

United States Sentencing Commission Public Meeting Minutes
April 13, 2010

Chair William K. Sessions III, called the meeting to order at 11:00 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge William K. Sessions III, Chair
- William B. Carr, Jr., Vice Chair
- Ketanji B. Jackson, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was present via telephone:

- Judge Ruben Castillo, Vice Chair

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

Chair Sessions stated that the Commission will hold a hearing on mandatory minimums on May 27, 2010, in Washington, D.C., in response to a directive from Congress. The Chair also stated that the annual National Training Seminar will be held on June 16-18, 2010, in New Orleans, LA.

The Chair expressed appreciation for the staff's work, noting the importance of this year's amendment cycle. The Chair thanked the commissioners as well, stating that it was a great honor to serve with them. The Chair explained that, while the Commission tries to arrive at a consensus, it also allows commissioners to express their own viewpoints and follow through on their own dictates of conscience without criticism from others. Finally, Chair Sessions indicated that it would likely be his and Vice Chair Castillo's last amendment cycle and stated that he honored their friendship. Vice Chair Castillo reciprocated the Chair's sentiments.

Ms. Sheon joined the Chair in thanking the staff for their hard work in a particularly busy year, which also included public hearings across the country. Ms. Sheon also noted that the Commission's 2009 Annual Report and Source Book are now available on the Commission's website, congratulating the Office of Legislative and Public Affairs and the Office of Research and Data for their work on the report.

The Chair called for a motion to adopt the January 12, 2010, public meeting minutes. Commissioner Howell made a motion to adopt the minutes, with Vice Chair Castillo seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

The Chair called on Mr. Cohen to inform the Commission on possible votes to amend the sentencing guidelines.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, amends §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005). The proposed amendment follows the three-step approach adopted by a majority of circuits in determining the sentence to impose and structures §1B1.1 to reflect that three-step approach. In addition, the proposed amendment adds Background Commentary to §1B1.1 to define the term “variance.” Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to promulgate the proposed amendment, with Vice Chair Carr seconding. The Chair called for a discussion on the vote. Vice Chair Castillo stated that he considered this an important amendment because, presently, there exist differences among the circuits as to what methodology to use at sentencing. Vice Chair Castillo believes that it is incumbent upon the Commission to standardize and formalize the sentencing methodology so that judges understand that there is a three-part analysis to sentencing, which has been endorsed by the Supreme Court. Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, addresses when a downward departure may be warranted in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant’s cultural assimilation to the United States. Several courts of appeals have upheld such departures and other courts of appeals have declined to rule on whether such a departure may be warranted. In order to promote uniform consideration of cultural assimilation by courts, the proposed amendment adds a new application note to §2L1.2 to provide that a downward departure based on cultural assimilation may be warranted in an illegal reentry case. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for a discussion on the vote. Commissioner Howell stated that a benefit of the regional hearings was the opportunity to hear from judges around the country, including two judges at the Austin, Texas public hearing who, independently of each other, raised the issue of cultural assimilation.

They both indicated the difficulty that they sometimes confront in illegal reentry cases with defendants who have lived their entire lives in the United States and are reentering, not because of any intention to commit further crimes, but because of their cultural ties to this country. Commissioner Howell expressed her appreciation that the Commission listened to those judges and addressed their concerns by providing a uniform set of standards and factors for courts to consider when evaluating a defendant's cultural assimilation.

Vice Chair Castillo stated that the Commission strives for sentencing uniformity pursuant to the Sentencing Reform Act of 1984. Vice Chair Castillo indicated that, during the regional hearings, the commissioners became aware through the experiences of judges along the United States-Mexico border that an amendment standardizing departures for cultural assimilation was warranted.

Commissioner Friedrich stated that she supports the proposed amendment because it has been refined to make clear that the departure is not appropriate in a case in which it would increase the risk to public safety. Commissioner Friedrich indicated that she also supports the amendment because several courts are already departing under §2L1.2 on cultural assimilation grounds, pursuant to §§5K2.0 (Grounds for Departure (Policy Statement)) and 5H1.6 (Family Ties and Responsibilities (Policy Statement)), and because, by providing greater guidance to judges on when such a departure is appropriate, this amendment may lead to greater consistency in application. Commissioner Friedrich noted that the Commission has increased the grounds for departure under §2L1.2 in recent years. Commissioner Friedrich continues to believe that the preferable and more effective course of action for reducing unwarranted disparities in sentences imposed pursuant to §2L1.2 would be to address the problems inherent in the §2L1.2 guideline itself. Commissioner Friedrich noted that the Commission consistently hears from judges, both in testimony and in their opinions, about the problems associated with this guideline and stated that she believes the Commission should take action to amend §2L1.2, including proactively seeking Congress's assistance in making the necessary statutory changes. Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, was a multi-part amendment regarding specific offender characteristics. Part A of the proposed amendment revises the introductory commentary to Chapter Five, Part H. As amended by Part A, the introductory commentary sets forth the statutory framework for the use of specific offender characteristics in sentencing. Part B revises the policy statements in Chapter Five, Part H, at §§5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works). As amended by Part B, these policy statements now provide that such characteristics may be relevant to determining whether a sentence outside the applicable guideline range is warranted, if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the

guidelines. Part C makes conforming changes to §5K2.0. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the motion. Vice Chair Castillo stated that this is an important first step in making Chapter Five more relevant to sentencing five years after Booker, and expressed his belief that more guidance would be forthcoming from the Commission. While noting that he and Chair Sessions would no longer be on the Commission, Vice Chair Castillo indicated that a very capable set of commissioners would provide this guidance. Vice Chair Castillo stated that reducing sentencing disparities is important, given that judges are not always conducting a departure analysis and are instead turning directly to variances. Vice Chair Castillo stated that he believes it is incumbent upon the Commission to revitalize Chapter Five, and he sees the current proposed amendment as an important first step.

Commissioner Howell echoed Vice Chair Castillo's remarks and added that the proposed amendment has garnered very interesting, in-depth public comment that was helpful to the commissioners and showed that this is a complicated area. Commissioner Howell expressed her thanks to all those who contributed helpful, thoughtful comments on the proposed amendment, noting particularly the Practitioner's Advisory Group, the Probation Officers Advisory Group, and the Federal Public Defenders, stating that the comments had provided the commissioners with important information to consider during the beginning of their discussions on how Chapter Five specific offender characteristics could be revised to become more useful to sentencing courts.

Commissioner Friedrich stated that she objected to the proposed amendment on both procedural and substantive grounds. With respect to process, Commissioner Friedrich stated that she strongly believes that any revisions to Chapter Five, Part H and §5K2.0 should be considered together, instead of using a piecemeal approach that the Commission has endorsed through this proposed amendment. Commissioner Friedrich explained that she believes that this approach will cause unnecessary confusion because the specific offender characteristics not addressed during this amendment cycle are subject to different departure standards than the amended specific offender characteristics.

Commissioner Friedrich maintained that the amendment will not achieve its intended goals. First, Commissioner Friedrich stated that the amendment will have little, if any, impact on the use of departures relative to variances, in part because variances are subject to more limited appellate review.

Second, Commissioner Friedrich explained that she does not believe the amendment will achieve the goal of reducing unwarranted sentencing disparities because the proposed amendment will

apply solely to departures, not variances, and therefore the “unusual degree” standard will not apply in any case in which a judge varies pursuant to section 3553(a). In addition, with respect to departures, Commissioner Friedrich noted that this amendment will loosen the post-PROTECT Act standard that requires a special offender characteristic to be present to an exceptional degree and replace it with a more permissive standard. She stated that this change in standard may result in a greater number of defendants being sentenced outside the guideline range. Commissioner Friedrich explained that, given that one of the principal purposes of the Sentencing Reform Act and the guidelines is to reduce unwarranted sentencing disparities, she is troubled that the Commission would propose this amendment at a time when sentencing disparity is increasing.

Commissioner Wroblewski expressed appreciation to Chair Sessions for his leadership during this amendment cycle, noting that the Chair took over in the middle of the amendment cycle. Commissioner Wroblewski noted that one of the biggest changes after the Supreme Court’s decision in Booker was the way in which specific offender characteristics are factored in the federal sentencing system: before Booker, specific offender characteristics were largely regulated by the Guidelines Manual and federal case law and had a deliberately limited role, while after Booker, they are largely unregulated by virtue of the effect of, and the appellate standard for reviewing decisions made pursuant to, section 3553(a)(1). Commissioner Wroblewski stated that the Department of Justice (DOJ) had expressed concern over unwarranted disparities resulting from this change. Commissioner Wroblewski noted that the Commission’s intent with this amendment is to try to address some of those disparities by bringing judges back from granting variances to considering departures, but he indicated that the DOJ is skeptical of this approach. Commissioner Wroblewski stated, however, that the DOJ hopes that this approach is effective and it looks forward to monitoring the effect of this amendment, and working with the Commission to address this issue, over the course of the next several years.

Commissioner Hinojosa stated that as a sentencing judge it is important to remind oneself that the Sentencing Reform Act itself recognized that there was a great need to avoid unwarranted disparities and at the same time recognized that there would be departures in an unusual and/or exceptional case. Commissioner Hinojosa maintained that it is also important for sentencing judges to recognize that one of the seven factors in section 3553(a) is the policy statements of the Commission, and therefore the departures, and that if judges skip section 3553(a)(5), they are not complying with all of the statutory requirements. Commissioner Hinojosa stressed that the belief that departures are not to be considered has no basis in the statute itself. Commissioner Hinojosa indicated that the proposed amendment is a partial means of addressing changes to the departure provisions in the manual and reflects the Commission’s continued commitment to studying the issue of departures and to providing further guidance on specific offender characteristics, including what, if any, changes should be made so that judges might find the manual more useful.

Chair Sessions stated that the purpose of the proposed amendment to the offender characteristics provisions is to revitalize departure use across the country in lieu of variances. The Chair

indicated that the Commission is suggesting that departures may be an option for those judges who were previously faced with the largely unregulated option of variances, and that this option may, in time, bring judges back into the guideline fold. The Chair contended that there is an even more important benefit to this particular approach, namely that it reflects input that the Commission has received for at least the past ten years concerning the need to provide information to practitioners about, for instance, how particular factors impact risk to the community, how particular characteristics affect recidivism, and the pluses and minuses of the use of offender characteristics. The Chair sees this amendment as the beginning of a real effort on behalf of the Commission to provide this kind of information to practitioners across the country. The Chair believes that by providing practitioners with this information, the Commission will see a reduction in disparity because a fairly similar approach to offender characteristics will be used across the country. The Chair stated that the more information that the Commission can provide to the community, information that the Commission has gained from the community of experts with which it consults, then the more consistency there will be throughout the country, both in terms of the ultimate sentence and in terms of justice done.

Hearing no further discussion, Chair Sessions called on the Staff Director to perform a roll call vote on the motion to adopt the proposed amendment. The motion was adopted by a 6 to 1 vote with Chair Sessions, Vice Chairs Castillo, Carr and Jackson, and Commissioners Hinojosa and Howell voting in favor of the motion and Commissioner Friedrich voting against the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, was a two-part amendment regarding alternatives to incarceration. Part A revises §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6, to clarify and illustrate cases in which a departure from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Part B expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the motion. Commissioner Friedrich stated that she supports Part A of this amendment because it clarifies the existing departure provision in Application Note 6 at §5C1.1 and provides additional direction to courts. In addition, unlike the departure that currently exists in Application Note 6, it directs courts to consider the risks to public safety. Commissioner

Friedrich expressed her support for Part B, explaining that it provides a modest expansion to the sentencing options available to judges for defendants who have an offense level of 11 or 13. Commissioner Friedrich indicated that she is sympathetic to the concerns raised by the DOJ, Department of the Treasury, Senator Leahy, and others about the effect this amendment could have on the types of sentences imposed on fraud and other white-collar offenders, but she supports the amendment because the authority granted to judges to impose alternative sentences is discretionary, and the Commission's sentencing statistics indicate that judges are already sentencing a large number of defendants who fall within these offense levels to such alternative sentences through both departures and variances.

Commissioner Howell stated that she supports both parts of this amendment and commended both Commissioner Hinojosa and Chair Sessions for their continued commitment to encouraging judges, in appropriate cases, to consider alternatives to incarceration. Commissioner Howell acknowledged the concern that the expansion of Zones B and C would affect white collar criminals, explaining that the Commission has had a longstanding concern for the fair and appropriate sentencing of white-collar defendants. Commissioner Howell underscored, however, the importance of placing these concerns in context: using 2009 federal sentencing data, Commissioner Howell noted that the number of serious white-collar offenders convicted of Class A and Class B felonies was small. Out of a total of about 71,000 cases, the number of serious white-collar defendants who would move from Zone C to Zone B under this amendment was 114, while the number of serious white-collar offenders who would move from Zone D to Zone C was 137, for a total number of 251, or .5 percent of the total number of cases.

Vice Chair Castillo expressed his thanks to Commissioner Howell for her analysis of the number and types of defendants affected by the proposed amendment; to Commissioner Hinojosa for starting the initiative on alternatives to incarceration; and to Chair Sessions for bringing the work to completion. Describing the amendment as a moderate first step in the development of alternatives to incarceration, Vice Chair Castillo stated that he was honored to support both parts of the amendment given that the country is eager for alternatives to incarceration and that judges have raised the need for alternatives throughout the Commission's regional hearings. Vice Chair Castillo indicated that the Commission would need to continue studying the impact of alternatives to incarceration to make sure that public safety was not impacted adversely, and noted that he was particularly sensitive to the issue of white-collar offenses and public corruption, having made it a hallmark of his career at the Commission to increase the penalties in these areas. Citing to the analysis provided by Commissioner Howell, Vice Chair Castillo expressed his confidence that there would be no jeopardy from the modest expansion of alternatives in this proposal. In addition, Vice Chair Castillo stated that the departure alternative for drug treatment is an important step given where the country is right now and he expressed the hope that this alternative, if successful, would be expanded in the future by other commissioners.

Commissioner Wroblewski stated that the DOJ had previously indicated its support for one part of this amendment and its opposition to a different part of the amendment. Commissioner Wroblewski thanked the Commission for working hard on Part A to craft an amendment

clarifying when departures are appropriate to serve a particular treatment purpose. Commissioner Wroblewski indicated that the DOJ believes that the clarification will be helpful and will preserve the fundamental principle in the guidelines that similar offenders who commit similar offenses will be treated similarly, while at the same time directing courts toward treatment for certain low-level offenders.

Addressing Part A, Chair Sessions stated that he believes that the issue is one of public safety, explaining that the Commission has reviewed studies indicating that recidivism rates are reduced when treatment is provided to low-level, nonviolent drug offenders. The Chair explained that the Commission's amendment is a modest step aimed at those offenders who probably would be facing periods of imprisonment that would not entail substantive drug treatment. The Chair stated that, given the studies on recidivism and treatment, the smartest course of action is to provide treatment for these offenders, not imprisonment, both because it is cost-effective, and more importantly, because it protects the public by addressing the treatment needs of the offenders before they are returned to the community. Chair Sessions stated that he endorses this amendment and hopes that this is only the first step in expanding alternatives to incarceration to reduce the risk to the public.

Commissioner Howell complimented Commissioner Wroblewski for all of his help throughout this amendment cycle. Commissioner Howell stated that Commissioner Wroblewski has provided the Commission with very constructive comments that have given the Commission much to think about.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Commissioner Hinojosa thanked the Chair for leading the Commission through this amendment cycle, noting that it is a difficult task and one which the Chair performed well. Commissioner Hinojosa also expressed his appreciation to Commissioner Wroblewski and to all of the groups and individuals that the Commission heard from during the amendment cycle, including the Federal Public Defenders, the Practitioner's Advisory Group, the Victims Advisory Group, the Probation Officers Advisory Group, and members of Congress. Commissioner Hinojosa stated that all of the comments that the Commission receives aid in the amendment process because input from different viewpoints makes the Commission's work easier and better.

Chair Sessions asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Howell made a motion to adjourn, with Commissioner Hinojosa seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 11:40 a.m.

EXHIBIT A

SECOND REVISED PROPOSED AMENDMENT: APPLICATION INSTRUCTIONS

Synopsis of Proposed Amendment: *This revised proposed amendment amends §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005).*

As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the Guidelines Manual, a district court is required to properly calculate and consider the guidelines when sentencing. See 18 U.S.C. § 3553(a)(4); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita v. United States, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." See Irizarry v. United States, 128 S.Ct. 2198, 2202 (2008). A "variance" – i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual – is considered only after departures have been considered.

As the Fifth Circuit has explained: "Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." United States v. Tzep-Mejia, 462 F.3d 522 (5th Cir. 2006) (internal footnote and citation omitted). On this point most other circuits agree. See, e.g., United States v. Dixon, 449 F.3d 194, 203-4 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Morehead, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. McBride, 434 F.3d 470 (6th Cir. 2006) (same); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). But see United States v. Johnson, 427 F.3d 423 (7th Cir. 2006) (departures "obsolete").

In short, the district court, in determining the appropriate sentence in a particular case, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See Rita, 551 U.S. at 351. This has been described as a "3-step process":

First, because the Booker decision requires that courts consult the

sentencing guidelines, a sentencing court must calculate the applicable guideline range in the customary fashion. Second, the court should determine whether a departure from the guideline range is consistent with the guidelines' policy statements and commentary. Third, the court should evaluate whether a variance, i.e., a sentence outside the advisory guideline range is warranted under the authority of 18 U.S.C. § 3553(a).

See United States Sentencing Commission, "Final Report on the Impact of United States v. Booker on Federal Sentencing" (2006) at 42.

The proposed amendment follows the approach adopted by a majority of circuits and structures §1B1.1 to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in this manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. § 3553(a) in determining the appropriate sentence. In addition, the proposed amendment amends the Commentary to §1B1.1 to define the term "variance".

Proposed Amendment:

§1B1.1. Application Instructions

- (a) **The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying** ~~Except as specifically directed,~~ the provisions of this manual ~~are to be applied~~ in the following order, **except as specifically directed:**
- (a1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
 - (b2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
 - (c3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (d4) If there are multiple counts of conviction, repeat steps ~~(a)~~(1) through ~~(c)~~(3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
 - (e5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
 - (f6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other

applicable adjustments.

- (g7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
- (h8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (ib) **The court shall then consider** ~~Refer to~~ Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and ~~to~~ any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. **See 18 U.S.C. § 3553(a)(5).**
- (c) **The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).**

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*
 - (A) *"Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.*
 - (B) *"Bodily injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.*
 - (C) *"Brandished" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.*
 - (D) *"Dangerous weapon" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).*

- (E) *"Departure" means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.*
- "Downward departure" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "Depart downward" means grant a downward departure.*
- "Upward departure" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "Depart upward" means grant an upward departure.*
- (F) *"Destructive device" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).*
- (G) *"Firearm" means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.*
- (H) *"Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).*
- (I) *"Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.*
- (J) *"Permanent or life-threatening bodily injury" means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-*

threatening bodily injury.

(K) *"Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up.*

(L) *"Serious bodily injury" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.*

2. *Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.*

The term "includes" is not exhaustive; the term "e.g." is merely illustrative.

3. *The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.*

4. (A) *Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.*

(B) *Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.*

5. *Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. E.g., in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.*

6. *Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another*

guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "variance". See Irizarry v. United States, 128 S. Ct. 2198, 2200-03 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").

EXHIBIT B

FOURTH REVISED PROPOSED AMENDMENT: CULTURAL ASSIMILATION

Synopsis of Proposed Amendment: *This proposed amendment addresses when a downward departure may be warranted in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States. Several courts of appeals have upheld such departures. See, e.g., United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998); United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998). Other courts of appeals have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Melendez-Torres, 420 F.3d 45, 51 (1st Cir. 2005); United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) (noting that post-Booker, "'family and cultural ties', however the factor is characterized, will still be part of tailoring an appropriate sentence"); United States v. Ticas, 219 F. App'x 44 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Even those courts of appeals that have not explicitly foreclosed cultural assimilation departures have acknowledged that district courts are within their discretion to deny such a departure in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also United States v. Galarza-Paya, 441 F.3d 885, 889-890 (10th Cir. 2006) ("a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law. § 3553(a)(2), (6)."); United States v. Maturin-Barraza, 2010 WL 517630 (10th Cir. February 2010) ("As the court indicated, many defendants explain their motivation to reenter this country illegally as predicated upon their family ties in this country. We have repeatedly rejected that explanation, standing by itself, as a basis to vary from the advisory guidelines sentence, provided the sentence imposed is otherwise consistent with the sentencing factors of § 3553(a).").*

In order to promote uniform consideration of cultural assimilation by courts, the proposed amendment adds a new application note to §2L1.2 to provide that a downward departure based on cultural assimilation may be warranted in an illegal reentry case. The application note provides that such a departure may be appropriate if (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant. The application note also provides factors for the court to consider.

Proposed Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
- (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) Definitions.—*For purposes of subsection (b)(1):*

(i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*

(ii) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

(iii) *"Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*

(iv) *"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*

(v) *"Firearms offense" means any of the following:*

(I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*

(II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*

(III) *A violation of 18 U.S.C. § 844(h).*

(IV) *A violation of 18 U.S.C. § 924(c).*

(V) *A violation of 18 U.S.C. § 929(a).*

- (VI) *An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vi) *"Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vii) *"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*
- (viii) *"Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*
2. *Definition of "Felony".*—*For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
3. *Application of Subsection (b)(1)(C).*—
- (A) *Definitions.*—*For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
- (B) *In General.*—*The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*
4. *Application of Subsection (b)(1)(E).*—*For purposes of subsection (b)(1)(E):*
- (A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*
- (B) *"Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).*
5. *Aiding and Abetting, Conspiracies, and Attempts.*—*Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
7. Departure ~~Consideration~~ Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.
8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

EXHIBIT C

FIFTH REVISED PROPOSED AMENDMENT: SPECIFIC OFFENDER CHARACTERISTICS

Synopsis of Proposed Amendment: *This fifth revised proposed amendment is a multi-part amendment that revises the introductory commentary to Chapter Five, Part H (Specific Offender Characteristics), and the policy statements relating to age, mental and emotional conditions, physical condition, and military service.*

Part A revises the introductory commentary to Chapter Five, Part H. As amended by Part A, the introductory commentary sets forth the statutory framework for the use of specific offender characteristics in sentencing. Specifically, it outlines three categories of specific offender characteristics described in the Sentencing Reform Act and the standards that apply to each category. It also cautions that, to avoid unwarranted disparities, the court in considering specific offender characteristics should not give them excessive weight. The introductory commentary also indicates that the Commission will continue its work on specific offender characteristics to revise the guidelines and to provide information to the courts.

Part B revises the policy statements in Chapter Five, Part H, relating to age; mental and emotional conditions; physical condition; and military service. As amended by Part B, these policy statements -- which have provided that such characteristics are "not ordinarily relevant" -- now provide that such characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted, if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Part C makes conforming changes to §5K2.0 (Grounds for Departure).

Proposed Amendment:

(A) Introductory Commentary

PART H - SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

~~*The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.*~~

This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the "Act") contains several provisions regarding specific offender

characteristics:

First, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).

Second, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. § 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. See 28 U.S.C. § 994(e).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, "the history and characteristics of the defendant". See 18 U.S.C. § 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, see 28 U.S.C. § 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). See §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, see 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). See §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. See, e.g., §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." See United States v. Booker, 543 U.S. 220, 264-65 (2005). Although the court must consider "the history and characteristics of the defendant" among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall v. United States, 552 U.S. 38, 49 (2007).

Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," see Gall v. United States, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," see 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), "provide certainty and fairness," see 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," see 18 U.S.C. § 3553(a)(2)(A).

This Part allocates specific offender characteristics into three general categories.

In the first category are specific offender characteristics the consideration of which Congress has prohibited (e.g., §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. See 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

~~The Commission has determined that certain circumstances~~ In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or to the determination of various other ~~incidents~~ aspects of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

~~In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.~~

As with the other provisions in this manual, these policy statements "are evolutionary in nature". See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

(B) Chapter Five, Part H Policy Statements

§5H1.1. Age (Policy Statement)

Age (including youth) ~~is not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

* * *

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions ~~are not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

Mental and emotional conditions may be relevant in determining the conditions of probation

or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

* * *

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, ~~is not ordinarily relevant in determining whether a departure may be warranted~~ **may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.** ~~However, an~~ **An** extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse **ordinarily** is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the ~~supervisory body~~ **probation office** to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

~~Similarly, where~~ **In a case in which** a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

* * *

§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

~~Military, civic~~ **Civic**, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

(C) §5K2.0

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

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the

circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) **DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.**—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) **DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.**—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) **LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.**—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

- (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and
 - (2) each such offender characteristic or other circumstance is—
 - (A) present to a substantial degree; and
 - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.
- (d) **PROHIBITED DEPARTURES.**—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:
- (1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the ~~third and last sentences~~ **last sentence** of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).
 - (2) The defendant’s acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
 - (3) The defendant’s aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
 - (4) The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).
 - (5) The defendant’s fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e., a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
 - (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.
- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If

the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

"Circumstance" includes, as appropriate, an offender characteristic or any other offense factor.

"Depart", "departure", "downward departure", and "upward departure" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement.—

(A) Departures Covered by this Policy Statement.—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines.—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a).—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in

Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

- (i) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.
- (ii) *Unidentified Circumstances.*—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.*—

- (i) *In General.*—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.
- (ii) *Examples.*—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline

range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

- (C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

As required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

4. Downward Departures in Child Crimes and Sexual Offenses.—

- (A) Definition.—For purposes of this policy statement, the term "child crimes and sexual offenses" means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.
- (B) Standard for Departure.—
- (i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).
- (ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (See Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

- (1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
- (2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
(B) a policy statement authorizing a departure pursuant to an early disposition program;
and
(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of ...section 5K2.0".

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

EXHIBIT D

FOURTH REVISED PROPOSED AMENDMENT: ALTERNATIVES TO INCARCERATION

Synopsis of Proposed Amendment: *This fourth revised proposed amendment is a two-part amendment expanding the availability of alternatives to incarceration.*

Part A revises §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6, to clarify and illustrate cases in which a departure from the sentencing options authorized by the guidelines for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. The application note provides that such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed. The application note also lists factors for the court to consider and provides examples.

Part A also inserts a new application note to encourage courts to consider the effectiveness of residential treatment programs. Finally, Part A deletes as unnecessary the second sentence of Application Note 7.

Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also makes conforming changes to §§5B1.1 and 5C1.1.

Proposed Amendment:

Part A:

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month

is satisfied by imprisonment; or

- (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
 - (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*
2. *Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing*

Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*

(A) *It may impose a sentence of imprisonment.*

(B) *It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

(C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*

(A) *It may impose a sentence of imprisonment.*

(B) *Or, it may impose a sentence of imprisonment that includes a term of supervised*

release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. *Subsection (e) sets forth a schedule of imprisonment substitutes.*
6. ~~*There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and, there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*~~

There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other considerations, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12-18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs

downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. ~~Generally, such defendants have failed to reform despite the use of such alternatives.~~*
8. *In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.*
89. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

Part B:

Chapter Five, Part A, is amended in the Sentencing Table by redesignating Zones A, B, C, and D (as designated by Amendment 462, see USSG Appendix C, Amendment 462 (effective November 1, 1992)) as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than nine months); Zone C (containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The proposed amendment to the Sentencing Table, as executed, is as follows (with the existing boundaries of Zones B and C marked with straight lines; the new proposed lower boundary of Zone B **shaded**; and the new proposed lower boundary of Zone C marked with a wavy line):

SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
 - (1) the applicable guideline range is in Zone A of the Sentencing Table; or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).
- (b) A sentence of probation may not be imposed in the event:
 - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
 - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
 - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

- 1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
 - (a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
 - (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the

offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. *Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~eight~~ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: *This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" impossible pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.*

* * *

§5C1.1. Imposition of a Term of Imprisonment

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Commentary

Application Notes:

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3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months), the court has three options:*

* * *

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ~~eight, nine, or ten months~~ten or twelve months), the court has two options:*

(A) *It may impose a sentence of imprisonment.*

- (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is ~~8-~~~~14~~**10-16** months, a sentence of ~~four~~**five** months imprisonment followed by a term of supervised release with a condition requiring ~~four~~**five** months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

*The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is ~~8-~~~~14~~**10-16** months, both a sentence of ~~four~~**five** months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ~~five~~**ten** months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.*

* * *

8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~twelve~~**15** months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*