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# Change Attorneys and Courts Can Believe In: Reviewing the Retroactive Application of Amendments to the Federal Sentencing Guidelines in United States v. Tolliver, 570 F.3d 1062 (8th Cir. 2009)

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Note*

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* Nathan D. Anderson, University of Utah 2008; University of Nebraska College of Law, J.D. expected, May 2012. I thank my Father and Mother for everything—all that I have accomplished I owe to the excellent life they have provided. I also thank my beautiful wife Suzanne and my two boys Lincoln and Ford for their continuous love, support, and sacrifice. I love you minha fofinha.

## I. INTRODUCTION

Politicians enjoy talking about change. This was aptly demonstrated by Barack Obama's 2008 presidential campaign slogan: "Change We Can Believe In." While change is often viewed positively in the political arena, more often than not change proves to be painful and difficult—especially with the law. Arnold Bennett, a British novelist, once stated, "Any change, even a change for the better, is always accompanied by drawbacks and discomforts."[1] Change and its accompanying discomforts are familiar concepts to the attorneys and courts that regularly deal with the Federal Sentencing Guidelines (the Guidelines). There have been over 700 proposed amendments to the Guidelines since their inception in 1987.[2] Some of these changes have been minor clarifications or adjustments, while others have been large, substantive changes.[3] The amendments present attorneys and courts with difficult questions of what the changes mean for today's sentences, for future sentences, and for claims for post-conviction relief.

As a general rule, in claims for post-conviction relief, courts must apply the version of the Guidelines in effect at the time the defendant is sentenced.[4] Subsequent amendments to the Guidelines may be used, however, if the particular amendment has been (1) designated as retroactive by the sentencing commission or (2) the amendment is merely clarifying as opposed to substantive.[5] A recent circuit split on the effect of amendment 706[6]—which lowered the base offense level

1. *Quotes by Arnold Bennett*, THINK EXIST, http://thinkexist.com/quotation/any_change-even_a_change_for_the_better-is_always/220763.html (last visited Oct. 3, 2011).

2. U. S. SENTENCING GUIDELINES MANUAL app. C (2009). As of November 2009 there have been 737 proposed amendments to the guidelines. *Id.* In 2009 there were eleven proposed amendments to the guidelines. *Id.*

3. For example, amendment 706 made relatively minor changes and included only five pages for the actual amendment and commentary. *Id.* supp. to app. C, at 226. By contrast amendment 651 made multiple changes to multiple sections of the Guidelines and involved over forty pages. *Id.* app. C, at C-820.

4. *Id.* § 1B1.11(a).

5. *See id.* § 1B1.11(b)(2); *see also* United States v. Capers, 61 F.3d 1100, 1109 (4th Cir. 1995) (noting that subsequent amendments may be considered to the extent they are clarifying and not substantive amendments).

6. The First, Second, Third and Fourth Circuits held amendment 706 is applicable to career offenders. United States v. Flemming, 617 F.3d 252 (3d Cir. 2010); United States v. Munn, 595 F.3d 183 (4th Cir. 2010); United States v. McGee, 553 F.3d 225 (2d. Cir. 2009) (per curiam); United States v. Cardosa, 606 F.3d 16 (1st Cir. 2010). By contrast, the Sixth, Eighth, and Tenth Circuits found amendment 706 inapplicable to career offenders. United States v. Pembrook, 609 F.3d 381 (6th Cir. 2010); United States v. Darton, 595 F.3d 1191 (10th Cir. 2010); United States v. Tolliver, 570 F.3d 1062 (8th Cir. 2009).

for most offenses involving crack cocaine by two levels[7]—illuminates both methods for retroactive application. Amendment 706, which created the split, was specifically designated retroactive,[8] and its retroactive applicability to sentences based *solely* on possession of crack cocaine was not contested. The split occurs when defendants are initially sentenced based on crack cocaine but their sentences are enhanced (because their criminal history qualifies them as career offenders under the Guidelines) and then reduced (because the judge grants them a 4A1.3 departure).[9] While the application of amendment 706 to career offenders created the split, another amendment—amendment 651—if applicable, may resolve it. Amendment 651 was not designated retroactive and, therefore, is only applicable if it is a clarifying amendment.[10]

The Eighth Circuit in *United States v. Tolliver*, relying in part on amendment 651, reached the correct conclusion that defendants convicted of crack cocaine offenses, who qualify as career offenders (an enhancement to their sentence) and are later granted a downward departure, are not eligible for a sentence reduction under amendment 706.[11] Though the conclusion is reasonable, the court failed to provide any justification for relying on amendment 651. The court never addressed whether the amendment was substantive or clarifying and its lack of reasoning was attacked by later decisions.[12]

This Note seeks to supplement the reasoning in *Tolliver* by explaining why the Eighth Circuit was justified in relying on amendment 651 to reach its conclusion and how properly resolving the applicability of amendment 651 cures the circuit split. More generally, this Note seeks to provide a framework for determining when subsequent amendments are clarifying and may properly be relied upon by attorneys and courts.

Part II of this Note discusses the Guidelines, their history, and their proper application. Part III reviews the retroactive applicability of amendments and specifically amendments 651 and 706. Part IV addresses the current circuit split and the divergent reasoning regarding the applicability of the amendments. Part V analyzes the flaws of both sides of the split in determining the applicability of amendment 651 and proposes a new test for determining when an amendment is clarifying or substantive. Part VI concludes the Note by describing how the new test not only resolves the current split regarding the ap-

7. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, at 226; *see also infra* section III.A (discussing the history and purpose behind amendment 706).
8. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c).
9. *See supra* note 6.
10. *See infra* Part III.
11. 570 F.3d 1062 (8th Cir. 2009).
12. *See, e.g.*, *Flemming*, 617 F.3d at 267–68.

plication of amendment 706 but also provides a framework for analyzing the applicability of retroactive amendments going forward.

## II. THE SENTENCING GUIDELINES

Prior to the 1984 Sentencing Reform Act (the Act),[13] sentencing was appropriately referred to as "the lottery."[14] Judges enjoyed a great deal of latitude at sentencing which often resulted in disparate and inconsistent sentences among similarly situated defendants.[15] The problem was exacerbated by the ability of the Parole Commission to reduce a defendant's sentence—often resulting in defendants serving one-third or less of their actual sentence.[16] Through the Act, Congress sought to eliminate the real and perceived disparities by creating a clear and uniform sentencing procedure.[17] The stated objectives of the Act were threefold: to achieve (1) honesty in sentencing, (2) uniformity in sentencing, and (3) proportionality in sentencing.[18] Honesty in sentencing was to be achieved by ensuring the sentence imposed would be the sentence actually served and the abolition of parole was thought to realize this objective.[19] Uniformity and proportionality, while the Guidelines note that tension exists between these objectives,[20] both seek the same goal: to ensure similar crimes and similar criminals receive a similar sentence.[21] Though striving for greater uniformity, Congress also sought to provide judges with some discretion by allowing for departures when the Guidelines failed

13. Pub. L. No. 98-473, 98 Stat. 1837 (1987) (codified in scattered sections of 18 U.S.C.).
14. THOMAS W. HUTCHISON ET. AL, FEDERAL SENTENCING LAW AND PRACTICE, § 10.1, at 1573 (2001). Prior to passage of the Act, federal judges were granted almost unfettered discretion to impose any sentence within a broad statutory range. *Id.* at 1572. The only real guidance provided to a judge prior to the Act was that the judge should consider "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 1572–73 (citing Williams v. New York, 337 U.S. 241, 247 (1949)). Also, a judge was not required to provide his reasoning for the sentence and only in limited circumstances could the sentence be appealed. *Id.* at 1573. As an example, prior to the Act, a judge could sentence an individual convicted of bank robbery anywhere from probation to twenty years imprisonment. *Id.* at 1575 n.2.
15. *Id.* at 1572.
16. *Id.*
17. *Id.* at 1574.
18. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 2 (2009).
19. *Id.* at 3.
20. The Guidelines note that uniformity could be achieved by simply lumping together simple categories of crimes. *Id.* It uses the example of robbery and notes that simple uniformity could be attained by sentencing all robbers to a fixed sentenced—i.e., five years. *Id.* However, this approach would ignore proportionality by not accounting for important differences in each crime, e.g., how much money was taken, was the defendant armed, were there any injuries. *Id.*
21. *Id.*; *see also* HUTCHISON *supra* note 14, at 1572 (noting the Guidelines sought uniformity by creating narrow sentencing periods that limited a judge's discretion).

to account for a particular aggravating or mitigating circumstance.[22] Three years after the passage of the Act, Congress enacted the Federal Sentencing Guidelines.[23]

The Guidelines are based on the United States Sentencing Commission's (the Commission) empirical evaluation of approximately 10,000 presentence investigations from pre-Guideline cases.[24] The Commission looked at "the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources" to determine what courts considered important in pre-Guideline sentencing practices.[25] The Guidelines resulted in a structured formula where specific traits of the criminal and specific facts of the crime are calculated to provide a defendant's sentencing range.[26]

### A. Application of the Guidelines

While an extensive discussion of the Guideline's application process is not warranted in this Note,[27] a solid understanding of their application is important. As a starting point, the Guidelines must be applied in the particular order established by the Commission.[28] The application instructions (Instructions) for the Guidelines dictate that order and consist of nine steps (a)–(i).[29] Applying these steps in order will provide courts with a sentencing range for a particular defendant.[30] The sentencing ranges are based on a grid, known as the Guidelines Sentencing Table (Sentencing Table), which consists of vertical (base offense level) numbers ranging from 1–43 and horizontal (criminal history category) numbers ranging from I–VI.[31] The first five steps of the Instructions relate to the vertical axis, or the defen-

22. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 6 (citing 18 U.S.C. § 3553(b)).
23. *Id.* at 1.
24. *Id.* at 4. Some scholars have suggested that because the defendant's sentencing range is based on the mathematical average of pre-Guidelines sentences (sentences that were found to be akin to the lottery), the new Guidelines "suffer[ ] from the same flaws that characterized pre-Guidelines sentences." Adam Lamparello, *Introducing the "Heartland Departure"*, 27 HARV. J.L. & PUB. POL'Y 643, 654 (2004).
25. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 4.
26. The formulaic and mathematical nature of the Guidelines is displayed by the existence of a sentencing calculator where an individual can input various aspects of a crime and the calculator produces the guideline range. The calculator is available at www.sentencing.us.
27. For a more detailed description of sentencing and the application of the guidelines, see *Sentencing Guidelines*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 681 (2009).
28. *See, e.g.*, United States v. Doe, 564 F.3d 305, 311 (3d Cir. 2009) ("The Sentencing Commission directs courts to apply the Guideline provisions in a specific order.").
29. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) to (i) (2009).
30. *Id.*
31. *See infra* Table 1.

dant's base offense level.[32] The base offense level pertains to the defendant's conduct and starts with the number assigned by the Guidelines for a particular offense[33]—for example, possession of crack cocaine has a base offense level of eight.[34] From there, the Instructions ask the court to make any applicable adjustments, up or down, to the base offense level, including: adjustments for specific characteristics of the offense,[35] the defendant's role in the offense,[36] and the defendant's acceptance of responsibility.[37] After the adjustments, the defendant's base offense level is set.

Next, the Instructions require a determination of the horizontal axis, or criminal history category.[38] Unlike the base offense level, the criminal history category relates to the individual defendant and not the offense. The horizontal axis accounts for the defendant's previous convictions, the length of imprisonment for each conviction, and the circumstances surrounding each conviction (e.g., committed while on parole).[39] Also at this step, the court may make any upward adjustments if the defendant's criminal history qualifies him for a sentencing enhancement, such as the career offender enhancement.[40] After the enhancements are applied, the criminal history category is established. Referencing both the base offense level and criminal history category numbers on the Sentencing Table, the court establishes the defendant's applicable guideline range. After the applicable guideline range has been determined, the last step of the Instructions permits a court to make any necessary departures.[41]

In addition to the Instructions, two specific sections of the Guidelines merit additional discussion: 4A1.3 departures and the career offender enhancement. The departures under 4A1.3 allow a sentencing court to depart upward or downward in the sentencing range if the court believes the defendant's criminal history category over or under represents the seriousness of the defendant's past criminal activity, or

32. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) to (e).

33. *Id.* § 1B1.1(a), (b).

34. *Id.* § 2D2.1(a)(1).

35. *Id.* § 1B1.1(b). For example, if during a drug trafficking charge a defendant is in possession of a dangerous weapon, the defendant's base offense level is increased by two levels. *Id.* § 2D1.1(b)(1).

36. *Id.* § 1B1.1(c). There are several role adjustments that are found in chapter three of the Guidelines; one example is if a defendant was an organizer or leader of an offense that involved five or more people, then the base offense level is increased by four levels. *Id.* § 3B1.1(a).

37. *Id.* § 1B1.1(e). Acceptance of responsibility results in a decrease of two or three levels. *Id.* § 3E1.1(a), (b).

38. *Id.* § 1B1.1(f).

39. *See id.* § 4A1.1.

40. *See id.* § 4B1.1 to 1.5.

41. *Id.* § 1B1.1(i).

over or under represents the defendant's likelihood of recidivism.[42] Section 4A1.3 is a policy statement as opposed to an actual guideline.[43] The Commission realized that the criminal history score is "unlikely to take into account all the variations in the seriousness of criminal history that may occur" and therefore provided courts with some discretion for departures.[44] While this provision can apply in several different circumstances,[45] courts have frequently applied this provision to grant downward departures to a defendant whose past crimes were committed at a young age.[46] As will be discussed later, at what exact point in the Instructions 4A1.3 departures should be applied was a critical issue in creating the circuit split.[47]

Similar to 4A1.3 departures, the career offender enhancement accounts for the defendant's criminal past; however, unlike 4A1.3 departures, the career offender enhancement only increases the defendant's sentence.[48] The enhancement in the Guidelines reflects a mandate that certain offenders be sentenced "at or near the maximum term authorized."[49] As a result, if a defendant qualifies as a career offender they will generally receive a considerably greater sentence.[50] Defendants qualify as career offenders if (1) they were at least eighteen years old when the instant offense was committed; (2) the instant offense is a felony that is either a crime of violence or a controlled substance; and (3) they have at least two prior felony convictions for crimes of violence or controlled substances.[51]

42. *Id.* § 4A1.3.

43. There are two key differences between the actual Guidelines and policy statements: (1) Guidelines and amendments to the Guidelines must be submitted to Congress before they can take effect; and (2) Guidelines have a binding effect on the court unless a particular departure applies, whereas no such requirement applies to policy statements. *See* HUTCHISON *supra* note 14, § 1B1.7, at 119 cmt. 3.

44. U. S. SENTENCING GUIDELINES MANUAL § 4A1.3 cmt background (2009).

45. *See* United States v. Collins, 122 F.3d 1297, 1307 (10th Cir. 1997) (affirming a departure because the defendant's prior convictions were committed nearly ten years before the instant offense); United States v. Abbott, 30 F.3d 71, 72–73 (7th Cir. 1994) (remanding for consideration of defendant's alcoholism at time of the prior convictions as a basis for a departure); United States v. Brown, 985 F.2d 478, 481 (9th Cir. 1993) (noting the sentencing court could consider the defendant's history as an abused child).

46. *See, e.g.*, United States v. Nelson, 740 F. Supp. 1502, 1518 (D. Kan. 1990) (granting a downward departure for the defendant because of the "youthful age" at which the past crimes were committed).

47. *See infra* sections IV.A, B.

48. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.

49. 28 U.S.C. § 994(h) (2006).

50. The increase is demonstrated in *Tolliver* where the defendant's sentencing range increased from 188–235 months to 262–327 months. United States v. Tolliver, 570 F.3d 1062, 1064 (8th Cir. 2009).

51. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.

### B. Modification of Sentences

Once a sentence is imposed under the Guidelines, it is a final judgment that cannot be modified[52] unless an individual qualifies for one of the enumerated exceptions in 18 U.S.C. § 3582. One particular exception allows a sentence to be modified if the defendant was: (1) "[S]entenced to a term of imprisonment based on a sentencing range that has subsequently been lowered" and (2) the reduction in sentence is "consistent with applicable policy statements issued by the Sentencing Commission."[53] For defendants' sentences to be "based on" a guideline range that has been lowered, their actual sentence must fall within the lowered guideline's range. For example, if a defendant's sentencing range for crack cocaine was forty to fifty months and the defendant was sentenced within that window—e.g., forty-eight months—then the defendant was likely sentenced "based on" the crack cocaine sentencing.[54] If that range is subsequently lowered by an amendment to the Guidelines, the defendant may qualify for a reduction.[55] If however, the defendant were sentenced outside of this range—e.g., fifty-five months—the sentence would not be "based on" the crack cocaine guidelines and the defendant would not be eligible for a reduction in sentence.[56]

After clearing the "based on" hurdle, the defendant still must show that his reduction is consistent with the applicable policy statements.[57] The policy statement for a reduction under 18 U.S.C. § 3582(c) states, "A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized . . . [if it] does not have the effect of lowering the defendant's *applicable guideline range*."[58] Therefore, the guideline range for a particular defendant and at what step in the application instructions it is determined are critical factors for deciding whether or not a defendant is eligible for a sentence modification.

## III. AMENDMENTS

As stated in the introduction to this Note, amendments to the Guidelines are frequent.[59] Even the policy statement found in the introduction to the Guidelines emphasizes the need for constant amendments. The title of one section reads, "Continuing Evolution and Role

52. 18 U.S.C. § 3582(b).
53. 18 U.S.C. § 3582(c)(2).
54. *See* United States v. Flemming, 167 F.3d 252, 258–59 (3d Cir. 2010).
55. *Id*.
56. *See id.*
57. 18 U.S.C. § 3582(c)(2).
58. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(2)(B) (2009) (emphasis added).
59. *See supra* note 3 and accompanying text.

of the Guidelines"[60] and notes: "[S]entencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior."[61] While amendments to the Guidelines are certain to continue, the issue addressed here is when the amendments may be applied retroactively. The general rule is that amendments may only be applied retroactively if (1) the amendment is specifically designated as retroactive by the Commission, or (2) if the amendment is merely clarifying as opposed to substantive.[62]

### A. Designated Retroactive Amendments—Amendment 706

The amendments specifically designated as retroactive are found in § 1.1B.10(c) of the Guidelines. Amendment 706 took effect November 1, 2007 and was added to section 1.1B.10(c) as a retroactive amendment on March 3, 2008.[63] The amendment was narrowly tailored to address and ameliorate an ongoing concern of the Commission, and others, regarding disparities in crack cocaine[64] sentencing when compared with powder cocaine sentences.[65] The disparity is a 100 to 1 ratio that is easily demonstrated by the following example: if a defendant was convicted of a first time trafficking offense that involves five grams or more of crack cocaine, the defendant will receive the same sentence as a person convicted of a first time offense involving 500 grams of powder cocaine.[66] At the time of the amendment, the Commission was prepared to submit a report to Congress on the mat-

60. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 12.
61. *Id.*
62. *See Id.* § 1B1.11(b)(2); *see also* United States v. Capers, 61 F.3d 1100, 1109 (4th Cir. 1995) (noting that subsequent amendments may be considered to the extent they are clarifying and not substantive amendments).
63. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, at 226, 253.
64. The major difference between crack and powder cocaine is that crack cocaine is cheaper and smokeable. CRAIG REINARMAN & HARRY G. LEVINE, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 2 (1997). The term crack comes from the crackling noise it makes when heated. *Id.* Further, because crack is cheaper it has been noted that the disparity in crack cocaine and powder cocaine sentences disproportionately affects minorities—in particular, African Americans. *See* Erik Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 28, 2010, at A16, *available at* http://www.nytimes.com/2010/07/29/us/politics/29crack.html?ref=cocaine_and_crack_cocaine. Roughly eighty percent of those convicted of crack cocaine offenses are African American. *Id.* The disparate impact on minorities was a consideration of the Commission in adopting amendment 706 and making the amendment retroactive. *See* U.S. Sentencing Commission Public Meeting Minutes at 4 (Dec. 11, 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20071211/20071211_Minutes.pdf.
65. U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, at 229.
66. *Id.*

ter in the hope that it would "facilitate prompt congressional action" to address the disparity.[67] While waiting to submit the report, the Commission thought it "urgent" to alleviate the disparity in the interim by passing amendment 706.[68] The amendment essentially reduced the base offense level for most offenses[69] involving crack cocaine by two levels.[70]

### B. Substantive or Clarifying Amendments—Amendment 651

Amendments that are not designated by the Commission as retroactive may only apply retroactively if they are clarifying amendments.[71] Amendment 651 was adopted in October of 2003 but was not made retroactive.[72] The focus of the amendment was on departures and making the Guidelines' interpretation of departures consistent with the directives of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act) which was enacted earlier that year.[73] More specifically, the Commission sought to "ensure that the incidence of downward departures [was] substantially reduced."[74] Unlike amendment 706 that was narrowly tailored to deal specifically with crack cocaine, amendment 651 was more expansive. It made modifications to eight different Instructions to the Guidelines, created a new policy statement and a new guideline, and made other changes to policy statements, the commentary, and the Guidelines themselves.[75]

While amendment 651 is broad, the only section at issue in the circuit split was the definition of the term "departure." The new definition appears in the commentary[76] to the Instructions and provides:

> 'Departure' means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise

67. *Id.*
68. *Id.* at 230.
69. The Commission estimated that the amendment would "affect 69.7 percent of crack cocaine offenses . . . and will result in a reduction in the estimated average sentence of all crack cocaine offenses from 121 months to 106 months. *Id.*
70. *Id.*
71. *See supra* note 5.
72. U.S. SENTENCING GUIDELINES MANUAL app. C, at C-878 (2009).
73. *Id.* at 871.
74. *Id.* at 872.
75. *Id.*
76. Commentary to the Guidelines are offered to help explain how a particular guideline should be applied. *Id.* § 1B1.7. Additionally, it provides background on the reasoning for the guideline and the factors the Commission considered in creating the guideline. *Id.* Commentary is the legal equivalent of a policy statement. *Id.*

> applicable criminal history category, in order to effect a sentence outside the applicable guideline range.[77]

Prior to the amendment there was no definition for departure. The definition resulted in two significant changes. First, 4A1.3 departures were specifically designated as departures *from* the applicable guideline range and were therefore to be applied at the final step of the Instructions after the guideline range was established.[78] Second, the definition—especially when coupled with other provisions in the amendment—makes clear that 4A1.3 departures should only result in departures in criminal history category and not a departure in both criminal history category and base offense level.[79]

## IV. THE CIRCUIT SPLIT

The First, Second, Third, and Fourth Circuits have granted a reduction in sentence to career offenders under amendment 706.[80] Interestingly, neither the First nor Second Circuits addressed the applicability of amendment 651 and based their reasoning only on amendment 706 and the application instructions.[81] By contrast, the Third and Fourth Circuits heavily discussed amendment 651, ultimately concluding that it was a substantive amendment and inapplicable.[82] However, the Sixth, Eighth, and Tenth Circuits have all held that amendment 706 is inapplicable to defendants who are designated career offenders.[83] Though none of these circuits provided reasoning for their reliance on amendment 651, or even referenced the amendment, they all relied on the new definition of the term "departure" that amendment 651 provided.[84]

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77. *Id.* § 1B1.1 cmt. n.1(E).

78. *Id.*

79. *Id.*

80. *See* United States v. Flemming, 617 F.3d 252 (3d Cir. 2010); United States v. Munn, 595 F.3d 183 (4th Cir. 2010); United States v. McGee, 553 F.3d 225 (2d Cir. 2009) (per curiam); United States v. Cardosa, 606 F.3d 16 (1st Cir. 2010).

81. *See McGee*, 553 F.3d at 228–30 (concluding there was ambiguity in the Guidelines and applying the rule of lenity in favor of the defendant); *Cardosa*, 606 F.3d at 21 (determining that if the defendant's exiting sentence was based on the crack cocaine guidelines, then the defendant is eligible for a reduction under amendment 706).

82. *See Flemming*, 617 F.3d at 266–67; *Munn*, 595 F.3d at 194.

83. *See* United States v. Pembrook, 609 F.3d 381 (6th Cir. 2010); United States v. Darton, 595 F.3d 1191 (10th Cir. 2010); United States v. Tolliver, 570 F.3d 1062 (8th Cir. 2009).

84. *See Pembrook*, 609 F.3d at 385 (quoting the new definition for departure); *Darton*, 595 F.3d at 1194 (same); *Tolliver*, 570 F.3d at 1066 (same).

### A. *United States v. Flemming*

In *United States v. Flemming*,[85] the defendant was indicted in March of 2003 by a federal grand jury on three counts: (1) possession of crack cocaine with the intent to distribute, (2) possession of a firearm in furtherance of a drug trafficking crime, and (3) possessing a firearm as a felon.[86] Using the 2001 edition of the Guidelines and based on the quantity of the drug and any aggravating or mitigating circumstances, the Probation Office determined Flemming's base offense level was 24 and his criminal history category was V.[87] His sentencing range, therefore, was 92–115 months in prison.[88] However, it was also determined that Flemming qualified as a career offender which increased the base offense level to 34 and the criminal history category to a VI which resulted in a sentencing range of 262–327 months imprisonment.[89] On top of this sentence, Flemming also faced an additional mandatory 60 month prison term for count two.[90]

Flemming argued for, and was granted, a downward departure based on 4A1.3 because the career offender enhancement overstated his criminal history.[91] The departure returned Flemming's base offense level to 24 and criminal history category to V—the numbers originally established for the crack cocaine offense minus the career offender enhancement.[92] Flemming's final sentence was 115 months imprisonment (the top of the crack cocaine range), plus the mandatory 60 month prison term for count two, resulting in a total sentence of 175 months.[93] After amendment 706 was made retroactive, Flemming unsuccessfully sought a sentence reduction pursuant to 18 U.S.C. 3582(c) arguing he was sentenced based on a sentencing range that had been subsequently lowered.[94]

#### *1. Applicable Guideline Range*

On appeal, the Third Circuit noted that in order to grant a sentence reduction, Flemming must have been (1) sentenced based on a sentencing range that was subsequently lowered by amendment 706

85. 617 F.3d 252 (3d Cir. 2010).
86. *Id.* at 254–55.
87. *Id.* at 255.
88. *Id.*
89. *Id.*
90. *Id.*; *see also* 18 U.S.C. § 924(c)(1)(A)(i) (2006) (requiring that all defendants who possess a firearm during a drug trafficking crime or crime of violence be sentenced to a minimum of five years).
91. *See Flemming*, 617 F.3d at 255. The court granted the departure for two reasons: (1) Flemming's age when the qualifying offenses where committed and (2) the fact his previous crimes were unrelated. *Id.* at 256.
92. *Id.* at 256.
93. *Id.*
94. *Id.*

and (2) the sentence reduction must be consistent with the applicable policy statements issued by the Sentencing Commission.[95] The court quickly determined that the first element was satisfied because Flemming's sentence, after the departure by the court from the career offender enhancement, was based on the guidelines for crack cocaine that were altered by amendment 706.[96] The ultimate question for the court was whether or not the sentence reduction was consistent with the Commission's policy statements.[97]

The policy statements provide that a sentence reduction that is based on a retroactive amendment is not consistent with the policy statements if it "does not have the effect of lowering the defendant's *applicable guideline range*."[98] The court looked to the application instructions for guidance as to what the applicable guideline range is and when it is established.[99] Initially, the court noted that the Guidelines "contain no global definition of the phrase applicable guideline range."[100] However, courts have generally concluded that the applicable guideline range is established at step (h) of the Instructions.[101] Next, the court attempted to ascertain at what point in the Instructions 4A1.3 departures are applied and reasoned that if applied before the applicable guideline range is established at step (h), then it is a departure *to* the applicable guideline range and Flemming would qualify for a reduction; if applied after step (h), it is a departure *from* the applicable guideline range and there could be no reduction.[102]

The government contended, and the court found it plausible, that 4A1.3 departures are to be applied after the applicable guideline range is established.[103] The court noted that the last step of the Instructions asks courts to apply departures and "any other policy statements . . . that might warrant consideration in imposing sentence."[104] Because 4A1.3 is both a policy statement and a departure, the court

95. *Id.* at 257 (internal citation omitted).
96. *Id.* at 259–60.
97. *Id.* at 260.
98. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(2)(B) (2009) (emphasis added); *see supra* subsection II.A.2.
99. *Flemming*, 617 F.3d at 261.
100. *Id.*
101. *See, e.g.*, *Flemming*, 617 F.3d at 262–63 (noting the applicable guideline range is established at step (h)); United States v. Munn, 595 F.3d 183, 190 (4th Cir. 2010) (same); United States v. Doe, 564 F.3d 305, 311–12 (3d Cir. 2009) (same).
102. *Flemming,* 617 F.3d at 262–64. The court noted that if the applicable guideline range "is the sentencing range calculated under the Career Offender Guidelines," then an offender is not eligible for a reduction because the career offender range was not affected by amendment 706. *Id.* at 260. However, if the applicable guideline range "is the Crack Cocaine Guidelines range—which is affected by Amendment 706—[an offender] is eligible for a sentence reduction." *Id.*
103. *Id.* at 261, 264.
104. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(i) (2009).

found plausible that it should be applied at this last step, in which case the departure would be a departure *from* the applicable guideline range.[105] If 4A1.3 departures are applied at the last step then the career offender enhancement—not the baseline crack cocaine guidelines—would represent Flemming's applicable guideline range.[106] Under this interpretation, amendment 706 (reducing *only* the crack cocaine guideline range) did not affect (or lower) Flemming's guideline range.[107]

However, the court found equally plausible an alternative interpretation of the Instructions that would require 4A1.3 departures to be applied before the applicable guideline range is established.[108] Step (f) of the Instructions, the same step that the career offender enhancement is applied, asks the court to apply Part A of Chapter 4.[109] The 4A1.3 departures are found in Part A of Chapter 4 and accordingly could reasonably be applied at this step.[110] If 4A1.3 departures are to be applied at this step, then the departure is a departure *to* the applicable guideline range and Flemming's applicable guideline range would be the crack cocaine guidelines—not the career offender enhancement.[111] Further, because amendment 706 does have the effect of lowering the crack cocaine guidelines, it would be applicable.[112] Because both readings are plausible, the court found the Instructions ambiguous.[113]

*2. Amendment 651*

Amendment 651, if applicable, resolves this ambiguity by specifically providing that 4A1.3 departures "effect a sentence *outside* the applicable guideline range."[114] The court in *Flemming* appeared to agree noting that 651 "appears . . . to suggest" and "appears to indicate" that 4A1.3 departures are departures *from* the applicable guideline range.[115] However, the court concluded amendment 651 was substantive and therefore inapplicable.[116] To reach this conclusion, the court relied on a simple test: "[I]f an amended guideline and commentary overrule a prior judicial construction of the guidelines, it is substantive; if it confirms our prior reading of the guidelines and does

105. *Flemming*, 617 F.3d at 264.
106. *Id.*
107. *Id.*
108. *Id.*
109. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(f).
110. *Id.* § 4A.
111. *Flemming*, 617 F.3d at 264.
112. *Id.*
113. *Id.* at 265.
114. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(E).
115. *Flemming*, 617 F.3d at 266.
116. *Id.* at 267–68.

not disturb prior precedent, it is clarifying."[117] The new definition of departures in amendment 651 conflicted with the Third Circuit's prior judicial construction of the guidelines. Specifically, the court had previously determined in *United States v. Shoupe*[118] that 4A1.3 departures could result in adjustments to both the base offense level and criminal history category. The new definition of departure conflicted with *Shoupe* because it expressly limited 4A1.3 departures to adjustments in the criminal history category only.[119] The court concluded that this conflict made the amendment substantive and, therefore, inapplicable.[120]

Because amendment 651 was inapplicable, the court found the application instructions to be ambiguous.[121] The Guidelines could plausibly be read to require 4A1.3 departures to be applied prior to determining the applicable guideline range or to be applied after.[122] When the Guidelines are ambiguous, the rule of lenity requires courts to resolve the ambiguity in favor of the defendant.[123] However, the rule of lenity is only applicable when the ambiguity is grievous.[124] The court in *Flemming* found the Instructions to be "grievously ambiguous" because it led to two plausible but contradictory interpretations and resolved the ambiguity in favor of Flemming.[125]

### B. *United States v. Tolliver*

Unlike *Flemming*, the court in *United States v. Tolliver*,[126] did not find the application instructions to be ambiguous and held that all departures, including 4A1.3 departures, are a departure from the applicable guideline range. It is important to note from the outset that *Tolliver* did not involve 4A1.3 departures but, rather, a departure based on a signed stipulation agreement.[127] Even though *Tolliver* did

117. *Id.* at 267 (citing United States v. Diaz, 245 F.3d 294, 303 (3d Cir. 2001)).
118. 35 F.3d 835 (3d Cir. 2001).
119. *Flemming*, 617 F.3d at 267.
120. *Id.* It is worth noting that the court was also swayed by the fact that both the government and Flemming agreed at oral argument that the new definition of departure was a substantive change in the law. *Id.* Admitting the change was substantive was a mistake by the government.
121. *Id.* at 269.
122. *Id.* at 269–70.
123. *Id.* ("[W]hen ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." (quoting United States v. Pollen, 978 F.2d 78, 85 (3d Cir. 1992))).
124. *Id.* at 270 ("To invoke the rule [of lenity], we must conclude that there is a grievous ambiguity or uncertainty in the statute." (quoting Muscarello v. United States, 524 U.S. 125, 138–39(1998))).
125. *Id.* at 272.
126. 570 F.3d 1062, 1066 (8th Cir. 2009).
127. *Id.* at 1064.

not involve 4A1.3 departures, the court still stated, though in dicta, that all departures—including 4A1.3 departures—are departures from the applicable guideline range.[128]

In March of 1998, Tolliver pled guilty to conspiracy to distribute and intent to distribute crack cocaine.[129] His base offense level was set at 34, his criminal history level was determined to be VI, and his resulting guideline range was 188–235 months.[130] The parties originally contemplated in a plea agreement that the proper sentence should be at the bottom of this range.[131] However, the probation officer determined that Tolliver qualified as a career offender which did not change his base offense level or criminal history category but resulted in a higher sentencing range of 262–327 months.[132] Tolliver filed motions to vacate, set aside, or correct his sentence and the parties ultimately signed a stipulation agreement that allowed Tolliver to be sentenced to 188 months as they originally contemplated in his plea agreement—this sentence was at the bottom of the crack cocaine guideline range.[133] After amendment 706 was made retroactive, Tolliver argued that his sentence was based on the crack cocaine guidelines and pursuant to 18 U.S.C. 3582(c)(2) he was eligible for a reduction in sentence.[134] The district court disagreed noting the amended guidelines did not change Tolliver's status as a career offender and Tolliver appealed.[135]

*1. Applicable Guideline Range*

Much like the court in *Flemming*, the government's argument (and the starting point of the court's decision) centered on the Instructions and determining when the applicable guideline range is established.[136] Identical to *Flemming*, the court agreed that the applicable guideline range is established at step (h).[137] However, unlike *Flemming*, the court did not find any ambiguity in the Instructions. The court noted that the last step of the Instructions asks courts to apply any applicable departures and that the stipulation was applicable at

128. *Id.* at 1066. Several months later, in a case involving the career offender enhancement and a 4A1.3 departure, the Eighth Circuit explicitly held that 4A1.3 departures are departures from the applicable guideline range and amendment 706 is inapplicable. United States v. Blackmon, 584 F.3d 1115, 1116 (8th Cir. 2009).
129. *Tolliver*, 570 F.3d at 1063–64.
130. *Id.* at 1064.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1065.
137. *Id.* at 1065–66; *see also supra* note 101 (citing authority that the applicable guideline range is established at step (h)).

this step and therefore was a departure from the applicable guideline range.[138] Relying on the new definition for departures provided by amendment 651, the court further reasoned that "all departures [are] outside the applicable guideline range."[139]

### *2. Amendment 651*

While the court in *Flemming* provided some basis for its decision not to apply amendment 651,[140] *Tolliver* failed to give any explanations for its reliance on the amendment. Again, it is important to note that *Tolliver* did not involve 4A1.3 departures but, rather, a departure based on a stipulation agreement and the court would not have needed amendment 651 to conclude that a stipulation agreement was a departure from the applicable guideline range.[141] However, it did rely on the new definition from amendment 651 to define all departures, including 4A1.3 departures, as outside the applicable guideline range. The failure of *Tolliver* to provide any reasoning for its reliance on amendment 651 was justifiably criticized by later decisions;[142] despite the criticism, the court in *Tolliver* reached the correct conclusion.

## V. ANALYSIS

While the application of amendment 706 created the split, amendment 651—if it can be applied retroactively—has the ability to resolve it. Indeed *Flemming* recognized as much by stating that amendment 651 "appears . . . to suggest" and "appears to indicate" that 4A1.3 departures are departures *from* the applicable guideline range.[143] Although amendment 651 resolves the split, neither side has reasoned or provided a cohesive framework for its retroactive application. *Tolliver*, and other courts applying similar reasoning,[144] provided no analysis on amendment 651's retroactive application and the test in *Flemming* is too simplistic, ignores precedent from its own circuit, and fails to consider additional relevant factors.

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138. *Id.* at 1067.

139. *Id.* at 1066. The court in Tolliver never specifically mentions amendment 651 by name, but it does rely on the new definition that was added as part of amendment 651 to reach this conclusion. *Id.*

140. *See supra* subsection IV.A.2.

141. *See* United States v. Flemming, 617 F.3d 252, 263 n.16 (3d Cir. 2010).

142. *See, e.g.*, *id.* at 267–68.

143. *Id.* at 266. The court also stated that the new definition for departure "may resolve this ambiguity," when referring to the ambiguity in the Instructions to the Guidelines. *Id.* at 270.

144. *See* United States v. Pembrook, 609 F.3d 381, 385 (6th Cir. 2010); United States v. Darton, 595 F.3d 1191, 1194 (10th Cir. 2010) (applying the new definition for departure without reference or discussion of amendment 651 and its applicability).

### A. The *Flemming* Test

In *Flemming*, the court applied a simple, bright-line test to determine whether or not amendment 651 was substantive or clarifying. It stated, "[I]f an amended guideline and commentary overrule a prior judicial construction of the guidelines, it is substantive; if it confirms our prior reading of the guidelines and does not disturb prior precedent, it is clarifying."[145] Interestingly, the Third Circuit—the same circuit that decided *Flemming*—in *United States v. Marmolejos*,[146] previously undermined this very test. The *Marmolejos* court concluded that a conflict with prior precedent does not make an amendment substantive and inapplicable, stating that even though an amendment "may alter the practice of courts in construing . . . and may even reverse caselaw interpreting [the Guidelines], it is the text of the amendment—not the courts gloss on the text—that ultimately determines whether the amendment is a clarification or a substantive revision."[147]

Similar to the defendants in both *Tolliver* and *Flemming*, the defendant in *Marmolejos*, sought post-conviction relief based on a subsequent amendment to the Guidelines.[148] The amendment established how to calculate the appropriate drug quantity if the offense involves a negotiation to traffic in narcotics.[149] The court noted that the pre-amendment version of the Guidelines provided that "weight under negotiation" would be the applicable amount in an uncompleted transaction.[150] However, the Guidelines were silent on the applicable quantity for completed transactions.[151] The amendment provided a separate standard for determining the applicable quantity in both completed and uncompleted transactions.[152] The amendment, however, conflicted with the court's prior construction of the Guidelines that established the weight under negotiation would be the applicable quantity in both completed and uncompleted transactions.[153] The government argued this conflict with prior precedent made the amendment substantive and inapplicable.[154] The court disagreed, noting that an "inconsistency between caselaw and the amendment

145. *Flemming*, 617 F.3d at 267 (citing United States v. Diaz, 245 F.3d 294, 303 (3d Cir. 2001)); *see also* United States v. Munn, 595 F.3d 183, 193–94 (3d Cir. 2010); United States v. Capers, 61 F.3d 1100, 1110 (4th Cir. 1995) (applying this same test).
146. 140 F.3d 488 (3d Cir. 1998).
147. *Id.* at 492.
148. *Id.* at 489.
149. *Id.* at 490.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 492.
154. *Id.*

. . . [does not] require[ ] a conclusion that the amendment works a substantive change [in the law]."[155] The court further found that the amendment resolved an ambiguity in the law and that the court was not "bound to close its eyes to the new source of enlightenment."[156]

Identical to the amendment at issue in *Marmolejos*, amendment 651 operates to resolve an ambiguity in the law and courts should not close their eyes to this new source of enlightenment. The ambiguity created by when to apply 4A1.3 departures was precisely the reason the court in *Flemming* opted for the rule of lenity and resolved the issue in favor of the defendant.[157] If an amendment resolves an ambiguity in the law, the amendment should be given consideration when possible. While resolving ambiguity is not the only additional factor that should be considered when determining if an amendment is clarifying or substantive, it is one of several factors missing from the simplistic test applied in *Flemming*.

### B. A New Test

There is a need for a new test. A test that only looks at potential conflicts with precedent is too simplistic. While there is little discussion regarding the proper test for determining clarifying amendments (many, and perhaps a majority, apply the *Flemming* test),[158] some courts have attempted to construct an analysis that accounts for important factors lacking in the *Flemming* test. For example, in *United States v. Geerken*[159] the court recognized the difficulty in determining if an amendment is substantive or clarifying and used a multifaceted test to resolve the issue. The test analyzes: "(1) how the Sentencing Commission characterized the amendment; (2) whether the amendment changes the language of the guideline itself or changes only the commentary for the guideline; and (3) whether the amendment resolves an ambiguity in the original wording of the guideline."[160] An-

155. *Id.* at 493.

156. *Id.*

157. *See supra* subsection IV.A.3.

158. *See* cases cited *supra* note 145.

159. 506 F.3d 461 (6th Cir. 2007). In *Geerken*, the defendant was convicted of possession of child pornography. *Id.* at 463. In his plea agreement, the defendant stipulated that he possessed 204 still images and 49 videos or movies. *Id.* At sentencing he received several enhancements to his base offense level; one of the enhancements—a five level increase—was based on his possession of 600 or more images of child pornography. *Id.* Although Geerken's crime was committed in 2003 and the sentencing court used the 2003 Guidelines, the court also relied on a 2004 amendment that defined the term images. *Id.* at 465. The 2004 amendment provided that one movie was the equivalent of 75 still images and using this 75:1 ratio, the court concluded that the defendant possessed 3,675 video images and 204 still images for a total of 3,879 images. *Id.* at 464.

160. *Id.* at 465.

other similar test is found, in *United States v. Thompson*[161] where the court, identical to *Geerken*, analyzed how the Commission characterized the amendment and whether it revised the Guidelines or only the commentary to the Guidelines. However, in *Thompson*, the court did not include resolution of ambiguity in its analysis; instead, the court added as an additional factor, the *Flemming* test—whether the amendment overrules a prior precedent.[162]

Unlike the test in *Flemming*, the tests in both *Geerken* and *Thompson* look at several factors to determine whether an amendment is substantive or clarifying. A synthesis of the tests applied in *Geerken*, *Thompson*, and *Flemming* provide a more nuanced approach that will not only account for the importance of preserving prior precedent and stare decisis[163] found in the *Flemming* test but also will better promote the goals of the Sentencing Reform Act by achieving uniformity in sentencing.[164] To determine if an amendment is substantive or clarifying, the new test requires courts to analyze: (1) how the Commission characterized the amendment; (2) whether the amendment changes the actual Guideline language or only changes the Guidelines commentary; (3) whether the amendment overrules prior precedent; and (4) whether the amendment resolves an ambiguity in the Guidelines.

These four elements should all be given consideration; however, the purpose of the Guidelines and the purpose in amending the Guidelines, supports a conclusion that resolution of ambiguity is a crucial factor and should be considered more heavily than others.[165] As stated in Part II of this Note, the objective in creating the Guidelines was to promote honesty, uniformity, and proportionality in sentencing. Ambiguity is perhaps the greatest threat to these objectives. The remaining factors, while all important, do not promote the fundamental purpose of the Guidelines as clearly as resolving ambiguity. Further, the remaining elements can, and in some cases have been, relegated to a somewhat minor role.[166] For example, how the Commission characterizes an amendment sheds light on their intentions,

161. 281 F.3d 1088 (10th Cir. 2002). In *Thompson*, the defendants were also convicted of child pornography offenses. *Id.* at 1089–90. The court found that an amendment to the Guidelines distinguishing the amount of child pornography contained in electronic formats was clarifying and therefore applicable. *Id.* at 1092–93.

162. *Id.* at 1093.

163. For a discussion on the importance of stare decisis see Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (1988) and Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988).

164. *See supra* Part II.

165. *See supra* Parts II and III.

166. *See* United States v. Capers, 61 F.3d 1100, 1109–10 (4th Cir. 1995) (noting that the Commission's statement of what an amendment is—i.e., clarifying or substantive—should not be determinative because "that would enable the Commis-

but if the Commission's intent is the critical component of the test, the Commission would be able to make substantive changes by simply labeling an amendment as clarifying.[167]

### C. Applying the New Test

Application of this new test makes amendment 651 a clarifying amendment and therefore applicable. First, the reasons proffered by the Commission for the amendment shed no light on whether the Commission intended to merely clarify or make substantive changes to the Guidelines. In *Geerken*, the court looked at the Commission's commentary for language that indicated the Commission's intent.[168] A similar exercise applied to amendment 651 produces no clear answers. On several occasions, when discussing the reasons for the amendment, the Commission stated that the amendment "clarifies" when a particular departure may be available and "more clearly sets forth" the extent of particular departures.[169] However, in its reasoning for the amendment the Commission also stated on several occasions that the amendment "substantially restructures" particular sections of the Guidelines,[170] or expands the availability of departures in "significant ways."[171] These conflicting remarks do little to determine the actual intent of the Commission.

Second, the amendment makes changes to the Guideline commentary and policy statements as opposed to the actual guidelines themselves. The new definition for a departure is found in the commentary to the Instructions.[172] Under the new test, making a change to the commentary as opposed to the actual Guidelines supports a conclusion that the amendment was merely clarifying and not substantive.

Third, the new definition for departure in amendment 651 does overrule the prior judicial construction of how 4A1.3 departures were resolved and therefore favors a finding that the amendment is substantive rather than clarifying.[173] However, as noted earlier, just because an inconsistency in the case law and the Guidelines exist, "[does

sion to make substantive changes in the guise of 'clarification'" (quoting United States v. Guerrero, 863 F.2d 245, 250 (2d Cir. 1988))).

167. *Id.*

168. United States v. Geerken, 506 F.3d 461, 466 (6th Cir. 2007)

169. U.S. SENTENCING GUIDELINES MANUAL app. C, at C-872 to C-876 (2009).

170. *Id.* at C-872.

171. *Id.* at C-877.

172. *Id.* § 1B1.1 cmt. n.1(E); *see also supra* note 76 (discussing the distinction between commentary and the Guidelines).

173. *See, e.g.*, United States v. Shoupe, 35 F.3d 835, 836 (3d Cir. 1998) *superseded by regulation* U.S. SENTENCING GUIDELINES MANUAL § 1.1B1 cmt. n.1(E) *as recognized by* United States v. Heilman, 377 Fed. Appx 157, 215–16 (holding that a court may depart downward in both criminal history category and base offense level and noting that other jurisdictions have done the same).

not] require[ ] a conclusion that the amendment works a substantive change in the law."[174] Also, if the circuits solely relied on whether or not the amendment conflicted with their own construction of the law, it is conceivable that inconsistencies would develop among the circuits. For example, if the Commission promulgated an amendment that conflicted with the precedent established by some circuits but in others there was no conflict—either because their decisions were consistent with the amendment or the circuit had never addressed the issue—then that amendment could potentially be retroactive in some circuits and not retroactive in others. This incongruous result is not consistent with the Guidelines' stated goal of uniformity in sentencing and is reminiscent of the pre-Guideline era when sentencing was akin to the lottery.[175] The potential for courts to reach different, though perfectly plausible conclusions, from the same Guidelines is the reason that resolution of ambiguity in the Guidelines ought to be the most important and critical factor of the new test.

Amendment 651 resolves an ambiguity in the Guidelines. A quick review of several decisions involved in the split is illustrative. The Instructions to the Guidelines were the focal point of the decisions in determining when 4A1.3 departures should be applied and whether such a departure was a departure *from* rather than a departure *to* the applicable guideline range.[176] *Tolliver*, in part because of its reliance on amendment 651, had little difficulty in determining that a 4A1.3 departure should be applied at step (i) and was therefore a departure *from* the applicable guideline range.[177] Equally as decisive in their conclusion, the court in *United States v. Munn*,[178] found the Instructions to be "well defined" but reached the exact opposite conclusion; holding that 4A1.3 departures should be applied at step (f) and were therefore a departure *to* the applicable guideline range.[179] The court in *Flemming* was not as decisive, it found that both readings of the Instructions were "plausible."[180] The court noted that the Instructions "[were] not entirely clear" and that the court "cannot conclude that the Instructions unambiguously compel" one conclusion over the other.[181] The court found the Instructions not only ambiguous but also "grievously ambiguous and uncertain" such that the rule of lenity should apply.[182] These three cases demonstrate a textbook defini-

174. United States v. Marmolejos, 140 F.3d 488, 493 (3d Cir. 1998).
175. *See supra* Part II.
176. *See supra* Part IV.
177. United States v. Tolliver, 570 F.3d 1062, 1066 (8th Cir. 2009).
178. 595 F.3d 183 (4th Cir. 2010).
179. *Id.* at 194.
180. United States v. Flemming, 617 F.3d 252, 264–65.
181. *Id.* at 264.
182. *Id.* at 270.

tion[183] of ambiguity with *Tolliver* saying a 4A1.3 departure should be applied after the applicable guideline range, *Munn* saying it should be applied before, and *Flemming* stating that the Instructions are grievously ambiguous.

Independent of conclusions reached by the circuits, the Instructions—prior to amendment 651—were ambiguous with regards to when 4A1.3 departures should apply. The Instructions appeared to suggest that 4A1.3 departures could be applied either before or after the applicable guideline range is established at step (h). First, step (f) of the Instructions states that a court should apply parts A and B from chapter four of the Guidelines and 4A1.3 departures are found in part A of chapter four.[184] If applied at this step, the 4A1.3 departure would be a departure *to* the applicable guideline range because it is applied prior to step (h) and a defendant would be eligible for a sentence reduction based on amendment 706.[185] However, three steps later, at step (i), the Instructions provide that courts may apply departures from chapter five or "any other policy statement[ ] or commentary in the guidelines that might warrant consideration in imposing sentence."[186] Section 4A1.3 of the Guidelines is a policy statement[187] and a plausible reading of the Instructions would require 4A1.3 to be applied at this step, after step (h). If applied after step (h) the departure would be a departure *from* the applicable guideline range and the defendant would not be eligible for a sentence reduction based on amendment 706.[188] This ambiguity destroys the fundamental purpose of the Guidelines by eliminating uniformity; it allows for similarly situated defendant's to receive varying sentences based solely on the court's interpretation of when 4A1.3 departures should apply.[189]

The new definition of departures from amendment 651 eliminates this ambiguity and achieves the goals of the Sentencing Reform Act by promoting uniformity. The new definition makes clear that all departures, including 4A1.3 departures are departures *from* the applicable guideline range and should therefore be applied after the guideline range is established at step (h).[190] While the first three factors of the test fail to provide a definitive answer as to whether amendment 651

183. The term "ambiguity" is defined as "an uncertainty of meaning or intention" and further described—in the context of statutory interpretation—as "capable of meaning two different things." BLACK'S LAW DICTIONARY 88 (8th ed. 2004). The ability of the court in *Tolliver* and *Munn* to reach opposite, yet definitive, interpretations highlights the uncertainty of the Instructions.
184. U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(f), 4A1.3 (2009).
185. *See supra* subsection II.A.2.
186. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(i).
187. *Id.* § 4A1.3.
188. *See supra* subsection II.A.2.
189. *See supra* Part II.
190. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(E); *see also supra* section III.B (discussing the text and changes from amendment 651).

is applicable, the fact that it resolves a grievous ambiguity in the law tilts the scales in favor of applying amendment 651. Because amendment 651 should be applicable, *Tolliver* was correct in determining that all departures, including 4A1.3 departures, are departures from the applicable guideline range and therefore amendment 706 could not apply to a career offender who was also granted a departure.

## VI. CONCLUSION

Change is inevitable. The Guidelines will continue to evolve to achieve the goals of honesty, uniformity, and proportionality in federal sentencing. The constant evolution creates a need for a coherent system to decide when amendments may be applied retroactively—particularly when dealing with claims for post-conviction relief. The prior-precedent test articulated in *Flemming*, while easy to apply, ignores relevant factors. For example, the test fails to consider the Commission's intent in passing the amendment and whether the amendment changes the Guidelines or only changes a policy statement or commentary. Most importantly, the *Flemming* test fails to consider if the amendment resolves an ambiguity in the Guidelines. A more nuanced approach—accounting for all of these factors—is the appropriate way for courts to proceed. Consideration of all of these factors—most often focusing on whether ambiguity is resolved—will promote the fundamental purpose of the Guidelines by providing more uniform and consistent sentences across all circuits. Equally as important, the framework will avoid decisions like *Tolliver*, where a court may reach the correct conclusion but without any principled reasoning to guide the Commission, the courts, or attorneys on future decisions regarding retroactive applicability of amendments. In short, the new test would provide attorneys and the courts with change they can believe in.

Table I*

| | Offense Level | Criminal History Category (Criminal History Points) I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
|---|---|---|---|---|---|---|---|
| | 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| | 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| | 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| | 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| Zone A | 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| | 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| | 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| | 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| | 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| Zone B | | | | | | | |
| | 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| Zone C | 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| | 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| | 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| | 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| | 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| | 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| | 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| | 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| | 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| | 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| | 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| | 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| | 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| | 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| | 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| | 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| | 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| Zone D | | | | | | | |
| | 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| | 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| | 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| | 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| | 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| | 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| | 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| | 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| | 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| | 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| | 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| | 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| | 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| | 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| | 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| | 43 | life | life | life | life | life | life |

*The Sentencing Table is found in the U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2009).