term ambiguous. Does the term "false" mean that the item wrongly purports to be something issued by a government (e.g., a card containing truthful personal data that someone has constructed to look like a state driver's license) or that the information contained on something actually issued by a government is not true (e.g., defendant A uses B's name, address, and other personal information to obtain from the state a driver's license that uses A's picture but contains B's personal information).[50]

Recommendations

The Options

We do not believe that the Commission should decide the matter at this time. There does not appear to have been many prosecutions under this new offense, so there is little real-world experience for the Commission to draw from. Drafting a guideline under these circumstances may create problems down the road that could be avoided by waiting a bit to learn about the cases being brought.[51]

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

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

The relatively high base offense levels for money laundering were premised on the

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

We believe the appropriate action in this instance is to postpone final action on the identity-theft changes to the text of the fraud guideline so that the Commission can study the matter further. Congress, however, must be assured that the Commission is not ignoring the congressional mandate. We recommend, if the Commission decides to defer action on enhancements to the fraud guideline, that the Commission, as an interim measure, add encouraged-departure language to the commentary to the fraud guideline. The language would be tailored to offenses under section 1028(a)(7). We suggest: "If the defendant is convicted under 18 U.S.C. § 1028(a)(7) and that offense results in harm not

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> Commission's anticipation that prosecutors would address "money laundering activities [that] are essential to the operation of organized crime," and would apply the money laundering sentencing guidelines to those offenses where the financial transactions "encouraged or facilitated the commission of further crimes" or were "intended to . . . conceal the nature of the proceeds or avoid a transaction reporting requirement."

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

adequately taken into account by the guidelines, an upward departure may be warranted."

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

Both options 1 and 2 seek to enhance for the larger-scale offenses, but option 1 does so more effectively. Option 1 targets those who manufacture unauthorized means of identification and those who possess five or more unauthorized means of identification. Option 2 not only sweeps too broadly but also is not as well-drafted. For example, option 2 would call for a two-level enhancement if the offense involved the transfer of six or more means of identification. A person who applies for a driver's license provides personal data (such as name, address, and date of birth) to the state employee empowered to issue the license. Each item of information would seem to be a "means of identification" (a name, number, or other information that "alone or in conjunction with any other information, [may be used] to identify a specific individual"). If so and if the person provides six items of personal data, there has been a "transfer" of six "means of identification" – thereby qualifying for application of the enhancement – even if that

transfer leads to the acquisition of only one driver's license. This is not the kind of activity that should qualify for a two-level enhancement.

We oppose the other enhancement in option 2, which adds two levels and sets a floor of level10 or 12 (to be decided) if the offense involves more-than-minimal harm to reputation or credit standing or more-than-minimal inconvenience related to correcting records. In our judgment, this enhancement also sweeps too broadly. The enhancement is not limited to identity-theft offenses, but would apply to all fraud offenses. The Identity Theft and Assumption Deterrence Act of 1998 did not call for an across-the-board increase in fraud sentences, and the Commission has published nothing suggesting that there is a need for such an enhancement for all fraud offenses. Regrettably, every fraud offense can have an unfavorable impact on the victim's reputation and credit standing. Even if the victim's pecuniary loss is minimal so that there is no impact on the victim's credit standing, the victim's reputation may suffer because the victim fell for a scam that most people saw through.[52]

Issues for Comment

Our general observation about all of the issues for comment in amendment 5 is that the Commission needs more data about identity-theft cases before drafting an identity-theft enhancement. We repeat our earlier recommendation that the Commission continue

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

to study identity theft and, as an interim step, add encouraged departure language to the commentary to the fraud guideline.

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

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

The applicable offense guideline in Appendix A for a section 1028 offense is the fraud guideline. Although that designation in Appendix A is not dispositive (at least at present), we would expect the fraud guideline to be the starting point in nearly every instance. Some identity-theft offenses may end up in other guidelines. The commentary to the fraud guideline, for example, indicates that § 2L2.1 or § 2L2.2, which deal with immigration offenses, can be used for a section 1028 offense if "the primary purpose of

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

the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status . . . ." Further, there may be an atypical case that would justify the sentencing court, under §1B1.2 selecting another offense guideline.

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

The third issue for comment is whether the Commission, in lieu of amending chapter two, should add a chapter three adjustment that would apply in every instance when there has been unauthorized use of an "identification means." We think a chapter three adjustment does not respond to the congressional concern as well as option 1. Option 1 is preferable because the Commission has attempted, as best it can given what is known, to tailor option 1 to the characteristics of identity-theft offenses prosecuted under section 1028.

The fourth issue for comment is whether, in lieu of amending chapter two, the Commission should add to chapter five an encouraged departure for unauthorized use of a identification means. We believe that an encouraged departure would comply with the

congressional mandate, at least as an interim step. As indicated above, we believe this to be the appropriate course of action at the present time. Because we view the encouraged departure language as an interim step, we think that it would be better to put the language in the commentary to the fraud guideline.

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

> any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

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

The loss presumption is used in the theft guideline to set a floor and is used only if

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

The sixth issue for comment concerns whether there should be an offense-level enhancement if the defendant has been convicted previously of a similar offense. We recommend against such an enhancement. The proper place for consideration of prior criminal conduct is in determining the criminal history score and in determining if there should be a departure under § 4A1.3 based upon the adequacy of the criminal-history category. The scoring of criminal history in chapter four is largely determined by the likelihood of recidivism.[55] We believe it would be unfair double counting to include an

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

[55]*See* U.S.S.G. ch. 4, pt. A, intro. comment. ("The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood fo recidivism, e.g., age and drug abuse, for policy reasons they were not included here at this time"). *See also* U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987) ("The criminal history score used in the guidelines is comprised of five items that address the frequency, seriousness, and recency

enhancement in the offense guideline for prior convictions of a nature similar to the instant offense.

AMENDMENT 6

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

Background

The Act directs the Commission to "review and amend" the guidelines, "if appropriate," to provide "an appropriate penalty for offenses involving the cloning of wireless telephone (including offenses involving an attempt or conspiracy to clone a wireless telephone)."[57] The Commission must consider a number of specified factors, as well as "any other factor that the Commission considers to be appropriate."[58]

Every cellular telephone has two identifying numbers, the ESN and the MIN. The ESN is the electronic serial number programmed into the telephone by the manufacturer

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of the defendant's prior criminal history. . . . The particular elements that the Commission selected have been found empirically to be related to the likelihood of further criminal behavior and also are compatible with the purposes of just punishment").

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

[57]*Id.* at § 2(e)(1).

[58]*Id.* at § 2(e)(2).

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

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

The Options

Amendment 6 sets forth two options. Option 1 would add a two-level enhancement to the fraud guideline that applies in either of two circumstances. First, the enhancement applies if the offense involved use or possession of "cloning equipment." Cloning equipment means, in essence, equipment used to capture the ESN and MIN.[59] Second, the

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

enhancement applies if the offense involved the manufacture or distribution of a "cloned telecommunications instrument." Option 1 defines that term to mean "a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization." As so defined, the term might be broader than a wireless telephone, which is what the Wireless Telephone Protection Act was concerned about. The explanation does not indicate a reason for applying the enhancement to more than wireless telephones. If the Commission adopts option 1, we recommend that the definition be modified so that the enhancement applies only if the offense involved a cloned wireless telephone.

Option 2 is broader than option 1. Option 2 would add a two-level enhancement to the fraud guideline if the offense involved the possession or use of "device-making equipment" or the distribution of a "counterfeit access device." Under option 2, device-making equipment means, in essence, equipment designed or primarily used for making an access device or a counterfeit access device.[60] Option 2 specifically states that "device making equipment" includes equipment used to capture the ESN and MIN as well as equipment used to intercept wire or electronic communication illegally.[61] An access

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

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

device is a card, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or other thing of value. A counterfeit access device is a fake access device. Thus, the enhancement in option 2 would apply to possession or use of more than just cell-phone cloning equipment. There are no reasons given for why option 2 expands beyond the mandate of the Wireless Telephone Protection Act.

Recommendation

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

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

To begin with, the suggestion that the applicability of the enhancement in option

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receiver."

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

The goal in determining loss should be to calculate, as nearly as possible, the actual loss that was inflicted or the loss that was intended to be inflicted. A presumptive amount is a fiction unrelated to the facts and circumstances of the case. Assume, for example, that the case involves unused ESN/MIN pairs. The initial question has to be whether the defendant intended to use them. If not, then a presumptive amount would only serve to overstate the seriousness of the offense.[63] If the intention was to use the ESN/MIN pairs, then the question becomes what was the loss intended from using them.

The determination of intended loss is best left to the sentencing court's discretion, perhaps with some guidance by the Commission. The actual conduct involved in the case would seem to be the best starting place. If the actual loss caused by the defendant was

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

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

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

Most of the other issues for comment either have been commented upon already or else raise issues that would require the Commission to go far beyond the scope of the Wireless Telephone Protection Act. We do not think that the Commission is in a position to make the kinds of decisions required by such issues, and we recommend that the Commission defer acting on them. We believe that the Commission should limit itself to carrying out faithfully what the Wireless Telephone Protection Act calls for.

AMENDMENT 7

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

Background

Until November 13, 1998, section 924(c) made it an offense to use or carry a firearm during and in relation to a crime of violence or drug trafficking crime. The penalty depended upon (1) the type of weapon and (2) whether the defendant previously was convicted under section 924(c). The punishment set forth in section 924(c) was unusual in three ways. First, the punishment prescribed was both the minimum and the maximum (providing, for example, that a person convicted of the least severe form of the offense "shall . . . be sentenced to imprisonment for five years"). Second, a prison term was mandated. Third, the prison term had to run consecutively to "any other term of imprisonment" imposed on the defendant.

Congress, effective November 13, 1998, revised both the definition of the section 924(c) offense and the punishment prescribed for a section 924(c) offense. The definition of the offense was modified to include possessing a firearm as well as carrying and using a firearm. In addition, the punishment was revised in several ways. First, the punishment

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

was made dependent upon the nature of the involvement of the firearm, as well as upon the type of weapon and a prior conviction under section 924(c). Second, the penalty provisions were amended to set forth a minimum but no maximum (section 924(c)(1)(A)(i), for example, provides that an offender "be sentenced to a term of imprisonment of not less than 5 years"). Third, a new punishment variable was added – the manner in which the weapon was involved. Specifically, the punishment for brandishing a firearm was set at a prison term of "not less than 7 years," and the term "brandish" was defined for the purposes of section 924(c).

The Commission has treated a section 924(c) offense as a functional equivalent of an enhancement for using, brandishing, discharging, or possessing a firearm. Thus, the offense guideline applicable to a section 924(c) conviction, § 2K2.4, provides that "the term of imprisonment is that required by statute." Further, the Commission has provided that when imposing a sentence for a section 924(c) conviction in conjunction with a sentence for an underlying offense, "any specific offense characteristic for the possession, use, or discharge of an explosive or firearm . . . is not to be applied in respect to the guideline for the underlying offense."[65] The purpose of that provision is to prevent unfair double counting.[66]

Part A – Definition of "Brandish"

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[65] U.S.S.G. § 2K2.4, comment. (n.2).

[66] *Id.* at comment. (backg'd).

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

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

The principal difference between the two definitions is whether the object must be seen by the victim. By specifying that the object be pointed, waved, or displayed, the guideline definition requires that the object be visible. The statutory definition requires only that the presence of the object be made known. That can be accomplished without the object being visible, however. For example, the defendant can tell the other person that she has a gun in her purse.[68] The defendant, however, must actually have a gun or else there can be no violation of section 924(c).

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

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

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

The guideline definition of brandish is used throughout chapter 2 in connection with a wide variety of offenses involving a wide variety of objects that can be used to injure someone. Replacing the guideline definition of brandish with the statutory definition would create a technical problem because of the guideline definition of "dangerous weapon." The guideline definition of dangerous weapon is "an instrument capable of inflicting death or serious bodily injury."[69] The guideline definition of dangerous weapon also provides that "[w]here an object that *appeared* to be a dangerous weapon was brandished, displayed or possessed, treat the object as a dangerous weapon."[70] The use of "appeared" means that the object itself must somehow be visible, either directly (as when the object is displayed) or by inference (the bulge in the coat pocket that resembles a pistol). The statutory definition of brandish, however, does not require visibility; all the defendant has to do is make the presence of the object known for the purpose of intimidation. A defendant who, for the purpose of intimidation, claims to have a pistol in her purse has brandished within the statutory definition, even if there is nothing

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

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

about the appearance of the purse that indicates that there is a pistol in the purse.

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

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

Part B of amendment 7 would amend § 2K2.4 "to clarify that the 'term required by statute' [as used in that guideline] . . . is the minimum term specified by the statute." Part B would also add commentary dealing with upward departures. Finally, there is an issue for comment about whether there should be a cross-reference to the underlying offense (if the guideline range for that offense is greater than the minimum required by 18 U.S.C. § 924(c)).

The offense guideline applicable to violations of 18 U.S.C. § 924(c) currently provides that "the term of imprisonment is that required by statute." That formulation works with both the old and new versions of section 924(c). The old section 924(c) called for a single penalty ("shall . . . be sentenced to imprisonment for five years"), so there was no ambiguity in the reference to the term "required by statute." New section 924(c)

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

prescribes a minimum but no maximum ("be sentenced to a term of imprisonment of not less than 5 years"). The new formulation does not render current § 2K2.4 ambiguous. All that new section 924(c) *requires* is the minimum term. New section 924(c) *authorizes*, but does not require, a sentence above the minimum. Nevertheless, the change to the text of § 2K2.4 can do no harm, and we support it.

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

To begin with, the proposed commentary is confusing because the interplay between the third and fourth sentences in the proposed new commentary is unclear. The factors in the fourth sentence seem to be applicable only in the circumstances described in the third sentence. The proposed new commentary, however, does not say so directly.

The five factors in the fourth sentence of the proposed commentary are encouraged departure grounds. A sentencing court can depart if one of the factors is present unless the applicable offense guideline has taken that factor into account, in which case the sentencing court may depart if the factor is present to a degree beyond that contemplated by the offense guideline.[72] We consider this to be inappropriate. The Commission – correctly in our view – considers a section 924(c) conviction to be, in effect, a weapon

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

enhancement. As such, a departure for a section 924(c) should be encouraged only to the extent that a departure is warranted for a weapon enhancement in the underlying offense (the offense during and in relation to which the firearm was possessed, carried, or used). Thus, for example, if the guideline for the underlying offense does not encourage a departure if the offense involved a stolen firearm or a firearm with an obliterated serial number (factor (B) in the proposed new commentary), then it is inappropriate for § 2K2.4 to provide for an encouraged departure if there were no conviction of that underlying offense. We think the same thing is true with respect to all of the other factors in the fourth sentence.

We suggest deleting all of the proposed commentary after the second sentence. As a general matter, we think it preferable to wait to see how sentencing courts actually sentence under new section 924(c). We think that the Commission should learn from the sentencing practices of federal judges before drafting encouraged-departure language.

Part C – Application of Weapon Enhancement

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

section 924(c) offense. We support that amendment.

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

When an offense guideline has an enhancement for possessing, using, or discharging a weapon, that enhancement applies only once, no matter how many guns are involved. Assume that defendant A is convicted on counts I and II of distributing cocaine, and during the count I distribution possessed a pistol. The sentencing court, applying the weapon enhancement of the drug-trafficking guideline, § 2D1.1(b)(1), would add two levels to A's offense level. If A had possessed the pistol during the count II distribution as well, the enhancement would still be two levels. The enhancement is not doubled because a gun was possessed on two separate occasions.[74] Because the Commission treats a

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

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

section 924(c) offense as the functional equivalent of a weapon enhancement, the same principle should apply when § 2K2.4 is applied. If, in addition to the count I and II cocaine distribution convictions, A is convicted of a section 924(c) offense for which the underlying offense is the count I distribution, A should receive the additional punishment called for by § 2K2.4 and the offense level should not be enhanced under § 2D1.1(b)(1) if A possessed a during the count II distribution. To do so would be inconsistent with treating § 2K2.4 as a weapon enhancement. We believe that the proposed new commentary makes this point effectively and recommend its adoption by the Commission.

Part D – Career Offender Guideline

Part D of amendment 7 amends §§ 2K2.4 and 4B1.2 to provide that a conviction under section 924(c) is not an instant offense for purposes of the career offender guideline. We support the amendment.

Section 2K2.4 is sui generis. The sentence under § 2K2.4 must "be imposed independently."[75] The defendant's criminal history category need not be calculated to determine sentence under § 2K2.4 because a defendant's criminal history is not germane to determining a sentence under § 2K2.4. Although an offense guideline in chapter two of the *Guidelines Manual*, § 2K2.4 does not have a base offense level. The Commission considers § 2K2.4 to be the functional equivalent of an enhancement for possession, use, or discharge of a firearm, but § 2K2.4 does not operate as an enhancement to the offense

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[75] U.S.S.G. § 5G1.2(a).

level calculated for another offense.[76] When there is more than one count of conviction, the grouping rules of chapter three, part D of the *Guidelines Manual* do not apply to the section 924(c) offense.[77]

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

Part E – Technical and Conforming Amendments

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

Issues for Comment

The first issue for comment is whether, if the statutory definition of brandish is adopted (which we recommend against), the Commission should delete "displayed" from

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

[77]U.S.S.G. § 3D1.1(b).

weapon enhancements that apply if a weapon was "brandished, displayed, or possessed." We agree that, as a matter of logic, the term "displayed" would be redundant. However, we point out again that if the statutory definition is adopted, there is a problem with the definition of dangerous weapon that the Commission would have to address..

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

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

AMENDMENT 8(A)

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

Background

A sentencing court must impose a sentence called for by the guidelines unless there is "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately

taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that" called for by the guidelines.[78] The Supreme Court addressed a sentencing court's authority to depart from the guidelines in *Koon v United States*.[79] Although the Sentencing Reform Act of 1984 "made far-reaching changes in federal sentencing,"[80] the Act left a District Court with "much of its traditional discretion . . . ."[81] In fact, the Supreme Court pointed out, "A district court's decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court."[82] The Court further pointed out that:

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

Single Act of Aberrant Behavior

Chapter one, part A(4)(d) of the *Guidelines Manual* states that "[t]he Commission,

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[78]18 U.S.C. § 3553(b).

[79]518 U.S. 81, 116 S.Ct. 2035 (1996).

[80]518 U.S. at 92, 116 S.Ct. at 2043-44.

[81]518 U.S. at 98, 116 S.Ct. at 2046.

[82]518 U.S. at 98, 116 S.Ct. at 2046.

[83]518 U.S. at 113, 116 S.Ct. at 2053.

of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures." The *Manual* nowhere elaborates on that statement, leaving its meaning somewhat ambiguous. Without guidance as to what the Commission contemplated as "single acts of aberrant behavior," the Circuits have come up with differing interpretations of that phrase. Several Circuits have interpreted the phrase to require a "spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning . . . ."[84] Other Circuits have used a broader interpretation and look to the totality of circumstances.[85]

The narrower interpretation renders the Commission's statement in chapter one, part A(4)(d) virtually empty. We are unaware of a reported case applying the narrower

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[84]United States v. Carey, 895 F.2d 318, 325 (7th Cir.1990). *Accord* United States v. Marcello, 13 F.3d 752, 760-61 (3d Cir.1994); United States v. Glick, 946 F.2d 335, 338-39 (4th Cir. 1991); United v. Williams, 974 F.2d 25, 26-27 (5th Cir. 1992); United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991); United States v. Withrow, 85 F.3d 527 (11th Cir. 1996).

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

standard that has sustained a downward departure based on aberrant behavior. The focus of that approach is on whether the offense involved a spontaneous, single act – something that occurs only rarely.[86] The First Circuit has stated that this approach produces an "absurd result . . . counting the number of acts involved in the commission of a crime to determine whether a departure is warranted. . . ."[87] We agree. Counting the number of acts is *not* "the traditional exercise of discretion by a sentencing court" in which the court considers "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." We believe that the Commission must have intended more than empty words when it wrote that a single act of aberrant behavior is a basis for departure.

The language of chapter one, part A(4)(d) of the *Guidelines Manual* makes a single act of aberrant behavior, however defined, an encouraged departure.[88] It does not follow

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

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

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

that departures for aberrant behavior based upon more than a single act are forbidden. Indeed, the Supreme Court pointed out in *Koon* that "the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear upon the decision to depart."[89] The *Guidelines Manual* contains no prohibition on departing for a defendant's aberrant behavior manifested by more than a single act. The *Manual* also contains no language discouraging such a departure. That factor, therefore, is unmentioned and under *Koon* the sentencing court retains discretion to depart even if the aberrant behavior is manifested by more than a single act.[90]

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

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[89]518 U.S. at 94, 116 S.Ct. at 2045.

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

be added.

In so doing, the Commission, we believe, should be mindful of the Supreme Court's view of the role of the District Court, vis-a-vis the Court of Appeals, in sentencing. "District courts have an institutional advantage over appellate courts in making these sorts of determinations [i.e., departures], especially as they see so many more Guidelines cases than appellate courts do. . . . ."[91] If that is true of District Courts vis-a-vis Courts of Appeals, we think it is also true of District Courts vis-a-vis the Commission.[92]

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

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

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

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

Courts rather than to deprive them of discretion.

The obvious concern with a departure for aberrant conduct is that a first-time offender should not be able to qualify for an aberrant-behavior departure simply because it is the person's first offense. This is a legitimate concern that a new policy statement must address.[94] Another legitimate concern is with offenses that cause physical harm to another. We think that the concern is best handled by trusting in the discretion of District Courts. Attempting to draft language to prohibit a departure for injury will, we fear, result in an overly-broad prohibition that excludes from consideration defendants who should not be excluded. The concept of "crime of violence," for example, encompasses offenses that do not result in physical harm or in a serious threat of physical harm. A defendant who hands a note to a teller that says "Give me your cash, this is a robbery," has committed a crime of violence. The other facts of the case (e.g., the defendant was of diminutive stature, the defendant was not armed, the teller was not frightened, and the defendant was

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[94]Circuits applying the broader standard have been careful to point out that a departure is not available just because the defendant is a first offender. *See* United States v. Grandmaison, 77 F.3d 555, 564 (1st Cir. 1996) (concerns that the standard "ensures every first offender a downward departure from their Guidelines-imposed sentence are without foundation. As the Ninth Circuit explained in United States v. Dickey, 924 F.2d 836 (9th Cir. 1991), 'aberrant behavior and first offense are not synonymous.'"); Zecevic v. U.S. Parole Comm'n, 163 F.3d 731, 735 (2d Cir. 1998) ("The totality standard is not a blanket rule that anyone with no prior criminal record will automatically be entitled to a downward departure because an absence of criminal convictions is but one of several factors the court must consider"). Those Circuits have not seen aberrant-behavior departures become routine for first offenders.

arrested before the teller had handed over any money) may suggest that a downward departure would be appropriate because the defendant did not present a serious risk of harm to anyone.

The Commission saw this sort of problem in the diminished capacity policy statement, § 5K2.13. That policy statement made diminished capacity an encouraged departure but only in the case of a "non-violent offense."[95] However, diminished-capacity defendants will commit crimes that are classified as a crime of violence, but not be a serious threat to public safety. The term "non-violent offense" precluded what was otherwise an appropriate departure. A diminished-capacity defendant may not in fact have presented a serious threat to public safety, but the sentencing court was precluded from departing under § 5K2.13.

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

> the degree of spontaneity and amount of planning inherent in the defendant's actions are not dispositive but merely are among the several factors courts consider in determining whether the defendant's conduct may properly be termed aberrant

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[95]Some courts interpreted the term "non-violent offense" to mean "crime of violence" (which is a term defined in the career offender guidelines) and others looked to all of the facts and circumstances of the case to determine if the offense was nonviolent. For a brief discussion, see U.S.S.G. App. C, amend. 583.

behavior. . . . Among the other factors courts have considered as part of the totality test are (1) the singular nature of the criminal act; (2) the defendant's criminal record; (3) psychological disorders from which the defendant was suffering at the time of the offense; (4) extreme pressures under which the defendant was operating, including the pressure of losing his job; (5) letters from friends and family expressing shock at the defendant's behavior; and (6) the defendant's motivations for committing the crime. . . . Courts adopting the totality test have also considered mitigating factors such as the level of pecuniary gain the defendant derives from the offense; the defendant's charitable activities and prior good deeds; and his efforts to mitigate the effects of the crime . . . as well as the defendant's employment history and economic support of his family . . . .[96]

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

§5K2.13. <u>Aberrant Behavior (Policy Statement)</u>

(a) The court may sentence below the applicable guideline range if the facts and circumstances of the case indicate that the defendant's offense was aberrant behavior. In determining whether the defendant's offense was aberrant behavior, the court shall consider the nature and circumstances of the offense and the history and

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

characteristics of the defendant. The factors that the court may consider in making that determination include (1) the singular nature of the offense; (2) the degree of spontaneity and amount of planning that went into the offense; (3) the defendant's criminal record; (4) the defendant's employment history and activities in the community; (5) whether the defendant suffered from a psychological disorder at the time of the offense, and the nature and extent of any such disorder; (6) the pressures under which the defendant was operating; (7) the defendant's motivation for committing the offense; (8) the opinion of family, friends, and others who know the defendant concerning the defendant's behavior; and (9) the defendant's efforts to mitigate the effects of the offense.

AMENDMENT 8(B)

The Commission has asked for comment upon "whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual." The cases holding

that § 2D1.1 applies based upon a defendant's relevant conduct have incorrectly interpreted the guidelines, especially § 1B1.2. The Federal Public and Community Defenders, therefore, recommend that the Commission amend application note 1 to § 1B1.2 explicitly stating that the sentencing court cannot consider relevant conduct beyond the conduct set forth in the count of conviction in the charging document. Our suggested amendment is set forth at the end of our comments on Amendment 8(B).

Background

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

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

The Commission initially attempted to develop a pure real-offense system, but rejected that approach as impracticable and risking a return to wide disparity.[98] The Commission

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[97]U.S.S.G. ch. 1, pt. A(4)(a).

[98] The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence

then developed a system "closer to a charge offense system," but containing "a significant number of real offense elements."[99]

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

The determination at the first stage is controlled by § 1B1.2.[101] Section 1B1.2(a)

> of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

Id.

[99]*Id.*

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

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

directs the sentencing court to select the offense guideline of chapter two that is "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."[102] The Commission has included a statutory index in Appendix A "to assist in this determination."[103] The statutory index, therefore, is not determinative. The legal standard does not call for determining the offense guideline listed in Appendix A, but for determining the offense guideline "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."

The Commission has not explained why it has not made the listing in Appendix A determinative. In part, the reason must be practicality – a statutory provision may set forth more than one offense, so that the statutory index will list more than one offense guideline.[104] The statutory index cannot be determinative when that occurs, and there must

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

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

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

be a legal standard for choosing among the listed guidelines. In part, the reason probably is that the sentencing court is better able than the Commission to determine the offense guideline that best suits the particular offense that has been charged. The Commission makes determinations in the abstract about general classes of conduct; the sentencing court is confronted with specific allegations in the charging documents and can determine if the offense guideline intended for the typical case under the statute is appropriate for the case at hand.

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

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and § 2H3.3 (obstructing correspondence).

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

§ 2D1.1 and § 2D1.2

The "basic" drug-trafficking offenses are set forth in 21 U.S.C. §§ 841 and 960. Section 841(a)(1), for example, makes it an offense knowingly or intentionally to distribute a controlled substance, except as otherwise authorized by law. The Commission has designated § 2D1.1 as the offense guideline applicable to offenses under sections 841 and 960.[106] Drug-trafficking offenses involving protected locations and protected individuals are set forth in 21 U.S.C. §§ 859, 860, and 861. Section 860(a), for example, makes it an offense to distribute a controlled substance within 1,000 feet of a public elementary school. The Commission has designated § 2D1.2 as the offense guideline applicable to drug-trafficking offenses under sections 859, 860, and 861.[107]

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

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

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

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

used.[109]

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

A straight-forward application of § 1B1.2(a) requires a sentencing court to use § 2D1.1 when the defendant has been convicted under 21 U.S.C. § 841 or § 960, even if a portion of the defendant's relevant conduct occurred in a protected location or involved a protected person. Where the trafficking occurred and whether the offense involved a protected person are not elements of an offense under either of those provisions. The Commission has designated § 2D1.1 as the offense guideline applicable to violations of sections 841 and 960.[110] Unless the charging document sets forth allegations that indicate

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[109]United States v. Robles, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); United States v. Clay, 117 F.3d 317 (6th Cir. 1997). The Commission indicates that the Eighth Circuit has taken this position in United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993), a view shared by the First Circuit, *see* Locklear, 24 F.3d at 647, the Ninth Circuit, *see* Crawford, 185 F.3d at 1026, and the Eleventh Circuit, *see* Saavedra, 148 F.3d at 1317. We believe, for reasons set forth later, that *Oppedahl* has been mischaracterized and addresses a different issue.

[110]*See* United States v. Locklear, 24 F.3d 641, 648 (4th Cir. 1994) ("we do not doubt that the Sentencing Commission could, if it chose, enhance the sentence of a defendant convicted of a drug-related crime if commission of the crime was aided by the use of a juvenile by defining the use of a juvenile as a specific offense characteristic . . . . We believe that, as currently constituted, section 2D1.2 is intended not to identify a

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

The Third Circuit (in an unpublished decision) and the Sixth Circuit, however, have reached a contrary result.[111] We find the opinions in both cases to be unpersuasive because they are based on a faulty premise. Both Circuits assumed – incorrectly – that the sentencing court could look to relevant conduct when selecting the offense guideline. The Third Circuit summarily affirmed a District Court's use of § 2D1.2.[112] The District Court had argued that, because of the relevant-conduct rules of § 1B1.3, "a court must look beyond the charged conduct to determine the appropriate sentence."[113] The District Court neither cited nor discussed § 1B1.2, and did not explain what authorized the use of relevant conduct to determine the applicable offense guideline. The Sixth Circuit likewise seemed to assume that the sentencing court could use relevant conduct in determining the applicable offense guideline.

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specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by section 2D1.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859, 860 and 861"); United States v. Saavedra, 148 F.3d 1311, 1318 ("§ 2D1.2 is the offense guideline that sets the punishment for violations of 21 U.S.C. § 860. Saavedra was not convicted of this crime, and he may not be sentenced as if he were.").

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

[112]Robles, 8 F.3d 814 (unpub.).

[113]Robles, 814 F. Supp. at 1252.

> Thus, while § 2D1.2 certainly applies to offenses like those described in 21 U.S.C. §§ 859, 860, and 861, where the involvement of minors or proximity to their schools is an element of the offense, it also applies in cases involving conviction for other offenses (including convictions under 21 U.S.C. § 841), if the conduct of the offender brings him within the scope of § 2D1.2.[114]

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

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

In reality, however, that is not the case. At the time the defendant was sentenced,

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

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

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

the offense guideline applicable to drug-trafficking conspiracies was § 2D1.4, which provided that "the offense level shall be the same as if the object of the conspiracy or attempt had been completed."[117] Thus, the sentencing court had to determine the offense guideline applicable to the object of the conspiracy. That determination, although similar to a determination under § 1B1.2, was being made in the context of applying a chapter two guideline, so the sentencing court was not limited to considering the elements of the offense of conviction. Indeed, § 1B1.3(a) *requires* the sentencing court to consider the defendant's relevant conduct when applying a chapter two guideline. In the Eight Circuit case, the defendant's relevant conduct included trafficking within 1,000 feet of a school.[118] Consequently, the District Court was correct to apply § 2D1.2, and the Eight Circuit properly affirmed. The Eighth Circuit case did not involve application of § 1B1.2, and thus is not germane to the issue over which the Fourth, Fifth, Ninth, and Eleventh Circuits are in conflict with the Third and Sixth Circuits.

What is at stake in the conflict between those groups of Circuits is the integrity of the guideline structure. The cases from the Third and Sixth Circuits are wrong as a matter of guideline application. If the Commission is to preserve the integrity of the guideline

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

[118]Oppedahl, 998 F.2d at 586.

structure, the Commission must make clear that it rejects the approach taken, and results reached, in those cases.

Appendix A

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

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

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

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

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

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outside of the heartland. An Eighth Circuit case also involved a departure that relied upon the fraud guideline in a money-laundering case. United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). *See* n. –, *infra*.

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

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

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

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

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

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conduct essential to conviction and base its selection on some other conduct. Brunson, 882 F.2d at 157.

[121]Smith, 186 F.3d at 293.

[122]*Id.* at 297.

[123]*Id.*

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

> A sentencing court may be required to perform a "heartland" analysis in two different circumstances – the first, during the initial choice of the appropriate guideline; the second, in the context of a departure request. Although these situations arise at different stages of the sentencing process, and are distinguishable to that extent, the "heartland" analysis remains identical.[125]

Therefore, the Court of Appeals concluded, "we must first determine what conduct the Sentencing Commission considered to fall within the 'heartland' of the money laundering guideline."[126]

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

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[125]Smith, 186 F.3d at 298.

[126]*Id.*

[127]*Id.* at 300.

course of conduct, was an 'incidental by-product' of the kickback scheme. . . . The root of the defendants's activity in this case was the fraud on GTECH."[128]

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

The application of the correct legal standard, however, does not always result in the use of a guideline that produces punishment less harsh than the punishment produced by the offense guideline listed in Appendix A. Two cases, one from the Ninth Circuit and one from the Second Circuit, illustrate this. In the Ninth Circuit case, the defendant had been convicted of violating 21 U.S.C. § 333.[129] The statutory index listed § 2N2.1 (violation of statutes dealing with food, drug, and cosmetics) as the applicable offense guideline, but the District Court used the fraud guideline, § 2F1.1.[130] The defendant's offense level under § 2N2.1 would have been 6 (the guideline at that time had a base offense level and no specific offense characteristics). The defendant's offense level under

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

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

[130] *Id.* at 754-55.

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

In the Second Circuit case, the defendant had been convicted under 18 U.S.C. § 641of theft of government property.[133] The statutory index lists the theft guideline, § 2B1.1, for that offense, but the District Court used § 2J1.2 (obstruction of justice) instead.[134] The defendant's offense level under § 2B1.1 was very low – level 5; the defendant's offense level under the obstruction guideline was level 18.[135] The Court of

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

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

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

Id. at 832.

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

[134]*Id.* at 676.

[135]*Id.*

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

> we understand the exception described in Appendix A to cover those cases, probably few in number, where the conduct constituting the offense of conviction also constitutes another, more serious offense, thereby rendering the offense conduct not typical of the usual means of committing the offense of conviction.
>
> The information to which [defendant] pled guilty described his conduct, in part, as "contact[ing] certain targets of the investigations and reveal[ing] to those targets confidential information concerning the ongoing investigation." . . . we cannot find that the District Judge was clearly erroneous when he concluded that [defendant's] conduct was not typical of theft of government property.[136]

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

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[136]*Id.* at 677.

[137]Requiring the sentencing court to use the guideline listed in Appendix A, moreover, will not guarantee the Department of Justice the result it probably seeks – sentencing of defendants convicted of money laundering within the guideline range determined under the money laundering guidelines. A sentencing court may depart from that guideline range. In United States v. Woods, 159 F.3d 1132, 1134-36 (8th Cir. 1998), for example, the Eighth Circuit approved a downward departure in a case in which the

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

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

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

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

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

Suggested Amendment

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

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

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

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

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

AMENDMENT 8(C)

The Commission has asked for comment upon whether the enhancement in § 2F1.1(b)(4)(B) "applies to falsely completing bankruptcy schedules and forms." Several Circuits have held that the enhancement applies,[139] and two Circuits have held that the enhancement does not apply.[140] One Circuit, in dictum, has indicated that the enhancement does not apply to filing false accounts in a state probate court, but the

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[139]The Commission identifies six Circuits: United States v. Saacks. 131 F.3d 540, 54346 (5th Cir. 1997); United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991); United States v. Welch, 103 F.3d 906. 907-08 (9th Cir. 1996); United States v. Messner, 107 F.3d 1448, 1457 (10th Cir. 1997); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994).

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

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

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

Background

The enhancement of § 2F1.1(b)(4)(B) applies "if the offense involved . . . violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines . . . ." The Commission has not expressly stated the purpose of the enhancement, but we understand the purpose of the enhancement to be to impose greater punishment upon a person who continues fraudulent activities after a court or administrative tribunal has directed that those activities be discontinued. Many states have a means whereby the Attorney General or dissatisfied consumers, customers, or the like can seek to have a person cease and desist from deceptive, misleading, dishonest, or fraudulent practices. A person who has been ordered to discontinue such practices but who nonetheless continues to engage in them is more culpable, and deserves greater punishment, than a person whose practices have not previously been challenged and ordered discontinued. The application of the enhancement to violations of administrative orders as well as judicial orders, and the examples in application note 6, underscore this

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

understanding of the purpose of the enhancement.[142]

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

The First Circuit rejected application of the enhancement because the language of the enhancement and commentary "plainly indicates that the enhancement was meant to apply to defendants who have demonstrated a heightened *mens rea* by violating a prior

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

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

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

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

'judicial or administrative order, decree, injunction or process.'"[145] The Third Circuit, the most recent Circuit to address the issue, agreed with the First Circuit.[146] The Third Circuit addressed the argument that a bankruptcy proceeding constitutes a "judicial . . . process" by relying on a Second Circuit case that held the enhancement inapplicable to filing false accounts in a probate court.[147] The Second Circuit noted that the enhancement applies to a "violation" of judicial process, not to an "abuse" of judicial process:

> "Violation" strongly suggests the existence of a command or warning followed by disobedience. This analysis in turn suggests that the term "process" – the command or warning violated – is used, not in the sense of legal proceedings generally, but in the sense of a command or order to a specific party, such as a summons or execution issued in a particular action. . . . This narrower reading of Section 2F1.1(b)([4])(B) is also consistent with the general practice – known as *ejusdem generis* – of construing general language in an enumeration of more specific things in a way that limits the general language to the same class of things enumerated.[148]

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[145]United States v. Shadduck, 112 F.3d 523, 530 (1st Cir. 1997). The Seventh Circuit, in a case at about the same time as United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995), seems to agree. *See* United States v. Gunderson, 55 F.3d 1328, 1332-33 (7th Cir. 1955) ("We agree" with defendant's argument that, based upon the commentary, § 2F1.1(b)(4)(B) "'is designed to apply when a defendant has had a previous warning.'" *Id.* at 1333 (quoting defendant).

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

[147]*Id.*

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

Recommendation

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

The Circuits that apply the enhancement to bankruptcy fraud have justified treating bankruptcy fraud more severely than other forms of fraud by simply stating the purpose of bankruptcy and describing bankruptcy fraud, apparently assuming that the rationale for treating bankruptcy fraud more severely is self-evident. The Sixth Circuit, for example, has stated:

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

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

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

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

We do not find the rationale for treating bankruptcy fraud more severely to be self-evident. The factors identified do not, in a meaningful way, distinguish bankruptcy fraud from other forms of fraud. A fraud always will betray faith, trust, or confidence. A person

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

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

seeking to get something from the Department of Veterans' Affairs who files false forms (seeking a greater payment than that to which the person is entitled, for example) has also committed fraud upon that person's source of financial assistance. That false filing also frustrates the public purpose behind the payment, by (potentially, at least) diverting funds that would otherwise be used to carry out the public purpose. That a large number of victims may be involved does not differentiate a bankruptcy fraud from any other large-scale fraud.

We see no reason to give especially-severe treatment to bankruptcy fraud. The guidelines already deal with bankruptcy fraud in an appropriate manner. The Commission has determined – correctly, we believe – that a fraud offense should be punished principally on the basis of the economic harm caused to the direct victims. That approach can result in a defendant receiving greater punishment for filing false bankruptcy forms and schedules and thereby causing a loss of $205,000 than for committing perjury in a United States District Court proceeding in an attempt to win several million dollars in a civil action.[152]

Suggested Amendment

The Federal Public and Community Defenders therefore recommend that the

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

following new paragraph be added at the end of application note 6:

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

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

6. Subsection (b)(4)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to a prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed while on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).

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

AMENDMENT 8(D)

The Commission has asked for comment upon "whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal." Seven Circuits have held that such postconviction rehabilitation is a basis for such a departure.[153] Only one Circuit has held that such postconviction rehabilitation is not a basis for such a departure.[154] The Federal Public and Community Defenders agree with the majority of Circuits.

Since *Koon v. United States*,[155] all the Circuits that have considered the matter agree

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

The Tenth Circuit also has approved such a departure. United States v. Roberts, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpub.) (relying on United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998), a postoffense rehabilitation case that held that "*Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts were not expressly forbidden as a basis for departure by the Sentencing Commission").

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

[155]518 U.S. 81, 116 S.Ct. 2935 (1996).