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Sweeping Up Guideline Floors: The Misguided Policy of Amendment 767 to the U.S. Sentencing Guidelines Manual

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ABSTRACT

Amendment 767 to the U.S. Sentencing Guidelines Manual (Guidelines), effective November 1, 2012, significantly modified the calculation of Guidelines ranges for federal defendants convicted of multiple counts where at least one of the counts is subject to a mandatory minimum sentence. The amendment, which altered section 5G1.2 of the Guidelines and its commentary, provides that the minimum statutory sentence for any count in a multicount conviction raises the floor of the Guidelines range for all counts.

The U.S. Sentencing Commission (Commission) set forth two reasons for Amendment 767: to resolve a circuit split and to make it easier for district courts to calculate departures and variances by reducing the likelihood of arriving at multiple Guidelines ranges. The first reason is unsupportable because, as communicated to the Commission in the comments to the proposed amendment, no circuit split actually existed. Moreover, the circuits that had resolved the issue all rejected the position adopted by the amendment. Although the Commission is correct that Amendment 767 will lead to some administrative benefits for district courts by reducing the likelihood that a defendant will have multiple Guidelines ranges, those minimal benefits are strongly outweighed by Amendment 767's negative consequences.

By linking the Guidelines range to a statutory minimum sentence applicable to a different count of conviction, Amendment 767 divorces the punishment determination from the underlying conviction. Such decoupling is counter to both the moral underpinnings of sentencing—an offender's punishment should not exceed her just deserts—and the statutory directive that district courts should impose a sentence that is no greater than necessary to achieve the goals of sentencing and fix a just punishment. Furthermore, Amendment 767 places additional administrative burdens on the criminal justice system by increasing the need to resentence defendants upon the vacation of a single count of conviction and by incentivizing prisoners to challenge more sentences and convictions through habeas petitions. Therefore, the changes wrought by Amendment 767 are not good sentencing policy, and district courts would be well advised to vary from Guidelines ranges calculated through amended section 5G1.2.

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INTRODUCTION

Amendment 767 to the U.S. Sentencing Guidelines Manual, effective November 1, 2012, significantly modified the calculation of Guidelines ranges for federal defendants convicted of multiple counts where at least one of the counts is subject to a statutorily mandated minimum sentence. The amendment, which altered section 5G1.2 of the Guidelines and its commentary, provides that a minimum statutory sentence for any count in a multicount conviction raises the floor of the Guidelines range for all counts.[1] By linking the calculation of the Guidelines range to the mandatory minimum sentence applicable to a different count of conviction, Amendment 767 unhinges the punishment determination from each underlying conviction. Decoupling the offense from the punishment in this way creates serious moral, legal, and administrative implications for federal sentencing.

This Article first explains the effects of Amendment 767 by illustrating the operation of section 5G1.2 before and after the amendment. Part II addresses the U.S. Sentencing Commission's stated reasons for the amendment. The Commission's primary reason for promulgating Amendment 767 was the resolution of a circuit split in the application of section 5G1.2. But this rationale falls flat because no circuit split existed. Its secondary reason—reducing the likelihood that sentencing courts will need to calculate multiple Guidelines ranges—creates only minimal administrative gains. Part III identifies the negative consequences of Amendment 767. As noted above, by divorcing the Guidelines calculation from the offense, Amendment 767 ignores the moral underpinnings of the sentencing process and invites sentencing courts to disregard the statutory mandate to impose just punishment. Moreover, the amendment will lead to administrative burdens elsewhere in the judicial process that outweigh any efficiency it creates at sentencing.

I. AMENDMENT 767'S EFFECT ON GUIDELINES RANGES

Even though the Guidelines are now only advisory,[2] district courts are required to accurately calculate a defendant's Guidelines range of imprisonment on the record at sentencing,[3] and sentences imposed within that range often benefit

1. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(b) & cmt. nn.1 & 3 (2012); *id.* app. C supp. amend. 767. Citations related to Amendment 767 refer to the amended language of the guideline and commentary of section 5G1.2. Citations to the Commission's stated reasons for the amendment, however, are to the statement of reasons contained in the 2012 supplement to Appendix C of the Guidelines and to the notice of submission of amendments published in the Federal Register.
2. *See* United States v. Booker, 543 U.S. 220, 245 (2005).
3. *See* 18 U.S.C. § 3553(a)(4)(A), (b)–(c) (Supp. V 2011).

from a presumption of reasonableness on appeal.[4] When a defendant is sentenced on an individual count, a statutory limit on the sentence's length sensibly restricts the Guidelines range of imprisonment.[5] A statutory limit on a sentencing court's discretion may take the form of either a mandatory minimum or maximum sentence. If a defendant's offense level and criminal history category yield a Guidelines range that is less, or partially less, than the statutorily mandated minimum sentence for the offense of conviction, the floor of the Guidelines range is raised to equal the statutory minimum.[6] Similarly, when calculating the Guidelines range for a defendant convicted of an individual count, the ceiling of the Guidelines range is limited by an applicable statutory maximum sentence.[7]

When a defendant is sentenced on multiple counts, the Guidelines range is calculated with respect to the aggregated offense conduct so that each count of conviction has the same Guidelines range to the extent permissible by law. Under a proper reading of pre-amendment section 5G1.2, a statutory minimum or maximum on an individual count only impacted the Guidelines range *for that particular* count.[8] Now, however, Amendment 767 requires that the statutory minimum sentence for one offense constrain the Guidelines ranges for *other* counts in a defendant's conviction. Under the amendment, if any individual count has a statutory minimum that is greater than the floor of the Guidelines range applicable to the defendant's other counts, the floor of the Guidelines range for *all of the counts*

4. *See* Rita v. United States, 551 U.S. 338, 347 (2007) (holding that federal appellate courts may apply a presumption of reasonableness to a sentence within a properly calculated Guidelines range). A majority of the federal courts of appeals have adopted such a presumption, *see* United States v. Carty, 520 F.3d 984, 993 n.9 (9th Cir. 2008) (listing cases), but even for those courts that have declined to extend a presumption of reasonableness to within-Guidelines sentences, "[t]he difference appears more linguistic than practical." *Id.* at 993–94 (declining to apply the presumption but noting that a within-Guidelines sentence will usually be reasonable).

5. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1. This limitation ensures that the Commission fulfills its duty to promulgate Guidelines that are "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a) (2006).

6. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b)–(c). For example, if a defendant's offense level and criminal history category yield a Guidelines range of 108 to 135 months but the statutory minimum is 120 months, the Guidelines range becomes 120 to 135 months. *Id.* § 5G1.1(c). If a defendant convicted of the same offense had an offense level and criminal history category that yielded a Guidelines range of 87 to 108 months, the statutory minimum would elevate the Guidelines sentence to 120 months. *Id.* § 5G1.1(b).

7. *See id.* § 5G1.1(a), (c). For example, if a defendant's offense level and criminal history category yield a Guidelines range of 108 to 135 months but the statutory maximum is 120 months, the Guidelines range constricts to 108 to 120 months. *Id.* § 5G1.1(c). If a defendant convicted of the same offense had an offense level and criminal history category that yielded a Guidelines range of 121 to 151 months, the statutory maximum would limit the Guidelines sentence to 120 months. *Id.* § 5G1.1(a).

8. *See* United States v. Evans-Martinez, 611 F.3d 635, 637, 641–42 (9th Cir. 2010) (explaining that pre-amendment section 5G1.2 required the Guidelines range for "each other count" to be determined without regard to a statutory limit on another individual count in a multicount sentencing).

is increased to the higher statutory minimum.[9] However, Amendment 767 did not open a two-way street; if any count has a statutory maximum that is below the ceiling of the otherwise properly calculated Guidelines range, the ceiling of the Guidelines range is lowered only for that individual count, not for all of the counts of conviction.[10]

Amendment 767 added an example to the Guidelines commentary that illustrates its effects.[11] A defendant with a combined offense level of nineteen and a criminal history category of I is to be sentenced on four counts. Such an offense level and criminal history category would otherwise yield a Guidelines range of thirty to thirty-seven months. Counts one, three, and four have statutory maximums of ten, twenty, and two years' imprisonment, respectively. Additionally, count two carries a mandatory minimum of ten years' imprisonment and a statutory maximum of thirty years' imprisonment.[12]

Under pre-amendment section 5G1.2, the Guidelines sentence for count two would have been 120 months because of the statutory minimum sentence on that count.[13] The Guidelines sentence for count four would have been 24 months because of the statutory maximum sentence on that count.[14] Neither the statutory minimum of count two nor the statutory maximum of count four, however, would have affected the Guidelines ranges of counts one and three.[15] Therefore, counts one and three would have retained Guidelines ranges of 30 to 37 months.

Under amended section 5G1.2, however, the statutory minimum of count two rolls up the floor of the Guidelines range for all counts.[16] Thus, the Guidelines sentence would be 120 months for counts one, two, and three. The Guidelines sentence for count four would remain 24 months because of the statutory maximum on that count.

Under the pre-amendment scheme, a district court imposing the harshest within-Guidelines sentences would sentence the defendant to 37, 120, 37, and 24 months on the four counts of conviction. But a district court adhering to the amended Guidelines would impose sentences of 120, 120, 120, and 24 months. Assuming that none of the offenses mandates a consecutive sentence, the sentences would run concurrently under either the unamended or the amended version of section 5G1.2. Therefore, the amendment does not affect the length of time—

9. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 cmt. n.3.
10. *Id.*
11. *Id.* § 5G1.2 cmt. n.3(C).
12. *Id.*
13. *Id.* § 5G1.2(b).
14. *Id.*
15. *See* United States v. Evans-Martinez, 611 F.3d 635, 637, 641–42 (9th Cir. 2010).
16. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 cmt. n.3.

here, 120 months—the defendant actually serves. Rather, the amendment lengthens the concurrent sentences imposed on additional counts of conviction that would have otherwise been subsumed by a lengthier mandatory custodial sentence on another count.

II. THE MISGUIDED JUSTIFICATIONS FOR AMENDMENT 767

A. The Commission's Stated Reasons for Adopting Amendment 767

The Commission set forth two reasons for enacting Amendment 767. First, the Commission intended the amendment to resolve what it perceived as a circuit split on the application of pre-amendment section 5G1.2.[17] Second, the Commission intended the amendment to "ensure that sentencing courts resolve multiple-count cases in a straightforward, logical manner, with a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations."[18] As described below, the Commission's reasons fail to justify the amendment because no circuit split existed and because the amendment will produce only a minimal administrative benefit.

B. The Circuits Did Not Split Over the Application of Section 5G1.2

Quite simply, no circuit split was present to warrant the Commission's intervention. In explaining its reasons for adopting Amendment 767, the Commission identified a split between the Fifth Circuit and the Ninth and D.C. Circuits.[19] According to the Commission, the amendment to section 5G1.2 "adopts the approach followed by the Fifth Circuit"[20] in *United States v. Salter*.[21] The Fifth Circuit's opinion in *Salter*, however, did not set forth any approach with regard to the effect of statutory minimum sentences on the Guidelines ranges of other counts in a multicount conviction. Thus, it could not have conflicted with the approach actually adopted by other circuits.[22] Nor could it be adopted by the Commission in any meaningful sense.

17. *Id.* app. C supp. amend. 767; Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2012, 77 Fed. Reg. 28,226, 28,233 (May 11, 2012).
18. U.S. SENTENCING GUIDELINES MANUAL app. C supp. amend. 767; 77 Fed. Reg. at 28,234.
19. U.S. SENTENCING GUIDELINES MANUAL app. C supp. amend. 767; 77 Fed. Reg. at 28,233.
20. U.S. SENTENCING GUIDELINES MANUAL app. C supp. amend. 767; 77 Fed. Reg. at 28,233.
21. 241 F.3d 392 (5th Cir. 2001).
22. In response to the Commission's request for public comment on the proposed amendment, a Federal Public Defender in the Fifth Circuit pointed out that no circuit split existed. *See* Letter From Marjorie A. Meyers, Fed. Pub. Defender, S. Dist. of Tex., to the Honorable Patti B. Saris, Chair of the U.S. Sentencing Comm'n, at 13–14 (Mar. 19, 2012) [hereinafter Federal Public Defender

In *Salter*, the defendant was convicted of money laundering and conspiracy to possess with intent to distribute more than 100 kilograms of marijuana and sentenced to two concurrent terms of 130 months' imprisonment.[23] The Fifth Circuit vacated the sentences because the district court erred in its calculation of the Guidelines range by not grouping the sentences under section 3D1.2 of the Guidelines. Under the proper grouping, the Fifth Circuit calculated a Guidelines range of 87 to 108 months.[24] Because the drug count carried a statutory minimum sentence of 120 months, however, the Fifth Circuit stated that "the appropriate sentence herein is 120 months."[25] The court went on to find that the criminal history category should also have been lowered, but that the change would have "no *effective* impact because the required sentence remain[ed] at 120 months."[26]

Importantly, the Fifth Circuit never stated in *Salter* that the Guidelines range for both counts was 120 months. Rather, it found that the *appropriate sentence* was 120 months, which was undeniably true given the drug count's 120-month statutory minimum sentence. In recounting the *Salter* opinion in support of the Guidelines amendment, however, the Commission improperly stated that the "Fifth Circuit instructed the district court that the appropriate Guidelines sentence was 120 months on each of the three counts."[27] Besides the Commission's conspicuous misstatement that *Salter* involved three counts rather than two, such language is entirely absent from the court's opinion. The Fifth Circuit never instructed the district court on the appropriate Guidelines sentence for each count. Rather, the Fifth Circuit simply stated that 120 months was the "appropriate sentence."[28] The Commission's account of the Fifth Circuit's holding in *Salter* simply fails to comport with the court's actual statements in the opinion.

Letter], *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20120329/FPD Public Comment 2012.pdf (stating that the "alleged circuit conflict" identified by the Commission was actually a "misread[ing]" and an "overstate[ment]" because the Fifth Circuit's *Salter* opinion "said nothing about whether § 5G1.2(b) required the court to impose [the mandatory minimum sentence] on the count carrying no mandatory minimum").

23. *Salter*, 241 F.3d at 393.
24. *Id.* at 395.
25. *Id.* at 396.
26. *Id.* (emphasis added).
27. U.S. SENTENCING GUIDELINES MANUAL app. C supp. amend. 767 (2012); 77 Fed. Reg. 28,226, 28,233 (May 11, 2012).
28. *Salter*, 241 F.3d at 396. Indeed, the Federal Public Defender for the Southern District of Texas stated in her letter to the Commission that "[d]efenders in the Fifth Circuit report that district courts typically impose separate sentences in multi-count cases where the guideline range is restricted or truncated by a mandatory minimum penalty." Federal Public Defender Letter, *supra* note 22, at 14 n.20. Such practice indicates that district courts in the Fifth Circuit have not read the same holding into *Salter* that the Commission perceived. Indeed, no later Fifth Circuit or district court opinion has ever cited *Salter* regarding the application of section 5G1.2.

Amendment 767 not only fails to adopt an actual holding of the Fifth Circuit, but it also effectively overrules actual holdings of other federal courts of appeals. The Ninth Circuit in *United States v. Evans-Martinez*[29] explicitly held that a statutory minimum sentence for one count does not define the floor of the Guidelines range for other counts in a multicount sentencing.[30] As support for this conclusion, the Ninth Circuit cited the pre-amendment language of section 5G1.2 and also noted "the possibility that the conviction on the count carrying the mandatory minimum sentence could be vacated or reversed, putting in doubt any sentence based on it."[31] Similarly, the D.C. Circuit found that, under the unamended guideline, a single count's statutory minimum did not affect the Guidelines range applicable to other counts.[32] Language in a Third Circuit opinion supported the same reading of pre-amendment section 5G1.2.[33]

Thus, the Commission's first proffered reason for Amendment 767—resolution of a circuit split—is simply unsupported by the case law.[34] No circuit split existed. And in fact, the circuits that had addressed the issue had all effectively rejected the position adopted by the Commission in Amendment 767.

C. The Amendment Will Not Result in Substantial Administrative Benefits

The Commission's second reason for adopting the amendment was to ease the administrative burden of sentencing on district courts by requiring only "a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations" in multicount sentencings.[35] The Guidelines have long directed district courts to calculate the "total punishment" and then, "[e]xcept as otherwise required by law," to impose that total punishment on each count of conviction.[36] Amendment 767 substantially alters the effect of the words "except as otherwise required by law" by using a mandatory minimum applicable to one

29. 611 F.3d 635 (9th Cir. 2010).
30. *Id.* at 640–42.
31. *Id.* at 637.
32. United States v. Kennedy, 133 F.3d 53, 60–61 (D.C. Cir. 1998) (holding that a mandatory sentence of life imprisonment on one count did not elevate the Guidelines range for another count).
33. United States v. Lee, 359 F.3d 194, 209–10 (3d Cir. 2004) ("Section 5G1.2(b) of the Guidelines instructs a court to apply the same sentence to each count in the same group, *unless* the statutorily authorized maximum for that count is less than the minimum of the guideline range or the statutory minimum is greater than the maximum of the guideline range." (emphasis added)).
34. To be fair, the Ninth Circuit stated in a footnote to *Evans-Martinez* that the Fifth Circuit had come to the "opposite conclusion" in *Salter*. *Evans-Martinez*, 611 F.3d at 641 n.9. The Ninth Circuit's footnote may have provided the basis for the Commission's mistaken characterization of a circuit split.
35. U.S. SENTENCING GUIDELINES MANUAL app. C supp. amend. 767 (2012); 77 Fed. Reg. 28,226, 28,234 (May 11, 2012).
36. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(b).

count to increase the floor of the Guidelines range applicable to all counts. According to the Commission, by setting identical Guidelines ranges for multiple counts, Amendment 767 reduces the need for district courts to calculate separate departures and variances from multiple different Guidelines ranges.[37]

Because more counts in a multicount conviction will have identical Guidelines ranges under amended section 5G1.2, the amendment will make it easier to calculate departures and variances. However, this incremental administrative benefit does not justify the amendment. The Commission clearly does not deem this consideration terribly compelling—otherwise, the amendment would have required the same treatment of statutorily mandated maximum sentences as well. But, as described above, when the sentence of a single count of conviction is restricted by a statutory maximum, the commentary added by the amendment specifically rejects this approach. Rather, the statutory maximum only limits the ceiling of the Guidelines range for that particular count.[38] Thus, when statutory maximums are at play, district courts will still be required to calculate departures and variances from multiple Guidelines ranges.[39] District courts are quite capable of making these determinations and will continue to make them in multicount sentencings involving statutory maximums. Eliminating the need for courts to make them in some instances is of only minimal administrative benefit.

III. AMENDMENT 767'S NEGATIVE CONSEQUENCES

The fact that the Commission erroneously conjured a circuit split and sided with a viewpoint that no circuit had actually adopted does not answer the question of whether Amendment 767 was a sound policy decision. Certainly the Commission is free to amend the Guidelines to administratively overrule what it believes to be erroneous judicial applications of the Guidelines.[40] To answer the question of

37. *Id.* app. C supp. amend. 767; 77 Fed. Reg. at 28,234.

38. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 cmt. n.3(B); *see also id.* § 5G1.2 cmt. n.3(C) (stating that the statutory maximum of one count does not limit the Guidelines range of other counts).

39. The example added by the amendment to the Guidelines commentary illustrates the point. See *id.*, discussed in Part I, *supra*. Although the amendment works to raise the floor of counts one, two, and three to 120 months based on the statutory minimum applicable to count two, the Guidelines range for count four remains 24 months based on the statutory maximum applicable to that count. Moreover, the 24-month statutory maximum would not limit the Guidelines ranges of the other counts even if count two had no statutory minimum. In that scenario, the Guidelines ranges for counts one, two, and three would be 30 to 37 months. Therefore, the district court would still be required to calculate departures and variances from multiple Guidelines ranges. *Id.*

40. And, indeed, the courts of appeals' prior treatment of calculating Guidelines ranges in multicount sentencings was based largely on the pre-amendment language of section 5G1.2 and its commentary rather than on independent policy determinations.

whether Amendment 767 was a positive enactment on its own terms, it is necessary to weigh its minimal administrative benefit against its other likely consequences. Amendment 767's negative consequences include weakening the moral and legal justification for the punishment by unhinging individual counts' sentences from the underlying offense conduct, and adding to administrative costs in other areas of the criminal justice system by increasing the likelihood of resentencing defendants and by multiplying the number of sentences and convictions challenged in habeas petitions.

A. Amendment 767 Separates the Sentence From the Underlying Offense Conduct

The primary problem with Amendment 767 is that it totally divorces the sentences for individual counts from their underlying convictions. Under the amendment, a statutory minimum sentence for one count of conviction can sharply increase the Guidelines range not only for that count, but for all counts in the multicount conviction. Return to the example added to the commentary by Amendment 767 discussed in Part I.[41] Assuming that the sentencing court imposes Guidelines sentences, the defendant would receive concurrent terms of 120 months' imprisonment on counts one, two, and three. The seriousness of the offense conduct and the defendant's recent past criminal history, however, yielded a Guidelines range of only 30 to 37 months' imprisonment for counts one and three. While the 120-month sentence is related to the offense for count two based on the legislative determination that 120 months is the appropriate minimum sentence for that offense, this sentence is completely unrelated to the conduct underlying the convictions for counts one and three.

The lack of relationship between the sentence and each underlying count of conviction is both morally and legally troubling. Morally speaking, a punishment should be limited by an offender's just deserts.[42] In other words, the punishment should fit, or at least not exceed, the crime. But Amendment 767 divorces the punishment determination from the offenses actually underlying the individ-

41. *Id.*, discussed in Part I, *supra*.

42. *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9 (1968) ("The retributive position . . . holds, very simply, that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones"). Even a system of limiting retributivism, which permits a society to pursue utilitarian objectives through punishment, sets the maximum limit of punishment at the offender's just deserts. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 75 (1974) ("The concept of desert here advanced is one of a retributive maximum; a license to punish the criminal up to that point [of deserved punishment] but by no means an obligation to do so.").

ual convictions. By separating the punishment calculation from the underlying offense, Amendment 767 disregards the just-deserts limitation on punishment and will surely cause some offenders to receive lengthier sentences than they deserve for some individual counts. To the extent that a criminal sentence is society's measured condemnation of the offense conduct and rebalancing of the social order,[43] decoupling the sentence from the underlying conviction and pinning it to a statutory minimum applicable to a *different* count's offense conduct eliminates moral proportionality from the imposition of the sentence.

For the same reason, the changes wrought by Amendment 767 call into question whether Guidelines sentences calculated under section 5G1.2 will comport with the statutory directive requiring district courts to impose sentences that are "sufficient, but not greater than necessary" to comply with the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," among other considerations.[44] The amendment undermines each of these three legislatively prescribed sentencing considerations. By coupling the Guidelines range to a mandatory minimum applicable to a different offense, the amendment mandates a Guidelines range that reflects the statutory minimum sentence of a single count rather than the seriousness of each count of conviction. In the same way that Amendment 767 may lead to sentences that exceed offenders' just deserts, it similarly leads to sentences that fail to comport with the legislatively mandated concept of just punishment.

Furthermore, to the extent that district courts impose within-Guidelines sentences, Amendment 767 will result in an uptick in average sentence length, especially among relatively less serious offenses, because the amendment increases the floors of Guidelines ranges. This data will be deceiving because the upward trend will not be the result of an independent determination by district courts that defendants deserve increased punishment on each count of conviction. Thus, to the extent that future courts wish to impose a punishment that is consistent with general sentencing practices, those courts should bear in mind that the statistics may skew upward. The Commission will lose the benefit of learning district court's just punishment determinations as well, and therefore have less reliable data on which to base future Guidelines revisions. Upon seeing longer sentences bearing

43. *See, e.g.*, ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2.5, at 49–50 (3d ed. 2004) ("Central to the retributive concept [of punishment] is the notion that inflicting punishment on willful offenders will restore some abstract balance of right and wrong to the social order. Thus, substantial segments of society feel imposing hardship on offenders helps offset the hardship offenders impose upon the community.").

44. 18 U.S.C. § 3553(a), (a)(2)(A) (2006).

less relation to the underlying offense conduct, the public may well lose respect for the law, which may ultimately lead to more crime.[45]

B. Amendment 767 Increases Administrative Costs

Beyond its moral and legal shortcomings, Amendment 767 creates administrative drawbacks that offset the minimal administrative benefit gained by partially avoiding the need to calculate departures and variances from multiple Guidelines ranges. Most notably, the amendment will require a district court to resentence a defendant on all remaining counts whenever a conviction on a count with a mandatory minimum is vacated.[46] Returning to the example discussed above,[47] vacating the defendant's conviction on count two would require resentencing on counts one and three because under amended section 5G1.2 the mandatory minimum sentence of count two controlled the Guidelines sentences of counts one and three.[48] Before the amendment, the count two conviction would not necessarily have affected the Guidelines calculation on the other counts; thus, vacating count two would not necessarily require adjusting the other counts' Guidelines ranges.[49] But after the amendment, vacating count two will require the district court to resentence the defendant on the other counts in every instance. Each of those resentencings may require probation officers to generate revised presentence investigation reports, district courts to conduct fresh sentencing hearings, and appellate courts to open the door to new (or renewed) appeals. In short, each resentencing creates significant administrative burden on the federal judicial system.[50]

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45. *See generally* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

46. The Ninth Circuit raised this concern in *Evans-Martinez*. *See* United States v. Evans-Martinez, 611 F.3d 635, 637 (9th Cir. 2010) (noting "the possibility that the conviction on the count carrying the mandatory minimum sentence could be vacated or reversed" and could thereby "put[] in doubt any sentence based on it").

47. U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 cmt. n.3(C) (2012), discussed in Part I, *supra*.

48. The amendment itself contemplates this eventuality and adds a "[s]pecial [r]ule on [r]esentencing" in the commentary that states that a district court should not take a statutorily required minimum sentence into account when resentencing a defendant if the minimum sentence no longer applies. *Id.* § 5G1.2 cmt. n.3(D).

49. If the counts were grouped together through subsections 3D1.2(a)–(c) and therefore collapsed into a single offense level through the operation of subsection 3D1.3(a), the multiple convictions would not have increased the offense level beyond the level applicable to the most serious offense in the group. Therefore, vacating a single conviction (other than the conviction for the most serious offense) would have no effect on the Guidelines ranges for other offenses in the group and no resentencing on the other counts would be required.

50. Amendment 767 will not only burden the courts, but it will also impose additional costs on the prison system and on incarcerated defendants. A defendant whose conviction that carried a mandatory minimum sentence has been vacated will likely serve additional prison time while awaiting the necessary resentencing on her other counts as a result of the amendment. If the defendant in the

Finally, Amendment 767 is likely to increase the already high number of convictions and sentences challenged through habeas petitions[51] because it lengthens Guidelines sentences for relatively less serious counts of conviction rather than permitting the custodial portions of those sentences to expire. Defendants are naturally more incentivized to challenge lengthier sentences and the convictions underlying lengthier sentences. Upon the expiration of the custodial portion of a sentence, a defendant's incentive to mount a habeas corpus challenge greatly decreases because the defendant no longer faces prison time. Thus, by lengthening the custodial portion of Guidelines sentences, Amendment 767 creates a greater incentive for defendants to collaterally attack more sentences and the convictions underlying those sentences and prolongs the time period during which the defendant is most heavily incentivized to file habeas petitions.[52] This increase in a defendant's likelihood to collaterally attack a sentence or conviction is not accompanied by an increased ability to do so successfully.[53] Most conspicuously, the one-year limitation on habeas petitions[54] will continue to render numerous petitions nonmeritorious. And it is precisely this category of frivolous petitions that unnecessarily consume court resources and should be discouraged. By lengthening custodial sentences for relatively less serious offenses, Amendment 767 incentivizes defendants to collaterally attack more sentences and the convictions underlying those sentences without having any positive effect on defendants' abilities to suc-

above example secured the vacation of her count two conviction after four years in prison, for example, she would then need to be resentenced on the other counts. She would thus potentially serve several additional months in prison awaiting resentencing while, in a pre-amendment world in which she received sentences of 37, 120, 37, and 24 months, she would have been eligible for immediate release because her remaining custodial sentences would be discharged. Amendment 767 will thus result in unwarranted additional imprisonment pending resentencing for some defendants who otherwise deserve to be released.

51. *See* 28 U.S.C. § 2255 (Supp. V 2011). In recent years, the number of section 2255 petitions filed annually has been at or near 6000, with occasionally upward spikes in excess of 10,000 annual petitions. *See* NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 116 (2011).

52. For example, sentencing the defendant in the illustration above to three concurrent terms of 120 months' imprisonment incentivizes the defendant to challenge all three of the sentences more so than if she had been sentenced to concurrent terms of 37, 37, and 120 months' imprisonment. The incentive to challenge the 37 month sentences would naturally decrease sharply upon the expiration of the custodial portions of those shorter sentences.

53. Because a defendant can mount a collateral attack until the expiration of supervised release, Amendment 767 does not actually extend the time within which a defendant could file a meritorious habeas petition. Rather, it only incentivizes defendants to challenge more convictions through habeas petitions by creating the false appearance that, for example, three separate convictions are keeping the defendant imprisoned for 120 months when actually only one conviction is extending the imprisonment.

54. 28 U.S.C. § 2255(f).

ceed. Such an increase in nonmeritorious habeas claims will be an administrative burden on the federal judiciary.

CONCLUSION

Neither of the Commission's proffered justifications for Amendment 767 holds up to scrutiny. First, no circuit split existed regarding the application of pre-amendment section 5G1.2 for the Commission to resolve. Second, the negative consequences of Amendment 767, including added administrative burdens elsewhere in the criminal justice system, strongly outweigh its minimal administrative benefit at sentencing. Most significantly, the amendment erodes the moral and legal relationship between the offense conduct and the resulting sentence by divorcing the sentence imposed on an individual count from the underlying count of conviction. In short, Amendment 767 will work more wrongs than it rights. District courts would be well advised to vary from Guidelines ranges calculated under amended section 5G1.2 in multicount sentencings involving a statutorily mandated minimum sentence.