



Amendments to the Sentencing Guidelines

May 18, 1998

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on May 1, 1998.*

*Effective Date: November 1, 1998 (unless modified or rejected
by Congress).*

INDEX TO 1998 AMENDMENTS TO THE SENTENCING GUIDELINES

<u>AMDT. NO.</u>	<u>PAGE NO.</u>	<u>ISSUE</u>
1	1	Desecration of Veterans' Cemeteries (§§2B1.1, 2B1.3, 2K1.4). — <i>This amendment increases by two offense levels the penalties in the theft, property destruction, and arson guidelines for offenses involving desecration of property in national cemeteries, in response to the Veterans' Cemeteries Protection Act of 1997.</i>
2	4	Mass-Marketed Frauds; Sophisticated Concealment (§§2F1.1, 2T1.1, 2T1.4, 2T3.1). — <i>This amendment (A) increases by two offense levels the penalties for fraud offenses that use mass-marketing to carry out the fraud; (B) provides a new enhancement and a floor offense level of level 12 in the fraud guideline if (i) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (ii) a substantial part of a fraudulent scheme was committed from outside the United States; or (iii) the offense otherwise involved sophisticated concealment; and (C) conforms the language of the current enhancement for “sophisticated means” in various tax guidelines to the new sophisticated concealment amendment in the fraud guideline.</i>
3	9	Prohibited Person Firearms Offenses (§2K2.1). — <i>This amendment (A) modifies the definition of “prohibited person” in the firearms guideline to include a person convicted of a misdemeanor crime of domestic violence; (B) increases by two offense levels the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person; and (C) makes technical and conforming changes in Application Note 12 of §2K2.1.</i>

- 4 12 **Failure to Appear, Grouping (§§2J1.6, 2P1.2, 3C1.1, 3D1.1, 3D1.2, 5G1.2).**—*This amendment (A) resolves a circuit conflict by (i) more clearly distinguishing between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); and (ii) stating that the method outlined for determining the sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (B) adds an upward departure provision in §2J1.6 if the offense conduct involves multiple obstructive behavior; (C) makes conforming changes in §2P1.2 because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (D) makes conforming changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2.*
- 5 18 **Abuse of Position of Trust, Imposters (§3B1.3).**—*This amendment resolves a circuit conflict by establishing that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust.*
- 6 20 **Applicability of Obstruction Adjustment to Closely Related Cases (§3C1.1).**—*This amendment (A) resolves a circuit conflict by stating that the obstruction must relate either to the defendant’s offense of conviction (including relevant conduct) or to a closely related case; and (B) clarifies that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant’s offense of conviction.*
- 7 22 **Lying About Drug Use While on Pre-Trial Release (§3C1.1).**—*This amendment resolves a circuit conflict by excluding from application of §3C1.1 a defendant’s denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1.*

- 8 23 **Diminished Capacity (§5K2.13).**—*This amendment (A) addresses a circuit conflict by allowing a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under three circumstances; and (B) adds an application note that defines “significantly reduced mental capacity” to include both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful), based on the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997).*
- 9 25 **Corrections to Conditions of Probation and Supervised Release (§§5B1.3, 5D1.3).**—*This amendment (A) adds to §5B1.3 a condition of probation regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; (B) deletes the reference in the supervised release guideline to “just punishment” as a reason for the imposition of curfew as a condition of supervised release because it is not included in 18 U.S.C. § 3583(c) as a factor to be considered in imposing a term of supervised release; and (C) amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary, as opposed to mandatory, conditions are policy statements of the Commission, not binding guidelines.*
- 10 27 **Koon Departure Review Standards (§5K2.0).**—*This amendment (A) incorporates into the general departure policy statement the principal holding and key analytical points of the United States Supreme Court’s decision in Koon v. United States, 518 U.S. 81 (1996); (B) removes language that is inconsistent with the Koon holding; and (C) generally enhances the precision of the language of the policy statement.*
- 11 29 **Technical Corrections (§§2B3.1, 2K2.1, 6A1.3).**—*This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3.*

**1998 AMENDMENTS TO THE SENTENCING GUIDELINES,
POLICY STATEMENTS, AND OFFICIAL COMMENTARY**

1. **Synopsis of Amendment:** *The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment implements the directive to the Commission in the Veterans’ Cemetery Protection Act of 1997, Pub. L. 105–101, § 2, 111 Stat. 2202, 2202 (1997). This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). "National cemetery" is defined in the same way as that term is defined in the statute.*

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

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- (b) Specific Offense Characteristics

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- (8) **If the offense involved theft of property from a national cemetery, increase by 2 levels.**

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Commentary

Application Notes:

1. * * *

“Foreign instrumentality” and “foreign agent” are defined in 18 U.S.C. § 1839(1) and (2), respectively.

***?National cemetery?** means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.*

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Background: * * *

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

Subsection (b)(8) implements the instruction to the Commission in Section 2 of Public Law 105–101.

§2B1.3 **Property Damage or Destruction**

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(b) Specific Offense Characteristics

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- (4) If property of a national cemetery was damaged or destroyed, increase by **2** levels.

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Commentary

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Application Notes:

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?National cemetery? means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

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Background: *Subsection (b)(4) implements the instruction to the Commission in Section 2 of Public Law 105–101.*

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§2K1.4 **Arson; Property Damage by Use of Explosives**

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(b) Specific Offense Characteristics

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- (2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by **2** levels.

Commentary

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Application Notes:

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4. *?National cemetery? means a cemetery (A) established under section 2400 of title 38, United States Code, or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.*

Background: *Subsection (b)(2) implements the directive to the Commission in Section 2 of Public Law 105-101.*

2. **Synopsis of Amendment:** *This amendment has three purposes: (1) to provide an increase for fraud offenses that use mass-marketing to carry out the fraud; (2) to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender; and (3) to clarify and conform an existing enhancement that provides an increase for tax offenses that similarly involve sophisticated concealment.*

First, this amendment adds a two-level enhancement in the fraud guideline for offenses that are committed through mass-marketing. The Commission identified mass-marketing as a central component of telemarketing fraud and also determined that there were other fraudulent schemes that relied on mass-marketing to perpetrate the offense (for example, Internet fraud). Accordingly, rather than provide a limited enhancement for telemarketing fraud only, the Commission determined that a generally applicable specific offense characteristic in the fraud guideline would better provide consistent and proportionate sentencing increases for similar types of fraud, while also ensuring increased sentences for persons who engage in mass-marketed telemarketing fraud.

Second, this amendment provides an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. The new enhancement provides a two-level increase and a "floor" offense level of level 12 in the fraud guideline and replaces the current enhancement for "the use of foreign bank accounts or transactions to conceal the true nature or extent of fraudulent conduct." There are three alternative provisions to the enhancement. The first two prongs address conduct that the Commission has been informed often relates to telemarketing fraud, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. Both types of conduct are specifically covered by the new enhancement. The third prong provides an increase if any offense covered by the fraud guideline otherwise involves sophisticated concealment. This prong addresses cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.

Third, this amendment provides a two-level enhancement for conduct related to sophisticated concealment of a tax offense. The primary purpose of this amendment is to conform the language of the current enhancement for "sophisticated means" in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline. Additionally, the amendment resolves a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment accordingly is based on the overall offense conduct for which the defendant is accountable.

§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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- (5) ~~If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.~~

(A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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- (7) If the offense was committed through mass-marketing, increase by 2 levels.

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Commentary

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Application Notes:

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14. For purposes of subsection (b)(5)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

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20. *"Mass-marketing," as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.*

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§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

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(b) Specific Offense Characteristics

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(2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels.**

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Commentary

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Application Notes:

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4. ~~"Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(2), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

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§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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(b) Specific Offense Characteristics

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- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels. If the offense involved sophisticated concealment, increase by 2 levels.~~

Commentary

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Application Notes:

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~~3. "Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

3. *For purposes of subsection (b)(2), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.*

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§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

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(b) Specific Offense Characteristic

- (1) ~~If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels.**

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Commentary

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Application Notes:

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3. *For purposes of subsection (b)(1), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.*

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3. **Synopsis of Amendment:** *This amendment has three purposes: (1) to change the definition of "prohibited person" in the firearms guideline so that it includes a person convicted of a misdemeanor crime of domestic violence; (2) to provide the same base offense levels for both a prohibited person and a person who is convicted under 18 U.S.C. § 922(d) of transferring a firearm to a prohibited person; and (3) to make several technical and conforming changes to the firearms guideline.*

The first part of the amendment amends Application Note 6 of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to include a person convicted of a misdemeanor crime of domestic violence within the scope of "prohibited person" for purposes of that guideline. It also defines "misdemeanor crime of domestic violence" by reference to the new statutory definition of that term in 18 U.S.C. § 921(a).

This part of the amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, Pub. L. 104–208, 110 Stat. 3009 (1996) (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. § 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. § 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists the information a person not licensed under 18 U.S.C. § 923 must include in a statement to the handgun importer, manufacturer, or dealer, was amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. § 921(a) to define "misdemeanor crime of domestic violence".

Violations of 18 U.S.C. § 922(d) and (g) are covered by §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". This part of the amendment conforms Application Note 6 of §2K2.1 to the new statutory provisions.

The second part of this amendment increases the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person. Specifically, this part amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline in order to make those offense levels applicable to the person who transfers the firearm to the prohibited person. A person who is convicted under 18 U.S.C. § 922(d) has been shown beyond a reasonable doubt either to have known, or to have had reasonable cause to believe, that the transferee was a prohibited person.

This part of the amendment derives from a recommendation by the United States Department of Justice and is generally consistent with a proposed directive contained in juvenile justice legislation approved by the Senate Judiciary Committee in 1997.

The third part of this amendment makes two technical and conforming changes in Application Note 12 of §2K2.1. First, the amendment corrects statutory references to 18 U.S.C. § 924(j) and (k), which were added as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub.

L. 103–322, 108 Stat. 1796 (1994). In the Economic Espionage Act of 1996, Pub. L. 104–294, 110 Stat. 3488 (1996), Congress again amended 18 U.S.C. § 924 and redesignated the provisions as subsections (l) and (m). The amendment conforms Application Note 12 to that redesignation. Second, the amendment corrects the misplacement of the reference to 26 U.S.C. § 5861(g) and (h).

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

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(4) **20**, if ~~the defendant~~ --

(A) **the defendant** had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) ~~is a prohibited person, and~~ the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); **and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d);** or

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(6) **14**, if the defendant **(A)** is a prohibited person; **or (B) is convicted under 18 U.S.C. § 922(d);** or

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Commentary

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Application Notes:

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6. "Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; (v) being an alien, is illegally or unlawfully in the United States; ~~or~~ (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); **or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33).**

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12. *If the offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), 18 U.S.C. ~~§ 924(j) or (k)~~, § 924(l) or (m), or 26 U.S.C. ~~§ 5861(g) or (h)~~ (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.*

Similarly, if the ~~only~~ offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.

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4. **Synopsis of Amendment:** *The purpose of this amendment is to clarify how several guideline provisions, including those on grouping multiple counts of conviction, work together to ensure an incremental, consecutive penalty for a failure to appear count. This amendment addresses a circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the count of conviction for the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare United States v. Agoro, 996 F.2d 1288 (1st Cir. 1993) (grouping rules apply), and United States v. Flores, No. 93-3771, 1994 WL 163766 (6th Cir. May 2, 1994) (unpublished) (same), with United States v. Packer, 70 F.3d 357 (5th Cir. 1995) (grouping rules defeat statutory purposes of 18 U.S.C. § 3146), cert. denied, 117 S. Ct. 75 (1996). The amendment maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies among different guidelines and explains how the guideline provisions work together to ensure an incremental, consecutive penalty for the failure to appear count. Specifically, the amendment (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) states that the method outlined for determining a sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (3) adds an upward departure provision if offense conduct involves multiple obstructive acts; (4) makes conforming changes in §2P1.2 (Providing or Possessing Contraband in Prison) because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (5) makes conforming changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2.*

§2J1.6. Failure to Appear by Defendant

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Commentary

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Application Notes:

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3. *In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.2-3D1.5 do not apply.*

~~*Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of*~~

~~imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.~~

In the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

4. *If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.*

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§2P1.2 Providing or Possessing Contraband in Prison

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Commentary

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Application Notes:

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2. *In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possession a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, § 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a ?total punishment? that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines a ?total punishment? of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.*

*Pursuant to 18 U.S.C. § 1791(c), ~~as amended~~, a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served **by the inmate** at the time of the violation.*

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§3C1.1. Obstructing or Impeding the Administration of Justice

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Commentary

Application Notes:

* * *

6. *~~Where~~If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except ~~where~~if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., ~~where~~if the defendant threatened a witness during the course of the prosecution for the obstruction offense).*

7. ~~Where~~*If the defendant is convicted both of the an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and the an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.*

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

- (b) ~~Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Exclude from the application of §§ 3D1.2-3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment.~~ Sentences for such counts are governed by the provisions of §5G1.2(a).

Commentary

Application Note:

1. ~~Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively). Convictions on such counts are not used in the determination of a combined offense level under this Part; The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). but~~ However, a count covered by subsection (b) may affect the offense level *determination* for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See, Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). ~~Example: The~~ *For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline.*

Pursuant to 18 U.S.C. § 924(c), ~~the~~ the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count, ~~as required by law.~~ See §5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q)(possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c)(penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

* * *

§3D1.2. Groups of Closely Related Counts

* * *

Commentary

Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute ~~mandates imposition of a consecutive sentence~~ (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. See §3D1.1(b); id., comment (n.1).

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) The sentence to be imposed on a count for which the statute ~~mandates a consecutive sentence~~ (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment shall be determined by that statute and imposed independently.

* * *

Commentary

* * *

~~Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts. Subsection (a) applies if a statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.~~

5. **Synopsis of Amendment:** *The purpose of this amendment is to establish that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust. This amendment resolves a circuit conflict on that issue. Compare United States v. Gill, 99 F.3d 484 (1st Cir. 1996) (adjustment applied to defendant who posed as licensed psychologist), and United States v. Queen, 4 F.3d 925 (10th Cir. 1993) (adjustment applied to defendant who posed as financial broker), cert. denied, 510 U.S. 1182 (1994), with United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (defendant who poses as physician does not occupy a position of trust). The amendment adopts the majority appellate view and provides that the abuse of position of trust adjustment applies to an imposter who pretends to hold a position of trust when in fact he does not. The Commission has determined that, particularly from the perspective of the crime victim, an imposter who falsely assumes and takes advantage of a position of trust is as culpable and deserving of increased punishment as is a defendant who abuses an actual position of trust.*

§3B1.3. Abuse of Position of Trust or Use of Special Skill

* * *

Commentary

Application Notes:

1. "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of **public or private** trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, ~~would apply~~**applies** in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment ~~would~~**does** not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

* * *

2. *This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.*

23. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*

Background: *This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not. Such persons generally are viewed as more culpable.*

6. **Synopsis of Amendment:** *The purpose of this amendment is to clarify what the term "instant offense" means in the obstruction of justice guideline, §3C1.1. This amendment resolves a circuit conflict on the issue of whether the adjustment applies to obstructions that occur in cases closely related to the defendant's case or only those specifically related to the offense of which the defendant convicted. Compare United States v. Powell, 113 F.3d 464 (3d Cir.) (adjustment applies if defendant attempts to impede the prosecution of a co-defendant who is charged with the same offense for which defendant was convicted), cert. denied, 118 S. Ct. 454 (1997), United States v. Walker, 119 F.3d 403 (6th Cir.) (same), cert. denied, 118 S. Ct. 643 (1997), United States v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (adjustment applies if defendant attempts to obstruct justice in a case closely related to his own), and United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992) (adjustment applies when defendant testifies falsely at his own hearing about co-defendants' roles in the offense), with United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) (cannot apply adjustment based on obstructive conduct outside the scope of charged offense), and United States v. Partee, 31 F.3d 529 (7th Cir. 1994) (same). The amendment, which adopts the majority view, instructs that the obstruction must relate either to the defendant's offense of conviction (including any relevant conduct) or to a closely related case. The amendment also clarifies the temporal element of the obstruction guideline (i.e., that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction).*

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. *This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.*

~~2.~~ * * *

- ~~2.~~3. *Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note ~~3~~4 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note ~~4~~5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in*

Application Notes ~~3~~4 and ~~4~~5 should assist the court in determining whether application of this enhancement is warranted in a particular case.

~~3~~.4.

* * *

~~4~~.5. *Some types of conduct ordinarily do not warrant application of this enhancement but may warrant a greater sentence within the otherwise applicable guideline range. However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note ~~7~~8, below.*

~~5~~.6.

* * *

~~6~~.7.

* * *

~~7~~.8.

* * *

~~8~~.9.

* * *

7. **Synopsis of Amendment:** *The purpose of this amendment is to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under §3C1.1. This amendment resolves a circuit conflict on that issue. Compare United States v. Belletiere, 971 F.2d 961 (3d Cir. 1992) (lying about drug use is not obstructive conduct that impedes government’s investigation of instant offense), and United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992), with United States v. Garcia, 20 F.3d 670 (6th Cir. 1994) (falsely denying drug use, while not outcome-determinative, is relevant), cert. denied, 513 U.S. 1159 (1995). The amendment, which adopts the majority view, excludes from application of §3C1.1 a defendant’s denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1 (Acceptance of Responsibility).*

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

* * *

Application Notes:

* * *

4. *Some types of conduct ordinarily do not warrant application of this ~~enhancement~~ **adjustment** but may warrant a greater sentence within the otherwise applicable guideline range **or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility))**. However, if the defendant is convicted of a separate count for such conduct, this ~~enhancement~~ **adjustment** will apply and increase the offense level for the underlying offense (*i.e.*, the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.*

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

* * *

- (d) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
- (e) *lying to a probation or pretrial services officer about defendant’s drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant’s sentence under §3E1.1 (Acceptance of Responsibility).*

* * *

8. **Synopsis of Amendment:** *The purpose of this amendment is to allow (except under certain*

circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a "crime of violence" as that term is defined in the career offender guideline. Compare United States v. Poff, 926 F.2d 588 (7th Cir.) (en banc) (definition of "non-violent offense" necessarily excludes a crime of violence), cert. denied, 502 U.S. 827 (1991), United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same), United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996) (same), United States v. Borrayo, 898 F.2d 91 (9th Cir. 1989) (same), and United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (same), with United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) (court must consider all the facts and circumstances to determine whether offense was non-violent; terms are not mutually exclusive), United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) (same), and United States v. Askari, ___ F.3d ___, 1998 WL 164561 (3d Cir. 1998) (en banc) ("non-violent offenses" are those that do not involve a reasonable perception that force against persons may be used in committing the offense), abrogating United States v. Rosen, 896 F.2d 789 (3d Cir. 1990) (non-violent offense means the opposite of crime of violence). The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines "significantly reduced mental capacity" in accord with the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity".

§5K2.13. Diminished Capacity (Policy Statement)

~~If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.~~

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to

incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. *For purposes of this policy statement—*

"Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

9. **Synopsis of Amendment:** *The purpose of this amendment is to make several technical and conforming changes to the guidelines relating to conditions of probation and supervised release. The amendment has three parts. First, the amendment adds to §5B1.3 a condition of probation regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L 104–208, 110 Stat. 3009 (1996). That section amended 18 U.S.C. § 3563(b) to add a new discretionary condition of probation with respect to deportation. Second, this amendment deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release. The need to provide "just punishment" is not included in 18 U.S.C. § 3583(c) as a permissible factor to be considered in imposing a term of supervised release. Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are advisory policy statements of the Commission, not binding guidelines.*

§5B1.3. Conditions of Probation

* * *

- (c) **(Policy Statement)** The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

* * *

- (d) **(Policy Statement)** The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(6) **Deportation**

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

- (e) **Additional Conditions (Policy Statement)**

The following "special conditions" may be appropriate on a case-by-case basis:

* * *

§5D1.3.

Conditions of Supervised Release

* * *

- (c) **(Policy Statement)** The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

* * *

- (d) **(Policy Statement)** The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

- (e) Additional Conditions **(Policy Statement)**

The following "special conditions" may be appropriate on a case-by-case basis:

* * *

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary ~~to provide just punishment for the offense~~, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

* * *

10. **Synopsis of Amendment:** *The purpose of this amendment is to reference specifically in the general departure policy statement the United States Supreme Court's decision in United States v. Koon, 518 U.S. 81 (1996). This amendment (1) incorporates the principal holding and key analytical points from the Koon decision into the general departure policy statement, §5K2.0; (2) deletes language inconsistent with the holding of Koon; and (3) makes minor, non-substantive changes that improve the precision of the language of §5K2.0.*

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists 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 described." Circumstances that may warrant departure from the ~~guidelines~~ **guideline range** pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The ~~controlling~~ decision as to whether and to what extent departure is warranted ~~can only be rests with the sentencing court made by the courts on a case-specific basis.~~ Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in **determining the guideline range** (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the ~~guideline level~~ **weight** attached to that factor **under the guidelines** is inadequate **or excessive**.

* * *

~~An~~**Finally, an** offender characteristic or other circumstance that is, **in the Commission's view**, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines ~~in a way that is important to the statutory purposes of sentencing.~~

Commentary

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996) Furthermore, ~~before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the~~

many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.? Id. at 98.

* * *

11. **Synopsis of Amendment:** *This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3.*

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

(b) Specific Offense Characteristics

* * *

(2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(67).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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Commentary

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Application Notes:

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5. "Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (a)(1), ~~and (a)(2)~~, and (b) and Application Note 1 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).

* * *

§6A1.3. Resolution of Disputed Factors (Policy Statement)

* * *

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 U.S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including

information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 ~~U.S.~~ **Ct.** at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

* * *