

## REVISED AMENDMENT 8: CIRCUIT CONFLICTS

**Synopsis of Proposed Amendment:** *This amendment proposes to address a number of circuit conflicts as follows:*

### (A) Aberrant Behavior

**Synopsis of Proposed Amendment:** *This amendment provides two options for addressing the circuit conflict regarding whether for purposes of downward departure from the guideline range a “single act of aberrant behavior” includes multiple acts occurring over a period of time. Option 1 provides for a downward departure for the extraordinary case in which the offense consisted of a single criminal act and constituted aberrant behavior on the part of the defendant. Option 1 lists three factors that must be present in order for a downward departure to be considered: (1) limited duration of the offense; (2) not more than limited planning; and (3) the lack of sophistication. Option 1 also lists a number of factors the court may consider in determining whether the offense constituted aberrant behavior. Finally, Option 1 provides that a downward departure for aberrant behavior ordinarily would not be warranted if the offense involved violence or the threat of violence, or if the defendant has more than one criminal history point.*

*Option 2 provides that a downward departure may be warranted if the defendant’s criminal conduct constitutes extraordinarily aberrant behavior. However, this option precludes the court from departing on this basis if: (1) death or serious bodily injury resulted; (2) a firearm or other dangerous weapon was brandished, discharged, or otherwise used; (3) the defendant was convicted of a serious drug trafficking offense; (4) the defendant has more than one criminal history point or a prior felony conviction; or (5) the facts and circumstances indicate a need to incarcerate the defendant to protect the public.*

### Proposed Option 1:

In Chapter One, Part A, Subpart (4)(d), insert a footnote at the end of the last sentence of the last paragraph as follows:

“Although the Commission had not addressed ‘single acts of aberrant behavior’ at the time the Introduction to Guidelines Manual was originally written, it subsequently addressed the issue in Amendment \_\_\_, effective November 1, 2000. (See Appendix C, Amendment \_\_\_.)”

In Chapter Five, Part K, Subpart 2, insert at the end the following new policy statement:

#### “§5K2.19 Aberrant Behavior (Policy Statement)

The court may reduce the sentence below the guideline range in an extraordinary case if the offense consisted of a single criminal act that constituted aberrant behavior on the part of the defendant. However, a reduction under this provision may be considered only if the offense: (1) was of limited duration; (2) involved not more than limited planning; and (3) lacked sophistication.

In determining whether the offense constituted aberrant behavior, the court may consider the defendant's: (1) mental and emotional conditions; (2) employment record; (3) family ties and responsibilities, and community ties; (4) record of prior good works; (5) motivation for committing the offense; and (6) efforts to mitigate the effects of the offense.

A reduction in the sentence below the guideline range under this section ordinarily would not be warranted if: (1) the offense involved actual violence or a serious threat of violence; or (2) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood).

#### Commentary

*Background: A downward departure would be warranted under this provision in an extraordinary case in which a combination of factors, such as those listed in this section, indicates aberrant behavior on the defendant's part and makes the case significantly different from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the factors individually distinguishes the case. See the Commentary to §5K2.0 (Grounds for Departure).*"

#### **Proposed Option 2:**

In Chapter One, Part A, Subpart (4)(d), insert the following footnote at the end of the last sentence of the last paragraph:

"Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual was originally written, it subsequently addressed the issue in Amendment \_\_, effective November 1, 2000. (See Appendix C, Amendment \_\_.)"

In Chapter 5, Part K, Subpart 2, insert at the end the following new policy statement:

#### **"§5K2.19      Extraordinarily Aberrant Behavior (Policy Statement)**

A sentence below the applicable guideline range may be warranted if the defendant's criminal conduct constituted extraordinarily aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant brandished, discharged, or otherwise used a firearm or other dangerous weapon; (3) the defendant was convicted of a serious drug trafficking offense; (4) the defendant has (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (B) a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four; or (5) the facts and circumstances of the defendant's offense otherwise indicate a need to incarcerate the defendant to protect the public.

#### Commentary

#### Application Note:

1.      *For purposes of this policy statement—*

*'Extraordinarily aberrant behavior' means (A) a single occurrence of criminal behavior committed*

spontaneously or with minimal planning; and (B) that behavior represents a marked deviation by the defendant from an otherwise law abiding life.

‘Serious drug trafficking offense’ means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

‘Brandished,’ ‘dangerous weapon,’ and ‘serious bodily injury’ are defined in the Commentary to §1B1.1(Application Instructions).”.

## **(B) Drug Sales in a Protected Location or to a Protected Individual**

**Synopsis of Proposed Amendment:** *This amendment addresses the circuit conflict regarding 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 in that guideline or, alternatively, whenever the defendant’s relevant conduct included drug sales in a protected location or involving a protected individual. The amendment modifies the Statutory Index (Appendix A) and §§1B1.1(a) and 1B1.2(a) to clarify the relationship among those provisions. Sections 1B1.1(a) and 1B1.2(a) state that courts must determine and apply the offense guideline in Chapter Two most applicable to the offense of conviction and that the Statutory Index provides a listing to assist in that determination. In the Statutory Index, the Commission has specified the offense guideline(s) most applicable to the listed statutes of conviction. This amendment makes clear that courts must apply the offense guideline referenced for the statute of conviction listed in the Statutory Index unless the case falls within the limited “stipulation” exception set forth in §1B1.2(a). The amendment also deletes the language which has been read to permit a court to decline to use the listed offense guideline in cases that were allegedly “atypical” or “outside the heartland”. See *United States v. Smith*, 186 F.3d 290 (3d Cir. 1999).*

### **Proposed Amendment:**

#### **§1B1.1. Application Instructions**

- (a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the applicable offense guideline section from Chapter Two (Offense Conduct) most applicable to the offense of conviction. See §1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.

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#### **§1B1.2. Applicable Guidelines**

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) 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). ~~Provided;~~ ~~however;~~ However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Conspiracies, Attempts, Solicitations) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses).

\* \* \*

Commentary

\* \* \*

Application Notes:

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~~The court is to use the appropriate Chapter Two guideline section from Chapter Two most applicable to the offense of conviction referenced in the Statutory Index for the offense of conviction. However, (A) in the case a plea agreement containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section most applicable to the stipulated offense is to be used, and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1, is to be used. ~~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~~the Statutory Index will specify only one offense guideline for that offense of conviction. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for ~~applies based upon the nature of~~ the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Conspiracies, Attempts, Solicitations) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. See §2X5.1 (Other Offenses).*

\* \* \*

3. *In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. ~~As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. See §§1B1.3 (Relevant Conduct) and 1B1.4 (Information to be Used in Imposing Sentence).~~*

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**§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

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Commentary

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Application Note:

1. ~~Where~~ This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which] only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).

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## APPENDIX A - STATUTORY INDEX

### INTRODUCTION

This index specifies the offense guideline section(s) or sections in Chapter Two ordinarily applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted. ~~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.)~~ For the rules governing the determination of the offense guideline section(s) from Chapter Two, and for any exceptions to those rules, see §1B1.2 (Applicable Guidelines).

~~————— If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 as well as the guideline for the substantive offense.~~

~~For those offenses not listed in this index, the most analogous guideline is to be applied. (See §2X5.1.)~~

~~The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See §1B1.9.)~~

### (C) Bankruptcy Fraud

**Synopsis of Proposed Amendment:** *This amendment addresses the conflict regarding whether the fraud guideline enhancement for violation of a judicial or administrative order, injunction, decree, or process applies to falsely completing bankruptcy schedules and forms. The amendment provides for a two-level enhancement for bankruptcy fraud by including it an alternative trigger for the existing enhancement. The amendment is intended to recognize the factual distinction between violations of prior court orders and the fraudulent action perpetrated in a bankruptcy proceeding that is not in violation of a prior court order.*

**Proposed Amendment:**

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

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(b) Specific Offense Characteristics

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- (4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, ~~or~~; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

\* \* \*

Commentary

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Application Notes:

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1. *If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.*

6. *Subsection (b)(4)(BC) provides an ~~adjustment for violation of any judicial or administrative order, injunction, decree, or process.~~ enhancement if the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such an official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of ~~the~~ that prior decree or order, this ~~provision~~ enhancement 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~~ enhancement. This ~~subsection~~ enhancement does not apply ~~to~~ if the same conduct ~~addressed~~ resulted in an enhancement pursuant to a provision found elsewhere in the guidelines; (e.g., a violation of a condition of release addressed in §2J1.7 (Offense Committed/Commission of Offense While on Release) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).*

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Background:

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*Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. 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. The commission of a fraud in the course of a bankruptcy proceeding is subject to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.*

#### **(D) Post-Offense Rehabilitation**

**Synopsis of Proposed Amendment:** *This amendment disallows a downward departure for post-sentencing rehabilitative efforts, even if those efforts are exceptional.*

#### **Proposed Amendment:**

### **CHAPTER ONE - INTRODUCTION AND GENERAL APPLICATION PRINCIPLES**

#### **PART A - INTRODUCTION**

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#### **4. The Guidelines' Resolution of Major Issues (Policy Statement)**

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##### **(b) Departures.**

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Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts) list several factors that the court cannot take into account as grounds for departure.

\* \* \*

In Chapter Five, Part K, Subpart 2, insert at the end the following new policy statement:

#### **“§5K2.19 Post-Sentencing Rehabilitative Efforts (Policy Statement)**

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

#### **Commentary**

***Background:*** *The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of*

imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.”

## (E) Upward Departure Based on Dismissed or Uncharged Conduct

**Synopsis of Proposed Amendment:** *This amendment addresses the circuit conflict regarding whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case. The amendment modifies §§1B1.4 and 6B1.2, with an accompanying new departure guideline in Chapter Five, to make clear that the court may accept a plea agreement and nevertheless depart upward based on charges dismissed or uncharged pursuant to that agreement.*

### Proposed Amendment:

#### §1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

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#### Commentary

Background: *This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range or for sentencing outside the guideline range. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).*

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## CHAPTER FIVE - DETERMINING THE SENTENCE

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### PART K - DEPARTURES

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## 2. OTHER GROUNDS FOR DEPARTURE



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**§5K2.19**      **Dismissed and Uncharged Conduct (Policy Statement)**

The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason, and (2) that did not enter into the determination of the applicable guideline range.

\* \* \*

**§6B1.2.**      **Standards for Acceptance of Plea Agreements (Policy Statement)**

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

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

\* \* \*

**Commentary**

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*The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct). Section 5K2.19 addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.*