

***RESOLVING
CIRCUIT
CONFLICTS***

Part 1

U.S. Sentencing Commission

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EXECUTIVE SUMMARY

Resolving Circuit Conflicts: Part 1

I. Introduction

This report presents an analysis of four of the nine circuit conflicts that the Commission is considering resolving during the 1997-98 amendment cycle. You will receive the second part of the report in November.

The presentation of each issue is as follows:

- Statement of Issue
- Significance of Conflict
- Recommendations
 - ▶ Options
- Case law
 - ▶ Majority View
 - ▶ Minority View

II. Summary of Issues and Options

Staff recommends the following options for resolving Issues 1-4:

Issue 1

Fraud Guideline: Does filing fraudulent forms with bankruptcy and probate courts violate a judicial order or process?

Options:

1. Define scope of sentencing enhancement to include fraudulent court filings. (majority view)
2. Define scope of sentencing enhancement to exclude fraudulent court filings. (minority view)

Issue 2

Fraud Guideline: Does an employee of a charity or government agency who misapplies or embezzles funds misrepresent that he was acting on behalf of the agency?

Options:

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

Issue 3

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

Options:

1. Define scope of sentencing adjustment to include impostors. (majority view)
2. Define scope of sentencing adjustment to exclude impostors. (minority view)
3. Define scope of sentencing adjustment to exclude impostors and provide an increase in fraud guideline to punish impostors.

Issue 4

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

Options:

1. Define scope of departure narrowly to include only spontaneous and thoughtless acts by the defendant. (majority view)
2. Define scope of departure broadly to include a consideration of the totality of circumstances. (minority view)
3. Define scope of departure as unplanned, opportune behavior inconsistent with the defendant's prior good conduct.
4. Eliminate language from Chapter 1 of the Guidelines Manual.

5. Defer action.

ISSUE 1

FRAUD GUIDELINE: VIOLATION OF JUDICIAL ORDER OR PROCESS

Statement of Issue

Whether falsely filling out bankruptcy forms/probate forms constitutes "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines." §2F1.1(b)(3)(B), p. 127.

Significance of Conflict

1. Involves a 5/2 conflict among the circuit courts that have addressed the issue.
2. Affects application of a 2- to 4-level enhancement in the fraud guideline—a guideline that the Commission proposes to amend extensively in this cycle.
3. Data show: 153 defendants received an increase for either violation of a judicial order . . . or misrepresentation of a charitable organization. The data do not distinguish between the two parts of the enhancement.

Recommendations

- *Clarify the scope of the sentencing enhancement*

The seven appellate courts addressing the issue have adopted varying interpretations of the scope of the sentencing enhancement. Five appellate courts have interpreted the provision broadly and have held that filling out fraudulent bankruptcy forms and schedules warrants the two-level increase. In contrast, the remaining two appellate courts have interpreted the provision narrowly and have held otherwise.

<u>Options</u>	<u>Advantages and Disadvantages</u>
(1) Define scope of sentencing enhancement to include fraudulent court filings (majority view)	Recognizes that fraud on judicial process both deserves extra penalty and promotes the sentencing purpose of deterrence. Increases penalty for conduct that is inherent in a charged offense for which Congress has not seen fit to provide heightened punishment.

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| (2) Define scope of sentencing enhancement to exclude fraudulent court filings (minority view) | Increases penalties for defendants in circuits that follow minority view. |
| | Limits enhancement to disobeying a command directed at a specific individual. Consistent with application note and background language in commentary in pages 128 and 132 of <u>Guidelines Manual</u> . |
| | Consistent with construction principle of <i>ejusdem generis</i> and with sentencing purposes of just punishment and incapacitation. |
| | Reduces penalties for defendants in circuits with the majority view. |

CASE LAW

Majority View

United States v. Michalek, 54 F.3d 325 (7th Cir. 1995).

Facts: Defendant convicted of bankruptcy fraud failed to disclose the ownership of artwork and other property to the bankruptcy trustee.

Holding: The district court's imposition of a two-level enhancement for violation of a judicial process was not erroneous.

Rationale:

- Relying on the Eleventh and Eighth Circuit opinions, the court reasoned that bankruptcy fraud in its most basic form involves a higher degree of culpability than other crimes sentenced under the fraud guideline. Therefore, the guidelines "permit" additional punishment for bankruptcy fraud.
- The appellate court specifically rejected the defendant's argument that the enhancement should not apply because the defendant did not violate an identifiable other, injunction, decree or process. According to the Seventh Circuit, "[s]uch a contention overlooks an essential difference between bankruptcy proceedings and other types of litigation."

Dissent:

- The majority decision in effect substituted the word "system" for "process." The word "process" must be interpreted, consistently with the terms that proceed it, to be a "specific judicial mechanism such as a subpoena or summons."
- The error in this case is particularly clear because the defendant's only violation was the core violation of bankruptcy—upon which the court calculated the base offense level. The majority opinion has effectively eliminated the words "order," "injunction," and "decree" from the sentencing enhancement.

United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (per curiam).

Facts: Defendant convicted of bankruptcy fraud concealed assets from bankruptcy court officers.

Holding: The district court properly increased the defendant's punishment for violating a judicial or administrative order, injunction, decree or process.

Rationale: Although the defendant did not violate a specific judicial order, injunction, or decree, he violated a judicial process by fraudulently concealing assets. He sought protection from his creditors by filing a bankruptcy petition and "then abused the bankruptcy process and hindered the orderly administration of the bankruptcy estate by concealing assets."

United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (per curiam).

Facts: Defendant convicted of bankruptcy fraud filed several false petitions with the bankruptcy court.

Holding: The district court did not err by enhancing defendant's offense level for violation of a judicial process.

Rationale: Relying on the Seventh and Eighth Circuit opinions, the court reasoned that the term "process" must be interpreted as a "directive based upon the kind of formalities that undergird orders, injunctions and decrees." *United States v. Linville*, 10 F.3d 630 (9th Cir. 1993). Accordingly, the sentencing enhancement at §2F1.1(b)(3)(B) "applies to violations of specific adjudicatory processes, such as bankruptcy processes, not addressed elsewhere in the guidelines."

United States v. Messner, 107 F.3d 1448 (10th Cir. 1997).

Facts: Defendant convicted of bankruptcy fraud concealed assets from bankruptcy court officers.

Holding: The district court did not err in enhancing the defendant's sentence for violating a judicial process.

Rationale: Relying on the Seventh, Eighth, and Eleventh Circuit opinions, the Tenth Circuit adopted the rationale that the sentencing enhancement is appropriate because it recognizes the importance of protecting the integrity of the bankruptcy system. According to the court, a debtor violates the spirit as well as the purpose of bankruptcy by obtaining protection from creditors and at the same time denying the creditors their lawful and equitable due.

United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (per curiam).

Facts: Defendant convicted of bankruptcy fraud failed to disclose assets valuing \$179,664 during his bankruptcy proceedings.

Holding: The defendant's knowing concealment during bankruptcy proceedings constitutes a violation of a **judicial order** within the meaning of sentencing enhancement in the fraud guideline.

Rationale: The Bankruptcy Rules and Official Forms mandate that the debtor truthfully disclose assets. "Moreover, the mandate is within the context of formal, adversary court proceedings that the defendant intentionally violated."

Minority View

United States v. Shaddock, 112 F.3d 523 (1st Cir. 1997).

Facts: Defendant convicted of bankruptcy fraud for concealing assets and falsely stating that he had no bank account, insurance policies, or pension plan.

Holding: The district court erred in imposing a two-level enhancement for violating a judicial order.

Rationale:

- Neither the language of the sentencing enhancement, nor the relevant commentary support the increase. "Their language plainly indicates that the enhancement was meant to apply to defendants who have demonstrated a heightened *mens rea* by violating a prior `judicial or administrative order, decree, injunction or process.'"
- To base the increase on false statements in the Official Bankruptcy Form 9, on the ground that the form constitutes an order, would make the increase "applicable in all bankruptcy fraud cases, simply by virtue of the forum in which the false statements were made and without regard to the aggravated criminal intent it was designed to redress.
- Because the issue was not addressed by the district court, the appellate court declined to address the government's alternative argument that defendant violated a judicial "process" by committing bankruptcy fraud—conduct which abused the bankruptcy process itself.

United States v. Carrozella, 105 F.3d 796 (2d Cir. 1997).

Facts: Defendant, an attorney, convicted of conspiracy and mail fraud charges arising from fraudulent investments also filed false accounts with probate courts.

Holding: The district court erred in making a two-level enhancement for violation of a judicial or administrative process.

Rationale:

- The term "violation of any judicial process" as used in the fraud guideline suggests a narrower reading than the term "abuse" of judicial process as used by the Eighth, Seventh, and Eleventh Circuit opinions. First, "violation" suggests the existence of a command or warning followed by disobedience. "Process," the command or warning violated, is used not in the sense of legal proceedings generally, but in the sense of a command or order to a specific person.
- Second, the narrower interpretation is consistent with the construction principle of *ejusdem generis*—"construing general language in a list of more specific things in a way that limits the general language to the same class of things enumerated."
- Third, the commentary to the sentencing enhancement reinforces the narrow interpretation that it applies only when the defendant commits a fraud after some type of official warning or order specifically directed at them.
- The appellate court's skepticism about whether the defendant's conduct fit into the narrow view of a "violation of judicial process" was not resolved. The court held the enhancement inappropriate because the defendant's conduct fit most properly under the abuse of trust adjustment. The sentencing enhancement at the fraud guideline for violation of judicial process only applies to conduct not addressed elsewhere in the guidelines.

ISSUE 2

FRAUD GUIDELINE: MISREPRESENTATION BY EMPLOYEE OF CHARITY OR GOVERNMENT AGENCY WHO EMBEZZLES OR MISAPPLIES FUNDS

Statement of Issue

Whether the sentencing enhancement for an offense involving "a misrepresentation that the defendant was acting on behalf of a charitable, educational . . . organization or government agency," applies to a defendant who in fact represents the agency but misapplies or embezzles agency funds. §2F1.1(b)(3)(A), p. 127.

Significance of Conflict

1. Involves a conflict between the Tenth and Fourth Circuits.
2. Affects application of a 2- to 4-level enhancement in the fraud guideline—a guideline that the Commission proposes to amend extensively in this cycle.
3. Data show: 153 defendants received an increase for either violation of a judicial order . . . or misrepresentation of a charitable organization. The data do not distinguish between the two parts of the enhancement.

Recommendation

- *Clarify scope of sentencing enhancement*

The two appellate courts that have addressed the issue have adopted opposing interpretations of the scope of the enhancement. The Tenth Circuit has interpreted the provision narrowly, holding that the enhancement does not apply to a legitimate agency representative who illegally misapplies funds. In contrast, the Fourth Circuit has interpreted the provision broadly holding otherwise.

Options

Advantages and Disadvantages

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| (1) Define scope of sentencing enhancement to exclude application to a defendant with legitimate authority to represent charitable impulses. A solicitation by the agency who misapplies or embezzles funds.
(Tenth Circuit) | Consistent with background commentary that focuses on exploiting victims' a legitimate representative and his subsequent embezzlement does not directly exploit charitable impulses.

Enhancement under §3B1.3 (Abuse of Position of Trust) adequately covers this |
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conduct. Embezzler violated the trust given him by the organization.

Narrow focus does not sufficiently protect public trust and charitable organizations.

- (2) Define scope of sentencing enhancement to **include application to a defendant** with legitimate authority to represent agencies. The embezzlement hurts not only the agency who misapplies or embezzles the funds.
(Fourth Circuit)

Provides additional penalty for violating public trust in charitable . . . government the agency defrauded but others as well.

Recognizes that defendant's actions misrepresent that use of funds was wholly for legitimate purposes.

Broad focus overpunishes defendant; Abuse of Position of Trust best way to enhance punishment for such an embezzler.

CASE LAW

Enhancement Does Not Apply

United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995).

Facts: Defendant, president of a non-profit corporation, was convicted of mail fraud. Defendant falsely stated that he used grant money as required by regulation when he in fact used some of the money to purchase computers, and the rest was a payoff.

Holding: The kind of aggravating circumstances contemplated by the sentencing enhancement at §2F1.1(b)(3)(A) are not present in this case.

Rationale:

- In this case, defendant was authorized to act on behalf of educational organization; at no time did he appeal to the generosity and charitable or trusting impulses of victim by falsely declaring his authority; did not exploit victim by claiming authority which did not exist; he simply used funds to which organization was entitled for unauthorized purposes.
- Disagrees with Fourth Circuit in *Marcum*, and distinguishes it: *Marcum* affirmatively solicited charitable contributions from the public, inducing public to act on charitable motives. Defendant here did not affirmatively solicit contributions but misapplied DOL grant funds to which the organization was entitled. The fact that he made a false

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statement certifying that the funds had been used for an authorized purpose does not implicate the guideline. Defendant did not personally gain from misapplication of the funds.

Dissent:

- Acting “on behalf of” also means “in the interest of.” Thus, a defendant misrepresents that he is acting on behalf of an agency when he actually has authority but is not acting in the agency’s interest.
- Neither the plain language nor the commentary of the guideline specifies that defendant must personally gain from his misrepresentation in order for the guideline to apply.

Enhancement Applies

United States v. Marcum, 16 F.3d 599 (4th Cir.), *cert. denied*, 513 U.S. 845 (1994).

Facts: The defendant, a deputy sheriff and president of the deputy sheriff’s association, a charitable organization, conducted public bingo games and skimmed ten percent of the games’ gross proceeds for himself and eight other deputies who worked the games.

Holding: Enhancement was proper.

Rationale: Marcum misrepresented to the public that he was conducting the bingo games wholly on behalf of the charitable organization; in fact, he was acting in part for himself and his fellow deputies.

ISSUE 3

ABUSE OF POSITION OF TRUST

Statement of Issue

Whether the increase for abuse of position of trust applies to a defendant who falsely presents himself as a person having special trust. §3B1.3, p. 233.

Significance of Conflict

1. Involves a 2/1 conflict among the circuits that have addressed the issue.
2. Affects application of a two-level sentencing adjustment.
3. Data show: Annually since 1994, approximately 1300 defendants received an abuse of position of trust increase. The data do not indicate the number of cases addressing the imposter issue.

Recommendations

- *Clarify scope of adjustment*

The three appellate courts that have addressed the issue have adopted varying interpretations of the adjustment. Two appellate courts have interpreted the adjustment broadly, allowing it to apply to impostors. The remaining court has taken the opposite approach.

Options

Advantages and Disadvantages

- (1) Define scope of sentencing adjustment to include imposters.
(majority view)

Penalizes defendants who use a position that affords freedom to commit difficult-to-detect crimes.

Focuses on victim's perspective. Treats imposter the same as a legitimate holder of the position.

Increases penalties for defendants in circuits with minority view.

- (2) Define scope of sentence adjustment to exclude

Recognizes that conduct is more akin to indicants of offense seriousness in Chapter 2

impostors.
(minority view)

offense conduct guidelines than to defendant culpability measurements in Chapter 3.

Does not penalize defendant for victim's reliance on imposter.

Reduces sentences for defendants in circuits with majority view.

(3) Define scope of sentencing adjustment to exclude impostors and provide an increase to fraud guideline to punish for impostors.

Similar to enhancement existing in fraud guideline regarding misrepresentation that defendant was acting on behalf of a charitable organization.

Increase in fraud guideline for impostors inadequate to penalize defendant/impostors who commit other crimes.

CASE LAW

Majority View

United States v. Gill, 99 F.3d 484 (1st Cir. 1996).

Facts: The defendant pled guilty to various charges including mail fraud, wire fraud, and making false statements to Medicare and Medicaid. Over a 15-month period, the defendant (1) provided psychological counseling services to individuals at two facilities, and (2) told clients, employers, and insurers that he possessed a doctoral degree in psychology and was licensed as a psychologist or counselor under Maine law. In fact, he was not licensed and had never received an advanced degree in either psychology or counseling. He submitted claims, or had clients submit claims, totaling \$37,000 and received fees of \$16,000 directly from patients. The district court increased the defendant's sentence for both (1) targeting vulnerable victims, and (2) abusing a position of trust. He received a sentence of 40 months imprisonment.

Holding: The district court did not err in increasing the defendant's sentence for abusing a position of trust.

Rationale:

- Read literally, the guideline could be taken to refer only to one who legitimately occupies a position of trust.

- But, the threat that animates the guideline may as easily be present where the position is occupied by an imposter: the wrongdoer's position facilitates the crime, and reduces chance of detection.
- The court stresses practical realities over legal titles.

United States v. Queen, 4 F.3d 925 (10th Cir. 1993), *cert. denied*, 510 U.S. 1182 (1994).

Facts: The defendant pled guilty to one count of mail fraud for fraudulently obtaining money from investors. For almost two years, defendant was president of a corporation that advertised itself as a brokerage firm specializing in precious metal and currency accounts. The company mailed postcards to individuals, stating that it received one percent of the net profit earned by an investor and did not charge commissions, brokerage fees, or turn fees. Individuals who responded to the postcards were telephoned by company representatives under defendant's supervision and provided with false information.

When investors actually sent money, the funds were either dissipated in the commodity futures market or used for the defendant's own personal expenses. To conceal the fraudulent activities, the company regularly sent false profit statements to investors. Investors lost \$1,097,680. The defendant received a sentence of 30 months imprisonment.

Holding: The district court did not err in increasing the defendant's sentence for abuse of a position of trust.

Rationale:

- Neither the guideline nor commentary define "position of trust," but if defendant had actually been an investment advisor/broker as he represented, he would have occupied a position of trust because the position provided the freedom to commit a difficult-to-detect wrong.
- Defendant held himself out to be equivalent to an investment advisor/broker and provided objective indicia to victims that he was occupying such a role. The victims accepted his offer to assume a position of trust.
- If rationale of enhancement is freedom of position to commit a difficult-to-detect wrong, the question should be addressed from the perspective of a victim.

Minority View

United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994).

Facts: The defendant, who fraudulently held himself out as a physician for several years, pled guilty to various offenses including making false statements in application for social Security disability benefits, mail fraud, and failing to disclose material events affecting his continued right to receive benefits. He advertised in telephone directories as a physician, displayed false academic credentials, and set up a medical office, describing himself variously as a neurologist or psychiatrist. The district court increased the defendant's sentence for both (1) targeting vulnerable victims and (2) abusing a position of trust. He received a sentence of 70 months imprisonment.

Holding: The district court erred in applying an increase for abuse of position of trust.

Rationale:

- The core of his convictions (except for one count) punished for the misrepresentation; an imposter does not “hold” the position that he purports to occupy.
- According to the commentary to §3B1.3, the provision is directed at the special opportunities for criminal conduct that are available to those who legitimately occupy positions of public or private trust because these persons are subject to less supervision; the position of trust facilitates the commission or concealment of the offense.
- The enhancement amounts to double counting where the core of the offense is the misrepresentation that he is a qualified physician; the underlying conviction, with the enhancement for more than minimal planning, addresses and punishes that misrepresentation.

ISSUE 4

ABERRANT BEHAVIOR DEPARTURE

Statement of Issue

Whether for purposes of downward departure from the guideline range, “single acts of aberrant behavior” include multiple acts occurring over a period of time. Chapter 1, Part A §4(d), p. 7.

Significance of Conflict

1. Involves a 5/2 conflict among the circuit courts that have addressed the issue.
2. Affects numerous defendants who do not receive the departure because of the narrow interpretation of its scope by the majority of appellate courts. May produce unwarranted disparity and leniency in circuits that follow the broader interpretation.
3. Data show: Number of Aberrant Behavior Departures

Year	1992	1993	1994	1995	1996
Number of Departures	19	178	223	321	299

Recommendations

- *Clarify scope of the departure*

The Guidelines Manual neither defines “aberrant” nor gives examples of the type of behavior contemplated by this departure. The seven appellate courts that have addressed the issue have adopted varying interpretations of the scope of the departure provision. Five of the appellate courts have interpreted the provision narrowly and have held that defendant conduct that is not spontaneous or thoughtless does not warrant the departure. The remaining two circuits take a broader view, encouraging the district court to look at the totality of the circumstances to determine if the defendant's behavior was aberrational.

- *Move departure provision to Chapter 5, Part K.*

Most generally applicable departure provisions are in Chapter 5, Part H or K.

Options

Advantages and Disadvantages

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| (1) Define scope of departure narrowly to include only spontaneous and thoughtless acts by the defendant.
(minority view) | Clarifies scope of departure; reduces disparity; decreases judicial discretion in the circuits that have adopted minority view. |
| (2) Define scope of departure broadly to include a consideration of the totality of circumstances.
(minority view) | Clarifies scope of departure; increases discretion in majority of circuits by allowing consideration of a broader range of factors; increases disparity; may routinely precipitate departure arguments in first-offender cases. |
| (3) Define scope of departure as unplanned, opportune behavior inconsistent with the defendant's prior good conduct. | Changes focus from the number of acts involved to whether the defendant's conduct deviates from the past. |
| (4) Eliminate language from Chapter 1 of the <u>Guidelines Manual</u> . | Recognizes that Criminal History Category I and combination of factor departure in §5K2.0 essentially cover the same circumstances. |
| (5) Defer action. | Maintains status quo. Any change would probably increase litigation. |

CASE LAW

Majority View

United States v. Marcelllo, 13 F.3d 752 (3d. Cir. 1994).

Facts: The defendant, a lawyer, structured bank deposits, totaling \$63,000 in seven separate deposits, in order to evade reporting requirements in violation of 31 U.S.C. §§ 5322(a), 5324(3).

Holding: The district court correctly determined that the defendant did not qualify for an aberrant behavior departure.

Rationale:

- In order to qualify for a departure on aberrant behavior, the behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender.
- The court concluded that some pre-planning was required to deposit \$9,000 each day over a one-week period of time.

United States v. Glick, 946 F.2d 335 (4th Cir. 1992).

Facts: The defendant, an employee of Arbitron Company, mailed anonymous letters containing confidential company information over a ten-week period to Arbitron's chief competitor, A.C. Nielson. When the FBI searched the defendant's home they discovered equipment stolen from Arbitron. He pled guilty to interstate transportation of stolen property. The district court made a downward departure based on the defendant's aberrant behavior and diminished capacity.

Holding: The district court erred in concluding that the defendant's actions constitute a single act of aberrant behavior.

Rationale:

- Aberrant behavior suggests a spontaneous and seemingly thoughtless act rather than one that was the result of substantial planning.
- The defendant's actions do not constitute aberrant behavior because of the extensive planning, number of actions involved, and the ten-week time period over which the defendant planned and perpetrated his offense.
- The court disagreed with the Ninth Circuit approach that a series of actions taken to further criminal misconduct qualified as aberrant behavior.

United States v. Williams, 974 F.2d 25 (5th Cir. 1992), *cert. denied*, 507 U.S. 934 (1993).

Facts: The defendant entered a bank and presented a teller with two demand notes for money, one dated July 29, 1991, and one dated August 1, 1991. He pled guilty to bank robbery and requested a downward departure contending that his actions in robbing the bank were spontaneous and therefore were aberrant. The district court found that the defendant's conduct did not qualify for the departure.

Holding: The district court did not err in finding that the defendant's conduct did not qualify as aberrant.

Rationale:

- A single act of aberrant behavior is generally a spontaneous or thoughtless act, and requires more than an act which is merely a first offense or “out of character” for the defendant.
- The defendant’s act was neither spontaneous nor thoughtless because one of the demand notes was dated several days prior to the bank robbery.

United States v. Carey, 895 F.2d 318 (7th Cir. 1990).

Facts: The defendant, a trucking company president, engaged in a check-kiting scheme over a 15-month period. Each workday during this period, the president concealed the two over-drawn bank accounts by having his bookkeeper prepare checks to cover the fund shortage. He signed each check and deposited the checks himself. The district court departed downward in part because the offense was a single act of aberrant behavior. According to the district court, because the scheme was (1) the defendant’s first criminal offense, (2) and was generally inconsistent with his otherwise exemplary life and high standing in the community, departure from the guidelines was warranted.

Holding: The district court erred in finding that the offense was a “single act of aberrant behavior.”

Rationale:

- A single act of aberrant behavior generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning. Departure for an aberrant act is warranted because such an act is one for which the defendant may be arguably less accountable.
- While the guidelines provide no guidance about what constitutes a single act of aberrant behavior, it must be more than merely something “out of character” or the defendant’s first offense.
- The court added that there must be some element of abnormal or exceptional behavior to qualify for a departure for aberrant behavior.

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991).

Facts: The defendant, a car dealer, pled guilty to bank fraud as a result of a scheme in which he pledged the same vehicles as collateral for separate loans from two banks over a one year period.

Holding: The district court correctly decided that it did not have the authority to depart downward for aberrant behavior.

Rationale: The defendant's actions in planning and executing the financing scheme over a one-year period were not spontaneous and seemingly thoughtless—a requirement for a departure based on aberrant behavior.

Minority View

United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996).

Facts: The defendant, an at-large member of the Nashua, New Hampshire Board of Aldermen, secretly took steps to use the contacts he enjoyed as an alderman to help his full-time employer, a construction firm, gain a lucrative contract from the city. The government charged the defendant with mail fraud, maintaining that he used the mail system (mailing the contract) to forward a fraudulent scheme in violation of the oath of honest, faithful, and impartial service he took before becoming an alderman and numerous other state and local laws related to, *inter alia*, conflicts of interests and acceptance of pecuniary benefits by public officials.

Holding: The district court erroneously decided that it did not have the authority to make a departure for aberrant behavior when the defendant's conduct was not thoughtless or spontaneous.

Rationale:

- In determining whether an offense constitutes a single act of aberrant behavior, the district court should consider the totality of the circumstances. Those circumstances include, *inter alia*, pecuniary gain to the defendant, past charitable activities, prior good deeds, and efforts to mitigate the effects of the crime.
- A contrary holding would result in an “absurd result. District courts would be reduced to counting the number of acts involved in the commission of the crime to determine whether the departure is warranted.”
- The practical effect of interpreting “single” as referring to the act and not the crime committed would make the aberrant behavior departure unavailable to most defendants because almost every crime involves a series of criminal acts.

- The approach does not expand the opportunities for departure beyond those contemplated by the Commission. The approach does not ensure every first-time offender a downward departure. “Without more, first-time offender status is not enough to warrant downward departure.”

United States v. Takai, 941 F.2d 738 (9th Cir. 1991).

Facts: The defendants pled guilty to bribery and conspiracy to bribe an INS official to obtain green cards (residency permits) for others. Co-defendant M met an INS agent on a flight from Tokyo to San Francisco. Three weeks later, she called him in his Washington office and engaged in general conversation. A few days later, she mentioned that a friend needed a green card for his wife. The agent recorded the conversation. During the course of several more phone calls over an 8-day period, Defendant M agreed to pay the INS agent \$15,000 to get green cards for four people. Defendant T agreed to go along with the plan to get a green card for his wife. However, he backed out of the deal after consulting with a lawyer who told him that the plan was illegal. Defendant T, however, did lend \$1,500 to one of his students to pay part of the bribe. Defendant M delivered half of the bribe to the agent and was arrested immediately.

Holding: The district court did not abuse its discretion in finding that the defendants' conduct constituted "single acts of aberrant behavior" justifying a departure.

Rationale:

- It is fair to read "single act" to refer to the crime rather than the whole series of acts leading to the commission of the offense.
- The two crimes committed—conspiracy and bribery—are closely related and constitute a single act for determining whether they were aberrant.
- Defendant T's action in consulting with a lawyer and withdrawing from conspiracy insofar as getting any personnel benefits, but continuing to help someone else, was contradictory. The conduct made no sense and was rightly viewed as an aberration by the district court.
- There was no evidence in defendant M's background or experience to indicate she was part of a smuggling ring. She stumbled onto something naively and awkwardly. She did not realize the seriousness of the crime she was proposing. Therefore, her action also was aberrant.