

**Resolving Circuit Conflicts:
Options**

December 1997

U.S. Sentencing Commission

Resolving Circuit Conflicts: Options

I. Introduction

This report presents options to resolve the nine circuit conflicts under consideration by the Commission during the 1997-98 amendment cycle. The Commission received reports in October and November analyzing the nine circuit conflicts that included relevant data and summaries of significant cases. Copies of these reports are available at the Commission web site.

The presentation of each circuit conflict is as follows:

- Statement of Issue
- Options
- Commission direction to staff

II. Presentation of Options

Issue 1

Fraud Guideline: Does filing fraudulent forms with bankruptcy and probate courts violate a judicial “order” or “process” within the meaning of the two-level enhancement under §2F1.1(b)(3)(B)?

Options:

1. Define scope of sentencing enhancement to include fraudulent court filings. (Majority View: 7th, 8th, 9th, 10th, & 11th circuits)
2. Define scope of sentencing enhancement to exclude fraudulent court filings. (Minority View: 1st & 2nd circuits)

Commission direction to staff: Draft amendment for both options.

Proposed Amendment:

Option 1: Majority appellate view - “violation of judicial process” interpreted broadly to mean an abuse of judicial proceedings (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal).

a) Enhancement provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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) violation of any 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**.

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Commentary

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Application Notes:

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5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).*

This enhancement also applies if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a

defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.

This enhancement does not apply to conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

* * *

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, the defendants who exploit victim's 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. **Similarly, a defendant who violates a special judicial process deserves additional punishment because the defendant is taking advantage of a judicial proceeding to gain an undeserved advantage.***

b) Upward departure provision:

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

* * *

(b) Specific Offense Characteristics

* * *

- (3) 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) violation of any 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**.

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Commentary

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Application Notes:

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5. ~~Subsection (b)(3)(B) provides an adjustment for~~*If the defendant committed a violation of any judicial or administrative order, injunction, decree, or process, an upward departure may be warranted.* If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of ~~the~~*that* prior decree or order, ~~this provision applies~~*an upward departure pursuant to this note may be warranted*, even if the defendant was not a specifically named party in that prior case. For example, *an upward departure may be warranted in the case of* 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.~~ *However, an upward departure based on* conduct addressed 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)) *is not authorized under this note.*

An upward departure pursuant to this note also may be warranted if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.

* * *

Background:

* * *

~~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, the defendants who exploit victim's 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.~~

Option 2: Minority appellate view -“violation of judicial process” is interpreted narrowly to mean a violation of a command or order issued to a specific person or party (presented as both an enhancement and an upward departure provision in coordination with the consolidation proposal).

a) Enhancement provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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) violation of any 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**.

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Commentary

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Application Notes:

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5. *Subsection (b)(3)(B) 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 warning, 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~~ is subject to this ~~provision~~ **enhancement**. This ~~subsection~~ **enhancement** does not apply to conduct addressed elsewhere in the guidelines; (e.g., a violation of a condition of release (addressed in §2J1.7 (~~Offense Committed~~ **Commission of Offense While on Release**)) or a violation of probation (addressed in §4A1.1 (Criminal History Category))).

* * *

Background:

* * *

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, the defendants who exploit victim's 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.

b) Upward departure provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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) violation of any 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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5. ~~Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative~~ *An upward departure may be warranted 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. The failure to comply with such a warning demonstrates aggravated criminal intent that may deserve a sentence outside the guideline range. If it is established that an entity the defendant controlled was a party to the prior proceeding and the defendant had knowledge of the prior decree or order, ~~this provision applies~~ an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, ~~would be subject to this provision. This subsection does not apply to~~ However, an upward departure based on conduct addressed 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)) is not authorized under this note.*

* * *

Background:

* * *

~~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, the defendants who exploit victim's 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.~~

Issue 2

Fraud Guideline:

Does an employee of a charity or government agency who misapplies or embezzles funds misrepresent that he was acting “on behalf of the agency” within the meaning of the two-level enhancement under §2F1.1(b)(3)(A)?

Options:

1. Define scope of sentencing enhancement to exclude a defendant with legitimate authority to represent the agency who misapplies or embezzles funds. (Tenth Circuit)
2. Define scope of sentencing enhancement to include a defendant with legitimate authority to represent the agency who misapplies or embezzles funds. (Fourth Circuit)

Commission direction to staff: Initially, Commissioners indicated that this issue should not be addressed at this time. Subsequently, Commissioners agreed to consider an option addressing the issue in the context of resolving issue 3 on imposters and the abuse of position of trust. This option is presented in option 1.

Upon further review, staff believes that it is better to resolve this issue in the context of §2F1.1. This approach is presented in option 2.

Option 1: (a) deletes all references to the specific offense characteristic regarding misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, in fraud guideline; (b) states that abuse of position of trust applies to the imposter who indicates he legitimately holds a position of trust when he does not; and (c) gives as an example, a defendant who commits a fraud by leading individuals to believe that the defendant was an authorized agent of a charitable, educational, religious, or political organization, or government agency.

Proposed Amendment:

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics

* * *

- (3) 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 violation of any 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.**

* * *

Application Notes:

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~~4. Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~

Background:

* * *

~~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.~~

* * *

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

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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.

Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.

- 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, (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician; or (C) perpetrates a fraud by leading individuals to believe the defendant was an authorized agent of a charitable, educational, religious, or political organization, or government agency. 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.

Option 2: (a) keeps the specific offense characteristic regarding misrepresentation in the fraud guideline; (b) clarifies that the enhancement applies to an individual who poses as an employee or an authorized agent of a charitable, educational, religious or political organization, or a government agency; (c) clarifies that the enhancement does not apply to a legitimate employee or authorized agent of a charitable, educational, religious or political organization, or a government agency; (d) directs that a legitimate employee who occupies a position of trust and who embezzles or misapplies agency funds receives an abuse of position of trust adjustment under §3B1.3.

§2F1.1.

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics

* * *

- (3) If the offense involved (A) a misrepresentation that the defendant ~~was acting on behalf of~~ **was an employee or authorized agent of** a charitable, educational, religious or political organization, or a government agency, or (B) **a** violation of any 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**.

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Application Notes:

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- 4. Subsection (b)(3)(A) provides an ~~adjustment~~ **enhancement** for a misrepresentation that the defendant was ~~acting on behalf of~~ **an employee or authorized agent of** a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan. **This enhancement does not apply to a legitimate employee or authorized agent of a charitable, educational, religious, or political organization, or a government agency, who embezzles or defrauds the organization or agency of its funds; however, such a defendant who holds a position of public or private trust will be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).**

Background:

* * *

*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~~ **To the contrary**, 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.*

Issue 3

Abuse of a Position of Trust: Does the enhancement apply to an impostor?

Options:

1. Define scope of sentencing adjustment to include impostors. (Majority View: 1st, 9th, & 10th circuits)
2. Define scope of sentencing adjustment to exclude impostors. (Minority View: 2nd Circuit)
3. Define scope of sentencing adjustment to exclude impostors and provide an increase in fraud guideline to punish impostors.

Commission direction to staff: Draft amendment for majority view only.

Proposed Amendment: (a) states that abuse of position of trust applies to the impostor who indicates that he legitimately holds a position of trust when he in fact does not; and (b) gives three examples of such circumstances.

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

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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.*

Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.

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 enhancement 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.*

Issue 4

Aberrant Behavior Departure: Is the departure limited to only spontaneous and thoughtless acts?

Options:

1. Define scope of departure narrowly to include only spontaneous and thoughtless acts by the defendant. (Majority View: 3rd, 4th, 5th, 7th, 8th, 11th, & D.C. circuits)
2. Define scope of departure broadly to include a consideration of the totality of circumstances. (Minority View: 1st, 9th, & 10th circuits)
3. Define scope of departure as unplanned, opportune behavior inconsistent with the defendant's prior good conduct.
4. Eliminate language from Chapter 1 of the Guidelines Manual.

Commission direction to staff: Draft amendment for the majority view that creates an aberrant behavior departure in Chapter 5 and removes the language from Chapter 1.

Proposed Amendment: (a) deletes aberrant behavior departure from Chapter One; (b) creates a new aberrant behavior departure in Chapter Five that limits the departure to “a spontaneous and thoughtless act”.

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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(d) Probation and Split Sentences.

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More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. ~~The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.~~

§5K2.19 Single Act of Aberrant Behavior (Policy Statement)

If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A “single act of aberrant behavior” means a spontaneous and thoughtless act. This definition does not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.

Issue 5

Obstruction of Justice Guideline: Does the term “instant offense,” as used in the obstruction of justice guideline, §3C1.1, include obstructions that occur in cases closely related to the defendant’s case or only those specifically related to the “offense of conviction.”

Options:

- (1) Define scope of sentencing adjustment broadly to apply to obstructions of justice in closely related cases. (Majority View: 3rd, 6th, 9th, & 10th circuits)
- (2) Define scope of sentencing adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. (Minority View: 2nd & 7th Circuits)

Commission direction to staff: Draft amendments for both options.

Proposed Amendment:

Option 1(a): Majority appellate view - “instant offense” means the offense of conviction and any closely related offense (straight interpretation and execution of majority view).

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

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. For purposes of this guideline—

“Instant offense” means the offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction.

~~1.2.~~ * * *

~~2.3.~~ * * *

~~3.4.~~ The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

- (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
- (b) committing, suborning, or attempting to suborn perjury *during the investigation, prosecution, or sentencing of the defendant's instant offense (see definition in Application Note 1)*;

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~~4.5.~~

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~~5.6.~~

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~~6.7.~~

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~~7.8.~~

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~~8.9.~~

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Option 1(b): Variation of majority appellate view - (1) clarifies the temporal element of the obstruction guideline (that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction); and (2) instructs that the obstruction must relate to either the defendant's offense of conviction or to a closely related case, such as that of a co-defendant.

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

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice (A) during **the course of** the investigation, prosecution, or sentencing of the instant offense **of conviction, and (B) the obstructive conduct related to the defendant's offense of conviction or 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 the defendant's offense of conviction or a closely related case, such as that of a co-defendant.*

~~1.2.~~ * * *

~~2.3.~~ * * *

~~3.4.~~ * * *

~~4.5.~~ * * *

~~5.6.~~ * * *

~~6.7.~~ * * *

~~7.8.~~ * * *

~~8.9.~~ * * *

Option 2: Minority appellate view - "instant offense" means offense of conviction; also clarifies the temporal element.

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

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense of conviction, 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 solely to the defendant's instant offense of conviction.*

~~1.2.~~ * * *

~~2.3.~~ * * *

~~3.4.~~ *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

* * *

*This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense **of conviction** if ~~where~~ there is a separate count of conviction for such conduct.*

~~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, below.*

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

(a) *providing a false name or identification document at arrest, except ~~where~~if such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense **of conviction**;*

* * *

~~5.6.~~ * * *

~~6.7.~~ * * *

~~7.8.~~ * * *

~~8.9.~~ * * *

Issue 6

Obstruction of Justice Guideline: Does lying to probation officer about drug use while on bail warrant the obstruction of justice adjustment?

Options:

- (1) Define scope of obstruction adjustment to exclude denial of drug use while on bail. (Majority View: 3rd & 7th circuits)
- (2) Define scope of obstruction adjustment to include denial of drug use while on bail. (Minority View: 6th Circuit)

Commission direction to staff: Do not draft amendments for either option at this time.

Issue 7

Failure to Appear Guideline: Does the guideline procedure of grouping the failure to appear count of conviction with the underlying offense violate the statutory mandate of imposing a consecutive sentence?

Options:

- (1) Maintain current grouping rules for failure to appear and obstruction of justice, but address internal inconsistencies in the Manual. (Majority view: 1st & 6th circuits)
- (2) Amend the failure to appear guideline to require a separate and consecutive sentence, similar to the manner in which a firearm conviction under 18 U.S.C. § 924(c) is sentenced. (Minority View: 5th Circuit)

Commission direction to staff : Draft amendment for the majority view only.

Proposed Amendment: (a) more clearly draws distinctions between statutes that require imposition of consecutive term of imprisonment only if imprisonment is imposed (e.g.,

18 U.S.C. § 3146 (Penalty for failure to appear)) and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of Firearm)); (b) adds paragraph stating that method outlined for determining sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (c) adds departure provision if offense conduct involves multiple obstructive behavior.

§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, although if a it does require that any sentence of imprisonment on the failure to appear count be 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).) Therefore, in such cases, theThe combined sentence mustwill 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, whereif 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. (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. (Please note that the reference to “instant offense” may be modified depending on whether and how the Commission decides to resolve that particular circuit conflict.)

~~4.5.~~

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

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Commentary

Application Notes:

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6. *Whereif* 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 *whereif* a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., *whereif* the defendant threatened a witness during the course of the prosecution for the obstruction offense).
7. *Whereif* 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

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- (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 USSG §2B3.1 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). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

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§3D1.2. Groups of Closely Related Counts

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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 the statute and imposed independently.

* * *

Commentary

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~~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 (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 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.

Issue 8

Computing Criminal History: Does confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualify as “incarceration” in determining the defendant’s subsequent criminal history score?

Options:

- (1) Include confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release from definition of incarceration in determining the defendant’s subsequent criminal history score. (Sixth Circuit)
- (2) Exclude confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation or supervised release from definition of incarceration in determining defendant’s subsequent criminal history score. (Ninth Circuit)

Commission direction to staff: Draft amendments for both options.

Proposed Amendment:

Option 1: Sixth Circuit approach - “term of imprisonment” includes confinement in a halfway house, community treatment center, or home detention imposed as a result of defendant violating probation, parole, or supervised release following an earlier term of imprisonment; such confinement relates back to the earlier term of imprisonment and brings that term of imprisonment within 15 year applicable time period.

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(e) Applicable Time Period

- (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant’s commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

* * *

Commentary

Application Notes:

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8. Applicable Time Period. ~~Section~~**Subsections** 4A1.2(d)(2) and (e) establish the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes **the offense of conviction and any relevant conduct.** ~~See within the scope of §1B1.3 (Relevant Conduct).~~ If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

Consistent with subsection (k) and Application Note 11 of this guideline, a term of imprisonment imposed upon revocation of probation, parole, or supervised release is considered part of the original sentence of imprisonment, even if the term of imprisonment imposed upon revocation was served in home detention, a community treatment center, or a halfway house. For example, for purposes of determining the applicable time period under §4A1.2(e)(1), a prior sentence of imprisonment that is not within the 15-year time period nevertheless will be countable if the defendant (A) was placed on probation, parole, or supervised release for that offense and (B) was sentenced to a term of imprisonment for revocation of the probation, parole, or supervised release within 15 years of the defendant's commencement of the instant offense.

* * *

11. Revocations to be Considered. Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. Example:

A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

* * *

Option 2: Ninth Circuit Approach - term of imprisonment does not include confinement in a halfway house, community treatment center, or home detention; such confinement upon revocation does not bring original term of imprisonment within the 15-year applicable time period.

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(e) Applicable Time Period

- (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

* * *

Commentary

Application Notes:

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8. Applicable Time Period. ~~Section~~**Subsections** 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

For purposes of subsection (d)(2), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation of probation, parole, or supervised release, are not within the meaning of “sentence to confinement.”

For purposes of subsection (e), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation of probation, parole, or supervised release, are not within the meaning of “sentence to imprisonment.”

Issue 9

Diminished Capacity Departure: Is a diminished capacity precluded if the defendant committed a “crime of violence” as that term is defined in the career offender guideline?

Options:

- (1) Define scope of departure narrowly to exclude all offenses that would be crimes of violence under the career offender guideline. (Majority View: 3rd, 6th, 7th, 8th, 9th, & 11th circuits)
- (2) Define scope of departure broadly to allow consideration of the facts and circumstances surrounding the commission of the crime in determining whether a defendant is dangerous. (Minority View: 4th & D.C. circuits)
- (3) Define scope of departure to exclude cases that involve actual violence or a serious threat of violence. (Variation of Minority View)
- (4) Define scope of departure broadly by removing “non-violent offense” limitation.

Commission direction to staff: Draft amendments for all options.

Proposed Amendment:

Option 1: Majority appellate view - importing definition of “crime of violence” from §4B1.2 (Definitions of Terms Used in Section 4B1.1).

§5K2.13 Diminished Capacity (Policy Statement)

If the defendant committed a ~~non-violent offense~~ **an offense other than a crime of violence** while suffering from significantly reduced mental capacity not resulting

from voluntary use of drugs or other intoxicants, a lower sentence **below the applicable guideline range** 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.

Commentary

Application Note:

1. *“Crime of violence” is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).*

Option 2: Minority appellate view - district court should consider totality of circumstances to determine whether the offense was non-violent:

§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 **below the applicable guideline range** 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 to protect the public. In determining whether an offense is non-violent, the court should consider the totality of the facts and circumstances of the offense. If the facts and circumstances of the offense or the defendant's criminal history indicate the defendant is dangerous such that there is a need for incarceration to protect the public, a departure under this policy statement is not warranted. If a departure is warranted, the departure should reflect the extent to which reduced mental capacity contributed to the commission of the offense.**

Option 3: “Compromise” version with McBroom volitional element:

§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 (a) the significantly reduced mental capacity was caused by the voluntary use of drugs or

other intoxicants; (b) 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 (c) 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 Notes:

1. For purposes of this policy statement—

“Significantly reduced mental capacity” means the defendant is unable 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.

Option 4: Eliminate “non-violent offense” element.

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

If the defendant committed ~~a non-violent~~ the offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a ~~lower~~ sentence **below the applicable guideline range** 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~~ **unless the nature and circumstances of the offense or the defendant’s criminal history** indicate a need for incarceration to protect the public.