
1998 Amendments to the Federal Sentencing Guidelines

(Effective November 1, 1998)



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Sentencing Guidelines 1998 Amendment Highlights

I. Congressional Interest Issues

- A. Desecration of Veterans' Cemeteries.**—In response to the Veterans' Cemeteries Protection Act of 1997, 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. (i) 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 (1) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (2) a substantial part of a fraudulent scheme was committed from outside the United States; or (3) 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”. (NOTE: The emergency amendment for sophisticated means, described in (ii) modified this portion of the amendment, effective November 1, 1998.) 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.

(ii) Sophisticated Means; Vulnerable Victim.—On September 23, 1998, in response to directives contained in the Telemarketing Fraud Protection Act of 1998, Pub. L. 105–184, the Commission submitted to Congress a temporary, emergency amendment that provided (1) a two-level increase and a minimum offense level of level 12 in the fraud guideline (§2F1.1) for offenses that involve sophisticated means; and (2) a two-level increase in the vulnerable victim guideline (§3A1.1) for offenses that involve a large number of vulnerable victims. The amendment, particularly the sophisticated means enhancement, built on and broadened the amendment submitted on May 1, 1998, which created an enhancement in §2F1.1 for sophisticated concealment (amendment described in (i)). The Commission specified an effective date of November 1, 1998 for this emergency amendment.

[The Commission proposed to re-promulgate this amendment as a permanent, non-

emergency amendment and submit it to Congress not later than May 1, 1999. 63 F.R. 55912 (Oct. 19, 1998). Under the terms of the congressionally granted authority, the emergency amendment is temporary unless re-promulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. 100–182, § 21, set forth as an editorial note under 28 U.S.C. § 994.]

- 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 Probation and 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. Finally, 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 §§2B3.2, 2K2.1, and 6A1.3.