



1-1-2008

A Meaningless Relationship: The Fifth Circuit's Use of Dismissed and Uncharged Conduct under the Federal Sentencing Guidelines Recent Development.

Erin A. Higginbotham

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Recommended Citation

Erin A. Higginbotham, *A Meaningless Relationship: The Fifth Circuit's Use of Dismissed and Uncharged Conduct under the Federal Sentencing Guidelines Recent Development.*, 40 ST. MARY'S L.J. (2008). Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol40/iss1/7>

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RECENT DEVELOPMENT

A MEANINGLESS RELATIONSHIP: THE FIFTH CIRCUIT'S USE OF DISMISSED AND UNCHARGED CONDUCT UNDER THE FEDERAL SENTENCING GUIDELINES

ERIN A. HIGGINBOTHAM

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I. INTRODUCTION

"[L]et the punishment fit the crime."¹ Sounds so simple. However, determining a defendant's sentence is a complex decision that seeks to balance the several purposes of criminal punishment, including deterrence, incapacitation, just punishment, and rehabilitation.² The Supreme Court has observed that courts have sought to attain these sometimes competing goals by issuing largely consistent sentences in cases involving similar crimes while making adjustments based on the character of the individual offense and the criminal history of the individual defendant.³

The United States Sentencing Commission Guidelines Manual (the Guidelines) was established to do just that—distribute consistent, yet individualized, punishments for those convicted of federal crimes. In order to assure that the sentence accurately reflects the actual conduct—and thus the seriousness of the offense—the Guidelines do not require that the conduct or evidence considered by the court during sentencing meet the same evidentiary standards or burdens of proof required during trial.⁴

1. W.S. GILBERT & ARTHUR SULLIVAN, *The Mikado*, in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 343, 382 (Garden City Publ'g Co. 1938).

2. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2) (1989) (describing the statutory mission of the Guidelines).

3. *Gall v. United States*, 128 S. Ct. 586, 598 (2007) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))).

4. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2007) (permitting the sentencing court to consider evidence without regard to the rules of evidence applicable at trial), available at http://www.ussc.gov/2007guid/6a1_3.html; see also 18 U.S.C. § 3661 (2006) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *United States v. Watts*, 519 U.S. 148, 154 (1997) (per curiam) (holding that a sentencing court may consider acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (holding that the consideration of uncharged criminal conduct to impose a higher sentence within the statutorily authorized range was not "punishment" for the uncharged conduct and did not bar subsequent prosecution of the uncharged conduct); *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting that district courts have traditionally considered a defendant's prior criminal conduct even when the conduct did not result in a conviction); *United States v. Buchanan*, 70 F.3d 818, 828 (5th Cir. 1995) ("While a conviction requires proof beyond a reasonable doubt, a district court may sentence a defendant within the Sentencing Guidelines on any relevant evidence that 'has sufficient indicia of reliability to support its probable accuracy.'" (quoting U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (1995))).

Rather, a judge acts as a fact finder and can make findings based on a preponderance of evidence.⁵

However, in some instances, it appears that this reduced evidentiary standard has been contrary to the goal of decreasing disparate sentencing and that a conflict has developed amongst the United States courts of appeals with respect to the assessment of dismissed or uncharged offenses allegedly committed by the defendant.⁶ The Guidelines, specifically section 5K2.21, sanction consideration of dismissed and uncharged conduct when determining a defendant's sentence;⁷ however, the Guidelines are

5. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2007), available at http://www.ussc.gov/2007guid/6a1_3.html. Any reliable and accurate information may be considered during sentencing. See *Watts*, 519 U.S. at 157 (holding that a sentencing court may consider acquitted conduct); *United States v. Rogers*, 1 F.3d 341, 344–45 (5th Cir. 1993) (holding that a district court could rely upon uncorroborated reports of confidential informants during sentencing and that a district court could adopt a presentence report's determination that drug quantities attributable to a defendant before the dates of charged conspiracy were relevant conduct for sentencing purposes, absent evidence that earlier quantities were not part of the same course of conduct); *United States v. Ortiz*, 993 F.2d 204, 208 (10th Cir. 1993) (stating that a sentencing court should not consider unreliable allegations); *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993) (“[A] defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information.”); *United States v. Zuleta-Alvarez*, 922 F.2d 33, 36–37 (1st Cir. 1990) (stating that defendants were not entitled to cross-examine witnesses, even though transcribed testimony of the witnesses was the basis for determining relevant drug quantity under the Guidelines); *United States v. Beaulieu*, 893 F.2d 1177, 1179 (10th Cir. 1990) (holding that at sentencing a district court could consider testimony from a prior trial of defendant's two brothers, who were involved in the same drug conspiracy, and that the record supported a finding that the defendant was an “organizer or leader” of a criminal activity for the purposes of increasing the offense level under the Guidelines); *United States v. Sciarrino*, 884 F.2d 95, 96–97 (3d Cir. 1989) (determining that the sentencing court could rely on hearsay evidence to determine the amount of marijuana involved in an offense, so long as the hearsay was not totally unreliable).

6. Compare *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007) (interpreting the Guidelines as requiring only a remote connection between the charged and uncharged conduct), and *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005) (determining that a remote relationship with uncharged conduct will suffice to validate consideration of such conduct), and *United States v. Smith*, 267 F.3d 1154, 1164 (D.C. Cir. 2001) (“[C]onduct forming the basis for the departure must be descriptively or logically . . . connected to the crime.”), with *United States v. Allen*, 488 F.3d 1244, 1257 (10th Cir. 2007) (holding that acts of uncharged conduct must relate meaningfully to the charged offense), and *United States v. Ellis*, 419 F.3d 1189, 1193 n.4 (11th Cir. 2005) (understanding the Guidelines to require a meaningful relationship between the uncharged conduct and the offense of conviction), and *United States v. Amirault*, 224 F.3d 9, 12 (1st Cir. 2000) (requiring a meaningful relationship between uncharged and charged conduct).

7. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007), available at http://www.ussc.gov/2007guid/5k2_21.html.

silent as to how closely related the uncharged or dismissed conduct must be to the underlying conviction in order for consideration of that conduct to be appropriate. While most of the circuits agree that some connection between uncharged conduct and the offense of conviction is required,⁸ the Fifth Circuit has recently articulated a standard that makes short work of “some connection,” holding that “a [mere] remote connection will suffice.”⁹

This Recent Development will argue that the approach adopted by the Fifth Circuit, which allows a judge to enhance a defendant's sentence on the basis of dismissed or uncharged conduct only remotely related to the underlying conviction, is improper. After a brief discussion of the history of the Guidelines, and more specifically the background of section 5K2.21 in Part II, Part III will analyze the “remote connection” standard adopted by the Fifth Circuit and its flaws. Part IV will discuss an alternative standard utilized by other circuit courts and will argue that, at the very least, a more demanding connection is required between uncharged or dismissed conduct and the conviction. Finally, Part V will conclude by urging circuit courts to adopt a more stringent standard and to declare departures based on remote uncharged conduct error.

II. BACKGROUND

A. *The Guidelines in General*

The Guidelines were established to implement structure and predictability into the punishment phase of the criminal trial.

8. See *Newsom*, 508 F.3d at 735 (agreeing that some degree of connection is required by section 5K2.21); *Allen*, 488 F.3d at 1257–58 (holding that a sentence was unreasonable because unrelated conduct should not have been considered); *Rogers*, 423 F.3d at 828 (requiring that there be at least some connection between the uncharged conduct and the offense of conviction); *Ellis*, 419 F.3d at 1193 (determining that conduct underlying a charge dismissed as part of a plea agreement can provide the basis for an upward sentencing departure “only if it sheds further light on the true nature of the offense of conviction”); *Smith*, 267 F.3d at 1165 (stating that a court's use of the preponderance of the evidence standard to determine the predicate offense for a conspiracy during sentencing was plain error); *Amirault*, 224 F.3d at 12 (stating that when a departure occurs for a reason not specifically considered by the Guidelines, on appeal the court determines if the ground is theoretically appropriate and then examines whether it finds adequate factual support in the record; if so, the appellate court “must probe the degree of the departure in order to verify its reasonableness”).

9. *Newsom*, 508 F.3d at 735.

Prior to the Guidelines, there was concern that defendants who were convicted of seemingly identical crimes were receiving wide-ranging sentences that varied based solely on who was holding the gavel.¹⁰ In response to this concern, Congress passed the Comprehensive Crime Control Act of 1984.¹¹ This Act articulated seven factors, now codified at 18 U.S.C. § 3553(a), central to the Guidelines scheme, which a court must consider when sentencing a defendant.¹² The Crime Control Act also created the Federal Sentencing Commission,¹³ which was charged with the responsibility of crafting the Guidelines.¹⁴ The first sentencing manual and chart were promulgated in 1987 and were “designed . . . to create a determinant sentencing system . . . with the aims of certainty, fairness, and the avoidance of unwarranted disparity among similar defendants who commit similar crimes.”¹⁵

While the Guidelines sought to proscribe uniform punishment for similar criminal conduct, its creators—recognizing that no two defendants, nor two crimes would be exactly the same—acknowledged the need to consider the individual characteristics of an offense and an offender in sentencing.¹⁶ Therefore, under

10. See U.S. Sentencing Comm’n, Public Hearing on Offense Seriousness (Apr. 15, 1986), in UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986, at 2–3 (1988) (emphasizing that the disparity in sentencing was a result of one factor—the judge who happened to preside over the case); see also *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (discussing the indeterminate sentencing and discretion of federal judges prior to the establishment of the Guidelines). In *Internet Crime Victimization: Sentencing*, practitioner John F. Curran discussed the creation of the United States Sentencing Commission by stating:

Similar to the broad discretion of a federal prosecutor in the charging decision, federal judges had virtually unfettered authority to impose any sentence within the statutory range To eliminate the widespread view that these sentencing disparities were inexplicable beyond the random assignment of a harsh or lenient sentencing judge, Congress enacted the Sentencing Reform Act of 1984, creating the United States Sentencing Commission.

John F. Curran, *Internet Crime Victimization: Sentencing*, 76 MISS. L.J. 909, 915 (2007).

11. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

12. *Id.* (codified as amended at 18 U.S.C. § 3553(a) (2006)).

13. *Id.* (codified as amended at 28 U.S.C. § 991 (2006)).

14. *Id.* (codified as amended at 28 U.S.C. § 994 (2006)).

15. U.S. Sentencing Comm’n, Public Hearing on Offense Seriousness (Apr. 15, 1986), in UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986, at 2–3 (1988).

16. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007) (enumerating the procedure for calculating the sentencing range), available at <http://www.ussc.gov/2007guid/>

the Guideline's sentencing scheme, a sentencing court is first required to identify the baseline sentencing range¹⁷ of a defendant by considering the generic offense¹⁸ and the defendant's criminal history.¹⁹ Next, the Guidelines allow the court to depart from that range depending on the individual characteristics of the crime and the criminal.²⁰ The ultimate goal of the Guidelines is to provide a sentencing court with the structure to punish consistently, while insuring the court retains enough discretion to craft a sentence that "reflect[s] the actual seriousness of the offense."²¹

Until recently, the Guidelines were considered mandatory, and a sentence that departed from the Guidelines was subject to de novo review on appeal.²² However, the Supreme Court invalidated these two requirements in *United States v. Booker*²³ when it decided that such a system of mandatory sentencing and its reliance on judge (as opposed to jury) fact finding violated the Sixth Amendment.²⁴ The Court's cure to this constitutional conflict was to make the Guidelines advisory and subject to

1b1_1.html; U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007) (enumerating the procedure for calculating the sentencing range), available at http://www.ussc.gov/2007guid/5k2_0.html.

17. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007) (enumerating the procedure for calculating the sentencing range), available at http://www.ussc.gov/2007guid/1b1_1.html; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2007) (demonstrating the sentencing range), available at <http://www.ussc.gov/2007guid/GL2007.pdf>. The Commission created a detailed sentencing table to determine the sentencing range for a particular offense, taking into consideration the defendant's individual criminal history. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A. (2007), available at <http://www.ussc.gov/2007guid/GL2007.pdf>.

18. See U.S. SENTENCING GUIDELINES MANUAL ch. 2, introductory cmt. (2007) (describing how to determine the base offense level), available at <http://www.ussc.gov/2007guid/GL2007.pdf>.

19. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt. background (2007) (describing how to determine the base criminal history level), available at http://www.ussc.gov/2007guid/4a1_1.html.

20. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007) (allowing a court to depart from the sentencing range if there is aggravating conduct that has not been taken into consideration), available at http://www.ussc.gov/2007guid/5k2_0.html.

21. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007) (typifying the Guidelines requiring a departure to be used to determine actual seriousness of the convicted crime), available at http://www.ussc.gov/2007guid/5k2_21.html.

22. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (declaring 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e) unconstitutional).

23. *United States v. Booker*, 543 U.S. 220 (2005).

24. *Id.* at 226.

appellate review for an abuse of discretion.²⁵ The Court, however, has clearly explained that while the Guidelines are no longer mandatory, they must still be “give[n] serious consideration” and departures must be clearly explained and accompanied “with sufficient justifications.”²⁶

Recently, in *Gall v. United States*,²⁷ the Supreme Court extensively reviewed the analytical process a sentencing court should use during sentencing proceedings.²⁸ The Court explained that first, “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”²⁹ Then, after both parties are allowed to present their arguments regarding an appropriate sentence, the judge should consider all the factors listed in 18 U.S.C. § 3553(a) “to determine whether they support the sentence requested by a party.”³⁰ The Court made it clear that the Guidelines range should not be presumed to be reasonable, but instead “an individualized assessment based on the facts presented” must be made.³¹ If, after looking at all the facts, the judge decides that a sentence outside the Guidelines range is appropriate, “he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”³² Finally, the judge must sufficiently explain his decision on the record after determining the final sentence.³³

Where a district court’s sentence is appealed, the appellate court reviews the decision under an abuse-of-discretion standard.³⁴ The same process is used regardless of whether the sentence is within the Guidelines range or departs from the Guidelines range; the first thing the appellate court must do is determine whether there

25. *Id.* at 260–62.

26. *Gall v. United States*, 128 S. Ct. 586, 594 (2007).

27. *Gall v. United States*, 128 S. Ct. 586 (2007).

28. *See id.* at 596–98 (outlining several factors the sentencing court should utilize in calculating the Guidelines range).

29. *Id.* at 596.

30. *Id.*

31. *Id.* at 597.

32. *Gall*, 128 S. Ct. at 597.

33. *See id.* (requiring the explanation of the sentence in order to allow appellate review and to promote fairness); *see also* *United States v. Omole*, 523 F.3d 691, 696 (7th Cir. 2008) (noting that a judge must explain an unusually harsh or lenient sentence).

34. *Gall*, 128 S. Ct. at 597; *see also* *United States v. Rodriguez*, 527 F.3d 221, 224 (1st Cir. 2008) (reviewing the case for an abuse of discretion).

were any significant procedural errors in determining the sentence.³⁵ This includes an initial determination as to “whether the district court properly interpreted and applied the sentencing guidelines.”³⁶ An appellate court will review the district court’s interpretation and application of the Guidelines *de novo*.³⁷ Then the court must evaluate “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”³⁸ This review of the trial court’s sentencing decision will consider “the totality of the circumstances,” including any departures from the applicable Guidelines range.³⁹ A circuit court is allowed, but not required, to presume a sentence is reasonable if it falls within the applicable Guidelines range.⁴⁰ However, a sentence outside the Guidelines range cannot be presumed unreasonable.⁴¹ If a sentence does depart from the Guidelines range, a court may consider the extent of this deviation in its reasonableness determination, but it is required to “give due deference to the district court’s decision that the [section] 3553(a) factors, on a whole, justify the extent of the variance.”⁴²

The Guidelines allow the sentencing court to consider evidence and conduct other than that used at trial to determine whether a departure from the applicable Guidelines range is appropriate.⁴³ In fact, inadmissible evidence is allowed to be considered in determining a defendant’s sentence so long as it is relevant, proven to have sufficient indicia of reliability,⁴⁴ and used to identify “the

35. *See Gall*, 128 S. Ct. at 597 (listing examples of errors such as improper calculation and failing to explain the sentence); *see also* *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (basing a decision to reverse the district court’s departure on the procedure outlined in *Gall*).

36. *United States v. Newsom*, 508 F.3d 731, 733 (5th Cir. 2007).

37. *Id.*

38. *Gall*, 128 S. Ct. at 597.

39. *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

40. *Id.*

41. *Id.*

42. *Id.* “The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Id.*

43. *See United States v. Lee*, 208 F. App’x 352, 355 (5th Cir. 2006) (*per curiam*) (permitting the sentencing court to use hearsay not admissible during trial at the sentencing proceedings so long as it bears indicia of reliability), *cert. denied*, 127 S. Ct. 1922 (2007).

44. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (2007) (allowing the consideration of inadmissible evidence if it is relevant and supported by reliability to

actual seriousness of the offense” committed.⁴⁵ Specifically, the Guidelines state that “[i]n determining the sentence to impose within the [G]uideline range, or whether a departure from the [G]uidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.”⁴⁶ Until recently, it was unclear whether this provision included conduct that was potentially a criminal offense, but was uncharged or dismissed for one reason or another.⁴⁷ The circuits held differently on this issue, with a majority allowing consideration of uncharged offenses.⁴⁸ However, in 2000, the

prove its accuracy), *available at* http://www.uscourts.gov/2007guid/6a1_3.html; *see also* *United States v. Puckett*, 505 F.3d 377, 387 (5th Cir. 2007) (stating that a court is allowed to use relevant, uncorroborated hearsay in sentencing determinations as long as it is shown that there are indicia of reliability), *cert. granted in part*, No. 07-9712, 2008 WL 647140 (U.S. Oct. 1, 2008).

45. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007) (exemplifying the Guidelines departure reasoning as being to determine the actual seriousness of the convicted crime), *available at* http://www.uscourts.gov/2007guid/5k2_21.html. The Guidelines do not allow information to be used as the basis for departure if that information has already been considered when determining the applicable sentencing range. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007), *available at* http://www.uscourts.gov/2007guid/5k2_0.html.

46. U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2007), *available at* http://www.uscourts.gov/2007guid/1b1_4.html; *see also* *United States v. Arce*, 118 F.3d 335, 341 (5th Cir. 1997) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2007), *available at* http://www.uscourts.gov/2007guid/1B1_4.html).

47. *See* *United States v. Harris*, 70 F.3d 1001, 1004 (8th Cir. 1995) (acknowledging the circuit split regarding the consideration of uncharged and dismissed conduct in sentencing).

48. *Compare* *United States v. Cross*, 121 F.3d 234, 242 (6th Cir. 1997) (indicating that defendant’s torture of victim, though never charged, warranted an upward departure), *and* *United States v. Barber*, 119 F.3d 276, 284 (4th Cir. 1997) (en banc) (explaining that the Guidelines do not preclude the consideration of dismissed charges, pursuant to a plea bargain, for a departure), *and* *United States v. Baird*, 109 F.3d 856, 864–65 (3d Cir. 1997) (noting that departure based on dismissed conduct is proper if “related in some way to the offense conduct”), *and* *United States v. Big Medicine*, 73 F.3d 994, 997 (10th Cir. 1995) (“Nothing in the plea agreement prevented the district court from considering uncharged misconduct in sentencing.”), *and* *United States v. Ashburn*, 38 F.3d 803, 807–08 (5th Cir. 1994) (using defendant’s dismissed robberies as justification for upward departure in determining the seriousness of the offense), *and* *United States v. Figaro*, 935 F.2d 4, 7 (1st Cir. 1991) (sanctioning a departure that makes an upward departure based on uncharged conduct), *and* *United States v. Kim*, 896 F.2d 678, 684 (2d Cir. 1990) (concluding that the Guidelines allow uncharged conduct to be the basis of departures), *with* *United States v. Lawton*, 193 F.3d 1087, 1090 (9th Cir. 1999) (“Our cases make clear that uncharged or dismissed conduct, in the context of a plea agreement, is an illegal basis for a departure.”), *and* *Harris*, 70 F.3d at 1004 (declining to uphold the sentencing court’s upward departure

Sentencing Commission ended the controversy by amending the Guidelines to include section 5K2.21, which specifically approved the consideration of uncharged or dismissed offenses.⁴⁹

B. *Consideration of Uncharged or Dismissed Offenses*

1. Pre-Amendment Split—The Minority View

Prior to the 2000 amendment, a minority of the circuits—the Seventh,⁵⁰ Eighth,⁵¹ and Ninth⁵²—rejected the use of dismissed conduct as a basis for an upward departure. These circuits interpreted the Guidelines provision that allows upward departures only for “aggravating or mitigating circumstance[s] . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission”⁵³ as inherently conflicting with another provision that requires a judge only to accept a plea bargain agreement if it “adequately reflect[s] the seriousness of the actual offense behavior.”⁵⁴ It was also argued by these courts that the consideration of conduct that was dismissed pursuant to a plea agreement as the basis for an upward departure was not allowed because section 5K2.0 allowed only acts “not adequately taken

based on uncharged conduct), *and* *United States v. Ruffin*, 997 F.2d 343, 346 (7th Cir. 1993) (explaining that uncharged or dismissed offenses could not be used in calculating the criminal history of a defendant unless the Guidelines specifically require consideration).

49. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 604 (2003).

50. *See Ruffin*, 997 F.2d at 346 (explaining that uncharged or dismissed offenses could not be used in calculating the criminal history of a defendant unless the Guidelines specifically require consideration).

51. *See Harris*, 70 F.3d at 1004 (declining to uphold the sentencing court’s upward departure based on uncharged conduct).

52. *See Lawton*, 193 F.3d at 1090 (“Our cases make clear that uncharged or dismissed conduct, in the context of a plea agreement, is an illegal basis for a departure.”); *United States v. Faulkner*, 952 F.2d 1066, 1070 (9th Cir. 1991) (stating that the integrity of the plea agreement would be undermined if the court considered the defendant’s dismissed counts); *United States v. Castro-Cervantes*, 927 F.2d 1079, 1082 (9th Cir. 1990) (holding that using dismissed conduct pursuant to a plea agreement as the basis for departure violates the fundamental concept of a plea agreement).

53. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007), available at http://www.ussc.gov/2007guid/5k2_0.html.

54. U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (2007), available at http://www.ussc.gov/2007guid/6b1_2.html; *see also Lawton*, 193 F.3d at 1091 (rejecting upward departure if based on uncharged acts in a plea bargain approved by the court); *Harris*, 70 F.3d at 1004 (emphasizing a plea should only be accepted if it reflects the seriousness of the offense); *Faulkner*, 952 F.2d at 1070 (limiting section 1B1.4 by the language of section 6B1.2).

into consideration by the Sentencing Commission” to be used to make an upward departure from the Guidelines, and the Commission had already taken into account conduct that was dismissed pursuant to a plea agreement in section 6B1.2(a).⁵⁵ The Ninth Circuit, which typified this view, reasoned that if the sentencing judge did not believe the Guidelines adequately reflected the seriousness of the offense, then the remedy was to reject the plea agreement, not to use the dismissed offenses to increase the punishment.⁵⁶ This minority of circuits also argued that while section 1B1.4—which allows a sentencing court to consider, without limitation, “any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law”—could be read to allow for the consideration of uncharged or dismissed offenses, it, too, is limited by section 6B1.2(a)’s instructions regarding plea bargaining.⁵⁷

Another argument employed by this minority was that “[t]he Guidelines prohibit only upward departures which sentence a defendant as if he had pled guilty to uncharged or dismissed conduct.”⁵⁸ These courts described departures based on dismissed conduct as “‘patently unfair’ because they hold a defendant to his end of the bargain, the guilty plea, ‘while simultaneously denying him the benefits promised him from the bargain.’”⁵⁹ Recognizing

55. *Faulkner*, 952 F.2d at 1070; *see also Lawton*, 193 F.3d at 1091 (declining departure because the court took into account conduct dismissed pursuant to a plea bargain); *Harris*, 70 F.3d at 1003 (holding that the sentencing court’s departure was erroneous because it violated the clear intentions of the parties’ plea bargain). The *Faulkner* court wrote:

To interpret [section] 1B1.4 without reference to [section] 5K2.0 to authorize the district court to depart on the basis of any information that the district court wished to consider, as the government would have it do, would undermine the overarching purpose of the Guidelines—the achievement of uniformity in sentencing.

Faulkner, 952 F.2d at 1070–71 (citing *United States v. Bruno*, 897 F.2d 691, 696 (3d Cir. 1990)).

56. *See Lawton*, 193 F.3d at 1091 (emphasizing that the court is required to reject the plea bargain if it believes the charges inadequately reflect the severity of the charged offense).

57. *Castro-Cervantes*, 927 F.2d at 1082; *see also Lawton*, 193 F.3d at 1091 (“The language of [section] 1B1.4 does not change our analysis.”); *Faulkner*, 952 F.2d at 1070 (limiting section 1B1.4 with section 6B1.2(a)).

58. *Lawton*, 193 F.3d at 1093.

59. *Id.* at 1092 (quoting *Faulkner*, 952 F.2d at 1070); *see Harris*, 70 F.3d at 1004 (following precedents set by the Third and Ninth Circuits); *Faulkner*, 952 F.2d at 1070 (applying the Ninth Circuit’s holding in *Castro-Cervantes* to the case); *Castro-Cervantes*, 927 F.2d at 1082 (arguing that it is unfair to penalize the defendant for charges dismissed

the conflict with a majority of circuit courts, this minority of courts argued that their view was a more accurate interpretation of not only the Guidelines, but also “the fundamental concept of plea bargaining.”⁶⁰

2. Pre-Amendment Split—The Majority View

While a minority of circuit courts found the consideration of uncharged acts at sentencing inappropriate, a majority of circuits disagreed, finding the offenses relevant to determining the “actual seriousness” of the charged offense.⁶¹ The First,⁶² Second,⁶³ Third,⁶⁴ Fourth,⁶⁵ Fifth,⁶⁶ Sixth⁶⁷ and Tenth⁶⁸ Circuits allowed

pursuant to the plea agreement).

60. *Castro-Cervantes*, 927 F.2d at 1082; see *Lawton*, 193 F.3d at 1092–93 (predicting that the plea bargaining process could break down if defendants are routinely denied the benefits of the plea bargain); *Harris*, 70 F.3d at 1003 (warning that the district court’s denial of the terms and intent of the bargain brings instability to the plea agreement process); *Faulkner*, 952 F.2d at 1070 (“[A]ny other result would undermine the integrity of the plea bargaining system.”). The Ninth Circuit in *Castro-Cervantes* declared that “for the court to let the defendant plead to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair; it violates the spirit if not the letter of the [plea] bargain.” *Castro-Cervantes*, 927 F.2d at 1082; see also *Harris*, 70 F.3d at 1004 (following precedents set by the Third and Ninth Circuits).

61. *United States v. Figaro*, 935 F.2d 4, 7 (1st Cir. 1991); see also *United States v. Cross*, 121 F.3d 234, 242 (6th Cir. 1997) (indicating that defendant’s torture of victim, though never charged, warranted an upward departure); *United States v. Barber*, 119 F.3d 276, 284 (4th Cir. 1997) (en banc) (explaining that the Guidelines do not preclude the consideration of dismissed charges pursuant to a plea bargain for a departure); *United States v. Baird*, 109 F.3d 856, 864–65 (3d Cir. 1997) (noting that departure based on dismissed conduct is proper if “related in some way to the offense conduct”); *United States v. Big Medicine*, 73 F.3d 994, 997 (10th Cir. 1995) (“Nothing in the plea agreement prevented the district court from considering uncharged misconduct in sentencing.”); *United States v. Ashburn*, 38 F.3d 803, 807–08 (5th Cir. 1994) (using defendant’s dismissed robberies as justification for upward departure in determining the seriousness of the offense); *United States v. Kim*, 896 F.2d 678, 684 (2d Cir. 1990) (concluding that departures are permitted for acts that are related to the offense of conviction).

62. See *Figaro*, 935 F.2d at 7 (sanctioning a departure that makes an upward departure based on uncharged conduct).

63. See *Kim*, 896 F.2d at 684 (concluding that the Guidelines allow uncharged conduct to be the basis of departures).

64. See *Baird*, 109 F.3d at 870 (approving of departures based on conduct that has been dismissed as long as it is related to the underlying offense).

65. See *Barber*, 119 F.3d at 283–84 (holding that uncharged conduct can be the basis of a departure).

66. See *Ashburn*, 38 F.3d at 807 (holding that it is appropriate to base an upward departure on uncharged conduct).

67. See *United States v. Cross*, 121 F.3d 234, 243 (6th Cir. 1997) (allowing departures based on uncharged conduct).

conduct dismissed pursuant to a plea agreement to be relied upon by sentencing courts in justifying departures from the Guidelines.

An important foundational decision for these courts was the Second Circuit's decision in *United States v. Kim*.⁶⁹ In that case, the Second Circuit analyzed the Sentencing Commission's treatment of "misconduct not resulting in conviction" throughout the Guidelines and held that the Commission intended to allow departures for uncharged misconduct related to the convicted offense.⁷⁰ The court found, however, that the uncharged offense must be related "in some way" to the convicted offense.⁷¹

Several other circuits adopted and built upon *Kim*'s reasoning.⁷²

68. See *United States v. Big Medicine*, 73 F.3d 994, 997 (10th Cir. 1995) (approving of departures based on uncharged or dismissed conduct).

69. *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990).

70. *Id.* at 684; see also *United States v. Baird*, 109 F.3d 856, 864–65 (3d Cir. 1997) (recognizing that the Guidelines permit consideration at sentencing of dismissed counts "related in some way to the offense conduct"); *United States v. Figaro*, 935 F.2d 4, 7 (1st Cir. 1991) (limiting the court's consideration of conduct to that which is "related to the offense of conviction"); *United States v. Sklar*, 920 F.2d 107, 110 (1st Cir. 1990) ("To bring uncharged conduct into play, the government must establish a sufficient nexus between the conduct and the offense of conviction."). In *Kim*, the Second Circuit focused on four provisions of the Guidelines that lead to the conclusion that uncharged offenses could be considered to justify a departure from the suggested sentencing range. *Kim*, 896 F.2d at 682. First, the court determined that section 1B1.3 of the Guidelines allowed the court to consider conduct "relevant to the offense of conviction." *Id.* Next, the court stated that, in section 1B1.2, "the Commission specified that misconduct constituting offenses to which the defendant has stipulated in connection with the entry of a plea to the offense of conviction shall be treated as if the defendant had been convicted of additional counts charging such offenses." *Id.* The court used the third provision of the Guidelines to justify its decision that upward departures for uncharged conduct were appropriate under section 4A1.3(e). *Id.* at 683. According to the court, this provision allows a court to "tak[e] into account 'prior similar conduct not resulting in a conviction.'" *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(e) (1989)). Finally, the court looked to section 5K2.0, which they interpreted as allowing an upward departure for misconduct that "occur[ed] in connection with a crime," [as] "such acts are precisely the type of events that the court's departure powers were designed to cover." *Kim*, 896 F.2d at 683 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A § 4(b) (1989)).

71. *Kim*, 896 F.2d at 684 ("[T]he Commission intended to preclude departures for acts bearing no relationship to the offense of conviction, but to permit departures for acts that relate in some way to the offense of conviction, even though not technically covered by the definition of relevant conduct.").

72. See *United States v. Barber*, 119 F.3d 276, 284 (4th Cir. 1997) (en banc) (agreeing with *Kim* and a majority of courts that an upward departure may be supported by uncharged conduct); *Baird*, 109 F.3d at 864 (acknowledging that consideration of dismissed conduct is supported by *Kim*); *Figaro*, 935 F.2d at 7 (adopting the reasoning from *Kim*). The Sixth Circuit added that it was section 1B1.4 and its commentary that made it clear that upward departure for uncharged conduct is appropriate. *Cross*, 121

Rejecting the minority view's argument regarding section 6B1.2's restriction on charges dismissed pursuant to a plea bargain, the Fifth Circuit, for instance, held that as long as an agreement did not have specific language that would lead a defendant to believe the dismissed conduct could not be the basis for a departure from the Guideline's sentencing range, a trial judge's consideration of such conduct was not prohibited by the Guidelines.⁷³ The Third Circuit, after initially expressing the view that the use of uncharged conduct was prohibited by the Guidelines,⁷⁴ relied upon the *Kim* decision, as well as the Supreme Court's decision in *United States v. Watts*,⁷⁵ to conclude that the Guidelines allowed consideration of uncharged offenses in sentencing.⁷⁶ In *Watts*, the Supreme Court held that it was permissible for a sentencing court to consider offenses for which the defendant was acquitted by the jury.⁷⁷ The Third Circuit found the decision consistent with a view that uncharged offenses had a role to play in assessing the seriousness of a defendant's crime of conviction.⁷⁸ In the late nineties, the majority of circuit courts allowed uncharged offenses

F.3d at 243. *But see* *United States v. Ashburn*, 38 F.3d 803, 812–13 (5th Cir. 1994) (Goldberg, J., dissenting) (arguing that the majority was wrong to allow uncharged conduct to be the basis of the departure).

73. *See Ashburn*, 38 F.3d at 808 (noting that since the language of the plea agreement did not imply a limitation on the court's ability to depart from the Guidelines, defendant "could not reasonably have inferred" that the district court was barred from an upward departure based on dismissed conduct); *see also Cross*, 121 F.3d at 243 (providing that defendant's plea agreement expressly acknowledged that upward departure could be based on the "entire scope of his criminal conduct," including uncharged conduct); *Big Medicine*, 73 F.3d at 997 (holding that the departure did not make the plea bargain an "empty bargain" because the agreement did not prohibit the consideration of uncharged conduct).

74. *Compare* *United States v. Thomas*, 961 F.2d 1110, 1120 (3d Cir. 1992) ("We hold that the district court erred by departing upward to compensate for the government's decision not to charge Thomas with a more serious crime."), *with Baird*, 109 F.3d at 860 ("We conclude, however, that even in the plea bargain context, conduct underlying dismissed counts may support an upward departure.").

75. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

76. *See Baird*, 109 F.3d at 864 (noting that a sentencing court may consider conduct underlying dismissed counts).

77. *See Watts*, 519 U.S. at 157 (stating that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge" if the conduct is proven by a preponderance of the evidence); *see also Baird*, 109 F.3d at 864 (discussing *Watts*'s impact on the uncharged offenses controversy).

78. *See Baird*, 109 F.3d at 864 (noting that the court in *Watts* acknowledged the sentencing court's power to examine various factors, including criminal conduct that did not result in a conviction).

to serve as the basis for upward departures, but with two important limitations: (1) the conduct still had to be related to the underlying conviction, and (2) the conduct had to be established by a preponderance of the evidence.⁷⁹

Activity in this legal area prompted the Sentencing Commission to update and clarify the Guidelines.⁸⁰ In 2000, the Guidelines were amended to include section 5K2.21, which explicitly sanctioned consideration of uncharged or dismissed conduct.⁸¹

C. *The Amendment—Section 5K2.21*

As stated above, in 2000 the Federal Sentencing Commission sought to clarify the role of uncharged offenses in criminal sentencing by amending the Guidelines.⁸² The text of the amendment indicated the Commission's agreement with the view held by a majority of circuits, namely that dismissed conduct could be used to enhance a defendant's sentence:

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.⁸³

However, as is often the case, one solution leads to more problems. Enactment of section 5K2.21 has led to a new circuit split.⁸⁴ The dispute involves how closely related the uncharged

79. *See, e.g., id.* at 870 (concluding that an upward departure is proper so long as the uncharged conduct relates to the charged offense and the uncharged acts are proved by a preponderance of the evidence).

80. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 604 (2003) (explaining that the amendment addresses the circuit split over whether dismissed conduct may serve as a basis for departure).

81. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007) (outlining the basis for upward departure), *available at* http://www.ussc.gov/2007guid/5k2_21.html.

82. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 604 (2003) (addressing the circuit split as a basis for amendment).

83. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007), *available at* http://www.ussc.gov/2007guid/5k2_21.html.

84. *Compare* *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007) (holding that in departing from the Guidelines, courts may consider uncharged offenses as long as they are at least remotely connected to the offense of conviction), *and* *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005) (holding that a court may examine even remotely related information about a defendant in determining propriety of departing from the Guidelines), *and* *United States v. Smith*, 267 F.3d 1154, 1164 (D.C. Cir. 2001) (holding that

conduct must be to the underlying convicted offense for an upward departure based on that dismissed conduct to be proper. Some circuits require only a remote connection between the underlying offense and the dismissed conduct,⁸⁵ while others require a more significant relationship.⁸⁶

1. Post-Amendment—The Split Continues

The text of section 5K2.21 fails to specify what degree of connectedness, if any, is required for uncharged conduct to serve as the basis for an upward departure. The only assistance the text of the Guidelines provides is that the section 5K2.21 departure is allowed to “reflect the actual seriousness of the offense.”⁸⁷ Some circuit courts have taken this to imply that the departure is only allowed if the uncharged conduct is “meaningfully related” to the underlying conviction.⁸⁸ In the language of these courts, conduct that meaningfully relates to the underlying offense is described as conduct that “sheds further light on the true nature of the *offense of conviction*.”⁸⁹ For example, utilizing the meaningful connection

a court may depart from the Guidelines as long as the uncharged conduct is logically related to the charged offense), *with* *United States v. Allen*, 488 F.3d 1244, 1257 (10th Cir. 2007) (holding that unconvicted conduct must be meaningfully related to the offense of conviction to support an upward departure), *and* *United States v. Ellis*, 419 F.3d 1189, 1193 (11th Cir. 2005) (rejecting upward departures using unproven allegations not meaningfully related to the offense of conviction), *and* *United States v. Amirault*, 224 F.3d 9, 12 (1st Cir. 2000) (holding departure appropriate as long as determining acts “relate meaningfully to the offense of conviction”).

85. *See Newsom*, 508 F.3d at 735 (declining to adopt the more stringent “meaningfully related” standard and adopting the “remote connection” standard); *Rogers*, 423 F.3d at 828 (emphasizing that a remote relationship is sufficient to support an upward departure); *Smith*, 267 F.3d at 1164 (concluding that a mere logical connection will justify an upward departure).

86. *See Ellis*, 419 F.3d at 1193 (requiring uncharged acts to relate meaningfully to the charged offense as a basis for departure); *Amirault*, 224 F.3d at 12 (allowing an upward departure for uncharged acts as long as such uncharged conduct “relate[s] meaningfully to the offense of conviction”).

87. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007), available at http://www.ussc.gov/2007guid/5k2_21.html.

88. *Ellis*, 419 F.3d at 1193; *accord Allen*, 488 F.3d at 1257 (“[T]hose acts must still ‘relate meaningfully to the offense of conviction.’” (quoting *United States v. Neal*, 249 F.3d 1251, 1260 (10th Cir. 2001))); *Amirault*, 224 F.3d at 12 (permitting upward departure “as long as those acts . . . relate meaningfully to the offense of conviction”).

89. *Ellis*, 419 F.3d at 1193 (emphasis added). This “meaningful” relationship is not equated to a section 1B1.3 relationship, which requires that when determining the applicable Guidelines range for the offense, the conduct that is to be considered must have “occurred during the commission of the offense of conviction, in preparation for that

standard, it would be appropriate to depart upwards from the base sentence of a defendant convicted of wire fraud involving the passing of a single false check, where the defendant had also committed sixty other instances of check fraud that were not taken into consideration in calculating the sentencing range.⁹⁰ Courts find support for requiring a meaningful relationship between uncharged conduct and the underlying offense in the text of the Guidelines (as mentioned above), in the underlying goal of the Guidelines to promote consistency in sentencing, as well as in the Sixth Amendment's guarantee of a right to trial.⁹¹

Other courts do not require such a stringent connection between the uncharged conduct being considered under section 5K2.21 and the underlying conviction.⁹² These courts interpret the Guidelines as requiring nothing more than a "remote connection" between the uncharged conduct and the underlying conviction.⁹³ In support, decisions from these courts have relied upon section 1B1.4 of the Guidelines, which allows a court to consider unlimited information regarding a defendant's background.⁹⁴

offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2007), *available at* http://www.ussc.gov/2007guid/1b1_3.html; *see also* *Ellis*, 419 F.3d at 1193 n.4 ("[T]herefore, upward departures are allowed for acts of misconduct not resulting in conviction, as long as those acts, whether or not relevant conduct in the section 1B1.3 sense, *relate meaningfully to the offense of conviction.*" (quoting *Amirault*, 224 F.3d at 12)).

90. *See* *United States v. Bell*, 243 F. App'x 539, 543 (11th Cir. 2007) (exemplifying a situation in which uncharged conduct is "meaningfully related" to the conviction). The Eleventh Circuit did not address specifically the "relatedness" issue in this case, but the court pointed out that the uncharged conduct was "almost identical" to the underlying conduct. *Id.* It can be inferred because of the language of the court and by the timing of this case that the court was applying the "meaningfully related" standard. *Id.* Also, this use of section 5K2.21 is in line with examples provided by the Commission in the Guideline's commentary. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 cmt. background (2007) ("For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure."), *available at* http://www.ussc.gov/2007guid/1b1_4.html.

91. *See* *Allen*, 488 F.3d at 1260 (analyzing different variables for requiring a meaningful relationship).

92. *See* *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007) (sanctioning a remote connection standard for departure); *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005) (adopting a remote relationship standard).

93. *Newsom*, 508 F.3d at 735; *Rogers*, 423 F.3d at 828.

94. *See* *Rogers*, 423 F.3d at 828 ("Rather, 'the court may consider, without limitation,

The Fifth Circuit, in *United States v. Newsom*,⁹⁵ recently adopted this “remote connection” standard.⁹⁶

III. REMOTE CONNECTION

A. *United States v. Newsom*

In January of 2006, Bryan Newsom became involved in a scheme to steal explosives from his friend's ex-employer.⁹⁷ Newsom's role in the plot was to provide tools to cut through locks, provide transportation to and from the crime scene, and store the stolen goods.⁹⁸ Shortly after the theft, federal agents questioned one of the men involved. He eventually informed the agents about Newsom's involvement.⁹⁹ A search warrant was executed at Newsom's residence.¹⁰⁰ While no explosives were found at the residence (Newsom had relocated them without telling his friends), other incriminating paraphernalia, including six firearms, were discovered at his home.¹⁰¹ Possession of these firearms was a violation of Newsom's parole.¹⁰² After agreeing to cooperate, Newsom assisted agents in recovering all the stolen material.¹⁰³

Charges were brought against Newsom for “aiding and abetting the theft of explosive materials in interstate commerce”; Newsom pled guilty.¹⁰⁴ His presentence report (PSR) calculated “a guideline range of twenty-one to twenty-seven months” in prison.¹⁰⁵ The probation officer working on Newsom's PSR, citing section 5K2.21, recommended an upward departure from the Guidelines range because of the fact that Newsom was “found

any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (1994)).

95. *United States v. Newsom*, 508 F.3d 731 (5th Cir. 2007).

96. *See id.* at 735 (accepting upward departure based upon a “remote connection”).

97. *Id.* at 732.

98. *Id.*

99. *Id.*

100. *Newsom*, 508 F.3d at 732.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *United States v. Newsom*, 508 F.3d 731, 732 (5th Cir. 2007).

in illegal possession of six firearms.”¹⁰⁶ The probation officer calculated the new sentencing range as if Newsom had been convicted of the illegal possession charge and suggested a new sentencing range from forty-one to fifty-one months.¹⁰⁷

Newsom objected to this departure on the grounds that section 5K2.21 could only be used to show the actual seriousness of the conviction (i.e., theft of explosives), and because the uncharged conduct (i.e., possession of firearms) was unrelated to the offense of conviction, the use of section 5K2.21 was improper.¹⁰⁸ The sentencing court overruled Newsom’s objections and sentenced Newsom to forty-one months in prison.¹⁰⁹ Newsom appealed to the Fifth Circuit, arguing that the use of section 5K2.21 in this context was improper and that the trial court’s sentence was unreasonable.¹¹⁰

B. *The Analytical Trail of the Remote Connection Standard*

Relying on the Eighth Circuit’s “remote connection” standard, the Fifth Circuit held that the use of section 5K2.21 in this situation was appropriate and upheld the forty-one month sentence.¹¹¹ The court connected the illegal possession of the guns to aiding and abetting the theft of the explosives by explaining that the guns were given to Newsom by his partners-in-crime in exchange for drugs (on a completely separate occasion) and all parties involved were “high on drugs the night they stole the explosives.”¹¹² The court also concluded that Newsom’s sentence was not unreasonable.¹¹³

106. *Id.* at 732–33.

107. *Id.* at 733.

108. *Id.*

109. *Id.*

110. *Newsom*, 508 F.3d at 733.

111. *See id.* at 735 (joining the Eighth Circuit in adopting the sufficiency of even a remote connection between charged and uncharged offenses, and affirming the sentence of the district court).

112. *Id.* After accepting the sufficiency of only a remote connection, the court approved the use of uncharged conduct—illegal firearm possession and drug distribution—as being remotely connected to the charged offense of the explosives theft to uphold a departure from the Guidelines because the defendants were on drugs while committing the robbery. *Id.*

113. *Id.* The Fifth Circuit held that the district court increased Newsom’s sentence based on his dangerous misconduct, and emphasized that the Fifth Circuit had already upheld departures of similar, and even much greater magnitude. *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007).

In the panel opinion, the court described the First Circuit's more "stringent" standard for consideration of uncharged conduct in sentencing.¹¹⁴ Judging by the citation to the First Circuit case *United States v. Amirault*,¹¹⁵ it can be inferred that the stringent standard to which the opinion refers requires the uncharged conduct to "relate meaningfully to the offense of conviction."¹¹⁶ The panel declined to adopt this stringent interpretation of section 5K2.21,¹¹⁷ reasoning that "[t]he Sentencing Commission explained: [Section 5K2.21] allows courts to consider for upward departure purposes aggravating conduct that is dismissed or not charged in connection with a plea agreement."¹¹⁸ The court concluded that while such "aggravating conduct" should have some degree of connection between uncharged and charged offenses, such conduct included any conduct with a remote connection to the offense of conviction.¹¹⁹ However, it is unclear how the panel arrived at this conclusion. There is no support for this interpretation in the Guidelines, and the panel opinion does not offer further explanation or support for such a conclusion.

The Fifth Circuit's decision was obviously guided by the work of the Eighth Circuit in this area—specifically that court's decision in *United States v. Rogers*.¹²⁰ However, an examination of that case reveals an unpersuasive and incomplete decision that provides little support for the Fifth Circuit's legal conclusion.¹²¹

Rogers involved a defendant who pleaded guilty to possession of child pornography, distribution of child pornography, and distribution of obscene material.¹²² The Guidelines range for *Rogers* was fifty-seven to seventy-one months; the court made an

114. *Id.*

115. *United States v. Amirault*, 224 F.3d 9 (1st Cir. 2000).

116. *Newsom*, 508 F.3d at 735; see *Amirault*, 224 F.3d at 12 (interpreting the pre-amendment case *Kim*).

117. *Newsom*, 508 F.3d at 735.

118. *Id.* (internal quotation marks omitted).

119. See *id.* (opining that an upward departure is justified so long as the uncharged conduct bears a remote connection with the charged offense).

120. *United States v. Rogers*, 423 F.3d 823 (8th Cir. 2005).

121. See *Newsom*, 508 F.3d at 735 (joining the Eighth Circuit's interpretation of section 5K2.21). In *Rogers*, the court followed a previous Eighth Circuit opinion holding that a remote relationship of the uncharged conduct to the offense of conviction was appropriate. *Rogers*, 423 F.3d at 828 (citing *United States v. Flores*, 336 F.3d 760, 765 n.6 (8th Cir. 2003)). The Fifth Circuit, without explanation, subscribed to *Rogers* in accepting the remote connection standard. *Newsom*, 508 F.3d at 735.

122. *Rogers*, 423 F.3d at 825.

upward departure and sentenced him to 360 months.¹²³ The court's upward departure was based on evidence that Rogers had been removing male genitalia in hotel rooms, and that one person almost died as a result of his conduct.¹²⁴ There was also evidence that he took pictures of these "surgeries" and kept and ate the removed genitalia.¹²⁵

Rogers argued that the facts regarding the hotel surgical procedures were not sufficiently related to his convictions for child pornography or obscenity such that they should form the basis of any departure from the Guidelines sentence.¹²⁶ The Eighth Circuit disagreed.¹²⁷ Relying on both section 1B1.4 and section 5K2.21, the Eighth Circuit concluded that it could consider any information, including uncharged or dismissed conduct and offenses.¹²⁸ While citing the Second Circuit's pre-amendment decision in the case *United States v. Kim*¹²⁹ and acknowledging that *some* connection between the uncharged conduct and the offense of conviction must exist, the *Rogers* court then referred to the Eighth Circuit case *United States v. Flores*¹³⁰ as support for the proposition that "even a remote relationship will suffice."¹³¹

Turning to the *Flores* decision in hopes of uncovering the basis for the Eighth Circuit's reasoning offers little help. *Flores* involved a defendant who shot his drug dealer.¹³² The non-fatal shooting

123. *See id.* at 826 (applying upward departure based on sections 5K2.2, 5K2.8, and 2G2.4 of the Guidelines).

124. *See id.* (describing the brutal nature of a procedure Rogers performed in a hotel room, which resulted in the patient bleeding continuously for six days).

125. *See id.* (providing testimony by an acquaintance of Rogers).

126. *Id.*

127. *Rogers*, 423 F.3d at 828.

128. *Id.*

129. *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990). In *Kim*, while the court was trying to decide whether or not to allow the consideration of uncharged offenses, the court hypothesized that if a man who was charged with fraud got into a barroom brawl while committing the fraud, this conduct would not be sufficiently connected to the underlying conviction to justify an upward departure. *Id.* at 683. The *Kim* court also took notice of the various ways in which "the Commission was careful to specify the different ways in which misconduct not resulting in conviction could be taken into account in determining punishment." *Id.* The court determined that, based on the Commission's specifications, while "consideration of unusual aggravating circumstances occurring in the course of committing the offense of conviction" is not prohibited, it should not extend to "all acts of misconduct, regardless of relationship to the crime of conviction." *Id.*

130. *United States v. Flores*, 336 F.3d 760 (8th Cir. 2003).

131. *Rogers*, 423 F.3d at 828 (citing *Flores*, 336 F.3d at 765 n.6).

132. *Flores*, 336 F.3d at 762.

resulted in an investigation of Flores, including a search of his home.¹³³ As a result of the search, the officers found drugs at Flores's residence.¹³⁴ Flores pleaded guilty to "possessing with intent to distribute approximately 391 grams of LSD."¹³⁵ A state charge of attempted murder was dropped in exchange for his promise to plead guilty to a reduced charge of terrorism.¹³⁶ The district court sentenced him to 235 months.¹³⁷ This sentence included upward departures based on multiple juvenile arrests that were not taken into consideration in determining Flores's criminal history score.¹³⁸ Flores appealed, arguing that the criminal history score departure was inappropriate and that his sentence was unreasonable.¹³⁹ The Eighth Circuit held that the upward departure from Flores's criminal history category under section 4A1.3 was appropriate because of the many juvenile arrests on Flores's record.¹⁴⁰ The court stated in a footnote that "[s]o long as previous criminal conduct is shown by 'reliable information,' it may be considered by a sentencing court even in the absence of conviction."¹⁴¹ The *Rogers* court in turn cites to this footnote to support the remote connection standard.¹⁴² However, it is unclear how the Eighth Circuit interpreted this footnote to conclude that section 5K2.21 only requires a remote relationship between the offense of conviction and the uncharged conduct.¹⁴³ The *Flores* decision does not refer to a remote connection standard nor does it

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Flores*, 336 F.3d at 763.

138. *Id.* at 762 n.2, 763 (noting Flores's extensive criminal history, including over twenty-five arrests, which would have qualified Flores as a career criminal had he reached the age of majority at the time of the drug offense).

139. *Id.* at 763.

140. *Id.* at 762–63.

141. *United States v. Flores*, 336 F.3d 760, 765 n.6 (8th Cir. 2003) (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2007), available at http://www.ussc.gov/2007guid/4A1_3.html). The court concluded that because the facts presented in the presentence report were uncontested, they were enough to be considered "reliable." *Id.*

142. *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005) (citing *Flores*, 336 F.3d at 765 n.6).

143. *See id.* (providing no explanation for the conclusion that: "Given this liberal standard, Rogers's conduct in performing the heinous and dangerous motel room nullification procedure is without a doubt sufficiently related at least to the obscenity counts of conviction to be considered for upward departure purposes.").

concern the amount of connectedness required for uncharged conduct to form the basis for an upward departure.¹⁴⁴ The court in *Flores* was simply making a statement about the level of certainty that must exist concerning whether past conduct actually occurred in order for that past conduct to be factored into a criminal history score.¹⁴⁵ Moreover, the court in *Flores* never mentioned section 5K2.21, but instead interpreted section 4A1.3 regarding what a court can consider in departing from a criminal history score.¹⁴⁶ The Guidelines make it clear that the decisions regarding whether to depart from the defendant's criminal history category and whether to depart from the final sentencing range are separate analytical processes and the scope of information that can be considered for each is different.¹⁴⁷ Consequently, aside from the fact that the question of connectedness was not even discussed by the *Flores* court, the *Flores* decision is an unpersuasive source for the principles that should guide the application of upward

144. See *Flores*, 336 F.3d at 763 (setting forth the framework for analysis in determining whether the factors considered by the district court were legitimate in the context of an upward departure).

145. See *id.* at 765 n.6 (noting that "reliable information" may be considered).

146. See *id.* at 764 (discussing section 4A1.3).

147. Compare U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2007) (outlining the type of information that can be considered when determining whether to depart from a criminal history category), available at http://www.ussc.gov/2007guid/4a1_3.html, with U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2007) (allowing "any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law" when considering whether to depart from the Guidelines range), available at http://www.ussc.gov/2007guid/1b1_4.html. The Commission provided the following explanation in the background commentary of section 1B1.3:

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by [section] 1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. background (2007), available at http://www.ussc.gov/2007guid/1b1_3.html. Additionally, the Commission stated in the commentary to section 5K2.0 that departures regarding criminal history were outside the scope of this provision. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. n.2 (2007) ("This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history . . . ; (ii) departures based on the defendant's substantial assistance to the authorities . . . ; and (iii) departures based on early disposition programs . . ."), available at http://www.ussc.gov/2007guid/5k2_0.html.

sentencing adjustments. Thus, following the analytical trail of the remote connection standard, it is clear that support for such a lax requirement is weak, at best.

IV. MEANINGFUL CONNECTION

A. Support for a More "Stringent" Standard

As mentioned above, the Fifth Circuit in *Newsom* acknowledged a more "stringent" interpretation of section 5K2.21 that they declined to adopt.¹⁴⁸ That interpretation, labeled the "meaningful connection" standard, finds support in many places, including the persuasive case law of multiple circuit courts, the text of the Guidelines, and the general policy and mission of the Guidelines.

1. Persuasive Authority from Multiple Circuits

The Guidelines clearly allow the consideration of uncharged or dismissed conduct when determining a defendant's sentence; however, all the circuits agree that this consideration is not limitless and that at the least some connection between the offense of conviction and the uncharged conduct is required.¹⁴⁹ The Fifth Circuit seemed to hastily adopt the Eighth Circuit's remote connection standard without much analysis or reasoning. As noted above, the court simply quoted a footnote from the Sentencing Commission, and then stated, "[t]hus, we join those other circuits, such as the Eighth Circuit, in interpreting [section] 5K2.21 as requiring some degree of connection between uncharged and charged offenses, although even a remote connection will suffice."¹⁵⁰ However, it seems that the Eighth Circuit is the only circuit court to have discussed the relatedness issue of section 5K2.21 and concluded that a "remote connection [would] suffice."¹⁵¹ The First, Tenth, Eleventh, and D.C. Circuits have all

148. *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007).

149. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007), available at http://www.ussc.gov/2007guid/5k2_21.html; see, e.g., *Newsom*, 508 F.3d at 735; *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005).

150. *Newsom*, 508 F.3d at 735 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 hist. n. (2007), available at http://www.ussc.gov/2007guid/5k2_21.html).

151. Compare *United States v. Ademi*, 439 F.3d 964, 966–67 (8th Cir. 2006) (holding that uncharged conduct that is related will support an upward departure), and *Rogers*, 423 F.3d at 828 (citing *United States v. Flores*, 336 F.3d 760, 765 n.6 (8th Cir. 2003)) (holding a remote connection will suffice), with *United States v. Allen*, 488 F.3d 1244, 1257 (10th Cir.

concluded that a more meaningful relationship is required.¹⁵²

Notably, both courts that have endorsed the meaningful connection and the remote connection standards rely on the pre-amendment Second Circuit case *United States v. Kim* in support of their respective arguments.¹⁵³ The operative section relied upon by both sides reads as follows:

We conclude that, with respect to acts of misconduct not resulting in conviction, the Commission intended to preclude departures for acts bearing no relationship to the offense of conviction, but to permit departures for acts that relate in some way to the offense of conviction, even though not technically covered by the definition of relevant conduct.¹⁵⁴

Neither the Sentencing Commission nor the Second Circuit has discussed the competing interpretations of the *Kim* case. However, examining the Second Circuit's analysis in *Kim* favors the interpretations made by the First, Tenth, Eleventh, and D.C. Circuits, which purport that the Sentencing Commission intended for uncharged conduct to be meaningfully, not remotely, related in

2007) (“But like enhancements for uncharged conduct under [section] 1B1.3, when a [section] 5K2.0 departure is based on ‘acts of misconduct not resulting in conviction’ those acts must still ‘relate meaningfully to the offense of conviction.’” (quoting *United States v. Neal*, 249 F.3d 1251, 1260 (10th Cir. 2001))), and *United States v. Ellis*, 419 F.3d 1189, 1193 n.4 (11th Cir. 2005) (“[T]herefore, upward departures are allowed for acts of misconduct not resulting in conviction, as long as those acts, whether or not relevant conduct in the section 1B1.3 sense, *relate meaningfully to the offense of conviction.*” (quoting *United States v. Amirault*, 224 F.3d 9, 12 (1st Cir. 2000))), and *Amirault*, 224 F.3d at 12 (citing *United States v. Kim*, 896 F.2d 678, 684 (2d Cir. 1990)) (requiring a meaningful connection).

152. See *Allen*, 488 F.3d at 1257 (requiring upward departures to “relate meaningfully to the offense of conviction”); *Ellis*, 419 F.3d at 1193 & n.4 (stating that “to reflect the actual seriousness of the offense,” the language of section 5K2.21 limits conduct not resulting in arrest to conduct that “relates meaningfully to the offense of conviction” (quoting *Amirault*, 224 F.3d at 12)); *United States v. Smith*, 267 F.3d 1154, 1164 (D.C. Cir. 2001) (“[T]he conduct forming the basis for the departure must be descriptively or logically, and not merely temporally, connected to the crime for which the defendant was actually convicted.”); *Amirault*, 224 F.3d at 12 (citing *Kim*, 896 F.2d at 684) (determining that pre-amendment case law supported the proposition that conduct must “relate meaningfully to the offense of conviction”).

153. Compare *Newsom*, 508 F.3d at 734–35 (citing *Kim*, 896 F.2d at 684) (discussing how there must be some connection, but citing *Kim* as evidence “that the relationship does not have to be a particularly close one”), with *Amirault*, 224 F.3d at 12 (citing *Kim*, 896 F.2d at 684) (“[U]pward departures are allowed for acts of misconduct not resulting in conviction, as long as those acts, whether or not relevant conduct in the section 1B1.3 sense, relate meaningfully to the offense of conviction.”).

154. *Kim*, 896 F.2d at 684.

order for that conduct to serve as the basis for an upward sentencing departure.¹⁵⁵

In *Kim*, the Second Circuit determined whether uncharged or dismissed conduct could be considered by a sentencing court at all.¹⁵⁶ The court discussed in detail the various ways the Commission treated “misconduct not resulting in conviction” and then held that such conduct cannot be considered.¹⁵⁷ Particularly interesting in this discussion are the *Kim* court’s statements regarding section 5K2.0 governing departures.¹⁵⁸ The court discussed the Commission’s acknowledgement that some acts not resulting in conviction might “occur *in connection with* a crime and that such acts are precisely the type of events that the court’s departure powers were designed to cover.”¹⁵⁹ However, the court went on to state that because of the Commission’s care in accounting for “acts of misconduct not resulting in conviction” throughout the Guidelines, it “did not expect *all* acts of misconduct, regardless of relationship to the crime of conviction, to warrant a departure.”¹⁶⁰ The various ways the Commission accounted for “misconduct not resulting in conviction” were by “the adjustments it thought appropriate for aggravating factors that frequently accompany various *offenses of conviction*, it detailed the scope of ‘relevant conduct’ for purposes of assessing such aggravating factors, and it provided a method for enhancing the criminal history category to reflect prior similar acts of misconduct.”¹⁶¹

155. *See id.* at 683 (“[The Commission’s intent] would be undermined if a sentencing judge could make an upward departure for any act of misconduct, regardless of relationship to the offense of conviction.”).

156. *Id.* at 682.

157. *Id.*

158. *See id.* at 683 (“[T]he Commission contemplated that the sentencing judge will make an upward departure under the general authority of section 5K2.0. . . . [I]t must not be assumed, however, that this authority permits the sentencing judge to make a departure for *any* act of misconduct that the defendant may have committed.”).

159. *Kim*, 896 F.2d at 683 (internal quotation marks omitted).

160. *United States v. Kim*, 896 F.2d 678, 683–84 (2d Cir. 1990).

161. *Id.* at 683 (emphasis added). “First, the Commission identified, by examining thousands of prior sentences and presentence reports, those acts of misconduct that had traditionally influenced the sentences imposed for various crimes prior to the Guidelines.” *Id.* at 682 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1989)). “Second, the Commission specified that misconduct constituting offenses to which the defendant has stipulated in connection with the entry of a plea to the offense of conviction shall be treated as if the defendant had been convicted of additional counts charging such

The *Kim* court went on to discuss how “the Commission’s carefully explained compromise between ‘charge offense’ sentencing and ‘real offense’ sentencing would be undermined if a sentencing judge could make an upward departure for any act of misconduct, regardless of [its] relationship to the offense of conviction.”¹⁶² The Commission admits that the modified real offense system it established is actually “closer to a ‘charge offense’ system.”¹⁶³ A real offense system bases a sentence on the actual conduct in which the defendant engaged regardless of conviction.¹⁶⁴ A charge offense system only considers conduct in the indictment and elements of the offense of conviction in sentencing.¹⁶⁵ The Commission describes the Guidelines system as falling somewhere in between these two extremes;¹⁶⁶ however, if the Commission intended for the system to be “closer to a ‘charge offense’ system,” it is logical to infer that sentencing departures based on uncharged conduct should have more than a remote relationship to the offense of conviction.

Finally, the Second Circuit discussed section 5K2.0 governing departures and whether the Commission intended the relevancy standard of section 1B1.3 to apply to all acts not resulting in conviction. The *Kim* court determined that, based on the language of the Guidelines and the fact that section 1B1.3 does not explicitly state that it applies to departures, “[i]t is unlikely that the Commission expected the strictures of the relevant conduct guideline to apply as a limitation on all acts of misconduct that might warrant a departure.”¹⁶⁷ The *Kim* court then discussed: the

offenses.” *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(c) (1989)). The *Kim* court also noted that the Commission carefully constructed mechanisms for allowing the sentencing judge to take “prior similar conduct not resulting in a conviction” into account in considering whether an upward departure is justified. *Id.* at 683 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(e) (1989)).

162. *Kim*, 896 F.2d at 683; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(a) (1989) (discussing the Commission’s decision to go with a modified real offense system).

163. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(a) (1989).

164. *See id.* (basing a sentence upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted).

165. *Id.*

166. *Id.*

167. *Kim*, 896 F.2d at 684. During the course of its analysis, the court identified a significant statement on this issue contained in section 5K2.0, which has since been deleted: “Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the

Commission's careful treatment of acts of misconduct, the Commission's decision to go with a system that more closely resembles a charge offense system, and whether or not the departure acts must meet strict section 1B1.3 relevancy standards.¹⁶⁸ Based on these analyses, it is unlikely the *Kim* court intended the "relate in some way" language to imply the limited remote connection inferred by the Eighth Circuit. It is a more likely conclusion that the *Kim* court intended to express a standard that was only slightly less rigorous than the relevancy standards required by section 1B1.3.

2. Textual Support for a Meaningful Connection

Support for the meaningful connection standard is also found in the language of the Guidelines. First, consider section 5K2.0, which governs a court's departure from the calculated Guidelines range. This section states: "The sentencing court may depart from the applicable guideline range if . . . 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."¹⁶⁹ The Sentencing Commission goes on to define the term "circumstance" as "includ[ing], as appropriate, an offender characteristic or any other *offense* factor."¹⁷⁰ The term "offense" is defined as "the offense of conviction and all relevant conduct under [section] 1B1.3 (Relevant Conduct) unless a different meaning is specified

limitations set forth in [section] 1B1.3." *Id.* at 683 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1989)). The Second Circuit differentiated between the "harms" mentioned in this section of the Guidelines and "the acts of misconduct" that potentially caused those harms, and decided that the Commission did not intend for the strict relevancy requirements of section 1B1.3 to apply to all acts of misconduct being considered for an upward departure. *Id.* at 683–84. However, even after deciding that the relevancy standards of section 1B1.3 did not apply, the court found that the "harm" limitation mentioned above "suggest[ed] some restriction on the extent to which misconduct unrelated to the offense of conviction may warrant a departure." *Id.* at 684. Specifically, the court concluded that the departure acts must "relate in some way." *United States v. Kim*, 896 F.2d 678, 684 (2d Cir. 1990).

168. *Id.* at 683–84.

169. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007) (emphasis added), available at http://www.ussc.gov/2007guid/5k2_0.html; see also *United States v. Ellis*, 419 F.3d 1189, 1193 n.4 (11th Cir. 2005) (discussing the language of section 5K2.0).

170. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. n.1 (2007) (emphasis added), available at http://www.ussc.gov/2007guid/5k2_0.html.

or is otherwise clear from the context.”¹⁷¹ Thus, section 5K2.0 allows a court to make an upward departure from the calculated Guidelines range when there is an aggravating factor of the *offense of conviction* that has not already been taken into consideration by the Guidelines. It seems clear then, by this definition, that the uncharged conduct that is the basis of the departure must be meaningfully related to the offense of conviction.¹⁷²

Additionally, further consideration of the text of the Guidelines, specifically sections 5K2.1 through 5K2.24, supports a meaningful relationship requirement. Almost every section requires a significant link “between the offense of conviction and the conduct that forms the basis for the departure.”¹⁷³ For example, the text of section 5K2.21 reads:

The court may depart upward to reflect the *actual seriousness of the offense* based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.¹⁷⁴

How can conduct that has only a remote relationship to the offense of conviction “reflect the actual seriousness of the offense” of conviction? Newsom made this argument in his appeal from the trial court’s decision in *United States v. Newsom* to the Fifth Circuit.¹⁷⁵ While the Fifth Circuit dismissed this argument, other courts, such as the Eleventh Circuit, have recognized that in order

171. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1 (2007), *available at* http://www.ussc.gov/2007guid/1b1_1.html.

172. *See Ellis*, 419 F.3d at 1193 n.4 (analyzing the Commission’s notes regarding section 5K2.0 and concluding that a meaningful connection between the uncharged conduct and the underlying conviction is required).

173. *See United States v. Cross*, 121 F.3d 234, 240 n.5 (6th Cir. 1997) (noting that the Commission, in listing specific grounds for departure, “require[d] a nexus between the offense of conviction and the conduct that forms the basis for the departure”). *See generally* U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.1–5K2.21 (2007) (explaining that the departure conduct must: result from the offense, occur in the commission of the offense, be caused by the offense, facilitate the offense, or be used to prove the actual seriousness of the offense), *available at* <http://www.ussc.gov/2007guid/GL2007.pdf>.

174. U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2007) (emphasis added), *available at* http://www.ussc.gov/2007guid/5k2_21.html.

175. *United States v. Newsom*, 508 F.3d 731, 734 (5th Cir. 2007) (arguing that the upward departure is only proper where there is a factual relationship between the uncharged offense and the offense of conviction).

for the conduct in question to “reflect the actual seriousness of the offense” it must “shed[] further light on the true nature of the offense of conviction.”¹⁷⁶ It is unclear how Newsom’s possession of illegal firearms, firearms which were not used at all in the commission of his offense, “sheds further light on the true nature” of his aiding and abetting the theft of explosives conviction.

3. Policy of the Guidelines

The commentary provided by the Commission regarding the mission of the Guidelines¹⁷⁷ and the Commission’s intentions with regard to departures from the Guidelines—namely that departures should be infrequent¹⁷⁸ and the result of an atypical fact situation,¹⁷⁹—supports the argument that requiring a meaningful

176. *Ellis*, 419 F.3d at 1193.

177. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (1989) (discussing the policy and goals Congress intended with the Guidelines).

[Congress’s] basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought *honesty* in sentencing. . . .

Second, Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Id.

178. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1990); *see also* *Koon v. United States*, 518 U.S. 81, 96 (1996) (“The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the Guidelines will be ‘highly infrequent.’” (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (1995))). The Commission further provided:

While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be *highly infrequent*.

U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1990) (emphasis added).

179. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1990). Furthermore:

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an *atypical* case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

Id. (emphasis added).

connection between the uncharged and underlying offense is the intended interpretation of section 5K2.21.¹⁸⁰ The Commission clearly discusses issues regarding the policy of the Guidelines in the introductory chapter. The following excerpt from this section of the Guidelines clearly states the Commission's intentions regarding departures:

[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time.¹⁸¹

Additionally, in the background commentary to section 5K2.0 governing departures, the Commission states: "[C]ircumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid."¹⁸²

Again, in the commentary to section 5K2.0 when discussing departures for circumstances "not adequately taken into consideration" by the Guidelines, the Commission writes:

A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to

180. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. background (2007), available at http://www.ussc.gov/2007guid/5k2_0.html.

Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the *exceptional* case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."

Id. (emphasis added) (quoting 28 U.S.C. § 991(b)(1)(B) (2006)).

181. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1989) (stating the Commission's policy regarding departures).

182. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. background (2007), available at http://www.ussc.gov/2007guid/5k2_0.html.

monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.¹⁸³

Since the Commission obviously intended departures to be reserved for the rare and exceptional fact situation, and allowing departures for conduct only remotely related to the offense of conviction clearly makes it easier to depart from the Guidelines, it is unlikely the Commission would approve of such a relaxed standard. This seems especially true given that if courts were to follow the application of the remote connection standard, as the Fifth Circuit did, it would be hard to imagine any acts of misconduct committed at any time by the defendant that could not be used to make an upward departure from the Guidelines range.¹⁸⁴

B. *Constitutional Concerns*

Several sentencing courts have developed the practice of departing from the advised range so that the defendant is punished as “if he had been tried and convicted of” the uncharged conduct,¹⁸⁵ a practice which raises serious constitutional concerns.¹⁸⁶ As the Tenth Circuit has pointed out, the Supreme Court’s decision to make the Guidelines advisory was out of concern over violations of the Sixth Amendment.¹⁸⁷ It would

183. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. n.3 (2007), available at http://www.ussc.gov/2007guid/5k2_0.html.

184. See *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007) (holding that because the defendant and his co-defendants “had a history of trading guns for drugs, and were all high on drugs the night they stole the explosives . . . there [was] a sufficient connection between the uncharged [illegal firearm possession] and charged [aiding and abetting the theft of explosives] offenses”).

185. *United States v. Allen*, 488 F.3d 1244, 1253 (10th Cir. 2007). The trial court recalculated Allen’s sentencing range by acting as if the uncharged offenses had been the offense of conviction. *Id.* at 1252.

186. See U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

187. See *Allen*, 488 F.3d at 1262 (stating that the purpose of *Booker* was to conform the sentencing system “closer to the norms of the Sixth Amendment”). Discussing the sentencing system since *Booker*, the Tenth Circuit stated:

To some extent—within the bounds of reasonableness—district courts are now free to sentence in ways not permitted under the Guidelines, and without benefit of jury fact-

raise serious Sixth Amendment problems were a defendant essentially convicted of uncharged conduct and then punished without due process of law, the benefit of a jury trial, or the state proving its case beyond a reasonable doubt.

Some have argued that when a defendant signs a plea agreement he waives his Sixth Amendment rights.¹⁸⁸ While that might be true for the offense of conviction and conduct closely related to that offense, is it logical to assume a defendant has waived his Sixth Amendment rights with regard to other offenses that are only remotely related to the conviction? For example, it is sensible to assume that Newsom anticipated being punished for his part in that entire incident when he pled guilty to aiding and abetting the theft of explosives. But would he have expected his guilty plea to pertain to the unrelated illegal firearms charge? Did the prosecution have enough evidence to convict Newsom for the illegal possession charge? Assuming Newsom would have entertained a guilty plea to this charge as well, he was certainly deprived of the opportunity to make an informed decision on the issue. The prosecution should have indicted Newsom for this separate offense, and, if necessary, put on evidence to convince a jury of his peers beyond a reasonable doubt that he was guilty. The occasional benefits of efficiency “do not . . . sanction[] an end-run around this fundamental process.”¹⁸⁹ Because this practice is

finding. Sentencing courts are empowered to impose lengthier sentences when needed to protect the public from further crimes of the defendant, 18 U.S.C. § 3553(a)(2)(C). But we should not forget that the purpose of *Booker* was not to liberate sentencing courts from statutory constraints. It was to bring our sentencing system closer to the norms of the Sixth Amendment. If we affirm the sentence in this case as a legitimate exercise of *Booker* discretion, we would move in the opposite direction. Even more than was so under the mandatory Guidelines system, where the sentencing judge was limited to enhancements based on conduct related to the offense of conviction and previous convictions, or to departures based on previous convictions and adult misconduct similar to the offense, the jury would be “relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” [Blakely v. Washington, 542 U.S. 296, 307 (2004)]. If that is what the Supreme Court intended by the *Booker* decision, it should say so; we will not leap to that interpretation on our own authority.

Id.

188. See *United States v. Conway*, 513 F.3d 640, 645–46 (6th Cir. 2008) (stating that the district court did not violate the Sixth Amendment because the defendant waived Sixth Amendment protections in his plea agreement).

189. *Allen*, 488 F.3d at 1262.

possibly unconstitutional, and definitely results in a misinterpretation and misapplication of the Guidelines, reviewing courts should consider such an application of section 5K2.21 to be improper and declare such a sentence invalid.¹⁹⁰

C. *Fundamental Fairness*

The fundamental unfairness inherent in a prosecutor's ability to negotiate a plea agreement for one offense and then punish a defendant as if he was also convicted of a remotely related offense is also a concern. The Supreme Court warned of such an "absurd result" in *Blakely v. Washington*,¹⁹¹ but that is exactly what happens when a judge uses section 5K2.21 to depart from the Guidelines for remotely related conduct.

Prosecutors and defendants should include a specific sentence, or a specific sentencing range, in plea agreements if courts are going to depart from the Guidelines range based upon remotely related conduct.¹⁹² If a plea agreement includes a specific

190. *Gall v. United States*, 128 S. Ct. 586, 597 (2007). Since the Guidelines were declared unconstitutional, and now only serve in an advisory fashion, appellate courts review the sentencing courts' decisions under an abuse-of-discretion standard. *Id.* at 598. Such an analysis has two steps. First, the reviewing court must make sure the sentencing court did not commit a procedural error. Procedural error can be described as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [section] 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.* at 597. If there was no procedural error, then the court will go on to "consider the substantive reasonableness of the sentence imposed." *Id.* If a district court departs from the sentencing range based on conduct that is only remotely related to the offense of conviction, this should be considered misinterpretation and a misapplication of the Guidelines, and the sentence should be reversed because of procedural error. See *United States v. Crawford*, 407 F.3d 1174, 1183 (11th Cir. 2005) (explaining that *Booker* requires the sentencing courts to consult the Guidelines, and "because true consultation cannot be based on an erroneous understanding of the Guidelines," the court's misinterpretation and misapplication of the particular Guideline provision results in procedural error).

191. *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004); see also *Allen*, 488 F.3d at 1261 (discussing the *Blakely* decision to support the argument that a system that allows a judge to replace the offense of conviction with his own subjective belief is unconstitutional).

192. FED. R. CRIM. P. 11(c)(1)(C); see also *Conway*, 513 F.3d at 643–45 (indicating that if the defendant did not expect for the court to depart from the anticipated sentencing range, he should have utilized the Federal Rules of Criminal Procedure and put that in the plea agreement). The applicable section of Rule 11 states:

(c) Plea agreement procedure.

(1) In general. An attorney for the government and the defendant's attorney, or the

sentencing range, and the judge accepts the plea, then that judge will be bound by the agreement and will be required to sentence accordingly.¹⁹³ Judges should reject plea agreements if they determine that the maximum sentence under the Guidelines does not adequately reflect the seriousness of the offense.¹⁹⁴ In fact, the Guidelines and the Federal Rules of Criminal Procedure both require a sentencing judge to reject a plea agreement under such circumstances.¹⁹⁵

Guideline departures allow judges to enhance punishment when the conduct of conviction technically fits the mold of the offense, but the facts are so exceptional that to sentence within the Guidelines would be unjust. Departures are not intended to shift prosecutorial responsibilities regarding indictment and conviction to the sentencing judge. Judges should not use upward departures from the Guidelines to punish defendants for conduct that prosecutors have refused to present to a jury.

V. CONCLUSION

Sentencing is complicated. A court must provide similar sentences for similar crimes and account for individual characteristics

defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

FED. R. CRIM. P. 11(c)(1)(A)–(C).

193. FED. R. CRIM. P. 11(c)(1)(C).

194. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 6B1.2 (2007), available at http://www.ussc.gov/2007guid/6b1_2.html.

195. FED. R. CRIM. P. 11(c)(1)(C); U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 6B1.2 (2007), available at http://www.ussc.gov/2007guid/6b1_2.html. A federal court may accept a plea agreement only if the court finds “that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 6B1.2 (2007), available at http://www.ussc.gov/2007guid/6b1_2.html.

of the offender.¹⁹⁶ While section 5K2.21 allows a court to depart from the Guidelines based on uncharged or dismissed conduct, the Fifth Circuit's failure to require the uncharged conduct to have a meaningful relationship with the conduct of conviction is flawed. The text and the policy of the Guidelines, as well as persuasive authority from other circuits, implies that a more meaningful relationship is required. Additionally, the Fifth Circuit's remote connection standard raises serious constitutional concerns. Punishing defendants as if they had been convicted of uncharged or dismissed conduct circumvents the protections of the Sixth Amendment. Sentences that depart from the Guidelines based on conduct that is unrelated or remotely related to the conviction offense represent an erroneous interpretation of the Guidelines, which courts should reject.

196. *Gall v. United States*, 128 S. Ct. 586, 598 n.8 (2007) (citing *Koon v. United States*, 518 U.S. 81, 113 (1996)).