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White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?

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White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?

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I. INTRODUCTION

As the population ages, a shift in crime is emerging. Individuals are becoming more likely to engage in financial crime and less likely to engage in violent crime.¹ According to data from the United States Sentencing Commission ("Commission"), approximately 8,000² individuals were

1. Gary Fields, *Financial Crimes Merit More Prison, Judicial Panel Says*, WALL ST. J., Apr. 26, 2001, at A4, available at 2001 WL-WSJ 2861614.

2. U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS [hereinafter 2000 SOURCEBOOK] tbl. 3 (2000), available at <http://www.ussc.gov/ANNRPT/>

sentenced for white-collar crimes³ at the federal⁴ level in the year 2000.⁵ This number represents approximately thirteen percent of all defendants sentenced for federal crimes in the year 2000.⁶

The Commission has been charged with the task of overseeing the sentencing of defendants convicted of all federal crimes, including white-collar crimes. Among the Commission's primary goals is to ensure that convicted individuals are sentenced uniformly and with minimal disparity.⁷ To accomplish these goals, the Commission has created the United States Sentencing Guidelines ("Guidelines").⁸ The Guidelines have been relatively

2000/SBTOC00.htm (last visited Oct. 15, 2002) (on file with author). The total consists of 6,286 defendants sentenced for fraud offenses, 940 sentenced for embezzlement, and 769 sentenced for tax offenses. *Id.*

3. White-collar crime is defined as a "nonviolent crime usu[ally] involving cheating or dishonesty in commercial matters. Examples include fraud, embezzlement, bribery and insider trading." BLACK'S LAW DICTIONARY 1590 (7th ed. 1999).

4. This Comment relates exclusively to white-collar crime under federal law, and sentences imposed under the Federal Sentencing Guidelines. Federal crimes are far outnumbered by state crimes, representing approximately only five percent of state crimes. See U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 3 (1998), available at <http://www.ussc.gov/annrpt/1998/sbtoc98.htm> (last visited Oct. 15, 2002) (on file with author) (noting 50,605 convictions for federal crimes in the year 1998); U.S. DEP'T. OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1998 STATISTICAL TABLES tbl. 1.1 (1998) (noting an estimated 927,717 convictions for state crimes in the year 1998), available at <http://www.ojp.usdoj.gov/bjs/abstract/scsc98st.htm> (last visited Oct. 15, 2002) (on file with author).

5. The year 2000 refers to the Commission's fiscal year ending September 30, 2000. See 2000 SOURCEBOOK, *supra* note 2 (Introduction).

6. 2000 SOURCEBOOK, *supra* note 2, at tbl. 3 (noting that 59,589 individuals were sentenced for federal crimes in the year 2000).

7. 28 U.S.C. § 991(b) (2001). The statute states:

(b) The purposes of the United States Sentencing Commission are to —

(1) establish sentencing policies and practices for the Federal criminal justice system that—

* * * *

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted *sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct

Id. (emphasis added); see also *Koon v. United States*, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified *disparities* and so [sic] reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.") (emphasis added).

8. U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] ch. 1, pt. A, § 3 (2001) ("[T]he Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system."), available at <http://www.ussc.gov/2001guid/1pta.htm> (last visited Oct. 15, 2002) (on file with author).

effective to date in reducing sentencing disparity,⁹ however, disparity in sentencing continues to exist.

This Comment discusses major sources of sentencing disparity that continue to affect defendants of white-collar crimes despite the existence of uniform sentencing guidelines. The focus of the Comment is to answer one primary question: Why might a defendant convicted of white-collar crime in one court receive a materially different sentence than he or she would have received if convicted in another court? As will be shown, the answer has many components.¹⁰

Part II of this Comment briefly discusses the history and mechanics of the Guidelines as a backdrop for the analysis to follow.¹¹ Part III discusses twelve distinct circuit splits that contribute to disparity in white-collar sentencing.¹² The circuit splits result from conflicting interpretations and application of the Guidelines by the various United States Courts of Appeals. Part IV discusses the nature and impact of “adjustments” to offense levels and “departures” from sentencing ranges under the Guidelines.¹³ The discussion reveals that both significant judicial discretion at the trial court level and the “clearly erroneous” standard of appellate review contribute to white-collar sentencing disparity. Part V addresses how judicial discretion conferred upon judges can lead to varying terms of imprisonment for similarly situated defendants of white-collar crimes.¹⁴ Among the sources of disparity stemming from judicial discretion are a judge’s ability to select a sentence from anywhere within a given sentencing range calculated under the Guidelines, and a judge’s ability to impose non-prison alternatives to physical incarceration. Part VI addresses how prosecutorial discretion held by Assistant United States Attorneys leads to sentencing disparity.¹⁵ Among the sources of disparity in this context are a prosecutor’s discretion in determining which charges to bring, discretion in

9. Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999) (concluding that the Guidelines have been generally effective in reducing sentencing disparity); Leslie A. Cory, Comment, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379, 436 (2002). “As a former federal probation officer, I have observed at close range hundreds of sentencings under both old law and the guidelines. My personal experience is that application of the sentencing guidelines has reduced unwarranted sentencing disparity.” *Id.*

10. This Comment identifies some of the more prevalent sources of sentencing disparity as identified through case law, scholarly works, and discussions with federal prosecutors. However, this Comment does not purport to identify each and every source of sentencing disparity. Disparity is an expansive concept not easily reduced to a complete list of contributing factors.

11. See *infra* notes 17-35 and accompanying text.

12. See *infra* notes 36-209 and accompanying text.

13. See *infra* notes 210-78 and accompanying text.

14. See *infra* notes 279-321 and accompanying text.

15. See *infra* notes 322-97 and accompanying text.

whether to seek a downward departure for “substantial assistance” provided by defendants, and discretion in whether to seek a plea agreement. Finally, Part VII concludes with a recommendation to the Commission to amend the Guidelines to resolve the circuit splits, and an observation that some sources of white-collar sentencing disparity are perhaps better left undisturbed.¹⁶

II. HISTORY AND MECHANICS OF THE GUIDELINES

A. History of the Guidelines

Congress enacted the Sentencing Reform Act of 1984 (“Act”) to reduce sentencing disparity between similarly situated offenders convicted of similar crimes.¹⁷ In response to the Act, the Commission was formed.¹⁸ The Commission was assigned the task of developing uniform sentencing guidelines for application to all federal crimes.¹⁹ Pursuant to this directive, the Commission enacted the Guidelines in 1987.²⁰ The Guidelines are a statutory body of law binding all federal courts in the sentencing of individuals convicted of federal crimes.²¹

Under the Guidelines, although uniformity in sentencing is a goal, some degree of customization in sentencing is permitted.²² Through various “adjustments” to a defendant’s offense level, and “departures” from a

16. See *infra* notes 398-410 and accompanying text.

17. U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 3 (“[I]n enacting the Sentencing Reform Act of 1984 . . . Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”); see also *supra* note 7 and accompanying text.

18. *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 362 (1989) (“The Commission is a body created under the Sentencing Reform Act of 1984 . . .”).

19. *Supra* note 7 and accompanying text; U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 1.

20. U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 2. Aside from issues of disparity in sentencing, major goals of the Guidelines were to increase the number of white-collar offenders spending time in prison, and increase the average length of incarceration per white-collar offender. Mark A. Cohen, *The Economics of Crime and Punishment: Implications for Sentencing of Economic Crimes and New Technology Offenses*, 9 GEO. MASON L. REV. 503, 517 (2000) (citing U.S.S.G. ch. 1). The intended increases in sentencing of white-collar criminals have come to fruition. For example, the rate of imprisonment for individuals convicted of white-collar crime increased from thirty-nine percent in 1984 to sixty-one percent in 1999. *Id.* at 517-18. The average sentence length for individuals convicted of white-collar crime increased from fourteen months in 1984 to eighteen months in 1999. *Id.*

21. See *Mistretta*, 488 U.S. at 391 (holding that the Guidelines are constitutional); *Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding that the commentary following the text of the Guidelines is constitutional).

22. See *infra* notes 23-26 and accompanying text.

calculated sentencing range, a sentence can be tailored to the unique circumstances surrounding each case.²³ Further, criminal history is a significant factor contributing to customization of a sentence.²⁴ In addition, the Guidelines produce a “sentencing range” rather than an exact number of months for a sentence, and judges are allowed to select a sentence anywhere within the applicable sentencing range.²⁵ In summary, while the Commission did seek to eliminate sentencing disparity, the Commission did not seek an inflexible system of sentencing where all defendants convicted of a particular statutory offense would receive the exact same sentence regardless of the circumstances surrounding each case.²⁶

B. Mechanics of the Guidelines

Calculation of a sentence under the Guidelines is a multi-step process.²⁷ First, the court must locate the statute of conviction in the Statutory Index.²⁸ Then, based on a mapping scheme contained in the Statutory Index, the court must determine which Guideline section applies.²⁹ Next, the court must look to the applicable Guideline section to determine the “base offense level” for the offense of conviction.³⁰ The base offense level is then adjusted upward or downward for any necessary “adjustments.”³¹ The court must then determine the criminal history category for the defendant.³² The court

23. See *infra* notes 220-50 and accompanying text.

24. See *infra* note 32.

25. See *infra* notes 282-94 and accompanying text; see also U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 2 (describing the concept of sentencing ranges). The maximum of any given sentencing range cannot exceed the minimum of the range by more than the greater of: (i) twenty-five percent, or (ii) six months. *Id.* §§ 2, 4(h) (citing 28 U.S.C. § 994(b)(2)). Selection of a precise sentence within the sentencing range is left to the discretion of the judge. See *infra* notes 282-94 and accompanying text.

26. U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 4(a) (discussing the decision of the Commission not to enact a purely “charge offense” system).

27. For a comprehensive discussion of the mechanics of the sentencing process explained by a federal district court judge, see Honorable Patti B. Saris, *Below The Radar Screens: Have The Sentencing Guidelines Eliminated Disparity? One Judge’s Perspective*, 30 SUFFOLK U. L. REV. 1027, 1031-37 (1997).

28. U.S.S.G., *supra* note 8, at app. A (Statutory Index).

29. *Id.*; see also U.S.S.G., *supra* note 8, § 1B1.1(a) (providing a roadmap for applying the Guidelines). The primary Guideline sections for white-collar offenses are: (i) Section 2B1.1, which applies to, among other things, embezzlement and “fraud & deceit”; (ii) Section 2B1.4, which applies to insider trading; and (iii) Section 2T1.1, which applies to tax evasion.

30. U.S.S.G., *supra* note 8, § 1B1.1(b) (providing a roadmap for applying the Guidelines). The Guideline sections in Chapter 2 (i.e. §§ 2A1.1 – 2X5.1) state a base offense level for each statute of conviction.

31. U.S.S.G., *supra* note 8, § 1B1.1(c) (providing a roadmap for applying the Guidelines). For a list of adjustments under the Guidelines, see *infra* note 220.

32. U.S.S.G., *supra* note 8, § 1B1.1(f) (providing a roadmap for applying the Guidelines); U.S.S.G., *supra* note 8, § 4A1.1 (providing instructions for calculating the criminal history category).

then uses the applicable offense level and criminal history category to locate a “sentencing range” on the Sentencing Table.³³ Next, the court must consider whether any necessary “departures” from the calculated sentencing range should be invoked.³⁴ Finally, once a final sentencing range is determined, the judge must select a precise sentence within the sentencing range.³⁵

Due to the mechanical nature of the Guidelines, differences in the interpretation or application of the Guidelines by different courts or judges at any step during the sentencing process may cause sentencing disparity to occur. The focus of this Comment now turns to specific instances of differing interpretation and application of the Guidelines that lead to sentencing disparity.

III. CIRCUIT SPLITS

A review of decisions of the United States Courts of Appeals reveals at least twelve distinct circuit splits that lead to disparity in sentencing among defendants of white-collar crimes. Many of the circuit splits relate to sentencing in the context of all crimes, not just white-collar crimes. However, for purposes of this Comment, the issues are discussed specifically with an eye toward their impact on sentencing of white-collar crimes.

33. U.S.S.G., *supra* note 8, § 1B1.1(g) (providing a roadmap for applying the Guidelines). The Sentencing Table is located at U.S.S.G. ch. 5, pt. A. The Sentencing Table has a horizontal axis for the offense level and a vertical axis for the criminal history category. The table is comprised of forty-three offense levels and six criminal history categories. A sentencing range appears at the intersection of each offense level axis and criminal history category axis. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

34. U.S.S.G., *supra* note 8, § 1B1.1(i). For a list of grounds for departure under the Guidelines, *see infra* note 238.

35. U.S.S.G., *supra* note 8, § 1B1.4. For a discussion of factors surrounding the selection of a sentence within a sentencing range, *see infra* note 285. The defendant usually serves most of the sentence imposed. Rewards for good behavior may decrease the sentence by up to fifteen percent. U.S.S.G., *supra* note 8, at ch. 1, pt. A, § 3 (“[T]he abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.”); 18 U.S.C. § 3624(b) (2001) (stating that a prisoner may receive up to fifty-four days of good-time credit per year for complying with institutional regulations).

A. Case Law and the Guidelines

1. Section 1B1.4 - Selecting the High End of the Sentencing Range for Refusal to Cooperate With Authorities

Once a sentencing range has been determined under the Guidelines,³⁶ a judge may select any point within the range to serve as the final sentence.³⁷ Sentencing ranges on the Sentencing Table vary in size from as small as six months to as large as eighty-one months, depending on the offense of conviction and the defendant's criminal history category.³⁸ Thus, a judge's decision of which point to select within the sentencing range has a significant impact on the ultimate sentence imposed.

In deciding the ultimate sentence to impose within a sentencing range, judges have a great deal of discretion and may consider a variety of factors.³⁹ While the list of factors available for consideration is quite expansive, at least one court of appeals has attempted to limit those factors. In doing so, a circuit split has evolved.⁴⁰

The Court of Appeals for the Second Circuit has held that sentencing judges are prohibited from using a defendant's failure to cooperate with authorities as a basis for selecting a sentence at the high end of the sentencing range.⁴¹ The court's rationale was that a sentence at the high end of the range would be a penalty in violation of the defendant's Fifth

36. See *supra* notes 27-35 and accompanying text (discussing the mechanics of determining the sentencing range).

37. See *infra* note 282 and accompanying text (discussing the discretion held by judges to select a sentence falling anywhere within the sentencing range).

38. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table). For example, the sentencing range is zero to six months for a defendant with an offense level of one through eight and a criminal history category of one. *Id.* The sentencing range is 324 to 405 months for a defendant with an offense level of thirty-six and a criminal history category of six. *Id.*

39. U.S.S.G., *supra* note 8, § 1B1.4 ("In determining the sentence to impose within the guideline range . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."). However, judges are expressly prohibited from considering the defendant's race, sex, national origin, creed, religion or socio-economic status when selecting a sentence within the sentencing range. U.S.S.G., *supra* note 8, § 5H1.10.

40. JEFRI WOOD, FEDERAL JUDICIAL CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES, 15 (2002) (discussing the views of various United States Courts of Appeals on assorted sentencing issues), available at http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_1=pages/556&url_1=index (last visited Jan. 6, 2003) (on file with author).

41. *United States v. Rivera*, 201 F.3d 99, 101-02 (2d Cir. 1999), cert. denied, 531 U.S. 901 (2000). The defendant faced a sentencing range of 360 months to life. *Id.* at 102. The trial judge imposed a sentence of 480 months, specifically attributing sixty months to the defendant's failure to cooperate with authorities. *Id.* at 101. The sentence was overturned on appeal. *Id.* at 102.

Amendment right to remain silent.⁴² In contrast, the Seventh Circuit has allowed sentencing judges to use a defendant's failure to cooperate with authorities as a basis for selecting a sentence at the high end of the sentencing range.⁴³ In so holding, the Seventh Circuit expressly rejected the defendant's argument that the sentence at the high end of the range was a penalty for the exercise of his Fifth Amendment right to remain silent.⁴⁴ The Second and Seventh Circuits appear to be the only circuits to have addressed the issue.⁴⁵

The effect of the circuit split is that a defendant who refuses to cooperate with authorities may receive a higher sentence in the Seventh Circuit, or a circuit adopting the Seventh Circuit approach, than in the Second Circuit, or a circuit adopting the Second Circuit approach. For example, if the defendant in *United States v. Rivera* was sentenced in the Seventh Circuit rather than the Second Circuit, he would have received a sentence of 480 months rather than 360 months.⁴⁶

It is not uncommon for defendants of white-collar crimes to refuse to cooperate with authorities.⁴⁷ Thus, the circuit split has the potential to affect a large number of defendants of white-collar crime. To the extent that sentencing judges use a defendant's failure to cooperate with authorities as a basis for selecting a sentence at the high end of the sentencing range, the potential for sentencing disparity exists.

42. *Id.* at 101-02.

43. *United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991). The defendant faced a sentencing range of 151 to 188 months. *Id.* at 709. The sentencing judge imposed a sentence of 180 months, attributed in part to the defendant's failure to cooperate with authorities. *Id.*

44. *Id.* at 710. The court also rejected the defendant's argument that the midpoint of the sentencing range should be used as a benchmark for sentencing purposes. *Id.* at 710-11.

45. See *United States v. Gerby*, No. 01-8077, 2002 U.S. App. LEXIS 9768, at *15 (10th Cir. May 22, 2002) (discussing the split of authority between the Second Circuit and the Seventh Circuit, but not stating the position of any other circuits); *United States v. Gonzales*, No. 00-4137, 2002 U.S. App. LEXIS 2701, at *4 (4th Cir. Feb. 20, 2002) (same). A detailed search of the Westlaw database on January 31, 2002 revealed no other circuits addressing the issue.

46. *Rivera*, 201 F.3d at 101-02. The defendant faced a sentencing range of 360 months to life. *Id.* The trial judge imposed a sentence of 480 months, specifically attributing sixty months to the defendant's failure to cooperate with authorities. *Id.* However, the sentence was overturned by the court of appeals. *Id.* at 102.

47. See, e.g., *United States v. Rosch*, No. 94-2888, 1995 U.S. App. LEXIS 34030, at *1-2, 14-15 (7th Cir. Nov. 20, 1995) (failure to cooperate with authorities by a Chief Operating Officer charged with embezzling bank funds and violating RICO laws); *Max v. Comm'r of Internal Revenue*, 48 T.C.M. (CCH) 984 (1984), 1984 WL 15313 (U.S. Tax Ct. Aug. 30, 1984) (failure to cooperate with authorities by a defendant charged with tax fraud).

2. Section 1B1.11 - Ex Post Facto Concerns

Section 1B1.11(b)(3) of the Guidelines states: “[I]f the defendant is convicted of two [related] offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual becomes effective, the revised edition of the Guidelines Manual is to be applied to both offenses.”⁴⁸ Constitutional concerns arise when laws that were not in effect at the time the defendant committed a particular crime are used to calculate a sentence for that crime. Specifically, the ex post facto clause of the United States Constitution forbids retroactive application of laws if application would result in a greater punishment than would have occurred under the law in effect at the time the crime was committed.⁴⁹ A violation of the ex post facto clause would appear to occur when retroactive application of a new or amended Guideline provision occurs pursuant to Section 1B1.11(b)(3), and the application results in a greater sentence than would have resulted under the Guideline provision in effect on the date the crime was committed. However, courts are split on the issue of whether an ex post facto violation indeed occurs.⁵⁰

The First, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that Section 1B1.11(b)(3) of the Guidelines does not violate the ex post facto clause.⁵¹ The rationale has generally been that Section 1B1.11,

48. U.S.S.G., *supra* note 8, § 1B1.11(b)(3).

49. The ex post facto clause appears in Article I of the United States Constitution, which in broad language simply prohibits any “ex post facto Law.” U.S. CONST. art. I, § 9, cl. 3; *see also id.* § 10, cl. 1. In interpreting the ex post facto clause, the Supreme Court has stated: “[T]o fall within the *ex post facto* prohibition, two critical elements must be present: first, the law ‘must be retrospective, that is, it must apply to events occurring before its enactment’; and second, ‘it must disadvantage the offender affected by it.’” *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

50. WOOD, *supra* note 40, at 24-26.

51. *United States v. Regan*, 989 F.2d 44, 48-49 (1st Cir. 1993) (no ex post facto violation where the defendant was sentenced for multiple counts of embezzlement under revised Guideline sections, even though some counts were committed before the revision). “The defendant [had] fair warning at the time he [committed] his later acts that the prior ones may or will be used in determining his sentence for the latter ones.” *Id.* (internal citation omitted); *United States v. Lewis*, 235 F.3d 215, 218 (4th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001) (no ex post facto violation because the defendant “had ample warning, when she committed the later acts of tax evasion, that those acts would cause her sentence for the earlier [related] crime to be determined in accordance with the [amended] Guidelines”); *United States v. Kimler*, 167 F.3d 889, 893-94 (5th Cir. 1999) (no ex post facto violation because the defendant “had adequate notice at the time he committed the counterfeiting offense in 1990 that his [1988] mail fraud offenses would be grouped with the counterfeiting offense and therefore that the 1990 guidelines would apply”); *United States v. Vivit*, 214 F.3d 908, 919 (7th Cir. 2000), *cert. denied*, 531 U.S. 961 (2000) (“the enactment of the grouping rules provides fair notice such that the application of [Section] 1B1.11(b)(3) . . . does not violate the Ex Post Facto Clause”); *United States v. Cooper*, 35 F.3d 1248, 1250-52 (8th Cir. 1994), *vacated by* 514 U.S. 1094 (1995), *and reaff’d by* 63 F.3d 761 (8th Cir. 1995) (no ex post facto violation because at the time the defendant elected to commit the third of three related offenses, he was presumed to be on notice of an amendment to the Guidelines that occurred after the first but before the third

read in its entirety, gives defendants “notice” that when they continue to commit related offenses, they risk sentencing for all of the offenses under the Guidelines in effect on the date of the later committed offense.⁵² The notice requirement that has been read into the *ex post facto* clause is deemed to have been met.⁵³

In contrast, the Third and Ninth Circuits have held that Section 1B1.11(b)(3) violates the *ex post facto* clause.⁵⁴ These circuits ignore the notice argument and broadly conclude that it is unconstitutional to impose greater penalties than were required by the law in effect at the time an

offense); *United States v. Sullivan*, 255 F.3d 1256, 1263 (10th Cir. 2001) (no *ex post facto* violation because the defendant was presumed to have had notice that his pre-amendment tax offenses would be grouped with his post-amendment tax offenses, and that all offenses would be sentenced under the more severe post-amendment Guidelines); *United States v. Bailey*, 123 F.3d 1381, 1405-06 (11th Cir. 1997). In *Bailey*, the court found no *ex post facto* violation for a defendant sentenced under the more severe 1991 Guidelines for a series of related offenses occurring from 1989 to 1992. The court stated:

The one book rule . . . provide[s] that related offenses committed in a series will be sentenced together under the Sentencing Guidelines Manual in effect at the end of the series. Thus, a defendant knows, when he continues to commit related crimes, that he risks sentencing for all of his offenses under the latest, amended Sentencing Guidelines Manual.

Id. at 1404-05.

52. See generally *supra* note 51.

53. *Miller*, 482 U.S. at 430 (“central to the *ex post facto* prohibition is a concern for ‘the lack of fair notice . . . when the legislature increases punishment beyond what was prescribed when the crime was consummated’”) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)) (emphasis added).

54. *United States v. Bertoli*, 40 F.3d 1384, 1403-04 (3d Cir. 1994). An *ex post facto* violation occurred where an amendment to the Guidelines took place after completion of the first offense, but before completion of a later related offense and the amendment resulted in a more severe penalty for the first offense. *Id.* “Apparently, the district court believed that if the conduct is grouped together, there is no need to assess the counts independently to determine whether *ex post facto* clause considerations arise. . . . The fact that various counts of an indictment are grouped cannot override *ex post facto* concerns. . . .” *Id.*; *United States v. Ortland*, 109 F.3d 539, 546 (9th Cir. 1997). In *Ortland*, the court found an *ex post facto* violation where the defendant was sentenced for five related mail fraud counts occurring over a span of several years. *Id.* at 541, 547. The same amended Guideline section was applied to all counts even though the Guideline section was amended after completion of the first offense but before completion of the last offense, and application of the amended Guideline section resulted in a more severe sentence for the offense occurring before the amendment. *Id.* at 546-47. The court stated:

[W]hen application of a version of the Guidelines enacted after the offense leads to a higher punishment than would application of the Guidelines in effect at the time of the offense, there is an *ex post facto* problem. . . .

Application of [Section 1B1.11(b)(3)] in this case would violate the Constitution; its application would cause [defendant’s] sentence on earlier, completed counts to be increased by a later Guideline.

Id.

offense was committed.⁵⁵ The rule adopted by the Third and Ninth Circuits is more favorable to defendants because it offers protection from harsher Guidelines that might be enacted after committing the first of a series of related offenses.⁵⁶

Fraud cases are particularly susceptible to application of Section 1B1.11(b)(3). This is because fraud offenses often lapse over significant spans of time and frequently involve multiple related counts.⁵⁷ Because amendments to the Guidelines occur every year,⁵⁸ and many of the amendments lead to increased sentences,⁵⁹ there is an inherent risk that an amendment that is unfavorable to a defendant will be enacted between the first and last crime in a related string of offenses.

To illustrate, in *United States v. Lewis*,⁶⁰ the defendant was charged with four counts of tax evasion for a tax fraud scheme spanning a three-year period.⁶¹ After the first offense, but before the last offense, the Guidelines

55. *Bertoli*, 40 F.3d at 1403-04; *Ortland*, 109 F.3d at 546-47.

56. As an aside, it is interesting to note that Commentary to Section 1B1.11 of the Guidelines states that both Congress and the Commission believe Section 1B1.11 is altogether exempt from an ex post facto analysis. Commentary to Section 1B1.11 states:

Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date generally have held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.

U.S.S.G., *supra* note 8, § 1B1.11, cmt. background. The Senate Report that is referred to in the Commentary to Section 1B1.11 states:

The practice of the Parole Commission has been to use [its] guidelines currently in effect, and this practice has generally withstood challenges that it violated the prohibition against ex post facto laws in Article I, Section 9 of the Constitution. The Committee believes that the reasons given for upholding the Parole Commission practice are equally applicable to the Sentencing Guidelines.

S. REP. No. 98-225, at 77-78 (1983), *reprinted in* U.S.C.C.A.N. 3182, 3260-3261. Despite the belief by Congress and the Commission that the ex post facto clause does not apply to the Guidelines, all circuits (both the majority and minority circuits) to address the issue have held that the ex post facto clause indeed does apply. *See supra* notes 51, 54. However, while the majority holds that the ex post facto clause applies and an ex post facto analysis is therefore necessary, the majority believes that the ex post facto clause is satisfied because defendants have “notice” of future sentencing increases. *See supra* note 51. The end result under the majority rule is the same as if the ex post facto clause simply did not apply altogether, as proposed by Congress and the Commission.

57. *E.g.*, *Regan*, 989 F.2d at 45 (fifty-five related counts of embezzlement from 1987 to 1991); *Kimler*, 167 F.3d at 890 (fourteen related counts of mail fraud and one count of counterfeiting from 1988 to 1990); *Ortland*, 109 F.3d at 541 (five related counts of mail fraud in an investment scheme from 1986 to 1990); *United States v. Scott*, No. 95-2078, 1997 U.S. App. LEXIS 5397, at *1-2 (7th Cir. Mar. 19, 1997) (forty-four related counts of mail fraud and one count of making a false statement to the Securities and Exchange Commission from 1983 to 1985).

58. *See infra* note 204 (citing all amendments from 1987 through 2001).

59. *See supra* notes 51, 54 (providing examples of cases in which post-amendment Guidelines were more detrimental to defendants than pre-amendment Guidelines).

60. 235 F.3d at 215.

61. *Id.* at 216-17.

were amended to increase the base offense level for tax evasion from eleven to thirteen.⁶² As a result, the minimum sentence that the defendant faced increased from eight months to twelve months.⁶³ The Fourth Circuit, in accordance with the previously discussed rule, found no ex post facto violation.⁶⁴ The court allowed the amended Guideline section to be applied to all charges, including those occurring before the date of the amendment.⁶⁵ Had the defendant been convicted in the Third or Ninth Circuit, an ex post facto violation would have occurred.⁶⁶ The Guideline in effect on the date of the earlier offense would have been applied to the earlier offense, and the defendant would have received a lesser aggregate sentence. Sentencing disparity clearly resulted to the detriment of the defendant.

To summarize, defendants of white-collar crimes convicted of multiple, related counts spanning more than one amendment period may face different sentences depending on the circuit of conviction. The majority rule allows a new or amended Guideline to be applied to all related counts, including those occurring before enactment or amendment of the Guideline. The majority rule is detrimental to defendants if the new or amended Guideline results in a sentence for the earlier offense that is harsher than what the sentence would have been under the Guideline in effect on the date of the earlier offense. In contrast, the minority rule prohibits a new or amended Guideline from being applied to related counts occurring before enactment or amendment of the Guideline. The minority rule is beneficial to defendants if the new or amended Guideline results in a sentence for the earlier offense that is harsher than what the sentence would have been under the Guideline in effect on the date of the earlier offense. Because the minority rule is more favorable to defendants than the majority rule, a source of sentencing disparity exists.

3. Section 2B1.1 - Loss Calculation

In past years, a great deal of controversy had been generated regarding interpretation and application of the "loss" concept for the sentencing of white-collar crimes.⁶⁷ In fact, the loss calculation had been one of the most

62. *Id.* at 217.

63. U.S.S.G., *supra* note 8, at ch. 5, pt. A (1993) (Sentencing Table).

64. *Lewis*, 235 F.3d at 218.

65. *Id.*

66. *See supra* note 54 (discussing the positions of the Third and Ninth Circuits).

67. Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 464 (1998). A loss calculation is

frequently litigated issues in sentencing law.⁶⁸ Fortunately, a major amendment to the Guidelines occurred in 2001, at which time the Commission resolved most of the disputes in the loss area.⁶⁹ Prior to the 2001 amendment there were numerous splits of authority among the circuit courts regarding the loss calculation.⁷⁰ Because the splits of authority were resolved by the 2001 amendment, they no longer constitute a source of white-collar sentencing disparity. Accordingly, they will not be further discussed here. However, it is noteworthy that the Commission, through its amendment enacting authority, resolved circuit splits and eliminated a significant source of sentencing disparity.

4. Section 3A1.1 - Vulnerable Victim Adjustment for Indirect Victim

Section 3A1.1(b)(1) of the Guidelines permits an upward adjustment to an offense level if the victim of the offense was a “vulnerable victim.”⁷¹ A circuit split exists regarding whether the adjustment may be applied when the vulnerable victim was an “indirect” victim of the offense.⁷² The Fifth, Ninth, and Eleventh Circuits have held that a Section 3A1.1(b)(1) upward adjustment may be applied where the vulnerable victim was an indirect victim of the offense.⁷³ Conversely, the Sixth Circuit has held that a Section 3A1.1(b)(1) upward adjustment cannot be applied for a vulnerable indirect

required to determine the offense level for defendants sentenced under the fraud Guideline. U.S.S.G., *supra* note 8, § 2B1.1(b)(1).

68. Bowman, *supra* note 67, at 464 n.2 (noting that a search of the Westlaw database for all federal appellate opinions, excluding the United States Supreme Court, revealed that the concept of “loss” for sentencing purposes was discussed in 894 cases decided from November 1987 to August 1997).

69. See U.S.S.G., *supra* note 8, at app. C, amend. 617. Among the significant changes from the amendment was a consolidation of the Guideline section for fraud (§ 2F1.1) with the Guideline section for theft (§ 2B1.1). The two Guideline sections are now combined at Section 2B1.1. U.S.S.G., *supra* note 8, § 2B1.1.

70. Bowman, *supra* note 67, at 464 n.3 (presenting a list of the then existing splits of authority).

71. U.S.S.G., *supra* note 8, § 3A1.1(b)(1) (“If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.”).

72. Marshall J. Lerman et al., *Thirtieth Annual Review of Criminal Procedure: Sentencing Guidelines*, 89 GEO. L.J. 1655, 1663 n.1992 (2001).

73. *United States v. Sidhu*, 130 F.3d 644, 655 (5th Cir. 1997) (adjustment applied where patients were made addicted to pain treatment as part of an insurance fraud scheme; the patients were merely indirect victims of the scheme and the insurer was the direct victim); *United States v. Sherwood*, 98 F.3d 402, 412-13 (9th Cir. 1996) (adjustment applied where a teenager was kidnapped and forced to strip and pose for photographs; the charge was money laundering conspiracy rather than kidnapping, and the teenager was merely an indirect victim of the crime of money laundering); *United States v. Yount*, 960 F.2d 955, 957-58 (11th Cir. 1992) (adjustment applied where the bank accounts of elderly individuals were raided by a bank vice-president; the elderly individuals were merely indirect victims, and the bank was the direct victim because it reimbursed the individuals’ accounts when the scheme was discovered).

victim.⁷⁴ The effect of the split is that a defendant causing harm to a vulnerable indirect victim may receive a higher sentence if sentenced in the Fifth, Ninth, or Eleventh Circuits, or a circuit following the rationale of those circuits, than if sentenced in the Sixth Circuit, or a circuit following the rationale of the Sixth Circuit.

To illustrate, in *United States v. Sidhu*,⁷⁵ the defendant was a physician convicted of an insurance fraud scheme involving fraudulent billings to Medicare and Medicaid.⁷⁶ Medicare and Medicaid were the direct victims of the offense.⁷⁷ During the course of the scheme, several patients who were deemed vulnerable indirect victims became addicted to pain medicine.⁷⁸ The patients were indirect victims because the scheme, although aimed at Medicare and Medicaid, used the patients as unsuspecting instrumentalities of the offense.⁷⁹ The court held that the harm to the patients, even though they were only indirect victims, could support a Section 3A1.1(b)(1) upward adjustment.⁸⁰ Had the defendant been convicted in the Sixth Circuit, or a circuit following the Sixth Circuit rationale, the adjustment would not have been applied and the sentence would not have been as high. As a consequence of the circuit split, sentencing disparity occurred to the detriment of the defendant.

A two-level upward adjustment, such as the vulnerable victim adjustment, can increase a sentence by as many as sixty-eight months.⁸¹ It is not unusual for “vulnerable victims” to be harmed in white-collar crime cases.⁸² Therefore, the potential for white-collar sentencing disparity in the

74. *United States v. Dixon*, 66 F.3d 133, 135-36 (6th Cir. 1995). The adjustment was not applied where the vulnerable victim, a payee whose name was falsely endorsed on a pension check, was merely an indirect victim of the offense of conviction. *Id.* The payee was an indirect victim in the sense that he suffered a temporary loss of funds to which he was entitled. *Id.* at 135. However, the credit union’s insurance company was the direct victim because the insurance company ultimately bore the loss. *Id.* at 136. The court stated that “[t]hrough other circuits have held that a nexus between the alleged harm suffered [by the vulnerable victim] and the defendant’s offense of conviction is not required, the Sixth Circuit . . . requires [such a nexus].” *Id.* at 135 (citing *Yount*, 960 F.2d at 958; *United States v. Wright*, 12 F.3d 70, 73 (6th Cir. 1993)).

75. 130 F.3d at 644.

76. *Id.* at 647.

77. *Id.*

78. *Id.*

79. *Id.* at 655.

80. *Id.*

81. For example, for a defendant with an offense level of forty and a criminal history category of one, a two-level upward adjustment into an offense level of forty-two would increase the low end of the sentencing range from 292 months to 360 months. This is an increase of sixty-eight months or twenty-three percent. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

82. *E.g.*, *United States v. Medrano*, 241 F.3d 740, 742-43 (9th Cir. 2001), *cert. denied*, 533 U.S.

context of Section 3A1.1(b)(1) adjustments is evident. To the extent that vulnerable victims are also deemed to be indirect victims of the offense, sentencing disparity may result. Where vulnerable indirect victims are involved, defendants sentenced in the Fifth, Ninth, or Eleventh Circuits, or circuits following the rationale of these circuits, may face significantly longer sentences than defendants sentenced in the Sixth Circuit, or circuits following the rationale of the Sixth Circuit.

5. Section 3B1.2 - Mitigating Role Adjustment for Conduct Outside the Offense of Conviction

Section 3B1.2 of the Guidelines permits a reduction in the offense level if the defendant was a “minimal” or “minor” participant in the crime.⁸³ A circuit split exists regarding the scope of conduct that courts may look to in determining the defendant’s role in the crime.⁸⁴ The issue arises most frequently when the defendant is charged with one crime that is part of a larger uncharged criminal enterprise.⁸⁵ In such cases, the defendant is usually only minimally involved in the overall criminal enterprise but highly involved in the specific offense of conviction.⁸⁶ Courts are divided as to whether the defendant’s activity in the larger criminal enterprise outside the offense of conviction may justify a downward adjustment for the offense of conviction.

963 (2001) (involving a vulnerable victim who was harmed when a bank employee embezzled funds from a bank); *United States v. Luca*, 183 F.3d 1018, 1021 (9th Cir. 1999) (involving a vulnerable victim who was harmed when a defendant committed securities fraud in connection with a Ponzi scheme); *United States v. Hogan*, 121 F.3d 370, 371-72 (8th Cir. 1997) (involving a vulnerable victim who was harmed when a securities broker sold counterfeit certificates of deposit to his clients); *United States v. Hardesty*, 105 F.3d 558, 558-59 (10th Cir. 1997) (involving a vulnerable victim who was harmed when a defendant engaged in embezzlement, money laundering, and mail fraud in a scheme to defraud a trust fund).

83. U.S.S.G., *supra* note 8, § 3B1.2. The Guideline states:

Based on the defendant’s role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Id. The reduction in offense level is intended to prevent minimal or minor participants from being punished as severely as major participants because minimal or minor participants are generally thought to be less culpable than major participants. *Id.* cmt. n.4.

84. Timothy P. Tobin, Comment, *Drug Couriers: A Call for Action by the U.S. Sentencing Commission*, 7 GEO. MASON L. REV. 1055, 1075 (1999) (discussing the split of authority in the context of sentencing drug couriers).

85. *Id.* at 1076-80 (discussing the analysis of the Third, Seventh, and Eleventh Circuits).

86. *Id.*

Most circuits addressing the issue have held that the court must look only to the conduct comprising the offense of conviction.⁸⁷ In contrast, the Third and Ninth Circuits have held that the court may look to all of the defendant's conduct, including participation in the larger uncharged criminal enterprise.⁸⁸

Most cases in which the issue has arisen involve drugs, but the issue has also arisen in cases involving white-collar crime.⁸⁹ For example, in *United States v. Anderson*,⁹⁰ the defendant was convicted of bank fraud. The defendant sought a downward adjustment for his minor role in a larger uncharged bank fraud.⁹¹ The court denied the adjustment, concluding that conduct outside the offense of conviction may not be considered for purposes of a Section 3B1.2 downward adjustment.⁹² Had the case been tried in the Third or Ninth Circuit, the adjustment could have been granted and the defendant could have received a lesser sentence. Thus, sentencing disparity in a white-collar context occurred to the detriment of the defendant. The circuit split presents a potentially significant source of sentencing disparity for defendants of white-collar crimes.

87. *United States v. Gomez*, 31 F.3d 28, 31 (2d Cir. 1994) (the court must look only to the offense of conviction, despite the defendant's claim that he had a lesser role in the overall uncharged drug conspiracy); *United States v. Atanda*, 60 F.3d 196, 198-99 (5th Cir. 1995) (the court must look only to the offense of conviction, despite the defendant's claim that he had a lesser role in the overall uncharged tax fraud conspiracy); *United States v. Roberts*, 223 F.3d 377, 381 (6th Cir. 2000) (the court must look only to the offense of conviction, despite the defendant's claim that he had a lesser role in the overall uncharged drug conspiracy); *United States v. Burnett*, 66 F.3d 137, 140 (7th Cir. 1995) (same); *United States v. Lucht*, 18 F.3d 541, 555 (8th Cir. 1994) (same); *United States v. James*, 157 F.3d 1218, 1220 (10th Cir. 1998) (same); *United States v. De Varon*, 175 F.3d 930, 943-44 (11th Cir. 1999) (same); *United States v. Olibrices*, 979 F.2d 1557, 1560 (D.C. Cir. 1992) (same; the court stated that a contrary result "would provide criminals with the incentive to be involved (or at least claim to be involved) tangentially in larger schemes in addition to the smaller conspiracies for which they are charged").

88. *United States v. Isaza-Zapata*, 148 F.3d 236, 239-41 (3d Cir. 1998) (holding that the court must look beyond the offense of conviction; a defendant's relative culpability should be assessed by considering all relevant conduct and "not simply on the basis of the . . . acts referenced in the count of conviction"); *United States v. Demers*, 13 F.3d 1381, 1383 (9th Cir. 1994) (stating that "a mitigating role adjustment under § 3B1.2 is not limited to the defendant's role in the offense of conviction").

89. *E.g.*, *Atanda*, 60 F.3d at 198 (tax fraud conspiracy); *United States v. Anderson*, No. 97-3019, WL 411649, at *1-2 (D.C. Cir. July 1, 1997) (bank fraud); *see also Isaza-Zapata*, 148 F.3d at 239 ("[I]t should be noted that the relevance of these factors is not necessarily limited to [drug] couriers. Rather, these considerations are directed generally towards a defendant's involvement, knowledge, and culpability, and should provide guidance in any case.").

90. 1997 WL 411649, at *1-2.

91. *Id.*

92. *Id.* (citing *Olibrices*, 979 F.2d at 1559-60).

6. Section 3B1.3 - Abuse of a Position of Trust

Section 3B1.3 of the Guidelines states: “If the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense, increase [the offense level] by 2 levels.”⁹³ Circuit splits have arisen in two distinct contexts with respect to Section 3B1.3. The first involves the definition of a position of trust. The second involves different views regarding whether a defendant’s abuse of a position of trust outside the offense of conviction may trigger the upward adjustment. Each of these contexts is discussed below.

i. Defining a Position of Trust

In attempting to define a position of trust, commentary to Section 3B1.3 states: “‘Public or private trust’ refers to a position . . . characterized by professional or *managerial discretion* (i.e., substantial discretionary judgment that is ordinarily given considerable deference).”⁹⁴ Despite this guidance, there is inconsistency among the circuit courts in defining a position of trust.⁹⁵ The Sixth and D.C. Circuits adhere closely to the “managerial discretion” language stated in the commentary.⁹⁶ In contrast, the Second, Third, and Ninth Circuits adopt a broadened view and look to whether the defendant, regardless of managerial discretion, has the freedom to commit a “difficult-to-detect wrong.”⁹⁷

93. U.S.S.G., *supra* note 8, § 3B1.3.

94. U.S.S.G., *supra* note 8, § 3B1.3, cmt. n.1 (emphasis added). The commentary includes an illustration:

This adjustment, for example, applies in the case of an embezzlement of a client’s funds by an attorney serving as a guardian, [or] a bank executive’s fraudulent loan scheme This adjustment 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.

Id.

95. WOOD, *supra* note 40, at 158-60.

96. United States v. Ragland, 72 F.3d 500, 502-03 (6th Cir. 1995) (no position of trust for a customer service representative at a bank who embezzled money given to her by a customer; the court held that “[t]he element of professional or managerial discretion is said to be the key,” and the defendant did not have the required level of managerial discretion); United States v. West, 56 F.3d 216, 220 (D.C. Cir. 1995) (no position of trust for a courier who stole checks from delivery packages; the court stated that “the commentary’s focus on positions characterized by professional or managerial discretion places a significant limit on the types of positions subject to the abuse-of-trust enhancement,” and the defendant’s duties involved “almost no discretion whatsoever”).

97. United States v. Allen, 201 F.3d 163, 166 (2d Cir. 2000). In finding an abuse of a position of trust for a defendant whose duties were merely ministerial in nature, the court stated:

[Defendant] contends that the District Court misapplied [§ 3B1.3] . . . because her employment responsibilities were at most “secretarial” or “ministerial,” and therefore devoid of the “professional or managerial discretion” necessary to constitute a position of

The managerial discretion standard is narrower and does not encompass many lower-level employees who might trigger an upward adjustment under the difficult-to-detect wrong test. The effect of the circuit split is that a defendant with the ability to commit a difficult-to-detect wrong, but with no managerial discretion, might receive an upward adjustment, and therefore a higher sentence, if convicted in the Second, Third, or Ninth Circuit, or circuits adopting this rationale, than if convicted in the Sixth or D.C. Circuits, or circuits adopting the rationale of those circuits.

To illustrate, in *United States v. Oplinger*,⁹⁸ the defendant was a bank supply coordinator accused of defrauding the bank in a scheme involving returns of office supplies for cash.⁹⁹ The court imposed a two-level upward adjustment under Section 3B1.3 for abuse of a position of trust because the defendant's position provided him with the "freedom to commit a difficult-to-detect wrong."¹⁰⁰ The adjustment was imposed even though the defendant was employed in a low-level position and had no managerial discretion.¹⁰¹ Had the defendant been convicted in the Sixth or D.C. Circuits, or a circuit adhering to the narrow "managerial discretion" test adopted by those circuits, the upward adjustment would not have been imposed. As a consequence of the circuit split, sentencing disparity occurred to the detriment of the defendant.

A two-level upward adjustment, such as the abuse of a position of trust adjustment, can increase a sentence by as many as sixty-eight months.¹⁰²

trust. We disagree. An employee need not have a fancy title or be a "big shot" in an organization to qualify for an enhancement for abuse of a position of trust. Rather, applicability of a § 3B1.3 enhancement turns on "the extent to which the position provides the freedom to commit a difficult-to-detect wrong."

Id. (citation omitted); *see also* *United States v. Lieberman*, 971 F.2d 989, 993 (3d Cir. 1992) (abuse of a position of trust for a defendant who was the sole employee responsible for balancing a company's suspense account; the defendant "was placed in a position to commit a 'difficult-to-detect wrong,' . . . [t]hus, he occupied a position of trust") (citation omitted); *United States v. Oplinger*, 150 F.3d 1061, 1069 (9th Cir. 1998) (abuse of a position of trust for a supply coordinator who returned supplies for cash and kept the proceeds; the court, rejecting the defendant's contention that a low-level, non-managerial position such as a supply coordinator was not a position of trust, stated that "the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong") (citation omitted); *accord* *United States v. Lamb*, 6 F.3d 415, 418-19 (7th Cir. 1993) (abuse of a position of trust for a postal carrier; the court stated that "[i]t would be contrary to logic and common sense to hold that just because a person has a 'low-level' job, he cannot be considered to occupy a position of trust").

98. 150 F.3d at 1061.

99. *Id.* at 1063-64.

100. *Id.* at 1069.

101. *Id.*

102. *See supra* note 81 (acknowledging that a two-level upward adjustment can increase the low

Section 3B1.3 adjustments are sought in a relatively high number of white-collar crime cases.¹⁰³ Thus, to the extent that defendants of white-collar crimes are in a position to commit a “difficult-to-detect wrong,” but lack managerial discretion, the split of authority presents a source of sentencing disparity.

ii. Abuse of a Position of Trust as Conduct Outside the Offense of Conviction

A circuit split also exists regarding whether an abuse of a position of trust that occurs outside the offense of conviction may warrant an upward adjustment under Section 3B1.3.¹⁰⁴ For example, a defendant might abuse a position of trust in unlawfully obtaining funds from his employer.¹⁰⁵ The defendant might subsequently be convicted of tax evasion, but not embezzlement or a similar charge relating to the actual theft of the funds from the employer. Under these circumstances, the abuse of a position of trust is independent of the offense of conviction.¹⁰⁶

There are two views as to whether an abuse of a position of trust that leads to, but is independent of, the offense of conviction may warrant an upward adjustment under Section 3B1.3. The Tenth and Eleventh Circuits adopt a narrow view and hold that the adjustment may not be imposed because the abuse of a position of trust is one step removed from the offense of conviction.¹⁰⁷ Conversely, the Third, Seventh, and Ninth Circuits adopt a broad view and are willing to look beyond the offense of conviction to find an abuse of a position of trust.¹⁰⁸ The effect of the circuit split is that a

end of the sentencing range by sixty-eight months).

103. *E.g.*, *United States v. Hussey*, 254 F.3d 428, 429-30 (2d Cir. 2001) (adjustment sought for a defendant convicted of securities fraud); *United States v. Sonsalla*, 241 F.3d 904, 906-07 (7th Cir. 2001) (adjustment sought for a defendant convicted of making false entries in bank records); *United States v. Liss*, 265 F.3d 1220, 1224-25 (11th Cir. 2001) (adjustment sought for a defendant convicted of receiving kickbacks in return for Medicare referrals).

104. *WOOD*, *supra* note 40, at 162-63.

105. *United States v. Guidry*, 199 F.3d 1150, 1153 (10th Cir. 1999) (the defendant abused a position of trust as an accountant and embezzled funds from her employer).

106. *Id.* (the defendant was convicted of tax evasion but not embezzlement).

107. *Id.* at 1159-60 (although the defendant abused a position of trust as an accountant when embezzling funds from her employer, she was only convicted of tax evasion and had no position of trust with respect to the victim of the offense, the federal government); *United States v. Barakat*, 130 F.3d 1448, 1454-55 (11th Cir. 1997) (a defendant convicted only of tax evasion could not receive an adjustment for abusing a position of trust as head of a county housing authority in obtaining the underlying funds).

108. *United States v. Cianci*, 154 F.3d 106, 112-13 (3d Cir. 1998) (an adjustment was imposed for an executive who embezzled money from his employer even though the sole offense of conviction was tax evasion); *United States v. Bhagavan*, 116 F.3d 189, 193 (7th Cir. 1997) (an adjustment was imposed for a company president who diverted corporate funds to himself even though the sole offense of conviction was tax evasion; the adjustment was deemed appropriate because the breach of

defendant who abuses a position of trust leading up to an independent uncharged crime may receive a greater sentence if sentenced in the Third, Seventh, or Ninth Circuits, or a circuit adopting this rationale, than if sentenced in the Tenth or Eleventh Circuits, or a circuit adopting the rationale of those circuits.

To illustrate, in *United States v. Barakat*,¹⁰⁹ the Eleventh Circuit refused to impose an upward adjustment for abuse of a position of trust where the defendant abused his position of trust by receiving kickbacks from an entity that conducted business with his employer.¹¹⁰ The defendant was convicted of tax evasion, but not mail fraud or any similar charges related to the receipt of funds that he failed to report as taxable income.¹¹¹ A Section 3B1.3 upward adjustment that was imposed by the district court was reversed on appeal, and the sentencing range of twenty-one to twenty-seven months was decreased to a range of fifteen to twenty-one months.¹¹² Had the court of appeals followed the rationale of the Third, Seventh, or Ninth Circuits, the higher sentencing range would have remained in effect. As a consequence of the circuit split, sentencing disparity occurred as illustrated by the reduction in the sentencing range.

In cases involving white-collar crime, it is not uncommon for an abuse of a position of trust to occur leading up to the offense of conviction.¹¹³ This is particularly true of crimes involving tax evasion.¹¹⁴ A two-level adjustment, such as the abuse of a position of trust adjustment, can increase

trust was part of the "overall scheme" of tax evasion); *United States v. Duran*, 15 F.3d 131, 132-34 (9th Cir. 1994) (an adjustment was imposed for a police officer who stole money from arrested individuals even though the sole offense of conviction was "structuring financial transactions to avoid reporting requirements; the court stated that, "in considering an abuse of trust adjustment, a sentencing court may consider conduct other than that involved in the offense of conviction").

109. 130 F.3d 1448, 1448 (11th Cir. 1997).

110. *Id.* at 1449-50, 1454-55.

111. *Id.* at 1449.

112. *Id.* at 1449-50. The adjusted offense level was sixteen before the reversal of the two-level adjustment for abuse of a position of trust. *Id.* at 1449. The sentencing range for an offense level of sixteen was twenty-one to twenty-seven months. *Id.*; U.S.S.G., *supra* note 8, at ch. 5, pt. A (1997) (Sentencing Table). After the reversal of the adjustment, the offense level decreased to fourteen. *See Bakarat*, 130 F.3d at 1456 (noting reversal of the adjustment). The sentencing range for an offense level of fourteen was fifteen to twenty-one months. U.S.S.G., *supra* note 8, at ch. 5, pt. A (1997) (Sentencing Table).

113. *See supra* notes 107-08 (discussing cases involving an abuse of a position of trust outside the offense of conviction).

114. *See supra* notes 107-08 (discussing cases involving an abuse of position of trust leading to charges of, among other things, tax evasion).

a sentence by as many as sixty-eight months.¹¹⁵ Thus, the split of authority presents a potentially significant source of white-collar sentencing disparity.

7. Section 3E1.1 - Loss of the Acceptance of Responsibility Adjustment

Section 3E1.1(a) of the Guidelines states: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."¹¹⁶ If the downward adjustment is earned, it may subsequently be lost for behavior that is inconsistent with the defendant's acceptance of responsibility. For example, defendants often lose the downward adjustment for engaging in the same course of unlawful activity after arrest but before sentencing.¹¹⁷ However, there is a split of authority as to whether the adjustment may be lost for unlawful activity that is unrelated to the offense of conviction.¹¹⁸

Most circuits hold that unlawful conduct engaged in after arrest but before sentencing, which is unrelated to the offense of conviction, may indeed serve as a basis for denying a Section 3E1.1 downward adjustment for acceptance of responsibility.¹¹⁹ In contrast, the Sixth Circuit has held

115. See *supra* note 81 (acknowledging that a two-level upward adjustment can increase the low end of the sentencing range by sixty-eight months).

116. U.S.S.G., *supra* note 8, § 3E1.1(a). There are several factors that a court may consider in determining whether a defendant qualifies for the adjustment. Appropriate considerations include, but are not limited to, the following:

- (a) truthfully admitting the conduct comprising the offense(s) of conviction . . . ;
- (b) voluntary termination or withdrawal from criminal conduct or associations;
- (c) voluntary payment of restitution prior to adjudication of guilt;
- (d) voluntary surrender to authorities promptly after commission of the offense;
- (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
- (f) voluntary resignation from the office or position held during the commission of the offense;
- (g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
- (h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Id. at cmt. n.1.

117. See, e.g., *United States v. Hromada*, 49 F.3d 685, 691 (11th Cir. 1995) (defendant's continued use of drugs while on pretrial release for pending drug charges caused the loss of a Section 3E1.1 downward adjustment); *United States v. Reed*, 951 F.2d 97, 99-100 (6th Cir. 1991) (defendant's continued engagement in credit card fraud while in jail awaiting sentencing for credit card fraud caused the loss of a Section 3E1.1 downward adjustment).

118. WOOD, *supra* note 40, at 209-10.

119. *United States v. O'Neil*, 936 F.2d 599, 600-01 (1st Cir. 1991) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting trial for a postal offense); *United States v. Darling*, No. 00-1353, 2001 WL 30664, at *1 (2d Cir. Jan. 11, 2001) (involving the loss of a Section 3E1.1 adjustment due to the possession of a false identification card while awaiting sentencing for theft of information from the Social Security Administration); *United States v. Ceccarani*, 98 F.3d 126, 131 (3d Cir. 1996) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting sentencing for theft); *United States v. Daniels*, No. 98-4279, 1999 WL 152633, at *1-2 (4th Cir. Mar. 22, 1999) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting

that unrelated conduct cannot serve as a basis for denying a Section 3E1.1 downward adjustment.¹²⁰ The effect of the split of authority is that a defendant who engages in unlawful conduct while awaiting sentencing for an unrelated offense may receive a lower sentence if convicted in the Sixth Circuit than if convicted in most other circuits.

To illustrate, in *United States v. Pace*,¹²¹ the defendant was convicted of conspiracy to commit tax fraud.¹²² The defendant admitted to the charges and qualified for a downward adjustment for acceptance of responsibility under Section 3E1.1.¹²³ However, after arrest but before sentencing, the defendant tested positive for drug use in violation of one of his conditions of release.¹²⁴ The Eleventh Circuit denied the downward adjustment, even though the defendant's drug use was unrelated to the offense of conspiracy to commit tax fraud.¹²⁵ Had the adjustment been applied, as would have occurred in the Sixth Circuit, the offense level would have been decreased by two levels. This would have reduced the defendant's eleven-month sentence by several months.¹²⁶ As a consequence of the split of authority, sentencing disparity occurred to the detriment of the defendant.

A two-level adjustment, such as the acceptance of responsibility adjustment, can have a significant impact on sentencing.¹²⁷ It is not uncommon for defendants of white-collar crimes to commit unrelated

sentencing for gun possession); *United States v. Watkins*, 911 F.2d 983, 984 (5th Cir. 1990) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting sentencing for treasury check fraud); *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting sentencing for a counterfeiting charge); *United States v. Byrd*, 76 F.3d 194, 197 (8th Cir. 1996) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting sentencing for assault); *United States v. Prince*, 204 F.3d 1021, 1022-24 (10th Cir. 2000) (involving the loss of a Section 3E1.1 adjustment due to stabbing an individual while awaiting sentencing for bank robbery), *cert. denied*, 529 U.S. 1121 (2000); *United States v. Pace*, 17 F.3d 341, 343 n.7 (11th Cir. 1994) (involving the loss of a Section 3E1.1 adjustment due to drug use while awaiting sentencing for conspiracy to commit tax fraud).

120. *United States v. Morrison*, 983 F.2d 730, 733-35 (6th Cir. 1993) (the defendant's drug use and attempted theft while on bail pending sentencing for possession of a firearm could not serve as a basis for denying a Section 3E1.1 adjustment; the court held that "criminal activity committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced," may not be used as the basis for denial of a Section 3E1.1 adjustment).

121. 17 F.3d at 341.

122. *Id.* at 342.

123. *Id.*

124. *Id.*

125. *Id.* at 343 n.7.

126. *Id.* at 342.

127. *See supra* note 81 (acknowledging that a two-level adjustment can impact the low end of the sentencing range by sixty-eight months).

unlawful activity while awaiting sentencing.¹²⁸ Thus, the split of authority presents a potentially significant source of white-collar sentencing disparity.

8. Section 4A1.3 - Criminal History: Departure Based on Prior “Dissimilar” Conduct

For purposes of calculating a sentence under the Guidelines, a defendant is assigned a criminal history category ranging from one to six.¹²⁹ The criminal history category is determined by assigning points based on the number and length of prior sentences imposed upon the defendant.¹³⁰ Many unlawful acts either do not result in the imposition of a sentence, or result in a sentence that under-represents the nature of the defendant’s actual conduct.¹³¹ Therefore, a risk exists that the criminal history category might under-represent the extent or seriousness of a defendant’s criminal past.

The Commission recognizes this risk and allows a sentencing court to depart upward from a sentencing range “[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes”¹³² In assessing a defendant’s criminal

128. *E.g.*, United States v. Darling, No. 00-1353, 2001 WL 30664, at *1 (2d Cir. Jan. 11, 2001) (the defendant was found in possession of a false identification card while awaiting sentencing for theft of information from the Social Security Administration); United States v. Barker, No. 95-5949, 1996 U.S. App. LEXIS 13165, at *1-2 (6th Cir. June 3, 1996) (the defendant was engaged in drug use while awaiting sentencing for mail fraud in connection with an insurance fraud scheme); *Pace*, 17 F.3d at 343-44, n.7 (the defendant was engaged in drug use while awaiting sentencing for conspiracy to commit tax fraud); United States v. Watkins, 911 F.2d 983, 984 (5th Cir.1990) (the defendant was engaged in drug use while awaiting sentencing for treasury check fraud).

129. U.S.S.G., *supra* note 8, § 4A1.1. See *supra* notes 32-33 and accompanying text for a discussion of how a defendant’s criminal history category impacts the calculation of a sentence.

130. U.S.S.G., *supra* note 8, § 4A1.1 (illustrating how to calculate the criminal history category).

131. *Id.*; Michael Edmund O’Neill, *Abraham’s Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 305 (2001) (acknowledging that criminal history points do not necessarily reflect the extent of a defendant’s true criminal past).

132. U.S.S.G., *supra* note 8, § 4A1.3. The Guideline more fully states:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (a) prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal offenses);
- (b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
- (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
- (e) prior *similar* adult criminal conduct not resulting in a criminal conviction.

Id. (emphasis added).

history, a court may consider, among other things, information concerning “prior *similar* . . . criminal conduct not resulting in a criminal conviction.”¹³³ Although Section 4A1.3 does not expressly permit a court to consider prior *dissimilar* conduct in assessing criminal history, two circuits have ruled that judges may indeed consider prior dissimilar conduct. A circuit split has evolved with respect to this issue.¹³⁴

The First Circuit has held that “a criminal history departure can be based upon prior *dissimilar* conduct that was neither charged nor the subject of a [prior] conviction.”¹³⁵ The rationale of the court was that the list of departure grounds stated in Section 4A1.3, which includes the word “similar” in describing prior conduct to be considered, is not an exclusive list of departure grounds.¹³⁶ The court allowed an upward departure under Section 4A1.3 based on the defendant’s seventeen-year history of uncharged domestic violence that was dissimilar to the firearms offense with which he was presently charged.¹³⁷ Similar to the First Circuit, the Seventh Circuit has also held that a criminal history departure can be based upon prior dissimilar conduct.¹³⁸

In contrast, the Second Circuit has stated that, in considering whether to invoke a Section 4A1.3 upward departure, a court may not consider prior uncharged conduct that was dissimilar to the instant offense.¹³⁹ To illustrate, in sentencing the defendant for possession of false immigration documents, and in considering whether to depart upward from the sentencing range under Section 4A1.3, the Second Circuit refused to consider the defendant’s prior uncharged acts of homicide, terrorism, and drug trafficking.¹⁴⁰

The holding of the Second Circuit is more beneficial to defendants. This is because sentencing judges are not permitted to consider prior

133. *Id.* § 4A1.3(e) (2001) (emphasis added).

134. WOOD, *supra* note 40, at 335.

135. *United States v. Brewster*, 127 F.3d 22, 27 (1st Cir. 1997) (emphasis added).

136. *Id.* at 26-27. The court reasoned that Section 4A1.3 “states explicitly that the list of five illustrations is not intended to be exhaustive. . . . [To] preclude[] any consideration of dissimilar misconduct . . . would frustrate the ‘included, but not limited to’ caveat that the Sentencing Commission deliberately inserted in the text of section 4A1.3.” *Id.* at 26.

137. *Id.* at 26.

138. *United States v. Schweih*s, 971 F.2d 1302, 1319 (7th Cir. 1992). The court stated that “similarity between the prior conduct and the offense of conviction is not necessary.” *Id.* The court reasoned that although Section 4A1.3(e) includes the word “similar” in describing prior conduct to be considered, Section 4A1.3 expressly states that the list of examples, including the example at Section 4A1.3(e), is not exhaustive. *Id.*

139. *United States v. Chunza-Plazas*, 45 F.3d 51, 56 (2d Cir. 1995) (stating that a sentencing judge may consider prior unlawful conduct “only if it is ‘similar’ to the crime of conviction”).

140. *Id.* at 57.

dissimilar conduct as grounds for a Section 4A1.3 upward departure. The effect of the circuit split is that a defendant who engaged in prior uncharged conduct that was dissimilar to the present offense of conviction could receive a higher sentence in the First or Seventh Circuit, or a circuit adopting the rule of those circuits, than in the Second Circuit, or a circuit adopting the rule of the Second Circuit.

An illustration of the resulting sentencing disparity in a white-collar crime context may be found in *United States v. Walker*.¹⁴¹ In *Walker*, the defendant was convicted of conspiracy to commit credit card fraud.¹⁴² The court imposed an upward departure from the calculated sentencing range based in part on the defendant's prior dissimilar conduct involving "shoplifting and . . . pimping."¹⁴³ The case took place in the Seventh Circuit, where an upward departure on such unrelated grounds was permitted.¹⁴⁴ Had the defendant been convicted in the Second Circuit, or a circuit adopting the rule of the Second Circuit, the upward departure would have been denied and the defendant would have received a lesser sentence. As a consequence of the circuit split, sentencing disparity occurred to the detriment of the defendant.

9. Section 5G1.3 - Sentence "Consecutive" to a Term Imposed for Violation of Probation or Supervised Release

Application Note six to Section 5G1.3 of the Guidelines states, in relevant part:

Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked [because of the commission of the instant offense], the sentence for the instant offense *should* be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release. . . .¹⁴⁵

A circuit split has evolved regarding whether the word "should" in Section 5G1.3 requires, or merely suggests, that the sentence for the instant offense run consecutively to the term imposed for violation of probation, parole, or supervised release.¹⁴⁶ The First, Fifth, Eighth, and Ninth Circuits

141. 98 F.3d 944 (7th Cir. 1996).

142. *Id.* at 945.

143. *Id.* at 948.

144. *Id.* at 947-48.

145. U.S.S.G., *supra* note 8, § 5G1.3, cmt. n.6 (emphasis added).

146. WOOD, *supra* note 40, at 282-83.

have held that Section 5G1.3 requires a consecutive sentence.¹⁴⁷ In contrast, the Second, Third, Seventh, and Tenth Circuits have held that Section 5G1.3 only suggests a consecutive sentence.¹⁴⁸ The difference is important because if Section 5G1.3 only suggests a consecutive sentence, the court therefore has discretion to impose a concurrent sentence.¹⁴⁹ A concurrent sentence is a significant benefit to the defendant because multiple sentences are served at the same time rather than one after another.¹⁵⁰ However, it should be noted that the circuit split only has an impact on sentencing if the judge exercises his or her discretion and elects a concurrent rather than consecutive sentencing scheme.

The case of *United States v. Chapman*¹⁵¹ illustrates this issue in a white-collar context. In *Chapman*, the defendant was convicted of bank fraud resulting from a check-kiting scheme.¹⁵² At the time of the offense, the defendant was under supervised release from a prior unrelated offense.¹⁵³ The court imposed a sentence of thirty-two months for the bank fraud charge

147. *United States v. Gondek*, 65 F.3d 1, 3 (1st Cir. 1995) (stating that “application note 4 [now note 6] is mandatory”); *United States v. Alexander*, 100 F.3d 24, 27 (5th Cir. 1996) (stating that “Application Note 6 is mandatory notwithstanding its use of the term ‘should’”); *United States v. Goldman*, 228 F.3d 942, 944 (8th Cir. 2000) (stating that “notwithstanding the Sentencing Commission’s use of the word ‘should’ rather than ‘shall,’ Application Note 6 is mandatory and requires consecutive sentences”), *cert. denied*, 531 U.S. 1175 (2001); *United States v. Bernard*, 48 F.3d 427, 431-32 (9th Cir. 1995) (stating that Application Note 4 (now Note 6) “required” a consecutive sentence).

148. *United States v. Maria*, 186 F.3d 65, 71 (2d Cir. 1999) (“‘[S]hould’ implies, suggests, and recommends, but does not require. The use of ‘should’ in Application Note 6 provides a sentencing court with the discretion to take a course of action not suggested by the Note”); *United States v. Swan*, 275 F.3d 272, 279 (3d Cir. 2002) (“we agree with the courts holding that the language of . . . application note [6] is permissive [rather than mandatory]”); *United States v. Walker*, 98 F.3d 944, 945 (7th Cir. 1996) (Application Note 6 creates only a “presumption in favor of consecutive sentencing”); *United States v. Tisdale*, 248 F.3d 964, 979 (10th Cir. 2001) (“we conclude that sentencing courts possess the discretion to determine, under U.S.S.G. § 5G1.3(c) and application note 6, whether to impose a sentence concurrent with, partially concurrent with, or consecutive to a prior undischarged term of imprisonment”), *cert. denied*, 534 U.S. 1153 (2002).

149. *Maria*, 186 F.3d at 69.

150. Concurrent and consecutive sentences are defined as follows:

concurrent sentences. Two or more sentences of jail time to be served simultaneously. For example, if a defendant receives concurrent sentences of 5 years and 15 years, the total amount of jail time is 15 years.

consecutive sentences. Two or more sentences of jail time to be served in sequence. For example, if a defendant receives consecutive sentences of 20 years and 5 years, the total amount of jail time is 25 years.

BLACK’S LAW DICTIONARY 1367 (7th ed. 1999).

151. 241 F.3d 57 (1st Cir. 2001).

152. *Id.* at 60.

153. *Id.* at 59.

and required that the sentence run consecutive to the twenty-four month sentence imposed for revocation of supervised release.¹⁵⁴ Had the defendant been convicted in the Second, Third, Seventh, or Tenth Circuits, or circuits adopting the rule of those circuits, the defendant would have faced at least the possibility of receiving concurrent sentences. To the extent that a judge in the Second, Third, Seventh, or Tenth Circuits would have elected concurrent rather than consecutive treatment for the sentences, the defendant would have spent up to twenty-four fewer months in prison.¹⁵⁵ As a result of the circuit split, to the extent that the judge in *Chapman* would have elected concurrent treatment of the sentences if he could, sentencing disparity occurred to the detriment of the defendant.

Defendants in white-collar crime cases are particularly prone to being affected by this circuit split because a significant number of white-collar defendants receive sentences that at least partially involve terms of probation or supervised release.¹⁵⁶ Further, it is not uncommon for white-collar defendants to engage in unlawful conduct while on probation, parole, or supervised release.¹⁵⁷ Accordingly, the circuit split represents a potentially significant source of white-collar sentencing disparity.

10. Section 5G1.3 - Federal Sentence “Consecutive” to a Pending State Sentence

Section 5G1.3 of the Guidelines incorporates by reference Title 18, United States Code, Section 3584(a).¹⁵⁸ Under 18 U.S.C. § 3584(a), a

154. *Id.* at 61.

155. The sentences ran consecutively, therefore the total time served was fifty-six months (thirty-two months for bank fraud plus twenty-four months for violation of supervised release). If the sentences ran concurrently, the total time served would have been thirty-two months, representing the longer of the two sentences. The difference between the total time served on a consecutive and concurrent basis was twenty-four months.

156. For example, in the year 2000 approximately forty-nine percent of all defendants sentenced for crimes involving fraud, embezzlement, or tax charges received sentences that at least partially included probation or supervised release. 2000 SOURCEBOOK, *supra* note 2, at tbl. 12 (indicating that the number of defendants sentenced for fraud, embezzlement, and tax offenses in the year 2000 was 6,174, 912, and 758, respectively (a total of 7,844), and that the number of defendants receiving at least partial probation or supervised release for fraud, embezzlement, and tax offenses was 2,798, 577, and 442, respectively (a total of 3,817) – the resulting ratio was forty-nine percent).

157. *See, e.g.*, *United States v. Steffen*, 251 F.3d 1273, 1274-75 (9th Cir. 2001) (involving a defendant who committed mail fraud and “travel fraud” while on probation from a prior wire fraud sentence), *cert. denied*, 534 U.S. 1062 (2001); *United States v. Smith*, Nos. 98-3794/98-3830, 1999 U.S. App. LEXIS 34045, at *2-4 (6th Cir. Nov. 22, 1999) (involving a defendant who committed bank fraud in connection with a loan scheme while on supervised release from a prior offense); *Chapman*, 241 F.3d at 59-60 (involving a defendant who committed bank fraud while on supervised release from a prior unrelated offense).

158. U.S.S.G., *supra* note 8, § 5G1.3, cmt. background. The commentary to Section 5G1.3 states: “In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run

sentence may be imposed to run consecutive to a previous sentence that has not been fully discharged at the time of sentencing for the instant offense.¹⁵⁹ The rule has been interpreted to allow a judge to elect consecutive treatment of a sentence currently imposed by the judge where, at the time of sentencing, the defendant faces a pending but not-yet-imposed sentence in another court for unrelated charges. In such circumstances, the judge may classify the currently imposed sentence as consecutive to the pending unrelated sentence even though the pending sentence has not yet been imposed. The effect is to ensure that, if the pending sentence is subsequently imposed, the two sentences will be served consecutively.

There is disagreement among the circuit courts as to whether the above stated rule applies to a state sentence that is pending but not yet imposed at the time of sentencing for a subsequent federal offense.¹⁶⁰ The Second, Fifth, Eighth, Tenth, and Eleventh Circuits have held that a federal sentence may be imposed to run consecutive to a pending but not-yet-imposed state sentence.¹⁶¹ In contrast, the Sixth, Seventh, and Ninth Circuits have held that a federal sentence cannot be imposed to run consecutive to a pending but not-yet-imposed state sentence.¹⁶²

concurrently with or consecutively to the prior undischarged term." *Id.* (citing 18 U.S.C. § 3584(a)).

159. 18 U.S.C. § 3584(a) (2001) (stating that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively").

160. WOOD, *supra* note 40, at 275.

161. *Salley v. United States*, 786 F.2d 546, 547 (2d Cir. 1986) (stating that a district court may order a consecutive sentence "regardless of whether the state sentence has as yet been imposed"); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991) (per curiam) (stating that a district court, when determining whether to impose a consecutive sentence, "may consider subsequent sentences anticipated, but not yet imposed, in separate state court proceedings"); *United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001) (per curiam) (stating that the sentencing court has "the authority to impose . . . a federal sentence to be served consecutively to a yet-to-be-imposed state sentence"); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) (stating: "We find no language in section 3584(a) prohibiting a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed"); *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993) (holding that a federal court has authority to impose a sentence consecutive to a pending unrelated state sentence).

162. *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998) (stating that "18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence"); *Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000) (stating that "the district judge . . . [may] specify the sequence of service only when . . . the other sentence is 'an undischarged term of imprisonment' to which the defendant is 'already subject'") (emphasis added); *United States v. Clayton*, 927 F.2d 491, 492 (9th Cir. 1991) (stating that the specific language of 18 U.S.C. § 3584(a), combined with supporting legislative history, "indicates that Congress did not vest federal courts with the authority to impose a federal sentence to run consecutive to a state sentence that has not yet been imposed").

The holding of the Second, Fifth, Eighth, Tenth, and Eleventh Circuits is detrimental to defendants because the imposition of a consecutive sentence by a federal court will prevent a state court from electing concurrent treatment when the pending state sentence is subsequently imposed.¹⁶³ However, it should be noted that the circuit split only has an impact on sentencing if the federal judge exercises his or her discretion and expressly elects consecutive treatment for the federal and pending state sentences.¹⁶⁴ If a federal judge in the Second, Fifth, Eighth, Tenth, or Eleventh Circuit elects not to require consecutive treatment of the sentences, the defendant will occupy the same position that would have been occupied in the Sixth, Seventh, or Ninth Circuit. That is, the defendant will have survived federal sentencing without a mandate that the federal and pending state sentences be served consecutively, and the defendant will at least face the possibility of receiving a concurrent sentence from the state court.

To illustrate the issue in the context of white-collar crime, the defendant in *United States v. Romandine*¹⁶⁵ was sentenced for credit card fraud while awaiting sentencing in state court for unrelated state charges.¹⁶⁶ The state offenses had been committed, but the sentence had not yet been imposed at the time of sentencing for the federal offenses.¹⁶⁷ Because the court was in the Seventh Circuit, the trial judge did not have an opportunity to designate the federal sentence as running consecutive to the pending state sentence.¹⁶⁸ Had the defendant been sentenced in the Second, Fifth, Eighth, Tenth, or Eleventh Circuit, the trial judge would have had an opportunity to elect consecutive treatment for the federal and pending state sentences. To the extent that the trial judge would have elected consecutive treatment if he could, the defendant benefited from the circuit split.

It is not uncommon for defendants of white-collar crimes to be sentenced for federal charges while awaiting sentencing for pending unrelated state charges.¹⁶⁹ Such defendants, if sentenced in the Second, Fifth, Eighth, Tenth, or Eleventh Circuits, stand a greater chance of

163. *Ballard*, 6 F.3d at 1504 (“the imposition of a consecutive sentence . . . will prevent the state court from imposing a concurrent sentence”).

164. Under 18 U.S.C. § 3584(a), the district court *may* impose a consecutive sentence, but it is not *required* to do so. 18 U.S.C. § 3584(a) (2001) (stating that “if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms *may* run concurrently or consecutively”) (emphasis added).

165. 206 F.3d 731 (7th Cir. 2000).

166. *Id.* at 732.

167. *Id.*

168. *Id.* at 737.

169. *E.g.*, *Romandine*, 206 F.3d at 732-33 (the defendant was sentenced for credit card fraud while awaiting sentencing for unrelated state charges); *United States v. Abro*, No. 96-1202, 1997 U.S. App. LEXIS 15325, at *1-3 (6th Cir. June 20, 1997) (the defendant was sentenced for money laundering and food stamp fraud while awaiting sentencing for unrelated state charges).

receiving consecutive treatment of sentences than if they were sentenced in the Sixth, Seventh, or Ninth Circuits. Consequently, the circuit split presents a potentially significant source of white-collar sentencing disparity.

11. Section 5K1.1 - Court's Ability to Depart From a Sentencing Range in Absence of a Substantial Assistance Motion from the Prosecutor

Section 5K1.1 states that “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart [downward] from the guidelines.”¹⁷⁰ Courts generally do not have authority to depart downward under Section 5K1.1 absent a motion from the prosecutor.¹⁷¹ However, prosecutors sometimes withhold Section 5K1.1 motions in bad faith.¹⁷² With respect to prosecutors withholding Section 5K1.1 motions in bad faith, a circuit split exists regarding whether the court may depart from the sentencing range on its own.¹⁷³

The Second, Third, and Eighth Circuits allow a court to depart from a sentencing range calculated under the Guidelines when a prosecutor withholds a Section 5K1.1 motion in bad faith.¹⁷⁴ In contrast, the First and Seventh Circuits strictly adhere to the language of Section 5K1.1 and do not allow a departure from a sentencing range absent a government motion, even if the motion is withheld by a prosecutor in bad faith.¹⁷⁵ The result of the

170. U.S.S.G., *supra* note 8, § 5K1.1. Substantial assistance relates to assistance in the investigation and prosecution of individuals other than the defendant. *Id.*; *id.* at cmt. n.2.

171. *Wade v. United States*, 504 U.S. 181, 185 (1992) (holding that a government motion is a prerequisite to a Section 5K1.1 downward departure, unless the motion is withheld by the prosecutor for unconstitutional reasons).

172. *See infra* notes 174-75 (illustrating cases acknowledging that prosecutors might withhold a Section 5K1.1 motion in bad faith).

173. *WOOD*, *supra* note 40, at 436-38.

174. *United States v. Avellino*, 136 F.3d 249, 260 (2d Cir. 1998) (stating that a prosecutor's “refusal to move for a departure under Guidelines § 5K1.1 is reviewable . . . for misconduct, bad faith, or an unconstitutional motive, such as the defendant's race or religion”); *United States v. Abuhouran*, 161 F.3d 206, 212 (3d Cir. 1998) (stating that “a district court has authority to depart downward for substantial assistance when the government's refusal to offer a motion is ‘attributable to bad faith’”) (quoting *United States v. Isaac*, 141 F.3d 477, 484 (3d Cir. 1998)); *United States v. Rounsavall*, 128 F.3d 665, 667 (8th Cir. 1997) (stating that “[r]elief may be granted absent a government substantial assistance motion if a defendant shows that the government's refusal to make the motion was . . . withheld in bad faith”) (quoting *United States v. Kelly*, 18 F.3d 612, 617-18 (8th Cir. 1990)).

175. *United States v. Romolo*, 937 F.2d 20, 24 (1st Cir. 1991) (“The simple, unvarnished fact remains that, without a government motion, a sentencing court cannot depart downward under

circuit split is that a defendant who provides substantial assistance to authorities, but is denied a Section 5K1.1 motion in bad faith, will be deprived of a departure in the First or Seventh Circuits, or a circuit adopting the holding of those circuits, but not in the Second, Third, or Eighth Circuits, or a circuit adopting the holding of those circuits.

Defendants in white-collar crime cases provide substantial assistance to authorities rather frequently.¹⁷⁶ Further, it is not uncommon for defendants in white-collar crime cases to allege that the prosecutor withheld a Section 5K1.1 motion in bad faith.¹⁷⁷ Substantial assistance departures, when granted in white-collar crime cases, result in an average downward departure length of approximately ten months.¹⁷⁸ To the extent that a defendant may be deprived of a Section 5K1.1 downward departure in some circuits, but not in others, the circuit split presents a potentially significant source of white-collar sentencing disparity.

It should be noted that if the opportunity for a downward departure under Section 5K1.1 is lost, whether due to the bad faith of a prosecutor or otherwise, the opportunity for a downward departure under Section 5K2.0¹⁷⁹ is gained.¹⁸⁰ However, there are at least two differences between Sections

U.S.S.G. § 5K1.1, despite mespiritedness, or even arbitrariness, on the government's part."); *United States v. Smith*, 953 F.2d 1060, 1064 (7th Cir. 1992) (stating that a sentencing court need not review a prosecutor's refusal to submit a Section 5K1.1 motion, even where "failure of the prosecutor to make a motion is arbitrary or in bad faith").

176. For example, downward departures for substantial assistance under Section 5K1.1 were granted in approximately seventeen percent of all fraud-related cases in the year 2000. *See* 2000 SOURCEBOOK, *supra* note 2, at tbl. 27 (noting that substantial assistance departures were granted in 1,084 fraud-related cases in the year 2000); *id.* at tbl. 3 (noting that there were 6,286 fraud-related cases in the year 2000).

177. *E.g.*, *United States v. Ales*, No. 99-1316, 2000 U.S. App. LEXIS 819, at *1-4 (2d Cir. Jan. 21, 2001) (involving a defendant who was charged with filing false tax returns and making false statements to the Social Security Administration who claimed that the prosecutor withheld a Section 5K1.1 motion in bad faith); *United States v. Pileggi*, No. CRIM.A.97-612-2, 2000 WL 298976, at *1-2 (E.D. Pa. Mar. 15, 2000) (involving a defendant who was convicted of insider trading and wire fraud who claimed that the prosecutor withheld a Section 5K1.1 motion in bad faith).

178. 2000 SOURCEBOOK, *supra* note 2, at tbl. 30 (noting that median decreases from the sentencing range in cases involving fraud, embezzlement, and tax offenses, were ten months, six months, and twelve months, respectively).

179. Section 5K2.0 states:

[T]he 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."

U.S.S.G., *supra* note 8, § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

180. *United States v. Kaye*, 140 F.3d 86, 87 (2d Cir. 1998). In addressing the interrelationship between Sections 5K2.0 and 5K1.1, the court stated:

It is . . . clear that if assistance to . . . authorities is covered by Section 5K1.1, then the district court lacks the power to downwardly depart on that basis under Section 5K2.0; conversely, if such assistance is not addressed by Section 5K1.1 then the district court

5K1.1 and 5K2.0 that indicate Section 5K1.1 is a more favorable departure basis for defendants.

The first difference is that a downward departure for providing substantial assistance to authorities is generally more difficult to obtain under Section 5K2.0 than under Section 5K1.1.¹⁸¹ Specifically, to qualify for a departure under Section 5K2.0, as opposed to Section 5K1.1, a defendant must meet the high burden of showing “that he offered assistance that is so unusual in type or degree as to take it out of the heartland of § 5K1.1 cases.”¹⁸² Thus, a defendant faces greater obstacles in obtaining a departure under Section 5K2.0 than under Section 5K1.1. Accordingly, Section 5K2.0 is a less favorable departure basis for defendants.

The second difference is that Section 5K1.1 permits a court to depart below a statutory minimum sentence.¹⁸³ In contrast, Section 5K2.0 does not permit a departure below a statutory minimum sentence.¹⁸⁴ In this regard, Section 5K1.1 is a more favorable departure basis for defendants. To illustrate, in *United States v. Gamble*,¹⁸⁵ the defendant provided assistance to authorities and was granted a Section 5K1.1 downward departure.¹⁸⁶ The departure resulted in a sentence below the statutory minimum for the offense of conviction.¹⁸⁷ Had the departure been granted under Section 5K2.0, the sentence would not have been reduced below the statutory minimum. Thus, the defendant benefited from receiving a departure under Section 5K1.1 rather than 5K2.0.

can depart under Section 5K2.0 on the basis of such assistance

Id.

181. See *United States v. Brown*, No. 00-2579, 2001 U.S. App. LEXIS 8108, at *2-3 (7th Cir. Apr. 26, 2001) (noting that a substantial assistance departure under Section 5K2.0 requires a higher degree of assistance to authorities than a departure under Section 5K1.1).

182. *Id.* at *3 (quoting *United States v. Santoyo*, 146 F.3d 519, 526 n. 5 (7th Cir. 1998)).

183. U.S.S.G., *supra* note 8, § 5K1.1, cmt. n.1 (stating that “substantial assistance . . . may justify a sentence below a statutorily required minimum sentence”).

184. *United States v. Santiago*, 201 F.3d 185, 188 (3d Cir. 1999) (stating that “a District Court lacks the authority to lower a mandatory minimum sentence via section 5K2.0 of the Guidelines”).

185. 917 F.2d 1280 (10th Cir. 1990).

186. *Id.* at 1282.

187. *Id.* at 1281-82. The defendant was sentenced for drug charges. *Id.* The sentence was ninety-six months despite a statutory minimum of 120 months. *Id.* While *Gamble* involved drug charges, departures below the statutory minimum also occur in cases involving white-collar crime. See, e.g., *United States v. Brechner*, No. CR 93-626, 1995 WL 804580, at *1 (E.D.N.Y. Oct. 19, 1995) (involving a defendant charged with tax evasion who entered into a plea agreement providing for a Section 5K1.1 departure that permitted a sentence “below any applicable [statutory] mandatory minimum sentence”), *rev'd on other grounds*, 99 F.3d 96 (2d Cir. 1996).

To summarize, the circuit split regarding the withholding of a Section 5K1.1 motion in bad faith by prosecutors deprives defendants in certain circuits of the opportunity to obtain a downward departure. However, deprived defendants may seek an alternative departure under Section 5K2.0.¹⁸⁸ In the context of providing substantial assistance to authorities, Section 5K2.0 is a less favorable departure basis for defendants because a departure under Section 5K2.0 is more difficult to obtain and in some instances does not allow for as significant a departure as Section 5K1.1.¹⁸⁹ Accordingly, as a result of the circuit split, defendants of white-collar crimes may face materially different sentences depending on the circuit in which they are convicted.

12. Section 5K1.1 - Substantial Assistance to State Authorities

The Section 5K1.1 downward departure for providing substantial assistance to authorities applies when a defendant provides assistance to federal authorities.¹⁹⁰ However, a circuit split exists regarding whether the departure also applies when a defendant provides assistance to state authorities.¹⁹¹

The Third and Ninth Circuits have held that a downward departure may be granted for substantial assistance provided to state authorities.¹⁹² Although less clear, the Seventh and Eighth Circuits appear to have held this way as well.¹⁹³ In contrast, the Second Circuit has held that a downward departure may not be granted for substantial assistance provided to state authorities.¹⁹⁴ The result of the circuit split is that a defendant who provides

188. See *supra* note 180 and accompanying text (noting that if the opportunity for a departure under Section 5K1.1 is lost, the opportunity for a departure under Section 5K2.0 is gained).

189. See *supra* notes 181-87 and accompanying text (discussing the differences between departures under Sections 5K1.1 and 5K2.0).

190. See *supra* note 170 and accompanying text (quoting the text of Section 5K1.1); *United States v. Kaye*, 140 F.3d 86, 87 (2d Cir. 1998) (“Section 5K1.1 addresses assistance . . . to federal authorities”).

191. *WOOD*, *supra* note 40, at 426.

192. *United States v. Love*, 985 F.2d 732, 734-35 (3d Cir. 1993) (“There is no indication in the language of § 5K1.1 or in the accompanying commentary that the Commission meant to limit ‘assistance to authorities’ to assistance to *federal* authorities. . . . [Section] 5K1.1 applies to assistance to state as well as federal authorities.”); *United States v. Emery*, 34 F.3d 911, 913 (9th Cir. 1994) (“[T]here is no indication in the guidelines or elsewhere that application of section 5K1.1 is limited to assistance to federal authorities in the investigation of federal crimes. Federal courts regularly have applied section 5K1.1 to instances in which a defendant has assisted state and local authorities.”).

193. *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990) (assuming without discussion that Section 5K1.1 applies to assistance to state authorities); *United States v. Hill*, 911 F.2d 129, 131 (8th Cir. 1990) (same), *vacated on other grounds*, 501 U.S. 1226 (1991).

194. *Kaye*, 140 F.3d at 87 (stating that “the term ‘offense’ in Section 5K1.1 is properly interpreted to refer only to federal offenses[,] and . . . Section 5K1.1 addresses assistance only to federal

substantial assistance to state authorities may receive a downward departure in the Third, Seventh, Eighth, and Ninth Circuits, or a circuit adopting the holding of those circuits, but not in the Second Circuit, or a circuit adopting the holding of the Second Circuit.

Substantial assistance by defendants is common in cases involving white-collar crime.¹⁹⁵ Further, it is not uncommon for defendants in white-collar crime cases to provide substantial assistance to state authorities.¹⁹⁶ Defendants providing assistance to state authorities in the Second Circuit, or a circuit following the holding of the Second Circuit, are disadvantaged because they are deprived of an opportunity to earn a Section 5K1.1 downward departure. Section 5K1.1 departures, when granted in the context of a fraud-related offense, result in an average departure length of approximately ten months.¹⁹⁷ Therefore, the circuit split leads to less favorable treatment for certain defendants. Although a Section 5K2.0 departure may be available as an alternative to a Section 5K1.1 departure,¹⁹⁸ Section 5K2.0 departures are generally more difficult to obtain than Section 5K1.1 departures and do not allow for as significant a departure as Section 5K1.1.¹⁹⁹ Accordingly, as a result of the circuit split, defendants of white-collar crimes may face materially different sentences depending on which circuit they are convicted in. The circuit split presents a potentially significant source of white-collar sentencing disparity.

B. Duty of the Commission to Resolve Circuit Splits

The Commission has been authorized to resolve sentencing-related circuit splits as they arise.²⁰⁰ In *Braxton v. United States*,²⁰¹ the Supreme Court acknowledged the Commission's power in this regard, stating that "in charging the Commission 'periodically [to] review and revise' the

authorities").

195. *See supra* note 176 (illustrating that substantial assistance departures were granted in seventeen percent of all fraud-related cases in the year 2000).

196. *E.g.*, *United States v. Napoli*, 179 F.3d 1, 3 (2d Cir. 1999) (involving a defendant convicted of bank fraud, wire fraud, money laundering, and conspiracy who cooperated with state law enforcement agencies).

197. *See supra* note 178 (citing data from the Commission).

198. *See supra* note 180 and accompanying text (noting that if the opportunity for a departure under Section 5K1.1 is lost, the opportunity for a departure under Section 5K2.0 is gained).

199. *See supra* notes 181-87 and accompanying text (discussing the differences between departures under Sections 5K1.1 and 5K2.0).

200. *See infra* notes 201-02 and accompanying text.

201. 500 U.S. 344 (1991).

Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.”²⁰² The Supreme Court has also stated that it will be more “restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts.”²⁰³

The Commission has addressed circuit splits in the past by issuing annual amendments to the Guidelines.²⁰⁴ However, while numerous circuit splits have indeed been resolved,²⁰⁵ many circuit splits continue to remain. In fact, most of the present circuit splits identified in this Comment have been outstanding for several years.²⁰⁶ This perhaps indicates that the Commission should increase its efforts to resolve conflicting judicial interpretations regarding the Guidelines.²⁰⁷

Each of the circuit splits identified in this Comment represents a source of white-collar sentencing disparity. The effect of the circuit splits is that a defendant convicted of a white-collar crime in one court might receive a materially different sentence than if convicted in another court. This result is in direct conflict with the goal of the Commission to reduce sentencing disparity.²⁰⁸ The Commission is the primary entity responsible for resolving circuit splits regarding Guideline issues.²⁰⁹ Therefore, if the Commission fails to act, the splits of authority are likely to remain unresolved. To meet the goal of reducing white-collar sentencing disparity, it is recommended that the Commission amend the Guidelines with clarifying language where necessary to eliminate circuit splits and help maintain consistent sentencing practices throughout the country.

202. *Id.* at 348 (citing 28 U.S.C. § 994(o)).

203. *Id.*

204. *See* U.S.S.G., *supra* note 8, at app. C (containing all amendments from 1987 to 2001), available at <http://www.ussc.gov/2001guid/TABCON01.htm> (last visited Oct. 15, 2002) (on file with author); U.S.S.G., *supra* note 8, at ch. 1, pt. A, sec. 5 (stating that “[t]he Commission . . . can amend the guidelines each year”).

205. *See supra* notes 67-70 and accompanying text (acknowledging that amendments were enacted in 2001 to resolve several circuit splits regarding the calculation of “loss” under the Guidelines).

206. *See supra* notes 41, 43, 51, 54, 73-74, 87-88, 96-97, 107-08, 119-20, 135, 139, 147-48, 161-62, 174-75, 192, 193 (indicating, among other things, the dates of the court opinions establishing the current circuit splits).

207. *See* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 303 n.16 (1994) (noting that “[j]udges, academics, and practicing lawyers continue to criticize the Federal Sentencing Guidelines and the United States Sentencing Commission for a variety of reasons including failure to reduce disparity, [and] failure to respond to judicial suggestions for amendments”).

208. *See supra* note 7 and accompanying text (discussing the goal of reducing sentencing disparity).

209. *See supra* notes 202-03 and accompanying text (noting the view of the Supreme Court with respect to resolving sentencing-related conflicts of authority).

Circuit splits are one source of sentencing disparity that can be controlled by the Commission. However, there are a number of additional sources of disparity that are less controllable by the Commission. These include: (i) fact-intensive “adjustments” and “departures” incorporated into the Guidelines; (ii) discretionary sentencing habits of judges; and (iii) discretionary practices of prosecutors. The analysis now shifts to these sources of white-collar sentencing disparity.

IV. ADJUSTMENTS AND DEPARTURES

The Guidelines are designed to account for many factors surrounding a particular criminal act. Much more information is considered than just the statute of conviction. Under the Guidelines, “adjustments” to an offense level and “departures” from a sentencing range allow for customization of a sentence based on the unique circumstances surrounding the case.²¹⁰ Adjustments and departures directly impact the length of a sentence imposed.²¹¹ Therefore, even under a Guideline system established to promote uniformity in sentencing and avoid disparity, it is possible that two defendants who commit identical crimes may receive materially different sentences. This leads to sentencing disparity by design. However, to the extent that judges interpret the Guidelines differently, or apply the Guidelines to the facts in different ways, unintended sentencing disparity may result.²¹²

210. *United States v. Gerard*, 782 F. Supp. 913, 914 (S.D.N.Y. 1992). The court stated: Despite the “widespread but serious misconception” that the promulgation of the Guidelines enjoined sentencing courts from considering personal characteristics of the offender (citation omitted), “it was not Congress’ aim to straitjacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines’ glass bubble, and preventing it from exercising its discretion, flexibility or independent judgment.”

Id. (quoting *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990)). Further, United States District Court Judge Patti B. Saris has stated: “I believe that the Supreme Court in the recent case of *Koon v. United States* has sent a strong message reaffirming the traditional discretion of the sentencing district court to individualize sentencing where warranted.” Saris, *supra* note 27, at 1029. “[D]epartures under [the Guidelines] . . . are primarily a ‘fine-tuning’ of the Guidelines so that different defendants are treated differently based on offender characteristics.” *Id.* at 1043. “As *Koon* recognized, departures beyond the guideline ranges provide sentencing courts with the flexibility of promoting the express congressional goal of enhancing ‘the individualization of sentences’ and permit the consideration of certain personal factors in the atypical case. These departures create warranted sentencing disparities” *Id.* at 1043-44 (quoting S. REP. No. 98-225, at 52-53 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235-36, 1983 WL 25404).

211. See *supra* notes 27-35 and accompanying text (discussing the mechanics of the Guidelines).

212. Cory, *supra* note 9, at 436-37. “The guidelines do not eliminate disparity. Even among judges[,] . . . human beings interpret facts differently. Further, as long as the guidelines present a

A. Standard of Review

In *Koon v. United States*,²¹³ the Supreme Court established the rule that the federal courts of appeals must review a district court's application of the Guidelines to the facts using an "abuse of discretion" standard.²¹⁴ This standard of review applies to the decision to invoke both adjustments and departures.²¹⁵ As a result of this highly deferential standard, sentencing judges have considerable leeway in applying the Guidelines.

The Court in *Koon* noted that "Congress directed courts of appeals to 'give due deference to the district court's application of the guidelines to the facts.'"²¹⁶ This deference appears to be alive and well, as evidenced by the fact that most sentencing decisions are affirmed on appeal.²¹⁷ As a consequence, although similar cases might involve similar facts, sentencing results may vary considerably between judges and still be upheld at the appellate level.²¹⁸ Essentially, case law regarding the invocation of adjustments and departures in different factual settings provides "little more than broad outer ranges within which district courts can operate freely."²¹⁹

B. Adjustment to the Offense Level

The Guidelines contain eleven separate and distinct grounds for adjustment to a given offense level.²²⁰ Relevant in the context of white-

degree of complexity, they will be subject to misinterpretation." *Id.*

213. 518 U.S. 81 (1996).

214. *Id.* at 91, 96-98; *United States v. King*, 257 F.3d 1013, 1024 (9th Cir. 2001) ("We . . . review application of the Guidelines to the facts for abuse of discretion.") (citing *Koon*, 518 U.S. at 91). However, it should be noted that legal questions regarding *interpretation* of the Guidelines are reviewed at the more detailed "de novo" standard. *Koon*, 518 U.S. at 100; *King*, 257 F.3d at 1024 ("We review interpretation of the Sentencing Guidelines de novo . . .").

215. *Koon*, 518 U.S. at 98-100; *United States v. McCarthy*, 97 F.3d 1562, 1579 (8th Cir. 1996) ("We consider the district court's determination of whether a[n] . . . adjustment is appropriate for an abuse of discretion.") (citing *Koon*, 518 U.S. at 96-100); *United States v. Vasquez*, 279 F.3d 77, 79 (1st Cir. 2002) ("Appellate review of a sentencing court's decision granting a departure is for abuse of discretion.") (citing *Koon*, 518 U.S. at 98-100).

216. *Koon*, 518 U.S. at 98 (quoting 18 U.S.C. § 3742(e)(4)). The court further stated that "[i]t 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." *Id.* at 113.

217. 2000 SOURCEBOOK, *supra* note 2, at fig. M. For example, in the year 2000, approximately seventy-nine percent of sentencing-related cases that were appealed were affirmed in full. *Id.* Another six percent were affirmed at least in part. *Id.*

218. *Tobin*, *supra* note 84, at 1083 ("Depending on the particular facts of a case, results may vary within a particular district and still be upheld at the appellate level. This variance results from the appellate courts' application of the clearly erroneous standard of review, . . . and the 'fact-specific' orientation of [the Guidelines].") (discussing sentencing disparity in the context of drug couriers).

219. *Id.* at 1072 (concluding that "[t]he result of this deference is widespread [sentencing] disparity").

220. The adjustments are: § 3A1.1, Hate Crime Motivation or Vulnerable Victim; § 3A1.2,

collar crime include the following: Section 3A1.1, Vulnerable Victim,²²¹ Section 3A1.2, Official Victim,²²² Section 3B1.1, Aggravating Role,²²³ Section 3B1.2, Mitigating Role,²²⁴ Section 3B1.3, Abuse of Position of Trust or Use of Special Skill,²²⁵ Section 3C1.1, Obstructing or Impeding the Administration of Justice,²²⁶ and Section 3E1.1, Acceptance of Responsibility.²²⁷

The impact an adjustment has on a given sentence is dictated by the mechanics of the Guidelines.²²⁸ To illustrate, a Section 3C1.1 adjustment for obstructing or impeding the administration of justice triggers a two-level increase in the offense level for the offense of conviction.²²⁹ The sentencing range on the Sentencing Table therefore increases by two levels and the sentencing range increases accordingly.²³⁰ Judges have no discretion in determining the degree to which an adjustment will impact a sentence because the extent of the adjustment (i.e. one level, two levels, etc.) is expressly stated in the Guidelines.²³¹ However, judges do have discretion in

Official Victim; § 3A1.3, Restraint of Victim; § 3A1.4, Terrorism; § 3B1.1, Aggravating Role; § 3B1.2, Mitigating Role; § 3B1.3, Abuse of Position of Trust or Use of Special Skill; § 3B1.4, Using a Minor to Commit a Crime; § 3C1.1, Obstructing or Impeding the Administration of Justice; § 3C1.2, Reckless Endangerment During Flight; and § 3E1.1, Acceptance of Responsibility. U.S.S.G., *supra* note 8, at ch. 3, pts. A-C, E.

221. *See supra* note 82 (illustrating instances in which vulnerable victims were harmed in white-collar crime cases).

222. *E.g.*, United States v. Campbell, No. 00-1715, 2000 WL 1617926, at *2 (8th Cir. 2000) (imposing a Section 3A1.2 adjustment in a case involving a defendant charged with mail fraud).

223. *E.g.*, United States v. Hetherington, 256 F.3d 788, 791, 796-97 (8th Cir. 2001), *cert. denied*, 534 U.S. 1050 (2001) (imposing a Section 3B1.1 adjustment in a case involving a defendant charged with securities fraud and wire fraud).

224. *See supra* notes 90-92 and accompanying text (illustrating an instance in which a Section 3B1.2 adjustment was sought in a case involving bank fraud).

225. *See supra* note 103 (illustrating instances in which Section 3B1.3 adjustments were sought in cases involving various white-collar crimes).

226. *E.g.*, United States v. Luca, 183 F.3d 1018, 1021-23 (9th Cir. 1999) (imposing a Section 3C1.1 adjustment in a case involving a defendant charged with securities fraud and mail fraud).

227. *See supra* notes 121-23 and accompanying text (illustrating an instance in which a Section 3E1.1 adjustment was sought in a case involving tax fraud).

228. *See supra* notes 27-35 and accompanying text (discussing the mechanics of the Guidelines).

229. U.S.S.G., *supra* note 8, § 3C1.1.

230. *See* U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table); *see also supra* note 81 (acknowledging that a two-level upward adjustment can increase the low end of the sentencing range by sixty-eight months).

231. *See* U.S.S.G., *supra* note 8, § 3A1.1(b)(1)-(2) (upward adjustment of two or four levels, depending on the facts of the case); *id.* § 3A1.2 (upward adjustment of three levels); *id.* § 3B1.1(a)-(c) (upward adjustment of two to four levels, depending on the facts of the case); *id.* § 3B1.2 (downward adjustment of two to four levels, depending on the facts of the case); *id.* § 3B1.3 (upward adjustment of two levels); *id.* § 3C1.1 (upward adjustment of two levels); *id.* § 3E1.1 (downward

deciding whether the adjustment should be imposed.²³² This is where the potential for sentencing disparity exists.

Sentencing judges must determine whether the underlying facts of a case warrant an adjustment.²³³ In making this determination, judges have considerable discretion in weighing and interpreting the facts.²³⁴ An inherent risk of their discretion is that two judges reviewing identical fact patterns might arrive at different conclusions regarding the need for an adjustment.²³⁵ To the extent this occurs, sentencing disparity results.

Adjustments can and do have a significant impact on the length of a sentence.²³⁶ Thus, inconsistencies in the manner in which adjustments are invoked by different judges constitute a material source of white-collar sentencing disparity.

C. Departure from the Sentencing Range

Once a sentencing range is determined under the Guidelines, a judge may depart above or below the calculated range.²³⁷ The Guidelines contain twenty-one separate and distinct grounds for departure.²³⁸ Relevant in the context of white-collar crime are the following: Section 5K1.1, Substantial Assistance to Authorities;²³⁹ Section 5K2.3, Extreme Psychological

adjustment of two or three levels, depending on the facts of the case).

232. *McCarthy*, 97 F.3d at 1579 (recognizing that district courts have discretion in making a “determination of whether a[n] . . . adjustment is appropriate”) (citing *Koon*, 518 U.S. at 96-100).

233. *United States v. Jackson*, 30 F.3d 199, 201 (1st Cir. 1994) (“The basic theory behind the sentencing guidelines is that, in the ordinary case, the judge will apply the guidelines, *make such interim adjustments as the facts suggest*, compute a sentencing range, and then impose a sentence within that range.”) (emphasis added).

234. *McCarthy*, 97 F.3d at 1579 (“We consider the district court’s determination of whether a[n] . . . adjustment is appropriate for an abuse of discretion.”) (citing *Koon*, 518 U.S. at 96-100).

235. See *supra* note 212; accord Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 347 (2000) (acknowledging a willingness by judges to “fudge the facts” to achieve desired sentencing results).

236. See *supra* note 81 (acknowledging that a two-level upward adjustment can increase the low end of the sentencing range by sixty-eight months).

237. U.S.S.G., *supra* note 8, at ch. 1, pt. A, sec. 4(b) (discussing the general departure policy of the Guidelines).

238. The departures are: § 5K1.1, Substantial Assistance to Authorities; § 5K2.1, Death; § 5K2.2, Physical Injury; § 5K2.3, Extreme Psychological Injury; § 5K2.4, Abduction or Unlawful Restraint; § 5K2.5, Property Damage or Loss; § 5K2.6, Weapons and Dangerous Instrumentalities; § 5K2.7, Disruption of Governmental Function; § 5K2.8, Extreme Conduct; § 5K2.9, Criminal Purpose; § 5K2.10, Victim’s Conduct; § 5K2.11, Lesser Harms; § 5K2.12, Coercion and Duress; § 5K2.13, Diminished Capacity; § 5K2.14, Public Welfare; § 5K2.16, Voluntary Disclosure of Offense; § 5K2.17, High-Capacity, Semiautomatic Firearms; § 5K2.18, Violent Street Gangs; § 5K2.20, Aberrant Behavior; § 5K2.21, Dismissed and Uncharged Conduct; and § 5K2.0, Grounds for Departure (a general provision). U.S.S.G., *supra* note 8, at ch. 5, pt. K.

239. E.g. *United States v. Torres*, 251 F.3d 138, 142 (3d Cir. 2001), *cert. denied*, 534 U.S. 936 (2001) (granting a Section 5K1.1 departure for a defendant convicted of bank fraud); *United States v. Butler*, No. 00-4840, No. 00-4909, 2001 U.S. App. LEXIS 14569, at *1, 5 (4th Cir. June 29, 2001)

Injury;²⁴⁰ Section 5K2.5, Property Damage or Loss;²⁴¹ Section 5K2.7, Disruption of Government Function;²⁴² Section 5K2.8, Extreme Conduct,²⁴³ Section 5K2.9, Criminal Purpose;²⁴⁴ Section 5K2.12, Coercion and Duress;²⁴⁵ Section 5K2.13, Diminished Capacity;²⁴⁶ Section 5K2.16, Voluntary Disclosure of Offense,²⁴⁷ and a general provision at Section 5K2.0 entitled Grounds for Departure.²⁴⁸

(granting a Section 5K1.1 departure for a defendant convicted of computer fraud).

240. *E.g.*, *United States v. Helbling*, 209 F.3d 226, 251 (3d Cir. 2000), *cert. denied*, 531 U.S. 1100 (2001) (granting a Section 5K2.3 departure for a defendant convicted of embezzling funds from a pension plan); *United States v. Astorri*, 923 F.2d 1052, 1054 (3d Cir. 1991) (granting a Section 5K2.3 departure for a defendant convicted of tax evasion and wire fraud); *United States v. Benskin*, 926 F.2d 562, 563 (6th Cir. 1991) (granting a Section 5K2.3 departure for a defendant convicted of securities fraud involving a Ponzi scheme).

241. *E.g.*, *United States v. Flinn*, 987 F.2d 1497, 1498, 1505 (10th Cir. 1993) (granting a Section 5K2.5 departure for a defendant charged with fraudulently obtaining the use of a long distance telephone access code); *United States v. Perkins*, 929 F.2d 436, 437-38 (8th Cir. 1991) (granting a Section 5K2.5 departure for a defendant charged with credit card fraud and wire fraud).

242. *E.g.*, *United States v. Gunby*, 112 F.3d 1493, 1502-03 (11th Cir. 1997) (granting a Section 5K2.7 departure for a Magistrate who embezzled funds from a county court system); *United States v. Khan*, 53 F.3d 507, 518 (2d Cir. 1995) (granting a Section 5K2.7 departure for a defendant charged with defrauding Medicaid); *United States v. Heckman*, 30 F.3d 738, 742-43 (6th Cir. 1994) (granting a Section 5K2.7 departure for a defendant charged with income tax fraud); *United States v. Root*, 12 F.3d 1116, 1120-21 (D.C. Cir. 1994) (granting a Section 5K2.7 departure for a defendant convicted of wire fraud and forging public records while practicing as an attorney before the FCC); *United States v. Hatch*, 926 F.2d 387, 397-98 (5th Cir. 1991) (granting a Section 5K2.7 departure for a defendant charged with unauthorized use of funds from a police department's general fund).

243. *E.g.*, *United States v. Davis*, 170 F.3d 617, 620, 623 (6th Cir. 1999) (granting a Section 5K2.8 departure for a defendant convicted of wire fraud in connection with a telemarketing scheme); *United States v. Jacobson*, No. 92-5406, 1993 U.S. App. LEXIS 22534, at *5, 14-15 (4th Cir. Sep. 3, 1993) (granting a Section 5K2.8 departure for a defendant convicted of mail fraud and wire fraud involving a scheme to defraud medical patients).

244. *E.g.*, *United States v. Prine*, No. 01-4094, 2001 WL 822449, at *2 (4th Cir. July 20, 2001) (granting a Section 5K2.9 departure for a defendant convicted of bank fraud).

245. *E.g.*, *United States v. Hall*, 71 F.3d 569, 570-71 (6th Cir. 1995) (granting a Section 5K2.12 departure for a defendant convicted of bank fraud in a check kiting scheme).

246. *E.g.*, *United States v. Sadolsky*, 234 F.3d 938, 945 (6th Cir. 2000) (granting a Section 5K2.13 departure for a defendant convicted of computer fraud); *United States v. Lewinson*, 988 F.2d 1005, 1006 (9th Cir. 1993) (granting a Section 5K2.13 departure for a defendant convicted of mail fraud in connection with receiving fraudulent reimbursements from the state).

247. *E.g.*, *United States v. Gerard*, 782 F. Supp. 913, 915 (S.D.N.Y. 1992) (considering a Section 5K2.16 departure for a defendant convicted of wire fraud in a scheme to defraud her clients).

248. *E.g.*, *United States v. Moskal*, 211 F.3d 1070, 1072, 1074 (8th Cir. 2000) (granting a Section 5K2.0 departure for a defendant convicted of mail fraud in connection with embezzling funds from his clients and employer); *United States v. Yeaman*, 194 F.3d 442, 446, 464 (3d Cir. 1999) (permitting a Section 5K2.0 departure, subject to findings on remand, in a case involving securities fraud and wire fraud).

The potential for sentencing disparity caused by departures is two-fold. First, different judges may arrive at different conclusions as to whether departures are warranted in a given factual setting.²⁴⁹ Second, once it is determined that an adjustment is warranted, there are no clear rules regarding the degree of the departure.²⁵⁰ As a consequence, different judges might arrive at different conclusions as to how many months to depart from a given sentencing range in a given case.

1. Determining Whether a Departure is Warranted

Judges have significant discretion in determining whether the facts of a given case justify a departure.²⁵¹ An inherent risk of this discretion is that judges may arrive at different departure conclusions in cases with substantially similar facts.

At least one study has found that tendencies to depart from the Guidelines do indeed vary between judges.²⁵² Reasons for the variances were not identified with certainty. One proposition was that the frequency

249. See *infra* notes 251-60 and accompanying text (discussing inter-judge disparity in determining whether departures are warranted); see also *Koon v. United States*, 518 U.S. 81, 98 (1996) (acknowledging that a district court's decision as to whether a departure is warranted "will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court").

250. Saris, *supra* note 27, at 1042. Judge Saris stated:

[M]ost departures are unguided because the magnitude of the departure is not mandated, or even calibrated by the guidelines. Once a court has decided to depart, generally there is no formula governing the degree of departure. The appellate courts have no jurisdiction to review the extent of a downward departure merely because a defendant believes the court is too parsimonious except if the departure is affected by a mistake of law. Where the government or defendant believes the magnitude of the departure is excessive, substantial deference is accorded the sentencing judge's decision to determine whether it is within the "realm of reason." Upward departures which literally triple the sentence and downward departures from a range of thirty three months to probation have all been held to be within the "realm of reason."

Id.

251. See *supra* note 216 and accompanying text; *United States v. Gregory*, 932 F.2d 1167, 1169 (6th Cir. 1991) (stating that "we have no jurisdiction over appeals which argue that the district court failed to properly weigh certain factors in departing downward").

252. Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299 (1996). The authors stated that "[w]hile the tendencies of individual judges to depart did vary dramatically, we found no clear ideological or temporal pattern." *Id.* at 358. The authors concluded that their "findings on white-collar departure suggest that the Commission should reexamine its approach to white-collar sentencing." *Id.* at 365. The study, based on data from 1991 and 1992 sentencing decisions, was derived from departure patterns of thirty United States District Courts in six circuits. *Id.* at 303. A similar conclusion was reached by another author in a study based on 1998 data. Cory, *supra* note 9, at 401. The author noted that "[a] defendant in the Northern District of Georgia whose case presents mitigating circumstances is significantly more likely to receive a sentencing reduction [based on a downward departure] than a defendant in the Eastern District of Tennessee whose case presents mitigating circumstances." *Id.*

with which departures are invoked is to some extent related to the age of judges.²⁵³ The theory is that judges from the pre-Guidelines era, i.e. judges on the bench before 1987, utilize greater discretion and are generally more willing to invoke departures.²⁵⁴ This is because judges from the pre-Guidelines era tend to remain accustomed to the much more discretionary sentencing system that was in effect prior to the Guidelines.²⁵⁵ The study found that courts in districts where sentence length tended to be below the national average for similar crimes in the pre-Guidelines era were more likely to invoke downward departures in the post-Guidelines era.²⁵⁶ This indicates that courts that tended to be less harsh in sentencing before the Guidelines continue to be less harsh after the Guidelines. Further, data at the circuit level revealed that different circuits tended to vary substantially in their general approach to departures.²⁵⁷ The case law of some circuits seemed to encourage departures, the case law of other circuits seemed to discourage departures, and the case law of other circuits seemed to remain neutral.²⁵⁸ In addition, large variations existed in departure practice among district courts within the circuits.²⁵⁹

The end result of the significant judicial discretion permitted by *Koon* appears to be that a departure deemed worthy of application in the eyes of one judge might not be deemed worthy of application in the eyes of another judge.²⁶⁰ To the extent that different judges utilize their departure discretion

253. Gelacak et al., *supra* note 252, at 357. The author stated that Judge Jack Weinstein, a federal judge in the Eastern District of New York, “hypothesized that the frequency of departures and judicial resistance to the Guidelines would gradually diminish as newer judges, with no pre-Guidelines sentencing experience, were appointed and fewer sentences were imposed by those [judges] accustomed to the unconstrained authority of the pre-Guidelines era.” *Id.* It has similarly been said that “[o]lder judges who operated before the guidelines were put in place are particularly resentful of the rules and formulas” regarding departures from sentencing ranges. Traci Neal, *Are Connecticut’s Federal Judges ‘Soft on White-Collar Crime?’*, CONN. LAW TRIB., Aug. 2, 1999, at 3.

254. *See supra* note 253.

255. *See supra* note 253.

256. Gelacak et al., *supra* note 252, at 362.

257. *Id.* at 358. With respect to departures in white-collar crime cases, Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit has stated that “[t]he Second Circuit has interpreted the[] [departure] provisions to be somewhat broader and more flexible than some other courts have.” Neal, *supra* note 253, at 3.

258. Gelacak et al., *supra* note 252, at 358. For example, the Second Circuit frequently upheld departures for reasons that other circuits tended to reject, the Seventh Circuit showed just the opposite trend, and the Eighth Circuit tended to take a balanced or neutral approach to reviewing departure decisions. *Id.* at 358-59.

259. *Id.* at 360.

260. Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 59-61 (2000) (noting that

in different ways, which indeed appears to occur, a source of sentencing disparity exists. Consequently, similarly situated defendants convicted of similar crimes might receive materially different sentences depending on which judge presides over the case.

2. Degree of the Departure

There are no specific rules regarding the degree of departures, i.e. the number of months by which a judge may depart from a sentencing range.²⁶¹ The standard is simply one of “reasonableness.”²⁶² The decision is a context-specific inquiry left to the discretion of the judge.²⁶³ With such a subjective standard,²⁶⁴ an inherent risk exists that sentencing disparity will occur.

To illustrate, in *United States v. Diaz-Villafane*,²⁶⁵ the court of appeals upheld an upward departure such that the defendant was sentenced to 120 months rather than a sentence within the range of twenty-seven to thirty-three months as calculated under the Guidelines.²⁶⁶ The upward departure, based on Section 5K2.0²⁶⁷ of the Guidelines, was supported by the court’s

“offenders in some circuits have received downward departures under circumstances that do not qualify for departure in other jurisdictions,” and concluding that sentencing disparity occurs in part “because appellate courts have applied *Koon* differently”); see also Saris, *supra* note 27, at 1041 (acknowledging that the dissenting opinions in *Koon* point out that, with respect to factors the Guidelines neither expressly permit nor prohibit as grounds for departure, appellate courts are likely to differ as to whether such factors may support a departure in a given case) (citing *Koon*, 518 U.S. at 115 (Souter, J., concurring in part and dissenting in part); *id.* at 118-19 (Breyer, J., concurring in part and dissenting in part)).

261. See U.S.S.G., *supra* note 8, § 5K2.0 (“The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis.”).

262. E.g., *United States v. Joan*, 883 F.2d 491, 496 (6th Cir. 1989) (stating that “the degree of departure must be measured by a standard of reasonableness on appeal”); *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989) (stating that “the . . . degree of departure must, on appeal, be measured by a standard of reasonableness”).

263. U.S.S.G., *supra* note 8, § 5K2.0; *Diaz-Villafane*, 874 F.2d at 49-50, 52. The court stated: [The reasonableness inquiry] involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier’s superior “feel” for the case. We will not lightly disturb . . . decisions implicating degrees of departure.

* * * *

[W]e read the Guidelines as envisioning considerable discretion in departure decisions.

Id.

264. See *Joan*, 883 F.2d at 496 (stating that reasonableness of departure length “is a flexible standard”).

265. 874 F.2d at 43.

266. *Id.* at 48, 52.

267. *Id.* at 52. Section 5K2.0 permits a departure where “the court finds ‘that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

conclusion that a number of unique facts took the case out of the heartland of cases in which the particular offense of conviction was typically involved.²⁶⁸ The court of appeals upheld the departure even though it resulted in a sentence more than three times higher than the high end of the applicable sentencing range.²⁶⁹ Essentially, the trial court could have imposed a sentence anywhere from thirty-three months to 120 months. To the extent that another sentencing judge might have imposed a less extreme departure under the circumstances, the case illustrates the potential for sentencing disparity.

Another case illustrates an extreme departure in the context of white-collar crime. In *United States v. Davis*,²⁷⁰ the defendant was convicted of wire fraud in connection with a telemarketing scheme.²⁷¹ The court of appeals upheld a departure that resulted in a sentence of 108 months rather than the thirty-seven to forty-six month range calculated under the Guidelines.²⁷² The sentence imposed was more than two times higher than the high end of the sentencing range. The departure was based on Section 5K2.8²⁷³ and was supported by the “cruel” and “degrading” manner in which the defendant treated his victims.²⁷⁴ Essentially, in assessing the severity of the facts, the trial judge could have imposed a sentence anywhere from forty-six months to 108 months. To the extent that another sentencing judge might have imposed a less extreme departure under the circumstances, the case illustrates the potential for sentencing disparity.

consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” U.S.S.G., *supra* note 8, § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

268. *Diaz-Villafane*, 874 F.2d at 50. The offense of conviction was drug possession. Reasons for the upward departure included: “(1) defendant’s status as an ‘important supplier . . . to drug addicts in the . . . Puerto Rico area;’ (2) the pendency of eight trafficking charges against defendant . . . ; (3) defendant’s use of ‘adolescent or pre-adolescent children’ to deliver narcotics; (4) defendant’s involvement in drug ventures that reaped \$10,000 - \$15,000 daily . . . ; and (5) the purity of the heroin.” *Id.*

269. *Id.* at 48, 52. For a similar conclusion, see *Saris*, *supra* note 27 (acknowledging that upward departures that triple the sentence, and downward departures from a sentence of thirty-three months to a sentence of probation, have been upheld on appeal).

270. 170 F.3d 617 (6th Cir. 1999).

271. *Id.* at 620.

272. *Id.*

273. *Id.* at 623. Section 5K2.8 permits a departure “[i]f the defendant’s conduct was unusually heinous, cruel, brutal, or degrading to the victim.” U.S.S.G., *supra* note 8, § 5K2.8 (1999).

274. *Davis*, 170 F.3d at 623.

3. Frequency of Departures

When enacting the Sentencing Reform Act, Congress believed that departures from sentencing ranges would be used only in truly exceptional circumstances.²⁷⁵ The Guidelines even state that, “despite the courts’ legal freedom to depart from the guidelines, they will not do so very often.”²⁷⁶ However, departures have become fairly common. For example, departures occurred in 1,814 fraud-related cases in the year 2000, representing thirty-one percent of the 5,775 fraud-related cases in the year 2000.²⁷⁷ The median departure length for these departures was approximately ten months.²⁷⁸ Given the frequency with which departures are invoked, and the significant discretion judges have to decide how many months to depart from a sentencing range, departures present a material source of sentencing disparity.

In summary, sentencing judges have significant discretion in determining whether departures are warranted and, if so, to what degree to depart from a sentencing range. This dual discretion, combined with the relatively high frequency with which departures are invoked, makes departures under the Guidelines a significant source of white-collar sentencing disparity.

V. JUDICIAL DISCRETION

Judges have the ability to influence sentencing through various other means in addition to the imposition of adjustments and departures. Most notably, judges have virtually unlimited discretion to sentence a defendant to

275. See 124 Cong. Rec. 382-383 (1988) (Senator Kennedy stated that “[w]e want to make sure these guidelines are followed in the great majority of cases,” and Senator Hart stated that “the presumption is that the judge will sentence within the guideline[] [range]”); see also 133 Cong. Rec. S16644-48 (daily ed. Nov. 20, 1987) (Senator Hatch stated: “If the [departure] standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines . . . to reduce disparity.”); see also U.S.S.G., *supra* note 8, § 5K2.0, cmt. (stating that “the Commission believes that [departure] cases will be extremely rare”) (discussing departures under Section 5K2.0 but not under other Section 5K provisions).

276. U.S.S.G., *supra* note 8, at ch. 1, pt. A, sec. 4(b).

277. 2000 SOURCEBOOK, *supra* note 2, at tbl. 27. There were 1,084 substantial assistance departures, 669 “other downward” departures, and 61 “upward” departures, for a total of 1,814 departures. *Id.* One commentator, noting that the frequency with which departures were invoked increased steadily from the year 1994 to 2000, suggested that the increase might have been due to judicial attempts to manipulate the Guidelines. Bowman, *supra* note 235, at 343.

278. 2000 SOURCEBOOK, *supra* note 2, at tbls. 30-32. The median departure rate for substantial assistance departures was ten months. *Id.* at tbl. 30. The median departure rate for “other downward” departures was nine months. *Id.* at tbl. 31. The median departure rate for “upward” departures was twelve months. *Id.* at tbl. 32.

any term within a sentencing range calculated under the Guidelines.²⁷⁹ Further, in many cases judges have the authority to substitute at least part of a defendant's sentence with a variety of non-prison alternatives.²⁸⁰ These discretionary measures can and do lead to different sentences, or at least different periods of incarceration, for similarly situated white-collar defendants.²⁸¹

A. *Selecting a Sentence within the Sentencing Range*

Once a sentencing range has been calculated, the judge has significant discretion to select any sentence within that range.²⁸² A sentencing range can include as few as six months between the high and low end of the range or as many as eighty-one months, depending on the adjusted offense level and criminal history category.²⁸³ Thus, selecting a point within a sentencing range has a significant impact on a defendant's overall sentence. The potential for sentencing disparity exists because judges are virtually unbound in determining which point to select within a sentencing range.²⁸⁴ There are very few limitations on the factors a judge may consider when selecting a sentence within the range.²⁸⁵ Further, as a practical matter, appellate courts are often unaware of which factors were relied on by the trial judge when

279. See *infra* notes 282-89 and accompanying text.

280. See *infra* notes 295-98 and accompanying text.

281. See *infra* note 289; see also Cory, *supra* note 9, at 437. The author, discussing the results of a study of sentencing decisions in the Eastern District of Tennessee, stated: "[J]udges' exercise of discretion results in a certain amount of 'unwarranted' disparity in sentencing. As this study has shown, different judges will . . . impose different sentences on the same defendant for the same offense."

282. See *infra* note 288; see also U.S.S.G., *supra* note 8, § 1B1.4 ("In determining the sentence to impose within the guideline range, . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant . . .") (citing 18 U.S.C. § 3661); *id.* § 5C1.1 ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

283. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table). Lesser offenses result in more narrow sentencing ranges than serious offenses. *Id.* For all sentencing ranges, the high end of the range cannot exceed the low end of the range by more than the greater of six months or twenty-five percent. U.S.S.G., *supra* note 8, at ch. 1, pt. A, §§ 2, 4(h) (citing 28 U.S.C. § 994(b)(2) (2000)).

284. See *supra* note 282.

285. Bowman, *supra* note 67, at 472 (the author, discussing Sections 5H1.1 to 5H1.6 of the Guidelines, noted that a defendant's personal characteristics such as age, mental condition short of insanity, physical condition, alcohol or drug addiction, education level, employment history, family responsibilities, and the like are relevant to a judge's choice of sentence within a sentencing range). The only factors a judge is expressly prohibited from considering are a defendant's "race, sex, national origin, creed, religion, and socio-economic status." U.S.S.G., *supra* note 8, § 5H1.10.

imposing a sentence within the sentencing range.²⁸⁶ This is because judges are required to formally state which factors they relied on only when the difference between the high and low end of the sentencing range exceeds twenty-four months.²⁸⁷ Further, even when stating the factors relied on, a judge's discretion in relying on those factors is virtually unreviewable.²⁸⁸ The result of the significant judicial discretion is that, in substantially similar cases, different judges may arrive at significantly different decisions regarding which point to select within a sentencing range.²⁸⁹

To illustrate the potential for sentencing disparity, in *United States v. Harris*,²⁹⁰ the defendant was charged with wire fraud and mail fraud in connection with misrepresentations made to real estate investors. The defendant was sentenced to seventy-one months, representing the highest point within the applicable sentencing range of fifty-seven to seventy-one months.²⁹¹ The court of appeals affirmed the sentence, despite acknowledging a number of factors that could have supported a sentence at a lower end of the range, including the defendant's "timely plea of guilty at arraignment, his cooperation with and production of documents . . . and his seeking of therapy for [a] bipolar mental disorder."²⁹² The court of appeals also acknowledged that letters seeking a sentence at the low end of the range were received from the defendant's wife, children, daughter-in-law, mother-in-law, housekeeper, and friends.²⁹³ In upholding the sentence at the high

286. See *infra* note 287.

287. 18 U.S.C. § 3553(c) (2002); *United States v. Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990) ("Section 3553(c) explicitly contemplates that the district court need not state its reasons for imposing [a] sentence at a particular point [within the sentencing range] unless the applicable range exceeds twenty-four months."). The size of the sentencing range exceeds twenty-four months only if the low end of the range is one hundred months or higher. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

288. E.g., *Neary*, 183 F.3d at 1198 (stating that "we may not review the district court's decision to impose a sentence at a particular point within the proper sentencing range"); *United States v. Harris*, 38 F.3d 95, 97 (2d Cir. 1994) (stating that "the district court's exercise of discretion is generally unreviewable when it imposes a sentence within a Guideline range"); *United States v. Garcia*, 919 F.2d 1478, 1481 (10th Cir. 1990) (acknowledging that "the general rule [is] that sentences falling within the Guidelines are not appealable").

289. Hofer et al., *supra* note 9, at 289 (a statistical analysis revealed that defendants, on average, can expect their sentences to be approximately eight months longer or shorter due solely to the judge assigned to the case); Cory, *supra* note 9, at 433-34 (concluding that "[w]hether a defendant receives a sentence at the top half or the bottom half of the sentencing guideline range will vary according to who the judge is," and stating that the reason for this is, in part, because "[s]ome judges take defendants' personal characteristics into consideration when deciding where within the range to impose sentence," whereas other judges "focus on details of offense conduct and prior criminal history").

290. 38 F.3d 95, 97 (2d Cir. 1994).

291. *Id.* at 96-97.

292. *Id.* at 97-98. However, the court also noted several factors in support of a sentence at the high end of the range. *Id.*

293. *Id.* at 97. However, the court also noted that other letters were received seeking a sentence at

end of the range, the court of appeals stated that “the district court’s exercise of discretion is generally unreviewable when it imposes a sentence within a Guideline range.”²⁹⁴ Presumably, based on the factors in the defendant’s favor, the trial judge could have imposed a sentence at a much lower point within the sentencing range. Given the significant deference afforded to trial courts when selecting a sentence within a sentencing range, such a sentence would have likely withstood appellate review. Thus, to the extent that a different sentencing judge might have selected a lower sentence within the sentencing range, the potential for sentencing disparity existed.

B. Alternatives to Incarceration

When a sentence is imposed, Section 5C1.1 of the Guidelines permits the judge to determine the manner in which the sentence will be served. Specifically, in certain situations, judges may impose a sentence of imprisonment, supervised release, probation, or a combination of the three.²⁹⁵ However, judges are bound by certain defined limitations in selecting the sentencing mix.²⁹⁶ In general, for all cases in which the minimum sentence in the sentencing range is less than twelve months, judges have the authority to substitute certain non-prison alternatives for at least part of the term that would otherwise be served in prison.²⁹⁷ In cases in which the minimum sentence in the sentencing range is greater than twelve months, the minimum term must be satisfied solely by imprisonment.²⁹⁸

the high end of the range. *Id.*

294. *Id.*

295. U.S.S.G., *supra* note 8, § 5C1.1. Supervised release consists of “community confinement” or “home detention.” *Id.* § 5C1.1(c). Community confinement consists of residence in a “community treatment center, halfway house, or similar residential facility.” *Id.* § 5C1.1(e)(2).

296. The limitations are as follows: If the minimum term in the sentencing range is zero months, the court may impose a sentence of either imprisonment, probation, or supervised release. U.S.S.G., *supra* note 8, § 5C1.1(b); *id.* at cmt. n.2. If the minimum term in the sentencing range is from one to six months, the sentence may be satisfied by either imprisonment for the entire term, imprisonment for at least one month with the remainder consisting of supervised release, or probation for the entire term. U.S.S.G., *supra* note 8, § 5C1.1(c); *id.* at cmt. n.3 (A)-(C). If the minimum term in the sentencing range is from seven to twelve months, the sentence may be satisfied by either imprisonment for the entire term, or imprisonment for at least half the term of the minimum sentence with the remainder consisting of supervised release. U.S.S.G., *supra* note 8, § 5C1.1(d); *id.* at cmt. n.4. Finally, if the minimum term in the sentencing range is twelve or more months, the minimum sentence must be satisfied solely by imprisonment. U.S.S.G., *supra* note 8, § 5C1.1(f); *id.* at cmt. n.8.

297. *See supra* note 296 (discussing limitations in selecting a sentencing mix).

298. *See supra* note 296 (discussing limitations in selecting a sentencing mix).

To the extent that different judges, districts, or circuits tend to be more pro-prison than others, two similarly situated defendants sentenced in different courts could face materially different sentencing mixes.²⁹⁹ It should be noted that this is not a true issue of sentencing disparity, but rather an issue of imposing more lenient alternatives to incarceration. Section 5C1.1 does not allow a judge to increase or decrease the length of the sentence; it merely allows a judge to substitute certain non-prison alternatives for actual incarceration.³⁰⁰ However, non-prison alternatives allow defendants to return to society sooner than they would if the sentence was served solely by incarceration. Freedom of the defendant is greatly restored under non-prison alternatives. Therefore, the imposition of non-prison alternatives is viewed as a type of sentencing disparity for purposes of this Comment.

The Guidelines do not specify which factors a judge may or may not consider when determining the mix of prison and non-prison alternatives.³⁰¹

299. See *infra* note 318 and accompanying text.

300. See *supra* note 296 (listing the non-prison alternatives to incarceration).

301. The only guidance provided by the Guidelines is the broad statement, applicable to all sentencing decisions, that “[i]n determining the sentence to impose within the guideline range . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” U.S.S.G., *supra* note 8, § 1B1.4. The Guidelines have been criticized for providing too little guidance to judges in determining the mix of prison and non-prison alternatives. See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 443 (1992) (arguing that the Commission should issue policy statements to “help judges in deciding whether and how to . . . select among different available sanctions.”). On the other hand, courts have recognized that Title 18, United States Code, Section 3553(a) provides a number of general factors for judges to consider when determining, among other things, the mix of sentencing alternatives. *United States v. Lively*, 20 F.3d 193, 199 (6th Cir. 1994). Section 3553(a) states:

- (a) Factors to be considered in imposing a sentence[:] . . . The court, in determining the particular sentence to be imposed, shall consider-
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed-
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for-
 - (A) the applicable category of offense committed by the defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
 - (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

A study conducted by the Commission in 1995 indicated that factors often considered by judges in determining the sentencing mix include a defendant's criminal history, gender, employment status, and disposition type (trial versus plea).³⁰² Neither the Guidelines nor case law provide specific guidance as to how these nor any other factors should be weighed in determining the sentencing mix.³⁰³

The decision of whether and to what extent a judge may impose non-prison alternatives is generally not reviewable at the appellate level.³⁰⁴ Further, if the difference between the high and low end of the applicable sentencing range is less than twenty-four months, the sentencing judge need not state on the record how or why a given sentencing mix was arrived at.³⁰⁵ Thus, the sentencing judge has significant discretion in determining whether and to what extent to assign non-prison alternatives.

1. Disparity Among Circuits

Disparity between circuits exists regarding the imposition of non-prison alternatives to incarceration. Commission data indicates that certain circuits are consistently more willing than others to grant at least partial non-prison alternatives when the opportunity exists to grant such alternatives. For example, during the years 2000, 1999, 1998, 1997, and 1996, the national ratio of fraud defendants receiving at least partial non-prison alternatives to fraud defendants eligible for such alternatives was 64%,³⁰⁶ 68%,³⁰⁷ 68%,³⁰⁸

- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2001).

302. U.S. SENTENCING COMM'N, STAFF DISCUSSION PAPER: SENTENCING OPTIONS UNDER THE GUIDELINES, 16-17 (1996) [hereinafter STAFF DISCUSSION PAPER], available at <http://www.ussc.gov/simple/sentopt.htm> (last visited Oct. 15, 2002) (on file with author).

303. An extensive search of the Westlaw database on October 15, 2002 revealed no judicial decisions, scholarly works, or other sources addressing the process of assigning weight to sentencing factors used in determining the mix of prison and non-prison alternatives.

304. *United States v. Perakis*, 937 F.2d 110, 111-12 (3d Cir. 1991) ("We do not have jurisdiction to review a sentencing court's discretionary refusal to impose a substitute detention under Guidelines section 5C1.1(c)(2).").

305. *Lively*, 20 F.3d at 198 (acknowledging that, where the sentencing range is less than twenty-four months, the sentencing judge need not state on the record his or her reasons for electing to impose a term of imprisonment rather than a non-prison alternative) (relying on 18 U.S.C. § 3553(c)).

306. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (2000) [hereinafter 2000 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/JUDPACK/JP2000.htm> (last visited Oct. 15, 2002) (on file with author).

70%,³⁰⁹ and 68%,³¹⁰ respectively.³¹¹ The Second and Third Circuits each had higher ratios than the national average in all five of those years. The ratios in the Second Circuit were 76%, 82%, 77%, 72%, and 73%, respectively.³¹² The ratios in the Third Circuit were 71%, 71%, 69%, 80%, and 75%, respectively.³¹³ This appears to indicate a greater willingness or ability in the Second and Third Circuits to grant non-prison alternatives as compared to the rest of the country. In contrast, the Sixth and Eighth Circuits each had lower ratios than the national average in all five of those years. The ratios in the Sixth Circuit were 52%, 63%, 65%, 60%, and 57%, respectively.³¹⁴ The ratios in the Eighth Circuit were 62%, 59%, 54%, 65%, and 66%, respectively.³¹⁵ This appears to indicate a lesser willingness or ability in the Sixth and Eighth Circuits to grant non-prison alternatives.

2. Reasons for Disparity

Analysis at the circuit level provides at least some indication that disparity in sentencing habits exists with respect to the imposition of non-prison alternatives. There appear to be no significant differences among the circuits in the relative availability of programs or facilities needed to

307. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (1999) [hereinafter 1999 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/judpack/jp1999.htm> (last visited Oct. 15, 2002) (on file with author).

308. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (1998) [hereinafter 1998 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/judpack/jp1998.htm> (last visited Oct. 15, 2002) (on file with author).

309. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (1997) [hereinafter 1997 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/judpack/jp1997.htm> (last visited Oct. 15, 2002) (on file with author).

310. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (1996) [hereinafter 1996 SENTENCING STATISTICS BY STATE], available at <http://www.ussc.gov/judpack/jp1996.htm> (last visited Oct. 15, 2002) (on file with author).

311. Defendants eligible for non-prison alternatives are those whose sentencing ranges under the Guidelines have a minimum term of less than twelve months. See *supra* note 296 (discussing limitations in selecting non-prison alternatives to incarceration).

312. See *supra* notes 306-10, at tbl. 6 (data sets for the Second Circuit for the years 2000, 1999, 1998, 1997, and 1996); accord, STAFF DISCUSSION PAPER, *supra* note 302, at 15 (results from a 1995 study indicated that defendants in the Northeast region of the United States were approximately nine percent more likely to receive non-prison sentences than were defendants in other regions).

313. See *supra* notes 306-10, at tbl. 6 (data sets for the Third Circuit for the years 2000, 1999, 1998, 1997, and 1996); accord, STAFF DISCUSSION PAPER, *supra* note 302, at 15 (results from a 1995 study indicated that defendants in the Northeast region of the United States were approximately nine percent more likely to receive non-prison sentences than were defendants in other regions).

314. See *supra* notes 306-10, at tbl. 6 (data sets for the Sixth Circuit for the years 2000, 1999, 1998, 1997, and 1996).

315. See *supra* notes 306-10, at tbl. 6 (data sets for the Eighth Circuit for the years 2000, 1999, 1998, 1997, and 1996).

administer non-prison alternatives.³¹⁶ Moreover, there appear to be no differences in substantive law among the circuits that would affect the sentencing habits of judges when imposing non-prison alternatives.³¹⁷ Rather, the more likely scenario is that disparity in sentencing mixes is caused in large part by differences in the individual preferences of sentencing judges.³¹⁸

Reasons for disparity in sentencing mixes imposed by judges are two-fold. First, judges have significant discretion in weighing the facts of each case and in determining whether the facts warrant non-prison alternatives.³¹⁹ Appellate courts generally lack authority to review the determination of whether and to what extent non-prison alternatives should be imposed.³²⁰ Therefore, facts warranting non-prison alternatives in the eyes of one judge might not warrant non-prison alternatives in the eyes of another. Under the Guidelines, either judge's conclusion is likely acceptable.

Second, individual judges tend to develop general personal preferences for or against non-prison alternatives.³²¹ In this respect, some judges tend to impose non-prison alternatives more frequently than other judges on the basis of personal habit or belief in the effectiveness of particular sentencing alternatives. As a consequence, similarly situated defendants convicted in different courts might receive materially different sentencing mixes depending on which judge presides over the case rather than on the underlying facts of the case.

316. STAFF DISCUSSION PAPER, *supra* note 302, at 15. A study conducted by the Commission in 1995 found that there were generally adequate numbers of community confinement facilities and home confinement programs throughout the country to manage offenders who qualified for such programs. *Id.* The authors concluded that “[i]n summary, availability does not appear to be the primary reason judges do not often impose the least restrictive alternative sentence permitted under the guidelines.” *Id.*

317. This conclusion was reached after several hours of research and discussions with federal prosecutors.

318. Interview with Pamela L. Johnston, a federal prosecutor in Los Angeles (Jan. 25, 2002) (the view expressed by Ms. Johnston is her personal view and does not represent the view of the Department of Justice or the United States Attorney's Office); *see also* Hofer et al., *supra* note 9, at 250 (acknowledging that there are both liberal and conservative judges, and that liberal judges tend to rely more on non-prison alternatives such as probation while conservative judges tend to be more punishment-oriented). Further, a 1988 study found that “prior experience as a prosecutor, as well as the judge's religion, were significantly related to the use of incarceration as opposed to probation.” *Id.* at 252.

319. *Lively*, 20 F.3d at 199 (stating that findings of fact underlying a court's selection of sentencing alternatives under Section 5C1.1 are reviewed on appeal under the “clearly erroneous” standard) (quoting *United States v. Duque*, 883 F.2d 43, 44-45 (6th Cir. 1989)).

320. *See supra* note 304 and accompanying text.

321. *See supra* note 318 and accompanying text.

In summary, some judges weigh sentencing factors differently than other judges in determining whether and to what extent to impose non-prison alternatives. Also, some judges view non-prison alternatives as more effective or otherwise more attractive than other judges view the same alternatives. In any event, due to the significant discretion afforded to judges, white-collar sentencing disparity exists with respect to the imposition of non-prison alternatives to incarceration.

VI. PROSECUTORIAL DISCRETION

Prosecutorial discretion has a considerable impact on the sentence imposed upon a defendant. Three important areas of prosecutorial discretion that have an effect on the sentencing of white-collar criminals are the decision of: (i) which charges to bring, (ii) whether to seek a downward departure for substantial assistance to authorities under Section 5K1.1 of the Guidelines, and (iii) whether and to what extent to enter into a plea agreement. Each of these areas of discretion is a source of white-collar sentencing disparity.

A. Charging Decisions

Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor.³²² When determining which charges to bring, prosecutors may often choose from more than one statutory offense. For example, when a defendant lies to cover up a crime, the prosecutor may charge the defendant with either false statements to authorities or obstruction of justice.³²³ False statements to authorities carry a base sentence of zero to six months for a defendant with a criminal history category of one.³²⁴ In

322. *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 975 (9th Cir. 2000) (stating that “the Guidelines do not give courts the authority to interfere with a prosecutor’s exercise of discretion in charging [defendants]”); *United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995) (stating that “[c]harging decisions are primarily a matter of discretion for the prosecution”); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1516, 1520 (2000) (acknowledging the legality of wide prosecutorial discretion in determining which charges to bring) (citing *United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998)); Chris Zimmerman, *Prosecutorial Discretion*, 89 *GEO. L.J.* 1229, 1230-31 nn.636-37 (2001) (discussing the freedom prosecutors have in bringing charges).

323. Michael Higgins, *Sizing Up Sentences*, 85 *A.B.A. J.* 42, 44 (Nov. 1999). Making false statements in this context is a violation of 18 U.S.C. § 1001. *See, e.g.*, *United States v. Wood*, 6 F.3d 692, 693 (10th Cir. 1993) (making false statements to the FBI during an investigation was a violation of 18 U.S.C. § 1001). Obstruction of justice is a violation of 18 U.S.C. § 1503.

324. Making false statements in violation of 18 U.S.C. § 1001 is sentenced under Section 2B1.1 of the Guidelines. U.S.S.G., *supra* note 8, at app. A (Statutory Index). The base offense level for an offense sentenced under Section 2B1.1 is six. U.S.S.G., *supra* note 8, § 2B1.1(a). The sentencing range for a defendant with an offense level of six and a criminal history category of one is zero to six months. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table). Even with a two-level upward

contrast, obstruction of justice carries a base sentence of ten to sixteen months for a defendant with a criminal history category of one.³²⁵ Elements of the two offenses are similar, and the same evidence is often sufficient to prove either charge.³²⁶ Thus, where a defendant's conduct is capable of supporting either of multiple similar charges, the defendant's sentencing fate is essentially left to the prosecutor.

As another example, money laundering charges may be added to many white-collar crimes.³²⁷ Money laundering is the crime of "transferring illegally obtained [funds] through legitimate persons or accounts so that its original source cannot be traced."³²⁸ Money laundering is a particularly applicable charge where fraud is involved because fraud schemes often involve the transfer of funds to conceal the source of the funds.³²⁹ Money laundering charges may increase a defendant's base offense level by up to four levels.³³⁰ This could increase a sentence by up to 125 months in an

adjustment under Section 3C1.1 for obstructing or impeding the administration of justice, the defendant would still occupy a sentencing range of zero to six months. U.S.S.G., *supra* note 8, § 3C1.1; U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

325. Obstructing justice in violation of 18 U.S.C. § 1503 is sentenced under Section 2J1.2 of the Guidelines. U.S.S.G., *supra* note 8, at app. A (Statutory Index). The base offense level for a charge sentenced under Section 2J1.2 is twelve. U.S.S.G., *supra* note 8, § 2J1.2. The sentencing range for a defendant with an offense level of twelve and a criminal history category of one is ten to sixteen months. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

326. *United States v. Kurtz*, No. 98 CR.733(BSJ), 1999 WL 349374, at *4-5 (S.D.N.Y. May 28, 1999) (stating that the "same operative facts" and "same conduct" could have supported a violation of either 18 U.S.C. § 1001 (false statements) or 18 U.S.C. § 1503 (obstruction of justice), but noting that technical differences exist in the elements of each statutory offense).

327. Jonathan H. Hecht, Comment, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U. L. REV. 289, 311 (1999) ("the money laundering laws are used to prosecute white collar or economic criminals"); Higgins, *supra* note 323, at 44 (discussing money laundering in the context of fraud offenses, the author stated that, "[o]ne of the most important uses of [prosecutor] flexibility . . . is the prosecutor's decision about whether to add a money laundering charge").

328. BLACK'S LAW DICTIONARY 889 (7th ed. 1999) (citing 18 U.S.C. § 1956).

329. *See United States v. Szur*, 289 F.3d 200, 204, 220 (2d Cir. 2002) (the defendant transferred proceeds of a securities fraud scheme to a certain bank account to conceal the nature and source of the funds); *United States v. Harris*, 79 F.3d 223, 230-31 (2d Cir. 1996) (the defendant transferred proceeds of a bank fraud scheme to a foreign bank account to conceal the nature and source of the funds); *United States v. Howard*, No. CRIM. A. CR. 99-120, 1999 WL 504561, at *2-3 (E.D. Pa. July 15, 1999) (the defendant transferred proceeds of a bank fraud and wire fraud scheme to a personal bank account to conceal the source and nature of the funds).

330. Money laundering charges add from one to four levels to "[t]he offense level for the underlying offense from which the laundered funds were derived." U.S.S.G., *supra* note 8, § 2S1.1(a); *see also* U.S.S.G., *supra* note 8, at app. C, amend. 634 ("As a result of the enhancements provided by subsections (b)(2)(A), (b)(2)(B), and (b)(3), all direct money launderers will receive an offense level that is one to four levels greater than the . . . offense level for the underlying offense, depending on the . . . sophistication of the money laundering offense conduct.").

extreme case.³³¹ Thus, the potential for sentencing disparity based on a prosecutor's charging decisions is evident.

Prosecutors have considerable flexibility in arriving at charging decisions, and variation exists among prosecutors as to how they use that flexibility.³³² Factors that tend to influence a prosecutor's charging decisions include the prosecutor's general familiarity with applicable charges, and the availability of prosecutorial resources.³³³ Not all prosecutors are familiar with the same charges. Prosecutors more familiar with certain charges, such as money laundering, are more likely to invoke those charges.³³⁴ Similarly, prosecutors less familiar with certain charges are less likely to invoke those charges.³³⁵ Further, some United States Attorney's Offices ("U.S. Attorney's Offices"), typically those in larger districts, are more specialized than offices in smaller districts.³³⁶ Offices in larger districts often have entire units devoted solely to particular types of crimes.³³⁷ The specialized knowledge and expertise associated with such

331. For example, a four-level increase in an offense level from thirty-eight to forty-two for a defendant with a criminal history category of one increases the low end of the sentencing range from 235 months to 360 months. U.S.S.G., *supra* note 8, at ch. 5, pt. A (Sentencing Table).

332. See Hofer et al., *supra* note 9, at 260 (acknowledging that prosecutors have discretion in determining which charges to bring, and that "[u]nless the government exercises its discretion to bring and press charges and prove facts in a similar way in similar cases, unwarranted sentencing disparity can easily result"); Higgins, *supra* note 323, at 44 (noting that "[t]he use of money laundering charges varies among jurisdictions").

333. Higgins, *supra* note 323, at 47 (acknowledging that one U.S. Attorney's Office did not begin to regularly charge money laundering until after the office added a prosecutor who specialized in money laundering charges); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 143-44 (1990) (stating that prosecutorial discretion is an area in which "personal and political judgments" influence charging decisions); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion – Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 378-79 (2000) (acknowledging that strained resources hinder the ability of prosecutors to investigate and charge certain offenses, and that "a prosecutor must weigh the evidence in each case and decide how best to expend limited resources based upon the severity of each [charge] and the probability of convicting the defendant"); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 163 (1994) (acknowledging that prosecutor charging decisions are driven by an efficient allocation of scarce government resources).

334. Higgins, *supra* note 323, at 47 (discussing the fact that one U.S. Attorney's Office did not begin to charge money laundering regularly until after the office added a prosecutor who specialized in money laundering).

335. *Id.* No money laundering charges were filed in the years before the money laundering specialist was added to the office. *Id.*

336. Higgins, *supra* note 323, at 47 (stating that larger districts often have greater and more specialized prosecutorial resources).

337. For example, the U.S. Attorney's Office for the Central District of California has an entire division, "Major Frauds," devoted primarily to prosecution of fraud and white-collar crime. Interview with Miriam A. Krinsky, former Chief of Criminal Appeals, United States Attorney's Office for the Central District of California, Los Angeles, Cal. (Dec. 14, 2001). Also, the U.S. Attorney's Office for the Southern District of Florida has a special healthcare fraud task force.

units increases the likelihood of less common, more complex charges being brought.³³⁸ Conversely, offices with strained resources or limited expertise in a given subject area might be less willing to bring additional or complex charges that require significant amounts of time to investigate and litigate.³³⁹

In summary, charging decisions are based on the experience of individual prosecutors, the specialized expertise available within U.S. Attorney's Offices, and the prosecutorial resources available within U.S. Attorney's Offices. As a result of these factors, a white-collar defendant in one district might face different charges than a similarly situated white-collar defendant in another district. To the extent that this occurs, and different sentences are imposed, discretion in charging decisions has a direct impact on white-collar sentencing disparity.

B. Substantial Assistance to Authorities

Section 5K1.1 of the Guidelines states that “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart [downward] from the guidelines.”³⁴⁰ The decision of whether to seek a downward departure under Section 5K1.1 is left solely to the prosecutor, not the judge.³⁴¹

Downward departures for substantial assistance under Section 5K1.1 are a relatively significant source of white-collar sentencing disparity.³⁴² Substantial assistance departures were granted in approximately seventeen percent of the 6,286 fraud-related cases sentenced under the Guidelines in

Higgins, *supra* note 323, at 47.

338. Higgins, *supra* note 323, at 46-47 (discussing expertise in the areas of money laundering and healthcare fraud).

339. *Id.* at 47 (discussing the absence of money laundering charges in a certain U.S. Attorney's Office before a prosecutor with specialized knowledge of money laundering was brought in); see also Moore, *supra* note 333, at 378-79 (acknowledging that strained resources hinder the ability of prosecutors to investigate and charge certain offenses).

340. U.S.S.G., *supra* note 8, § 5K1.1. Departures for substantial assistance represent the majority of all departures granted under the Guidelines. See 2000 SOURCEBOOK, *supra* note 2, at tbl. 27 (indicating that, with respect to fraud-related offenses, there were 1084 “substantial assistance” departures, 669 “other downward” departures, and 61 “upward” departures granted in the year 2000).

341. *Wade v. United States*, 504 U.S. 181, 185 (1992) (stating that a government motion is a prerequisite to a Section 5K1.1 downward departure, unless the motion is withheld by the prosecutor for unconstitutional reasons).

342. See *infra* notes 345-47 and accompanying text; see also Saris, *supra* note 27, at 1049 (stating that “downward departures based on substantial assistance motions are an invitation to unwarranted, secret sentencing disparity”).

the year 2000.³⁴³ The median departure was ten months.³⁴⁴ Thus, the significant impact of substantial assistance departures on white-collar sentencing is evident. An analysis of substantial assistance departures at the circuit and district level indicates the existence of disparity throughout the country.

1. Disparity by Geographic Location

Commission data indicates that the relative frequency with which substantial assistance departures are granted is inconsistent among the circuits. For example, substantial assistance departures were granted in thirty-one percent of all fraud-related cases in the Third Circuit in the year 2000.³⁴⁵ In contrast, substantial assistance departures were granted in just thirteen percent of all fraud-related cases in the First and Tenth Circuits in the year 2000.³⁴⁶

The relative frequency with which substantial assistance departures are granted also varies considerably among districts.³⁴⁷ This geographical

343. See *supra* note 176.

344. See *supra* note 178.

345. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 9 (data set for the Third Circuit). The Third Circuit has consistently led the nation in relative frequency of substantial assistance departures. Every year from 1996 to 2000, the Third Circuit had a greater ratio of substantial assistance departures, measured as a percentage of fraud-related cases in the Third Circuit, than any other circuit. Specifically, the ratio of substantial assistance departures to fraud-related cases in the Third Circuit was 31%, 27%, 26%, 34%, and 31% for the years 2000, 1999, 1998, 1997, and 1996, respectively. The national average for the same period was 19%, 17%, 15%, 17%, and 16%, respectively. *Id.*; 1999 SENTENCING STATISTICS BY STATE, *supra* note 307, at tbl. 9 (data set for the Third Circuit); 1998 SENTENCING STATISTICS BY STATE, *supra* note 308, at tbl. 9 (data set for the Third Circuit); 1997 SENTENCING STATISTICS BY STATE, *supra* note 309, at tbl. 9 (data set for the Third Circuit); 1996 SENTENCING STATISTICS BY STATE, *supra* note 310, at tbl. 9 (data set for the Third Circuit). The Third Circuit exceeded the next closest circuit by at least six percent in each of those five years. This was determined by reviewing the individual data sets for each of the twelve circuits in each of the years from 1996 to 2000. A summary spreadsheet of this data was prepared by, and is on file with, the author of this Comment. One commentator has suggested that the high departure frequency in the Third Circuit is the result of prosecutors in at least one district consistently abusing substantial assistance motions. Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 59 (1999) (stating that many prosecutors in the Eastern District of Pennsylvania use substantial assistance motions as a "convenient caseload reduction tool").

346. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 9 (data sets for the First and Tenth Circuits).

347. Saris, *supra* note 27, at 1045-46. Judge Saris noted that substantial assistance departures were granted in forty-eight percent of cases sentenced in the Eastern District of Pennsylvania and only seven percent of cases sentenced in the Central District of California in the year 1996. *Id.* The ratios have not materially changed from 1996 to 2000. In the year 2000, substantial assistance departures were granted in thirty-seven percent of cases sentenced in the Eastern District of Pennsylvania and only thirteen percent of cases sentenced in the Central District of California. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 8. Judge Saris also stated that:

analysis reveals that disparity with respect to substantial assistance departures indeed exists. However, the reasons for the disparity lie beneath a circuit-level or district-level analysis.

2. Reasons for Disparity

A commonly cited reason to explain differences in the frequency with which substantial assistance departures are granted is that requirements for receiving a substantial assistance departure are different among U.S. Attorney's Offices.³⁴⁸ This is because each U.S. Attorney's Office is allowed to establish its own substantial assistance policy. One commentator, a federal district court judge, has noted that "there are no national Department of Justice guidelines governing either the amount of substantial assistance necessary to trigger a section 5K1.1 motion, or the degree of a downward departure to recommend."³⁴⁹

Policies in most U.S. Attorney's Offices state that defendants who either testify against other individuals, or provide information leading to the prosecution of other individuals, qualify for a substantial assistance departure.³⁵⁰ However, several inconsistent policies among U.S. Attorney's Offices have been shown to exist. For example, despite the fact that the Guidelines only permit a substantial assistance departure for information pertaining to the prosecution of individuals other than the defendant,³⁵¹

The rate of downward departures based on substantial assistance varies dramatically from district to district, depending on the law enforcement practices of the United States Attorney. . . . The statistics suggest that in some districts, the use of substantial assistance motions is viewed as a key law enforcement tool, while in others it is not.

Saris, *supra* note 27, at 1045-46.

348. *E.g.*, LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 7, 9 (1998) (noting that each U.S. Attorney's Office is allowed to establish its own Section 5K1.1 policy, and that results from a study conducted in 1995 indicate that there is "a lack of coordinated policies and benchmarks in the U.S. attorney's offices to guide decision making as to when a defendant qualifies for a substantial assistance departure motion"); Bowman, *supra* note 345, at 61, 67 (noting that "[d]efendants in District A may very well receive different sentences than identically situated defendants in District B because of differing local substantial assistance practices," and concluding that there are "dramatic disparities in substantial assistance practices between U.S. Attorneys' Offices").

349. Saris, *supra* note 27, at 1046.

350. MAXFIELD & KRAMER, *supra* note 348, at 8 (presenting findings from a study conducted in 1995). As reported in the study, of ninety-four U.S. Attorney's Offices sampled, all were willing to consider substantial assistance departures for offenders who testified against other individuals, and ninety-nine percent of the offices were willing to consider departures for defendants who provided information leading to the prosecution of others. *Id.* at 7 n.17, 8, and ex.4.

351. *Supra* note 170 and accompanying text (quoting text from Section 5K1.1).

approximately one-half of the U.S. Attorney's Offices throughout the country are willing to request a substantial assistance departure when the defendant provides information pertaining to the defendant's own prosecution.³⁵² Further, while some offices are willing to request a substantial assistance departure based on information that merely confirms existing information known by prosecutors, other offices require new information not previously known by prosecutors.³⁵³ In addition, while some offices require that information provided by the defendant lead to the arrest of another individual, other offices are willing to request a downward departure absent an arrest.³⁵⁴

Even when consistent substantial assistance policies are adopted among U.S. Attorney's Offices, prosecutors sometimes diverge from the policies.³⁵⁵ For example, a Commission study conducted in 1995 suggested that substantial assistance policies, and supervisory review policies with regard to substantial assistance practices, were disregarded in approximately sixteen percent of all U.S. Attorney's Offices.³⁵⁶ When prosecutors diverge from formal policies, the result is that similarly situated defendants prosecuted by different prosecutors might receive different sentences depending on which prosecutor prosecuted the case, rather than on the degree or type of substantial assistance provided.³⁵⁷ As a consequence, significant sentencing disparity could occur.

352. MAXFIELD & KRAMER, *supra* note 348, at 9. The authors stated:

The U.S. attorneys split almost evenly over whether [information a defendant provides about his or her *own* criminal behavior] would be considered in making a §5K1.1 motion; just under half of the districts (48.9 %) used self-incriminating information in considering substantial assistance. This . . . suggests that, depending upon the sentencing jurisdiction, one defendant may receive a sentence reduction for such behavior, while a similarly situated defendant in another district would not.

Id.

353. Higgins, *supra* note 323, at 45 ("Sometimes telling everything you know is good enough. In other cases, that information must be truly new information, not merely confirming what investigators already know. 'You must always check with the district you are practicing in to see what the policy is . . .'" (quoting Rebekah Poston, a former federal prosecutor).

354. Saris, *supra* note 27, at 1049 ("In some districts . . . an arrest must actually result. In another district, . . . a motion should be filed if a defendant 'does everything he is called upon to do,' without focusing entirely on 'results.'").

355. MAXFIELD & KRAMER, *supra* note 348, at 8 (stating that "districts frequently diverged from their stated [substantial assistance] policy").

356. *Id.*

357. *Id.* at 9 (noting that, due to inconsistent substantial assistance policies, one defendant might receive a sentencing reduction for certain behavior while a similarly situated defendant engaging in similar behavior might not receive a sentencing reduction).

3. Disparity Caused by Prosecutors Rather than Judges

Most circuits have held that once the prosecutor submits a motion for a substantial assistance departure, the decision of whether to depart from the applicable sentencing range is left to the court.³⁵⁸ As a practical matter, judges grant the vast majority of motions sought by prosecutors.³⁵⁹ Therefore, disparity between the relative frequencies with which substantial assistance departures are granted is primarily explained by prosecutorial discretion rather than judicial discretion.³⁶⁰

4. Summary of Disparity Related to Substantial Assistance Departures

Defendants in white-collar crime cases provide substantial assistance to authorities rather frequently, triggering downward departures under Section 5K1.1.³⁶¹ The frequency with which prosecutors seek substantial assistance departures varies from circuit to circuit and district to district.³⁶² The variance in frequency is caused in large part by the fact that different U.S. Attorney's Offices have established different internal policies regarding the type of conduct that qualifies for a substantial assistance departure.³⁶³ In addition to variant substantial assistance policies, prosecutors sometimes diverge from the policies established in their offices.³⁶⁴ As a result of variant policies, and divergence from those policies, two similarly situated defendants providing similar assistance to authorities but prosecuted by different prosecutors might be subjected to different departure outcomes.³⁶⁵ Accordingly, significant sentencing disparity could occur.³⁶⁶

358. WOOD, *supra* note 40, at 440-41 (collecting cases).

359. MAXFIELD & KRAMER, *supra* note 348, at 5 n.11 (stating that "information obtained by the Commission indicates that the vast majority of motions are granted as a matter of course").

360. Although the prosecutor determines whether to seek a Section 5K1.1 motion for departure, the judge determines the length of the departure. *See* Saris, *supra* note 27, at 1049 (discussing departures for substantial assistance, Judge Saris stated that "as a practical matter, a sentencing court has unfettered discretion in determining the extent of downward departures"). Judicial discretion with regard to departure length indeed leads to sentencing disparity. *See supra* notes 261-69 and accompanying text (discussing departures generally, not just departures for substantial assistance). Thus, judicial discretion does to some extent contribute to sentencing disparity in the context of downward departures for substantial assistance.

361. *See supra* note 176 (noting that substantial assistance departures were granted in seventeen percent of all fraud-related cases in the year 2000).

362. *See supra* notes 345-47 and accompanying text.

363. *See supra* notes 348-54 and accompanying text.

364. *See supra* notes 355-56 and accompanying text.

365. *See supra* note 357 and accompanying text.

366. Saris, *supra* note 27, at 1049.

C. Plea Agreements

Plea agreements are another source of white-collar sentencing disparity related to prosecutorial discretion. Plea agreements were reached in approximately ninety-six percent of all fraud-related cases sentenced under the Guidelines in the year 2000.³⁶⁷ Thus, plea agreements play an important role in white-collar sentencing.³⁶⁸ Plea agreements are beneficial to defendants because they usually result in a lesser sentence.³⁶⁹ In this respect, inconsistencies in the manner in which plea agreements are arrived at, or the extent of sentencing reductions offered by prosecutors to white-collar defendants, constitute a source of white-collar sentencing disparity.

1. Disparity Among Circuits

Commission data indicates that inconsistencies exist among the circuits in the relative frequency with which plea agreements are reached. For example, plea agreements were reached in approximately ninety-seven percent of all fraud-related cases in the Third Circuit in the year 2000.³⁷⁰ In contrast, plea agreements were reached in just ninety-three percent of all fraud-related cases in the Second Circuit in the year 2000.³⁷¹ Further, every

In short, downward departures based on substantial assistance motions are an invitation to unwarranted, secret sentencing disparity. . . . With respect to cooperating individuals, there is little assurance that a [defendant] in New Hampshire will receive the same sentence as one in Rhode Island, or that even among cooperating defendants who are similarly situated and cooperate in similar ways, that the sentences will be uniform.

Id.

367. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 3 (indicating that there were 5,997 plea agreements reached in 6,278 fraud-related cases in the year 2000).

368. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under The Federal Sentencing Guidelines: Guideline Circumvention And Its Dynamics In The Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1296 (1997) (stating that “[plea bargaining] policies are an important part of the environment in which the Guidelines operate, and they contribute significantly to sentencing disparity”). The Guidelines discuss plea agreements only briefly. See U.S.S.G., *supra* note 8, §§ 6B1.1 - 6B1.4 (addressing general plea agreement procedures).

369. Schulhofer & Nagel, *supra* note 368, at 1290 (estimating, based on case reviews and interviews in ten federal court districts, that in approximately twenty to thirty-five percent of cases resolved by plea agreements the sentence imposed is less than that required by strict application of the guidelines); Richard B. Zabel & James J. Benjamin Jr., ‘Queen For a Day’ or ‘Courtesan for a Day’: *The Sixth Amendment Limits to Proffer Agreements*, 15 No. 9 WHITE-COLLAR CRIME REPORTER 1, sec. B (Oct. 2001) (acknowledging that as part of the plea bargain process prosecutors often agree to drop one or more charges in exchange for a plea of guilty to other charges).

370. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 3 (data set for the Third Circuit). There were 448 plea agreements reached in 462 fraud-related cases in the Third Circuit in the year 2000. *Id.* The resulting ratio of plea agreements to fraud-related cases was ninety-seven percent. *Id.* The Third Circuit had the highest ratio of all circuits. *Id.* (per review of individual data sets for all twelve circuits).

371. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 3 (data set for the Second Circuit). There were 753 plea agreements reached in 812 fraud-related cases in the Second Circuit in the year 2000. *Id.* The resulting ratio of plea agreements to fraud-related cases was ninety-three

year from 1996 to 2000, the Seventh Circuit had a lower ratio of plea agreements in fraud-related cases, measured as a percentage of total fraud-related cases in the Seventh Circuit, than the national average.³⁷² This circuit-level analysis reveals that disparity with respect to plea agreements indeed exists. However, the reasons for disparity lie beneath a circuit-level analysis.

2. Reasons for Disparity

There are at least two reasons for disparity in the relative frequency with which plea agreements are reached throughout the country. First, different U.S. Attorney's Offices have established different internal policies regarding the manner in which plea agreements will be struck.³⁷³ A subset of this is the fact that different U.S. Attorney's Offices have established different review procedures regarding the manner in which supervisory personnel will review plea agreements for compliance with office policy.³⁷⁴ Second, different U.S. Attorney's Offices have different prosecutorial resources from which to draw when determining whether to litigate a case.³⁷⁵ The availability of prosecutorial resources directly impacts the prosecutor's decision of whether to enter into a plea agreement.

percent. *Id.* The Second Circuit had the lowest ratio of all circuits. *Id.* (per review of individual data sets for all twelve circuits).

372. Specifically, the ratio of plea agreements in fraud-related cases, measured as a percentage of total fraud-related cases in the Seventh Circuit, was 95.3%, 94.2%, 93.0%, 92.1%, and 91.0% for the years 2000, 1999, 1998, 1997, and 1996, respectively. The ratio of plea agreements in fraud-related cases, measured as a percentage total fraud-related cases on a national level, was 95.5%, 95.1%, 94.4%, 94.1%, and 93.1% for the years 2000, 1999, 1998, 1997, and 1996, respectively. 2000 SENTENCING STATISTICS BY STATE, *supra* note 306, at tbl. 3 (data set for the Seventh Circuit); 1999 SENTENCING STATISTICS BY STATE, *supra* note 307, at tbl. 3 (data set for the Seventh Circuit); 1998 SENTENCING STATISTICS BY STATE, *supra* note 308, at tbl. 3 (data set for the Seventh Circuit); 1997 SENTENCING STATISTICS BY STATE, *supra* note 309, at tbl. 3 (data set for the Seventh Circuit); 1996 SENTENCING STATISTICS BY STATE, *supra* note 310, at tbl. 3 (data set for the Seventh Circuit). The Seventh Circuit was the only circuit to have had a ratio below the national average in each year from 1996 to 2000. This was determined by reviewing the individual data sets for each of the twelve circuits in each of the years from 1996 to 2000. A summary spreadsheet of this data was prepared by, and is on file with, the author of this Comment.

373. *See infra* notes 376-81 and accompanying text.

374. *See infra* notes 382-85 and accompanying text.

375. *See infra* notes 386-92 and accompanying text.

i. Differing Internal Policies

Each U.S. Attorney's Office typically establishes its own internal policies regarding the plea bargaining process.³⁷⁶ These policies are a significant determinant of the circumstances under which plea bargains are offered.³⁷⁷ To the extent that plea bargain policies differ from one U.S. Attorney's Office to another, sentencing disparity may result.³⁷⁸

To illustrate, one U.S. Attorney's Office might adopt a formal, rigid policy regarding the offer of plea agreements to first time offenders, while another U.S. Attorney's Office might adopt an informal, flexible policy regarding the offer of plea agreements to first time offenders.³⁷⁹ The formal, rigid policy might strictly require prosecutors to offer a plea agreement to all first time offenders, regardless of the offender's true criminal past. The informal, flexible policy might provide prosecutors with discretion to withhold a plea agreement when the first time offender has a checkered but technically conviction-free past. Sentencing disparity could result from these inconsistent policies.

For example, suppose a defendant was indicted for involvement in a fraud scheme. Suppose also that the defendant was charged for a similar crime several months earlier, but the charges were dismissed because critical evidence was suppressed.³⁸⁰ In the U.S. Attorney's Office with a formal, rigid policy, the prosecutor would be obligated to offer a plea agreement to the defendant because the defendant was technically a first time offender. However, in the U.S. Attorney's Office with an informal, flexible policy, the prosecutor would have discretion to decline to offer a plea agreement because the defendant, although technically a first time offender, was known to be involved in prior criminal conduct.³⁸¹ To the extent that the plea agreement would result in a reduced sentence, sentencing disparity would occur as a result of the inconsistency in office policies. A defendant

376. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1344-45 (1993) (recognizing that plea bargaining policies vary from one U.S. Attorney's Office to another, and recommending that each U.S. Attorney's Office adopt at least a system of informal controls over plea bargaining decisions).

377. I WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 1.5(h) n.458 (2d ed. 1999) (stating that "internal guidelines of prosecutors' offices continue[] as the primary regulator of discretion as to whether to plea bargain and as to what concessions should be offered").

378. Schulhofer & Nagel, *supra* note 368, at 1296 (stating that "[plea bargaining] policies are an important part of the environment in which the Guidelines operate, and they contribute significantly to sentencing disparity"); *see also infra* note 397.

379. *See Pizzi, supra* note 377, at 1365 (noting that some U.S. Attorney's Offices are reluctant to adopt formal published guidelines regarding plea bargaining because formal policies restrict flexibility).

380. *See id.* (discussing suppression of evidence of a defendant's drug use).

381. *Id.*

prosecuted in a district subject to the formal, rigid policy would receive a lesser sentence than a similarly situated defendant prosecuted in a district subject to the informal, flexible policy.

Sentencing disparity also results from the fact that different U.S. Attorney's Offices establish different review procedures regarding the manner in which supervisory personnel review prosecutors' plea agreements.³⁸² Lack of supervision may lead to sentencing disparity because a prosecutor's unfamiliarity with the Guidelines during plea negotiations can cause inadvertent variances in sentencing.³⁸³ For example, a prosecutor might dismiss several seemingly insignificant fraud-related charges against a defendant who is charged with several other significant fraud charges, without realizing that such actions affect the calculation of the overall sentence.³⁸⁴ Without adequate supervision, this oversight could cause the defendant to receive a significantly lower sentence than the defendant would have received if more strict supervisory procedures were in place with respect to the plea agreement.³⁸⁵

ii. Differing Prosecutorial Resources

Availability of prosecutorial resources also has an impact on the frequency with which plea agreements are reached. For example, U.S. Attorney's Offices with sufficient prosecutorial resources to handle the workload required for high numbers of trials might be less willing to accept plea agreements.³⁸⁶ In contrast, U.S. Attorney's Offices with strained

382. Schulhofer & Nagel, *supra* note 368, at 1295. Of the ten U.S. Attorney's Offices included in the authors' study, the authors found that only one office established a formal supervisory committee charged with reviewing plea agreements. *Id.* at 1284, 1295. The authors also noted that "offices in two [of the ten] districts expressly reject the notion of supervisory review, insisting that line attorneys produce better results if they are entrusted with unfettered discretion . . ." *Id.* at 1295. Further, "[i]n most offices, the idea of supervisory review is accepted in principle, but only a few . . . districts seriously implement it." *Id.* The authors concluded by stating:

[Supervisory] policies [regarding plea bargaining] are an important part of the environment in which the Guidelines operate, and they contribute significantly to sentencing disparity. Because supervisory control is on the whole relatively lax, Guidelines evasion continues to occur. Because the degree of supervisory control varies greatly from district to district, the degree of Guidelines evasion also varies greatly.

Id. at 1296.

383. *Id.* at 1294 (discussing the effect of supervisory review of plea agreements on sentencing disparity).

384. *Id.* (phrasing the analysis in terms of bank robbery charges).

385. *Id.*

386. Higgins, *supra* note 323, at 47 (acknowledging that prosecutorial resources vary among U.S. Attorney's Offices and that smaller, low-volume districts can often afford to decline plea agreements

prosecutorial resources might be more willing to accept plea agreements in order to avoid lengthy litigation. The result of differing prosecutorial resources is that defendants might have a greater or lesser chance to enter into plea agreements and receive lesser sentences depending on the jurisdiction in which they are prosecuted.

The United States Department of Justice publishes the United States Attorneys' Manual ("Manual"), which establishes general principles governing plea agreements.³⁸⁷ Prosecutors sometimes disregard the Manual, or apply its provisions differently than other prosecutors.³⁸⁸ Disregard for, or inconsistent application of, the Manual could be caused in part by strained prosecutorial resources and a prosecutor's related desire to avoid trial by entering into a plea agreement.³⁸⁹ To the extent that variances in resources lead to variances in the application of the Manual, which in turn lead to inconsistent plea agreement practices, sentencing disparity may result.

To illustrate, the Manual states that after an indictment has been filed a prosecutor should only dismiss a charge if, "as a result of a change in the evidence," the prosecutor in good faith determines that the charge is not readily provable by the current evidence.³⁹⁰ This provision has been known to lead to sentencing disparity.³⁹¹ For example, some prosecutors wishing to avoid trial, or to litigate fewer charges after filing an indictment, might claim a lack of evidence for one or more of the charges even though sufficient evidence in fact exists.³⁹² The result is that the defendant will face fewer

because of a greater availability of resources with which to prosecute); Schulhofer & Nagel, *supra* note 368, at 1296 (stating that "office resources prompt some prosecutors to attempt to resolve some cases quickly, just to get them off their desks so that they can devote more time and attention to matters believed to be more important").

387. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (2002) [hereinafter U.S. ATTORNEYS' MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html (last visited Oct. 15, 2002) (on file with author); Saris, *supra* note 27, at 1056 (discussing the U.S. Attorney's Manual in the context of plea bargaining).

388. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486-87 (1996) (acknowledging that "disregard of the United States Attorneys' Manual" by federal prosecutors indeed occurs).

389. See Saris, *supra* note 27, at 1056 n.150 (acknowledging that prosecutors may attempt to bypass the U.S. Attorney's Manual because of pressures from an "overwhelming case load").

390. U.S. ATTORNEYS' MANUAL, *supra* note 387, § 9-27.400(B), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.400 (last visited Oct. 15, 2002) (on file with author).

391. Saris, *supra* note 27, at 1056. "In practice . . . AUSAs generally have broad discretion to decide whether a charge is 'readily provable' . . ." *Id.* The result of using prosecutorial discretion to stretch the provisions of the U.S. Attorney's manual "is that similarly situated defendants will receive different treatment, depending on the AUSA they draw." *Id.*

392. *Id.* "Many . . . judges have suggested that AUSAs hide their decisions to dismiss charges under cover of a claimed lack of proof, when in fact other reasons animate their actions." *Id.*

This is not to suggest that prosecutors have evil motives in dismissing charges, but rather that they have varied motives: general sympathy for a defendant; recognition that the case is atypical for some reason; an overwhelming case load; a belief that the mandatory

charges and likely a lesser sentence. To the extent that a different prosecutor would not have engaged in such trial tactics, sentencing disparity will occur.

3. Summary of Disparity Related to Plea Agreements

Defendants of white-collar crimes enter into plea agreements rather frequently.³⁹³ However, the frequency with which plea agreements are entered into varies from circuit to circuit.³⁹⁴ The variance is caused in large part by the fact that different U.S. Attorney's Offices have established different internal policies regarding the plea bargaining process.³⁹⁵ In addition, differences in prosecutorial resources among U.S. Attorney's Offices impact the likelihood of whether a prosecutor will be inclined to enter into a plea agreement.³⁹⁶ As a result of these differences in policies and prosecutorial resources, two similarly situated white-collar defendants charged by different prosecutors might not receive similar plea agreements. To the extent that plea agreements result in decreased sentences, which usually occur, the plea bargaining process presents a significant source of white-collar sentencing disparity.³⁹⁷

VII. CONCLUSION

Among the Commission's primary goals is to avoid unwarranted sentencing disparity among defendants with similar records who have engaged in similar misconduct.³⁹⁸ This Comment has identified several sources of white-collar sentencing disparity that run counter to the Commission's goal of reducing disparity.

A review of decisions of the United States Courts of Appeals reveals at least twelve distinct splits of authority that lead to white-collar sentencing

sentence is too high; the need to protect a witness; or many other reasons.

Id. at n.150.

393. *Supra* note 367 and accompanying text (noting that plea agreements were reached in approximately ninety-six percent of all fraud-related cases in the year 2000).

394. *Supra* notes 370-72 and accompanying text.

395. *Supra* notes 376-85 and accompanying text.

396. *Supra* notes 386-92 and accompanying text.

397. Saris, *supra* note 27, at 1055 ("Large majorities of district judges . . . somewhat or strongly agree with the statement that 'plea bargains are a source of hidden unwarranted disparity in the guidelines system.'") (quoting Molly Treadway Johnson & Scott A. Gilbert, FED. JUD. CTR., THE UNITED STATES SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S SURVEY 6 (1996), 13 tbl. 7).

398. *See supra* note 7 and accompanying text.

disparity.³⁹⁹ The Commission has been designated as the primary entity responsible for resolving splits of authority regarding interpretation and application of the Guidelines.⁴⁰⁰ Amendments to the Guidelines, which occur every year, serve as the primary mode for addressing sentencing-related splits of authority among the courts.⁴⁰¹ It is recommended that the Commission review the splits of authority identified in this Comment and amend the Guidelines with clarifying language to resolve conflicting authority. This Comment does not propose a particular resolution of the substantive issues underlying each split of authority. Rather, it is merely recommended that the Commission address the splits of authority so as to eliminate the outstanding sources of sentencing disparity.

Other sources of white-collar sentencing disparity include the fact-intensive “adjustments” and “departures” established under the Guidelines.⁴⁰² As a result of the abuse of discretion standard of appellate review, sentencing judges have significant discretion in deciding whether adjustments should be imposed in a given case, and whether and to what extent departures should be imposed in a given case.⁴⁰³ However, to the extent that different judges weigh facts differently, or apply the Guidelines to the facts in different ways, unwarranted sentencing disparity often occurs.⁴⁰⁴ In this respect, adjustments and departures are a source of white-collar sentencing disparity.

Further sources of white-collar sentencing disparity include the discretion held by judges to: (i) select a sentence within the sentencing range;⁴⁰⁵ and (ii) substitute part of a defendant’s sentence with non-prison alternatives.⁴⁰⁶ Due to the discretionary nature of sentencing in these areas, unwarranted sentencing disparity often occurs. The result of the judicial discretion is that, in substantially similar cases, different judges might arrive at significantly different decisions regarding which point to select within a sentencing range and which non-prison alternatives, if any, to impose.

A final source of white-collar sentencing disparity identified in this Comment is the discretion held by prosecutors in determining: (i) which charges to bring;⁴⁰⁷ (ii) whether to seek a downward departure for substantial assistance provided to authorities;⁴⁰⁸ and (iii) whether to enter into a plea

399. *See supra* Part III.A.

400. *See supra* notes 201-03 and accompanying text.

401. *See supra* note 204 and accompanying text.

402. *See supra* Part IV.B., C.

403. *See supra* Part IV.A.

404. *See supra* notes 212, 235 and accompanying text.

405. *See supra* Part V.A.

406. *See supra* Part V.B.

407. *See supra* Part VI.A.

408. *See supra* Part VI.B.

agreement.⁴⁰⁹ A risk of sentencing disparity exists in these areas because not all prosecutors exercise their prosecutorial discretion in the same manner. As a result, two similarly situated defendants prosecuted for identical crimes by different prosecutors might receive significantly different sentences.

The goal of this Comment was to identify sources of white-collar sentencing disparity. It was not a goal to determine how to remedy the identified disparity. Nevertheless, the remedy issue is worthy of at least a passing remark. A recommendation for resolving the splits of authority among the courts of appeals is stated above. Regarding the discretion held by judges and prosecutors, commentators have suggested that the virtues of judicial and prosecutorial discretion tend to outweigh the vices.⁴¹⁰ Therefore, remedial measures do not appear to be needed with respect to discretionary sentencing practices exercised by judges and prosecutors under the Guidelines.

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409. See *supra* Part VI.C.

410. See Cory, *supra* note 9, at 437 (2002) (concluding that in the context of a judge's sentencing discretion under the Guidelines, some resulting sentencing disparity is tolerable and need not be completely eliminated; "[b]earing in mind that abuse of discretion cannot be eliminated without also eliminating use of discretion, I believe . . . that the virtues of judicial sentencing discretion outweigh the vices"); Saris, *supra* note 27, at 1062 (concluding that in the context of a prosecutor's discretion in the plea bargaining process, some resulting sentencing disparity is tolerable and need not be completely eliminated; "[t]o the extent plea bargaining does create some unwarranted [sentencing] disparity in a minority of the cases, any statutory 'solution' (like abolishing plea bargaining or making the probation officers fact finders) would be worse than the problem"); Schulhofer & Nagel, *supra* note 368, at 1295-96 (concluding that in the context of a prosecutor's discretion in the plea bargaining process, some resulting sentencing disparity is tolerable and need not be completely eliminated).

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