the electronic serial number programmed into the telephone by the manufacturer and cannot lawfully be changed. The MIN (mobile identification number) is the telephone number assigned to the cellular telephone by the wireless carrier and can be changed by the carrier. A cell phone, when turned on, broadcasts the ESN and MIN, in part to enable the wireless carrier to bill for the use of the cell phone. If the ESN and MIN are captured, they can be programmed into another cell phone, thereby creating a clone of the “authentic” cell phone (the cell phone from which the numbers were taken). Whoever has the cloned cell phone can then use it to make calls that will be billed to the account of the authentic cell phone.

The statutory provision used to prosecute cloned cell phone cases is 18 U.S.C. § 1029 (fraud and related activity in connection with access devices). Appendix A lists § 2F1.1, the fraud guideline, as the offense guideline ordinarily applicable to offenses under section 1029.

The Options

Amendment 6 sets forth two options. Option 1 would add a two-level

⁵⁷*Id.* at § 2(e)(1).

⁵⁸*Id.* at § 2(e)(2).

enhancement to the fraud guideline that applies in either of two circumstances. First, the enhancement applies if the offense involved use or possession of “cloning equipment.” Cloning equipment means, in essence, equipment used to capture the ESN and MIN.⁵⁹ Second, the enhancement applies if the offense involved the manufacture or distribution of a “cloned telecommunications instrument.” Option 1 defines that term to mean “a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.” As so defined, the term might be broader than a wireless telephone, which is what the Wireless Telephone Protection Act was concerned about. The explanation does not indicate a reason for applying the enhancement to more than wireless telephones. If the Commission adopts option 1, we recommend that the definition be modified so that the enhancement applies only if the offense involved a cloned wireless telephone.

Option 2 is broader than option 1. Option 2 would add a two-level enhancement to the fraud guideline if the offense involved the possession or use of “device-making equipment” or the distribution of a “counterfeit access device.” Under option 2, device-making equipment means, in essence, equipment designed or primarily used for making

⁵⁹Option 1 adds commentary defining “cloning equipment” to mean “any hardware, software, mechanism, or equipment that has been, or can be, configured to insert or modify any telecommunication identifying information . . . so that [the cloned cell phone] may be used to obtain telecommunications service without authorization.”

an access device or a counterfeit access device.⁶⁰ Option 2 specifically states that “device making equipment” includes equipment used to capture the ESN and MIN as well as equipment used to intercept wire or electronic communication illegally.⁶¹ An access device is a card, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or other thing of value. A counterfeit access device is a fake access device. Thus, the enhancement in option 2 would apply to possession or use of more than just cell-phone cloning equipment. There are no reasons given for why option 2 expands beyond the mandate of the Wireless Telephone Protection Act.

Recommendation

We recommend that the Commission adopt option 1. The Commission’s first step in this area, we believe, should be to track the statute. Expansion beyond the statutory requirements can be considered in another cycle.

The first issue for comment is whether “the use of a presumptive loss amount or a presumptive loss increase is preferable to the specific offense characteristics proposed in

⁶⁰Option 2 incorporates the definition of device-making equipment in 18 U.S.C. § 1029(e)(6).

⁶¹The proposed commentary refers to a “scanning device” as defined in 18 U.S.C. § 1029(e)(8). The definition in 18 U.S.C. § 1029(e)(8), however, is of the term “scanning receiver.”

Option One.” The reason suggested for a presumptive loss amount or a presumptive loss increase is that the applicability of the enhancement in option 1 “would have to be (at least potentially) considered in every case sentenced under this guideline (i.e., over 6,000 cases in FY 1998)” We think that the use of a presumptive loss amount or a presumptive loss increase would be unwise.

To begin with, the suggestion that the applicability of the enhancement in option 1 might have to be considered in some 6,000 cases is misleading. The enhancement would only be seriously considered in those cases involving convictions under 18 U.S.C. § 1029. The enhancement can be passed right over in other cases. The Commission’s own data establishes that cell-phone cloning cases are a minuscule percentage of the 6,000 fraud cases.⁶²

The goal in determining loss should be to calculate, as nearly as possible, the actual loss that was inflicted or the loss that was intended to be inflicted. A presumptive amount is a fiction unrelated to the facts and circumstances of the case. Assume, for example, that the case involves unused ESN/MIN pairs. The initial question has to be whether the defendant intended to use them. If not, then a presumptive amount would

⁶²See Economic Crimes Policy Team, U.S. Sentencing Comm’n, *Cellular Telephone Cloning: Final Report* 6-7 (Jan. 27, 2000) (analysis of a 50% random sample of all cases with at least one conviction under section 1029 “yielded 47 cases involving cellular fraud”).

only serve to overstate the seriousness of the offense.⁶³ If the intention was to use the ESN/MIN pairs, then the question becomes what was the loss intended from using them.

The determination of intended loss is best left to the sentencing court's discretion, perhaps with some guidance by the Commission. The actual conduct involved in the case would seem to be the best starting place. If the actual loss caused by the defendant was \$500 per cloned phone and the defendant had unused ESN/MIN pairs to clone additional 20 phones, the starting point for determining the loss intended from those additional phones would be \$10,000 (20 times \$500). If the government can show that the defendant had begun modestly, averaging \$100 per cloned phone, but in the last several weeks before being arrested had increased that to \$750 per cloned phone, then the sentencing court would have a basis for determining that the intended loss from the 20 additional ESN/MIN pairs was \$15,000 (20 times \$750). If the defendant can show the reverse, that the initial average was \$750 but the recent average was \$100, then the sentencing court would have a basis for determining that the intended loss was \$2,000 (20 times \$100). If that sort of calculation is not appropriate, then the matter should be left to the sound discretion of the sentencing court.

Most of the other issues for comment either have been commented upon already or else raise issues that would require the Commission to go far beyond the scope of the

⁶³Given the government's burden of persuasion (preponderance), ordinarily it will be very hard for a convicted defendant to convince a sentencing court that he or she did not intend to use the ESN/MIN pairs that had not been used.

Wireless Telephone Protection Act. We do not think that the Commission is in a position to make the kinds of decisions required by such issues, and we recommend that the Commission defer acting on them. We believe that the Commission should limit itself to carrying out faithfully what the Wireless Telephone Protection Act calls for.

AMENDMENT 7

Amendment 7 would make a number of changes in the guidelines relating to firearms. The amendment is prompted by legislation enacted in late 1998 that amended 18 U.S.C. § 924(c).⁶⁴ The amendment has five parts, and we will discuss them seriatim.

Background

Until November 13, 1998, section 924(c) made it an offense to use or carry a firearm during and in relation to a crime of violence or drug trafficking crime. The penalty depended upon (1) the type of weapon and (2) whether the defendant previously was convicted under section 924(c). The punishment set forth in section 924(c) was unusual in three ways. First, the punishment prescribed was both the minimum and the maximum (providing, for example, that a person convicted of the least severe form of the

⁶⁴Pub. L. No. 105-386, 112 Stat. 3469 (Nov. 13, 1998).

offense “shall . . . be sentenced to imprisonment for five years”). Second, a prison term was mandated. Third, the prison term had to run consecutively to “any other term of imprisonment” imposed on the defendant.

Congress, effective November 13, 1998, revised both the definition of the section 924(c) offense and the punishment prescribed for a section 924(c) offense. The definition of the offense was modified to include possessing a firearm as well as carrying and using a firearm. In addition, the punishment was revised in several ways. First, the punishment was made dependent upon the nature of the involvement of the firearm, as well as upon the type of weapon and a prior conviction under section 924(c). Second, the penalty provisions were amended to set forth a minimum but no maximum (section 924(c)(1)(A)(i), for example, provides that an offender “be sentenced to a term of imprisonment of not less than 5 years”). Third, a new punishment variable was added – the manner in which the weapon was involved. Specifically, the punishment for brandishing a firearm was set at a prison term of “not less than 7 years,” and the term “brandish” was defined for the purposes of section 924(c).

The Commission has treated a section 924(c) offense as a functional equivalent of an enhancement for using, brandishing, discharging, or possessing a firearm. Thus, the offense guideline applicable to a section 924(c) conviction, § 2K2.4, provides that “the term of imprisonment is that required by statute.” Further, the Commission has provided that when imposing a sentence for a section 924(c) conviction in conjunction with a

sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm . . . is not to be applied in respect to the guideline for the underlying offense.”⁶⁵ The purpose of that provision is to prevent unfair double counting.⁶⁶

Part A – Definition of “Brandish”

Part A of amendment 7 proposes to replace the current guideline definition of “brandish” in the commentary to § 1B1.1 with the new statutory definition in section 924(c)(4). We recommend that this not be done.

The Commission has defined the term “brandish” to mean “that the [dangerous] weapon was pointed or waved about, or displayed in a threatening manner.”⁶⁷ The statutory definition is that brandish means “to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.”

The principal difference between the two definitions is whether the object must be seen by the victim. By specifying that the object be pointed, waved, or displayed, the guideline definition requires that the object be visible. The statutory definition requires

⁶⁵U.S.S.G. § 2K2.4, comment. (n.2).

⁶⁶*Id.* at comment. (backg’d).

⁶⁷U.S.S.G. § 1B1.1, comment. (n. 1(c)).

only that the presence of the object be made known. That can be accomplished without the object being visible, however. For example, the defendant can tell the other person that she has a gun in her purse.⁶⁸ The defendant, however, must actually have a gun or else there can be no violation of section 924(c).

Congress developed the statutory definition of brandish for use with a particular offense, an offense that requires the *actual* presence of a *real* firearm. The actual presence of a real firearm justifies a definition that does not require another person actually to see the firearm during the offense.

The guideline definition of brandish is used throughout chapter 2 in connection with a wide variety of offenses involving a wide variety of objects that can be used to injure someone. Replacing the guideline definition of brandish with the statutory definition would create a technical problem because of the guideline definition of “dangerous weapon.” The guideline definition of dangerous weapon is “an instrument capable of inflicting death or serious bodily injury.”⁶⁹ The guideline definition of dangerous weapon also provides that “[w]here an object that *appeared* to be a dangerous

⁶⁸This statement would not qualify as brandishing under the guideline definition even if it was the defendant’s intent to frighten the other person. To be brandishing under the guideline definition, if the pistol itself is not visible, then what appears to be the pistol must be visible. If, for instance, the defendant had the pistol in her coat pocket and the pistol created a visible bulge, the pistol itself would not be visible, but something that appeared to be the pistol would be. Under the guideline definition, a mere claim to have a weapon does not qualify as brandishing.

⁶⁹U.S.S.G. § 1B1.1, comment. (n. 1(d)).

weapon was brandished, displayed or possessed, treat the object as a dangerous weapon.”⁷⁰ The use of “appeared” means that the object itself must somehow be visible, either directly (as when the object is displayed) or by inference (the bulge in the coat pocket that resembles a pistol). The statutory definition of brandish, however, does not require visibility; all the defendant has to do is make the presence of the object known for the purpose of intimidation. A defendant who, for the purpose of intimidation, claims to have a pistol in her purse has brandished within the statutory definition, even if there is nothing about the appearance of the purse that indicates that there is a pistol in the purse.

The Commission’s definition of brandish has been used for over 13 years, ever since the initial set of guidelines was promulgated, and a significant body of case law interpreting the term has developed. We believe it would be a mistake to scrap the current guideline definition and replace it with a definition developed for a particular offense. We recommend that the Commission retain the current guideline definition of brandish.⁷¹

Part B – § 2K2.4 (Term “Required by Statute”)

Part B of amendment 7 would amend § 2K2.4 “to clarify that the ‘term required by statute’ [as used in that guideline] . . . is the minimum term specified by the statute.”

⁷⁰*Id.* (emphasis added).

⁷¹If the Commission does not adopt the statutory definition for use in the guidelines, the statutory definition will still be used in determining the minimum sentence that section 924(c) requires.

Part B would also add commentary dealing with upward departures. Finally, there is an issue for comment about whether there should be a cross-reference to the underlying offense (if the guideline range for that offense is greater than the minimum required by 18 U.S.C. § 924(c)).

The offense guideline applicable to violations of 18 U.S.C. § 924(c) currently provides that “the term of imprisonment is that required by statute.” That formulation works with both the old and new versions of section 924(c). The old section 924(c) called for a single penalty (“shall . . . be sentenced to imprisonment for five years”), so there was no ambiguity in the reference to the term “required by statute.” New section 924(c) prescribes a minimum but no maximum (“be sentenced to a term of imprisonment of not less than 5 years”). The new formulation does not render current § 2K2.4 ambiguous. All that new section 924(c) *requires* is the minimum term. New section 924(c) *authorizes*, but does not require, a sentence above the minimum. Nevertheless, the change to the text of § 2K2.4 can do no harm, and we support it.

We do not support all of the proposed changes to the commentary as written, however. We suggest keeping the first two sentences of the new commentary and placing them in the Background note. The remainder of the commentary is inappropriate, as well as unhelpful and confusing.

To begin with, the proposed commentary is confusing because the interplay between the third and fourth sentences in the proposed new commentary is unclear. The

factors in the fourth sentence seem to be applicable only in the circumstances described in the third sentence. The proposed new commentary, however, does not say so directly.

The five factors in the fourth sentence of the proposed commentary are encouraged departure grounds. A sentencing court can depart if one of the factors is present unless the applicable offense guideline has taken that factor into account, in which case the sentencing court may depart if the factor is present to a degree beyond that contemplated by the offense guideline.⁷² We consider this to be inappropriate. The Commission – correctly in our view – considers a section 924(c) conviction to be, in effect, a weapon enhancement. As such, a departure for a section 924(c) should be encouraged only to the extent that a departure is warranted for a weapon enhancement in the underlying offense (the offense during and in relation to which the firearm was possessed, carried, or used). Thus, for example, if the guideline for the underlying offense does not encourage a departure if the offense involved a stolen firearm or a firearm with an obliterated serial number (factor (B) in the proposed new commentary), then it is inappropriate for § 2K2.4 to provide for an encouraged departure if there were no conviction of that underlying offense. We think the same thing is true with respect to all of the other factors in the fourth sentence.

We suggest deleting all of the proposed commentary after the second sentence. As a general matter, we think it preferable to wait to see how sentencing courts actually

⁷²See *Koon v. United States*, 518 U.S. 81, 94-95, 116 S.Ct. 2035, 2045 (1996).

sentence under new section 924(c). We think that the Commission should learn from the sentencing practices of federal judges before drafting encouraged-departure language.

Part C – Application of Weapon Enhancement

Part C of amendment 7 addresses application note 2 of § 2K2.4, which provides that an enhancement for possessing, using, or discharging a weapon in the guideline for the underlying offense is not to be applied if the defendant is convicted of both the underlying offense and a section 924(c) offense. Part C amends that application note to preclude application of an enhancement for brandishing a weapon in the guideline for the underlying offense if the defendant is convicted of both the underlying offense and a section 924(c) offense. We support that amendment.

As we noted above, the Commission considers a section 924(c) offense to be a functional equivalent of an enhancement for using, discharging, or possessing a weapon. To avoid unfair double counting, the Commission requires the sentencing court to use the section 924(c) penalty instead of the weapon enhancement.⁷³

When an offense guideline has an enhancement for possessing, using, or discharging a weapon, that enhancement applies only once, no matter how many guns are involved. Assume that defendant A is convicted on counts I and II of distributing

⁷³In the great majority of cases, the mandatory prison term called for by section 924(c) will be greater than the additional prison time called for by a weapon enhancement, even a seven-level enhancement for discharging a firearm – especially now that Congress has increased the penalties under section 924(c).

cocaine, and during the count I distribution possessed a pistol. The sentencing court, applying the weapon enhancement of the drug-trafficking guideline, § 2D1.1(b)(1), would add two levels to A's offense level. If A had possessed the pistol during the count II distribution as well, the enhancement would still be two levels. The enhancement is not doubled because a gun was possessed on two separate occasions.⁷⁴ Because the Commission treats a section 924(c) offense as the functional equivalent of a weapon enhancement, the same principle should apply when § 2K2.4 is applied. If, in addition to the count I and II cocaine distribution convictions, A is convicted of a section 924(c) offense for which the underlying offense is the count I distribution, A should receive the additional punishment called for by § 2K2.4 and the offense level should not be enhanced under § 2D1.1(b)(1) if A possessed a during the count II distribution. To do so would be inconsistent with treating § 2K2.4 as a weapon enhancement. We believe that the proposed new commentary makes this point effectively and recommend its adoption by the Commission.

Part D – Career Offender Guideline

Part D of amendment 7 amends §§ 2K2.4 and 4B1.2 to provide that a conviction

⁷⁴The enhancement also would not be doubled if there had been two different weapons. In the example in the text, the enhancement would be two levels, not four, if A had possessed a rifle during the count II distribution. Similarly, assume that defendant L and codefendant M each brandish a gun during a robbery. L's enhancement under § 2B3.1(b)(2)(C) is five levels. Even though L is accountable for M's conduct under the relevant conduct rules, L's enhancement under § 2B3.1(b)(2)(C) is still five levels. The enhancement does not double because of the second gun brandished by M.

under section 924(c) is not an instant offense for purposes of the career offender guideline. We support the amendment.

Section 2K2.4 is sui generis. The sentence under § 2K2.4 must be imposed independently.”⁷⁵ The defendant’s criminal history category need not be calculated to determine sentence under § 2K2.4 because a defendant’s criminal history is not germane to determining a sentence under § 2K2.4. Although an offense guideline in chapter two of the *Guidelines Manual*, § 2K2.4 does not have a base offense level. The Commission considers § 2K2.4 to be the functional equivalent of an enhancement for possession, use, or discharge of a firearm, but § 2K2.4 does not operate as an enhancement to the offense level calculated for another offense.⁷⁶ When there is more than one count of conviction, the grouping rules of chapter three, part D of the *Guidelines Manual* do not apply to the

⁷⁵U.S.S.G. § 5G1.2(a).

⁷⁶Another unique chapter two guideline, § 2J1.7, which applies to an offense under 18 U.S.C. § 3147, does operate as if a specific offense characteristic. Under 18 U.S.C. § 3147, a consecutive term of imprisonment (with no minimum term specified) is required if a defendant is “convicted of an offense committed while released” on bail. Section 2J1.7, which directs the sentencing court to “add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.” To comply with the consecutive-term mandate of 18 U.S.C. § 3147, application note 2 to § 2J1.7 directs the sentencing court to “divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement” and designate that the latter runs consecutively.

section 924(c) offense.⁷⁷

We support the amendment, even though it would mean that a section 924(c) offense is the only offense that is a career-offender predicate offense but not a career-offender instant offense. The unique nature of the offense and its integration into the guidelines justifies this treatment.

Part E – Technical and Conforming Amendments

Part E of amendment 7 makes technical and conforming changes to two guidelines to conform those guidelines to new section 924(c). We support Part E.

Issues for Comment

The first issue for comment is whether, if the statutory definition of brandish is adopted (which we recommend against), the Commission should delete “displayed” from weapon enhancements that apply if a weapon was “brandished, displayed, or possessed.” We agree that, as a matter of logic, the term “displayed” would be redundant. However, we point out again that if the statutory definition is adopted, there is a problem with the definition of dangerous weapon that the Commission would have to address..

The second issue for comment is whether § 2K2.4 should be a cross reference to the guideline applicable to the underlying offense if there has been no conviction for the underlying offense. We oppose such a change as unnecessarily complicating what is now a straight-forward guideline.

⁷⁷U.S.S.G. § 3D1.1(b).

The third issue for comment is whether a section 924(c) conviction should be an instant offense for career-offender guideline purposes. We oppose such a change, which would require extensive revision of the guidelines.

AMENDMENT 8(A)

The Commission has requested comment upon whether for purposes of downward departure from the guideline range a ‘single act of aberrant behavior’ (Chapter 1, Part A § 4(d)) includes multiple acts occurring over a period of time.”

Background

A sentencing court must impose a sentence called for by the guidelines unless there is “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that” called for by the guidelines.⁷⁸ The Supreme Court addressed a sentencing court’s authority to depart from the guidelines in *Koon v United States*.⁷⁹ Although the Sentencing Reform Act of 1984 “made far-reaching changes in federal sentencing,”⁸⁰ the Act left a District Court with

⁷⁸18 U.S.C. § 3553(b).

⁷⁹518 U.S. 81, 116 S.Ct. 2035 (1996).

⁸⁰518 U.S. at 92, 116 S.Ct. at 2043-44.

“much of its traditional discretion”⁸¹ In fact, the Supreme Court pointed out, “A district court’s decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court.”⁸² The Court further pointed out that:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.⁸³

Single Act of Aberrant Behavior

Chapter one, part A(4)(d) of the *Guidelines Manual* states that “[t]he Commission, of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures.” The *Manual* nowhere elaborates on that statement, leaving its meaning somewhat ambiguous. Without guidance as to what the Commission contemplated as “single acts of aberrant behavior,” the Circuits have come up with differing interpretations of that phrase. Several Circuits have interpreted the phrase to require a “spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning”⁸⁴ Other Circuits have used a

⁸¹518 U.S. at 98, 116 S.Ct. at 2046.

⁸²518 U.S. at 98, 116 S.Ct. at 2046.

⁸³518 U.S. at 113, 116 S.Ct. at 2053.

⁸⁴United States v. Carey, 895 F.2d 318, 325 (7th Cir.1990). Accord United States v. Marcello, 13 F.3d 752, 760-61 (3d Cir.1994); United States v. Glick, 946 F.2d 335,

broader interpretation and look to the totality of circumstances.⁸⁵

The narrower interpretation renders the Commission's statement in chapter one, part A(4)(d) virtually empty. We are unaware of a reported case applying the narrower standard that has sustained a downward departure based on aberrant behavior. The focus of that approach is on whether the offense involved a spontaneous, single act – something that occurs only rarely.⁸⁶ The First Circuit has stated that this approach produces an "absurd result . . . counting the number of acts involved in the commission of a crime to determine whether a departure is warranted. . . ."⁸⁷ We agree. Counting the number of

338-39 (4th Cir. 1991); *United v. Williams*, 974 F.2d 25, 26-27 (5th Cir. 1992); *United States v. Garlich*, 951 F.2d 161, 164 (8th Cir. 1991); *United States v. Withrow*, 85 F.3d 527 (11th Cir. 1996).

⁸⁵*United States v. Grandmaison*, 77 F.3d 555, 560-64 (1st Cir. 1996) ("determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances"); *Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731 (2d Cir. 1998) ("We adopt the view . . . that aberrant behavior is conduct which constitutes 'a short-lived departure from an otherwise law-abiding life,' and that the best test by which to judge whether conduct is truly aberrant is the totality test"); *United States v. Takai*, 941 F.2d 738 (9th Cir. 1991) ("We look to the totality of the circumstances in determining whether there were single acts of aberrant behavior by the defendants that justify a departure"); *United States v. Pena*, 930 F.3d 1486, 1494-96 (10th Cir. 1991) (defendant attempted to smuggle drugs hidden in car; her "behavior here was an aberration from her usual conduct, which reflected long-term employment, economic support for her family, no abuse of controlled substances, and no prior involvement in the distribution" of drugs).

⁸⁶The person who, on an impulse while leaving a restaurant, steals an unattended purse from a table may get prosecuted in state court, but not in federal court.

⁸⁷*Grandmaison*, 77 F.3d at 563 (such an approach would "make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts").

acts is *not* “the traditional exercise of discretion by a sentencing court” in which the court considers every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” We believe that the Commission must have intended more than empty words when it wrote that a single act of aberrant behavior is a basis for departure.

The language of chapter one, part A(4)(d) of the *Guidelines Manual* makes a single act of aberrant behavior, however defined, an encouraged departure.⁸⁸ It does not follow that departures for aberrant behavior based upon more than a single act are forbidden. Indeed, the Supreme Court pointed out in *Koon* that “the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear upon the decision to depart.”⁸⁹ The *Guidelines Manual* contains no prohibition on departing for a defendant’s aberrant behavior manifested by more than a single act. The *Manual* also contains no language discouraging such a departure. That factor, therefore, is unmentioned and under *Koon* the sentencing court retains discretion to depart even if the aberrant behavior is manifested

⁸⁸*Koon* identifies four categories of factors that can bear on a departure decision. They are (1) a factor that the Commission has identified as a basis for departure (an encouraged factor); (2) a factor that the Commission has discouraged as a basis for departure (discouraged factor); (3) a factor that the Commission has forbidden as a basis for departure (prohibited factor); and (4) a factor not addressed by the Commission (an unmentioned factor). *Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 2045 (1996).

⁸⁹518 U.S. at 94, 116 S.Ct. at 2045.

by more than a single act.⁹⁰

Unfortunately, matters seem to have polarized and the analysis seems to end if it is determined that the aberrant behavior was manifested by more than a single act, no matter how that term is defined. We believe that the best course of action for the Commission is to address aberrant behavior departures more fully. We suggest that the language in chapter one, part A(4)(d) be deleted and that a new policy statement in chapter five, part K be added.

In so doing, the Commission, we believe, should be mindful of the Supreme Court's view of the role of the District Court, vis-a-vis the Court of Appeals, in sentencing. "District courts have an institutional advantage over appellate courts in making these sorts of determinations [i.e., departures], especially as they see so many more Guidelines cases than appellate courts do. . . ." ⁹¹ If that is true of District Courts vis-a-vis Courts of Appeals, we think it is also true of District Courts vis-a-vis the

⁹⁰The standard of review for such a departure – which would, in *Koon* terminology, be based upon an unmentioned factor – would be different from the standard of review for a departure based upon an encouraged factor. The standard for the former is whether the factor "is sufficient to take the case out of the Guideline's heartland," while the standard for the latter is whether the applicable guideline already takes the factor into account. 518 U.S. at 96, 116 S.Ct. at 2045. Even if the encouraged factor is taken into account, the sentencing court nevertheless can depart "if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." 518 U.S. at 96, 116 S.Ct. at 2045.

⁹¹*Koon v. United States*, 518 U.S. 81, 99, 116 S.Ct. 2047 (1996).

Commission.⁹²

A new policy statement should seek, in harmony with *Koon*, to spell out considerations appropriate for a sentencing court to consider in deciding whether to depart for aberrant behavior. A new policy statement, in other words, should seek to foster the “traditional exercise of discretion by a sentencing court,” in which the sentencing court “consider[s] every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”⁹³ The goal, we believe, should be to guide the discretion of District Courts rather than to deprive them of discretion.

The obvious concern with a departure for aberrant conduct is that a first-time offender should not be able to qualify for an aberrant-behavior departure simply because it is the person’s first offense. This is a legitimate concern that a new policy statement must address.⁹⁴ Another legitimate concern is with offenses that cause physical harm to

⁹²In a sense, the Commission “sees” every case sentenced because it collects data about every case sentenced. The Commission, however, does not “see” a case in the same manner that a District Court does. The District Court deals with real human beings, observes their demeanor, and far knows more details about the case than the summary information provided to the Commission.

⁹³*Koon v. United States*, 518 U.S. 81, 98, 113, 116 S.Ct. 2035, 2045, 2053 (1996).

⁹⁴Circuits applying the broader standard have been careful to point out that a departure is not available just because the defendant is a first offender. *See United States v. Grandmaison*, 77 F.3d 555, 564 (1st Cir. 1996) (concerns that the standard ensures every first offender a downward departure from their Guidelines-imposed

another. We think that the concern is best handled by trusting in the discretion of District Courts. Attempting to draft language to prohibit a departure for injury will, we fear, result in an overly-broad prohibition that excludes from consideration defendants who should not be excluded. The concept of “crime of violence,” for example, encompasses offenses that do not result in physical harm or in a serious threat of physical harm. A defendant who hands a note to a teller that says “Give me your cash, this is a robbery,” has committed a crime of violence. The other facts of the case (e.g., the defendant was of diminutive stature, the defendant was not armed, the teller was not frightened, and the defendant was arrested before the teller had handed over any money) may suggest that a downward departure would be appropriate because the defendant did not present a serious risk of harm to anyone.

The Commission saw this sort of problem in the diminished capacity policy statement, § 5K2.13. That policy statement made diminished capacity an encouraged departure but only in the case of a “non-violent offense.”⁹⁵ However, diminished-

sentence are without foundation. As the Ninth Circuit explained in *United States v. Dickey*, 924 F.2d 836 (9th Cir. 1991), ‘aberrant behavior and first offense are not synonymous.’’); *Zecevic v. U.S. Parole Comm’n*, 163 F.3d 731, 735 (2d Cir. 1998) (‘The totality standard is not a blanket rule that anyone with no prior criminal record will automatically be entitled to a downward departure because an absence of criminal convictions is but one of several factors the court must consider’). Those Circuits have not seen aberrant-behavior departures become routine for first offenders.

⁹⁵Some courts interpreted the term “non-violent offense” to mean “crime of violence” (which is a term defined in the career offender guidelines) and others looked

capacity defendants will commit crimes that are classified as a crime of violence, but not be a serious threat to public safety. The term “non-violent offense” precluded what was otherwise an appropriate departure. A diminished-capacity defendant may not in fact have presented a serious threat to public safety, but the sentencing court was precluded from departing under § 5K2.13.

The Second Circuit, in a comprehensive opinion, has identified the factors that have been taken into consideration by courts considering aberrant-behavior departures.

The factors that have been considered include

the degree of spontaneity and amount of planning inherent in the defendant’s actions are not dispositive but merely are among the several factors courts consider in determining whether the defendant’s conduct may properly be termed aberrant behavior. . . . Among the other factors courts have considered as part of the totality test are (1) the singular nature of the criminal act; (2) the defendant’s criminal record; (3) psychological disorders from which the defendant was suffering at the time of the offense; (4) extreme pressures under which the defendant was operating, including the pressure of losing his job; (5) letters from friends and family expressing shock at the defendant’s behavior; and (6) the defendant’s motivations for committing the crime. . . . Courts adopting the totality

to all of the facts and circumstances of the case to determine if the offense was nonviolent. For a brief discussion, see U.S.S.G. App. C, amend. 583.

test have also considered mitigating factors such as the level of pecuniary gain the defendant derives from the offense; the defendant's charitable activities and prior good deeds; and his efforts to mitigate the effects of the crime . . . as well as the defendant's employment history and economic support of his family⁹⁶

We think that the Second Circuit's excellent summary can serve as a guide to the drafting of a new policy statement. We suggest that the Commission consider the following:

§5K2.13. Aberrant Behavior (Policy Statement)

- (a) The court may sentence below the applicable guideline range if the facts and circumstances of the case indicate that the defendant's offense was aberrant behavior. In determining whether the defendant's offense was aberrant behavior, the court shall consider the nature and circumstances of the offense and the history and characteristics of the defendant. The factors that the court may consider in making that determination include (1) the singular nature of the offense; (2) the degree of spontaneity and amount of planning that went into the offense; (3) the defendant's criminal record; (4) the defendant's employment history and activities in the community; (5) whether the defendant suffered from a psychological disorder at the time of the offense, and the nature and extent of any such disorder;

⁹⁶*Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731, 735 (2d Cir. 1998).

(6) the pressures under which the defendant was operating; (7) the defendant's motivation for committing the offense; (8) the opinion of family, friends, and others who know the defendant concerning the defendant's behavior; and (9) the defendant's efforts to mitigate the effects of the offense.

AMENDMENT 8(B)

The Commission has asked for comment upon “whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual.” The cases holding that § 2D1.1 applies based upon a defendant's relevant conduct have incorrectly interpreted the guidelines, especially § 1B1.2. The Federal Public and Community Defenders, therefore, recommend that the Commission amend application note 1 to § 1B1.2 explicitly stating that the sentencing court cannot consider relevant conduct beyond the conduct set forth in the count of conviction in the charging document. Our suggested amendment is set forth at the end of our comments on Amendment 8(B).

Background

The Commission confronted a number of basic questions when it began to consider drafting the initial set of guidelines. As the Commission has stated,

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted (“real offense” sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted (“charge offense” sentencing). . . .⁹⁷

The Commission initially attempted to develop a pure real-offense system, but rejected that approach as impracticable and risking a return to wide disparity.⁹⁸ The Commission then developed a system “closer to a charge offense system,” but containing “a significant number of real offense elements.”⁹⁹

⁹⁷U.S.S.G. ch. 1, pt. A(4)(a).

⁹⁸ The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated ‘real harm’ facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission’s view, such a system risked return to wide disparity in sentencing practice.

Id.

⁹⁹*Id.*

The blended system adopted by the Commission uses both the offense of conviction and real offense conduct, but at different stages in determining the guideline sentencing range.¹⁰⁰ In the first stage, the sentencing court selects the applicable offense guideline by using the offense of conviction. In the second stage, the sentencing court uses the real offense conduct (“relevant conduct” in guideline terminology) to apply the offense guideline, as well as the adjustment guidelines in chapter three of the *Guidelines Manual*.

The determination at the first stage is controlled by § 1B1.2.¹⁰¹ Section 1B1.2(a) directs the sentencing court to select the offense guideline of chapter two that is “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).”¹⁰² The

¹⁰⁰See William W. Wilkins & John M. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 497-500 (1990); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 11-12 (1988).

¹⁰¹See *United States v. McCall*, 915 F.2d 811, 814-15 (2d Cir. 1990); *United States v. Aderhold*, 87 F.3d 740, 743-44 (5th Cir. 1996); *United States v. Jackson*, 117 F.3d 533 (11th Cir. 1997); William W. Wilkins & John M. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 497-500 (1990); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 11-12 (1988).

¹⁰²As the Eighth Circuit has stated, “Under § 1B1.2(a) the court determines which guideline is most applicable to the ‘offense of conviction.’ Thus, it selects the guideline solely by ‘conduct charged in the count of the indictment or information of which the defendant was convicted.’” *United States v. Street*, 66 F.3d 969, 979 (8th Cir. 1995).

Commission has included a statutory index in Appendix A “to assist in this determination.”¹⁰³ The statutory index, therefore, is not determinative. The legal standard does not call for determining the offense guideline listed in Appendix A, but for determining the offense guideline “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).”

The Commission has not explained why it has not made the listing in Appendix A determinative. In part, the reason must be practicality – a statutory provision may set forth more than one offense, so that the statutory index will list more than one offense guideline.¹⁰⁴ The statutory index cannot be determinative when that occurs, and there must be a legal standard for choosing among the listed guidelines. In part, the reason probably is that the sentencing court is better able than the Commission to determine the offense guideline that best suits the particular offense that has been charged. The Commission makes determinations in the abstract about general classes of conduct; the

¹⁰³U.S.S.G. § 1B1.2, comment. (n.1). *See* U.S.S.G. § 1B1.1(a) (sentencing court to determine the applicable offense guideline section from Chapter Two. See § 1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.”).

¹⁰⁴For example, 18 U.S.C. § 1702 makes it an offense to “take” mail matter from an “authorized depository;” take mail matter “from any letter or mail carrier;” or open mail matter before delivery “with design to . . . pry into the business or secrets of another.” Appendix A lists three offense guidelines, § 2B1.1 (theft), § 2B3.1 (robbery), and § 2H3.3 (obstructing correspondence).

sentencing court is confronted with specific allegations in the charging documents and can determine if the offense guideline intended for the typical case under the statute is appropriate for the case at hand.

Once the sentencing court has determined the applicable offense guideline, the real offense conduct comes into play. Under § 1B1.3(a), the court uses the defendant's relevant conduct to apply the offense guideline and the adjustment guidelines of chapter three of the *Guidelines Manual*. Section 1B1.3 excludes all chapter one guidelines from its scope. Section 1B1.3(a), by its express terms, applies only to determinations under chapters two and three of the *Guidelines Manual*, and § 1B1.3(b), again by its express terms, applies only to determinations under chapters four and five of the *Guidelines Manual*.¹⁰⁵

§ 2D1.1 and § 2D1.2

The “basic” drug-trafficking offenses are set forth in 21 U.S.C. §§ 841 and 960. Section 841(a)(1), for example, makes it an offense knowingly or intentionally to distribute a controlled substance, except as otherwise authorized by law. The Commission has designated § 2D1.1 as the offense guideline applicable to offenses

¹⁰⁵See *United States v. Crawford*, 185 F.3d 1024, 1028 (9th Cir. 1999) (“The government, however, argues that, pursuant to U.S.S.G. § 1B1.3(a), school proximity may be considered as ‘relevant conduct’ in selecting the applicable offense guideline section. We disagree. Section 1B1.3(a) does not envision consideration of ‘relevant conduct’ in ascertaining which offense guideline to apply, but rather only in choosing among various base offense levels in the chosen guideline and in making adjustments to the offense level.”).

under sections 841 and 960.¹⁰⁶ Drug-trafficking offenses involving protected locations and protected individuals are set forth in 21 U.S.C. §§ 859, 860, and 861. Section 860(a), for example, makes it an offense to distribute a controlled substance within 1,000 feet of a public elementary school. The Commission has designated § 2D1.2 as the offense guideline applicable to drug-trafficking offenses under sections 859, 860, and 861.¹⁰⁷

The issue over which there has been a split in decisions arises when a defendant is convicted of a basic drug-trafficking offense – a violation of 21 U.S.C. § 841(a), for example – but a portion of the defendant’s relevant conduct takes place in a protected location. Four Circuits – the Fourth, Fifth, Ninth, and Eleventh – have held that § 2D1.1 should be used.¹⁰⁸ Two Circuits – the Third and Sixth – have held that § 2D1.2 may be used.¹⁰⁹

¹⁰⁶Both U.S.S.G. Appendix A and the statutory provisions note to § 2D1.1 indicate that the offense guideline applicable to a violation of 21 U.S.C. § 841 or § 960 is § 2D1.1.

¹⁰⁷Both U.S.S.G. Appendix A and the statutory provisions note to § 2D1.2 indicate that the offense guideline applicable to a violation of 21 U.S.C. §§ 859, 860 or 861 is § 2D1.2.

¹⁰⁸*United States v. Locklear*, 24 F.3d 641, 646-49 (4th Cir. 1994); *United States v. Chandler*, 125 F.3d 892 (5th Cir. 1997); *United States v. Crawford*, 185 F.3d 1024 (9th Cir. 1999); *United States v. Saavedra*, 148 F.3d 1311, 1314-16 (11th Cir. 1998).

¹⁰⁹*United States v. Robles*, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); *United States v. Clay*, 117 F.3d 317 (6th Cir. 1997). The Commission indicates that the Eighth Circuit has taken this position in *United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993), a view shared by the First Circuit, *see*

The issue confronting the sentencing court when the defendant has been convicted of a drug trafficking offense is, what offense guideline is “most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted).” As noted above, the relevant conduct rules of § 1B1.3 do not apply to this determination.

A straight-forward application of § 1B1.2(a) requires a sentencing court to use § 2D1.1 when the defendant has been convicted under 21 U.S.C. § 841 or § 960, even if a portion of the defendant’s relevant conduct occurred in a protected location or involved a protected person. Where the trafficking occurred and whether the offense involved a protected person are not elements of an offense under either of those provisions. The Commission has designated § 2D1.1 as the offense guideline applicable to violations of sections 841 and 960.¹¹⁰ Unless the charging document sets forth allegations that indicate

Locklear, 24 F.3d at 647, the Ninth Circuit, *see* Crawford, 185 F.3d at 1026, and the Eleventh Circuit, *see* Saavedra, 148 F.3d at 1317. We believe, for reasons set forth later, that *Oppedahl* has been mischaracterized and addresses a different issue.

¹¹⁰*See* United States v. Locklear, 24 F.3d 641, 648 (4th Cir. 1994) (“we do not doubt that the Sentencing Commission could, if it chose, enhance the sentence of a defendant convicted of a drug-related crime if commission of the crime was aided by the use of a juvenile by defining the use of a juvenile as a specific offense characteristic We believe that, as currently constituted, section 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by section 2D1.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859, 860 and 861”); United States v. Saavedra, 148 F.3d 1311, 1318 (“§ 2D1.2 is the offense guideline that sets the punishment for violations of 21 U.S.C. § 860. Saavedra was not convicted of this crime, and he may not be sentenced as if he were.”).

that the offense of which the defendant has been convicted is atypical of drug-trafficking offenses, § 2D1.1 is the most applicable guideline.

The Third Circuit (in an unpublished decision) and the Sixth Circuit, however, have reached a contrary result.¹¹¹ We find the opinions in both cases to be unpersuasive because they are based on a faulty premise. Both Circuits assumed – incorrectly – that the sentencing court could look to relevant conduct when selecting the offense guideline. The Third Circuit summarily affirmed a District Court’s use of § 2D1.2.¹¹² The District Court had argued that, because of the relevant-conduct rules of § 1B1.3, “a court must look beyond the charged conduct to determine the appropriate sentence.”¹¹³ The District Court neither cited nor discussed § 1B1.2, and did not explain what authorized the use of relevant conduct to determine the applicable offense guideline. The Sixth Circuit likewise seemed to assume that the sentencing court could use relevant conduct in determining the applicable offense guideline.

Thus, while § 2D1.2 certainly applies to offenses like those described in 21 U.S.C. §§ 859, 860, and 861, where the involvement of minors or proximity to their schools is an element of the offense, it also applies in cases involving

¹¹¹United States v. Robles, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); United States v. Clay, 117 F.3d 317 (6th Cir. 1997).

¹¹²Robles, 8 F.3d 814 (unpub.).

¹¹³Robles, 814 F. Supp. at 1252.

conviction for other offenses (including convictions under 21 U.S.C. § 841), if the conduct of the offender brings him within the scope of § 2D1.2.¹¹⁴

Neither the Third nor the Sixth Circuits has any authority to support their assumptions that the relevant conduct rules apply to selecting the applicable offense guideline. As the Eleventh Circuit has correctly pointed out, using relevant conduct to determine the applicable offense guideline under § 1B1.2 “ignore[s] the fact that the concept of relevant conduct does not come into play until the correct offense guideline has been selected.”¹¹⁵

The Eighth Circuit has decided a case in which the defendant was convicted of conspiring to distribute a controlled substance, an offense to which § 2D1.1 now applies.¹¹⁶ The District Court, however, used § 2D1.2 to sentence the defendant. Thus, it appears that the Eighth Circuit has sided with the Third and Sixth Circuits and in opposition to the Fourth, Fifth, Ninth, and Eleventh Circuits.

In reality, however, that is not the case. At the time the defendant was sentenced, the offense guideline applicable to drug-trafficking conspiracies was § 2D1.4, which provided that “the offense level shall be the same as if the object of the conspiracy or

¹¹⁴Clay, 117 F.3d at 319 (footnote omitted). The Sixth Circuit footnoted that sentence with a quotation from application note 1 to § 1B1.3. *Id.* at n.5.

¹¹⁵United States v. Saavedra, 148 F.3d 1311, 1316 (11th Cir. 1998).

¹¹⁶United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993).

attempt had been completed.”¹¹⁷ Thus, the sentencing court had to determine the offense guideline applicable to the object of the conspiracy. That determination, although similar to a determination under § 1B1.2, was being made in the context of applying a chapter two guideline, so the sentencing court was not limited to considering the elements of the offense of conviction. Indeed, § 1B1.3(a) *requires* the sentencing court to consider the defendant’s relevant conduct when applying a chapter two guideline. In the Eight Circuit case, the defendant’s relevant conduct included trafficking within 1,000 feet of a school.¹¹⁸ Consequently, the District Court was correct to apply § 2D1.2, and the Eight Circuit properly affirmed. The Eighth Circuit case did not involve application of § 1B1.2, and thus is not germane to the issue over which the Fourth, Fifth, Ninth, and Eleventh Circuits are in conflict with the Third and Sixth Circuits.

What is at stake in the conflict between those groups of Circuits is the integrity of the guideline structure. The cases from the Third and Sixth Circuits are wrong as a matter of guideline application. If the Commission is to preserve the integrity of the guideline structure, the Commission must make clear that it rejects the approach taken, and results reached, in those cases.

¹¹⁷The Commission deleted § 2D1.4 effective November 1, 1992. U.S.S.G. App. C, amend. 447. We have examined a copy of the indictment and judgment order in *Oppedahl*. The indictment alleges an offense committed between July 1990 and February 20, 1992. The District Court imposed sentence on September 25, 1992. Section 2D1.4 was in effect at both times.

¹¹⁸*Oppedahl*, 998 F.2d at 586.

Appendix A

The Commission, at the request of the Department of Justice, has asked for comment upon a proposal to amend Appendix A, “if the Commission were to choose to clarify that the enhanced penalties in § 2D1.2 only apply in circumstances in which the defendant is convicted of an offense referenced to that guideline in the Statutory Index (Appendix A).” The proposal would require that the sentencing court “apply the offense guideline referenced for the statute of conviction listed in the Statutory Index (unless the case falls within the limited exception for stipulations set forth in § 1B1.2 (Applicable Guidelines)) and that courts may not decline to use the listed offense guideline in cases that could be considered atypical or outside the heartland.” We oppose this attempt to diminish judicial discretion.

The Justice Department is concerned about two cases involving money-laundering convictions. We will focus on one of them, the *Smith* case.¹¹⁹ *Smith* held that the fraud

¹¹⁹United States v. Smith, 186 F.3d 290 (3d Cir. 1999).

The other case is United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998). We will not discuss *Hemmingson* in detail because the case involves a conclusion by the Fifth Circuit that a downward departure was justified based upon the District Court’s determination that “the offenses did not fall within the heartland of the money-laundering guideline, § 2S1.1” Hemmingson, 157 F.3d at 360. The similarity to *Smith* arises because the District Court in *Hemmingson* used the fraud guideline to structure the departure. The case simply affirms that the sentencing court can depart if the case is outside of the heartland. An Eighth Circuit case also involved a departure that relied upon the fraud guideline in a money-laundering case. United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). See n. –, *infra*.

guideline (§ 2F1.1), rather than the money-laundering guideline (§ 2S1.1) should be used to sentence a defendant convicted of money laundering under 18 U.S.C. § 1956. The Justice Department's inclusion of the *Smith* case in amendment 8(B) suggests that the Justice Department considers the decision in *Smith* to be another example of using the wrong legal standard to select the offense guideline.¹²⁰

¹²⁰The Justice Department also cites *United States v. Brunson*, 882 F.2d 151 (5th Cir. 1989). It is not clear why *Brunson* is cited. *Brunson* simply reaffirms that relevant conduct cannot be used to determine the applicable offense guideline – the point we argue above.

The District Court in *Brunson* had used § 2C1.1 (“Offering, Giving, Soliciting or Receiving a Bribe; Extortion Under Color of Official Right”) to determine the offense level of a defendant convicted of an offense under 18 U.S.C. § 215 because the defendant was an assistant district attorney in addition to being a director of a bank. Appendix A listed § 2B4.1 (“Bribery and Procurement of Bank Loan and Other Commercial Bribery”) for a violation of 18 U.S.C. § 215. The charging document alleged that the defendant “was a director and attorney of the bank, that he corruptly solicited and demanded sexual favors from Grayson for himself and others, in exchange for which he would be influenced concerning repayment of Grayson’s overdrawn checking account.” *Brunson*, 882 F.2d at 153. The government argued that the atypicality language of the commentary to Appendix A justified the District Court’s use of § 2C1.1, but the Fifth Circuit disagreed.

It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an “atypical case.” Given the emphatic statutory requirement that the “court shall apply the offense guideline section . . . most applicable to the offense of conviction,” the commentary cannot have the effect urged upon us by the government. Section 1B1.2(a). The government’s interpretation of this commentary would give the district court, in choosing the offense guideline, the discretion to disregard the conduct essential to conviction and base its selection on some other conduct.

Brunson, 882 F.2d at 157.

The defendants in *Smith* had been convicted of several counts, including fraud, interstate transportation of stolen property, and money laundering, arising from an embezzlement and kickback scheme.¹²¹ All counts were put into a single group, a decision not appealed by either party.¹²² In determining the offense level for the group, the sentencing judge was deeply concerned about which guideline to apply and whether to depart. After an extended hearing and with obvious reluctance, he concluded that the money laundering guideline should apply as opposed to that for fraud and that there should be no departure.”¹²³

The Third Circuit reversed.¹²⁴ The Third Circuit pointed out that the introductory commentary to Appendix A states that, “If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See § 1B1.2.)” The atypicality standard requires consideration of a particular guideline’s heartland.

A sentencing court may be required to perform a “heartland” analysis in two different circumstances – the first, during the initial choice of the appropriate

¹²¹Smith, 186 F.3d at 293.

¹²²*Id.* at 297.

¹²³*Id.*

¹²⁴The Court of Appeals reviewed the determination de novo because “[t]he initial choice of guideline . . . is a question of law subject to plenary review.” *Id.* at 297.

guideline; the second, in the context of a departure request. Although these situations arise at different stages of the sentencing process, and are distinguishable to that extent, the “heartland” analysis remains identical.¹²⁵

Therefore, the Court of Appeals concluded, “we must first determine what conduct the Sentencing Commission considered to fall within the ‘heartland’ of the money laundering guideline.”¹²⁶

The Third Circuit reviewed the development of the money laundering guideline and the Commission’s Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report (Sept. 18, 1977), as well as the legislative history of the legislation disapproving a proposed amendment to the money-laundering guideline. The Third Circuit concluded that “the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime.”¹²⁷ With regard to the case at bar, the Court of Appeals concluded, “That is not the type of conduct implicated here. . . . The money laundering activity, when evaluated against the entire course of conduct, was an ‘incidental by-product’ of the kickback scheme. . . . The

¹²⁵Smith, 186 F.3d at 298.

¹²⁶*Id.*

¹²⁷*Id.* at 300.

root of the defendants's activity in this case was the fraud on GTECH."¹²⁸

There is nothing in the opinion to indicate that the Third Circuit, in addressing the choice of guideline issue, used conduct other than the offense conduct charged in the counts of conviction. Had the Court of Appeals done so, of course, that would have been error. The Justice Department may disagree with the Third Circuit about what constitutes the heartland of the money-laundering guideline, but the Third Circuit had to make a determination about that guideline's heartland to apply the correct legal standard.

The application of the correct legal standard, however, does not always result in the use of a guideline that produces punishment less harsh than the punishment produced by the offense guideline listed in Appendix A. Two cases, one from the Ninth Circuit and one from the Second Circuit, illustrate this. In the Ninth Circuit case, the defendant had been convicted of violating 21 U.S.C. § 333.¹²⁹ The statutory index listed § 2N2.1 (violation of statutes dealing with food, drug, and cosmetics) as the applicable offense guideline, but the District Court used the fraud guideline, § 2F1.1.¹³⁰ The defendant's offense level under § 2N2.1 would have been 6 (the guideline at that time had a base offense level and no specific offense characteristics). The defendant's offense level

¹²⁸*Id.* (quoting from *United States v. Henry*, 136 F.3d 12, 20 (1st Cir. 1998)).

¹²⁹*United States v. Cambra*, 933 F.2d 752 (9th Cir. 1991).

¹³⁰*Id.* at 754-55.

under § 2F1.1 was more than twice that.¹³¹ Pointing out that the defendant “had plead[ed] guilty to two counts alleging an intent to defraud,” the Ninth Circuit sustained the District Court’s use of the fraud guideline.¹³²

In the Second Circuit case, the defendant had been convicted under 18 U.S.C. § 641 of theft of government property.¹³³ The statutory index lists the theft guideline, § 2B1.1, for that offense, but the District Court used § 2J1.2 (obstruction of justice) instead.¹³⁴ The defendant’s offense level under § 2B1.1 was very low – level 5; the defendant’s offense level under the obstruction guideline was level 18.¹³⁵ The Court of

¹³¹Depending upon the date of the offense, either 7 or 9 levels were added based upon a loss of \$500,000. *Id.* at 756. The opinion does not indicate whether any other specific offense characteristics in the fraud guideline were applied.

¹³²*Id.* at 755. In a later case, *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999), *cert. denied* __ U.S. __, 2000 WL 197666, 197667, 197668 (Feb. 22, 2000), the Ninth Circuit again approved a District Court’s use of a guideline that produced a greater offense level than the guideline listed in Appendix A for the offense of conviction. The District Court used § 2J1.2 to sentence defendants, who were tax protesters convicted of obstructing proceedings before the I.R.S. under 18 U.S.C. §§ 371 and 1505.

According to the Statutory Index, defendants convicted of violating § 1505 normally be sentenced under § 2J1.2. In this case, however, the district court looked at the overt acts taken by Appellants and held that § 2J1.2 did not “address the seriousness of the defendants’ conduct.” We agree.

Id. at 832.

¹³³*United States v. Elefant*, 999 F.3d 674 (2d Cir.1993).

¹³⁴*Id.* at 676.

¹³⁵*Id.*

Appeals affirmed the District Court. Quoting the commentary in Appendix A about an atypical case, the Second Circuit stated that

we understand the exception described in Appendix A to cover those cases, probably few in number, where the conduct constituting the offense of conviction also constitutes another, more serious offense, thereby rendering the offense conduct not typical of the usual means of committing the offense of conviction.

The information to which [defendant] pled guilty described his conduct, in part, as “contact[ing] certain targets of the investigations and reveal[ing] to those targets confidential information concerning the ongoing investigation.” . . . we cannot find that the District Judge was clearly erroneous when he concluded that [defendant’s] conduct was not typical of theft of government property.¹³⁶

The suggestion that a sentencing court be required to use the offense guideline listed in Appendix A inappropriately diminishes judicial discretion and does not address the real problem illustrated by the *Smith* case. The standard applicable to selecting the offense guideline, we believe, ought to result in the sentencing court using the offense guideline that best fits the offense of which the defendant has been convicted.¹³⁷ The

¹³⁶*Id.* at 677.

¹³⁷Requiring the sentencing court to use the guideline listed in Appendix A, moreover, will not guarantee the Department of Justice the result it probably seeks – sentencing of defendants convicted of money laundering within the guideline range determined under the money laundering guidelines. A sentencing court may depart from that guideline range. In *United States v. Woods*, 159 F.3d 1132, 1134-36 (8th Cir.

sentencing court, considering the offense alleged in the charging documents, is in a better position than the Commission to determine which offense guideline best fits the offense of conviction.

The factor that controlled the outcome in the *Smith* case was the determination by the Court of Appeals that the offense of conviction did not fall within the heartland of the money-laundering guideline. The defendant in *Smith* argued that the evidence was insufficient to support their convictions for money laundering, but the Third Circuit sustained the convictions.¹³⁸ That the Justice Department may disagree with the Third Circuit's heartland determination does not mean that the Third Circuit's determination is wrong, any more than the defendants' disagreement with the determination on the sufficiency of the evidence means that the Third Circuit's determination of that issue is wrong.

1998), for example, the Eighth Circuit approved a downward departure in a case in which the defendant had pleaded guilty to bankruptcy fraud and money laundering. The defendant "moved for a departure from the money-laundering guideline . . . arguing that the case presented factors that took it outside the 'heartland' of money-laundering cases, and that the appropriate level for sentencing should take into account § 2F1.1, the guideline for the underlying offense, bankruptcy fraud." *Id.* at 1133. The District Court agree and sentenced accordingly, and the government appealed. The Court of Appeals affirmed. "[W]e do not believe the deposit of the check by Ms. Woods into her husband's account, or their obtaining of the cashier's checks, constitutes serious money-laundering conduct as contemplated by the Sentencing Commission for punishment under the money-laundering guidelines." *Id.* at 1136.

¹³⁸United States v. Smith, 186 F.3d 290, 294-95 (3d Cir. 1999) (?All in all, although Smith and Dandrea have provided us with forceful arguments, we cannot say that the jury verdict lacked sufficient support in the record").

The main thing that the *Smith* case illustrates, in our view, is that the continuing problems with the money-laundering guidelines. We recommend that the Commission make revision of those guidelines a matter of high priority.

Suggested Amendment

The first paragraph of application note 1 to § 1B1.2 is amended by adding at the end thereof the following:

?The determination of the applicable offense guideline is not a determination made on the basis of the defendant’s relevant conduct under § 1B1.3. Rather, that determination is made on the basis of the nature of the offense conduct set forth in the count of conviction.”

Changes made by recommended amendment (new language in italic):

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the

subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted. *The determination of the applicable offense guideline is not a determination made on the basis of the defendant's relevant conduct under § 1B1.3. Rather, that determination is made on the basis of the nature of the offense conduct set forth in the count of conviction.*

AMENDMENT 8(C)

The Commission has asked for comment upon whether the enhancement in § 2F1.1(b)(4)(B) “applies to falsely completing bankruptcy schedules and forms.” Several Circuits have held that the enhancement applies,¹³⁹ and two Circuits have held that the enhancement does not apply.¹⁴⁰ One Circuit, in dictum, has indicated that the

¹³⁹The Commission identifies six Circuits: *United States v. Saacks*, 131 F.3d 540, 543-46 (5th Cir. 1997); *United States v. Michalek*, 54 F.3d 325, 330-33 (7th Cir. 1995); *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991); *United States v. Welch*, 103 F.3d 906, 907-08 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Bellew*, 35 F.3d 518 (11th Cir. 1994).

The Sixth Circuit has also held that the enhancement applies. *United States v. Guthrie*, 144 F.3d 1006, 1010-11 (6th Cir. 1998).

¹⁴⁰*United States v. Shaddock*, 112 F.3d 523, 528-30 (1st Cir. 1997); *United States v. Thayer*, 1999 WL 1267728 (3d Cir. Dec. 28, 1999).

enhancement does not apply to filing false accounts in a state probate court, but the reasoning in that case indicates that the Circuit would also conclude that the enhancement does not apply to bankruptcy schedules and forms.¹⁴¹ The Federal Public and Community Defenders recommend that the commentary to § 2F1.1 be amended to state that the enhancement does not apply to falsely completing bankruptcy schedules and forms. Our suggested amendment is set forth at the end of our comments on Amendment 8(C).

Background

The enhancement of § 2F1.1(b)(4)(B) applies “if the offense involved . . . violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines” The Commission has not expressly stated the purpose of the enhancement, but we understand the purpose of the enhancement to be to impose greater punishment upon a person who continues fraudulent activities after a court or administrative tribunal has directed that those activities be discontinued. Many states have a means whereby the Attorney General or dissatisfied consumers, customers, or the like can seek to have a person cease and desist from deceptive, misleading, dishonest, or fraudulent practices. A person who has been ordered to discontinue such practices but who nonetheless continues to engage in them is more culpable, and deserves greater punishment, than a person whose practices have not previously been challenged

¹⁴¹United States v. Carrozzella, 105 F.3d 796, 799-802 (2d Cir. 1997).

and ordered discontinued. The application of the enhancement to violations of administrative orders as well as judicial orders, and the examples in application note 6, underscore this understanding of the purpose of the enhancement.¹⁴²

Of the Circuits upholding application of the enhancement to falsely completed bankruptcy schedules and forms, one Circuit does so on the basis that there has been a violation of a “judicial order.”¹⁴³ The other Circuits upholding application rely upon the term “judicial . . . process.”¹⁴⁴

The First Circuit rejected application of the enhancement because the language of the enhancement and commentary “plainly indicates that the enhancement was meant to

¹⁴²The example in the second sentence of application note 6 refers to a party to “prior proceeding” and “prior order or decree.” The third sentence of that application note indicates that the enhancement applies to “a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product”

The Background commentary also underscores our understanding, stating that “[a] defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

¹⁴³*United States v. Bellew*, 35 F.3d 518, 520-21 (11th Cir. 1994) (“concealment of assets in a bankruptcy proceeding amounts to a violation of a ‘judicial order’ within the meaning of the guideline”) (concluding that the Bankruptcy Rules and Official Forms constitute a judicial order). An interpretation that the Bankruptcy Rules and Official Forms constitute a judicial order seems strained, at best.

¹⁴⁴*See, e.g., United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998) (“the term ‘judicial process’ as used in § 2F1.1(b)(4)(B) includes bankruptcy proceedings”).

apply to defendants who have demonstrated a heightened *mens rea* by violating a prior ‘judicial or administrative order, decree, injunction or process.’”¹⁴⁵ The Third Circuit, the most recent Circuit to address the issue, agreed with the First Circuit.¹⁴⁶ The Third Circuit addressed the argument that a bankruptcy proceeding constitutes a “judicial . . . process” by relying on a Second Circuit case that held the enhancement inapplicable to filing false accounts in a probate court.¹⁴⁷ The Second Circuit noted that the enhancement applies to a “violation” of judicial process, not to an “abuse” of judicial process:

“Violation” strongly suggests the existence of a command or warning followed by disobedience. This analysis in turn suggests that the term “process” – the command or warning violated – is used, not in the sense of legal proceedings generally, but in the sense of a command or order to a specific party, such as a summons or execution issued in a particular action. . . . This narrower reading of Section 2F1.1(b)([4])(B) is also consistent with the general practice – known as *ejusdem generis* – of construing general language in an enumeration of more

¹⁴⁵United States v. Shaddock, 112 F.3d 523, 530 (1st Cir. 1997). The Seventh Circuit, in a case at about the same time as United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995), seems to agree. See United States v. Gunderson, 55 F.3d 1328, 1332-33 (7th Cir. 1995) (“We agree” with defendant’s argument that, based upon the commentary, § 2F1.1(b)(4)(B) “is designed to apply when a defendant has had a previous warning.” *Id.* at 1333 (quoting defendant).

¹⁴⁶United States v. Thayer, 1999 WL 1267728 (3d Cir. Dec. 28, 1999).

¹⁴⁷*Id.*

specific things in a way that limits the general language to the same class of things enumerated.¹⁴⁸

Recommendation

We believe that the First, Second, and Third Circuits are correct in their interpretation of the enhancement. The decisions from the Circuits upholding use of the enhancement suggests that those Circuits believe bankruptcy fraud to be a particularly aggravated form of fraud deserving of greater punishment.¹⁴⁹ Whether bankruptcy fraud is deserving of greater punishment than other forms of fraud is a policy decision for the Commission to make, however – a decision, we believe, that the Commission has not yet made. Further, we do not believe that the case for punishing bankruptcy fraud more severely than other forms of fraud is very strong.

The Circuits that apply the enhancement to bankruptcy fraud have justified treating bankruptcy fraud more severely than other forms of fraud by simply stating the

¹⁴⁸United States v. Carrozzella, 105 F.3d 796, 800 (2d Cir. 1997).

¹⁴⁹In United States v. Saacks, 131 F.3d 540, 543-44 (5th Cir. 1997), for example, the Court of Appeals observed that

in neither § 2F1.1 nor any other section of the Guidelines is there either a base offense level or an enhancement provision for bankruptcy fraud as such. Consequently, were we to stop with the general sentencing provisions for fraud, we would fail to make any distinction between the most pedestrian federal fraud offense and bankruptcy fraud with all of its implications of a scheme to dupe the bankruptcy court, the trustee, and the creditor or creditors of the debtor, i.e., the entire federal system of bankruptcy.

purpose of bankruptcy and describing bankruptcy fraud, apparently assuming that the rationale for treating bankruptcy fraud more severely is self-evident. The Sixth Circuit, for example, has stated:

Bankruptcy fraud undermines the whole concept of allowing a debtor to obtain protection from creditors, pay debts in accord with the debtor's ability, and thereby obtain a fresh start. When a debtor frustrates those objectives by concealing the very property which is to be utilized to achieve that purpose, the debtor works a fraud on the entirety of the proceeding. By obtaining protection from creditors and, at the same time, denying them of their lawful and equitable due, a debtor violates the spirit as well as the purpose of bankruptcy. This artifice strongly supports increasing the perpetrator's sentence for committing fraud upon the very source of his financial refuge and salvation.¹⁵⁰

That statement describes what occurs, but does not indicate how what occurs makes bankruptcy fraud deserving of greater punishment than other forms of fraud. A factor not mentioned by the Sixth Circuit, but sometimes mentioned, is that a bankruptcy fraud can involve a large number of victims.¹⁵¹

¹⁵⁰United States v. Guthrie, 144 F.3d 1006, 1010-11 (6th Cir. 1998).

¹⁵¹See United States v. Saacks, 131 F.3d 540, 544 (5th Cir. 1997) ("If we imagine, for example, some simple fraud with a federal nexus implicating one defrauder's attempt to defraud two individuals . . . for a targeted amount of \$70,000 . . . our hypothetical defrauder would be sentenced under precisely the same offense level as Saacks, whose skulduggery directly affected the federal bankruptcy system and thus some seventy-five

We do not find the rationale for treating bankruptcy fraud more severely to be self-evident. The factors identified do not, in a meaningful way, distinguish bankruptcy fraud from other forms of fraud. A fraud always will betray faith, trust, or confidence. A person seeking to get something from the Department of Veterans' Affairs who files false forms (seeking a greater payment than that to which the person is entitled, for example) has also committed fraud upon that person's source of financial assistance. That false filing also frustrates the public purpose behind the payment, by (potentially, at least) diverting funds that would otherwise be used to carry out the public purpose. That a large number of victims may be involved does not differentiate a bankruptcy fraud from any other large-scale fraud.

We see no reason to give especially-severe treatment to bankruptcy fraud. The guidelines already deal with bankruptcy fraud in an appropriate manner. The Commission has determined – correctly, we believe – that a fraud offense should be punished principally on the basis of the economic harm caused to the direct victims. That approach can result in a defendant receiving greater punishment for filing false bankruptcy forms and schedules and thereby causing a loss of \$205,000 than for committing perjury in a United States District Court proceeding in an attempt to win

creditors, a bankruptcy trustee, and a bankruptcy judge”).

several million dollars in a civil action.¹⁵²

Suggested Amendment

The Federal Public and Community Defenders therefore recommend that the following new paragraph be added at the end of application note 6:

Subsection (b)(4)(B) does not apply on the basis of filing a false document of any kind with a federal, state, or local court.

As amended, application note 6 would read as follows (new language in italic):

6. Subsection (b)(4)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to a prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; *e.g.*, a violation of a condition of release (addressed in § 2J1.7 (Offense

¹⁵²For the bankruptcy fraud, the defendant's offense level under § 2F1.1 would be 16 (base offense level of 6, plus 8 levels for the amount of loss, plus 2 levels for either more-than-minimal planning or a scheme to defraud more than one victim). For the perjury, the defendant's offense level under § 2J1.3 would be 12 (or 15 if the perjury resulted in a substantial interference with justice).

Committed while on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).

Subsection (b)(4)(B) does not apply on the basis of filing a false document of any kind with a federal, state, or local court.

AMENDMENT 8(D)

The Commission has asked for comment upon “whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal.” Seven Circuits have held that such postconviction rehabilitation is a basis for such a departure.¹⁵³ Only one Circuit has held

¹⁵³The Commission identifies *United States v. Core*, 125 F.3d 74, 76-79 (2d Cir. 1997) *cert. denied* __ U.S. __, 118 S.Ct. 735 (1998); *United States v. Sally*, 116 F.3d 76, 79-81 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997) (involving postconviction rehabilitation) (overruling *United States v. Van Dyke*, 895 F.2d 984 (4th Cir. 1989), a decision written by the then-Chair of the Sentencing Commission, Judge William W. Wilkins, holding that postoffense rehabilitation was not a basis for departing) (per Wilkins, C.J.); *United States v. Rudolph*, 190 F.3d 720, 722-28 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202, 1206-08 (9th Cir. 1999); *United States v. Rhodes*, 145 F.3d 1375, 1378-82 (D.C. Cir. 1998).

The Tenth Circuit also has approved such a departure. *United States v. Roberts*, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpub.) (relying on *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998), a postoffense rehabilitation case that held that “*Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts

that such postconviction rehabilitation is not a basis for such a departure.¹⁵⁴ The Federal Public and Community Defenders agree with the majority of Circuits.

Since *Koon v. United States*,¹⁵⁵ all the Circuits that have considered the matter agree that *postoffense* rehabilitation can justify a downward departure.¹⁵⁶ Even the Circuit that holds that postconviction rehabilitation is not a basis for a downward departure has held that postoffense rehabilitation is a basis for a downward departure.¹⁵⁷ *Postconviction* rehabilitation is simply a subcategory of postoffense rehabilitation and

were not expressly forbidden as a basis for departure by the Sentencing Commission”).

¹⁵⁴*United States v. Sims*, 174 F.3d 911 (8th Cir. 1999).

¹⁵⁵18 U.S.C. 81, 116 S.Ct. 2935 (1996).

¹⁵⁶*See United States v. Brock*, 108 F.3d 31 (4th Cir. 1997) (per Wilkins, C.J.) (holding that prior decision that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; hence, they potentially may serve as a basis for departure”); *United States v. Kapitkze*, 130 F.3d 820 (8th Cir. 1997); *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998) (“We conclude that *Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts were not expressly forbidden as a basis for departure by the Sentencing Commission.” (overruling *United States v. Ziegler*, 39 F.3d 1058, 1061 (10th Cir. 1994))).

¹⁵⁷In *United States v. Kapitkze*, 130 F.3d 820 (8th Cir. 1997), the Eighth Circuit applied a *Koon* analysis and concluded that “because the acceptance of responsibility guideline takes postoffense rehabilitation efforts into account, departure under section 5K2.0 is warranted only if the defendant’s efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted.” *Id.* at 823.

should be treated no differently from postoffense rehabilitation.¹⁵⁸

While it may be desirable to amend the *Guidelines Manual* to make clear that postconviction rehabilitation is an unaddressed factor, we do not recommend that the Commission do so. Situations in which such a departure might occur arise infrequently, and only one Circuit has found that the sentencing court lacks authority to depart.

The Supreme Court set forth the method of analyzing whether a departure is permissible in the *Koon* case.¹⁵⁹ The initial step in the *Koon* analysis is to determine if the Commission has prohibited a departure based upon the factor relied upon.

[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no – as it will be most of the time – the sentencing court must

¹⁵⁸As the Third Circuit has observed, “post-conviction rehabilitation efforts are, by definition, post-offense rehabilitation efforts and hence should be subject to at least equivalent treatment under the Guidelines.” *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). *See also* *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997) (“We see no significant difference between the post-offense rehabilitation that we found in *Maier* to furnish a legally permissible grounds for departure and rehabilitation achieved in prison between imposition of the original sentence and resentencing.”) (referring to *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992)); *United States v. Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999) (“an inconsistency would arise if courts permitted departures for post-offense rehabilitation but prohibited departures for post-sentence rehabilitation”); *United States v. Green*, 152 F.3d 1202, 1208 (9th Cir. 1998) (“Like the Second Circuit, we cannot ascertain any meaningful distinction between post-offense and post-sentencing rehabilitation”).

¹⁵⁹*Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996).

determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.¹⁶⁰

The initial inquiry, then, is whether the Commission has forbidden reliance on postconviction rehabilitation. We agree with the former Chair of the Commission, Chief Judge Wilkins of the Fourth Circuit, that “The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure.”¹⁶¹

The next step in the *Koon* analysis is to determine into which category the factor fits – (1) a factor identified by the Commission as a basis for departure (an “encouraged” factor); a factor for which the Commission discourages departure (a “discouraged”

¹⁶⁰*Id.* at 109, 116 S.Ct. at 2051. “[T]he Commission chose to prohibit consideration of only a few factors, and not otherwise limit, as a categorical matter, the considerations which might bear upon the decision to depart.” *Id.* at 94, 116 S.Ct. at 2045.

¹⁶¹*United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997). The District of Columbia Circuit concluded that

Koon identifies only race, sex, national origin, creed, religion, and socioeconomic status . . . lack of guidance as a youth . . . drug or alcohol abuse . . . and personal financial difficulties and economic pressures upon a trade or business . . . as prohibited under the Guidelines. . . . Obviously, postconviction rehabilitation is not one of these prohibited factors, nor have we found any other provision of the Guidelines, policy statements, or official commentary of the Sentencing Commission prohibiting its consideration.

United States v. Rhodes, 145 F.3d 1375, 1378 (D.C. Cir. 1998).

factor); and (3) a factor not mentioned by the Commission.¹⁶² The availability of a departure depends upon the factor's category.¹⁶³ Like Chief Judge Wilkins, we conclude with regard to postconviction rehabilitation that

[b]ecause the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted.¹⁶⁴

¹⁶²Koon v. United States, 518 U.S. 81, 95 116 S.Ct. 2035, 2045 (1996).

¹⁶³For an encouraged factor,

the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," . . . decide whether it is sufficient to take the case out of the Guidelines's heartland.

Koon v. United States, 518 U.S. 81, 95, 116 S.Ct. 2035, 2045 (1996) (citations omitted) (quoting from United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

¹⁶⁴Brock, 108 F.3d at 35. The Fourth Circuit had previously held that a downward departure could not be based on postconviction rehabilitation. United States v. Van Dyke, 895 F.2d 984, 986-87 (4th Cir. 1990). Brock held that Koon required overruling Van Dyke.

The one Circuit that holds that postconviction rehabilitation is not a basis for departure – the Eighth Circuit – argues that *Koon* does not control the determination of whether postconviction rehabilitation is a proper basis for departure.¹⁶⁵ The opinion states:

While there is language in *Koon* that can be taken to support [defendant's] argument, its context disqualifies it for application to the present situation. Cases cannot be read like statutes. *Koon* addressed the matters that a district court may properly consider in departing from the guidelines at an original sentencing. The Court never addressed the question of whether post-sentencing events might support a departure at a resentencing because that matter was not before it.¹⁶⁶

The opinion, therefore, does not do a *Koon* analysis of the matter but rather looks to policy considerations to conclude that a departure is not possible. First, the opinion argues that permitting a departure would create disparity because “a few lucky defendants, simply because of a legal error in their original sentencing, receive a windfall in the form of a reduced sentence for good behavior in prison.”¹⁶⁷ Second, the opinion states that “it may well be that the Sentencing Reform Act precludes a sentencing court

¹⁶⁵United States v. Sims, 174 F.3d 911, 912 (8th Cir. 1999) (“We do not think that *Koon* is controlling here”).

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 913.

from considering post-conviction rehabilitation at sentencing,” citing that Act’s abolition of parole and vesting of the power to award good-time credit in the Bureau of Prisons.¹⁶⁸

All aspects of this rationale – that *Koon* is inapplicable, that permitting departure for postconviction rehabilitation will create disparity, and that Congress intended to preclude such departures – are unpersuasive. The assertion that *Koon* does not apply seems mostly *ipse dixit*. A complete resentencing is no different in kind or legal effect from an “original sentencing.” Both are governed by 18 U.S.C. § 3553(b), which requires the sentencing court to impose a sentence called for by the guidelines unless there is present in the case a factor that the Sentencing Commission has not adequately considered. It is true – but not particularly significant – that *Koon* did not specifically address “whether post-sentencing events might support a departure at a resentencing.” *Koon*, however, did address departures and the principles applicable to evaluating them, and there is no basis for concluding that departure principles applicable at an original sentencing is not applicable at a resentencing. *Koon* also did not specifically address

¹⁶⁸*Id.* The use of the phrase “it may well be” suggests that the Court of Appeals was not entirely convinced that the Sentencing Reform Act precludes a departure for postconviction rehabilitation. The argument that the Sentencing Reform Act precluded a departure was advanced more assertively by the dissent in the earlier case of *United States v. Rhodes*, 145 F.3d 1375, 1384 (D.C. Cir. 1998) (“I think the very passage of the Sentencing Reform Act of 1984 . . . implicitly precludes a district court from considering post-conviction behavior in imposing sentences”) (Silberman, J. dissenting). The dissent in *Rhodes*, however, agreed with the opinion in that case that “the Sentencing Guidelines do not address the question presented – whether a district court may consider a prisoner’s post-conviction conduct when it resentsences a prisoner following an appeal.” *Id.*

whether postoffense rehabilitation would justify a departure, but that has not prevented the Eighth Circuit from using a *Koon* analysis to conclude that such rehabilitation does justify a departure.¹⁶⁹

The disparity rationale is also unpersuasive. To begin with, the Sentencing Reform Act of 1984 did not seek to end all disparity, only disparity that is unwarranted. Thus, 18 U.S.C. § 3553(a)(6) sets forth as a purpose of sentencing the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.”¹⁷⁰ Likewise, 28 U.S.C. § 991(b)(1)(B) states that a purpose of the Sentencing Commission is to “establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants

¹⁶⁹United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997). “When assessing whether the Sentencing Commission adequately considered a potential basis for departure, courts focus on whether the factor is addressed by the Guidelines, policy statements, or official commentary.” *Id.* at 822 (citing *Koon*). The Eighth Circuit next described the four types of factors and the justification needed for each to support a departure, citing *Koon*. The Eighth Circuit then analyzed the case “[w]ith these principles in mind,” *id.*, deciding that “[b]ecause the acceptance of responsibility guideline takes postoffense rehabilitation efforts into account, departure under section 5K2.0 is warranted only if the defendant’s efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted,” *id.* at 823.

¹⁷⁰18 U.S.C. § 3553(a) was enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(2), 98 Stat. 1989.

with similar records who have been found guilty of similar criminal conduct”¹⁷¹ We agree with the District of Columbia Circuit that

[a]ny disparity that might result from allowing the district court to consider post-conviction rehabilitation . . . flows not from [defendant] being “lucky enough” to be resentenced, or from some “random” event . . . but rather from the reversal of his section 924(c) conviction. . . . Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems “unwarranted.”¹⁷²

Further, as the Sixth Circuit has pointed out,

[w]hile it may seem “fair” to allow all rehabilitated defendants to plead their case, the approved practice of permitting departures for post-offense rehabilitation has already introduced unfairness and disparity into the granting of downward departures: one defendant may have no chance to rehabilitate himself before sentencing (e.g., his case might rapidly proceed to trial and sentence), whereas another defendant might face lengthy (yet constitutionally acceptable) pre-trial and pre-sentence delays that permit her to avail herself of many rehabilitative services

¹⁷¹28 U.S.C. § 991 was enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 217(a), 98 Stat. 2017. *See also* 28 U.S.C. § 994(f) (directing the Commission, in promulgating guidelines, to give “particular attention to the requirements of subsection [*sic*] 991(b)(1)(B)”).

¹⁷²*United States v. Rhodes*, 145 F.3d 1375, 1381 (D.C. Cir. 1998).

before her sentencing. Allowing post-sentence departure will probably encourage attempts at rehabilitation (or at least attempts at appearing rehabilitated), so perhaps a utilitarian calculus supports the departure.¹⁷³

We would only add that it does not seem to serve the ends of justice to say that if we cannot be fair to every defendant who is rehabilitated, then we will be fair to none of them.

Finally, to our knowledge, no provision of the Sentencing Reform Act of 1984 or other law expressly precludes departures for postconviction rehabilitation.¹⁷⁴ The Eighth Circuit’s argument, therefore, is that the Act, by abolishing parole and vesting in the Bureau of Prisons the authority to administer good-time credit, implies that Congress intended to preclude departures for postconviction rehabilitation. That argument fails for two reasons. First, that implication is inconsistent with express language of the Sentencing Reform Act of 1984. Second, the provisions of the Act relied upon – abolition of parole and vesting in the Bureau of Prisons the authority to administer good-time credit – do not support that implication.

To start, the Sentencing Reform Act expressly provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a

¹⁷³United States v. Rudolph, 190 F.3d 720, 724 (6th Cir. 1999).

¹⁷⁴ “[N]either the [Sentencing Reform] Act nor any other provision of law we have found explicitly bars consideration of post-conviction rehabilitation.” United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998).

person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁷⁵ This express provision is inconsistent with an intention to preclude consideration of postconviction rehabilitation.

Further, the inference that Congress intended that abolition of parole preclude all departures for postconviction rehabilitation is weak – but, if true, would also to preclude departures for postoffense rehabilitation, which (as noted above) even the Eighth Circuit permits.¹⁷⁶ As the District of Columbia Circuit has pointed out, “Congress ended parole largely to remedy significant problems flowing from the fact that district court sentences for terms of imprisonment were generally open-ended, with the United States Parole Commission actually determining an offender’s date of release.”¹⁷⁷ The Sentencing Reform Act established a sentencing system in which federal judges determine sentence length. We agree with the District of Columbia Circuit that

[a]llowing district courts to depart from the Guidelines for post-conviction rehabilitation implicates none of the concerns that primarily led Congress to

¹⁷⁵Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(1), 98 Stat. 1987 (reenacting 18 U.S.C. § 3577 as 18 U.S.C. § 3661). The Commission interprets this provision in § 1B1.4 to mean that a sentencing court, in determining (1) where within the applicable guideline range to sentence or (2) whether a departure is warranted, “may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.”

¹⁷⁶United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997).

¹⁷⁷United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998).

abolish parole. There will be no mystery about the sentences defendants will serve because sentences that take account of post-conviction rehabilitation will be entirely determinate. And because the same district court that imposed the initial, erroneous sentence will impose the second, correct sentence, such sentences pose no risk of judicial second-guessing.¹⁷⁸

The inference that Congress, by vesting in the Bureau of Prisons the authority to administer good-time credit, intended to preclude departures for postconviction rehabilitation fares no better than the abolition-of-parole inference. Good-time credit is awarded for satisfactory behavior – obeying institutional rules and not getting in trouble – behavior that does not, in and of itself, demonstrate a person’s rehabilitation.

While considerations that inform the Bureau of Prisons’ exercise of discretion in awarding good time credits . . . may parallel some factors sentencing courts could weigh for post-conviction rehabilitation departures, awards of good time credits differ from post-conviction departures in several important respects. For one thing, good time credits simply reduce time served for behavior expected of all prisoners . . . while departures based on rehabilitation alter the very terms of imprisonment; indeed, prisoners receiving departures at resentencing will remain

¹⁷⁸*Id.* at 1380.

eligible for future good time credits.¹⁷⁹

Although not cited or discussed by the Eighth Circuit, 28 U.S.C. § 994(t), it might be argued, supports an inference that Congress intended to preclude downward departures for postconviction rehabilitation. A sentencing court is authorized by 18 U.S.C. § 3582(c)(1)(A)(i) to reduce a sentence that is a final judgment. There must be a motion made by the Director of the Bureau of Prisons, and the sentencing court must find that “extraordinary and compelling reasons warrant such a reduction.” Section 994(t) provides that the Commission,

in promulgating policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant

¹⁷⁹*Id.* The Sixth Circuit rejected an argument that because the Commission, when drafting the guidelines, was aware of how good-time credit is administered, the Commission adequately considered rehabilitation and thereby precluded departure for postconviction rehabilitation.

We agree that the Commission was presumably aware of [18 U.S.C.] § 3624(b). But it does not follow that the Commission intended to bar sentencing courts from considering rehabilitation in prison as a basis for departure. Furthermore, as good time credit under § 3624(b) ordinarily starts accruing during service of sentence, i.e. after the imposition of the sentence, and the issue of departure arises at sentencing, there is little logical support for the inference that the Commission would have considered the means of earning good time credit relevant to the issues affecting what sentence would be imposed.

United States v. Core, 125 F.3d 74, 78 (6th Cir. 1997).

alone shall not be considered an extraordinary and compelling reason.

We do not find convincing an argument that section 994(t) precludes a downward departure for postconviction rehabilitation, for several reasons. First, the language of section 994(t) is directed at the Commission, not at sentencing courts. Section 994 of title 28 describes the powers of the Commission. The sentencing court's authority to impose sentence derives from 18 U.S.C. § 3553. Section 994(t), therefore, does not limit the discretion of a sentencing court. Second, section 994(t) addresses a proceeding that is not the functional equivalent of a sentencing. The purpose of a sentencing is to determine, and impose, what is the appropriate punishment under all of the facts and circumstances of the case. The purpose of a proceeding under section 2582(c)(1)(A) is to determine if the appropriate punishment should be reduced. Third, Congress has not eliminated rehabilitation as a purpose of sentencing, although Congress was skeptical that rehabilitation could occur in a prison context.¹⁸⁰ When rehabilitation does occur in that context, therefore, the congressional skepticism, a judgment formulated in the abstract but which may be correct in many instances, has been overridden by what the defendant has actually been able to achieve.

¹⁸⁰18 U.S.C. § 3553(A)(2)(D) specifically identifies rehabilitation as a purpose of sentencing. Congress rejected arguments eliminate rehabilitation as a purpose of sentencing. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 76 (1983). 18 U.S.C. § 3582(a) directs a sentencing court, when considering sentence, to consider the factors set forth in 18 U.S.C. § 3553(a), “recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”

The goal of our sentencing system is not to deprive federal judges of all discretion at sentencing. As the Supreme Court stated in *Koon*,

[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.¹⁸¹

The Sentencing Reform Act of 1984 may have narrowed the scope of judicial sentencing discretion, but the Act did not – and did not intend to – eliminate that discretion entirely.¹⁸²

The legislative history of that Act indicates that “[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”¹⁸³ We urge the Commission not to narrow judicial discretion.

AMENDMENT 8(E)

¹⁸¹*Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 2053 (1996).

¹⁸²“We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge.” *Koon*, 518 U.S. at 113, 116 S.Ct. at 2053.

¹⁸³S. Rep. No. 98-225, 98th Cong., 1st Sess. 52 (1983).

The Commission has asked for comment upon “whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case.” The Circuits are divided over this question, we believe, because of a lack of specificity in § 6B1.2(a), p.s. The Federal Public and Community Defenders recommend the addition of language to § 6B1.2(a), p.s. that would foster and facilitate plea agreements. Our suggested amendment is set forth at the end of our comments on amendment 8(E).

Under § 6B1.2(a), p.s., if there is a plea agreement that includes a commitment by the government to dismiss a charge or not to bring a charge, a sentencing court “may accept the agreement if the court determines . . . that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Neither the policy statement nor its commentary indicates whether the sentencing court is to make this determination on the basis of (1) the guideline range applicable to the remaining charges or (2) the maximum possible sentence available if the court were to depart upward from the applicable guideline range. If the former is the correct meaning, then acceptance of the plea agreement would foreclose an upward departure based upon conduct in the dismissed or uncharged offenses.

Because the Commission’s intention is not clear, the Circuits have divided over whether it is possible for a sentencing court to depart upward based upon conduct

covered by charges that were dismissed or not brought pursuant to a plea agreement.¹⁸⁴

Several Circuits have held that such a departure is permissible, although not all of them have discussed the impact of § 6B1.2(a), p.s.¹⁸⁵ Other Circuits have held that such a departure is not permissible¹⁸⁶

¹⁸⁴There can be no doubt that, in the absence of a plea agreement, a sentencing court can base an upward departure on conduct covered by charges that were dismissed or never brought. 18 U.S.C. § 3661 provides that a sentencing court can consider, without limitation, any information about the background, character, and conduct of the defendant. The Commission, in § 1B1.4, has interpreted this provision to govern when the sentencing court is deciding (1) where within the applicable guideline range to sentence, and (2) whether to depart.

¹⁸⁵The Commission cites cases from six Circuits. Of the six cases cited, three discussed § 6B1.2(a), p.s. *United States v. Baird*, 109 F.3d 856 (3d Cir. 1997); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994); *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997).

The other three cases cited did not discuss § 6B1.2(a), p.s. *United States v. Figaro*, 935 F.2d 4, 6-8 (1st Cir. 1991); *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990); *United States v. Big Medicine*, 73 F.3d 994 (10th Cir. 1995). A close reading of two of these three cases indicates that they may be of limited value in analyzing this issue. The defendant in *Figaro* pleaded guilty, but the opinion does not state whether that plea was pursuant to a plea agreement. The defendant in *Big Medicine* did plead guilty pursuant to a plea agreement, but, for reasons spelled out in the opinion, the Tenth Circuit expressly concluded that, “We therefore need not address *Big Medicine*’s argument that a court cannot consider in its sentencing decision charges dismissed as part of a plea agreement.” *Big Medicine*, 73 F.3d at 997 n.5.

¹⁸⁶The Commission cites cases from three Circuits: *United States v. Ruffin*, 997 F.2d 343 (7th Cir. 1993); *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995); *United States v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991); *United States v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1991). We would not cite *Ruffin* for the proposition that a district court cannot depart in a case in which counts are dismissed pursuant to a plea agreement.

Because the question that has divided the Circuits is what the Commission intended § 6B1.2(a), p.s. to mean, the Commission should clarify its intention. The policy choice confronting the Commission is to what extent the Commission wishes to foster and facilitate the negotiation of pleas.

Pleas of guilty play an important role in the federal criminal justice system. The most-recently available Commission data is that more than 93% of federal cases are disposed of by plea of guilty.¹⁸⁷ While not all guilty pleas are the result of plea negotiation, a significantly large number of them are. Plea negotiation is a legitimate and necessary part of the federal criminal justice system.

Plea agreements are reached because each side gets something. A defendant usually gets a lesser sentence, and the prosecutor usually gets a guaranteed conviction plus the certainty of some punishment. Each side also gives up something, however. A defendant may believe that she has a good defense and is 90% certain of winning if the case were to go to trial. If she reaches a plea agreement, she gives up the opportunity to walk away from a trial as a free person. She may be willing to do so because there is a chance, even if only 10%, that she will be convicted, in which case she would be exposed to a significantly-longer sentence. The prosecutor in the case foregoes the chance to convict her of an offense that yields greater punishment. The prosecutor may be willing

¹⁸⁷U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 20 (Fig. C).

to do so because the case against the defendant is not strong and he also believes that there is only a 10% chance of conviction.

The defendant's principal concern in negotiating a plea is exposure – what is the likely sentence if a plea is negotiated. There is little incentive to negotiate a plea if the resulting sentence will not be significantly different from the sentence if the defendant is convicted after a trial. There will, of course, always be a difference if there is only one charge. A plea of guilty ordinarily will trigger a reduction of two or three levels under § 3E1.1 for acceptance of responsibility. A plea agreement in such circumstances is not necessary for the defendant to get something by pleading guilty. The matter is not so easy, however, if there is more than one charge or if the two- or three-level reduction is not a sufficient incentive to a defendant.

The ability of a sentencing court to depart upward based upon conduct in charges that have been dismissed or not brought pursuant to a plea agreement generates uncertainty for a defendant and makes it harder for a defendant to determine the extent of his or her exposure. Suppose a defendant in criminal history category I is charged with three counts of robbery. The applicable offense level, before credit for acceptance of responsibility, is 28, yielding a guideline range of 78-97 months if the defendant goes to trial and 57-71 months if the defendant pleads guilty to all three counts. If the plea agreement calls for the government to dismiss two of the counts, the offense level will be reduced by three levels, which, together with the three-level reduction for acceptance of

responsibility yields a guideline range of 41-51 months. If the sentencing court can go no higher than 51 months, the defendant probably will find this an attractive offer. If the court can depart upward, the defendant's exposure becomes uncertain. What is the likelihood that the court will depart upward – 33%, 50%, 80%? If the court decides to depart, how great will the departure be?¹⁸⁸ Those questions make it difficult to evaluate a plea offer and inevitably will cause some plea negotiations to fail.

A defendant can know his or her exposure with certainty if there is a plea entered under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. Such a plea ordinarily requires the court to impose an agreed-upon sentence, if the court accepts the plea.¹⁸⁹ In our experience, Rule 11(e)(1)(C) pleas are not generally available.

Because of the need for certainty, we believe that § 6B1.2(a), p.s. should require the sentencing court to determine if the applicable guideline range permits imposition of a sentence that adequately reflects the seriousness of the actual offense conduct. This policy enables a defendant to determine exposure with reasonable certainty – the sentence will be within the applicable guideline range. The sentencing court can protect

¹⁸⁸Under 18 U.S.C. § 3742(f)(2), the extent of the departure must be reasonable. While we would argue that it would be unreasonable to impose a sentence in excess of 71 months – the defendant's maximum exposure had the defendant pleaded to all three counts without a plea agreement – it is not certain what a court would determine. Any sentence in excess of 71 months would make a mockery of the plea agreement.

¹⁸⁹We use the term “ordinarily” because a Rule 11(e)(1)(C) plea does not necessarily have to specify the ultimate sentence. Such a plea can specify a range, for example, or that the defendant is entitled to credit for acceptance of responsibility.

against a plea agreement that would result in an inappropriately lenient sentence by rejecting the plea.¹⁹⁰

Suggested Amendment

The Federal Public and Community Defenders recommend that the first sentence of § 6B1.2(a), p.s. by deleting “remaining charges adequately reflect” and inserting in lieu thereof “guideline range applicable to the remaining charges adequately reflects”. As amended, § 6B1.2(a) would read as follows (new language in italic, deleted language struck-through):

- (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that the ~~remaining charges adequately reflect~~ *guideline range applicable to the remaining charges adequately reflects* the seriousness of the actual offense behavior and that accepting the agreement will not

¹⁹⁰An inappropriately lenient sentence would be one in which the defense attorney has been able to take advantage of an inexperienced or unsophisticated assistant United States Attorney. Quite frankly, our experience has been that plea agreements result in inappropriately lenient sentences only rarely. By and large, United States Attorneys’ offices are staffed with qualified attorneys and have a review mechanism in place to ensure that the less experienced prosecutors are not taken advantage of. What might appear to be a lenient sentence nearly always is the result of a dispassionate evaluation of all of the circumstances of the case by the United States Attorney’s office.

undermine the statutory purposes of sentencing or the sentencing guidelines. *Provided*, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

AMENDMENT 9

Amendment 9 sets forth five technical and conforming amendments to various guidelines and commentary. We have examined them and do not consider them controversial. We support adoption of them.