April 6, 1998

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write to comment on what we believe to be the latest version of the proposed "economic crime package" of amendments and also to comment on two other items on the Commission's agenda for the April meeting.

Economic Crimes - Loss definition

We are cognizant of the intense effort that the Commission has undertaken to address what some believe to be the relatively lenient guideline ranges that result in this area. Nevertheless, we continue to oppose the proposed increases for three reasons: (a) they will overstate the culpability of many defendants, (b) they introduce concepts of tort and contract law -- such as consequential damages -- not otherwise applicable in other guidelines which will unduly complicate sentencing and are better left to civil actions, and (c) they continue the trend of unnecessarily ratcheting up sentences without empirical basis.

First, we believe that because the guideline sentence in economic crimes is driven by the aggregate "loss" determined under relevant conduct, the proposed increases will result in many of the same injustices now permeating sentencing in drug offenses - the guidelines overstate the culpability of non-violent, first time offenders, who are essential but ministerial members of larger criminal enterprises. This problem is particularly serious when one considers that relevant conduct requires proof merely by a preponderance of the evidence and includes acts of others, uncharged conduct, acquitted conduct, and acts beyond the statute of limitations and may amount to acts that are merely the same course of conduct or a common scheme of plan to the offense of conviction.

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Relevant conduct thus compounds the unfairness of "aggregated" offenses for the peripheral but essential participant in a fraudulent scheme. It is not unusual to find an employer or ringleader who devises, controls and puts in place a fraudulent scheme for his own profit but which ensnares ministerial employees who are then drawn into the illegal web by perceived fears of losing their jobs. which are otherwise legitimate. This happens in medical fraud cases, where the secretary is asked to falsify records or in schemes to defraud customers, where the accounting clerk knowingly processes documents reflecting false statements. There are also those cases where there are intervening causes for the loss not related to the defendant's fraud but for which the defendant is nevertheless held accountable. Also , there are those cases where a fraudulent contract is negotiated for the benefit of the employer without any actual gain going to the defendant who negotiates the contract. See United States v. Walters, 67 F.3d 452 (2d Cir. 1995) (downward departure granted for combination of factors where defendant did not personally profit from fraud, the contract was favorable to the government under existing market conditions, and the government received restitution from the employer). The latest proposals make no provision for such overstatement of culpability, particularly where there is no gain to the defendant. Indeed, the proposal effectively cuts back the available grounds currently available for downward departure.

Second, introduction of consequential damages into the loss equation aggravates the problems of overrepresentation for a number of defendants. It also introduces a concept not otherwise applicable in criminal law. It will complicate application of this guideline without any real benefit while at the same time doubly increasing the penalties -- additional amounts will be included in loss at the same time that the loss tables are being increased.

Lastly, the perception that these guidelines do not provide sufficiently severe penalties is belied by the actual sentences being imposed by federal judges on actual defendants. In every quartile, the position of the sentences for larceny, fraud, embezzlement and tax offenders that federal judges are imposing on actual defendants are within, if not below, the relative range of sentences being imposed in all cases:

	1st quarter	2d quarter	3rd quarter	4th quarter
all cases	43.8%	9.6%	3.3%	9.1%
larceny	61.9%	11.6%	2.8%	8.7%
fraud	46.5%	11.8%	2.9%	11.6%
embezzlement	68.2%	8.2%	2.1%	3.5%
tax	57.2%	13.5%	2.6%	8.0%

1996 U.S.S.G. Sourcebook of Federal Sentencing Statistics, table 27.

There is only a 2% difference from the average for all offenses in the last quartile. That increase in sentences however is offset by the the sentences in the first and second quartile. It hardly seems just to increase sentences for all defendant because a very small minority of the most severe fraud offenses may require higher sentences. The current provisions for departures is sufficient to take care of any real need for more severe sentences.

As we have recommended in the past, there is a greater need to provide for alternatives to incarceration at the less serious offense levels, a policy that is consistent with the congressional mandate of 28 U.S.C. § 994(j). We request the Commission not undertake these proposed changes, particularly when it is acting with less than the full seven Commissioners.

CIRCUIT CONFLICTS

AMENDMENT 7(A) - ABERRANT BEHAVIOR

NACDL opposes the proposal to limit this ground for departure to "a spontaneous and thoughtless act" and to make it unavailable whenever the crime of conviction consists of a "course of conduct composed of multiple planned criminal acts." Whether the crime was spontaneous or thoughtless, or consisted of one or several planned acts, may or may not have a bearing on whether the crime was "aberrant" in the context of the defendant's character and life. Furthermore, as a spontaneous and thoughtless act is not a crime, and even the least complex crimes ordinarily are composed of more than one planned illegal act, the effect of the proposal would be to prohibit aberrant behavior as a ground for departure. This would conflict with congressional mandates and Supreme Court law requiring individualized, case-by-case departure determinations.

Putting aside for the moment the issue of whether a "spontaneous and thoughtless act" constitutes a crime, requiring in all cases that a criminal episode be "spontaneous and thoughtless" in order to be "aberrant" is inconsistent with the plain meaning of the word. "Aberrant" is defined in the dictionary as "[d]eviating from the proper or expected course," or "from what is normal; untrue to type." See American Heritage Dictionary 67 (2d College ed. 1985). "Aberrant behavior" in the sentencing context must mean that which deviates from what is expected or normal for the offender in the context of his or her character and life. Whether the crime was spontaneous and thoughtless, or consisted of only one or a number of planned criminal acts, may or may not have a bearing on whether it was an "aberrant" act for the offender.

The term "spontaneous and thoughtless act" was coined by the Seventh Circuit in United States v. Carey, 895 F.2d 318 (7th Cir. 1990), where the court held that a check-kiting scheme that lasted over fifteen months and involved hundreds of overt acts was not aberrant behavior. The

Seventh Circuit opined that a "spontaneous and seemingly thoughtless act," as opposed to one which was "the result of substantial planning" or a "continued reflective process is one for which the defendant may be arguably less accountable." Id. NACDL does not disagree, but the departure is one for "aberrant" behavior, which may or may not be "spontaneous and seemingly thoughtless." The dichotomy between spontaneity and thoughtlessness on the one hand and substantial planning and repeated similar acts on the other does not take account of a range of behavior in between, including behavior that is not spontaneous or thoughtless, but may nonetheless be aberrant for the offender.

Making thoughtlessness and spontaneity the single prerequisite to departure for aberrant behavior could lead to absurd results. For example, a police officer's beating of a suspect who initially provoked the officer to anger could be characterized as a spontaneous and thoughtless act, or at least one that involved no prior planning. The departure presumably would be available even though the officer beat suspects in the past. See Koon v. United States, 116 S. Ct. 2035, 2041 (1996) (officer radioed after beating that he hadn't "beaten anyone this bad in a long time"). In contrast, a battered woman who premeditated the murder of her abuser as the only means of escape, or a man who intentionally committed fraud or theft to pay the extraordinary cost of his child's medical care, could not receive the departure, even though their lives were otherwise exemplary, because their crimes could not be characterized as spontaneous and thoughtless.

The totality of the circumstances test adopted by the First, Ninth and Tenth Circuits is better suited for the aberrant behavior departure determination because it looks to factors that are relevant to whether the crime represented a deviation from the offender's character and life. See United States v. Bradstreet, Nos. 97-1164, 97-1204, 1998 WL 25231, *11 (1st Cir. Jan. 29, 1998) (finding the departure was not warranted because the defendant intentionally testified dishonestly in his trial for felonious dishonesty, showing that the conduct was not aberrant, isolated or unlikely to recur); United States v. Grandmaison, 77 F.3d 555, 562-64 (1st Cir. 1996) (adopting totality of the circumstances test to determine if crime was aberrant, including consideration of, inter alia, the defendant's first offender status (which is not enough without more), pecuniary gain, charitable activities, prior good deeds, efforts to mitigate the effects of the crime, and whether he was convicted of several unrelated offenses or was a regular participant in elaborate criminal enterprises); United States v. Lam, 20 F.3d 999, 1005 (9th Cir. 1994) (departure justified where otherwise law-abiding immigrant defendant obtained a sawed-off shotgun to protect his family after he and his pregnant sister were robbed at gunpoint at their place of business); United States v. Tsosie, 14 F.3d 1438, 1442-43 (10th Cir. 1994) (departure was justified where victim had an affair with defendant's wife and actively participated in the fight that ended in his death, defendant attempted to provide aid and medical care immediately after the fight, and defendant had no criminal history and a long history of steady employment and economic support of his family); United States v. Morales, 961 F.2d 1428, 1431-32 (9th Cir. 1992) (district court erred in failing to depart where defendant was first time offender, had not been convicted of unrelated offenses, and was not a regular participant in an

on-going criminal enterprise over a substantial period of time); United States v. Takai, 941 F.2d 738, 743-44 (9th Cir. 1991) (departure warranted where defendants had no criminal record, were not motivated by pecuniary gain but by helping members of their community obtain green cards, were influenced by a government agent, and had done outstanding good deeds); United States v. Pena, 930 F.2d 1486, 1495 (10th Cir. 1991) (departure was warranted because possession with intent to distribute was an aberration from defendant's usual conduct which reflected long-term employment, economic support of her family, no abuse of controlled substances, and no prior involvement in the distribution of such substances). It is appropriate to permit district courts to consider spontaneity or that little thought was involved among other factors that might show aberrance, rather than as an absolute prerequisite, Grandmaison, 77 F.3d at 563. For example, spontaneity in response to an opportune moment or unexpected provocation may be a factor indicating that the criminal episode was aberrant.

Furthermore, the proposed definition would effectively eliminate aberrant behavior as a basis for departure. It is hornbook law that a crime (other than a strict liability crime) consists of both an act or omission and a guilty state of mind. See Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.4 (1986). "Thoughtless," however, means "devoid of thought," see Merriam Webster's Collegiate Dictionary 1228 (10th ed. 1993), and "spontaneous" implies "action engaging neither the mind nor the emotions." Id. at 1137. Accordingly, a "spontaneous and thoughtless" act is not a crime. See United States v. McCarthy, 840 F. Supp. 1404, 1410 (D. Colo. 1993). Even the crime committed by the defendant in United States v. Russell, 870 F.2d 18 (1st Cir. 1989), widely regarded as fitting even the most restrictive definition of aberrant behavior, would not meet the definition now proposed. Russell, a Wells Fargo driver with no criminal record, agreed with his partner to take and keep a bag of money a bank had mistakenly given them, took the bag, and kept it for a week before admitting what he had done and returning the money. Id. at 19. The crime may have been "spontaneous" at its inception, but it did not remain so and was never "thoughtless." If it had been, Russell could not have pled guilty to bank larceny, which requires an "intent to steal or purloin." 18 U.S.C. § 2113(b). Nor did Russell's course of conduct -- conspiring with his partner to take the money, taking the money, and keeping it hidden for a week -- consist of only one planned criminal act. As the First Circuit noted in holding that "single acts of aberrant behavior" include "multiple acts leading up to the commission of a crime," the "practical effect of [a contrary] interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts." United States v. Grandmaison, 77 F.3d 555, 563 (1st Cir. 1996); see also McCarthy, 840 F. Supp. at 1410 ("Strict and literal adherence to the definition of 'single act' as 'spontaneous' and 'thoughtless' would eliminate the availability of the departure.").

The proposed definition, by precluding as a categorical matter consideration of whether the defendant's crime was aberrant in light of his or her background, character, and conduct, would seem to violate Congress' directive that "[n]o limitation shall be placed on the information concerning the

background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. As Justice Scalia recently pointed out, neither the courts nor the Sentencing Commission have authority to contravene the statute by prohibiting consideration of certain types of evidence at sentencing. See United States v. Watts, 117 S. Ct. 633, 638 (1997) (Scalia, J., concurring).

Whether an offender's criminal conduct was an aberration in the context of his or her character and life, and, in addition, "should result in departure," 18 U.S.C. § 3553(b), "embodies the traditional exercise of discretion of a sentencing court." Koon, 116 S. Ct. at 2046. To resolve this question, a district court should be free to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." Id. at 2046-47. Confining the aberrant behavior inquiry to a single factor, especially one that would effectively preclude the departure, would contravene the congressional purpose in reposing in federal district judges discretion to depart under the sentencing guidelines:

> This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines . . . .

Id. at 2053.

AMENDMENT 7(I) - DIMINISHED CAPACITY

NACDL supports option four and opposes the options that propose to limit this departure ground to offenses that are not "crimes of violence", as that term is defined in the career offender guideline. Option One would preclude a departure if the offense of conviction is a "crime of violence" based on a categorical consideration of its elements. A categorical approach is inconsistent with the individualized nature of a departure determination and for that reason should not be adopted.

NACDL believes that the better course is option four, which eliminates the restriction on the type of offense altogether. In its place, it permits district judges, on a case-by-case basis, to determine the "extent to which reduced mental capacity contributed to the commission of the offense, provided that consideration of the nature and circumstances of the offense unless the nature and circumstances of the offense or the defendant's criminal history indicates a need for

incarceration to protect the public." This approach is more consistent with departure methodology.

The career offender definition of "crime of violence" should not be used because that definition addresses entirely different and diametrically opposed issues. See United States v. Chatman, 986 F.2d 1446, 1451 (D.C. Cir. 1993). Section 4B1.2 deals with whether a defendant is a "career offender" and should be incarcerated longer than others who have committed the same crime. Higher sentences for "career offenders" are justified based on the greater culpability of recidivists and the general deterrence that results from sending the clear message that "repeated criminal behavior will aggravate the need for punishment with each recurrence." U.S.S.G. Ch. 4, Pt. A, Intro. Comment. (1995). Furthermore, in Congress' view, longer sentences incapacitate those offenders whose criminal record suggests a likelihood that they will commit future violent crimes and result in the efficient use of "[s]hrinking law enforcement resources . . . target[ing] those who repeatedly commit violent crimes". Chatman, at 1451, citing, 128 Cong.Rec. 26,518 (1982) (statement of Sen. Kennedy).

The definition of "crime of violence" in the career offender guideline thus "extends not only to crimes that involve actual violence, but to many crimes that have an "unrealized prospect of violence" as well. Chatman at 1451. As the Chief Judge for the D. C. Circuit explained:

> In short, § 4B1.2 can be read as depriving career offenders of the benefit of the doubt, and assuming the worst. In the service of identifying particular trends within an individual's criminal history, § 4B1.2 appears to characterize as "crimes of violence" many offenses that, taken individually on their facts, might be interpreted as non-violent.

Id.

The policy concerns that animate the definition of "crime of violence" for career offenders are not germane to departures for diminished capacity. Departures for diminished capacity are granted

> to treat with lenity those individuals whose "reduced mental capacity" contributed to commission of a crime. Such lenity is appropriate in part because . . . two of the primary rationales for punishing an individual by incarceration -- desert and deterrence -- lose some of their relevance when applied to those with reduced mental capacity. As to desert, "[p]ersons who find it difficult to control their conduct do not -- considerations of dangerousness to one side -- deserve as much punishment as those who act maliciously or for gain. Further,

> "[b]ecause legal sanctions are less effective with persons suffering from mental abnormalities, a system of punishment based on deterrence also curtails its sanction." Indeed, those defendants whose "significantly reduced mental capacity" is caused by the "voluntary" use of "drugs or other intoxicants" are logically excluded from consideration under § 5K2.13 because they have "diminished" their capacity by choice, and "legal threats may induce them to abandon their habits . . .".
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> . . .
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> Consistent with this analysis, a downward departure is disallowed where "the defendant's criminal history . . . indicates a need for incarceration to protect the public." U.S.S.G. § 5K2.13

Id. at 1451-52, citing, United States v. Poff, 926 F.2d 588, 595 (7th Cir.) (en banc)(Easterbrook, J. dissenting), cert. denied, 502 U.S. 827 (1991).

Furthermore, a factual approach which would require the sentencing court to consider the facts of the offense of conviction does not implicate "practical difficulties and potential unfairness". See Taylor v. United States, 495 U.S. 575, 600 (1990) (adopting a categorical approach to determine whether a particular offense is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA")). A categorical approach "look[s] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions". Taylor, 495 U.S. at 600. This approach avoids requiring "the sentencing court to engage in an elaborate fact-finding process regarding the defendant's prior offenses." Id. In the context of career offender and ACCA cases, the categorical approach avoids the practical problems of "retrying" the predicate convictions, years after a formal conviction was entered. Those considerations do not apply in the departure context.

In the § 5K2.13 departure situation the sentencing court will not be asked to "retry" an old case. Rather, the court must conduct fact-finding with respect to the offense of conviction for which the court will be imposing a sentence. This is a task which the sentencing court is required to conduct in any event. 18 U.S.C. § 3553(a)(1). Individualized fact-finding with respect to the offense of conviction does not impose, therefore, the practical burdens or fairness problems involved in considering past convictions. Furthermore, a factual inquiry into the offense conduct is likely to yield a more accurate picture of the offender and the offense. This facilitates the court's task of determining whether the defendant poses a danger to the public and should not be granted a departure. It also complies with the congressional mandate "to impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

Indeed, such an approach is consistent with the congressional mandate that

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

Lastly, as with the aberrant behavior departure, whether the defendant's diminished capacity "should result in a departure", 18 U.S.C. § 3553(b), "embodies the traditional exercise of discretion by a sentencing court." United States v. Koon, 116 S. Ct. 2035, 2046 (1996). To resolve this question, a district court should be free to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." Id. at 2046-47. Option Four comports with the congressional purpose, as explained by the Supreme Court in Koon, reposing in federal district judges discretion to depart under the sentencing guidelines and in keeping with the "federal judicial tradition for the sentencing judgeto considerr every convicted person as an individual and every case as a unique study in the human failings that sometime mitigate . . . the crime and the punishment to ensue. Koon at 2053.

Thank you for your consideration of NACDL's concerns. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Gerald B. Lefcourt /CDH

Gerald B. Lefcourt
President

Alan Chaset
Alan Ellis
Carmen D. Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

Sentencing Guidelines
1997-98 Amendment Highlights

I. Congressional Interest Issues

A. **Desecration of Veterans' Cemeteries.**—In response to the Veterans' Cemeteries Protection Act of 1977, the amendment increases by two offense levels the penalties in the theft, property destruction, and arson guidelines for offenses involving desecration of property in national cemeteries.

B. **Mass-Marketed Frauds; Sophisticated Concealment.**—This is a three part amendment. First, the amendment increases by two offense levels the penalties for fraud offenses that use mass-marketing to carry out the fraud. Second, the amendment provides a new enhancement and a floor offense level of level 12 in the fraud guideline if (i) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (ii) a substantial part of a fraudulent scheme was committed from outside the United States; or (iii) the offense otherwise involved sophisticated concealment. This new enhancement replaces the current enhancement for "the use of foreign bank accounts or transactions to conceal the true nature or extent of fraudulent conduct". Third, this amendment conforms the language of the current enhancement for "sophisticated means" in various tax guidelines to the new sophisticated concealment amendment in the fraud guideline. In so doing, this amendment also resolves a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment is based on the overall offense conduct for which the defendant is accountable.

C. **Prohibited Person Firearms Offenses.**—This is a three part amendment. First, the amendment modifies the definition of "prohibited person" in the firearms guideline to include a person convicted of a misdemeanor crime of domestic violence. Second, the amendment increases by two offense levels the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person. Third, this amendment makes technical and conforming changes in Application

Note 12 of §2K2.1.

II. Circuit Conflicts

A. **Failure to Appear, Grouping.**—This amendment resolves a circuit conflict regarding whether the guideline procedure of grouping the failure to appear count with the count for the underlying offense violates the statutory mandate of imposing a consecutive sentence on the failure to appear conviction. The amendment maintains the current rule requiring grouping of the failure to appear count and the underlying offense count (which receives an obstruction of justice adjustment for the failure to appear conduct). However, the amendment addresses internal inconsistencies among different guidelines and explains how the guideline provisions work together to ensure an incremental consecutive penalty for the failure to appear count. Specifically, the amendment (i) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (ii) states that the method outlined for determining the sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (iii) adds an upward departure provision in §2J1.6 if the offense conduct involves multiple obstructive behavior; (iv) makes conforming changes in §2P1.2 (Providing or Possessing Contraband in Prison) because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (v) makes conforming changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2.

B. **Abuse of Position of Trust, Imposters.**—This amendment resolves a circuit conflict regarding whether §3B1.3 applies to an imposter (i.e., a defendant who pretends to legitimately occupy a position of trust when, in fact, the defendant does not). The amendment, which adopts the majority view, establishes that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust.

C. **Applicability of Obstruction Adjustment to Closely Related Cases.**—This amendment resolves a circuit conflict regarding whether the obstruction enhancement applies when the obstructive conduct relates to another case closely related to the defendant's case, or only when it relates specifically to the offense of which the defendant was convicted. The amendment, which adopts the majority view, states that the obstruction must relate either to the defendant's offense of conviction (including relevant conduct) or to a closely related case. The amendment also clarifies that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction.

D. **Lying About Drug Use While on Pre-Trial Release.**—This amendment resolves a circuit conflict regarding whether lying to a probation officer about drug use while released on bail warrants an obstruction of justice adjustment under §3C1.1. The amendment, which adopts the majority view, excludes from application of §3C1.1 a defendant's denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1 (Acceptance of Responsibility).

E. **Diminished Capacity.**—This amendment addresses a circuit conflict regarding whether a diminished capacity departure is precluded if the defendant committed a "crime of violence," as that term is defined in the career offender guideline. The amendment replaces the current policy statement with a new provision that represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under three circumstances: (i) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (ii) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (iii) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines "significantly reduced mental capacity" based on the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an

inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity."

III. Miscellaneous Amendments

A. **Corrections to Supervision Conditions.**—This is a three-part amendment. First, the amendment adds to §5B1.3 a condition of probation regarding deportation, in response to Section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That section amended 18 U.S.C. § 3563(b) to add deportation as a discretionary condition of probation. Second, this amendment deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release. The need to provide "just punishment" is not included in 18 U.S.C. § 3583(c) as a factor to be considered in imposing a term of supervised release. Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary, as opposed to mandatory, conditions are policy statements of the Commission, not binding guidelines.

B. **Koon Departure Review Standards.**—This amendment incorporates into the general departure policy statement (§5K2.0) the principal holding and key analytical points of the United States Supreme Court's decision in Koon v. United States, 116 S. Ct. 2035 (1996). Additionally, the amendment removes language that is inconsistent with the Koon holding and generally enhances the precision of the language of the policy statement.

C. **Technical Corrections.**—This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3.

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4 18 **Failure to Appear, Grouping (§§2J1.6, 2P1.2, 3C1.1, 3D1.1, 3D1.2, 5G1.2).**—*This amendment (A) resolves a circuit conflict by (i) more clearly distinguishing between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); and (ii) stating that the method outlined for determining the sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (B) adds an upward departure provision in §2J1.6 if the offense conduct involves multiple obstructive behavior; (C) makes conforming changes in §2P1.2 because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (D) makes conforming changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2.*

5 24 **Abuse of Position of Trust, Imposters (§3B1.3).**—*This amendment resolves a circuit conflict by establishing that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust.*

6 26 **Applicability of Obstruction Adjustment to Closely Related Cases (§3C1.1).**—*This amendment (A) resolves a circuit conflict by stating that the obstruction must relate either to the defendant's offense of conviction (including relevant conduct) or to a closely related case; and (B) clarifies that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction.*

7 28 **Lying About Drug Use While on Pre-Trial Release (§3C1.1).**—*This amendment resolves a circuit conflict by excluding from application of §3C1.1 a defendant's denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1.*

8 29 **Diminished Capacity (§5K2.13).**—*This amendment (A) addresses a circuit conflict by allowing a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under three circumstances; and (B) adds an application note that defines "significantly reduced mental capacity" to include both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful), based on the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997).*

9 30 **Corrections to Conditions of Probation and Supervised Release (§§5B1.3, 5D1.3).**—*This amendment (A) adds to §5B1.3 a condition of probation regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; (B) deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release because it is not included in 18 U.S.C. § 3583(c) as a factor to be considered in imposing a term of supervised release; and (C) amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary, as opposed to mandatory, conditions are policy statements of the Commission, not binding guidelines.*

10 32 **Koon Departure Review Standards (§5K2.0).**—*This amendment (A) incorporates into the general departure policy statement the principal holding and key analytical points of the United States Supreme Court's decision in Koon v. United States, 518 U.S. 81 (1996); (B) removes language that is inconsistent with the Koon holding; and (C) generally enhances the precision of the language of the policy statement.*

11 34 **Technical Corrections (§§2B3.1, 2K2.1, 6A1.3).**—*This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3.*

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

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

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

* * *

(b) Specific Offense Characteristics

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

* * *

Commentary

Application Notes:

1. * * *

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

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

* * *

Background:

* * *

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

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

§2B1.3 Property Damage or Destruction

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

Commentary

* * *

Application Notes:

1. * * *

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

* * *

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

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

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

Commentary

* * *

Application Notes:

* * *

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

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

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

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

Second, this amendment provides an increase for fraud offenses that involve conduct,

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

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

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

* * *

(b) Specific Offense Characteristics

* * *

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

(A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another

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

* * *

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

* * *

Commentary

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Application Notes:

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

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

~~14~~15. * * *

~~15~~16. * * *

~~16~~17. * * *

~~17~~18. * * *

~~18~~19. * * *

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

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

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

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

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

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

Commentary

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Application Notes:

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

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

* * *

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

* * *

(b) Specific Offense Characteristic

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

* * *

Commentary

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Application Notes:

* * *

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

* * *

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

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

This part of the amendment addresses section 658 of the Treasury, Postal Service,

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

Violations of 18 U.S.C. § 922(d) and (g) are covered by §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". This part of the amendment conforms Application Note 6 of §2K2.1 to the new statutory provisions.
The second part of this amendment increases the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person. Specifically, this part amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline in order to make those offense levels applicable to the person who transfers the firearm to the prohibited person. A person who is convicted under 18 U.S.C. § 922(d) has been shown beyond a reasonable doubt either to have known, or to have had reasonable cause to believe, that the transferee was a prohibited person.

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

The third part of this amendment makes two technical and conforming changes in Application Note 12 of §2K2.1. First, the amendment corrects statutory references to 18 U.S.C. § 924(j) and (k), which were added as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796 (1994). In the Economic Espionage Act of 1996, Pub. L. 104–294, 110 Stat. 3488 (1996), Congress again amended 18 U.S.C. § 924 and redesignated the provisions as subsections (l) and (m). The amendment conforms Application Note 12 to that redesignation. Second, the amendment corrects the misplacement of the reference to 26 U.S.C. § 5861(g) and (h).

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

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

* * *

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

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

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

* * *

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

* * *

Commentary

* * *

Application Notes:

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

* * *

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

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

* * *

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

§2J1.6. Failure to Appear by Defendant

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Commentary

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Application Notes:

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

~~*Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.*~~

In the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example,

if the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

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

~~4.~~5. * * *

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§2P1.2 Providing or Possessing Contraband in Prison

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Commentary

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Application Notes:

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

underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.

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

* * *

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

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Commentary

Application Notes:

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

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

* * *

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

* * *

(b) ~~Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5.~~ Exclude from the application of §§ 3D1.2-

3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

Commentary

Application Note:

1. ~~*Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules.*~~ *Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively).* ~~*Convictions on such counts are not used in the determination of a combined offense level under this Part;*~~ *The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b),* ~~*but*~~ *However, a count covered by subsection (b) may affect the offense level determination for other counts.* ~~*A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The*~~ *For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c),* ~~*The*~~ *the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count,* ~~*as required by law*~~. *See §5G1.2(a).*

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

* * *

§3D1.2. Groups of Closely Related Counts

* * *

Commentary

Application Notes:

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

* * *

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

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

* * *

Commentary

* * *

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

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

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

* * *

Commentary

Application Notes:

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

* * *

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

~~2~~3. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*

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

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

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

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

Commentary

Application Notes:

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

~~1.~~2. * * *

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

~~3.~~4. * * *

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

~~5.~~6. * * *

~~6.~~7. * * *

~~7.~~8. * * *

~~8.~~9. * * *

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

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

* * *

Commentary

* * *

Application Notes:

* * *

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

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

* * *

(d) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight)).;*

(e) *lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*

* * *

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

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

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

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

Commentary

Application Note:

1. For purposes of this policy statement—

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

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

pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are advisory policy statements of the Commission, not binding guidelines.

§5B1.3. Conditions of Probation

* * *

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

* * *

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

* * *

(6) Deportation

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

(e) Additional Conditions (Policy Statement)

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

* * *

§5D1.3. Conditions of Supervised Release

* * *

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

* * *

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

* * *

(6) Deportation

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

(e) Additional Conditions (Policy Statement)

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

* * *

(5) Curfew

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

* * *

10. **Synopsis of Amendment:** *The purpose of this amendment is to reference specifically in the general departure policy statement the United States Supreme*

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

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

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

* * *

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

Commentary

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996) Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.

* * *

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

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

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

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

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 ~~U.S.~~S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 ~~U.S.~~S. Ct. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980).

Unreliable allegations shall not be considered. United States v. Ortiz, *993 F.2d 204 (10th Cir. 1993).*

* * *