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Proportionality and Punishment: Double Counting under the Federal Sentencing Guidelines

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PROPORTIONALITY AND PUNISHMENT: DOUBLE COUNTING UNDER THE FEDERAL SENTENCING GUIDELINES

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Abstract: The Federal Sentencing Guidelines enhance sentences when the commission of a crime includes certain kinds of egregious conduct. The guidelines define such egregious conduct in a way that allows the sentencing judge to enhance the defendant's sentence twice for the same conduct—once as a "characteristic" of the specific offense for which the defendant is convicted and again under a general "adjustments" section. The federal circuit courts are divided concerning whether the guidelines permit double counting. This Comment examines the courts' differing interpretations of the governing statutes and concludes that the guidelines do not permit double counting unless explicitly stated in the sentencing guidelines.

That the punishment should fit the crime is a recurring theme in the American justice system. It was one of the foundation themes of the Sentencing Reform Act of 1984[1] which authorized the United States Sentencing Guidelines.[2] Contrary to this theme, some courts have interpreted the guidelines to require convicted criminal offenders to receive duplicative sentence "enhancements" for the same criminal conduct, thus imposing more punishment than the crime deserves.

This Comment examines the problem of double counting criminal conduct under the guidelines. It begins with a discussion of the purposes of the sentencing guidelines and the use of enhancements under the guidelines. The Comment then describes double counting and the split in the federal circuit courts as to whether the guidelines permit double counting. Finally, the Comment examines the findings of the circuit courts and concludes that double counting should not occur under the guidelines except in the rare instances where the guidelines explicitly call for it.

1. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551–3625 and 28 U.S.C. §§ 991–998 (1988)).

2. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 2 (1993) [hereinafter U.S.S.G.]. All references are to the 1993 guidelines unless otherwise noted.

I. THE FEDERAL SENTENCING GUIDELINES AND DOUBLE COUNTING

The Sentencing Reform Act was the first comprehensive sentencing law for the federal system.[3] It culminated more than a decade of efforts by reformers aiming to curb broad discretion of federal judges and the corresponding disparity in sentences.[4] The support for sentencing reform came from a diverse group including conservatives, liberals, judges, prosecutors, and defense attorneys.[5] In the Act, Congress laid the foundation for sentencing reform. It stated the purposes for sentencing[6] and for sentencing reform[7] and left the details of the new sentencing system to the United States Sentencing Commission which ultimately promulgated the guidelines.[8] To understand the problem of double counting it is necessary to focus on the purpose of the Sentencing Reform Act and examine the guidelines' enhancement mechanisms.

A. The Purposes of the Sentencing Reform Act

Congress created the Sentencing Commission and gave it broad discretion to develop a sentencing system that would make sentences more fair for offenders and society.[9] Congress wanted a new sentencing system to promote honesty,[10] proportionality, and of primary importance, uniformity in sentencing.[11] Preguidelines sentencing practice resulted in wide disparity in sentences.[12] Each federal judge

3. S. REP. No. 225, 98th Cong., 1st Sess. 37 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220.

4. *Id. See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

5. S. REP. No. 225, *supra* note 3, at 37, *reprinted in* 1984 U.S.C.C.A.N. at 3220. Congress intended that this diversity extend to the Sentencing Commission. *Id.* at 63, 1984 U.S.C.C.A.N. at 3246. Note, however, that the President did not appoint a defense attorney to the Commission. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines,* 101 HARV. L. REV. 1938, 1948 (1988).

6. 18 U.S.C. § 3553(a)(2) (1988).

7. 28 U.S.C. § 991(b)(1) (1988).

8. *Id.* § 991(a). The Commission must submit the guidelines to Congress, but Congressional inaction is deemed approval. *Id.* § 994(p).

9. S. REP. No. 225, *supra* note 3, at 39, *reprinted in* 1984 U.S.C.C.A.N. at 3222.

10. The goal of honesty is to be achieved by abolishing the parole system. U.S.S.G., *supra* note 2, at 2. It has no impact on the following double counting analysis and is therefore not further discussed.

11. 28 U.S.C. § 991(b)(1)(B) (1988); U.S.S.G., *supra* note 2, at 2. For an analysis of whether these goals are being met, see Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis,* 40 EMORY L.J. 393 (1991).

12. S. REP. No. 225, *supra* note 3, at 38, 41–48, *reprinted in* 1984 U.S.C.C.A.N. at 3221, 3224–31 (showing empirically the wide disparity in sentences).

had his or her own sentencing rationale and handed out sentences constrained only by broad statutory maximum, and sometimes minimum, sentences.[13] The guidelines set narrow sentence ranges for criminal offenses to constrain judges in sentencing.[14] By setting a narrow range for each offense, Congress intended that sentences across the nation become more uniform.[15]

Congress' second goal was proportionality in sentencing. Congress recognized that uniformity by itself is unworkable and unfair.[16] With strict uniformity, offenders committing similar crimes would receive the same sentence even if one committed the crime in a less egregious fashion than the other.[17] An armed robber, for example, would receive the same sentence as an unarmed robber. The sentence for one of these robbers would be unfair—either the armed robber receives too lenient a sentence or the unarmed robber receives too severe a sentence.[18] Congress postulated that this disparity would result in unfairness to offenders when they are punished too severely and unfairness to society when offenders are punished too leniently.[19] Congress thus expected that the Commission would provide a method that would vary sentences based on aggravating and mitigating factors.[20]

B. Enhancements Under the Sentencing Guidelines

The guidelines set forth narrow sentencing ranges for specific categories of offenses.[21] Two factors determine the sentencing range: the severity level of the offense, and the offender's criminal record.[22] The guidelines use a grid with the offender's criminal history score on the horizontal axis and a measure of the offense's severity on the vertical

13. *Id.* at 39, 1984 U.S.C.C.A.N. at 3222.

14. See *infra* notes 21–33 and accompanying text for a discussion of how judges determine sentence ranges.

15. S. REP. NO. 225, *supra* note 3, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3235. *But see* Gerald W. Heaney, *Reality of Guidelines Sentencing: No End to Disparity,* 28 AM. CRIM. L. REV. 161, 189, 202 (1991) (arguing that there has been no reduction in sentence disparity).

16. *See* U.S.S.G., *supra* note 2, at 2.

17. *Id.*

18. A third, and more likely scenario, is that the Commission would split the difference with neither robber getting the punishment he or she deserves.

19. S. REP. NO. 225, *supra* note 3, at 45–46, *reprinted in* 1984 U.S.C.C.A.N. at 3228–29. Congress also thought that disproportional sentences would create tension among inmates angry about their relative sentences. *Id.* Too severe sentences also increase prison overcrowding, which Congress sought to avoid. *Id.* at 61, 1984 U.S.C.C.A.N. at 3244.

20. *Id.* at 52, 1984 U.S.C.C.A.N. at 3235.

21. The sentencing range cannot exceed 25 percent of the minimum sentence or six months, whichever is greater. 28 U.S.C. § 994(b)(2) (1988).

22. 18 U.S.C. § 3553(a)(1) (1988); U.S.S.G., *supra* note 2, at 1.

axis.[23] At the intersection of the axes is a range of months for which a judge may sentence a defendant.

The sentencing judge determines the severity of the offense through several factors.[24] The statutory violation of which the defendant was convicted provides the base offense level.[25] The guidelines increase the offense level in two ways. First, judges must increase the offense level if the defendant's crime included "specific offense characteristics,"[26] such as using a weapon in a robbery[27] or engaging in more than minimal planning of a fraud crime.[28] Second, judges also must apply "adjustments" to the offense level.[29] Unlike specific offense characteristics, adjustments apply to any crime.[30] Judges will enhance a defendant's offense level whenever, for example, the defendant is an organizer or leader of a crime.[31] Although the sentencing judge may depart up or down from the guidelines range in special circumstances,[32] because the Commission designed departures to be the exception,[33] the guidelines achieve their goal of proportionality primarily through the two types of modification.

C. Double Counting

Double counting occurs when the judge applies an enhancement in the adjustments section of the guidelines for conduct already

23. There are 6 criminal history categories and 43 offense level categories, amounting to 258 cells in the sentencing grid.

24. The steps outlined below are those taken for one count of conviction. An additional step is necessary to group multiple counts to avoid unjust multiple punishment. *See* U.S.S.G., *supra* note 2, § 3D1.1.

25. *Id.* § 1B1.1(a). The guidelines manual lists the guidelines section that applies to each federal criminal statute. *Id.* App. A.

26. *Id.* § 1B1.1(b). These characteristics apply only to particular offenses and are listed under those offenses.

27. *Id.* § 2B3.1(b)(2) (five-level enhancement if the gun was fired, four if "otherwise used," and three if just possessed).

28. *Id.* § 2F1.1(b)(2) (two-level enhancement).

29. *Id.* § 1B1.1(c). Adjustments can increase or decrease a sentence. There are, however, a disproportionate number of increasing adjustments compared to reductions. *See* Ogletree, *supra* note 5, at 1951–54.

30. *See* U.S.S.G., *supra* note 2, § 1B1.1.

31. *Id.* § 3B1.1(c).

32. *See, e.g.*, United States v. Maier, 975 F.2d 944, 945 (2d Cir. 1992) (downward departure for defendant's drug addiction); United States v. Phillip, 948 F.2d 241, 253 (6th Cir. 1991) (upward departure for extremely brutal child abuse), *cert. denied*, 112 S. Ct. 1994 (1992). *See generally* Bruce M. Selya & Matthew R. Kipp, *An Examination of the Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991) (describing the use of departures by the federal courts).

33. Judges may depart from the guidelines only when there are aggravating or mitigating circumstances that the Commission has not adequately considered in the guidelines. U.S.S.G., *supra* note 2, § 5K2.0.

accounted for either in the definition of the offense,[34] in a specific offense characteristic enhancement,[35] or in the defendant's criminal history.[36] If, for example, a bank examiner who accepted a bribe receives an increased sentence for abuse of a position of trust[37] the court has double counted the examiner's behavior because the examiner's crime already assumes such an abuse.[38] Double counting also occurs when the judge departs from the guidelines based on conduct already considered in the guideline mechanisms.[39] For example, if a judge departs upward from the guidelines because a defendant committed multiple robberies, this results in double counting because the guidelines already account for multi-count convictions.[40]

The guidelines have explicitly prohibited double counting in certain situations. They do not permit judges to apply the adjustment enhancement for a vulnerable victim[41] to increase sentences, for example, when the definition of the offense or of a specific offense characteristic includes that vulnerability.[42] The enhancements for an official

34. *See, e.g.*, Erich D. Andersen, *Enhancement for "Abuse of a Position of Trust" Under the Federal Sentencing Guidelines*, 70 OR. L. REV. 181, 198–203 (1991).

35. *See* United States v. Romano, 970 F.2d 164 (6th Cir. 1992).

36. *See* United States v. Adeleke, 968 F.2d 1159 (11th Cir. 1992) (permitting a past crime to serve as the basis for an enhancement for being previously deported after conviction of a felony and to count in the defendant's criminal history); *see also infra* notes 47–51 and accompanying text.

37. U.S.S.G., *supra* note 2, § 3B1.3.

38. *See id.* § 2C1.6 cmt. 1; *see also* Andersen, *supra* note 34, at 198–203.

39. *See* United States v. Eagan, 965 F.2d 887 (10th Cir. 1992); United States v. Phillip, 948 F.2d 241, 257 (6th Cir. 1991) (Merritt, J., dissenting), *cert denied*, 112 S. Ct. 1994 (1992).

40. *See* United States v. Coe, 891 F.2d 405, 410 (2d Cir. 1989). The concept of double counting is similar to violations of the double jeopardy clause when, for example, a defendant who takes a car is charged both with joyriding and with auto theft. *See* Brown v. Ohio, 432 U.S. 161, 163 (1977). Although the double jeopardy clause of the Constitution protects defendants against multiple convictions for the same offense, it does little to protect defendants from cumulative punishment for the same offense. Legislatures are "free to prescribe two different punishments . . . for a single offense." Missouri v. Hunter, 459 U.S. 359, 370 (1983) (Marshall, J., dissenting).

41. U.S.S.G., *supra* note 2, § 3A1.1. A vulnerable victim is one whose age, physical or mental condition, or other factor makes the victim particularly susceptible to the criminal conduct. *Id.*

42. *Id.* § 3A1.1 cmt. 2. Double counting would occur where, for example, the victim in a criminal sexual abuse case was under 12 years old and the judge enhanced the sentence under the vulnerable victim adjustment. The specific offense characteristics for criminal sexual abuse already contain an enhancement for children under 12. *Id.* § 2A3.1(b)(2). But, if age was not the only vulnerable characteristic of the victim, the guidelines would permit multiple enhancements. For example, if the victim was both young and disabled and the disabling factor made the victim particularly susceptible to the crime, then the guidelines would permit a judge to apply the enhancement.

victim[43] and for restraint of a victim[44] also include an explicit double counting limitation.

The guidelines also prohibit double counting when judges depart from the guidelines. The guidelines permit departures from the guideline range only when the court finds aggravating or mitigating circumstances not adequately taken into consideration by the Commission.[45] Thus, any explicit enhancement in the guidelines forecloses the possibility of a sentencing judge using that conduct as a basis for increasing a sentence through the departure mechanism.[46]

The guidelines explicitly permit double counting in one situation.[47] The crime of illegally reentering the United States after being deported[48] carries with it a specific offense characteristic enhancement if the defendant was previously deported after a felony conviction.[49] The guidelines specifically state that this enhancement is in addition to any criminal history points added for the felony conviction in the criminal history score, even though the enhancement and the crime involve the same conduct.[50] Courts applying the enhancement note, however, that this double counting is unique because it advances two distinct policies—punishing recidivists through the criminal history score, and punishing the wrongfulness of the act through the enhancement.[51]

D. The Method for Analyzing the Sentencing Guidelines

Courts interpreting the sentencing guidelines follow the same rules of statutory construction that they use to interpret criminal statutes.[52] The Supreme Court has established three areas to examine when ana-

43. *Id.* § 3A1.2 cmt. 3. Law enforcement and corrections officers, as well as their immediate family members are examples of official victims. *Id.* § 3A1.2.

44. *Id.* § 3A1.3 cmt. 2. Restraint of victim occurs when the victim is physically restrained, such as tied up during a robbery. *Id.* § 3A1.3

45. 18 U.S.C. § 3553(b) (1988); U.S.S.G., *supra* note 2, § 5K2.0.

46. Of course, if the sentencing judge did not apply the enhancement and just departed from the guidelines, no double counting would occur. This would be an improper basis for departure, however.

47. A second potential area of permitted double counting arises when applying multiple specific offense characteristics for an offense. Guidelines commentary requires judges to apply these enhancements cumulatively, but the Commission defines these enhancements so that there can be no overlap of conduct. *See* U.S.S.G., *supra* note 2, § 1B1.1 cmt. 4.

48. 8 U.S.C. § 1326 (1988).

49. U.S.S.G., *supra* note 2, § 2L1.2(b)(1).

50. *Id.* § 2L1.2 cmt. 5; *see* United States v. Adeleke, 968 F.2d 1159 (11th Cir. 1992).

51. *Adeleke,* 968 F.2d at 1161; United States v. Campbell, 967 F.2d 20, 24 (2d Cir. 1992).

52. United States v. Rocha, 916 F.2d 219, 243 (5th Cir. 1990), *cert. denied,* 111 S. Ct. 2057 (1991); *see also* Mistretta v. United States, 488 U.S. 361, 391 (1989) (likening the guidelines to court rules).

lyzing criminal statutes: the language and structure of the statute; if the text is ambiguous, Congressional intent behind the specific statutory language the court is addressing; and, if uncertainty persists, the motivating policies behind the entire statute.[53] If ambiguity still exists after this analysis, a court must interpret the statute in favor of lenity to the defendant.[54]

In the first step of analyzing statutory construction, the court looks to the statute's language, giving words their plain or ordinary meaning.[55] If the plain meaning of statutory language appears to settle the issue, and no clear legislative intent exists to the contrary, the court ends its analysis.[56] If the plain language inquiry does not resolve the issue, the court proceeds to the second step and seeks to glean the meaning of a particular section by referring to the structure of the entire statute. Provisions and language included or excluded in other portions of the statute can shed light on the meaning of a separate section of the statute.[57]

If the issue is not resolved after examining the structure of the guidelines, the court turns to the legislative history of the statute to determine legislative intent as to the specific statutory language in question.[58] Another area in which a court can glean the meaning of statutory language is the motivating policies behind the statute.[59] If the meaning of the statutory language is still ambiguous at the end of this analysis, the court must apply the rule of lenity and decide the

53. United States v. R.L.C., 112 S. Ct. 1329, 1338 (1992) (applying these criteria to a case involving the guidelines); Moskal v. United States, 111 S. Ct. 461, 465 (1990); Bifulco v. United States, 447 U.S. 381, 387 (1980).

54. *R.L.C.*, 112 S. Ct. at 1338; *Moskal*, 111 S. Ct. at 465.

55. *R.L.C.*, 112 S. Ct. at 1334 (looking first to the "plain meaning" of the statute); *Moskal*, 111 S. Ct. at 465 ("In determining the scope of a statute, we look first to its language . . . giving the 'words used' their 'ordinary meaning.' ") (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

56. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3 (1981) (per curiam); United States v. Neal, 976 F.2d 601 (9th Cir. 1992) (sentencing guidelines case). *But see R.L.C.*, 112 S. Ct. at 1339–41 (Scalia, J., concurring) (arguing that legislative history should never be used to construe an otherwise ambiguous criminal statute against a defendant).

57. *See, e.g.*, Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (holding that courts should interpret statutory language to give effect to all parts of the statute, leaving no wholly superfluous language).

58. A court can determine the legislative intent of the guidelines from looking at the history of Congress' enabling legislation, the Sentencing Reform Act, and the Sentencing Commission's policy statements.

59. Legislative intent, for purposes of this Comment, refers to the intent of Congress and the Commission to permit or prohibit double counting. The motivating policies, on the other hand, are the general purposes behind sentencing reform, such as uniformity and proportionality in sentencing.

issue in the defendant's favor.[60] The rule of lenity prohibits courts from interpreting criminal statutes to increase a defendant's penalties if the court bases such an interpretation on nothing more than conjecture of congressional intent.[61] The rule embodies two policies: providing fair warning to the world of what will happen if people perform certain conduct, and ensuring that legislatures, and not courts, define criminal conduct and criminal punishment.[62] The rule applies not only to the interpretations of the substantive criminal statutes, but also to the penalties they impose,[63] and applies equally to the sentencing guidelines.[64]

E. The Split Among the Federal Circuit Courts on When Double Counting is Permissible

Federal circuit courts disagree as to what constitutes impermissible double counting. Two cases, *United States v. Curtis*[65] and *United States v. Romano,*[66] exemplify this controversy. Both cases involved separate specific offense character enhancements for "more than minimal planning" of a crime[67] and adjustment enhancements for "organizing or managing" a crime.[68] The *Curtis* court held that double counting is permitted except when the guidelines explicitly prohibit it.[69] The *Romano* court, on the other hand, held that when the guidelines are ambiguous about double counting, the courts should resolve this ambiguity in favor of lenity and not allow double counting.[70]

60. *R.L.C.*, 112 S. Ct. at 1338; Bifulco v. United States, 447 U.S. 381, 400 (1980).

61. *Bifulco,* 447 U.S. at 387.

62. United States v. Bass, 404 U.S. 336, 348 (1971).

63. *Bifulco,* 447 U.S. at 387.

64. *R.L.C.*, 112 S. Ct. at 1338.

65. 934 F.2d 553 (4th Cir. 1991).

66. 970 F.2d 164 (6th Cir. 1992).

67. U.S.S.G., *supra* note 2, §§ 2B1.1(b)(5), 2F1.1(b)(2)(A). Both enhancement sections provide for a two-level enhancement when the "offense involved more than minimal planning." More than minimal planning means "more planning than is typical for commission of the offense in a simple form." *Id.* § 1B1.1 cmt. 1(f). It includes, for example, crimes involving repeated acts over a period of time, luring the victim to the crime location, or preparing false invoices to cover an embezzlement. *Id.*

68. *Id.* § 3B1.1. The guidelines applicable in *Curtis* stated: "If the defendant was an organizer, leader, manager, or supervisor in any criminal activity . . . increase by 2 levels." *Id.* § 3B1.1(c). The provision in *Romano* stated: "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." *Id.* § 3B1.1(a).

69. *Curtis,* 934 F.2d at 556.

70. *Romano,* 970 F.2d at 167.

1. The Fourth Circuit View

In *United States v. Curtis,* a jury convicted the defendant of falsely impersonating an officer of the Immigration and Naturalization Service ("INS").[71] Curtis presented false identification to furniture store employees and led them to believe that the government would pay for the furniture that was actually for his home.[72] As part of this scheme, Curtis asked two others to call the store and support his story that he was an INS special agent and that the government would pay for the furniture.[73] His ploy finally worked and the store delivered $3,000 in furniture to Curtis's home.[74] When the store did not receive payment, store officials called the authorities who arrested Curtis for impersonating an INS agent.[75]

After Curtis's conviction, the district court judge sentenced him under the guidelines for impersonation and theft.[76] The judge then enhanced Curtis's sentence under the specific offense characteristics because his crime involved more than minimal planning.[77] The judge further enhanced Curtis's sentence under the adjustments section for being an organizer of a crime involving other people.[78] On appeal, Curtis argued that the district court judge erred by applying two separate enhancements based on the same conduct. This, he claimed, amounted to impermissible double counting.[79]

The Fourth Circuit Court of Appeals rejected Curtis's double counting argument. The court based its rejection on two sections of the commentary to the guidelines. The court first noted that the "Application Notes" commentary to several other guidelines sections does not permit an offense level increase based on conduct already accounted for in the definition of the offense.[80] Applying the canon of statutory construction *expressio unis est exclusio alterius* (*expressio unis*),[81] the court determined that the absence of commentary prohib-

71. *Curtis,* 934 F.2d at 554.

72. *Id.* at 555.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*; *see supra* note 67 (quoting the guideline section). The section under which Curtis was convicted was formerly designated § 2B1.1(b)(4).

78. *Curtis,* 934 F.2d at 555; *see supra* note 68 (quoting the guideline section).

79. *Curtis,* 934 F.2d at 556.

80. *Id.*

81. In English, the enumeration of specific exclusions to a statute indicates that the statute applies to all cases not specifically excluded.

iting multiple enhancements suggested that both enhancements could apply to the same offense.[82]

The court also placed great weight on the commentary to the "General Application Principles" section of the guidelines. This commentary directed the courts to cumulatively apply enhancements for several specific offense characteristics within a guideline unless the guidelines state otherwise.[83] Consequently, the court held that if conduct falls within the guidelines' definition, courts should increase the offense level for each enhancement unless the guidelines explicitly forbid double counting.[84]

2. *The Sixth Circuit View*

The Sixth Circuit's analysis of the guidelines in *United States v. Romano*[85] differed from the Fourth Circuit's approach. *Romano* involved a medical clinic owner convicted of several crimes growing out of a complex scheme to defraud Medicaid.[86] The defendant Romano owned three medical clinics in Detroit.[87] He hired doctors for the use of their names on prescriptions and use of their provider numbers to bill the Michigan Medicaid program for medical tests although these doctors rarely, if ever, saw patients.[88]

A jury convicted the defendant on twelve counts including conspiracy, Medicaid fraud, and unlawful distribution of controlled substances.[89] After determining the sentencing guidelines criteria for these offenses, the district court judge applied the relevant specific offense characteristic enhancements, including an enhancement for engaging in more than minimal planning of the crime.[90] The court then enhanced the defendant's sentence under the adjustments section for being an organizer or leader of five or more persons.[91] Romano appealed.

82. *Curtis,* 934 F.2d at 556.

83. *Id.* The commentary states: "The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used." U.S.S.G., *supra* note 2, § 1B1.1 cmt. 4.

84. *Curtis,* 934 F.2d at 556.

85. 970 F.2d 164 (6th Cir. 1992).

86. *Id.* at 165.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; *see supra* note 67 (quoting the guidelines section).

91. *Romano,* 970 F.2d at 166; *see supra* note 68 (quoting the guidelines section).

The Sixth Circuit Court of Appeals rejected the Fourth Circuit's "narrow" view of double counting.[92] The court instead followed a line of Supreme Court decisions that require clear legislative intent before courts apply sentence enhancement provisions cumulatively.[93] The court noted that this line of cases followed the rule of lenity in criminal cases.[94]

The *Romano* court adopted the view previously articulated by the Eighth Circuit in *United States v. Werlinger,*[95] that the Commission did not intend to punish defendants twice for the same conduct,[96] and held that it was bound by the rule of lenity to conclude that the guidelines prohibited double counting.[97] Applying this rule to the facts of *Romano,* the court concluded that because being an organizer or leader of a crime necessarily entails more than minimal planning, the district court erred by double counting this conduct in sentencing Romano.[98]

II. THE FEDERAL SENTENCING GUIDELINES DO NOT PERMIT DOUBLE COUNTING

An enhancement under either the specific offense characteristic sections or the adjustment section cannot be based on conduct necessarily accounted for in the other section.[99] The Sixth Circuit came to this conclusion while the Fourth Circuit did not. The following analysis examines the Sixth and Fourth Circuit decisions in light of the analytic framework for statutory construction laid down by the Supreme

92. *Romano,* 970 F.2d at 166.

93. *Id.* at 167 (citing Busic v. United States, 446 U.S. 398, 403–04 (1980); Simpson v. United States, 435 U.S. 6, 12–13 (1978)).

94. *Romano,* 970 F.2d at 167; *see supra* notes 60–64 and accompanying text.

95. 894 F.2d 1015, 1017 (8th Cir. 1990).

96. *Romano,* 970 F.2d at 167. The *Curtis* court, however, distinguished *Werlinger.* It characterized *Werlinger* as holding that the defendant's conduct did not meet the enhancement definition, not that applying the enhancement would be impermissible double counting. Curtis v. United States, 934 F.2d 553, 556 n.2 (4th Cir. 1991).

97. *Romano,* 970 F.2d at 167 ("[I]f certain conduct is used to enhance a defendant's sentence under one enhancement provision, the defendant should not be penalized for that same conduct again under a separate provision.").

98. *Id.* The court found support for this statement in the Application Notes which state that in applying the organizing role provision "the court should consider . . . the degree of participation in planning or organizing the offense." U.S.S.G., *supra* note 2, § 3B1.1 cmt 3. The guidelines thus include planning the crime in the organizing enhancement.

99. While the guidelines call for imposition of specific offense characteristic enhancements first, U.S.S.G., *supra* note 2, § 1B1.1(b), justice calls for judges to impose the enhancement that carries the greater penalty (presumably for the most egregious conduct).

Court.[100] It concludes that the Sixth Circuit came to the correct conclusion.

A. The Sixth Circuit Used the Correct Approach

The Sixth Circuit's conclusion that double counting is not permitted under the guidelines is correct for several reasons. First, the language and structure of the guidelines do not support double counting. Second, the legislative history does not support double counting. Third, double counting is inconsistent with the motivating policies of the Sentencing Reform Act. Fourth, the guidelines are at best ambiguous as to whether they permit double counting; thus, the rule of lenity applies to prohibit the practice. Finally, state courts support a rule against double counting. The Fourth Circuit, on the other hand, applied a flawed approach to statutory construction and arrived at the incorrect conclusion that the guidelines permit double counting.

1. Language and Structure of the Guidelines Do Not Support Double Counting

The plain language of the guidelines does not support double counting enhancements. The guidelines sections that define offense levels[101] and that adjust offense levels[102] merely delineate conduct that requires imposition of enhancements. They do not discuss interplay between these mechanisms. Likewise the application instructions[103] lay out the steps to follow in determining a sentence range, but do not provide a guide to resolving conflicts among the steps. There is no language in the guidelines to support the cumulative application of enhancements.[104]

As with the plain-language inquiry, the structure of the sentencing guidelines does not support double counting. The guidelines' language does not present an overarching theme indicative of the Commission's intent to allow double counting.[105] Nor do the guidelines provide a list of permissible or prohibited areas of cumulative punishment from which to extrapolate that the Commission permits double counting.[106]

100. *See supra* notes 52–64 and accompanying text.

101. *See, e.g.*, U.S.S.G., *supra* note 2, § 2B1.1 (defining the offense level for theft crimes).

102. *See, e.g., id.* § 3B1.1 (defining adjustments for an aggravating role in the crime).

103. *Id.* § 1B1.1.

104. Language cited by the Fourth Circuit in *Curtis* was commentary, not guidelines language. *See infra* notes 136–41 and accompanying text.

105. *See infra* notes 115–16 and accompanying text.

106. The permissible and prohibited areas of double counting discussed *supra* in notes 41–51 and accompanying text were defined by the court or by the guidelines commentary and were not

The Sixth Circuit's rule against double counting is therefore consistent with the language and structure of the guidelines.

2. No Legislative Intent for Double Counting Exists

As with the language and structure of the guidelines, legislative intent[107] does not support double counting. The key indicator of Congress' intent is the Senate report outlining the findings supporting the Sentencing Reform Act.[108] In this report Congress found that in preguidelines sentencing judges had too little regard for the relative seriousness of offenses.[109] The report shows that Congress found sentences that are too severe in relation to others create unnecessary tension among inmates, leading to discipline problems in prison.[110] Congress' goal was to create a system of ranked seriousness that the guidelines embody.[111] It intended to treat categories of offenders consistently without resorting to narrow sentencing statutes.[112] It also sought to eliminate problems created by offenders who might fall into more than one category.[113] Congress did not, however, call for more severe sentences.

These findings do not show that Congress intended for sentence enhancements to apply cumulatively for the same conduct. Instead they show that a primary concern was for proportional sentences without over-punishing.[114] The legislative history of the Sentencing Reform Act, therefore, does not support double counting. Instead, it suggests that Congress did not intend such cumulative punishment.

The Sentencing Commission commentary, likewise, does not support double counting. Its policy statement largely summarizes the enabling statutes, reiterating the purposes of the guidelines,[115] but provides no rationale for sentencing nor any statements giving insight into whether the Commission intended to permit double counting. The Sentencing Commission intentionally avoided adopting a criminal punishment philosophy.[116] If the Commission had adopted such a

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defined in the guidelines themselves. *See infra* notes 136–57 and accompanying text (criticizing the Fourth Circuit's attempt to equate commentary with the guidelines).

107. *See supra* note 59.

108. S. REP. No. 225, *supra* note 3, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

109. *Id.* at 39, 1984 U.S.C.C.A.N. at 3222.

110. *Id.* at 45–46, 1984 U.S.C.C.A.N. at 3228–29.

111. *Id.* at 51, 1984 U.S.C.C.A.N. at 3234.

112. *Id.*

113. *Id.*

114. *Id.* at 39, 52, 1984 U.S.C.C.A.N. at 3222, 3235 (sentencing legislation should be "fair both to the offender and to society").

115. U.S.S.G., *supra* note 2, at 1–2.

116. *Id.* at 2–3.

philosophy, courts could determine whether double counting was consistent with that philosophy and make a better determination as to the Commission's intent to permit or prohibit double counting. The only Commission commentary that provides insight into the Commission's views of double counting is found in the section application notes. These notes indicate that, at least in some circumstances, the Commission did not intend for courts to double count conduct in two or more enhancements.[117] They show that where double counting was easily foreseeable, the Commission attempted to eliminate the problem. Thus, the only meaningful insight into the Commission's thoughts on multiple enhancements is that in some instances it foresaw and prohibited double counting. The Sixth Circuit's rule against double counting is, therefore, consistent with Congress' and the Sentencing Commission's intent.

3. *The Motivating Policy of Proportionality is Inconsistent With Double Counting*

Double counting defeats the congressional goal to create a sentencing system that promotes proportionality in sentencing.[118] The enhancement mechanisms are the main avenue for obtaining proportionality.[119] They serve to more severely punish defendants who commit crimes in more egregious ways. The Sentencing Commission examined criminal conduct and assigned sentence increases based on its determination of the penalty that certain conduct should carry.[120] Double counting warps that determination. For example, if a three-level enhancement under the adjustments section of the guidelines includes conduct considered in a two-level increase under the specific offense characteristics of the crime, courts will enhance sentences by five levels even though the Commission determined that the conduct only warranted a three-level increase. Proportionality is lost because crimes that are more susceptible to double counting will have more severe sentences.[121] The goal of proportionality, one of the two main

117. *See supra* notes 41–44 and accompanying text.

118. *See* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 22–24 (1987). Of course, any rule on double counting consistently applied satisfies the goal of a uniform sentencing system.

119. *See supra* notes 24–33 and accompanying text.

120. *See* U.S.S.G, *supra* note 2, at 3–4 (discussing how the Commission established the sentence ranges).

121. In United States v. Curtis, 934 F.2d 553 (4th Cir. 1991), for example, the defendant's cumulative punishment for more than minimal planning, and for being an organizer of the crime amounted to a four-level enhancement. *See supra* notes 67–68 and accompanying text. This is the same offense level increase that the Commission applies to those whose assault results in

goals of the sentencing reform act, suggests that double counting should not occur.[122] The Sixth Circuit's rule against double counting is, therefore, consistent with the motivating policy of proportionality in sentencing.[123]

4. The Rule of Lenity Requires a Rule Against Double Counting

Double counting is not supported by the language and structure of the guidelines or the legislative intent, and is inconsistent with the motivating policies of the Sentencing Reform Act. Even if any ambiguity about intent to allow double counting exists, double counting is still impermissible under the rule of lenity.[124] The rule of lenity does not allow double counting unless the guidelines explicitly call for it.

The rule of lenity as applied to the guidelines serves two purposes. First, the rule requires that would-be criminal offenders receive fair warning of the potential sentence they could receive.[125] An ambiguity in the guidelines prevents this and therefore a court must resolve the ambiguity in the defendant's favor.[126] Second, the rule requires that legislators determine criminal penalties.[127] By forcing judges to resolve ambiguity in favor of defendants, Congress maintains control of punishment.

The Sixth Circuit Court of Appeals applied the rule of lenity to double counting under the sentencing guidelines.[128] The court found that nothing in the guidelines or its commentary indicates that the Sentencing Commission intended cumulative punishment.[129] The court refused to guess as to what Congress and the Commission

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serious bodily injury. *See* U.S.S.G., *supra* note 2, § 2A2.2(b)(3)(B). If the Commission intended this more severe punishment, the logical approach would have been to increase the offense level rather than to double count conduct.

122. The goal of Congress to create a sentencing system that alleviates prison overcrowding also suggests a rule against double counting. *See* 28 U.S.C. § 994(g) (1988); *see also supra* note 19. Counting the same conduct in more than one enhancement leads to more prison time for crimes that lack greater severity. If courts only apply the enhancement with the larger increase in offense level, they would alleviate overcrowding without sacrificing the goals of sentencing.

123. Conversely, the Fourth Circuit rule in *Curtis* is inconsistent with the motivating policies of the Sentencing Reform Act.

124. *See supra* notes 60–64 and accompanying text.

125. *See supra* notes 60–64 and accompanying text. This is especially true where the penalty attempts to deter future crimes.

126. The probability that offenders would heed this fair warning is, of course, quite slim. However, because criminal sentences are at least in part founded on the idea of deterrence, *see, e.g.*, 18 U.S.C. § 3553(a)(2)(B), sentencing statutes should provide offenders the opportunity to be deterred.

127. *See supra* notes 62–64 and accompanying text.

128. United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992).

129. *Id.* (quoting United States v. Werlinger, 894 F.2d 1015, 1017 (8th Cir. 1990)).

intended, and resolved the double counting issue in favor of less punishment.[130] The Sixth Circuit was correct in its holding. The rule of lenity does not permit double counting.

5. *A Rule Against Double Counting is Consistent With State Court Decisions*

State courts support a rule against double counting. The structure of state sentencing guidelines and statutes differ from the federal guidelines,[131] but the goals behind them are largely the same.[132] State courts have held that double counting is impermissible. In Washington, for example, the state supreme court held that judges cannot use, as aggravating factors, conduct necessarily considered in the presumptive sentence.[133] Likewise, the New Jersey courts have also prohibited double counting of aggravating factors.[134] Due to the problems of proportionality, states have prohibited double counting.[135] The federal courts should follow suit and likewise prohibit double counting under the guidelines.

B. The Fourth Circuit Approach to Double Counting is Incorrect

The Fourth Circuit in *United States v. Curtis*,[136] incorrectly concluded that the guidelines indicated that the Commission intended double counting. Moreover, the court's analysis leading to its conclusion was flawed. As discussed above, the language and structure of the guidelines show no indication that the Sentencing Commission

130. *Id.*

131. The Washington guidelines, for example, have a small list of enhancements, most notably the use of a firearm during a crime. *See* WASH. REV. CODE § 9.94A.310(3) (1992). For a comparison of the federal guidelines and the Washington guidelines, see John M. Junker, *Guidelines Sentencing: The Washington Experience,* 25 U.C. DAVIS L. REV. 715 (1992).

132. S. REP. NO. 225, *supra* note 3, at 63, *reprinted in* 1984 U.S.C.C.A.N. at 3246; *see also, e.g.,* State v. Yarbough, 498 A.2d 1239, 1243–44 (N.J. 1985) ("The paramount goal of sentencing reform was greater uniformity. . . . [Sentencing] purposes center upon the concept that punishment of crime be based primarily on principles of deserved punishment in proportion to the offense"), *cert. denied,* 475 U.S. 1014 (1986).

133. State v. Dunaway, 109 Wash. 2d 207, 218, 743 P.2d 1237, 1242 (1987). The Washington Supreme Court stated: "A reason offered to justify an exceptional sentence is sufficient only if it 'take[s] into account factors other than those which are necessarily considered in computing the presumptive range for the offense.' " *Id.* (quoting State v. Norby, 106 Wash. 2d 514, 518, 723 P.2d 1117, 1117 (1986)). Note that the analogy to the federal guidelines is not perfect. Washington's aggravating factors lie somewhere between enhancements and departures under the federal guidelines.

134. *Yarbough,* 498 A.2d at 1248 (judicially adopting criteria from the Model Sentencing and Corrections Act (U.L.A. 1974), including a prohibition on double counting).

135. *See id.* at 1249.

136. 934 F.2d 553 (4th Cir. 1991).

intended that courts double count conduct.[137] The Fourth Circuit improperly equated guidelines commentary with statutory language and inappropriately applied a disfavored canon of statutory construction to this commentary.

The Fourth Circuit incorrectly relied on guidelines commentary to support double counting. The court based its conclusion in *Curtis* on two areas of the guidelines: the application notes to various enhancements in the adjustments section of the guidelines, and the commentary in the general application principles to the guidelines.[138] The court incorrectly interpreted the implications of both of these sections of commentary.

The court's first error was treating sections of commentary as part of the guidelines. Although the application notes and other commentary pass through Congress, they are not guidelines. They are instead unique statutory features—not statute, but of greater importance than legislative history.[139] On the one hand, commentary that interprets or explains a particular guideline is binding on the courts and must be followed.[140] On the other hand, the application notes are not guidelines themselves and thus do not carry the same force of law.[141] The weight courts should give to the commentary depends on the court's usage of the commentary.

The *Curtis* court erred by granting undue weight to the commentary. The application notes that prohibit double counting[142] apply only to the guidelines to which they are directed. When courts use the application notes to interpret these guidelines, courts can properly regard the application notes as quasi-statutory language.[143] When interpreting different guidelines, however, the application notes do not rise to the level of statutory language and have no place in the language analysis of statutory construction.[144]

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137. *See supra* notes 113–17 and accompanying text.

138. *See supra* notes 80–84 and accompanying text.

139. United States v. Anderson, 942 F.2d 606 (9th Cir. 1991) (en banc); *see also* U.S.S.G., *supra* note 2, § 1B1.7 (stating that commentary may interpret or explain how a court should apply a guideline).

140. Stinson v. United States, 113 S. Ct. 1913, 1919 (1993); *see also Anderson,* 942 F.2d at 610 (citing U.S.S.G., *supra* note 2, § 1B1.7 which states that "[f]ailure to follow such commentary could constitute an incorrect application of the guidelines"); 18 U.S.C. § 3553(b) (1988) (stating that courts shall have due regard to the applicable policy statements of the Commission).

141. *See Anderson,* 942 F.2d at 611.

142. *See, e.g.,* U.S.S.G., *supra* note 2, § 3A1.1 cmt. 2.

143. *Stinson,* 113 S. Ct. at 1919. The application notes, however, must not be "inconsistent with, or a plainly erroneous reading of the guideline." *Id.*

144. *Cf. Anderson,* 942 F.2d at 612 (stating that "guideline and commentary . . . should be construed as to be consistent with the scheme of other guidelines (and their commentary) *within*

Not only did the *Curtis* court give undue weight to commentary, but it misinterpreted one section. The court relied on commentary in the general application principles to the guidelines directing courts to cumulatively apply enhancements for specific offense characteristics within a guideline, unless the guideline states otherwise.[145] The Commission directed this commentary only at enhancements *within* each specific offense characteristics subsection of an offense guideline. The court used this commentary to direct cumulative application *between* enhancements in a specific offense characteristics subsection and enhancements in the adjustments section. The commentary cited by the court clearly does not call for such cumulative application. Thus, even treating the commentary cited by the *Curtis* court as quasi-statutory language, no indication exists from the language of the guidelines that the Commission intended double counting. Furthermore, no indication of any such intent exists from the structure of the guidelines.[146] The Fourth Circuit, therefore, erred twice in relying on guidelines commentary; first by using commentary for an inappropriate purpose and second by misinterpreting another section of commentary.

Even taken in its proper role as something more than legislative history, the commentary to the adjustments used by the Fourth Circuit does not support the court's conclusion that the Commission intended double counting. This commentary applies only to the guidelines in which it is included. The Fourth Circuit attempted to overcome this limitation by applying statutory construction tools to the commentary. This was incorrect.

The court in *Curtis* applied the canon of statutory construction *expressio unis*[147] to these application notes and concluded that since the Commission prohibited double counting in some instances, it must have intended it in all other instances.[148] The court ignored the application notes' status as commentary and incorrectly treated them as statute.

It is inappropriate to apply the canons of statutory construction to nonstatutory language in order to interpret an otherwise ambiguous

the Part as a whole") (emphasis added). Note that the Fourth Circuit applied commentary *between* parts of the guidelines, parts A and B of the adjustments section. United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991).

145. *See supra* note 83.

146. *See infra* notes 147–57 and accompanying text (discussing the Fourth Circuit's attempt to glean intent from the structure of commentary, not the guidelines).

147. *See supra* note 81.

148. *Curtis*, 934 F.2d at 556.

statute. The Supreme Court has held that *expressio unis* should not be applied to congressional committee reports.[149] The Court reasoned that a committee should not be expected to have foreseen every possible application of a contemplated rule.[150] Presumably the Commission intended that courts use its commentary to interpret the guideline to which it relates.[151] To apply such commentary to other guidelines would require the Commission to foresee every possible application of commentary to every guideline. If the Commission intended that courts use commentary like statutory language, it would simply put the information in the guidelines themselves.[152]

Furthermore, courts and commentators increasingly disfavor the use of *expressio unis* even to statutes themselves.[153] Courts have recognized that they should use the canon with care[154] because it is an uncertain guide to legislative intent and is often based on an unfounded assumption that the legislature considered and rejected all factors.[155] Some courts have restricted its use by requiring some evidence from the statute's language that the legislature intended the maxim to apply.[156] The guidelines do not indicate that the Commission considered all possible areas of double counting. Indeed, the Commission has stated that it did not, and could not, consider all possible combinations of criminal conduct.[157] The list of permitted or prohibited areas of double counting, therefore, does not indicate that

149. Standefer v. United States, 447 U.S. 10, 20 n.12 (1980) (rejecting an attempt to apply *expressio unis* to a committee report in order to read ambiguity into a criminal statute).

150. *Id.*

151. U.S.S.G., *supra* note 2, § 1B1.7 states that commentary accompanying the guideline sections serves several purposes. "First, it may interpret *the guideline* or explain how *it* is to be applied. . . . Finally, the commentary may provide background information, including factors considered in promulgating *the guideline* or reasons underlying promulgation of *the guideline*." (emphasis added).

152. United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (en banc).

153. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234–35 (1975) (arguing that *expressio unis* is more a description of what courts discover from context than an interpretive aid).

154. McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 667 (3rd Cir.) *cert. denied,* 449 U.S. 976 (1980); *see also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395, 401–06 (1950) (describing how every canon of construction has a counter-canon).

155. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 755 n.2 (7th Cir. 1979).

156. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.25 (5th ed. 1992); *see also* Columbia Hosp. Ass'n v. Milwaukee, 151 N.W.2d 750, 754 (Wis. 1967).

157. The Commission stated that its data did not enable it to conclude that all aggravating factors were empirically important to the offense to warrant an enhancement provision. U.S.S.G., *supra* note 2, at 4. This, along with the policy to allow departures only in instances where the Commission had not adequately considered the circumstances, indicates that the Commission did not include all factors in the guidelines.

the Commission considered all possible instances of double counting and decided that some were acceptable. The commentary to the guidelines does not support a conclusion that the Commission intended double counting to occur.

III. CONCLUSION

Congress and the Sentencing Commission promulgated the federal sentencing guidelines to reduce sentencing disparity and increase sentencing proportionality. In doing so, they have created confusion as to whether certain sentence enhancements are meant to apply cumulatively when conduct supplying the basis for an enhancement under the adjustments section necessarily includes conduct fitting the definition of a specific offense characteristic enhancement. The language and structure of the guidelines and the legislative history do not support double counting. The motivating policies of sentencing reform suggest that courts should not double count conduct. Even if the guidelines are ambiguous, courts should resolve this ambiguity in the favor of criminal defendants and the courts should not permit double counting.