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 should be treated no differently from postoffense rehabilitation.[158]

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[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)).

[157]In 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.

[158]As 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

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 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

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rehabilitation").

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

[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.

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" 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

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[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).

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

[163]For 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

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]

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

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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)).

[164]Brock, 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*.

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

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 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

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[166] *Id.*

[167] *Id.* at 913.

[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 resentences a prisoner following an appeal." *Id.*

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 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

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[169]United 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.

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 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,

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[170]18 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.

[171]28 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).

> [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 change 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 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

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[173]United 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).

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 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

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[175]Sentencing 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."

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

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 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

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

[178]*Id.* at 1380.

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 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,

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[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).

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 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

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[180]18 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

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.

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.

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of promoting correction and rehabilitation."

[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.

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

AMENDMENT 8(E)

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 permissible[186]

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[184]There 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.

[185]The 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.

[186]The 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

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

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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.

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

convict her of an offense that yields greater punishment. The prosecutor may be willing 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

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[188]Under 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.

[189]We 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.

within the applicable guideline range. The sentencing court can protect 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

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[190]An 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.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
1 COURTHOUSE WAY, SUITE 4130
BOSTON, MASSACHUSETTS 02210

NANCY GERTNER
DISTRICT JUDGE

March 10, 2000

BY FAX (202) 502-4788

Andy Purdy, Esq.
Chief Deputy General Counsel
United States Sentencing Commission
One Columbus Circle, N.E., Washington, DC.

Re: Proposed Guidelines Amendment

Dear Mr. Purdy:

Because of my heavy schedule (ironically, my heavy sentencing docket), I have not been able to spend as much time on these remarks as I would have liked. To a degree, this response derives from student papers; Professor Freed and I have suggested that the students send in their own submissions based on the research they have done.

Specifically, I would like to address two proposed areas in which the Commission is seeking comments. The Commission notes circuit conflicts on the aberrant behavior departure. As the issue has been described it is "whether downward departure for single act of aberrant behavior includes multiple acts occurring over a period of time; ii) whether an alternative approach should be provided to guide the courts in determining the appropriateness of a departure."

In addition, the Commission noted conflicts on the question of post conviction rehabilitation. The issue was framed in two ways: "whether sentencing courts may consider post conviction rehabilitation while in prison or on probation as a basis for downward departure at re-sentencing following an appeal," and "whether to distinguish between departure for post offense rehabilitation and post sentence rehabilitation."

First, I want to spell out my approach: Plainly, the aberrant conduct departure and the post offense rehabilitation departure derive from the same animus -- the desire to have sentences reflect both concerns for uniformity and proportionality. According to Congress, fair sentencing policies and practices must "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or

aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C.A. § 991(b)(1)(B). The Introduction to the Guidelines recognizes that no set of guidelines can accomplish the task. *See* USSG Section 1A.4(b), *Departures*, Handbook at 6; USSG Section 1A.3, *the Basic Approach*, Handbook at 3. The Guidelines accommodated the competing concerns: In the interest of uniformity, it created sentences that took into account many factors relating to the offense, the offender's criminal history, and – to a much lesser extent – other offender characteristics. In the interest of proportionality, the Commission gave courts the discretion to depart from these guideline sentences when additional factors, unaccounted for in the Guidelines, existed that made the case unusual.

It should come as no surprise that the unaccounted for factors are those having to do with the offender's life and circumstances. One student, Joanna Schwartz, theorized that this result is built into the guideline structure. The Commission made no effort to accommodate each guideline to include complex information about an offender's life circumstances. The language of the Guidelines' introduction, suggests that each guideline, defining a "heartland" of "typical cases", necessarily included only offense and criminal history characteristics, not the offender characteristics which are wrapped up in the aberrant behavior departure or the post offense rehabilitation departure.

The observations of the Introduction, in short, are still true: that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." USSC Guidelines Manual, Ch. 1, Pt. A (1998), that "circumstances that may warrant departure from the guideline range...cannot, by their very nature, be comprehensively listed and analyzed in advance." USSG section 5K2.0, *Grounds for Departure*, Handbook at 1047. In a sense, the Commission expressly recognized that judicial decisions would fill in the Guidelines' holes in specific cases.

There are, to be sure, limits to departures based on offense characteristics. First, is the Guidelines' express exhortation that such departures are, or should be, infrequent. Second, the Guidelines categorize certain departures as encouraged, discouraged or prohibited. Third, the district court was obliged to give reasons for any departure. Fourth, the Courts of Appeals was required to monitor the evolving district court common law of departures, essentially at the margins, determining when the district court went too far, when it "abused its discretion."

Given this framework my suggestion is that the Commission in fact make no amendment or policy statement with respect to either departure ground, aberrant conduct or post offense rehabilitation, *at this point*, letting the common law continue to evolve. The problem of generalizing, and categorizing offender characteristics is endemic. The aberrant behavior departure, for example, has existed for only twelve years, as one student, Mitch Bailin, has

suggested; the circuit split for only nine. This is a relatively short judicial experiment which has yielded a rich debate.

Moreover, the same problems which led the early Commission to step back from a deductive system of guidelines, embodying a certain philosophy of sentencing, with prescribed purposes, persist in this setting. While my students have attempted to come up with proposals on both issues, every proposal revolves around particular theories about sentencing– the significance of rehabilitation vs. deterrence, the extent to which the opportunistic nature of the crime should bear on the culpability of the offender. In short, it is difficult to resolve these narrow issues without considering the larger ones.

I am not suggesting that the Commission do nothing. Plainly, in the interim, the Commission could study aberrant behavior and post offense rehabilitation departures. It could encourage district courts to issue more detailed opinions so that it can monitor the area. It can evaluate the data from a number of perspectives: What percentage of cases involve these departures? Are there regional variations? Are there gender or race variations? To what degree is a coherent common law evolving or likely to evolve?

The Commission can publish the data it has generated as an aid to the evolving common law. If district court judges do not write opinions, then the Commission, with the help of probation, can circulate the fact patterns which have led to particular departures. (In a way, the analog is to the commentary to §1B1.3, which comprises what I call "sentencing stories," narratives not unlike the narratives of the case law.)

To be sure, I have specific suggestions about each area – aberrant conduct and post offense rehabilitation– but my overwhelming preference is to defer the amending process until more data can be gathered, and the common law of sentencing refined.

Sincerely,

Judge Nancy Gertner

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March 10, 2000

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Attn: Public Information – Public Comment

Re: **Comments of the International AntiCounterfeiting Coalition, Inc. Regarding Proposed Amendments to Section 2B5.3**

Ladies and Gentlemen:

On behalf of its members, the International AntiCounterfeiting Coalition, Inc. ("IACC") respectfully submits the following comments in response to the United States Sentencing Commission's ("Commission") Federal Register Notice of February 11, 2000, and request permission to testify at the Commission's hearing on March 23, 2000. These comments are meant to supplement those provided by the IACC to the Commission on January 26, 2000.

The IACC supports the Commission's new Option 4 with one recommended change. Specifically, the IACC recommends that the Commission amend subsection b(2) of Option 4 to call for a two-level decrease in cases where the offense involved both greatly discounted merchandise and the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item. With this change, the proposal would satisfy the primary concerns articulated in the IACC's earlier comments and successfully implement the mandate of the No Electronic Theft Act

IACC Recommendations

The IACC reiterates the concerns it articulated in its earlier comments regarding Options 1-3 and suggests a modification of Option 4[1]

The IACC's criticism of Option 4 stems from the use of "greatly discounted merchandise," and "substantially inferior" as specific offense characteristics that separately

[1] The IACC remains concerned that the downward departure provision of Option 1 generates a level of uncertainty that is antithetical to the Commission's objective in promulgating guidelines. As noted previously, the departure consideration found in 5(B) gives way to a more substantive determination as to whether the calculation substantially understates or overstates the pecuniary harm of the offense. An additional concern is that the only example provided to guide prosecutors and judges in applying the provision is that of a trademark case that may justify a downward departure. The IACC recommends that in this instance any official examples should cover both downward and upward scenarios and not specify a type of product in order to avoid prejudicing consideration by judges, prosecutors or defendants

result in a two-level decrease. The IACC is concerned that these provisions only serve to reward counterfeiters and pirates that sell substantially inferior merchandise (as distinct from marginally inferior merchandise) at substantially reduced prices (instead of marginally discounted prices).

If the Commission wishes to make a distinction between classes of infringing items based on price and quality, it should do so by considering both characteristics as a whole. Price alone may be an indicator that goods are false, but if the infringing products are of decent quality, they may translate into a one-for-one sales loss that is properly captured without a two-level decrease. Likewise, poor quality may call into question the authenticity of a product, but if counterfeiters and pirates find that they can sell cheap knock-offs at higher prices, they most certainly will.

Finally, digital technology now allows for near perfect reproduction of some works. The IACC does not believe that copyright pirates making exact copies of popular software, music or videos should benefit from a two-level decrease simply because they sell their products cheaply. Consequently, the IACC recommends that the Commission amend Option 4 to call for a two-level decrease when the offense involved greatly discounted merchandise **and** the quality or performance of the infringing item was substantially inferior to the quality or performance of the infringed item.

The IACC commends the Commission for its hard work in devising a guideline to capture the many nuances of intellectual property crimes. Trademark counterfeiting and copyright piracy are serious crimes. They discourage creativity, devalue investment, harm reputations, and often defraud consumers. Limited law enforcement resources and minimal penalties, however, have made criminal enforcement of intellectual property rights a low priority at the federal level. The enhancements proposed by the Commission in Option 4 will help to encourage prosecutions and deter counterfeiting and piracy.

Respectfully Submitted,

Tim Trainer, President
International AntiCounterfeiting Coalition, Inc.

cc Judge Ruben Castillo
Judge Sterling Johnson, Jr
Judge Joe Kendall
Judge Diana E. Murphy
Judge William K. Sessions, III
Mr. John R. Steer
Professor Michael O'Neill

Before the

UNITED STATES SENTENCING COMMISSION

Washington, DC

In the Matter of

PROPOSED AMENDMENT TO INCREASE THE PENALTIES FOR METHAMPHETAMINE OFFENSES IN RESPONSE TO THE INCREASED MANDATORY MINIMUM PENALTIES MADE BY THE METHAMPHETAMINE TRAFFICKING PENALTY ACT OF 1998

Comments of Joseph R. Meiss

This comment is in response to the United States Sentencing Commission's proposed amendment to increase the penalties for methamphetamine offenses in response to the increased mandatory minimum penalties made by the Methamphetamine Trafficking Act Penalty Enhancement Act.

The comment recommends that the Commission should only change the calculations in the Drug Quantity Table in Sec. 2D1.1 for methamphetamine substance to conform the quantities for those drugs to the quantities that now trigger the statutory five- and ten-year mandatory minimums.

Synopsis

The effects and spread of methamphetamine use are documented in various studies. Although the United States Sentencing Commission should make every effort to help prevent the further growth of the problems associated with the drug, any attempt by the Commission must conform to legislative intent. Congress's latest legislation to suppress the illicit drug trade of methamphetamine indicates that the legislators want methamphetamine offenders' sentences calculated by using either the weight of a mixture or substance containing a detectable amount of the drug or the weight of the drug in its pure form. The current proposed amendment to base the accused sentence solely on the weight of pure methamphetamine is not only in direct conflict with the intentions of Congress, but precedent is established that will complicate the sentencing scheme by creating two concurrent systems for

determining an offender's sentence. Until Congress, who is entrusted with the responsibility of revising a statute's structure and policy, amends the criteria used for calculating a methamphetamine offender's sentence, the Commission should not significantly alter the current method. Consequently, the Commission should only modify the Drug Quantity Table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences for methamphetamine offense, and increase the methamphetamine-mixture to reflect a presumptive purity greater than 10 percent.

I. Introduction

A. What Is Methamphetamine?

The National Institute of Drug Abuse (NIDA) describes methamphetamine as "a powerfully addictive stimulant that dramatically affects the central nervous system."[1] It is closely related chemically to amphetamine, but increases the activities of certain systems in the brain more dramatically. "It is a white, odorless, bitter-tasting crystalline powder that easily dissolves in water or alcohol."[2] The drug comes in many forms and can be smoked, snorted, orally ingested, or injected.[3] The drug is commonly known by various names depending on the methods of ingestion. Thus, Methamphetamine may be referred to as "speed" or "crystal" when it is swallowed or sniffed; as "crank" when it is injected; or as "ice" or "glass" when it is smoked.

B. What Are the Effects of Methamphetamine Use?

Although some of the immediate physiological effects of methamphetamine differ slightly depending upon how the drug was used,[4] the central nervous system generally experiences similar reactions to the drug regardless of how it was ingested. Ordinarily, the drug causes increased wakefulness, increased physical activity, decreased appetite, increased respiration, irritability, confusion, tremors, anxiety, and/or paranoia. In addition, the prolonged use of even a moderate amount of methamphetamine may produce mental confusion, physical dependence, and even death. Due to these intense reactions to methamphetamine, experts

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[1] National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), *Methamphetamine Abuse and Addiction*, Pub. No. 98-4210 (April 1998).

[2] *Id.*

[3] *Id.*

[4] "Immediately after smoking the drug or injecting it intravenously, the user experiences an intense rush or 'flash' that lasts only for a few minutes and is described as extremely pleasurable. Snorting or oral ingestion produces euphoria - a high but not an intense rush. Snorting produces effects within 3 to 5 minutes, and oral ingestion produces effects within 15 to 20 minutes." *Id.*

have discovered that users are easily susceptible to becoming highly dependent upon the drug.

Because the drug has a high potential for abuse, many methamphetamine users become addicted resulting in many damaging long-term effects. "Chronic methamphetamine abusers exhibit symptoms that can include violent behavior, anxiety, confusion and insomnia. They also display a number of psychotic features, including paranoia, auditory hallucinations, mood disturbances ... [which] can result in homicidal as well as suicidal thoughts."[5] In addition, the chronic use of methamphetamine causes the users to develop a tolerance, which may cause him or her to take higher does of the drug, take it more frequently, or change their method of drug intake to intensify the desired effect. "In some cases, abusers forego food and sleep while indulging in a form of bingeing known as a 'run,' injecting as much as a gram every 2 to 3 hours over several days until the user runs out of the drug or is too disorganized to continue. [This] chronic abuse can lead to psychotic behavior, characterized by intense paranoia, visual and auditory hallucinations, and out-of-control rages that can be coupled with extremely violent behavior."[6] As expected, the continual and gradual increased use of the drug produces various physiological complications as well, including brain[7] and cardiovascular problems. Not only does the chronic methamphetamine user encounter significant brain cell damage, but he or she also will experience "rapid heart rate[s],irregular heartbeat[s], increased blood pressure, irreversible, and stroke-producing damage to small blood vessels in the brain."[8] These various physiological and psychological effects demonstrate the seriousness of

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[5] *Id.*

[6] *Id.*

[7] "In scientific studies examining the consequences of long term methamphetamine exposure in animals, concerns have arisen over the toxic effects on the brain. Researchers have reported that as much as 50 percent of the dopamine-producing cells, [which are important in the body's regulation of pleasure], can be damaged after prolonged exposure to relatively low levels of methamphetamine. Researchers also have found that serotonin-containing nerve cells may be damaged even more extensively." *Id.*

[8] *Id.*

methamphetamine use, and the need of the government to seriously consider any changes to the policies concerning the regulation of methamphetamine offenders.

C. What Is the Status of Methamphetamine Use in the United States?

Traditionally, methamphetamine use had been a small problem limited to the Western portion of the United States.[9] Methamphetamine was typically confined to outlaw motorcycle gangs who generally manufactured, used, and distributed the drug. Although it would be ideal to assume that the effects of methamphetamine are still restrained to such a small percentage of the population, recent data has indicated a dramatic increase in methamphetamine use throughout the country. Although the problem still seems to be isolated in the West, Southwest, and Midwest segments of the United States, there is little doubt that methamphetamine use is escalating at an alarming rate.

According to the United States Sentencing Commission's own reports, "the number of methamphetamine drug-trafficking cases received by the Commission from fiscal year 1992 through the fiscal year 1998 has increased steadily from 630 cases in 1992 to 2,234 cases in 1998, an increase of over 250 percent in the past seven years."[10] Although the Commission's policy team recognizes and admits the limited reliability of its conclusions, other independent data sources reflect similar trends in the intensifying methamphetamine dilemma. The National Household Survey on Drug Abuse indicates a steady incline in methamphetamine use in the United States. From 1994 to 1996, the number of people who have admitted to using the drug has increased from an estimated 3.8 million or approximately 1.8 percent of the population to an estimated 4.9 million or 2.3 percent of the population. This is an increase of 1.1 million people in just 2 years. In addition to these startling statistics, the Substance Abuse and

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[9] *See Id.*

[10] The Final Report of the Informal Methamphetamine Policy Team (1999).

Mental Health Services Administration also reports a dramatic incline in the number of admissions for methamphetamine treatment. "In a January report, the [administration recorded] that there were 14,400 admissions for methamphetamine treatment in 1992, 20,512 in 1993, 32,917 admissions in 1994, 47,410 admissions in 1995, and 42,330 admissions in 1996."[11] These selected findings are just a few of the hundred of other reports that indicate the growth of methamphetamine use in this country.[12]

II. Public Comments to Only Modify the Drug Quantity Table for Methamphetamine-actual to Conform to the 1998 Statutory Amendment Affecting the Mandatory Minimum Sentences for Methamphetamine Offense, and Increase the Methamphetamine-mixture to Reflect a Presumptive Purity Greater than 10 Percent.

A. The Continuing Use of Basing Sentences on the Weight of the Methamphetamine Mixture or the Weight of the Pure Methamphetamine Conforms the Guidelines to Congressional Intent.

The continual use of considering either the total weight of methamphetamine mixture or the weight of the pure methamphetamine in considering the drug offender's sentence is more consistent with congressional intent. The plain language of 21 U.S.C. § 841 and § 2D1.1 of the Federal Sentencing Guidelines clearly indicates that Congress intended sentencing to be based on the quantity of the control substance rather than its purity. As these two provisions read, the defendant's sentence is largely determined by the amount of a drug attributed to him or her including "any mixture or substance containing a detectable amount of the controlled substance." Thus, "[s]o

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[11] The Final Report of the Informal Methamphetamine Policy Team (1999)(quoting the National Institute on Drug Abuse, *Assessing Drug Abuse Within and Across Communities: Community Epidemiology Surveillance Network on Drug Abuse*, NIH Pub. No. 98-3614 (April 1998)).

[12] For additional findings marking the incline of methamphetamine use and trafficking in the Unites States consider the reports from: The Unites States Sentencing Commission's Methamphetamine Policy Team, The Drug Abuse Warning Network, and The National Institute on Drug Abuse's Community Epidemiology Work Group.

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long as [the contraband] contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence."[13]

If Congress intended the sentencing scheme to be based only on the purity of the control substance rather than its quantity, the provisions in question could have been easily drafted to reflect this intent. In fact, with regards to methamphetamine, Congress explicitly dictated that the sentencing for this particular drug be based on either the weight of a mixture containing a detectable amount of the drug, or on the lower weight of the pure substance.[14] This language expressly declares that Congress determined the sentencing for methamphetamine offenses is different than that of other controlled substances by specifically providing the judiciary with an alternative for deciding the offense level of the accused. Any attempts to promulgate regulations that base the sentencing of methamphetamine offenders on only the pure form of the drug are clearly contrary to the legislator's intent.

Moreover, a closer examination of the statute's structure further illustrates that Congress did not intend methamphetamine sentencing to be solely based on the pure form of the drug. "With respect to various drugs, including heroin, cocaine, and LSD, [the statute] provides for mandatory minimum sentencing for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs."[15] While on the other hand, "with respect to other drugs, namely phencyclidine (PCP) or *methamphetamine*, it provides for a mandatory minimum sentence based either on the weight of a mixture or substance containing a detectable amount of the drug, or on lower weights of pure PCP or *methamphetamine*."[16] "Thus, with

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[13] *Chapman v. United States*, 500 U.S. 453 (1991)(holding that LSD required the weight of the carrier medium be included when deterring an offender's sentence).

[14] *See generally* 21 U.S.C. § 841(b).

[15] *Chapman*, 500 U.S. at 459.

[16] *Id.* (emphasis added).

respect to [various drugs, including heroin, cocaine, and LSD], Congress declared that the sentence should be based exclusively on the weight of the mixture or substance."[17] But with respect to methamphetamine, Congress clearly indicated that the pure drug or a mixture or substance containing a detectable amount of the pure drug is the basis for sentencing. A comparison of these two provisions reveals that Congress intended two different criteria for use in sentencing depending on the type of the illicit drug involved. The drafting of these two provisions in such a manner was not an error by legislature, but rather, reflects a deliberate effort by Congress to ensure that methamphetamine sentences are based on either the weight of the mixture or substance containing the drug or its pure form.

As illustrated by the drafting of the legislation for heroin, cocaine, and LSD, Congress knew how to limit the basis for sentencing to either the weight of the mixture or substance or the weight of the pure drug. However, Congress consciously chose not to exclusively use the weight of pure methamphetamine for determining sentencing. By drafting the legislation in this fashion, Congress has deliberately intended to base methamphetamine sentencing on the weight of the mixture containing the drug or the weight of the pure drug. Since Congress intended to use both criteria as a basis for sentencing methamphetamine offenders, eliminating the use of the weight of a mixture or substance containing methamphetamine from the sentencing guidelines would be in conflict with congressional intentions.

B. Basing All Methamphetamine Sentencing on the Amount of Pure Methamphetamine Would Be in Direct Conflict with the Mandatory Minimum Statutes.

Because the statute provides for a mandatory minimum sentence based on either the weight of a mixture or substance containing a detectable amount of methamphetamine, or on lower weights of pure methamphetamine, any revision to the

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[17] Id

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sentencing guidelines that determines the offender's sentence on only pure methamphetamine would be in direct conflict with the statutory minimums. Since the Sentencing Commission has no power to directly amend these statutes, the proposed change to the sentencing guidelines would create two different methods for determining methamphetamine offenders' sentences. Courts would be able, and as some circuits have interpreted bound, to base the offender's sentence on the "mixture or substance" approach when it would result in triggering the statutory minimum, and in addition, concurrently apply the purity approach in all other situations. Such a sentencing method would be inconsistent with policy of the sentencing guidelines to establish a scheme that was supposed to embrace honesty, uniformity and proportionality in sentencing.[18]

An example of the inconsistency that may develop is depicted by the current predicament caused by a similar amendment to the sentencing guidelines. In 1993, the Sentencing Commission attempted to resolve an inter-circuit conflict that had developed over the interpretation of what constituted a 'mixture or substance' under 21 U.S.C. § 841 and § 2D1.1 of the federal sentencing guidelines. Although the amendment was promulgated to alleviate disparity in sentencing that had developed, the result of the change complicated sentencing by creating a dual system for calculating drug weights. Similar to this prior modification of the sentencing guidelines, the current proposed amendment to base methamphetamine sentences solely on the pure weight of the drug would likewise cause the development of two concurrent systems for determining the appropriate penalty for methamphetamine offenders.

Prior to 1991, the phrase 'mixture or substance' under 21 U.S.C. § 841 and § 2D1.1 of the Federal

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[18] *See* Todd E. Gonyer, Comment, *Federal Sentencing in a Post-Chapman World: What is a 'Mixture or Substance' Anyhow?*, 46 U. Kan. L. Rev. 983 (1998) (citing Lisa A. Bongiovi, Note, *Criminal Law-Sifting Through the "Mixture" Problem to Determine a Drug Offender's Sentence*, 15 W. New Eng. L. Rev. (1993)

Sentencing Guidelines was never defined. Even though a universal definition of this phrase was crucial for sentencing uniformity, Congress and the Sentencing Commission had failed to explicitly define these terms. Consequently, several of the circuits had developed various approaches for determining its meaning, which resulted in inconsistent sentencing because an offender's sentence is largely based on the quantity of the drug possessed by or attributed to him or her.

Largely because of the sentencing discrepancy that had developed due to the lack of congressional guidance, the Supreme Court tried to eliminate the conflict by judicially interpreting the phrase "mixture or substance." In 1991, the Court, attempting to alleviate the disparity in sentencing, granted certiorari to authoritatively construe the statute's terms. In Chapman v. United States,[19] the defendants violated U.S.C. 21 § 841(a) by selling 10 sheets (1000 doses) of blotter paper containing LSD.[20] Although the weight of the LSD alone was only approximately 50 milligrams, the District Court combined the total weight of the paper and LSD in determining the weight of the drug to be used for calculating petitioners' sentences.[21] Consequently, the total weight of LSD and the blotter paper resulted in the imposition of the mandatory minimum sentence of five years required by § 841(b)(1)(B)(v) for distributing more than 1 gram of a mixture or substance containing a detectable amount of LSD.[22] The Court of Appeals for the Seventh Circuit concurred with the rationale of the lower court and subsequently upheld the basing of the offenders' sentences on the combined weight of the blotter paper and LSD.

Affirming the Seventh Circuit, the Supreme Court determined that Congress intended to include the

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[19] *Id.*

[20] *See Id.* at 455.

[21] *See Id.*

[22] *See Id.* at 456.

weight of the blotter paper or any other carrying agent for computing the sentence of a defendant convicted of distributing LSD. Despite the defendants' arguments that including the weight of the carrier agent would lead to anomalous results,[23] the majority of the Court found support for its interpretation in the other provisions of § 841, and in the relevant statutory history.

Following the Chapman decision, the issue of what constitutes a "mixture or substance" was settled at least as far as LSD sentencing was concerned. However, a new dilemma quickly arose with regard to other drugs because the Court's opinion ambiguously focused its discussion entirely on LSD violations.[24] In an attempt to resolve the ever-expanding confusion of what constitutes a "mixture or substance," the Sentencing Commission subsequently amended § 2D1.1 of the sentencing guidelines. Among various other changes,[25] the Commission revised the method of calculating the weight of LSD in order to promote uniformity in sentencing.[26] In contrast to its

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[23] The defendants essentially contented that including the weight of the drug medium was irrational because LSD is independently sold by the dose without regards to the agent used for transporting the drug. To emphasize the illogical results of the lower court's conclusions, the defendants posed a hypothetical situations where "a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence." *Id.* at 548.

[24] Although the direct holding of the case is easily applicable to subsequent LSD violations (i.e., the weight of the carrying agent containing LSD, and not the weight of the pure LSD determines eligibility for the minimum sentence), the Court's opinion did not sufficiently explain the basis for reaching its decision. Thus, another split developed among the circuits as to whether the decision was grounded in the plain meaning of the phrase "mixture or substance" or whether the fact that the carrier medium was consumable and aided in the marketability and distribution of the drug. *See* Gonyer, supra note 18 at 993.

[25] Although the Commission revised various provisions of the sentencing guidelines, for purposes of this comment, only the provisions that are needed to support the above stated position will be discussed in turn.

[26] The Commission determined "that because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled

prior approach of weighing the entire weight of the mixture or substance containing LSD, the Sentencing Commission amended guidelines to give each dose of LSD on a carrier medium a constructive or presumptive weight of 0.4 milligrams. Although the new amendment provided a basis for uniform sentencing, the alternative approach initially furthered the perplexity of the guidelines because courts were now in conflict over the effect the revision had on the statutory provisions of 21 U.S.C. § 841.

To resolve this latest problem with the interpretation of the phrase "mixture or substance," the Court granted certiorari in Neal v. United States[27] in hopes of establishing the uniformity in sentencing that Congress had sought.

In Neal, "the petitioner was arrested for selling 11,456 doses of LSD on blotter paper. The combined weight of the LSD and the paper was 109.51 grams. Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of one count of possession of LSD with the intent to distribute it, in violation of 21 U.S.C. § 841, and one count of conspiracy to posses LSD with the intent to distribute it, in violation of 21 U.S.C. § 846. At the initial sentencing, the method for determining the weight of the illegal mixture or substance was the same under the guidelines and the statute directing minimum sentences. The determinative amount was the whole weight of the blotter containing the drug. Because the total weight of the LSD and the blotter paper exceeded 10 grams, the District Court found the petitioner subject to the 10-year mandatory minimum sentence specified in 21 U.S.C. § 841(b)(1)(A)(v),"[28] and

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substance itself, ... basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD ... as well as sentences disproportionate to those for other more dangerous controlled substances." 1995 USSG § 2D1.1, comment, backg'd.

[27] *Id.*

[28] *Id.* 516 U.S. at 286.

imposed concurrent sentences of 192 months on both counts.[29]

Because the Sentencing Commission subsequently revised the method of calculating the weight of LSD in the Sentencing Guidelines,[30] the petitioner filed a motion to modify his sentence in accordance with the new retroactive amendment. Petitioner argued that "the weight of the LSD attributed to him under the amended Guidelines was 4.58 grams (11,456 x 0.4 milligrams)," and that the appropriate sentence should be 70 to 84 months instead of the statutory 10-year (120 months) minimum period.[31] In order for the sentence to be reduced, the petitioner contended that the 10-year statutory minimum of § 841(b)(1)(A)(v) was no bar to the modification because the presumptive-weight method of the Guidelines should also control the mandatory minimum calculations.[32] The District Court, as affirmed by the Court of Appeals for the Seventh Circuit, rejected petitioner's assumption, and held that the mandatory minimum sentence of 10 years is still applicable notwithstanding the sentencing range under the Guidelines.[33] The courts reasoned that since the Guidelines no longer authorize a sentence above the statutory minimum, the sentence should only be reduced to 120 months. In essence, the courts asserted that a dual system prevailed in calculating LSD weights, one for determining the weight of LSD for purposes of the statutory mandatory minimums, and one for calculating sentencing for when the statutory minimums did not apply.

In Neal, the Supreme Court granted certiorari to resolve the conflict over whether the revised Guidelines govern the calculation of the weight of LSD for purposes of § 841(b)(1). Although the

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[29] *Id.*

[30] *See* supra text accompanying notes 23-26.

[31] *Neal*, 516 U.S. at 287

[32] *See Id.*

[33] *See Id.*

Court acknowledged the Commissions expertise and even conceded that the Guidelines may be of potential weight and relevance in other contexts, the Court nevertheless concluded that the revised method for weighing LSD did not effect the interpretation of the statute in Chapman.[34] After first deducting that the Commission did not intend, and in fact had no authority to displace the actual-weight method that Chapman requires for statutory minimum sentences, the Court, for argument's sake, authoritatively concluded that the principles of stare decisis required it to adhere to the earlier decision.[35]

The precedent set forth in this line of cases, especially the Neal decision, is of particular importance to the current proposed amendment by the Commission. Because any revision to the sentencing guidelines will not supplant the statutory method for determining minimum sentencing, the proposed regulation to base methamphetamine offender's sentence on only the pure amount of the drug will create a dual system for determining sentencing similar to that which has developed in the area of LSD offenders. The result of such a scheme would greatly complicate the calculations for sentencing, which is contrary to the objectives of the sentencing guidelines.

Although Chapman and its progeny deal with LSD violations, the discrepancy in sentencing that has resulted from the prior amendments to the Sentencing Guidelines may be clearly illustrated by cases involving methamphetamine offenses. In 1996, the Court of Appeals for the Tenth Circuit relied on Neal to reverse the decision of the lower court to exclude the weight of liquid by-products for determining the base level offense of the accused. In Richards v. United States,[36] law enforcement officials arrested the defendant before he was able to complete the process of

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[34] *See Id.* at 290.

[35] *See Id.* at 294-95.

[36] *Richards v. United States*, 87 F.3d 1152 (10th Cir. 1996).

manufacturing pure methamphetamine. When the accused was arrested, he possessed thirty-two kilograms of a liquid mixture containing twenty-eight grams of pure methamphetamine.[37] Applying U.S.S.G. § 2D1.1, the court, using the entire weight of the thirty-two kilogram liquid mixture, sentenced the Defendant to 188 months imprisonment.[38] Upon announcement of the sentence, the Defendant instantly filed a motion for modification of his sentence, arguing that the court misapplied the sentencing guidelines by including both the weights of the liquid by-product and extractable methamphetamine in determining his base level offense.[39] Relying on the guidelines' 1993 retroactive amendment that explicitly excluded the weight of waste water from being used in calculating the offender's sentence,[40] the District Court granted the defendant's motion, and resentenced him to 60 months imprisonment.[41]

The lower court reasoned "that § 2D1.1 and § 841 should 'be interpreted harmoniously where reasonably possible,' because, to give the statute a different meaning than the guidelines would produce illogical and inconsistent results."[42] Thus, the District Court displaced the prior statutory interpretation of "mixture or substance" with the subsequent definition promulgated by the Commissions. On appeal, the Court of Appeals for the Tenth Circuit affirmed the decision by

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[37] *See Id.* at 1153.

[38] *See Id.*

[39] *See Id.*

[40] In the 1993 amendment, the Sentencing Commission attempted to uniformly define the phrase, "mixture or substance," by excluding any "material that must be separated from the controlled substance before the controlled substance can be used." "Examples of such material include ... waste water from an illicit laboratory used to manufacture a controlled substance." U.S.S.G. § 2D1.1 application note 1; *See also* supra text accompanying notes 23-26.

[41] *Richards*, 87 F.3d at 1154.

[42] *Id.*

"holding that the Supreme Court's 'recognition of Congress' market-orientation approach, [in Chapman], dictates that [the courts] not treat unusable drug mixtures as if they were usable;' and that, under a congruent approach, § 841 should be interpreted consistent with the construction provided by the Sentencing Commission."[43]

Recognizing the importance of the divided panel's decision, the Tenth Circuit "granted *en banc* review to determine whether the Sentencing Commission's amended construction of 'mixture or substance' authoritatively defined the terms 'mixture or substance' in § 841, or whether the statutory terms retain their plain meaning as construed by the Supreme Court in Chapman."[44] Notwithstanding the recent amendment to the sentencing guidelines, the *en banc* court held that the plain meaning of § 841 and the Supreme Court precedent compelled it to hold that the combined weight of the liquid by-product containing methamphetamine and the pure methamphetamine was to be used as the basis for calculating the defendant's sentence.[45] According to the court, Chapman defined the terms mixture or substance for purposes of § 841, and "'once [the Court] has determined a statute's meaning, [the judiciary must] adhere to [the] ruling under the doctrine of stare decisis.'"[46] The court reinstated the strict interpretation of the statute over the separate determinations of the Sentencing Commission because, as the court emphasized, once the Supreme Court has supplied a definition of a statute, the Sentencing Commission has no authority to override or amend that statutory definition.[47] The court reiterated that as long as the defendant possesses the specified quantity of a mixture or substance

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[43] *Id.* (citing *United States v. Richards*, 67 F.3d 1531, 1536 (10th Cir. (1995))).

[44] *Id.*

[45] *See Id.* 87 F3d at 1157-58.

[46] *Id.* 87 F.3d at 1156-57 (citing *Neal*, 516 U.S. at 295).

[47] *Id.*

as interpreted by the Supreme Court, Congress requires the courts to apply the mandatory minimum sentence. Although acknowledging that the incongruent interpretation might produce disparate sentences, the Court concluded that Congress, and not the Judiciary, has the responsibility to review the statute's policies and revise it.

As illustrated by these cases, any revision to the Sentencing Guidelines that deviates for the statutory mandatory minimum sentences under § 841 will produce two concurrent systems for calculating a drug offender's sentence. Because the Sentencing Commission has no power to affect the definition of the statute as determined by the Supreme Court, courts will continually be able to apply the mixture or substance approach when the statutory minimums are triggered. Although such a dual scheme may simplify the "apparent unwarranted disparity of whether to use meth-mix or meth-actual to determine the guideline sentence for meth-offenders," the proposed amendment does not solve a problem, but only shifts the disparity to whether to use the mixture or purity approach as a basis for calculating sentences.[48] The proposed revision to base all methamphetamine sentences on the pure weight of the drug only perpetuates the unwarranted complexity in this area of the law. Because the current "minimum [statutes] are both structurally and functionally at odds with the sentencing guidelines and the goals the guidelines seek to achieve," no major changes should be made to the guidelines until this discrepancy is resolved.[49] As noted by the Court in Neal, Congress is entrusted with the power to determine its statutes' policies and constructions, and it is their responsibility to revise their prior determinations if the results of their decisions do not conform to legislator's intent.[50] Until Congress decides to correct the developing

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[48] The Final Report of the Informal Methamphetamine Policy Team (1999).

[49] *Neal*, 516 U.S. at 291-92 (citing *United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal System* 26 (Aug. 1991)).

[50] *See Id.* 516 U.S. at 296.

problems associated with this particular legislation, the Commission should only modify the guidelines to conform to the 1998 legislation, and not alter the basis for determining the sentences of methamphetamine offenders.

C. The Continuing use of Basing Sentences on the Weight of the Methamphetamine Mixture or the Weight of the Pure Methamphetamine Conforms the Guidelines with Congress's 'Market Oriented' Approach for Punishing Drug Trafficking.

The history of the legislation promulgated to combat the ongoing drug war clearly indicates that Congress currently intended drug offenders be sentenced according to the total quantity of the drug rather than its purity. In prior congressional efforts to control the illicit drug trade in the United States, Congress attempted to use various schemes to penalize drug offenders. In one of its earlier schemes, Congress tried to curb illegal drug distribution by basing penalties on the classification of the drug within the statute.[51] Because of the Act's failure to unify sentencing among similar offenders, Congress amended the statute to provide for sentencing based on the pure weight of the drug.[52]

Unsatisfied with the results of their latest legislation, Congress once again amended the statute to reflect the current penalties used for narcotic transgressions.[53] In 1986, Congress promulgated the Anti-Drug Abuse Act, which adopted a 'market oriented approach' for calculating sentencing. Under the market oriented approach, the offender's sentence length is determined primarily by the "amount of the total quantity of

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[51] *See*, The Comprehensive Drug Abuse Prevention and Control Act of 1970, (Pub.L. 91-513, 84 Stat. 1236).

[52] *See*, The Controlled Substance Penalties Amendment Act of 1984, (Pub. L. 98-473, 98 Stat. 2068).

[53] *See*, Anti-Drug Abuse Act of 1986, (Pub.L. 99-570, 100 Stat. 3207).

what is distributed, rather than the amount of the pure drug involved."[54]

Congress adopted this approach, because they found that "focussing on the pure [weight of the] drug often allowed retail traffickers, who supplied street markets with mixed or diluted drugs ready for consumption, to receive lighter sentences than what Congress deemed necessary."[55] This amendment intended "the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found--cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level."[56] Thus, this 'street effect' solution ensures that penalties are in accordance with specific minimum quantities of a mixture or substance that would be indicative of a major trafficker, manufacturer or retailer.[57] Consequently, "Congress set mandatory minimum sentences corresponding to the 'weight or substance' containing a detectable amount of the various controlled substances" to implement this principle.[58]

The current proposal to base all methamphetamine offenders on only the pure weight of the drug is in direct conflict with the legislator's "market oriented approach." Although the purity method for calculating sentencing would produce uniformity among similar offenders, the proposed method would not establish penalties in accordance with the illicit drug market. As Congress discovered with the enactment of the Controlled Substance Penalties Amendment Act of 1984, the basing of sentencing on only the pure form of the drug resulted in retail traffickers receiving a lesser sentence then intended. Consequently,

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[54] *Chapman* 500 U.S. at 461 (citing H.R.Rep., No. 99-845, pt. 1, pp. 11-12, 17 (1986)).

[55] *Neal*, 516 U.S. at 289-90

[56] *Id.* (citing H.R. Rep No. 99-845, supra, at pt.1,p.12).

[57] *Richards*, 87 F.3d at 1156.

[58] *Chapman*, 500 U.S. at 461

Congress explicitly amended the statute to include the weight of an entire mixture or substance containing a detectable amount of a controlled drug for calculating an offender's penalty to ensure that all offenders will receive just punishment regardless of the degree in which they are involved in the drug violation. This action by Congress demonstrated that the legislators no longer desired drug offenders' sentences to be based on only the pure weight of the drug. Thus, any attempt by the Sentencing Commission to alter this determination for sentencing purposes would be in direct conflict with the legislator's objectives. Therefore, the Commission should only modify the drug quantity table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences because such a result will guarantee that the intentions of Congress are followed.

III. Conclusion

Methamphetamine is a dangerously potent and addictive drug with very serious psychological and physiological effects. As indicated by various studies, the one-time minor problems associated with the drug have dramatically magnified. Because of this alarming increase in methamphetamine use, great effort should be employed by the Commission to help control this epidemic. However, any measures taken by the Commission should conform to congressional intent.

Congress's latest attempt to control the illicit drug trade of methamphetamine indicates that the legislators want the offenders' sentences to be based on either the weight of a mixture or substance containing a detectable amount of the drug or on the weight of the drug in its pure form. The current proposed amendment to base the accused sentence solely on the weight of pure methamphetamine is not only in direct conflict with the intentions of Congress, but precedent is established that will complicate the sentencing scheme by creating two concurrent

systems for determining an offender's sentences. Until Congress changes the criteria used for calculating sentences, the Commission should not significantly alter the method used for computing sentences under the guidelines. Thus, the Commission should only modify the Drug Quantity Table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences for methamphetamine offense, and increase the methamphetamine-mixture to reflect a presumptive purity greater than 10 percent.

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March 10, 2000

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, D.C. 20002-8002
Attention: Public Information – Public Comment

Re: Second Revised Proposed Amendment to Implement the NET Act

Dear Commissioners:

Thank you for the opportunity to submit these supplemental comments on the second revised proposed amendment to implement the NET Act. Consistent with the comments submitted by the Business Software Alliance and the International Anticounterfeiting Coalition, Microsoft supports Option 4, provided that the following amendments are adopted by the Commission:

1. **Application note regarding digital or electronic copies:** Option 4 should contain an application note that expressly excludes digital or electronic copies of an infringed item from the offense level decrease provided under (b)(2)(C), which pertains to infringing items that are substantially inferior in quality or performance. As noted in BSA's previous comments, digital or electronic reproductions of an infringed item are, by definition, identical to, or substantially indistinguishable from, the infringed item.

2. **Omit offense level reduction for greatly discounted merchandise:** There is no justification for an offense level reduction for greatly discounted merchandise, as provided in (b)(2)(B). Digital and electronic copies of software can be sold profitably at a "greatly discounted" price because the price of genuine software primarily reflects the cost of research and development, as opposed to the cost of manufacturing CD-ROMs or other media. In the case of digital and electronic copies, the price of the pirated media is by no means indicative of inferior quality or an obvious fake. To the contrary, digital and electronic copies are, as noted in paragraph 1, perfect or near perfect reproductions of the copyrighted work. Moreover, counterfeit copies are very often manufactured and marketed to compete with, and thus displace, sales of genuine software.

   This sentencing guideline could very well result in offense level reductions for high-volume distributors of counterfeit software (which, in many cases, have ties to organized crime) vis-a-vis relatively low-volume resellers that distribute counterfeit product to consumers. As with any distribution network, the price of counterfeit product is increased as

it moves through the distribution channel. High-volume counterfeiters are able to sell copies at a "greatly discounted" price because such copies are produced in massive quantities. As these copies are resold through the distribution channel, the price increases to the point where ultimate consumers may realize a relatively low reduction in the retail price.

For example, Microsoft is now investigating a huge counterfeiting operation, in which the counterfeit wholesale distributor is able to purchase near-perfect counterfeit copies of Office 2000 for $30 per copy and Windows 98 for $13 per copy (in both cases, well below 25 percent of the retail price), and to sell them for $50 and $24 per copy respectively. In contrast, the ultimate reseller is likely to offer counterfeit copies for many times the wholesale price. If paragraph (b)(2)(B) were to be applied in this case, the wholesale counterfeit distributor (which is the more serious criminal offender) would qualify for an offense level reduction, whereas the reseller would not. This example vividly illustrates that, in the era of digital and electronic piracy, pricing bears little or no relation to the economic harm caused by the pirate or incurred by the copyright owner.

In addition to these amendments, Microsoft once again urges the Commission to adopt a specific offense characteristic for "organized schemes". The Department of Justice, FBI and U.S. Customs Service have all acknowledged the growing presence of organized crime in U.S. counterfeiting operations. We urge the Sentencing Commission to do the same and implement an SOC that complements and supports the efforts of federal law enforcement to deter organized counterfeiting operation through increased penalties.

Very truly yours,

Laurie C. Self
Counsel to Microsoft Corporation

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March 7, 2000

Via Hand Delivery

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG positions on 2000 amendment cycle

Dear Judge Murphy:

We are writing on behalf of the United States Sentencing Commission's Practitioners' Advisory Group to provide our perspective on the guideline amendments presently being considered by the Commission.

By way of introduction, the PAG acts as a liaison to the Commission in connection with the views of private defense attorneys that practice in federal courts around the country. We look forward to continuing our productive working relationship with the Commission as you begin your tenure as Chair.

For your convenience, we have organized our submission to correspond with the order of the proposed guideline amendments. In addition, we have included a table of contents so that you can more easily locate our discussion of any particular amendment.

TABLE OF CONTENTS

1. Implementation of the No Electronic Theft Act

Amendment 1 seeks to implement the No Electronic Theft Act, Pub. L. No. 105-147. The Act directs the Commission to ensure 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." Two options to accomplish this are set forth. The Practitioners Advisory Group supports option three.

All three options reach comparable results in the most egregious cases, where a significant loss has been inflicted on the owner of the copyright or trademark. Only option three deals appropriately with cases in which there is little or no loss to the copyright or trademark owner. Those cases are ones in which street retailers sell fake copies of expensive (and sometimes not-so expensive) items – the street retailer who sells Gucci handbags that retail for $350 for $5. Both options one and two result in enhancements that significantly overstate the harm from such an offense. In addition, option three is focused more directly on the harm from the kind of offense that concerned Congress in the No Electronic Theft Act.

Although we support option three, we believe some changes in it are necessary. There is no need to increase the base offense level and add new enhancements. We believe that the enhancements should be retained because they are aimed directly at conduct that increases the harm from copyright and trademark infringement offenses. The across-the-board approach of increasing the base offense level affects the street retailer cases as well as the more serious cases in which the copyright or trademark owner has suffered a loss. We recommend, however, that a reduction in the two-level enhancement that applies if the buyer believes the item he or she bought is the real thing. We believe that any sales of the real item will be reflected in the application of the infringed value. The other justification for the enhancement, harm to innocent buyers, can be accounted for by a one-level increase.

2. Re-promulgation of Temporary, Emergency Telemarketing Fraud Amendment

Amendment 2 would re-promulgate amendment 587, an "emergency" amendment promulgated in 1998. We opposed several features of amendment 587 at the time it was promulgated, and we would like the Commission to revisit those features. The Commission is not in a position to do so during this cycle, so it has no choice but to re-promulgate the amendment. Not to do so would be irresponsible on the Commission's part.

3. Implementation of the Sexual Predators Act

Amendment 3 is the Commission's response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314. The members of the Practitioners Advisory Group do not have sufficient experience with offenses covered by this Act to enable the Group to comment upon the proposals. We only would point out a fact of which we are sure the Commission already is aware. Any amendment to §§ 2A3.1, 2A3.2, 2A3.3, or 2A3.4 will have the greatest impact on Native Americans.

4. Offenses Relating to Methamphetamine

The Practitioners Advisory Group urges that the Commission take no action now to alter the methamphetamine guidelines. Over the past twelve years Congress and the Commission have altered the "Meth" guidelines three times each. On every occasion the threshold amounts of substance necessary for the five and ten year mandatory minimums have decreased. On three occasions the guidelines have been altered, twice allowing these minimums to drive all other methamphetamine guidelines sentences.

It is never sound policy to continually change sentencing provisions. Such repeated changes cause confusion, lead to mistaken application of the guidelines, decrease the certainty in sentencing and lead to disparate sentences, the very reason the guidelines were instituted. No sound apolitical reason requires methamphetamine changes now and merely changing the guidelines because Congress chose to change the mandatory minimum is not a political decision which was mandated by the congressional action.

OVERALL POLICY CONCERNING CONTROLLED SUBSTANCES

One of the most controversial and criticized areas involving federal guidelines concerns the mostly quantity driven and abundantly harsh sentences required to be administered upon individuals convicted of Title 21 offenses. The two most critical aspects which have affected drug sentencing policy were the congressional action of increasing the mandatory minimum sentences for drugs shortly after passage of the Sentencing Reform Act and the Commission decision to make drug quantity the linch pin in drug sentencing with the mandatory minimum drug quantities as the anchor of a quantity table based on geometric symmetry.

These decisions and the lengthy sentences which they generate have been a consistent source of debate both inside of and outside of the Commission. In 1995 when the Commission published its crack report and proposed changes in crack sentencing, it left on the table a multitude of proposals which would have changed the quantity driven aspects of drug sentencing and which would have clarified the ambiguities surrounding role in the offence factors that are so often misapplied in drug cases.

Now that the Commission is again at full membership, the Practitioners Advisory Group suggests that these issues should be re-examined. If changes are required in methamphetamine sentencing it is suggested that the Commission postpone any changes until a more comprehensive examination of drug policy is undertaken.

THE LACK OF NEED FOR IMMEDIATE CHANGE

The underlying rationale for creating the dual system of sentencing methamphetamine offenses utilizing the "actual" and "Mixture" dichotomy was to punish the low level "street" dealers trading in methamphetamine mixtures less severely than the manufacturers of "pure" or actual methamphetamine.

The current ratio of 1 to 5 between actual methamphetamine and mixtures punishes at the less severe mixture amount any street dealer whose substances are 20% pure or less. According to the Commission's methamphetamine report released in November of 1999, methamphetamine seized from street dealers are currently testing at less than 30% pure on average. As a result, the mixture to actual 20% ratio is therefore approximating the street reality so as to justify this dichotomy. Changing the guidelines to reflect the new mandatory minimum 10% ratio would have the guidelines no longer reflect the true ratio which exists on the street.

Another factor used to justify changing the guideline to mirror the new mandatory minimums is that if no change occurs the mandatory minimums will trump the guidelines at the five and ten year drug levels creating sentencing cliffs. The fallacy of this argument is that these cliffs have never been totally eliminated because Congress has also created increased mandatory minimums based on prior convictions which also create sentencing cliffs and which have not been eliminated by the quantity tables for any of the drugs affected by mandatory minimums.

Such cliffs are a further affront to guidelines uniformity because the mandatories tied to prior record must by statute be prosecution initiated and past practices have shown that such prosecution initiatives occur unsystematically, creating sentencing disparity.

The Commission has gone on record repeatedly in its opposition to mandatory minimums. It is not necessary for the Commission to change the methamphetamine guidelines simply because Congress has once again utilized this unfortunate method to alter sentencing policy outside of the guidelines arena.

PROSECUTION & JUDICIAL RESPONSE TO CURRENT METHAMPHETAMINE GUIDELINES

According to data developed by the Commission, methamphetamine offenders receive a disproportionately high number of minor role adjustments, safety valve utilization and substantial assistance departures.

There appears to be no sound reason for this disproportionality. It is suggested that prosecutors and judges may be over-using these sentencing diminishers because the sentences called for by the current guidelines are so harsh that de facto nullification of the required sentence is occurring to some degree.

These practices broadcast to the Commission that those who are administering the guidelines do not support increasing methamphetamine penalties which would be the result of the proposed amendments. If the amendments pass and then are not enforced uniformly, sentencing disparity increases.

SAFETY VALVE RAMIFICATIONS OF PROPOSED CHANGES

In response to continued criticism of the impact of drug guidelines, especially on first offenders, Congress and the Commission created the safety valve which bypasses the mandatory minimums. Also the Commission instituted a two level reduction for those who qualify for the safety valve. It is these offenders that the proposed amendments affect most harshly. Because the mandatory minimums do not apply to safety valve qualifiers, there are no cliffs for these first offenders. However, because the new guideline proposals are anchored to the new crack-like sentences for actual methamphetamine, those first offenders whose drug amounts exceed 5 and 50 grams of actual methamphetamine or its mixture equivalent will have their sentences determined because of the new mandatory minimum even though in theory they do not apply to them. This is so because under the proposals, the guidelines are tied to the mandatory minimums. Currently 60 grams of methamphetamine actual has a guideline base level of 28. (See Chart A below). The proposed guideline for 60 grams of actual methamphetamine is level 32 for proposal 1 and 2. Currently a safety valve defendant with 60 grams would be sentenced at level 26 after trial (absent any specific offence characteristics or adjustments) with a resulting range of 63 to 78 months instead of 120 months. Under proposals 1 and 2 a 60 gram offender would get a safety valve level after trial of 30 or a range of 97 to 121 months which requires an increase of 30 months or a sentence 50% higher than is currently called for. These proposed sentences are not consistent with the safety valve policies created by Congress and the Commission, and this Commission should not institute these unduly harsh measures for first offenders unless and until such changes are mandated by Congress. It is possible that the very reason that Congress did not require the Commission to make guidelines changes to mirror the new minimums was so that the mandatory minimum changes would have no effect on individuals who qualify for the safety valve. In fact, it is probable that some members of Congress did not add a mandatory Commission response to this legislation so that first offenders would not be so severely impacted by