

PUBLIC COMMENT

1997 AMENDMENT CYCLE



United States Sentencing Commission

March 1997

FEDERAL PUBLIC DEFENDER

Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

February 4, 1997

Honorable Richard P. Conaboy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On behalf of the Federal Public and Community Defenders, I submit the following comments on the proposed emergency amendments to the guidelines.

Amendment 1
(§ 2D1.11)

Amendment 1 would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment responds to the Congressional directive in the Comprehensive Methamphetamine Control Act of 1996 (P.L. 104-237). Section 302 of the Act directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). The Act also raises the maximum penalty for these offenses from ten to twenty years. We do not oppose the amendment.

Amendment 2
(§ 2L1.1)

Amendment 2 responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), which directs the Commission to increase the

guideline penalties for alien smuggling offenses. Specifically, the legislation directs the Commission to increase the base offense level for alien smuggling by at least three levels; increase the enhancement in § 2L1.1(b)(2) by at least 50 percent; provide an enhancement for an offender with a prior felony conviction for a similar offense; impose an enhancement for death or bodily injury; and consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child.

Base Offense Level

Amendment 2 would increase by three to five levels the base offense level in § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony." The amendment would increase the base offense level for other smuggling offenses covered under § 2L1.1 (a)(2) by three, four, or five levels. A three-level increase in the offense levels of both subsection (a)(1) and subsection (a)(2) satisfies the Congressional directive in section 203, and best serves the purposes of sentencing. Without data indicating that the resulting offense levels are inadequate, there is no rationale for raising the offense levels higher than the legislation requires.

Number of Aliens Smuggled

In response to the second directive, which requires at least a 50-percent increase in the sentencing enhancement for the number of aliens smuggled, transported, or harbored, the proposed amendment would completely revise the present alien-smuggling table. We oppose this part of the proposal as written.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of aliens	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to promulgate an emergency amendment adding an enhancement for offenses involving 3-5 aliens. Under the amendment, however, an offense involving 3-5 aliens will result in a one-level increase for number of aliens smuggled. The Commission should collect data to determine if it is necessary to promulgate such an amendment, increasing already harsh penalties for low level offenders, under the Commission's regular authority.

There is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 aliens. The legislation requires that the two-level enhancement for these offenses be increased by one level, but the amendment would increase the enhancement by three levels. According to Commission data,¹ between October 1994 and September 1995, 63.7 percent of the offenses covered by § 2L1.1 involved the smuggling of 6-24 unlawful aliens. Thus, without any

¹Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 44 (December 2, 1996).

rational justification, the amendment increases the enhancement for a large percentage of cases by 150 percent.

For offenses involving 25-99 aliens, the amendment, without a reasoned basis, would increase the enhancement by three-levels -- a 75-percent increase. The enhancement for the most egregious cases, those involving 100 or more aliens, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. The cosmetic uniformity provided by a table with two-level increments is not worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 2 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

We oppose the amendment's broad interpretation of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction of an immigration, naturalization, or passport offense.

We support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 (three-strikes), which requires predicate offenses to be separated from the instant offense (and from each other) by a conviction. The Commission has adopted a similar policy for the career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions" In addition, as the Commission staff has pointed out, the approach of option 2 "would make the enhancement more susceptible to prosecutorial manipulation."² To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Firearm Enhancement

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . uses or brandishes a firearm or other dangerous weapon." In response, the amendment would provide a six-level increase and a minimum offense level of [22-24] if "[the defendant discharged a firearm][a firearm was discharged]," a four-level increase and a minimum

²Id. at 6.

offense level of [20-22] if [the defendant brandished or otherwise used a dangerous weapon (including a firearm),] [a dangerous weapon (including a firearm) was brandished or otherwise used], and a two-level increase and a minimum offense level of [18-20] if "a dangerous weapon was possessed."

We oppose the part of this amendment that would provide minimum offense levels. These minimum offense levels would only result in a greater proportional increase for possession or use of a weapon in less egregious cases where the base offense level would be determined under § 2L1.1(b). For example, a defendant whose base offense level is determined under § 2L1.1(a)(1), would, under the amendment, receive a base offense level of [23-25]. If that defendant brandished a firearm, then the offense level would be increased to [27-29] -- an increase of up to four levels. A defendant convicted of a less egregious offense would receive a base offense level of [12-14]. If that defendant brandished a firearm, however, the offense level would be [20-22] -- an increase of up to ten levels. We find this tendency to over punish relatively less serious offenders troubling and inconsistent with thoughtful legislation, such as 18 U.S.C. § 3553(f), the "safety valve" statute. Rather than create mandatory minimums within the guideline structure, the enhancement should simply provide a uniform increase for use of a weapon.

We oppose those parts of this amendment that do not strictly conform to the legislative directive. We therefore oppose that part of the amendment that would provide a two-level increase and a minimum offense level of [18, 19, or 20] "if a dangerous weapon (including a firearm) was possessed." The legislation does not give the Commission emergency authority to provide an enhancement for possession of a weapon. Similarly, the legislation does not give the Commission emergency authority to impose an enhancement on a defendant who did not personally discharge,

brandish or otherwise use a firearm or other dangerous weapon. To comply with the Congressional directive, the proposed enhancements should apply as presented in the first brackets. Thus, for discharging a weapon, the enhancement should read "if the defendant discharged a firearm" and the proposed enhancement of § 2L1.1(4)(B) should read, "if the defendant brandished or otherwise used a dangerous weapon . . ."

The proposed amendment would also add a new application note, which would hold a defendant accountable if "another person discharges, brandishes, or otherwise uses a firearm and the defendant is aware of the presence of the firearm," and if "another person possesses a dangerous weapon during the offense." We oppose this part of the amendment.

The legislation requires the defendant personally to have used the weapon; the legislation does not give the Commission emergency authority to make the defendant accountable for another person's use or possession of a weapon. In any event, the language proposed is flawed. Although the note appears to be designed to limit a defendant's accountability for acts of others under § 1B1.3, the proposed application note would hold a defendant accountable for possession or use of a weapon by "another person." Thus, the enhancement would apply to an offense involving an unarmed defendant who is stopped by an armed border patrol officer. We also believe that a defendant's "awareness" of the presence of a weapon should not make that defendant as culpable as the defendant who controls and is in a position to use the weapon. A defendant who is aware of the presence of a weapon should not receive the same enhancement as a defendant who fires the weapon. Finally, the note should specify that the defendant was aware of the presence of the weapon when the offense commenced. A defendant may be unaware of a weapon when the

offense begins, but become aware of the weapon (when a co-defendant displays it, for example) after it is too late for the defendant to back out.

Risk of Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury." The amendment presents two options to carry out that directive. Each option provides a two-level increase and a minimum offense level of [18, 19 or 20] "if the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person." The first option would make this enhancement an alternative to the weapon enhancement, by putting the risk of death enhancement in the same subsection as the weapon enhancement. The second option would call for the risk of bodily injury enhancement to be in addition to the weapon enhancement. Neither option properly responds to the Congressional mandate.

The Congressional directive calls for an enhancement if the defendant personally "engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury" The amendment, however, applies more broadly than that. The enhancement would apply "if the offense involved" creating a risk of injury. Congress has not given the Commission emergency authority to make a defendant accountable for conduct other than the defendant's own conduct. If the amendment is limited to cover only the defendant's conduct, we would support the placement of the enhancement as presented in option 1.

The presence of a weapon always increases the risk of death or serious bodily injury. When a weapon is present, a separate, additional enhancement to account for risk of death or

injury, will often result in double-counting. Under option 2, a sentence could be enhanced for discharge of a weapon under § 2L1.1(b)(4), for creating a substantial risk of death or bodily injury under § 2L1.1(b)(5), and for actual bodily injury under § 2L1.1(b)(6). The Congressional directive does not authorize an emergency amendment cumulating the enhancements. Congress has directed the Commission to impose an enhancement on a defendant who "(i) murders or otherwise causes death; (ii) uses or brandishes a firearm or other weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury (emphasis added)." The use of the term "or" between (ii) and (iii) requires that the enhancements be alternative.

We also oppose the part of this amendment that would require a minimum offense level of [18, 19, or 20]. A mandatory minimum in the guideline structure disproportionately increases the sentence of less serious offenders. Thus, under the proposal, a defendant with a base offense level of [12-14] under § 2L1.1(a)(2) would receive an increase of four to eight levels. A more serious offender, with a base offense level of [23-25] under § 2L1.1(a)(1) would receive only a two-level increase.

Bodily Injury or Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury to another individual." In response, the amendment would provide an enhancement "[i]f any person died or sustained bodily injury as a result of the offense," including a two-level increase for bodily injury, a four-level increase for serious bodily injury, a six-level increase for permanent or life-threatening injury, and an eight-level increase for death. In addition, the amendment would

• add a cross-reference to the murder guideline "[i]f any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special and maritime and territorial jurisdiction of the United States."

We believe that the proposed enhancement for death or bodily injury exceeds the emergency authority that Congress gave the Commission. The legislation specifies that the enhancement should apply to "a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury" This directive limits the accountability of the defendant to acts the defendant committed or aided and abetted.

Downward Adjustment for First Offense if Person Smuggled is Defendant's Spouse or Child

This part of the amendment responds to the Congressional directive which requires the Commission to "consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child." The proposed amendment would delete § 2L1.1(b)(1), which provides a three-level reduction "if the defendant committed the offense other than for profit" and replace that provision with "[i]f the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child, decrease by [2-3] levels." We oppose this amendment.

The Congressional directive does not require the Commission to amend the guidelines or policy statements, but only to consider the appropriateness of a downward adjustment under the circumstances described in the Congressional directive. Section 2L1.1(b)(1) already provides for a reduction in such circumstances. There is nothing in the legislation to confer emergency authority on the Commission to delete the reduction provided by § 2L1.1(b)(1) if, for example, a defendant, for no profit, smuggles a parent into the country. The directive mandates study -- not

change. We suggest that before deleting § 2L2.1(b)(1), the Commission should study further the appropriateness of amending the existing downward adjustment. The legislative language produces a result difficult to defend -- a defendant would receive a downward adjustment for smuggling a spouse or child, but not for smuggling a parent or grandparent.

The proposed amendment would also provide a [2-4] level enhancement "if the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense." We oppose this amendment. Congress did not give the Commission emergency authority to add an enhancement for a defendant's status as a former deportee.

Amendment 3
(§§ 2L2.1 and 2L2.2)

Amendment 3 responds to section 211 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (P.L. 104-208). The legislation directs the Commission to increase by two levels the guidelines applicable to offenses involving the fraudulent use of government documents; "review the sentencing enhancement for number of documents or passports involved (U.S.S.G. § 2L2.1(b)(2)), and increase the upward adjustment by at least 50 percent;" and provide an enhancement if the defendant has one or more prior felony convictions for an offense that involved the same or similar underlying conduct as the current offense.

Base Offense Level

In response to the legislation, amendment 3 would increase the base offense level of § 2L2.1 (trafficking in immigration documents) from level 9 to level [11-13] and the base offense level of § 2L2.2 (fraudulently acquiring immigration documents or passports) from level 6 to level [8-10]. We believe that the amendment should increase the base offense level of both guidelines

by two-levels -- the minimum required by the legislation. Without data to indicate that the current base offense levels are inadequate, there is no justification for an increase of more than two levels.

Downward Adjustment

The amendment presents two options to provide a reduction from the base offense level of § 2L2.1. Either option would replace the three-level reduction in § 2L2.1(b)(1) currently available "if the defendant committed the offense other than for profit." Option 1 would provide a three-level decrease "if the defendant committed the offense other than for profit and had not been convicted of an immigration and naturalization offense prior to the commission of the instant offense." Option 2 would provide a decrease of [2-3] levels "if the offense involves documents only related to the defendant's spouse or child." We oppose both options.

The legislation does not authorize the Commission to promulgate an emergency amendment to limit or revise the reduction available under § 2L2.1(b)(1). Further, without data to indicate that the existing adjustment needs revision, there is no justification for this part of the amendment.

Enhancement for Number of Documents

In response to the directive to provide an increased enhancement based on the number of documents, the amendment completely revises the table in § 2L2.1(b)(2). The revised table would provide a one-level increase if the offense involved three to five documents, a three-level increase if the offense involved six to eleven documents, a five-level increase if the offense involved 12 to 24 documents, a seven-level increase for 25-99 documents, and a nine-level increase if 100 or more documents were involved. We oppose this part of the amendment.

The legislation directs the Commission to "review the sentencing enhancement for the number of documents or passports involved . . ." We believe that the Commission should increase the enhancement by the 50 percent that Congress mandated until the Commission has thoroughly reviewed the sentences under this guideline. The review may indicate that no further adjustment is necessary.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of documents	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to add an enhancement for offenses involving 3-5 documents. Under the amendment, however, an offense involving 3-5 documents will result in a one-level increase. Instead of arbitrarily increasing the penalty for offenses involving 3-5 documents, the Commission should collect data to determine whether such an increase is warranted.

Similarly, there is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 documents. The legislation requires that the two-level enhancement for these offenses be increased by one-level, but the amendment would increase the enhancement by

three levels. For offenses involving 25-99 documents or passports, the legislation requires a two-level increase (50 percent of four). Again, without a reasoned basis, the amendment would increase the enhancement by three-levels -- a 75-percent increase. The most egregious cases, those involving 100 or more documents, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. We do not believe that the cosmetic uniformity provided by a table with two-level increments is worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 3 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

Here too, we oppose the amendment's broad use of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction for an immigration, naturalization, or passport offense.

As stated in our comments to proposed amendment 2, we support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 ("three-strikes") and the Commission's career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions." Both the "three-strikes" and career offender provisions lessen the ability of prosecutors to manipulate sentences. To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Our comments to amendments 2 and 3 suggest that the Commission, as the sentencing policy maker, should move thoughtfully and not more aggressively than is minimally required by Congress. We are, of course, concerned about increasing the harsh penalties already suffered by our non-citizen clients. But we are also mindful that the legislative directives for change in these guidelines flow from a volatile, emotional, political environment. Such an environment is not the best for producing rational and fair sentencing law. By moving cautiously, the Commission furthers a greater, overriding Congressional mandate for penalties that are "sufficient, but not greater than necessary" to satisfy the purposes of sentencing and the goal of equal justice.

Amendment 4
(§ 2H4.1)

Amendment 4 responds to section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). The legislation increases the maximum penalty for peonage offenses and slavery offenses from five to ten years imprisonment and directs the Commission to review the guidelines for involuntary servitude offenses and to amend the guidelines as necessary.³

Involuntary servitude, peonage, and slavery cases are brought infrequently. The Commission's staff reports seven cases brought in the last ten years -- less than one case per year. The involuntary servitude guideline (§ 2H4.1) presently calls for an offense level of 15 or two plus the offense level applicable to an underlying offense. That offense, almost invariably, will be kidnaping. Because the present guideline produces an offense level greater than the kidnaping guideline, any disparity that may exist results from § 2H4.1 producing an offense level greater than the offense level for kidnaping. Similarly, when the offense involves alien smuggling, § 2H4.1 produces an offense level greater than the alien smuggling guideline. Again, any disparity that

³Section 218 directs the Commission to amend the guidelines as necessary to:

(A) reduce or eliminate any unwarranted disparity . . . between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnaping offenses and alien smuggling offenses; (B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses and adequately reflect the heinous nature of such offenses; and (C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve — (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude."

may exist is caused by § 2H4.1 producing an offense level greater than the offense level for alien smuggling.

We believe, therefore, that no increase in the offense level produced by § 2H4.1 is necessary to eliminate unwarranted disparity with the kidnaping and alien smuggling guidelines. The additional complexity that amendment 4(A) would bring to § 2H4.1 is unnecessary. We oppose amendment 4(A).

Amendment 4(B) invites comment on whether the enhancements provided by the multiple count rules "are sufficient to ensure appropriately enhanced sentences when peonage, involuntary servitude, or slave trade offenses involve a large number of victims or whether a new specific offense characteristic for a large number of victims is needed." We believe that the multiple count rules ensure appropriate incremental punishment for the number of victims.

Of the seven cases in the past ten years reported on by the Commission's staff, four involved one victim and another involved "several" men.⁴ In the unusual case where a large number of victims are involved, the grouping rules provide additional sufficient punishment to account for the number of victims. Under the grouping rules of § 3D1.2, offenses involving different victims will not group together. Each count involving a separate victim will comprise a separate group. Under § 3D1.4, the combined offense level will result in as much as a five-level increase. If, in a particular case, the increase provided by § 3D1.4 inadequately addresses a large number of victims, the court can depart upwards. "Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be

⁴Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 38-40 (Dec. 2, 1996).

unusual and can be handled by departure from the guidelines." U.S.S.G. § 3D1.4, comment (backg'd.). Because cases involving a large number of victims occur infrequently, we do not believe that a specific offense characteristic is necessary to account for the number of victims.

We appreciate the opportunity to express our views on the proposed emergency amendments and trust that you will give serious consideration to our comments.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hillier II" with a stylized flourish at the end.

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington,
on behalf of the Federal Public
and Community Defenders

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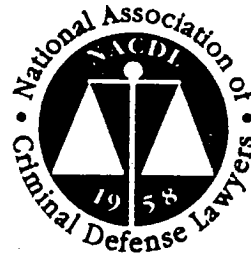
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February 4, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed Emergency Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

We commend you for your forthright attempts to assure that federal sentences "provide just punishment". As you embark on this year's amendment cycle, we ask you to be cognizant that: (a) our rate of incarceration in the United States is the greatest of any civilized nation; (b) federal criminal laws are impacting and being applied disproportionately on minorities; and (c) sentences must be "sufficient, but not greater than necessary" to meet the purposes of sentencing.

Disturbing Rate of Incarceration

First and foremost, we want to express our alarm at the "disturbing state of affairs," to quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, in which our criminal justice system finds itself.

Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial

detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark, mark us as the most penal of civilized nations. . . .

[W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest. . . .

[J]udges on the one hand should not be eager enlists in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. . . .

Richard A. Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advice to judges applies equally well to you, Sentencing Commissioners who have been entrusted with establishing federal sentencing guidelines.

Disparate Application & Impact of Criminal Penalties

Second, we also express alarm at the unwarranted and increasing racial disparity of the prison population. This pernicious reality seems to have developed "between 1986 and 1988" but continues into today.¹ U.S.S.C., Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 82 (1991). This troubling disparity results not merely from a disparate impact but from a disparate application of the harshest federal penalties.

The Commission has reported the disparate racial application of the penalties for federal drug and gun offenses.

The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the

¹ "Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for Hispanics, and to a lesser degree for Blacks." U.S.S.C. Annual Report 46 (1995).

defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum; and to the circuit in which the defendant happens to be sentenced. . . . This differential application on the basis of race and circuit reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.

Id. at ii.

The Commission has also reported the disparate racial impact of the penalties for cocaine use and trafficking. U.S.S.C., Special Report to the Congress: Cocaine and Federal Sentencing Policy 192 (1995) ("To the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.").

We commend you for your forthright actions in discovering, reporting and attempting to correct these injustices. In particular in promulgating the immigration amendments, the Commission should be mindful of the Supreme Court's recognition that there may be unwitting or invidious discrimination against "races or types which are inimical to the dominant group" and that therefore "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds a statute that required sterilization of habitual felony offenders excluding felonies involving embezzling, revenue act violations, and political offenses while including larceny).

We ask you to continue to perform your proper statutory function in leading the fight to eradicate the unwarranted disparate application and impact on minorities of federal sentencing laws.

Just Punishment

Third, we ask you to keep in mind the congressional mandate that sentencing courts must impose "a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing, the first of which is "just punishment". 18 U.S.C. § 3553(a); see also 28 U.S.C. § 991(b)(1)(A). Absent empirical evidence to support increased penalties, the Commission should not devise guidelines that increase the term a convicted person must spend in prison.

Three other matters are also of concern.

Emergency Amendments

We question the Commission's promulgation of emergency amendments when the congressional grant of authority requires only that you promulgate amendments "as soon as practicable". These emergency amendments came at a time when the Commission was already considering a substantial number of issues as it implements its simplification project. The Commission has had less than three months from the passage of the methamphetamine (October 3, 1996) and immigration (September 30, 1996) bills until it voted to publish these emergency amendments at its December 17, 1996 meeting. It is not practicable for the Commission to promulgate amendments if it has not had adequate time to gather empirical evidence and study the issues. Amendments promulgated under the abbreviated emergency procedures lack the reasoned and empirical base necessary to provide certainty and fairness. The Commission's exercise of this emergency authority seems particularly debatable when there has been no Congressional finding that an emergency in fact exists.

The four emergency amendments under consideration illustrate the problem with this abbreviated procedure. In publishing multiple options for a number of the adjustments, the Commission has seemingly selected numbers willi-nilly without any empirical or other reasoned basis. While the power of Congress to make such political judgments as it pertains to criminal laws may be subject to few restraints beyond the will of the electorate, the Commission does not have such unchecked authority. Both by virtue of the enabling legislation and of its function as an agency in the judicial branch, the Commission may act only pursuant to reasoned judgment.

In light of the shortcomings of the abbreviated emergency procedures, we ask the Commission to promulgate only those options that are directly required by the legislation. The Commission should not exceed the congressional directive unless and until the Commission is able to provide due consideration to the issues raised by these amendments.

Vacancies on the Commission

We are troubled that the Commission is undertaking such serious amendments to the sentencing guidelines without its full seven-person membership. Of concern is the fact that the Commission is missing one of its three vice-chairs. Of greatest concern is the fact that at present the Commission has only two federal judges rather than the "[a]t least three" that Congress considered necessary for the proper functioning of the Commission. 28 U.S.C. § 991(a).

The opinion of a single Commissioner, especially a federal judge, speaking with the considered judgment gained from experience, knowledge and wisdom cannot easily be discounted. Indeed, a single Commissioner may well sway the whole Commission on any one or a number of issues. We urge the Commission to defer action on any of the amendments until such time as it at least has three federal judges, appointed by the President and confirmed by the Senate, able to consider and vote on the amendments.

Congressional Directives

Lastly, we are troubled that the increasing use by Congress of specific directives to the Commission threatens to undo the cohesiveness of the sentencing guidelines and thereby undermine the congressional purpose of securing "certainty and fairness, [while] avoiding unwarranted sentencing disparities". 28 U.S.C. § 991(b)(1)(A). Congressional directives are aimed at troubleshooting in limited areas but fail to consider the interrelated complexity of the guidelines which may already account for factors which Congress is attempting to address. Congress established the Sentencing Commission as an expert body to develop sentencing policies and practices. The enabling legislation provides for a dynamic process, permitting fine tuning as warranted by empirical evidence.

We urge the Commissioners to persuade Congressional leaders to refrain from undermining the structure and purpose of the sentencing guidelines through the increasing use of such specific directives. We intend, with other interested individuals, to petition our representatives in Congress on this issue.

Thank you for your consideration of NACDL's concerns. Attached are our particularized comments on the proposed emergency amendments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,



Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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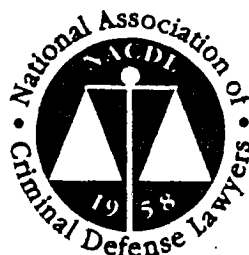
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EXECUTIVE DIRECTOR

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COMMENTS ON THE 1997 EMERGENCY AMENDMENTS

Amendment 1 - § 2D1.11 (Listed Chemicals)

We do not support this amendment because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it.

The amendment increases by two the offense levels for list I chemicals, raising the top of the chemical quantity table to level 30 from level 28. Congress directed the Commission to effect this increase. Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302. Section 302 also raised the maximum penalty from ten to twenty years for offenses under 21 U.S.C. §§ 841(d)(1), (2) and 960(d)(1), (3).

Amendment 2 - § 2L1.1 (Alien Smuggling)

The Commission should amend to meet the statutory directive, not go it one better. In the absence of empirical evidence to support anything more than Congress directed, the higher options would not be reasonable and warranted. The Commission also should not delete provisions currently in effect that are not addressed by the congressional directives. The grant of emergency authority is limited to "promulgat[ing] the guidelines or amendments provided for under" § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.C. The Commission has not been granted emergency authority to delete or amend existing guideline provisions that are not referred to in § 203.

IIRIRA

Section 203(e) of IIRIRA, directs the Commission to (a) increase the base offense level for alien smuggling, (b) increase or create enhancements for the number of aliens, the use of a firearm, causing death or serious bodily injury, creating a risk of such injury, and for offenders with prior felony convictions for similar conduct, and (c) consider other aggravating or mitigating circumstances.

1. Base Offense Level - §§ 2L1.1(a)(1) & (a)(2)¹

The Commission should not raise the base offense level beyond the 3 levels mandated by § 203(e)(2)(A) of IIRIRA. A three level increase would raise the base offense level from 20 to 23 for offenses under § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony."

The Commission should consider that a 3-level increase results in a base offense level for this nonviolent offense that is equal to or greater than that for most violent offenses. E.g., § 2A2.1(a)(2) (base offense level 22 for assault with intent to commit murder, where the object of the offense would not have constituted first degree murder); § 2A2.2 (base offense level 15 for aggravated assault); § 2A3.2 (base offense level 15 for criminal sexual abuse of a minor (statutory rape)); § 2A4.1 (base offense level 24 for kidnapping and abduction); § 2B3.1 (base offense level 20 for robbery).

Section 2L1.1(a)(2), which applies to all other offenses covered under this guideline, would be raised from 9 to 12. The Commission has provided no empirical evidence or other reason why the increase should go beyond what Congress required. Most importantly, offenders who engage in conduct that involves aggravating factors will see their offense level substantially increase as a result of the other congressional directives enacted under IIRIRA.

2. Number of Aliens Smuggled - § 2L1.1(b)(2)

Here also, for the same reasons, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' increase. With respect to the number of aliens smuggled, IIRIRA directs the Commission to "increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 203(e)(2)(B).

We recommend a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment, unduly complicates it and does not follow the congressional directive.

¹ This guideline applies to convictions of offenses under 8 U.S.C. §§ 1324(a) and 1327. Section 1327 makes it a crime to aid or assist certain aliens to enter the United States. Section 1324(a), makes it a crime to unlawfully employ aliens.

Section 2L1.1(b)(2) currently reads:

If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<u>Number of Unlawful Aliens...</u>	<u>Increase in Level</u>
(A) 6-24	add 2
(B) 25-99	add 4
(C) 100 or more	add 6

U.S.S.G. § 2L1.1(b)(2). The following table illustrates our position:

Number of Aliens	Current	NACDL Recommendation (% increase)	Proposed Amendment # of aliens - adjustment - (% increase)
			3-5 - add 1 - (new)
6-24	add 2	add 3 - (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 - (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 - (50%)	100 or more - add 9 - (50%)

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L1.1.

Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 203(e)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. *Id.*

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. *See e.g.*, U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense as a prior, even if the conduct is as dissimilar as obtaining a false work permit for one's own use. *See* 2L2.2. NACDL recommends that only offenses scored under the same guideline, § 2L1.1, would amount to the same or similar conduct.

4. Firearm Enhancements

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others in possessing or using a firearm. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E). As we have previously stated, in this emergency amendment the Commission should restrict itself to the enhancements specifically directed by Congress.

NACDL also opposes the provision that requires imposition of a minimum offense level, if a firearm enhancement applies. Such minimum offense levels are not mandated by the congressional directive and are not used by the Commission in either the robbery or aggravated assault guidelines that contain similar enhancements.

5. Cross-Reference to Murder Guidelines

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances. Imposition of a sentence of life imprisonment is the harshest penalty, short of the death penalty, that a sovereign may impose upon an individual. Under our criminal laws, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive. We believe it corrupts the criminal justice system and our constitutional guarantees to impose such a penalty on the basis that a person committed murder in the absence of a grand jury indictment, the right to confrontation, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

A sentence of life imprisonment pursuant to a cross-reference would certainly amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). In these circumstances, it would violate due process. The Supreme Court has never upheld imposition of such a harsh sentence on the basis of a mere preponderance of the evidence. See United States v. Watts, 117 S.Ct. 633, 637-38 n.2 (1997) (declining to address the issue under the circumstances of that case but acknowledging divergence of opinion among the Circuits as to whether due process prohibits imposition of a dramatically increased penalty on a preponderance standard).

Furthermore, IIRIRA does not direct the Commission to provide for a cross-reference to the murder guideline. The Commission should certainly not undertake such an enhancement under an emergency amendment.

6. Other Adjustments for Death, Bodily Injury and Risk of Injury

IIRIRA also does not direct a sentencing enhancement on the basis of vicarious liability. It directs an enhancement only where the bodily injury or death was caused by the defendant, himself. Section 203(e)(2)(E) provides in pertinent part:

(2) [T]he Commission shall . . .

(E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--

(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;

(ii) uses or brandishes a firearm or other dangerous weapon; or

(iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

The Commission should cap the cumulative effects of the weapons and injury enhancements. As proposed, depending on the option chosen, a defendant's offense level may be increased by as many as 14 levels where the offense results in injury short of death (discharge of a firearm, recklessly creating risk of serious bodily injury, permanent bodily injury). This represents a substantial increase, even for a first offender, if the applicable base offense level is 23. (OL 23 & CH I = 46 to 57 months; OL 37 (23 + 14) & CH I = 210 to 262 months). If any of the other enhancements apply, the numbers would be that much greater. The Commission should keep in mind that, as proposed, these substantial penalties would apply to a defendant who would be vicariously liable for the acts of others even if he or she did not personally handle a firearm or cause the injury.

Lastly, the commentary defining "reckless conduct" is too broad. It encompasses behavior such as "transporting persons in the trunk ... of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded ... condition." Proposed application note 9. This definition includes conduct that is typical for the offense -- smuggling, transporting, or harboring unlawful aliens -- in its simplest form. As such it is inconsistent with the structure utilized by the Commission in other guidelines. It is particularly inappropriate to add a specific offense adjustment for such conduct when the base offense level for this offense is relatively high.

7. Downward Adjustments - § 2L1.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2)". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 203 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to replace the existing § 2L1.1(b)(1) adjustment with the one suggested by Congress where the "offense is a first offense and involves the smuggling only of the alien's spouse or child." IIRIRA, § 203(e)(2)(F). The existing adjustment and the one suggested by Congress address different mitigating factors. The former could involve other family members or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted. Also, the existing adjustment applies only to the less serious offenses covered under § 2L1.1(a)(2).

Furthermore, Congress did not provide the Commission emergency authority to delete this provision.

NACDL recommends that the Commission add the downward adjustment identified by Congress but leave untouched the existing adjustment. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels. If the adjustment were found to be applicable, the base offense level under the emergency amendment would be decreased from 12 to 8, maintaining the 1/3 reduction.

8. Upward Adjustment for a Previously Deported Alien

NACDL opposes this new upward adjustment (§ 2L1.1(b)(7)). This adjustment potentially may cause triple counting of a prior offense if the deportation involved a prior conviction. It also is not warranted in light of the relatively high base offense level vis a vis violent offenses. As it is not directed by Congress and there is no empirical evidence that it represents a factor requiring emergency attention by the Commission, it should not be promulgated.

Amendment 3 - §§ 2L2.1 & 2L2.2 (Immigration Document Fraud)

Many of the comments made with respect to emergency amendment 2 apply with equal force to emergency amendment 3.

1. Base Offense Level - § 2L2.1²

The Commission should not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. There is no empirical evidence to support a greater increase during this emergency cycle. The base offense level would increase from 9 to 11. Other enhancements directed by Congress would enhance the sentence for those offenders engaging in more aggravated conduct.

² As it pertains to this amendment, these guidelines apply to convictions for offenses under 18 U.S.C. §§ 1028(b)(1) (fraudulent use of government-issued documents), 1425 (unlawful procurement of citizenship or naturalization), 1426 (fraudulent naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (issuance of passport without authority), 1542 (false statement in application or use of passport), 1543 (forgery or false use of passport), 1544 (misuse of passport), and 1546(a) (fraud and misuse of visas, permits, and other documents).

2. Number of Documents - § 2L2.1(b)(2)

Here also, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' suggested increase. With respect to the number of documents involved in the offense, IIRIRA directs the Commission to "increase the upward adjustment by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 211(b)(2)(B).

NACDL recommends a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment and disproportionately increases it for the mid-level offenders.

The following table illustrates our point.

Number of Documents	Current Adjustment	NACDL Recommendation (% increase)	Proposed Amendment # of docs - adjust - (% increase)
-	-		3-5 - add 1 - (new)
6-24	add 2	add 3 (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 (50%)	100 - add 9 - (50%) or more

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L2.1. Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 211(b)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. *Id.*

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. *See e.g.*, U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense covered by U.S.S.G. § 2L as a prior, even if the conduct is dissimilar. NACDL recommends that only offenses scored under the same guideline, § 2L2.1, would amount to the same or similar conduct.

4. Downward Adjustments - § 2L2.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 211 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to amend the existing § 2L2.1(b)(1) to require in addition that the defendant not have been convicted of a prior immigration offense. Because of the double counting directed by Congress for priors (as part of the offense level in addition to the criminal history), this additional impediment based also on a prior offense would amount to triple counting of the prior conviction. No other offenses, except perhaps, obstruction of justice impose such triple counting of a single aggravating factor. The existing adjustment and the one proposed as option 2 (if the documents relate only to the defendant's spouse or child) address different mitigating factors. The existing one which requires that the defendant have committed the offense other than for profit could involve family members (other than a spouse or child) or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted or be limited if a prior conviction exists.

NACDL recommends that the Commission not amend the existing adjustment for offenses committed other than for profit. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels.

NACDL also recommends that the Commission amend § 2L2.1 to provide an additional adjustment if the offense involved documents related only to the defendant's spouse and child.

5. Base Offense Level - § 2L2.2

NACDL recommends, for the reasons previously stated, that the Commission not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. This would result in a base offense level of 8 from the existing 6.

6. Enhancement for Prior Similar Convictions - § 2L2.2(b)(2)

NACDL opposes both options proposed by this amendment, for the reasons stated with respect to emergency amendments 1 and 2. The proposed amendment is harsher than necessary to comply with the congressional directive. In recognition of the double counting of the prior convictions, (as a basis for increasing both the offense level and the criminal history), the Commission should amend to provide a 1-level enhancement for a single prior and a 2-level enhancement for two priors.

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The proposed amendment also contains an unduly broad definition of similar prior conduct. NACDL urges the Commission, in keeping with the manner in which double-counted criminal history is scored in those few guidelines where it occurs, to adopt the enhancement only for true recidivists.

Conclusion

NACDL appreciates this opportunity to provide our comments to the Commission. We urge each Commissioner in considering the proposed amendments to be guided by the mandate in 18 U.S.C. § 3553(a) that sentences should be "sufficient, but not greater than necessary" to provide just punishment.



U. S. Department of Justice

Criminal Division

#970002722

Washington, D.C. 20530

February 4, 1997

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the emergency sentencing guideline amendments recently proposed by the Sentencing Commission in the areas of List I chemicals, alien smuggling, document fraud, and involuntary servitude.

LIST I CHEMICALS (AMENDMENT 1)

Amendment 1 amends guideline section 2D1.11 to increase the penalties for List I chemicals involved in certain violations of the laws regulating chemicals used in the manufacture of controlled substances. The amendment generally raises the offense level by two levels for the most serious chemical violations, such as possessing a listed chemical with intent to manufacture a controlled substance or with knowledge or reasonable cause to believe it would be so used. The increase is mandated by section 302 of the Comprehensive Methamphetamine Control Act of 1996.

The proposed two-level increase in offense levels satisfies the Congressional directive with one exception. At offense level 12 in the proposed Chemical Quantity Table (the lowest level in the table under section 2D1.11), the amendment would result in no increase in offense level for many quantities of the listed chemicals previously subject to this offense level. No mention is made of this exception in the explanation of the amendment. As reflected in the proposed amendment, for example, less than 2.7 kilograms of anthranilic acid would result in offense level 12. The same result would exist under the current guideline, which provides level 12 for less than 3.6 kilograms of the substance.

It is true that the proposal provides a two-level increase from level 12 to 14 for the upper end of the range of List I

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chemical quantities previously sentenced at level 12 -- e.g., 2.7 to 3.6 kilograms of anthranilic acid.¹ Apparently, the chemical quantities previously assigned to offense level 12 for anthranilic acid and other List I chemicals were split between levels 12 and 14 in the proposal so that only the upper end of the range was increased to the higher offense level. However, this approach does not comport with the Congressional mandate to increase the offense levels by at least two for List I chemicals for the offenses covered by guideline section 2D1.11. No exception was provided for small quantities, and if such an exception is needed, it should be sought from Congress.

Since Congress provided that a two-level increase is the minimum appropriate, we recommend that the Commission study the effect of the proposed two-level increase during the next year to determine whether offense levels are sufficient for the affected offenses. The gap between a controlled substance offense and the relevant chemical offenses may continue to be too great.

ALIEN SMUGGLING (AMENDMENT 2)

Amendment 2 amends guideline section 2L1.1 on smuggling, transporting, or harboring an unlawful alien. It responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. We generally agree with the proposed amendment and have the following comments on specific issues it raises.

We strongly agree with the proposed narrowing of subsection (b)(1), which replaces the current three-level reduction for offenses committed other than for profit with a two- or three-level reduction if the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child. The current reduction is subject to overuse and does not correctly identify the least serious class of alien smugglers since an offender can transport or smuggle numerous aliens or otherwise engage in serious conduct even if not for profit. Moreover, what constitutes profit can be difficult to assess in some cases. The proposed amendment of subsection (b)(1) more appropriately identifies those smugglers who engage in the least serious offenses.

The proposed amendment of subsection (b)(1) presents a choice of either a two- or three-level reduction. We believe that the greater reduction would be appropriate if the Commission were to select more than a three-level increase in the base offense level. In addition, we urge the Commission to retain the

¹ Curiously, 3.6 or more kilograms of anthranilic acid (which should be increased from level 14 to 16) seem to be absent altogether from the proposed table.

limitation on the reduction currently found in subsection (b)(1) -- namely, that it should apply only if the base offense level is determined under subsection (a)(2) for ordinary smuggling and related offenses. By contrast, a base offense level determined under subsection (a)(1) indicates that the defendant's violation involved an alien who was previously deported after a conviction for an aggravated felony. The reduced sentence should not be available for smuggling, transporting, or harboring such an alien, even if such a person is a close relation of the defendant's.

Subsection (b)(3) concerns the proposed enhancement for prior convictions for an immigration and naturalization offense, as mandated by the new immigration law. The amendment presents two options. We urge the Commission to select Option 2, which we believe more closely reflects the statutory directive. The directive requires an enhancement if the defendant had one or two prior felony convictions arising out of a separate and prior prosecution for conduct similar to that involved in the current offense. Option 1 limits the application of the enhancement to a case in which the defendant engaged in the new conduct subsequent to a conviction for the prior conduct. We see no reason for this limitation and do not believe that the statutory directive contemplated it. As long as the conviction occurred before the current sentencing and related to a separate transaction, there is an appropriate basis for enhancing the current sentence to reflect the defendant's recidivist tendencies.

Subsection (b)(4) concerns the possession or use of a weapon in connection with alien smuggling. The Commission has included two options. One is that the defendant must have discharged or used the weapon, while the second is that another person may have done so. However, commentary language in proposed Application Note 7 provides that if it is another person, the defendant must be aware of the presence of the firearm.

We disagree with creating what amounts to a special relevant conduct rule for firearms use in connection with alien smuggling and related offenses. The normal relevant conduct rules should operate since a special rule would unnecessarily complicate the guidelines and cause a great deal of litigation. Moreover, we see no policy basis for a narrower approach to addressing the conduct of others for this offense as compared to other offenses in which firearms are used. If the normal rules apply, the defendant's potential responsibility for another person's firearms use would be the same for this offense as for robbery. That is, section 1B1.3(a)(1)(B) of the guidelines would operate to make the defendant liable in the case of jointly undertaken criminal activity for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" Similarly, the defendant would be

responsible for acts and omissions that he or she aided, abetted, counseled, or commanded, as provided in section 1B1.3(a)(1)(A).

The proposed amendments also address recklessly creating a substantial risk of death or serious bodily injury to another person. This enhancement is extremely important because of the dangerous situations sometimes created in alien smuggling and related violations. Option 2 is preferable to Option 1 since Option 2 seems to provide a cumulative, rather than an alternative, enhancement to the risk created by a weapon. A cumulative enhancement is needed unless the risk of death or serious bodily injury arises only because of the weapon. As Option 1 is drafted, an offender who brandished a weapon at one individual but also created a separate risk by transporting others in the trunk of a car would receive the same sentence as one who only brandished a weapon.

We also have several concerns with respect to proposed changes in the commentary to guideline section 2L1.1. Application Note 5, as amended, provides that if the offense involved more than 400 aliens, an upward departure may be warranted. This note previously allowed for upward departure in the case of substantially more than 100 aliens. The proposed amendment represents too great a gap between the enhancement for 100 aliens and the number required for an upward departure. For example, a court should be able to consider the possibility of an upward departure when 300 aliens are involved. We strongly recommend retaining the current language involving "substantially more than 100 aliens" for purposes of this departure.

Another problem with Application Note 5 is that it eliminates a useful basis for upward departure previously authorized -- inhumane treatment of aliens. It is not uncommon for defendants to subject smuggled aliens to demeaning living conditions. District courts should maintain their ability to enhance the sentence of a defendant who treats a smuggled alien in an inhumane manner, even if no substantial risk of death or serious bodily injury results.

With respect to Application Note 9 concerning the enhancement for risk of death or serious bodily injury, we suggest deleting "may include" and inserting "includes" in the second sentence so that it reads as follows: "Such conduct includes, but is not limited to, transporting persons in the trunk or engine compartment of a motor vehicle" If the defendant engaged in any of the types of conduct specified, the enhancement should apply. However, because of the word "may" in the proposed language, a court may conclude that it need not apply the enhancement in the situations listed.

Proposed Application Note 10 includes a definition of an "immigration and naturalization offense" as any offense covered

by Chapter 2, Part L. We suggest that this definition be modified to add any related offense under state or local law.

We also recommend the inclusion of language regarding another basis for departure from the guidelines: the defendant's knowing involvement in smuggling, transporting, or harboring an unlawful alien who engages in, or intends to engage in, unlawful activity upon arrival in this country. Certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. However, such smugglers generally have not engaged in conduct that would result in conviction for conspiring to traffic in narcotics. An alien smuggling or related offense in such circumstances should result in a Commission-sanctioned upward departure.

NATURALIZATION OR CITIZENSHIP DOCUMENT FRAUD (AMENDMENT 3)

Amendment 3 amends sections 2L2.1 and 2L2.2 of the guidelines regarding trafficking in, or fraudulently acquiring, documents relating to naturalization, citizenship, or legal resident status, or a United States passport. This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Subsection (b)(1) of section 2L2.1 includes two options for a reduced sentence. The first retains the current reduction for offenses committed other than for profit but adds a limitation that the defendant must not have been convicted of an immigration and naturalization offense prior to the commission of the new offense. The second option limits the reduction to cases involving documents only related to the defendant's spouse or child. We prefer Option 2 since the reduced sentence would not be appropriate in all cases of not-for-profit offenses. For example, committing document fraud to assist numerous aliens who enter unlawfully, even if not for profit, should not result in a reduced sentence.

Sections 2L2.1(b)(4) and 2L2.2(b)(2) provide two options for an enhancement if the defendant had one or two prior convictions for an immigration and naturalization offense. We prefer Option 2 for the reasons set forth in our discussion of Amendment 2 above on the same issue in the alien smuggling guideline.

Proposed Application Note 5 to section 2L2.1 and Note 3 to section 2L2.2 define "immigration and naturalization offense." The amendment we suggested above in the alien smuggling guideline should also apply to the definitions in these guidelines.

We also urge the Commission to include upward departure language in section 2L2.1 for offenses involving substantially more than 100 documents. Without such language a court may

conclude that the quantity of documents has been adequately considered by the Commission and that upward departure is not warranted even for hundreds of documents.

PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE (AMENDMENT 4)

Amendment 4 revises section 2H4.1 substantially and responds to a directive in section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Two key aspects of the directive are: 1) the reduction or elimination of any unwarranted disparity between the sentences for servitude offenses and the sentences for kidnapping and alien smuggling; and (2) the assurance of guidelines that are stringent enough to deter servitude offenses and adequately reflect their heinous nature.

In our view involuntary servitude and related offenses are very similar to kidnapping and should result in offense levels that are similar. Of course, some minor variation is necessary to reflect certain differences, such as the long period of time during which a servitude offense is likely to endure.

Several base offense levels are proposed, beginning with 18 and ending with 24. We strongly support level 24, which is the base offense level for kidnapping. See §2A4.1. If the Commission adopts base offense level 24, the lower offense levels for serious or life-threatening bodily injury in proposed subsection (b)(1) would be appropriate.

Assuming base offense level 24 is selected, the lower option (2 levels) for use of a dangerous weapon in proposed subsection (b)(2) would be consistent with the kidnapping guideline and adequate for peonage offenses.

Under proposed subsection (b)(3), which deals with the length of servitude, the high options provided are most appropriate since they most accurately reflect the seriousness of the conduct. For example, an increase of five levels is needed to reflect the seriousness of an involuntary servitude offense that lasts more than one year. In this regard, involuntary servitude and related offenses are distinguishable from kidnapping, which typically has a shorter duration, and the proposal reflects this distinction by including longer time periods than in the kidnapping guideline. The highest adjustment for length of time in that guideline is two levels if the victim is not released before 30 days have elapsed. Thus, it is appropriate to start with a three-level enhancement under the proposed amendment of the servitude guideline for cases in which the victim is held for more than thirty days and to increase in accordance with the high options presented for longer periods.

Proposed subsection (b)(4) concerns other offenses committed during the commission of, or in connection with, the servitude, peonage, or slave trade offense. As proposed, it only provides a two-level increase above the offense level otherwise determined under the amended guideline or above the offense level from the offense guideline applicable to that other offense. The kidnapping guideline provides a four-level increase. The two-level increase proposed for the servitude guideline is inadequate and would result in unwarranted disparity with the kidnapping guideline.

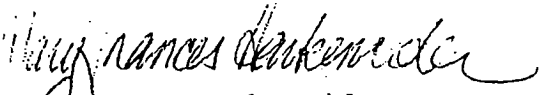
We note that the proposal fails to provide an enhancement for cases in which the victim is a minor. The kidnapping guideline includes a three-level enhancement where the victim was a minor and, in exchange for money or other consideration, the victim was placed in the care or custody of another person who had no legal right to such care or custody of the victim. §2A4.1(b)(6). A similar enhancement should be included in the servitude guideline since an offense involving the enslavement of a minor is particularly serious.

We also recommend several revisions to the proposed commentary to section 2H4.1. The term "dangerous weapon" in proposed Application Note 3 should be defined in terms that are appropriate to slavery and related cases. Since the essence of such a case is forced incarceration, implements used to enslave should be included in any sentence calculated under these guidelines. Thus, any device capable of causing injury to prevent or deter escape, such as razor wire or guard dogs, should be incorporated into this definition.

The proposed amendment includes upward departure language for cases involving the holding more than 10 victims. In addition, there is an issue for comment concerning the portion of the statutory directive requiring the Commission to ensure that the guidelines reflect the general appropriateness of enhanced sentences for cases involving a large number of victims. We believe that upward departure language is not sufficient to meet the directive. Nor are the current multiple count rules, which provide no increase in the sentence if there are more than six counts. See §3D1.4. A guideline increase is needed to address large number of victims, but such increase should be devised in such a way as not to defeat the operation of the multiple count rules where there are six or fewer victims.

We would be pleased to provide assistance in the further development of the guidelines discussed.

Sincerely,


Mary Frances Harkenrider
Counsel to the Assistant
Attorney General



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February 4, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

I am writing in response to the published "emergency amendments" on guideline §2L1.1, on behalf of the Committee on Criminal Law. I also have a personal interest in immigration cases, based on handling countless cases of this kind for over seventeen years.

In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. The combination of those factors means that they are usually very poor witnesses. Because they have been dealt with by many persons along the transportation chain, usually under clandestine conditions, they often cannot identify defendants and give testimony inconsistent from other material witnesses or from what they have allegedly told Border Patrol agents at the time of their own arrest.

The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial

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Detainees has become a major problem for the Marshals Service--in absolute numbers, in medical needs, and in transportation needs.

It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings. In fact, often the defendant is himself an undocumented alien selected by the "coyote" to drive or guide the group for a discounted fee. Moreover, at a time when the Commission is rethinking quantity-driven guidelines in narcotics cases, it should be slow to make quantity-driven increases in this area. Even more than with narcotics, the number of aliens being transported often has little bearing on the degree of culpability of the defendant.

We would also urge you not to abandon the "not for profit" language of §2L1.1(b)(1). There are many cases of defendant's helping relatives other than a spouse or child. In that connection, however, at some appropriate time it would be useful to clarify that this language does not refer to whether the defendant personally expected to profit but rather whether the transported or harbored aliens were paying someone for this service, as distinguished from directly working with a close friend or relative. Frequently I encounter cases where it is undisputed that a purely commercial venture was afoot, but there is no evidence that the particular defendant driving or guiding the group was directly receiving any money.

In sum, we realize you have no choice with respect to certain changes, but we urge great caution in going beyond the Congressional mandate.

Thank you for your consideration of these suggestions.

Sincerely,



cc: Commissioner Michael S. Gelacak
Commissioner Wayne A. Budd
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
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February 4, 1997

Dear Mr. Courlander:

Enclosed, please find the American Bar Association's comments with regard to the emergency amendments proposed by the United States Sentencing Commission, pursuant to 61 C.F.R. 152-198.

Sincerely,

Alan J. Chaset
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Mary Lou Soller
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Enclosure

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AMERICAN BAR ASSOCIATION

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COMMENT OF

THE AMERICAN BAR ASSOCIATION

to

THE UNITED STATES SENTENCING COMMISSION

on

PROPOSED EMERGENCY AMENDMENTS TO
THE FEDERAL SENTENCING GUIDELINES

February 4, 1997

[46]

Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines. The members of this committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists.

On January 2nd of this year, the Commission published notice of proposed temporary emergency guideline amendments which increase and/or impose penalties for certain offenses. The notice requested public comment from interested parties. On behalf of our Committee, the Criminal Justice Section, and the American Bar Association, please accept the following brief remarks as our response to that publication and that request.

In that regard, our principal policy directive on these matters can be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18-2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18-4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

As opposed to the changes to U.S.S.G. §§2L1.1, 2L2.1 and 2L2.2 initiated in response to the Illegal Immigration Reform and Immigration Responsibility Act of 1996, we recommend that the base offense levels in each instance be increased by the least amount required by the applicable legislative directive. As to that issue and the options presented in the proposals, we believe that the Commission bears the burden of justifying any additional increases. Since no data supporting the need for something more onerous has been offered and without any other rationale or argument provided to explain or support the larger increases, we conclude that this burden has not been met.

As to the options for enhancing the now increased base offense levels for offenders with prior records for the immigration and naturalization offenses, we recommend Option 1 in each instance. We believe that these options are fairer, more responsive to the legislative directive and more consistent with other aspects of the guidelines. And as to the various other specific offense characteristic enhancements, in the absence of data or a documented rationale, we can only recommend that option or that point in the enhanced range that would result in the less severe alternative.

Next, as regards the proposed downward adjustments where the offense involves the smuggling of only the alien's spouse or child, we recommend that the Commission permit a decrease in each instance equal to the base level increase discussed above.

Next, as to the proposed changes to U.S.S.G. §2H4.1 similarly initiated in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, we again feel that the Commission has not met its burden of justifying anything more than the minimum increases in either

the base offense level and/or the various specific offense characteristic increases. Thus we recommend the adoption of the least severe alternatives.

Finally, as regards the request for comment on the need for some additional amendment to better address those instances where the peonage, involuntary servitude, slave trade offense involve a large number of victims, please permit us to respond first that we do not possess nor have we been provided with enough information about these crimes and the difficulties they have presented to the sentencing courts in order for us to answer in a useful or intelligent fashion. Without an indication or evidence that the current mechanisms for dealing with unusual facts or atypical circumstances do not function well for these offenses and without data indicating that the number of victims is sufficiently remarkable to necessitate the development of a specific offense characteristic here, there should be no need to treat them any differently and no need to amend the guideline here any further.

Having said that, permit us to conclude that we remain uncomfortable with the emergency amendment process in general and its use in these four amendment circumstances in particular.¹ We do not understand why the Congress singled out these guideline changes for the more immediate reaction by the Commission and we do not appreciate the rationale for addressing these matters outside the normal amendment cycle. We recognize the increased burden these directives place on the Commission and would support any effort to communicate that problem to the appropriate committees of the Congress.

Thank you for this opportunity to comment.

¹We are offering no comment on the proposal to increase the base offense levels for offenses involving list chemicals pursuant to the Comprehensive Methamphetamine Control Act of 1996.



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February 21, 1997

Honorable Richard P. Conaboy
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Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment regarding conflicts among the circuits, for the 1997 amendment cycle. The Committee will be sending another written response on other published amendments and issues in early March. While the Committee recommends that the Commission resolve all circuit splits, at a minimum we strongly recommend that the Commission resolve during this amendment cycle those splits listed below as priorities.

The Sentencing Commission should resolve conflicts among the circuits to minimize unwarranted disparity, which is a goal of the Sentencing Reform Act, and also to minimize unnecessary litigation. It is also only logical for the Commission to resolve conflicts on the definition of terms or application of procedures which the Commission itself has created. The Sentencing Commission is statutorily directed to monitor the application of the guidelines and to resolve those conflicts among the circuits which it is capable of resolving. This statutory mandate

February 25, 1997

was reaffirmed by the Supreme Court in United States v. Braxton, 111 S.Ct. 1854 (1991), as a reason why that court would not scrutinize such conflicts as closely as it does in other areas of law.¹

Having been urged to narrow our list of recommendations regarding circuit conflicts, we are submitting a "top ten" list of conflicts which we urge the Commission to resolve. Most of these conflicts relate to Chapter Three or Four guidelines, and therefore affect most sentencings. Furthermore, all involve a fairly easy resolution that does not involve major policy decisions.

In each of the circuit conflicts listed there are several, if not many, circuits yet to resolve the issue. Rather than wait until all circuits attempt to determine what the Commission meant by its terms and procedures, the Commission should take action to resolve the controversy and prevent further litigation. The Commission's resolution of the ten conflicts listed below would avoid litigation in literally hundreds of district courts and numerous appellate courts, which would otherwise need to litigate the issues involved.

The Commission has asked for suggested resolutions to the conflicts. Where the Commission staff has suggested a resolution, we are recommending that the Commission adopt the proposed published resolutions. For the remaining conflicts, we have proposed the resolution which either most closely conforms to the Commission's probable intent, or what is most consistent with the application of the guidelines.

We also believe that resolution of some of the listed conflicts would have additional administrative or policy benefits. For example, clarification regarding the fine for costs would, in addition to resolving a conflict, clear up confusion about the nature of that basis for a fine when offenders are also asked to contribute to the cost of supervision services. The conflict regarding application of retroactive amendments would, in addition to resolving a conflict, avoid sentences being reduced below time served, thereby eliminating the administrative problem regarding the "prison credit" created by such an application. That resolution also clarifies the discretionary nature of such applications and helps defend against unnecessary collateral motions by confirming that the original sentence was not an "illegal" sentence. The suggested resolution to the conflict regarding escape from a federal prison camp would help provide deterrence for escapes from such facilities, where most federal escapes occur.

¹ The Court said, "in charging the Commission 'periodically [to] review and revise' the guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." 111 S.Ct. 1854, 1858 (citing 28 U.S.C. §994(o)). The Court went on to indicate that because the Commission is charged with this role, the Court would be more "restrained and circumspect" in using its certiorari power to resolve circuit conflicts on sentencing matters. *Id.*

A. Published Amendments Which Resolve Circuit Conflicts:

1. Amendment # 11: Application of retroactive amendments.

We ask the Commission, as a proper exercise of its authority pursuant to 28 U.S.C. §994(u), to adopt published amendment 11, with one suggested addition. This amendment would be very helpful in clearing up several sources of ambiguity regarding the application of retroactive amendments. First, it clarifies that application of such amendments is discretionary with the court. Next, it more closely conforms the policy statement to the statute, by stating that such amendments can only be applied to a term of imprisonment, and not to any other component of the sentence - such as a period of supervised release. This helps to resolve several issues frequently raised and litigated. We suggest an additional phrase be added which would clarify that such amendments are applicable only to a term of imprisonment for the original offense, which would resolve the ambiguity which allowed a recent circuit court to hold that such amendments could be applied to a term of imprisonment for revocation of release.

Finally, and perhaps most importantly, the amendment specifies that courts are only authorized to apply such amendments to reduce a term of imprisonment down to the amount of time already served, and not below that time, thereby avoiding the generation of prison credit, which can create administrative problems for the courts.

2. Amendment # 14: Express threat of death.

We ask the Commission to adopt the published proposed amendment regarding "express threat of death" in §2B3.1 for robbery offenses. The amendment clarifies the operation of the guideline to include inferred threats. This is not only a logical resolution for this issue, but it is also the majority view of the circuits which have already litigated the issue.

3. Amendment # 17: Underlying offense.

We ask the Commission to adopt the published proposed amendment which clarifies how courts should compute the "underlying offense" for certain offenses. The proposed resolution is logical as well as consistent with the application of the guidelines in general, which focus on the conduct for which the defendant was convicted.

4. Amendment #27: Controlled substance offense/career offender.

We ask the Commission to adopt the published proposed amendment regarding the career offender guideline. The proposed amendment resolves a circuit conflict by including in the career offender definition of "controlled substance offense," an offense of possessing a listed chemical with intent to manufacture a controlled substance. This is a logical resolution, consistent with other applications of the guidelines. The amendment also clarifies the guideline regarding "crime of violence," and makes other non-substantive, conforming amendments to the same guideline.

5. Amendment #23: Obstructive Conduct.

We ask that the Commission adopt the published proposed amendment, which resolves a circuit conflict and clarifies and conforms the operation of the obstruction guideline in several significant ways. This is precisely the kind of change that only the Commission can make, and which prevents litigation and confusion.

B. Circuit Conflict Issues Published for Comment in Amendment #28:

6. Item 4 of Amendment 28: Whether a minimum security prison camp is a "similar facility" to a halfway house under §2P1.1(b)(3), in order to qualify for a downward adjustment.

Resolution of this conflict would provide clarity and uniform application of the guideline regarding escape from prison. We recommend a resolution that would provide that a minimum security prison camp is not a "similar facility" for purposes of the §2P1.1(b)(3) downward adjustment, in keeping with the majority position of the circuits. Also, we understand that nearly all federal prison escapes take place from such facilities (and from halfway houses). Preventing a downward adjustment for escapes from prison camps would assist in deterring escapes from such camps.

7. Item 8 of Amendment 28: Whether a sentence to a community confinement center, halfway house or drug treatment center qualifies as "imprisonment" under §4A1.2(e)(1).

This conflict affects the criminal history computation of numerous cases. Its resolution would, therefore, significantly assist uniformity of application and avoid unwarranted disparity. We recommend that the Commission seek a resolution which would be consistent, to the extent possible, with the Bureau of Prisons' treatment of time spent in a halfway house as "prison" credit.² In general, the BOP procedure is that, service of time in a halfway house is not treated as "prison" credit if such time is spent as a condition of supervision, but such time is treated as "prison" credit by the BOP if it is spent as a result of a direct commitment as part of the sentence (either original or upon revocation), or as a result of BOP designation for the last portion of a prison sentence.

8. Item 10 of Amendment 28: Whether a court may impose a fine for costs of supervision or imprisonment under §5E1.2(i) when it has not imposed a punitive fine under §5E1.2(c).

We ask the Commission to eliminate §5E1.2(i) as an "additional" basis for a fine and convert it to a factor under §5E1.2(d) for determining a punitive fine under §5E1.2(c). This would avoid not only the circuit conflict, but would also avoid the potential recurrence of another conflict on the

² The Supreme Court recently upheld the BOP's treatment of such time and resolved a similar circuit split. Reno v. Koray, 115 S.Ct 2021 (1995)

issue.³ Such an additional fine provision is seldom needed, because there are very few defendants who can pay the full punitive fine, much less another, separate fine amount based on costs. When a fine is deemed appropriate, however, some courts prefer to base the amount of fine, at least in part, on the estimated cost of defendant's incarceration. The result, nevertheless, is still one fine and the separate provision in (i), with its "additional" language, serves no useful purpose and only serves to generate confusion and litigation.

9. Item 6 of Amendment 28: **Whether "victim of the offense" under §3A1.1 refers only to a victim of the offense of conviction or also to a victim of the relevant conduct.**

We ask the Commission to clarify that guidelines §§3A1.1, 3A1.2, and 3A1.3 refer to a victim of the relevant conduct of the offense, as defined in §1B1.3. This is the majority view, and is consistent with other Chapter Three adjustments. Resolution now would avoid further litigation in the remaining circuits. Three cases in the opposing circuit have been a potential source of confusion and litigation in courts in the remaining circuits.

10. Item 15 of Amendment 28: **Whether the definition of "non-violent offense" for purposes of §5K2.13 (Diminished Capacity) is consistent with the definition of "crime of violence" under §4B1.2.**

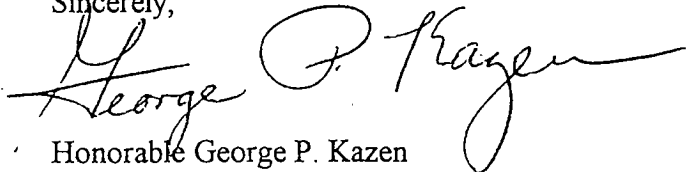
Section 5K2.13 provides for a possible departure if the defendant committed a "nonviolent offense" while suffering from certain mental incapacities. The lack of definition of a "non-violent" offense in §5K2.13, such as exists in the commentary for §5K2.17, has led a minority of the circuits to conclude that perhaps the Commission intended the criteria for "non-violent offense" in §5E2.13 to be different than the criteria for "violent offense" under §4B1.2. Most probably, the Commission intended the definitions in 4B1.2, §5K2.17, and §5K2.13 to be consistent with each other. We recommend that the Commission change the term in §5K2.13 to an "offense other than a violent offense" and/or provide an explanatory commentary note, as it did for §5K2.17.

³There was a circuit conflict on whether there was statutory authority to impose a fine based on costs, which may have been settled, at least as to whether it can be a factor of the punitive fine, with the statutory addition in September 1994, of 18 U.S.C. § 3572(a)(6), allowing costs to be a factor considered in the imposition of the fine. While it is likely that the statutory amendment will also support a separate and additional fine amount too, it has not yet been determined to be so.

Page 6
February 25, 1997

As always, we appreciate the Commission's consideration of our submissions.

Sincerely,

A handwritten signature in cursive script, reading "George P. Kazen". The signature is written in dark ink and is positioned above the printed name.

Honorable George P. Kazen
Chairman

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Eunice Holt-Jones, Chief, Federal Corrections and Supervision Division, AO

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Honorable George P. Kazen
Chair

March 6, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment for the 1997 amendment cycle. Our comments are brief, in recognition of the fact that the Commission has decided to not enact substantive amendments beyond some circuit splits or conforming amendments, due to the number of amendments necessary to implement new legislative provisions at this time. The Commission has, nevertheless, indicated its desire to receive comment on pending issues, and it is primarily to that end that we direct most of the following comments. All of the proposed amendments we discuss are, in our view, worthy of continued serious efforts toward passage next year. We also urge the Commission to do whatever might be possible this year, beyond implementing legislation and some circuit splits, to improve the system where it is clear that it should be done.

A. Circuit Conflicts

The Sentencing Commission has a responsibility to resolve conflicts among the circuits, in order to maximize uniformity of guideline application and to minimize disparity and unnecessary litigation. These reasons, in themselves, are sufficient justification for the Commission to resolve circuit conflicts on an ongoing basis, to do what it can to ensure the smooth and uniform application of the guidelines with the least litigation possible.

We ask the Commission to resolve those circuit splits we cited in our February 21, 1997 letter, and to also adopt any other conforming or clarifying amendments it deems useful for the operation of the guidelines, in compliance with its statutory task of monitoring the application of the guidelines and clarifying those conflicts and confusions that arise, where possible. We list below those published circuit conflicts that we ask the Commission to prioritize for resolution this year:

1. Amendment # 11: **Application of retroactive amendments.**
2. Amendment # 14: **Express threat of death.**
3. Amendment # 17: **Underlying offense.**
4. Amendment #27: **Controlled substance offense/career offender.**
5. Amendment #23: **Obstructive conduct.**
6. Item 4 of Amendment 28: **Definition of facility "similar facility" to a halfway house**
7. Item 8 of Amendment 28: **A sentence to a community confinement center as prison**
8. Item 10 of Amendment 28: **The fine for costs of supervision or imprisonment**
9. Item 6 of Amendment 28: **"Victim of the offense" under §3A1.1**
10. Item 15 of Amendment 28: **Definition of "non-violent offense" in §5K2.13**

B. Acceptance of Responsibility

We have urged, and continue to urge, the Commission to reform the acceptance of responsibility guideline by "de-linking" the third point from the first two points, to bring a greater degree of certainty to the first two points when the defendant enters a plea, and to allow the court to exercise its discretion, based on a totality of the circumstances, to award the third point reduction to those defendants who not only enter a plea, but do something in addition, *i.e.*, the "plea-plus" situation.

The published amendment was a step in that direction, but we have come to realize that a simpler version would better serve the system. We have discussed among ourselves and with others, including the judicial advisory group and members of the Commission, to more clearly focus on what should be changed, and to change only that, and no more, of the current guideline. We are very close to completing a proposal that we believe would be well received, but some minor fine-tuning still needs to be done. In light of the shortness of time remaining in this cycle, and in light of the low probability that the Commission will be receptive to this amendment this

year, we have decided not to urge adoption of any amendment at this time. However, we urge the Commission to keep acceptance of responsibility high on the agenda for the next amendment cycle.

C. Fraud Table and Loss Issues

We appreciate the Commission's publication of our proposed fraud table and the commitment of your staff to work with us and others in an effort to reach consensus on a new proposed fraud table. The Department of Justice has joined the Committee in calling for increased fraud levels, and the recent FJC judicial survey indicated this was one area in which the judiciary wants change. We asked the Commission to minimize unnecessary litigation by converting the one-level categories to two-level categories and by eliminating the more than minimal planning adjustment. We also asked, as has the Department, that fraud offenses levels be significantly raised.

We realize that the Commission has said it will not be enacting any amendments this year beyond some conforming ones and some circuit splits. However, because it appears that we are very close to achieving a consensus draft proposal, and because of the importance of this issue to the judiciary, we plan to continue working on the fraud proposal. We hope to be able to submit a revised fraud table with accompanying adjustments very soon, which will address the concerns of both the Committee and the Department. If we are able to do so, we hope that the Commission will give it serious consideration this amendment cycle.

We also believe that the loss issues published for comment merit serious consideration, and we have spent considerable time reviewing them. We regret that the Commission chose not to seriously pursue these issues this year. Several of them merit clarification by the Commission, in order to avoid needless litigation and to enhance uniformity of guideline application. We hope the Commission will solicit comment on these issues again next year, and that it will commit staff resources early to help response groups such as ours work through possible options, to ensure that meaningful options are submitted to the Commission for serious consideration next year.

D. Mitigating Role

We still believe that both aggravating and mitigating role adjustments should be reformed, along the lines of the published mitigating role proposal. We were actively working to fine-tune that proposal, and were close to a significant proposal when we were told the Commission was not prepared to go forward with it this year. A proposal similar to that published on mitigating role has been pending for Commission consideration since the 1995 amendment cycle. Role is a crucially important aspect of every federal sentencing, and one in which maximum flexibility is appropriate and needed for the sentencing court. We ask the Commission to also keep role on the table for serious reform next year.

E. Conforming Amendments

We ask the Commission to adopt the following amendments, which simply conform the guidelines to recent changes in law. These amendments can only bring benefit to the system, and avoid ambiguity:

Amendment #34 on §5K2.0.

Amendment #29 on Probation and Supervised Release

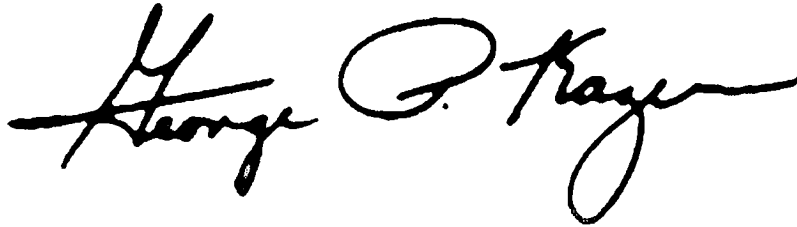
Amendment #30 on Supervised Release

Amendment #31 on Restitution

Amendment #36 on the Presentence Report.

Thank you, as always, for your consideration of our recommendations.

Sincerely,

A handwritten signature in black ink, reading "George P. Trayer". The signature is fluid and cursive, with the first name "George" and last name "Trayer" clearly legible, and "P." as a small initial in the middle.

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Eunice Holt-Jones, Chief, Federal Corrections and Supervision Division, AO

Statement of
Thomas W. Hillier, II
Federal Public Defender
Western District of Washington

on behalf of
Federal Public and Community Defenders

concerning the
Proposed Guideline Amendments, Part II

March 28, 1997

Amendment 1
(§ 2D1.1)

Amendment 1 would repromulgate as a permanent amendment the emergency amendment to § 2D1.11 promulgated by the Commission in February. The amendment would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment is in response to a specific Congressional directive in the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237. We do not oppose promulgating Amendment 1 as a permanent amendment.

Amendment 2
(§§ 2L1.1, 2L2.1, 2L2.2, 2H4.1)

Amendment 2 would repromulgate as permanent amendments several emergency amendments the Commission approved on March 19, 1997. On February 4, 1997, we submitted to the Commission our comments on these amendments. We do not oppose repromulgating the version of the amendments that the Commission adopted on March 19, 1997.

Amendment 3
(§ 2L1.2)

Amendment 3 would implement section 321 and 334 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 321 of that Act amends the definition of the term "aggravated felony" in 8 U.S.C. §1101(a)(43), and section 334 of that Act requires the Commission to amend the guidelines to reflect amendments made by sections 130001 and 130009 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2023, 2030.

Congress initially defined the term "aggravated felony" in 1988 to mean murder, drug trafficking, and illegal trafficking in guns or explosives. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 (enacting 8 U.S.C. § 1101(A)(43)). Since then, the

definition has become complex and broad. For example, a fraud offense is an aggravated felony if the loss to the victim exceeds \$10,000, and receipt of stolen property is an aggravated felony if the court imposed a prison term of one year, suspended execution of the prison term, and placed the defendant on probation for one year. The result is that the label "aggravated felony" is not a reliable way to identify defendants who are deserving of greater punishment.

The unfairness of using an unreliable indicator is heightened by the drastic consequences that § 2L1.2 imposes -- a 16-level enhancement if the defendant has been deported after having been convicted of an aggravated felony. For a defendant in criminal history category II, the effect of this enhancement is to increase the guideline range from 4-10 months to 57-71 months. The unfairness is further heightened by the double counting that occurs. The aggravated felony also counts towards the defendant's criminal history score.

Amendment 3 would revise § 2L1.2 to call for a 16-level enhancement if the defendant had been deported after "conviction . . . for a crime of violence or controlled substance offense [and such conviction was punishable by more than five years imprisonment]," and a [10, 12]-level enhancement if the conviction was for any other aggravated felony. We believe that, if the Commission adopts the proposal, the bracketed language should be included. The statutory maximum is way to distinguish serious offenses from less serious offenses.

We believe that using the statutory maximum to distinguish between the more serious and less serious offenses is preferable to including all crimes of violence and controlled substance offenses. We also believe, however, that the statutory maximum is still too rough a measure of severity. A defendant may be convicted of a drug trafficking offense that has a 20-year maximum prison term but, because the offense was the sale of a small amount of marijuana, receive probation.

That defendant is less dangerous than a defendant who receives a prison term of 15 years for the sale of three kilograms of heroin or a prison term of 20 years for manslaughter.

We believe that the prison term served by the defendant is a better measure of actual severity than the statutory maximum.¹ The Commission can implement this measure rather easily and without complicating matters by utilizing the criminal history scoring. We suggest that the Commission adopt the following provision:

If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

- (1) if the conviction was for a crime of violence or controlled substance offense for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 16 levels;
- (2) if the conviction was for (A) a crime of violence or controlled substance offense for which the defendant receives 2 criminal history points under § 4A1.1(b) or (B) an aggravated felony, other than a crime of violence or controlled substance offense, for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 8 levels;
- (3) if the conviction was (A) for (i) an aggravated felony, other than an aggravated felony described in subdivisions (1) and (2), or (ii) any other felony for which the defendant receives 3 criminal history points under § 4A1.1(a), or (B) three or more misdemeanors that were either crimes of violence or

¹Another possible approach might be to measure the severity on the basis of other statutory or guideline indicators of severity. For example, federal drug laws call for mandatory minimums based upon quantity. A prior drug trafficking offense might qualify the defendant for a 16-level enhancement if the quantity of drugs involved in the prior offense were sufficient to trigger a ten-year mandatory minimum sentence. We do not advocate such an approach because we believe that such an approach would unduly complicate application of this guideline.

controlled substance offenses, for each of which the defendant receives 2 criminal history points under § 4A1.1(B), increase by 4 levels.

Amendment 4
(Appendix A -- statutory index)

Amendment 4 would amend the statutory index to add two new offenses enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Amendment 4 would list § 2H2.1 (obstructing an election or registration) as the offense guideline applicable to the new offense of voting by aliens (18 U.S.C. § 611). Amendment 4 would list § 2A2.4 (obstructing or impeding officers) as the offense level applicable to the new offense of "high speed flight from immigration checkpoint" (18 U.S.C. § 758). We do not oppose the amendment.

Amendment 5
(§ 3C1.2)

Section 3C1.2 currently provides for a two-level enhancement "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Amendment 5, requested by the Department of Justice, would add a mandatory minimum offense level -- that is, where the enhancement applies and after adding two points, "if the resulting offense level is less than [18-20], increase [the level] to [18-20]." We oppose this amendment.

The enhancement would apply only to 0.3 percent of defendants sentenced each year. See, e.g., U.S. Sentencing Comm'n, 1995 Annual Report 74; U.S. Sentencing Comm'n, 1994 Annual Report 69. Moreover, the base offense level for the type of case in which the enhancement is most commonly applied, robbery, see U.S. Sentencing Comm'n, 1993 Annual Report 89, 103 (34 of 91 cases in which enhancement applied were robbery cases), is already at or above the proposed

minimum level, U.S.S.G. § 2B3.1(a) (setting base offense level for robbery at 20). More importantly, for those cases that would be below the proposed mandatory minimum, the current two-level enhancement already represents a proportionally larger increase in offense level than it does for offenses that start at a relatively high level, such as robbery. The Commission has provided no justification for implementing such a disproportionate additional increase.

Amendment 6
(interstate stalking; harassing communications)

The proposals in amendment 6 are cumbersome and complex and if adopted, would impose significant and unwarranted policy changes. The synopsis of this amendment states that the proposals incorporate in the guidelines several new federal offenses. In our view, however, every one of the proposals in amendment 6 is flawed and would unnecessarily increase the difficulty in applying the guidelines. We urge the Commission to take a less sweeping and more reasonable approach to addressing the new federal offenses.

This past November, Congress enacted several new offenses that involve threatening or harassing behavior. Section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201 makes interstate stalking (18 U.S.C. § 2261A) a federal offense:

Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person; and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to, that person or a member of that person's immediate family . . . shall be punished as provided in section 2261 of this title.

The maximum penalties range from five years to life, depending on whether and to what degree the victim is injured.

Section 502 of the Telecommunications Act of 1996, Pub. L. 104-104, adds several new telephone call offenses to 47 U.S.C. § 223. The new offenses (47 U.S.C. § 223(a)(1)(C)-(E)), which have a maximum prison term of two years, make it a crime for a person to--

(C) make a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

(D) make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) make repeated telephone calls or repeatedly initiate communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

In response to these new offenses, the Commission has published for comment a two-part amendment. Part A of amendment 6, consists of two options that would significantly alter the operation of several guidelines, including the statutory index. Part B requests comment on how to address the new offenses.

The new harassing telephone calls and stalking offenses are different from other offenses covered by the guidelines of chapter 2, part A. The harm in these offenses is ongoing or continuous. These offenses are unlikely to be prosecuted with any frequency in federal court. In the long run, a separate guideline may be the most appropriate way to incorporate these new offenses. In the short term, however, the current version of § 2A6.1 (threatening communications) should suffice to cover the few cases that occur. If § 2A6.1 does not adequately address the circumstances of a particular case, the court may depart.

should be amended. The Commission may decide that a separate guideline for stalking may be more appropriate than revising existing guidelines or the Commission may decide that no amendment is necessary. The proposed revisions would unnecessarily complicate the application of § 2A2.3 and 2A6.1.

We believe that the existing version of § 2A6.1 (threatening communications) should adequately cover the new harassing communications offenses. Because the offenses call for a maximum of only two years imprisonment, we would suggest providing a reduction if the offense did not involve an intent to carry out a threat.

The new offenses typically involve repeated instances or continuing conduct. For this reason, the offenses are not easily accommodated under any guideline in chapter two part A. We would advise against establishing a special exception to the relevant conduct rules just to accommodate these offenses. If it is necessary to amend the guidelines to cover these offenses, then the applicable guideline should be listed under § 3D1.2(d) as offense behavior that is "ongoing and continuous in nature." Otherwise, an unusual number of repeated instances can be handled by a departure.

We oppose revising the definition of aggravated assault. We are unaware of any documented instance where the application note inhibited sufficient punishment of an assault involving a weapon.

Amendment 7
(Chapter 2, parts B and F)

Amendment 7 of part II would amend five guidelines in chapter 2, parts B and F, and the statutory index to respond to changes in law enacted by the Economic Espionage Act of 1966, Pub. L. No. 104-294, 110 Stat. 3488.

Section 101 of the Economic Espionage Act of 1966 enact a new offense, captioned economic espionage (18 U.S.C. § 1831), that punishes theft of, or receipt of a stolen, trade secret, obtaining a trade secret by fraud, and unauthorized duplication of a trade secret. The defendant must intend or know that the offense will benefit a foreign government, foreign instrumentality, or foreign agent, terms defined in 18 U.S.C. § 1839 (also enacted by the Economic Espionage Act of 1966). The maximum prison term for an economic espionage offense is 15 years.

Amendment 7 would amend § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property) by adding a new specific offense characteristic designated subsection (b)(7). Subsection (b)(7) would provide that if the offense involved misappropriating a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, "increase by [2] levels." We do not oppose the amendment.⁴

Section 201 of the Economic Espionage Act of 1966 amended 18 U.S.C. § 1030 (fraud and related activity in connection with computers). Amendment 7 would add an application note to § 2B1.1 stating that, for an offense under 18 U.S.C. § 1030(e)(2)(A) or (B), loss includes "the

⁴Amendment 7 would amend the statutory Index to indicate that § 2B1.1 is the offense guideline for offenses set forth in 18 U.S.C. § 1831 and § 1832 (theft of trade secrets, also enacted by section 101 of the Economic Espionage Act of 1966), but would not amend the statutory provisions note at the end of § 2B1.1 to list § 1831 and § 1832. We believe that the statutory provisions note to § 2B1.1 should also be amended. Similarly, amendment 7 would amend the Statutory Index to indicate that § 2B3.2 is the offense guideline for a violation of 18 U.S.C. § 1030(a)(7). While amendment 7 would also add a sentence to the background note to § 2B3.2 stating that guideline applies to "offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer,'" amendment 7 would not amend the statutory provisions note to § 2B3.2. We believe that amendment 7 should also amend the statutory provisions note to § 2B3.2.

reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue or costs incurred due to interruption of service." We do not oppose the amendment.

Amendment 7 would also add two application notes addressing grounds for departure. New application note 16 would indicate that an upward departure may be warranted "in cases involving theft of information from a 'protected computer,'" if the defendant sought the stolen information to further a broader criminal purpose.⁵ We oppose this language as vague and unhelpful.

New application note 15 would indicate that an upward departure may be warranted if loss "does not fully capture the harmfulness of the conduct" The new application note gives as an example the theft of personal information that involves a substantial invasion of a privacy interest. U.S.S.G. § 2F1.1 currently contains a similar application note. We believe that the Commission should defer action on new application note 15 and take it up when the Commission begins work on amendment 18 in part I of the proposed amendments. Loss as determined under § 2B1.1(b)(1) -- and § 2F1.1(b)(1) -- may not adequately reflect the harm of the offense, but not only because loss can understate the harm of the offense. Loss so determined can also overstate the harm. New application note 15 should be more balanced and reflect that reality, as should application note 10 to § 2F1.1.

Amendment 7 would amend § 2B1.3 and § 2F1.1 to provide that a defendant convicted under 18 U.S.C. § 1030(a)(4) or (5) receive a prison term of at least six months. These amendments are

⁵The proposed application note does not define the term "protected computer," but 18 U.S.C. § 1030(e)(2) does. If the Commission intends to adopt that definition, the proposed application note should be modified to say so.

in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 805(c), 110 Stat. 1305. We question the wisdom of mandatory minimum sentences restricting the discretion of judges to fashion an appropriate punishment, but the Commission has no choice in the matter. We do not oppose the amendment.

Finally, amendment 7 would amend § 2B3.2 to add a new specific offense characteristic calling for an enhancement of the offense level using the fraud loss table "if the offense involved invasion of a protected computer resulting in a loss" We recommend that the Commission not act on this part of amendment 7. This matter should be considered after this cycle as a part of the consideration of the issues involved in amendment 18 in part I. There are a number of questions that need to be addressed. If the protected computer trespassed upon is a federal government computer, does the enhancement of § 2B3.2(b)(1) apply? If the defendant committed the offense at home, where he or she keeps a weapon, does the Commission intend that the enhancement of § 2B3.2(b)(2) apply? By its literal terms, that enhancement would apply, but computer trespassing is different from trespassing upon real property. A first offense under 18 U.S.C. § 1030(a)(3) carries a maximum prison term of one year. Use of the loss table may result in all first offenders under that provision receiving the statutory maximum.

**Amendment 8
(flunitrazepam)**

Amendment 8 consists of two parts in response to the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, which directs the Commission to "review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam." The Act increases the maximum penalty for offenses involving flunitrazepam. For violations of 21 U.S.C.

§ 841, the Act raises the maximum penalty for flunitrazepam from three-years imprisonment to five-years imprisonment for thirty milligrams and twenty-years imprisonment for one gram. The Act also revises 21 U.S.C. § 959 (import and export) to provide a maximum penalty of twenty-years imprisonment for offenses involving any quantity of flunitrazepam. The Act increases the penalty for simple possession of flunitrazepam to three years.

Part A

Part A presents two options to amend § 2D1.1 (drug trafficking) and § 2D2.1 (simple possession) to address offenses involving flunitrazepam. Both options would revise § 2D1.1 to treat flunitrazepam as a Schedule I and II depressant. Under option one, the base offense level for simple possession of flunitrazepam in § 2D2.1 would remain at level four. Option Two would amend § 2D2.1 to provide a base offense level of eight if the substance possessed is flunitrazepam. We oppose Option Two and do not oppose Option One.

Because the maximum prison term for a flunitrazepam offense is twenty years, it makes sense to treat flunitrazepam like Schedule I and II depressants, which have a maximum prison term of twenty years. We oppose that part of Option Two, however, that would treat simple possession of flunitrazepam as equivalent to possession of heroin or crack and much more seriously than possession of any Schedule I or II depressant. The proposed revision of § 2D2.1 would result, in some cases, in sentencing simple possession of flunitrazepam more harshly than trafficking flunitrazepam. Under the proposed amendment, a trafficking offense involving less than 250 units of flunitrazepam would yield an offense level of six, while simple possession of that same amount would result in an offense level eight.

Part B

Part B seeks comment on how the guidelines should incorporate "date rape" and related crimes. The Drug-Induced Rape Prevention and Punishment Act enacted a new federal offense of "date rape," codified at 21 U.S.C. § 841(b)(7):

Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

"Date rape" is essentially a state law crime and is unlikely to be prosecuted with any frequency in federal court. We suggest that at this time the Commission not amend the guidelines to incorporate this new offense. The Commission will be in a better position to determine whether and what type of amendment is necessary after there have been some cases prosecuted in federal court.

Amendment 9 (methamphetamine)

Amendment 9 consists of two parts in response to certain parts of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237.

Part A

Part A would respond to sections 101, 201, and 209 of the Act. Section 101 revises 21 U.S.C. § 959 (manufacture or distribution for purpose of unlawful importation) to make it unlawful to manufacture or distribute a listed chemical. Section 201 of the Act revises 21 U.S.C. § 844 to make it unlawful "for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person . . . if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business

in the manner contemplated by his registration.” Section 209 of the Act corrects the spelling of certain precursor chemicals.

Part A would amend § 2D2.1 (unlawful possession) to provide a base offense level of 4 “if the offense involved a list I chemical.” In addition, part A would amend the statutory index to include § 2D1.11 (listed chemicals) as an applicable guideline for violations of importation offenses under 21 U.S.C. §§ 959 and 960(d)(7).

We do not oppose part A.

Part B

Part B invites comment in response to section 203 of the Act, which revises 21 U.S.C. § 843(d) to provide up to ten years imprisonment for a violation of 21 U.S.C. § 843(a)(6) or (7) (possession, manufacture or distribution of certain laboratory equipment) if the offense is committed with intent to manufacture or to facilitate the manufacture of methamphetamine. Section 203 directs the Commission to amend the guidelines “to ensure that the manufacture of methamphetamine in violation of section 403(d)(2) of the Controlled Substances Act . . . is treated as a significant violation.” Part B requests comment on how to respond to this directive and specifically, on whether there should be an additional enhancement in § 2D1.12 (prohibited flask or equipment) “if the equipment is used to manufacture methamphetamine.”

We believe that § 2D1.12, the guideline currently applicable to violations of 21 U.S.C. § 843(a)(6) - (7), treats those offenses as a significant violation. The new offense requires an intent to manufacture methamphetamine, and § 2D1.12 provides a cross reference to § 2D1.1, “if the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance.” The cross-reference should ensure a guideline range at or above the statutory

maximum of ten years. If the resulting sentence is inadequate, the government can prosecute the offense as an attempt to manufacture under 21 U.S.C. § 846, for which the statutory maximum is twenty years. Such cases would be sentenced under § 2D1.1.

Amendment 10
(§§ 2D1.1 and 2D1.11)

Amendment 10 consists of five parts in response to sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996. Section 301 of the Act directs the Commission to amend the guidelines "to provide for increased penalties" for offenses involving methamphetamine and to "submit to Congress explanations therefor and any additional policy recommendations for combating methamphetamine offenses." Section 303 directs the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses in the Controlled Substance Act (specifically, 21 U.S.C. §§ 841(d), 841(g)(1), 843(a)(6), and 843(a)(7) which result in violations of subsection (d) or (e) of section of the Solid Waste Disposal Act; section 103(b) of the Comprehensive Environmental Response, Compensation and Liability Act; section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act; or 49 U.S.C. § 5124 (violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)).

Parts A through D of Amendment 10 would increase the guideline penalties for methamphetamine offenses. Part A would revise the drug quantity table. Part B would raise the penalties for importation offenses involving methamphetamine. Part C would provide new penalties for environmental harm caused by manufacturing methamphetamine. Part D would state explicitly that manufacturers may be subject to a special skill adjustment. We believe that before

implementing any of these changes, the Commission should undertake a comprehensive study of methamphetamine offenses and their sentencing.

The Congressional directive to increase the guideline penalties for methamphetamine offenses is a part of the latest craze in the current political arena. We trust that the Commission will maintain its role as an independent body committed to a reasoned and rational sentencing policy, and will resist responding impulsively to the political concerns of Congress.⁶ Implicit in the Congressional directive is an assumption that the current penalties are not stringent enough. The Commission, as the federal agency entrusted to ensure rational sentencing policy, is best qualified to determine whether this assumption is correct, and if so, what specific changes are called for. For this reason, we believe that the Commission's initial response to the directive should be to gather the facts upon which sound policy judgments can be based.

Part A

Part A would increase the penalty for methamphetamine offenses by revising the drug quantity table in § 2D1.1. The proposal would reduce by one-half the current quantities of methamphetamine required for each offense level in the table. Thus, for a base offense level of 26, the quantity of methamphetamine would be reduced from "at least 100 G but less than 400 G of Methamphetamine" to "at least 50 G but less than 200 G of Methamphetamine." Part A would also amend the drug equivalency table by increasing two-fold the quantity of marijuana listed as equivalent to a particular amount of methamphetamine. For instance, the amount of marijuana equivalent to one gram of methamphetamine would be increased from one kilogram to two

⁶There is a parallel to the crack cocaine hysteria that produced swift legislation resulting in unfair and unwise sentencing policy. The Commission is to this day attempting to remedy that problem.

kilograms. Finally, part A would amend application note B to state "[i]n the case of a mixture or substance containing PCP or methamphetamine, if the purity of the mixture or substance can be determined and exceeds ten percent, then the weight of the actual controlled substance in the mixture shall be used to determine the offense level. In any other case involving a mixture or substance containing PCP or methamphetamine, use the weight of the mixture containing PCP or methamphetamine to determine the offense level."

We oppose Part A. The synopsis of Part A states that the increased guideline penalties would have "the same effect on methamphetamine guideline penalties that would have occurred if Congress had passed legislation to reduce by half the quantities to trigger the mandatory minimum penalties under 21 U.S.C. § 841." Congress considered and rejected that proposal. We fail to understand the rationale for increasing the penalties based on legislation that was never enacted. We suggest that before increasing the penalties for methamphetamine, the Commission come up with a rational explanation for the extent of any such increase. We believe that the Commission should conduct a comprehensive study of the methamphetamine offenses to determine whether, relative to other drugs, methamphetamine offenses are being treated too leniently.⁷ Once that question is answered, the Commission will be in a better position to determine how to provide more appropriate punishment.

Part B

Part B of amendment 10 presents three options ("either as an alternative or an addition to Part A") to amend § 2D1.1 to include an enhancement for offenses involving the importation of

⁷The drug trafficking guideline already treats methamphetamine offenses differently from other controlled substances. The determination of the base offense level of a methamphetamine offense takes into account the purity of the drug by differentiating between methamphetamine and methamphetamine (actual).

methamphetamine or precursor chemicals. Option One would revise § 2D1.1 to provide a two-level increase "if the offense involved the importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully." Option Two would amend § 2D1.1 to provide a two-level increase if "(A) the offense involved the importation of methamphetamine [or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully,] and (B) the defendant [is subject to an adjustment under § 3B1.1 (Aggravating Role)][is not subjected to an adjustment under § 3B1.2 (Mitigating Role)]." Option Three would amend the commentary to § 2D1.1 to state that an upward departure may be warranted "if the offense involved the unlawful importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. . . . [particularly if the defendant had an aggravating role in the offense under § 3B1.1 Aggravating Role]."

We realize that Congress has directed the Commission to increase the penalties for importation offenses involving methamphetamine, but, in our view, sound policy does not require an increase. We do not understand why importing methamphetamine is any more serious than manufacturing methamphetamine in this country. The vast majority of defendants who are arrested for importing are low-level mules or couriers. Their sentences are already too high. Frequently couriers and mules are poor people without a future who bring drugs into the United States for a fee that has no relation to the street-value of what they bring in. They generally are unaware of the scope of the drug enterprise they are assisting or even the identity of the participants. A simple enhancement for importing will inevitably result in even greater sentences for these least culpable offenders. The enhancement as set forth in Option One is too broad and would unfairly increase the

punishment of those who deserve a reduced rather than an increased sentence, and we therefore oppose it. We also oppose the departure instruction in Option Three because it could result in disparate sentencing. The problem with Option Three is that the proposed commentary provides no guidance as to what type of importation offense would warrant a departure.

We suggest that to comply with the directive, the Commission, as part of the study of methamphetamine offenses, identify those factors that would justify an enhancement for importation. For example, the market-oriented approach Congress has taken to punishing drug offenses suggests that the leaders of methamphetamine-importing organizations are probably most deserving of increased punishment. The exploitation of desperate and despairing individuals who become mules or couriers only makes drug kingpins more deserving of punishment. Although we believe the enhancement for importation is greatly at odds with sound policy, we suggest that the Commission adopt the least onerous alternative in Option Two which would read: "If (A) the offense involved the importation of methamphetamine and (B) the defendant is subject to an adjustment under § 3B1.1, increase by two levels."

Part C

Part C presents two options to amend the drug guidelines ("either as an alternative or an addition to Part A") to provide an enhancement if the offense caused "environmental damage associated with the manufacture of methamphetamine." Option One would amend § 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy), § 2D1.11 (distributing, importing, exporting, or possessing a listed chemical; attempt or conspiracy), § 2D1.12 (prohibited flask or equipment; attempt or conspiracy), and § 2D1.13 (structuring chemical transactions or creating a chemical mixture to evade reporting or record keeping requirements;

presenting false or fraudulent identification to obtain a listed chemical; attempt or conspiracy) to provide an increase of [2-6] levels "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm."

Option Two would amend the commentary to §§ 2D1.1, 2D1.11, 2D1.12, and 2D1.13 to state that an upward departure may be warranted "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm."

We oppose both options.

We believe that manufacturing offenses that create a significant risk of serious environmental harm (at least in this country) occur too infrequently to warrant adding a specific offense characteristic. We believe that a departure would best address the rare instance when such a risk is created. The manufacture of methamphetamine always produces some waste that contains toxic substances. An increased sentence should be reserved for those cases where the toxic or hazardous substance poses a substantial risk of serious environmental harm.

Part D

Part D would amend the commentary to § 2D1.1 and § 3B1.3 (abuse of position of trust or use of special skill) to state that drug manufacturers ("cooks") may be subject to an enhancement under § 3B1.3. Part D also offers an option that would delete that part of § 3B1.3 that states that a sentence may not be enhanced for both use of a special skill and aggravating role. We oppose the amendment.

We believe that the revised commentary is unnecessary and conflicts with existing commentary on the definition of special skill. Not all drug manufacturing takes a significant amount of skill. For instance, converting cocaine powder into crack cocaine or free-base cocaine requires

neither much skill nor much training. The definition of "special skill" in the existing guideline is sufficient to alert a court that it may adjust a sentence when the manufacturing process involves some degree of sophistication.

We also oppose deleting the prohibition against adjusting a sentencing for both use of a special skill and aggravating role. There has been no justification for changing the existing policy to prevent double-counting.

Part E

Part E requests comment on three issues relating to punishing methamphetamine offenses. We believe that the issues can best be resolved after a comprehensive study of methamphetamine cases. As indicated above, we urge the commission to conduct such a study.

Amendment 11 (Indexing of New Offenses)

Part A

Part A of amendment 11 would add offenses created under the Health Insurance Portability and Accountability Act of 1996 to the statutory index contained in Appendix A.

1. The offense guideline applicable to a violation of 18 U.S.C. § 1347, the new offense of health care fraud (punishable by a maximum of ten years in prison (20 years if the violation results in serious bodily injury, and life imprisonment if the violation results in death)) would be the fraud guideline, § 2F1.1. We do not oppose this change.

2. The offense guideline applicable to violations of 18 U.S.C. § 669, the new offense of "theft or embezzlement in connection with health care" (punishable by a maximum of ten years in prison) would be the fraud guideline, § 2F1.1. We oppose this portion of amendment 11.

The new offense, entitled by Congress "theft or embezzlement in connection with health care" and placed in chapter 31 (embezzlement and theft) of title 18, United States Code, punishes "[w]hoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program" with up to ten years in prison. The appropriate guideline for this offense is § 2B1.1, covering larceny, embezzlement, and other forms of theft, not § 2F1.1. Cf. 18 U.S.C. § 1347 (new offense entitled "Health care fraud," placed in chapter 63 (mail fraud) of title 18, United States Code, and violations of which to be sentenced under U.S.S.G. § 2F1.1, see Proposed Amendments, Pt. II, amendment 11(A)(1)).

3. The offense guideline applicable to a violation of 18 U.S.C. § 1035, the new offense of "false statements relating to health care matters" (punishable by a maximum of five years in prison) would be the fraud guideline, § 2F1.1. We do not oppose this change.

4. The offense guideline applicable to a violation of 18 U.S.C. § 1518, the new offense of "obstruction of criminal investigations of health care" (punishable by a maximum of 5 years in prison) would be the guideline for obstruction of justice, § 2J1.2. We do not oppose this change.

Part B

Part B of amendment 11 addresses changes made by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.

1. Section 648 of the Appropriations Act increased the statutory maximum term of imprisonment for 18 U.S.C. §§ 474 and 474A (counterfeiting offenses) from 12 years to 25 years by reclassifying these offenses from Class C offenses to Class B offenses. Section 474, covering the

possession, use, manufacture, or sale of counterfeiting equipment, is presently addressed by § 2B5.1. Section 474A, covering the possession of special paper or counterfeit deterrents, is not listed in the statutory index. Part B(1) of amendment 11 would reference § 474A to § 2B5.1. We do not oppose this change.

2. Section 648 also created a new offense involving fictitious obligations, that is, obligations that are completely made up but used as if real (e.g., Monopoly money used instead of currency), as opposed to being copies of real obligations (i.e., counterfeit). This offense also criminalizes the use of the mail, wire, radio, or other electronic communication to transfer the fake instruments. To be convicted, a defendant must have committed the offense with the intent to defraud. Part B(2) of amendment 11 would reference the new offense, 18 U.S.C. § 514, to the fraud guideline, § 2F1.1. We do not oppose this change.

Amendment 12
(Guidelines incorporating loss table of § 2F1.1)

Amendment 12, which would amend ten guidelines that rely on the loss table of § 2F1.1 to determine the offense level, is dependent upon the Commission's approval of amendment 18 in part I of the amendments published by the Commission for public comment. We recommend that the Commission take no action on amendment 12.

Amendment 18 in part I raises complicated and important issues about defining and calculating loss. We have recommended that the Commission postpone action on amendment 18 and take up the issues raised by that amendment after completion of work on this cycle's amendments. Because amendment 12 in part II is dependent upon Commission action on amendment 18 in part I, we make the same recommendation for amendment 12.



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 19, 1997

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the proposed sentencing guideline amendments published for comment in the Federal Register January 2, 1997. The detailed comments that follow relate to the proposed guideline amendments that we understand the Commission is most likely to consider. However, there are a number of other amendments on which we will comment at Commission meetings if the Commission decides to consider them, such as the ones relating to acquitted conduct and role in the offense. We strongly oppose these particular amendments and urge the Commission not to adopt them.

Before addressing the issues the Commission has indicated it is likely to consider, we wish to reiterate the need to amend the fraud, tax, and related guidelines to produce more appropriate sentences and to simplify the guidelines' operation. Specifically, the fraud table should be adjusted to include more than minimal planning and to produce higher sentences for serious offenses. In addition, several new enhancements are needed, as outlined in our proposal last December. We urge the Commission to address the fraud area and would be happy to work with you in finalizing a guideline this amendment cycle. If, however, the Commission decides to delay action on this amendment, we believe the Commission should give it its utmost attention in the next amendment cycle.

AMENDMENT 7 -- STATUTORY INDEX

Amendment 7 amends the Statutory Index and guideline §1B1.2 to clarify that the Statutory Index specifies the offense guideline most applicable to the offense of conviction, subject

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to certain exceptions. The effect would be to give the Statutory Index more binding effect than it may now have. Although we agree that the Statutory Index should be given binding effect, we are not convinced that the proposed amendments will prevent the litigation they are aimed at discouraging.

AMENDMENT 10 -- CROSS REFERENCES AND ATTEMPTS AND CONSPIRACIES

Amendment 10 would revise the operation of cross-references that specifically direct the use of a different guideline if it results in a higher offense level. It would also amend the guideline on attempts, solicitations, and conspiracies (where such offenses are not covered by a specific offense guideline), §2X1.1, to eliminate the three-level reduction that now applies where the defendant has not completed all the acts he or she believed necessary for the successful completion of the substantive offense. The amendment would allow downward departures of up to three levels if the defendant were arrested well before such completion. We recommend that the Commission adopt the proposed amendment of §2X1.1. It will simplify the operation of the guidelines and recognize the seriousness of many attempts and conspiracies.

AMENDMENT 11 -- REDUCTION IN TERM OF IMPRISONMENT BECAUSE OF RETROACTIVE GUIDELINE APPLICATION

Amendment 11 responds to recent litigation regarding the reduction of a term of imprisonment under policy statement §1B1.10 because of an amended guideline range. The amendment clarifies that this guideline provision authorizes a court to reduce a prison sentence but not other components of the sentence, such as supervised release. It also provides that the reduced term of imprisonment may not be less than the term of imprisonment the defendant has already served. We support this amendment since the statutory authority for this guideline provision, 18 U.S.C. §3582(c), authorizes a court to reduce a prison term and provides no authority retroactively to reduce other components of the sentence.

While we urge the Commission to adopt an amendment along the lines proposed, we find proposed Application Note 3 problematic. It states that the determination whether to grant a reduction in imprisonment and the amount of reduction are "within the sound discretion of the court, subject to the limitations in subsection (b)" of §1B1.10. We are concerned that this language may result in arguments that the court can depart below the amended guideline range in the retroactive consideration of the amended guideline. The amendment should make clear that a court may not sentence below the amended guideline range.

AMENDMENT 14 -- THREAT OF DEATH

Amendment 14 would amend the robbery guideline by deleting the word "express" from "express threat of death" in the specific offense characteristic imposing a two-level enhancement in cases involving such threats, §2B3.1(b)(2). The commentary would also be amended to clarify that a defendant need not have expressly stated his intent to kill the victim in order for the enhancement to apply.

We favor the proposed amendment. However, the proposed commentary amendment to Application Note 6 would delete examples of death threats previously included. These consist of a number in which the defendant has explicitly stated or written the death threat and one in which there is a combination of words and a gesture: "Give me the money or else (where the defendant draws his hand across his throat in a slashing motion)." We recommend that the Commission retain the proposed examples in the commentary. These examples will continue to be useful to the courts in construing the amended guideline, and their deletion would likely engender arguments that the conduct they describe is not meant to be covered. Retaining the examples would require some adjustment of the commentary preceding them and may also require the addition of further examples illustrating the effect of the amendment.

AMENDMENT 15 -- AGGRAVATED SEXUAL ABUSE AND SEXUAL ABUSE AS SERIOUS BODILY INJURY

Amendment 15 addresses the recent statutory change to the carjacking statute, 18 U.S.C. §2119, which was amended to include aggravated sexual abuse and sexual abuse within the definition of "serious bodily injury." Two options are presented: one narrowly addressing the robbery guideline, and the other amending the definition of "serious bodily injury" generally for the guidelines. We prefer the broader approach, which is embodied in Option 2, since guidelines for offenses other than robbery should recognize that aggravated sexual abuse and sexual abuse involve serious bodily injury. For example, the guidelines applicable to assault with intent to commit murder and aggravated assault, §§2A2.1 and 2A2.2, both include enhancements for serious bodily injury to the victim and should reflect injury in the form of aggravated sexual abuse and sexual abuse.

The proposed amendment may have an unintended consequence that should be addressed. It may give rise to arguments that where sexual abuse or aggravated sexual abuse occurs in connection with a robbery (or other offense if the broader option is chosen), the injury can never be greater than serious. Whichever option is chosen, the Commission should clarify that cases of aggravated sexual abuse or sexual abuse that result in permanent or life-threatening injury are not excluded from the

greater enhancement for such injury just because these offenses themselves constitute serious bodily injury. For example, if a victim suffers permanent or life-threatening injury as a result of a robbery-related rape (such as through contracting the HIV virus), the injury should not be considered merely serious because it occurred in connection with an aggravated sexual abuse. The Commission should clarify the potential applicability of the greater enhancement for permanent or life-threatening injury in this and other situations where such injury occurs.

While we favor Option 2, we are concerned about the proposed narrowing of the portion of the definition of "serious bodily injury" involving impairment of a function of a bodily member, organ, or mental faculty. The proposed change is to require that such impairment be "protracted." While there may be a need to differentiate "serious bodily injury" from "bodily injury," the proposed standard is likely to engender litigation on the meaning of the term "protracted." We are not convinced that there is a need to amend this aspect of the definition of "serious bodily injury."

We also recommend that additional conforming amendments be made if Option 2 is approved. For example, the kidnapping guideline, §2A4.1, includes a two-level increase for serious bodily injury and a three-level increase if the victim was sexually exploited. The amended definition of "serious bodily injury" including sexual abuse and aggravated sexual abuse should not apply to this guideline.

AMENDMENT 16 -- ALTERED BEARER OBLIGATIONS OF THE UNITED STATES

Amendment 16 would treat offenses involving altered bearer obligations of the United States in the same manner as cases involving counterfeit bearer obligations. It would accomplish this result by moving the former offenses from guideline §2F1.1 to §2B5.1. The amendment would also add a two-level enhancement for offenses committed outside the United States -- a feature which is the result of a directive in the Antiterrorism and Effective Death Penalty Act.

We generally favor the amendment. However, we question the need for the addition of proposed Application Note 3, which excludes from the calculation items "that clearly were not intended for circulation" because, for example, of defects but includes "partially completed items that would have been completed but for the discovery of the offense" Determining which items are defective and which are only partially completed calls for a level of distinction that would be impossible on the basis of found items in many cases. Nevertheless, the presence of this application note would encourage litigation. Had the defective items been better produced, the offender would likely have circulated them along with the well-produced items. The

fact that a counterfeiter has produced some defective items should not reduce his or her sentence; the defective items reflect his or her intent as much as the good ones do.

AMENDMENT 17 -- UNDERLYING OFFENSE FOR RICO AND OTHER GUIDELINES

Amendment 17 amends the guidelines pertaining to use of a communication facility in committing drug offenses, §2D1.6; unlawful conduct relating to racketeer influenced and corrupt organizations (RICO), §2E1.1; interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. Each of these guidelines refers to the offense level applicable to the underlying offense or to the underlying racketeering activity, or similar language. The Commission proposes to specify that the underlying offense is determined on the basis of the conduct of which the defendant was convicted. This language would eliminate relevant conduct as a basis for determining the offense level in many instances and create arguments in others that relevant conduct is not meant to apply to this determination. We strongly oppose these amendments and recommend that, if the Commission acts on this issue, it do so in a manner opposite to that proposed. That is, the Commission should clarify that the underlying offense is to be determined on the basis of relevant conduct.

First, we do not agree that there is a circuit conflict with respect to the two cases cited, United States v. McCall, 915 F.2d 811 (2d Cir. 1990), and United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993). The court in McCall did not discuss the effect of the relevant conduct guideline, §1B1.3, in determining how to apply the guideline applicable to the offense of conviction for violent crimes in aid of racketeering activity. It seemed to assume the result it reached -- that the offense of conviction determines the applicable guideline referred to in guideline §2E1.3. That is, the court never entered into an analysis of whether the direction in §1B1.2 to use the guideline most applicable to the offense of conviction operates beyond selecting the guideline applicable to violent crimes in aid of racketeering, §2E1.3, and to the derivative guideline for the underlying offense. Similarly, the court never discussed the effect of relevant conduct on determining the guideline for the underlying offense. In addition, the court in McCall was apparently concerned about the impact of the defendant's guilty plea and his possible lack of understanding of the operation of the guidelines.

Next, we believe that the proposed amendment would result in seriously incorrect sentences for some of the most dangerous offenders we prosecute. The proposed amendment is a departure from the fundamental policy determination of the guidelines not to use a pure charge offense approach to sentencing. The

Commission has resolved the tension between a charge offense and real offense system generally through the relevant conduct guideline. In most cases the guidelines base sentences on real offense conduct that is reasonably related to the offense of conviction. Thus, for example, uncharged but related drug transactions are part of relevant conduct. The Commission also uses cross-references to achieve this mixed charge-offense and real-offense approach. Thus, murder committed in connection with a robbery results in application of the murder guideline even though the offense of conviction is robbery. This result is consistent with the view that real offense conduct counts toward the sentence where it is connected to the offense of conviction and is not an uncommon or unforeseen result.

While the above description of the guidelines pertains to many guidelines, the Commission proposes to take a narrower approach to one of the most serious federal crimes prosecuted -- that pertaining to racketeer influenced and corrupt organizations. Particularly with respect to racketeering offenses, the relevant conduct approach is important. Crime bosses establish their structure of organized crime, in part, to insulate themselves from the criminal acts that they direct and control. The relevant conduct approach cuts through this insulating structure and punishes the bosses for the acts they command and encourage, even when there are more limited specific counts of conviction that can be proved beyond a reasonable doubt. Precisely because RICO involves criminal enterprises, it is important to focus on the enterprise's illegal conduct, and not simply on any one individual's offense of conviction.

Despite the nature of organized crime, the Commission proposes to treat RICO offenses as if they were mere conspiracies to commit a particular unlawful act. This approach ignores the fact that a RICO offense is not an underlying individual racketeering act, but rather the behavior of conducting the affairs of an enterprise through a pattern of racketeering activity. The heart of the RICO statute, 18 U.S.C. §1962, is a defendant's ongoing participation in an enterprise that affects commerce. A defendant violates the RICO statute only if, among other things, he also engages in a "pattern of racketeering activity" (two racketeering acts) or the "collection of an unlawful debt" that has a specified relationship to the charged enterprise. Generally speaking, the gravamen of the offense is to conduct the affairs of an enterprise through a pattern of racketeering activity. This offense should not be likened to a one-time conspiracy to commit an unlawful act.

Another problem with the proposed amendment is that it ignores the fact that Congress views various forms of illegal conduct as related when committed in an organized crime context. By including particular crimes as RICO predicates, Congress has indicated the nature of offenses it believes are typical of

racketeering enterprises. These include: murder, kidnapping robbery, extortion, controlled substances trafficking, bribery, retaliation against witnesses, and other serious offenses. See 18 U.S.C. §1961. The RICO predicates are related in that they represent the types of criminal activity a racketeering enterprise uses as a means to conduct its affairs. Since Congress regards numerous offenses as related in an organized crime context, the Commission should do so as well. As it does with other related offenses, the Commission should allow the relevant conduct rules to operate with respect to racketeering offenses so that a racketeering defendant's measure of criminal conduct is not limited to his offense of conviction.

We have similar concerns about the proposals relating to the two other racketeering guidelines proposed for amendment, interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. The offenses to which these guidelines pertain are used to prosecute racketeering cases, and any narrowing of the underlying conduct could result in insufficient sentences for serious offenders.

With respect to the proposed amendment of guideline §2D1.6, we believe this proposal will create confusion at best. The proposed new Application Note 1 may be viewed as inconsistent with Note 2. Note 1 states that the offense level must be determined on the basis of the offense of conviction, while Note 2 allows relevant conduct to enter into this determination. Some courts may be able to read these two notes together and understand that the added application note is intended to direct them to the drug distribution guideline, to which relevant conduct, including conduct not contained in a count of conviction, applies in establishing the offense level. However, other courts may find that the new application note limits relevant conduct to the quantity embodied in the offense of conviction and that this new note serves as an exception to guideline §1B1.3. In any case, a great deal of litigation can be expected. The commentary to guideline §2D1.6 should not be amended as proposed. Relevant conduct should control the determination of the offense level.

AMENDMENT 23 -- OBSTRUCTING JUSTICE

Amendment 23 attempts to address recent litigation surrounding the last sentence of Application Note 1 following guideline §3C1.1 on obstruction of justice: "In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant." The Commission's stated concern is that the above language may suggest a heightened standard of proof when a court applies the obstruction enhancement to perjury. While we favor the concept of this

amendment, we find it problematic in its execution in several respects.

The proposed amendment purports to eliminate the suggestion of a heightened standard of proof by deleting part of the above quoted language -- namely, the instruction regarding how the court should evaluate the testimony or statements. However, the proposal substitutes new language admonishing the court to be cognizant that inaccurate testimony or statements may result from confusion, mistake, or faulty memory and may not necessarily reflect a willful attempt to obstruct justice.

While it would be helpful to delete the offending language, the proposed substitute language will raise new questions. The Commission does not ordinarily instruct the courts as to how to consider evidence, and such instruction is not appropriate here. Moreover, some will regard the new language as the practical equivalent of the old, and the problem the Commission is attempting to cure may persist. It would be preferable to delete the offending sentence and to include no substitute language.

The proposed amendment is also problematic in another respect. It deletes Application Note 3(i), which contains a reference to offenses in title 18, United States Code, to which the obstruction enhancement applies. The reason given for the deletion is that the statutes referred to "include a hodgepodge of provisions" and that some have marginal, if any, relevance to the obstruction enhancement. This aspect of the proposal is unnecessary tinkering. The deleted provisions include some that have clear relevance to obstruction, such as influencing or injuring a juror and obstruction of a criminal investigation. The deletion of this language is simply not neutral and will spawn many unnecessary arguments. As a result, the main effect of the deletion will be to increase litigation surrounding conduct that was clearly covered as obstructive conduct in the past. The specifically listed sections of title 18, United States Code, should be retained in Application Note 3.

AMENDMENT 28 -- CIRCUIT CONFLICTS

Amendment 28 includes issues for comment on a number of matters. We agree that the Commission should address significant circuit conflicts when they exist and would be pleased to consider these conflicts further in discussions with the Commission.

We have several specific comments about the proposed amendments to resolve circuit conflicts.

Item 6

Item 6 concerns the issue whether the "victim of the offense" for purposes of the guideline on hate crimes and vulnerable victims, §3A1.1, refers only to the victim of the offense of conviction or to the victim of any relevant conduct. As indicated above, we favor the broader view. For example, a defendant may be convicted of several counts of mail fraud in which part of his relevant conduct, but not his offense of conviction, included a scheme to defraud several vulnerable victims. By contrast, in a similar mail fraud scheme evidentiary considerations may result in counts of conviction that involve one or more vulnerable victims but not other counts that would be included within relevant conduct.

The reasons the guidelines include relevant conduct for purposes of determining the extent of a fraud apply equally to the manner in which that fraud is conducted generally. Real offense sentencing enhances the ability of the guideline system to reduce unwarranted sentencing disparity. Without the use of relevant conduct principles, two offenders who commit identical conduct could receive very different sentences, depending upon the specific charges pursued. Thus, the Commission should resolve this issue so that the vulnerable victim guideline operates in accordance with relevant conduct principles.

Item 13

Item 13 addresses the issue of whether multiple criminal incidents over time may constitute a single act of aberrant behavior warranting departure from the applicable sentencing guideline range. We urge the Commission to specify that such acts are not a basis for departure. A single act of aberrant behavior may constitute a basis for departure because a defendant who acts out of character and engages in illegal conduct on one occasion is deserving of less punishment and is less in need of incapacitation than one who engages in multiple unlawful acts over time. However, to extend the reasoning of this departure basis to multiple unlawful acts occurring over time defies logic and undermines the guideline system. We urge the Commission to disallow this basis for departure when based on multiple unlawful acts occurring over time.

Item 14

Amendment 14 concerns the issue whether collateral consequences of a defendant's conviction can be a basis for a downward departure. The Commission should address this issue since departures based on collateral consequences of conviction may be seized upon by judges as a means of avoiding guideline sentences in white collar cases. In addition to the cases cited by the Commission, a recent tax case, United States v. Olbres,

99 F.3d 28, 32-37 (1st Cir. 1996), shows how the courts have had to deal with this issue. In Olbres the defendants appealed from the denial of a downward departure based on the fact that their business would fail and their 12 employees would be adversely affected if the defendants were imprisoned. The First Circuit rejected a categorical approach to these cases and remanded to the trial court to determine whether the case fell outside the heartland of these offenses. The court gave some indication that a disadvantage to innocent persons is not enough to take a case out of the heartland.

The Commission should disallow collateral consequences of conviction as a basis for downward departure so that the guidelines can operate as intended. Every individual suffers collateral consequences of conviction, whether such consequences be in the form of lost employment or lost business. Collateral consequences are a heartland effect of imprisonment and should not be the basis for a lower sentence. We urge the Commission to disallow this basis for departure.

AMENDMENT 30 -- SUPERVISED RELEASE AND SAFETY VALVE

Amendment 30 amends the supervised release guideline, §5D1.2, to provide that a defendant eligible for the "safety valve" exemption from mandatory minimum sentences is also exempt from a statutorily determined minimum term of supervised release. While we do not object to the substance of this amendment, we would recommend that its form be changed somewhat. The current proposal sets forth the change in an Application Note but includes contrary language in subsection (b) of the guideline itself: "The term of supervised release imposed shall in no event be less than any statutorily required term of supervised release." (Emphasis added.) To improve clarity in this area, we recommend that subsection (b) begin with the words "Except as provided in §5C1.2". With this addition, the commentary and the guideline itself will be consistent.

AMENDMENT 31 -- RESTITUTION

Amendment 31 includes an issue for comment concerning "community restitution" for a defendant convicted of certain controlled substances offenses in which there is no identifiable victim. The issue for comment arises because of section 205(c) of the Antiterrorism and Effective Death Penalty Act of 1996, which permits a court to order restitution based on the amount of public harm in such cases. This provision directs the Sentencing Commission to promulgate guidelines in this area and further provides that no restitution may be ordered until the Commission promulgates guidelines.

We urge the Commission to move forward with a guideline this amendment cycle in accordance with section 205(c) of the Act so

that the statutory provision can take effect in November. Delaying the issuance of a guideline for another year would mean a two-and-a-half year gap between the enactment of the statutory directive and its practical effect.

Since the concept of community restitution is a new one, we believe that a fairly general guideline that complies with the statutory provision would be appropriate. The guideline could be refined in the future after the courts gain experience with this form of restitution. For the present, the amount of public harm caused by the offense could be based on the offense level. Moreover, since the statute provides that the amount of community restitution may not exceed the fine ordered in the case, the guideline could refer to the ranges from the fine table for purposes of community restitution. The Commission should act quickly so that the statutory provision authorizing community restitution becomes a reality.

We would be pleased to provide assistance in the further development of the guidelines discussed.

Sincerely,



Mary Frances Harkenrider
Counsel to the Assistant
Attorney General

March 13, 1997

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed, please find our comments with regard to the amendments proposed by the United States Sentencing Commission.

Sincerely,



Mary Lou Soller
Miller & Chevalier
655 Fifteenth Street, N.W.
Suite 900
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Alan J. Chaset
Law Offices of Alan J. Chaset
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Alexandria, VA 22314

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Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Sections's Committee on the United States Sentencing Guidelines. The members of that committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists. We are corresponding today, however, in our individual capacities as private defense attorneys and not as representatives of either the committee, the section or the association.

On January 2, 1997, the Commission published notice of proposed temporary emergency guideline amendments. Additionally, that notice contained several "non-emergency" proposals to amend and consolidate various other sections of the guidelines. Subsequently, on February 25, 1997, the Commission published another notice containing proposals for other emergency and non-emergency amendments to the guidelines and including some conforming changes to the previously published proposals. While we have already forwarded a brief response to the initial set of emergency proposals in our representative capacity, we are using this occasion to address some of the issues raised within the remainder of those notices and ask that you accept these comments on our own behalf.

As a starting point, we wish to commend the Commission (and more specifically its staff) for the significant amount of effort obviously reflected by the broad range of issues implicated by the various and numerous proposals. To the agency's credit, it was able to craft potential changes to advance its commitment to simplify and consolidate the guidelines while, at the same time, drafting responses to the many legislative directives requiring some more immediate action. And it was also able to deal with other aspects of the guidelines that needed adjustment, able to address several disparate decisions between the circuit courts, and able to attempt to placate the various constituent groups, entities and organizations that seek amendments to the Manual.

Because we are cognizant of the quantum of effort required just to produce the several hundred pages of proposals and because we understand the work that would now be required to polish and refine these matters to permit their adoption and to facilitate their implementation, we appreciate all the more the signal apparently being provided by the Commission as to what can and probably will be handled during this amendment cycle and what needs to be deferred for the present. Rather than being critical of the Commission for raising false hopes, we fully understand that message in general and recognize the impact of the two current commissioner vacancies in particular. Furthermore, considering previously stated remarks in regard to the Commission's Rules of Practice and Procedure, we believe that such deferral would be consistent with the suggestion of a more deliberate system of proposal, comment, review and more focused reproposal.

Having said the above, we believe that the Commission must in turn appreciate that, as a consequence, it has been somewhat more difficult to enlist volunteer members of our and other such committees to spend the time necessary to fully and properly consider and then formally address each of the proposals on the long amendment agenda. For instance, while some of our

volunteers were ready to volunteer their individual opinions on single issues, there was insufficient comment and discussion provided as to most others. As a result, no clear consensus position could be achieved for each of the items on the lists and thus no fairly representative statement could be crafted. We will, however, be providing herein some brief comments of our own on several of the proposals and we do offer our commitment to continue to work with the Commission and its staff on the remainder.

With that as background and even though we are speaking as individual practitioners, please understand that our principal policy directive on sentencing guideline matters is still to be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18 - 2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18 - 4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding with experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

I. January 2, 1997 - Non-Emergency Amendments

A. Amendment 5: While cognizant of the fact that the proposal here effectively amounts to making permanent a previously promulgated emergency amendment, we remain uncomfortable with U.S.S.G. §3A1.4 in its current and amended forms because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points).

B. Amendment 6: We too are troubled by the confusion surrounding the definition of "instant offense" and its relation to relevant conduct and we also believe that explanatory language is needed. Unfortunately, the current proposal does not fully address and solve that confusion and that need. While we believe that more work is needed on this otherwise worthwhile proposal, we are also troubled by what is labeled as a conforming change to U.S.S.G. §3C1.1. Despite the label, we view the amendment as applied here as more a broadening of the coverage of this obstruction provision as opposed to an explanatory definition.

C. Amendment 8: We support incorporating the holding in United States v. Hill into U.S.S.G. §1B1.3.

D. Amendment 9: While we have previously and consistently stated our opposition to having acquitted conduct being considered for sentencing purposes and while we favor Option

1B among the proposals now being provided, we are cognizant of the fact that the Commission may not presently be in a position to consider all the implications of United States v. Watts and all the issues surrounding the use of acquitted conduct in the guideline equation.

E. Amendment 10: While we are supportive of that part of this proposal that simplifies the operation of Chapter Two cross references by limiting the what goes into/ what is to be considered in the determination of "greater offense level," we believe that more research needs to be undertaken and presented demonstrating the need to amend U.S.S.G. §2X1.1 as proposed.

F. Amendment 11: We are opposed to the proposed amendment to U.S.S.G. §1B1.10 limiting the impact of retroactive guideline changes to only reductions in the term of imprisonment. For many judges, the sentencing decision is a gestalt reflecting the use of the various sanctioning alternatives available under the statutes and the guidelines. Often, the appropriate sentence for the unique combination of offense and offender characteristics is a similarly unique combination of a particular point on the otherwise applicable range of months, a certain fine including the costs of imprisonment and/or supervision, a period of supervision to follow with particularized conditions of supervision, etc. When one of those factors is changed or eliminated in some way, the entire package has thus been changed. The only way to then achieve the desired balance is to similarly adjust each of the other pieces of the sentencing puzzle.

G. Amendments 12 & 18: The need to address the multiple problems associated with fraud and theft and tax guidelines in general and the interrelated loss issue in particular is most apparent as is the appropriateness of taking those matters off the table for this amendment cycle. While we have not as yet developed a specific position on the changes as currently proposed, we are encouraged by the lead taken in this area by the Practitioner's Advisory Group and are impressed with the drafts already authored by James Felman, Barry Boss and John Cline. As the effort on this front moves forward, we anticipate making substantial use of the product being prepared by these individuals and expect to recommend substantial parts of same for your consideration.

H. Amendment 14: Since we believe that the decisions from the 6th and 11th circuits represent the more appropriate response to the application of the "express threat of death" enhancement in U.S.S.G. §2B3.1, we oppose the proposed changes within the guideline and the application note.

I. Amendment 15: While we remain uncomfortable with language that equates injury as conduct and while there might be a better way to frame the point the Commission is trying to make, we prefer Option 1 as the identified narrower approach to the matter.

J. Amendment 16: While having no difficulty with the first and third parts of this proposal, we are opposed to the functional increase in the offense level for the covered bearer instrument offenses that will occur by moving the offenses from U.S.S.G. §2F1.1 to §2B5.1.

There has been no showing/demonstration that the current arrangement is not adequate to address the crime.

K. Amendment 17: We support the clarification of the meaning of "underlying offense" being proposed here.

L. Amendments 21 & 22: We share the belief that the current guidelines relating to role in the offense merit further study and refinement and we have long felt that these provisions could be integrated in some way with the drug guidelines to lessen the impact of drug quantity on the overall guideline assessment. While we see the need for change, we have some difficulties with each of the options being proposed for dealing with aggravating role and mitigating role adjustments. Because these sections are so significant, we trust that the Commission will place the issue high on the priority list for the next amendment cycle and we pledge to work with staff to share our specific thoughts and suggestions.

M. Amendment 23: While we prefer the clear and convincing standard adopted in the District of Columbia circuit, we believe that the decision in United States v. Dunnigan provides all the guidance necessary here. Further, we oppose the last of the four changes being proposed for the application note to U.S.S.G. §3C1.1; there has been no demonstrated need or other data provided justifying the expansion to a broader set of cases.

N. Amendments 24, 25 & 26: Of the three proposals addressing various aspects of the Acceptance of Responsibility concept in U.S.S.G. §3E1.1, we note our support of only those revisions that remove the restriction that currently prohibits the application of the additional one level decrease for offense level 15 or lower.

O. Amendment 28: As a general proposition, we believe that the Commission should not necessarily dictate a determination/resolution each time a disagreement between the circuit courts is identified as regards the implementation or application of a guideline provision. However, we appreciate the difficulties and unfairness that arise because of disparate interpretations and we are cognizant of the twenty-plus-page document prepared by the Commission's General Counsel listing such conflicts already addressed by Commission amendment.

If, however, the Commission decides to address any of the fifteen conflict issues listed within this proposed amendment during this cycle, please permit us to offer our position on several of those items. As to 4), we believe that a federal prison camp is clearly a non-secure facility and thus is functionally similar to the other listed facilities in U.S.S.G. §2P1.1(b)(3). As to 5), we believe that the two level enhancement at U.S.S.G. §2F1.1(b)(3)(A) requires that the defendant affirmatively misrepresent his/her authority to act on behalf of a charitable or governmental organization. As to 12), we believe that the use of the career offender provisions should be restricted to only those who otherwise statutorily qualify and thus cannot be used for departure purposes. As to 13), we believe that it may be reasonable in some circumstances for multiple criminal incidents occurring over a period of time to constitute a single act of aberrant

behavior thus warranting departure. And as to 14), we believe that it may be reasonable in some circumstances for the collateral consequences of defendant's conviction to serve as the basis of a downward departure.

P. Amendments 33, 34 & 35: We appreciate the desire of the Commission to recognize and implement the holding in Koon v. United States. While we support some of the more technical changes in amendment 34, we believe that amendments 33 and 35 are an inappropriate and unnecessary response to that decision and we see no need to merely repeat the language from the introduction in U.S.S.G. §5K2.0. If the Commission does intend to recraft the entire introduction in an upcoming amendment cycle, that would be the time to handle this matter.

Q. Amendment 37: As to the numerous consolidations and refinements proposed within this item, we have reviewed the detailed comments in this regard prepared by the Federal Public Defenders. While not necessarily adopting the position stated therein on each of the proposed consolidations, we find the effort thorough and complete and commend the discussion to the Commission.

II. February 25, 1997- Emergency/Non-Emergency Amendments

Aside from amendments 2, 12 and 13 that are necessarily implicated by either our previous comments our remarks contained above, we have not had an opportunity to review and discuss these proposals. Any comments in that regard from either us individually or more formally from the committee that we chair will be provided by the March 28, 1997 response date.

Finally, attached hereto are some additional comments prepared by one of the members of the committee. While this document was originated as a response to our request for reactions to the amendments being proposed during this cycle, its content is more general in nature and speaks to the structure of the present system and the author's perceived need for dramatic change. Since we are providing the above discussion in our individual capacities, we thought it appropriate to similarly forward this thoughtful piece from Professor Russell Coombs.

Thank you for this opportunity to provide our input.



THE CATHOLIC UNIVERSITY OF AMERICA

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March 14, 1997

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1997 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1997 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the

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Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

* * *

COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 5 will be our comment on proposed amendment (or issue for comment) number 5 and so forth.

Amendment 5 (§ 3A1.4)

Using emergency authority, the Commission amended § 3A1.4 in November 1996, in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. U.S.S.G. App. C, amend. 539. The emergency amendment broadened the scope of § 3A1.4 (by deleting "international") to apply to a federal crime of terrorism. Amendment 5 would repromulgate § 3A1.4 (terrorism) as a permanent guideline. We understand that the guidelines must provide an adjustment for acts that involve or promote terrorism, but we oppose the type of enhancement provided by § 3A1.4.

The amended version of § 3A1.4 provides the same enhancement as the original. The adjustment imposes a twelve-level increase in the offense level, a minimum offense level of 32, and a criminal history category VI. We believe that mandatory minimums are counterproductive and inconsistent with the guideline system, and therefore oppose establishing a mandatory minimum offense level of 32. For similar reasons we believe it is inappropriate for a chapter three adjustment to raise the criminal history category.

The guidelines are set up in a logical order: chapters two and three address the offense conduct; chapter four captures the defendant's criminal history. Under this adjustment, however, every defendant will have the same criminal history category. This renders chapter four virtually meaningless and results in unwarranted disparity between defendants with a serious criminal record and defendants with a less serious or no criminal record. A twelve-level adjustment for terrorism is a significant increase to any offense level and there should be no automatic criminal history category VI.

Amendment 6 (§ 1B1.1, § 3C1.1, § 4B1.1, § 4B1.2)

Part One

Amendment 6 has two parts. The first part corrects a technical error in the application instructions guideline, §

1B1.2. We support that amendment.

Part Two

We are troubled with the second part of amendment 6. The language proposed to be added to application note 1(1) of § 1B1.1 and to the commentary of § 3C1.1 we find to be convoluted and confusing and therefore unhelpful. We recommend that the Commission not promulgate any of the revisions set forth in part two of amendment 6.

The explanation of the amendment concerning "instant offense," for example, indicates that the purpose of the amendment is "to distinguish the current or 'instant' offense from prior criminal offenses." The proposed language, however, only results in confusion. The Commission has defined the term "offense" to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n. 1(1)). The term "instant offense," therefore, must mean "the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." If the Commission believes it necessary to define "instant offense," we offer the following suggestion: "The term 'instant offense' means the violation for which the defendant is being sentenced."

The explanation of the amendment to the commentary of § 3C1.1 does not indicate how the amendment conforms § 3C1.1 to the definition of "instant offense." The willful obstruction guideline already uses the term "instant offense." Moreover, the proposed language, once untangled, would change § 3C1.1 substantively. Under the present guideline, the adjustment applies only to the conduct of the defendant or conduct that the defendant aids and abets, see application note 7; U.S. Sentencing Com'n, Questions Most Frequently Asked about the Sentencing Guidelines ques. 62 (June 1, 1994), and only to efforts to obstruct justice with respect to the offense for which the defendant is being sentenced. The proposed "conforming" language would permit application of the enhancement beyond conduct for which the relevant conduct rules of § 1B1.3 hold a defendant accountable. For example, the proposal would call for an obstruction of justice based upon conduct that obstructed the investigation of a civil violation committed by another person, even though the conduct that triggers application of the adjustment (1) did not occur during the offense of conviction, or in preparation for or attempting to evade responsibility for the offense of conviction, and (2) was not part of the same course of conduct as or part of a common scheme or plan with the offense for which the defendant is being sentenced. In other words, absent the proposed amendment, the obstruction enhancement would not apply because the relevant conduct rules of § 1B1.3 would not call for application of the enhancement. We do not believe that the obstruction guideline should be a vehicle for sanctioning

conduct so far removed from the offense of conviction.

Amendment 7
(§ 1B1.2)

We do not oppose the amendment.

Amendment 8
(§ 1B1.3)

Amendment 8 would amend the commentary in § 1B1.3 to provide an example of what is meant by "same course of conduct." The example incorporates the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), by amending application note 9(B) to state that "if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information, is insufficient to show that they are part of the same course of conduct or common scheme or plan." We do not oppose the amendment.

The proposed amendment would provide a useful example to illustrate that similar offenses are not necessarily part of the same course of conduct, particularly when there is a lapse of time between them. In such cases, there must be a stronger showing of a connection between the offenses.

Amendment 9
(§ 1B1.3)

Amendment 9 presents three options to amend § 1B1.3 to address the extent to which acquitted conduct should be considered relevant conduct. All three options use the term "acquitted conduct" to mean "conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge." Option 1(A) would revise § 1B1.3 to state that acquitted conduct "shall not be considered relevant conduct under this section unless it is independently established by evidence not admitted at trial." Option 1(B) would revise § 1B1.3 to state that acquitted conduct "shall not be considered relevant conduct under this section." This option would also include an application note stating that acquitted conduct may provide a basis for an upward departure. Option 2 would revise § 1B1.3 to provide that "acquitted conduct shall not be considered relevant conduct unless such conduct is established by clear and convincing evidence." Option 3 would add an application note to the current guideline stating that a downward departure may be warranted "if the court determines that, considering the totality of circumstances, the use of such conduct as a sentencing enhancement raises substantial concerns of fundamental fairness, a downward departure may be considered." We prefer option 1(B).

We believe that the Commission has the power to limit or preclude the use of acquitted conduct to determine the guideline

range.

Congress has given the Commission great discretion to determine federal sentencing policy. A sentencing rule promulgated by the Commission must be complied with, 18 U.S.C. § 3553(b), unless the rule conflicts with the Constitution or a statute. We are unaware of any constitutional provision that prohibits the Commission from adopting a rule that precludes or limits the use of acquitted conduct to determine sentence.

In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's sentence on conduct of which the defendant has been acquitted. Most people equate acquittal with vindication and do not perceive using acquitted conduct as fair or just. We recognize the differing burdens of persuasion rationale that supports the use of acquitted conduct, but the use of acquitted conduct to determine the guideline range is neither compelled by the Constitution or by statute. We think it unwise policy to have a rule that can render a jury's verdict meaningless.

Amendment 10
(§ 1B1.5, § 2X1.1)

Part A

We support the amendment.

Part B

Part B of amendment 10 would amend § 2X1.1 to eliminate the three-level reduction available for certain attempts, conspiracies, and solicitations. Instead of the three-level reduction, the amended commentary would state that a downward departure of up to three levels may be warranted "if the defendant is arrested well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense." We oppose the amendment.

There's a qualitative difference in culpability between a defendant who commits a crime and a defendant who attempts, conspires, or solicits another to commit a crime, especially when the object crime is not carried out. Indeed, in recognition of this difference, Congress has created a maximum five-year penalty for a conspiracy conviction under 18 U.S.C. § 371. Under 18 U.S.C. § 373 (solicitation to commit a crime of violence), the maximum penalty is "not more than one-half the maximum term of imprisonment" or "if the crime solicited is punishable by life imprisonment or death . . . not more than 20 years." The guidelines should continue to recognize the distinction in culpability -- even if only a few defendants qualify for the reduction. Replacing the three-level reduction with a very detailed departure instruction would unnecessarily allow for disparate sentencing of defendants who would otherwise qualify for a reduced sentence.

Amendment 11
(§ 1B1.10)

Amendment 11 would revise § 1B1.10, p.s. (retroactivity of amended guideline range) to provide that a sentence reduction under 18 U.S.C. § 3582(c)(2) authorizes only a reduction in the term of imprisonment, and that "in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served." This amendment responds to what the explanation of the amendment calls a "circuit conflict" between the Eighth and Ninth Circuits. We oppose the amendment.

To begin with, there may not be, strictly speaking, a circuit conflict. The issue involved is an interpretation of 18 U.S.C. § 3624. The Ninth Circuit case involves a holding; the Eighth Circuit case involves dictum.

As originally contemplated, supervised release served purely to help reintegrate defendants into society. Indeed, as originally enacted, the supervised release provisions did not authorize revocation of supervised release. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1999 (enacting 18 U.S.C. § 3583). The Senate Judiciary Committee's report on that Act states that the legislation did not provide for revocation proceedings for violation of a condition of supervised release because [the Committee] does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense.

S. Rep. No. 225, 98th Cong., 1st Sess. 125 (1983). The lack of revocation proceedings suggests that supervised release originally was intended to be a way of helping the defendant.

Congress has changed its view of supervised release, however, and has made supervised release punitive. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a), 100 Stat. 3207-6 (1986), authorized revocation of supervised release and imposition of a prison term for a violation of a condition of supervised release. Since then, Congress has mandated imprisonment for certain types of violations of supervised release, see 18 U.S.C. § 3583(e), and has authorized courts to revoke supervised release for a violation of a condition of supervised release and impose a term of imprisonment to be followed by another term of supervised release, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 2016 (amending 18 U.S.C. § 3583(e)(3)). It is no longer accurate to describe supervised release as merely helping defendants to adjust to life outside of prison. As evidenced by the growing number of revocation proceedings, supervised release is punitive.

The meaning of section 3624 should be determined by courts in the context of a case or controversy. In any event, we believe that amendment 11 represents unjust and unsound public

policy. The amendment turns a blind eye to the fact that a defendant has been in prison longer than the defendant should have been. If a fine is reduced, any excess money paid to the clerk by the defendant can be returned. Excess time in prison cannot be returned. The least that can be done is to give the defendant credit against the term of supervised release for the excess time in prison.

Amendment 12
(§ 2F1.1, § 2B1.1)

Amendment 12 would amend § 2F1.1(b)(6)(B) (fraud) and § 2B1.1(b)(6)(B) (theft) by revising the enhancement that applies "if the offense affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense." The proposed amendment would revise the enhancement to apply if "(A) obtaining or retaining the gross receipts of one or more financial institutions was an object of the offense, [and] (B) the defendant derived more than \$1,000,000 in gross receipts from such institutions."

We support the amendment. The current language of the enhancement is ambiguous as to what is meant by "affected a financial institution" and whether there must be a connection between the \$1,000,000 obtained and the financial institution. The amendment would make clear that the enhancement requires the defendant to have obtained the \$1,000,000 from the affected financial institution or institutions.

Amendment 13
(Ch. 5, part A)

Amendment 13 consists of two parts. The first part would create a new guideline (§ 5A1.3) to cover the sentencing table. We do not oppose either part of the proposed amendment.

Amendment 14
(§ 2B3.1)

Amendment 14 would amend § 2B3.1 to address a split in the circuits over the enhancement for "express threat of death." The amendment would revise § 2B3.1(b)(2)(F) to provide a two-level enhancement if a "threat of death was made." The amendment would also revise application note 6 by deleting the examples of "an express threat of death," and add an instruction providing that "the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply." We oppose this amendment.

Robbery necessarily includes instilling some kind of fear in the victim. Under the Hobbs Act, for example, robbery means "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property" The

purpose of the enhancement in § 2B3.1(b)(2)(F) is to increase the punishment for a threat that a reasonable person would understand as a threat of death. The enhancement is inapplicable in situations where there can be no doubt about the existence of such a threat -- where a gun or dangerous weapon is used or possessed, or a toy weapon or an object appearing to be a weapon is displayed or possessed -- because in those situations a greater enhancement supersedes the two-level enhancement of § 2B3.1(b)(2)(F). The requirement of an express threat in the situation where there is in fact no weapon (or even a toy weapon or an object that appeared to be a weapon) helps ensure that the perception of a threat is a reasonable perception. To be reasonable in such a situation, the threat must have been unambiguous and a direct statement of the defendant's intention.

Amendment 15
(§ 2B3.1)

Amendment 15 would amend § 2B3.1 in response to the Carjacking Correction Act of 1996, Pub.L. No. 104-217. That Act revised the carjacking offense in 18 U.S.C. § 2119 to include in the definition of "serious bodily injury" conduct that would constitute aggravated sexual abuse or sexual abuse. The amendment presents two options to revise § 2B3.1. Both options would provide a two-level enhancement if the offense involved carjacking, in addition to the two-level enhancement "if the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense." Option 1 would revise the commentary to § 2B3.1 stating that for purposes of § 2B3.1, "serious bodily injury" includes "conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." Option 2 would amend § 1B1.1 (application instructions) to revise the definition of "serious bodily injury" to include "conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law."

The Carjacking Correction Act revised the definition of "serious bodily injury" only for purposes of 18 U.S.C. § 2119. Option B would revise the definition of "serious bodily injury" in § 1B1.1, which applies to all offenses, unless otherwise specified. We believe the Commission should, in accordance with the Act, limit the applicability of this expanded definition of "serious bodily injury" to carjacking offenses by amending the definition for purposes of § 2B3.1 only.

The proposed definition, including injury as well as criminal conduct, will cause unnecessarily complicated application problems. We therefore suggest that the proposed addition to the definition of serious bodily injury be rewritten. We recommend that the new language recognize that an artificial definition is being used by stating: "For purposes of subdivision (b)(3)(B), serious bodily injury is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse

under 18 U.S.C. §§ 2241 or 2242 or a similar offense under state law."

Amendment 16
(§ 2B5.1, § 2F1.1)

Amendment 16 consists of three parts. The first part of the amendment responds to section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, which directs the Commission to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470. In response, this part of the amendment would revise § 2B5.1 (offenses involving counterfeit bearer obligations) to provide a two-level enhancement "if the offense was committed outside the United States." The second part of the amendment would make § 2B5.1 the applicable guideline for offenses involving altered bearer instruments of the United States. The third part of this amendment would revise the commentary to § 2B5.1 to address offenses in which the counterfeit or altered items "are so defective that they are unlikely to be accepted."

We support the first and third parts of this amendment and oppose the second part. The second part of the amendment moves offenses involving altered bearer instruments from § 2F1.1 to § 2B5.1, which results in at least a one-level increase in the offense level. The Commission's explanation for the increase is that the "higher offense level reflects the lower level of scrutiny realistically possible in transactions involving currency." There has been no showing, however, that the current levels of punishment are inadequate. Absent such a showing, there is no justification for the increase.

(Amendment 17)
(§ 2D1.6, § 2E1.1, § 2E1.2, § 2E1.3)

Amendment 17 would amend the commentary four guidelines -- § 2D1.6 (use of a communication facility in committing drug offense), and § 2E1.1, § 2E1.2, and § 2E1.3 (racketeering offenses) -- to define the phrase "offense level applicable to the underlying offense" (and variants of that phrase). This amendment would resolve a split in the circuits as to whether, under these guidelines, the term "underlying offense" (or a variant of that term) means the offense of conviction or the offense of conviction plus relevant conduct. The proposed amendment would state that the "underlying offense" is determined based on the "conduct of which the defendant was convicted." The amendment would also amend § 2E1.1 to require the application of application note 5 of § 1B1.2 when the conduct involves more than one underlying offense.

We support the amendment.

Amendment 18
(§ 2B1.1, § 2F1.1, § 2T1.4, § 2T4.1)

Proposed amendment 18 addresses important issues in theft and fraud cases. Amendment 18(A) includes proposed changes to the more than minimal planning enhancement and to the loss tables applicable in theft, fraud, and tax cases. Amendments 18(B) and 18(C) contain issues for comment regarding, among other things, the loss tables, specific enhancements, and loss determination.

At the outset, it is important to emphasize that the PAG believes that the issues addressed in proposed amendment 18(A-C) are of critical importance, and that Commission action is necessary to clarify and simplify the application of these guidelines, while simultaneously serving the twin goals of reducing unwarranted disparity and uniformity. Unfortunately, based on the Commission's failure to propose draft amendment language on the calculation of loss, we have discerned that it is unlikely that any of these significant issues will be addressed during the current amendment cycle. We urge the Commission, however, not to abandon these areas, but to begin the process of obtaining meaningful input from the various advisory groups and from the Department of Justice so that these somewhat complicated guidelines can be addressed during the next amendment cycle. In order to advance that objective, we have included the PAG's general comments on the important issues which are raised by the Commission's published amendments.

I. Introduction

The PAG's views with respect to the fraud and theft guidelines are driven by two guiding principles. First, revisions to the theft and fraud guidelines must not lose sight of the notion that the calculation of "loss," and its role as the driving force in guideline calculations, is not intended as an end in itself, but rather to serve as a rough and approximate proxy for the relative culpability of the defendant and the severity of the offense. The point behind calculation of loss should not be to endeavor to seek mathematical certainty regarding the precise quantity of funds lost by the victim(s), but rather to measure in approximate terms the appropriate punishment for the offense conduct. Accordingly, amendments which simplify the calculation of loss by reducing the need to engage in detailed and complex fact finding, particularly where the impact of the calculation on the total loss figure is relatively small, are supported.

Second, the use of actual loss as a surrogate for culpability suffers from two serious and readily identifiable flaws in a potentially large number of cases. First, the use of actual loss to drive guidelines calculations wholly fails to take into consideration the distinction between those defendants who intend to appropriate the lost funds to their own use, and those who do not. Using bank fraud as an example, a simple calculation of the loss suffered by a bank from a bad loan does not distinguish between the offender who intends from the beginning to pocket the full amount of the loan and abscond, on the one

hand, and the offender who honestly intended to repay the loan but was unable to do so as a result of unexpected developments, on the other. It is respectfully submitted that there is a wide divergence of culpability between cases in which intended loss or intended gain is similar to the actual loss, and cases where intended loss or gain is zero or near zero. Because actual loss is only a loose surrogate for culpability, the avoidance that in a potentially large number of cases factors such as proximate cause, intended loss, and intended gain must be permitted to play a role.

Using these two principles as a guide, the PAG submits the following comments regarding the proposed amendments.

II. Consequential damages.

The guidelines currently permit the inclusion of reasonably foreseeable consequential damages only in government procurement cases. It has been observed that singling out this particular type of case for different treatment is likely unwarranted. There would appear to be two options for elimination of this unwarranted disparity: (1) eliminate the use of consequential damages in procurement cases, or (2) consider consequential damages in all cases. In the interests of simplicity and ease of application, the PAG strongly supports the first of these options. Evidence regarding consequential damages will almost never be within the possession of either the government or the defendant, and will require considerable investigation, research, and discovery from third parties. It involves litigation of frequently complex issues which may have almost no factual connection to the conduct underlying the charged offense. Given that loss amounts are intended only to serve as a rough guide to culpability, the added complexity and burden involved in litigating issues of consequential damages is likely not worth the effort in order to arrive at an appropriate sentence. In highly extraordinary cases in which actual loss is minor and consequential damages are extreme, an upward departure could be appropriate. There seems little reason, however, to believe such cases occur with sufficient frequency to justify the difficulty and complexity of calculating such losses in every case, or even in every procurement or product substitution case.

III. Interest

The PAG believes the current guideline commentary with respect to the exclusion of interest from loss calculation is appropriate. The use of loss as a measure of culpability does not require consideration of a victim's opportunity costs or bargained-for interest. In short, the added complexity of calculating interest of either type, which is likely to be a rather small component of the total loss figure in most cases, is not justified by any measurably increased accuracy in

determining culpability or offense severity.

The exclusion of interest from the calculation of loss does not, however, necessarily mean that interest actually paid by the defendant should not be deducted from the victim's loss. The reason interest should be excluded is that it essentially represents lost profit, and lost profit is not truly a component of "loss." On the other hand, to the extent that the defendant has paid interest in a loan, the interest represents a direct profit to the bank. The PAG submits that there is no reason why the victim's profits should not be offset against a victim's loss to arrive at a "net" loss for guidelines purposes. Moreover, the inclusion of interest actually paid would present no significant fact finding difficulties. Indeed, inclusion of paid interest would potentially simplify loss calculation by eliminating the need in every case to revisit the payments made by the defendant to determine the principal and interest components of each payment.

IV. Elimination of "more than minimal planning" SOC.

Because of the frequency with which this specific offense characteristic is applied, the PAG agrees with its incorporation into the loss table. On the other hand, because there are a significant number of theft cases which do involve only minimal planning, the PAG strongly believes a specific offense characteristic should be added which provides for a two level decrease in those cases in which the defendant used no more than minimal planning. This is particularly appropriate in view of the effect the proposed revision of the loss table would have on offenders in criminal history category II, who may otherwise lose the ability to be considered for a probationary punishment for minor theft and fraud offenses. Limitation of the two level decrease to cases involving losses of less than \$250,000 may also be appropriate in order to reduce the need to consider this SOC in those cases in which it is unlikely to be applicable.

V. Risk of loss, intended loss, and intended gain.

The PAG believes that actual loss should ordinarily be used to determine the base offense level in both theft and fraud cases. Intended loss, rather than being used to determine the base offense level only in cases where it is greater than actual loss, should instead be an encouraged basis for both upward and downward departure where it varies significantly from actual loss. Similarly, risk of loss and intended gain should be encouraged bases for departure where they differ significantly from actual loss.

The concepts of risk of loss and intended gain and loss are interrelated in the sense that they present alternatives to actual loss as a means for approximating culpability. It is

important to recognize, however, that they are strictly alternatives, and cannot readily be used to modify the definition or calculation of actual loss. That is, if the guideline utilizes actual loss as a determinant of offense severity, in or loss could easily be incorporated into the guidelines a manner other than as grounds for departure from the guideline range established by actual loss calculation. On the other hand, in those cases where the intended gain or loss differs greatly from the actual loss, significant and relatively frequent departures are absolutely essential if unwarranted uniformity is to be avoided. Otherwise, those who steal money by fraud will be treated in exactly the same manner as those who cause similar losses, but not through any intent to gain or cause loss in such amounts.

Because of the near parity of the current theft and fraud guidelines, the fraud loss table appears to be based on a built-in assumption that the defendant intended gain and loss amounts very close to the actual loss sustained. As set forth above, however, the PAG submits that fraud cases frequently involve defendants whose intended gain was a tiny fraction of the actual loss sustained. While actual loss must play a key role in determining the appropriate sanction for such offenses, the PAG suggests there should be a very permissive commentary suggesting the appropriateness of downward departures in cases where the defendant's intended gain is minimal in relation to the actual loss. A similar downward departure should be encouraged where the loss intended by the defendant is considerably less than the loss actually inflicted.

Because the loss table assumes intended gain and loss will be similar to actual loss, the instances in which the defendant intended to gain or inflict loss in an amount dramatically higher than the actual loss, upward departures in such cases may also be appropriate. Anecdotal evidence suggests that these cases will occur with considerably less frequency than cases warranting a downward departure, parity of reasoning indicates upward departures under these unusual circumstances should also be permitted in the commentary to the guidelines.

VI. Causation.

The PAG favors an express provision in the fraud guideline (or the accompanying commentary) limiting the actual loss figure to those losses for which the defendant's criminal conduct was (1) a "but-for" cause, and (2) a proximate cause. Thus, the defendant's sentence would be increased only by those losses that would not have occurred but for his criminal conduct and that were reasonably foreseeable to him as a direct result of that conduct.

The suggested causation standard follows from the role actual loss plays at sentencing in fraud cases. The fraud guideline contemplates that loss will provide a rough measure of the defendant's culpability. But loss that the defendant either

did not cause or that was not reasonably foreseeable to him has little (if any) bearing upon his culpability. Suppose, for example, that a defendant defrauds a business out of \$50,000 through the sale of worthless merchandise and, unforeseeably to him, that \$50,000 loss pushes the business into bankruptcy and costs it \$5 million. To sentence the defendant based on the unforeseeable \$5 million loss, rather than the foreseeable \$50,000 loss, would unfairly exaggerate his culpability.

In addition to an express standard limiting the actual loss figure to those losses for which the defendant's criminal conduct is both a "but for" and a proximate cause, the PAG believes that some provision should be made for the "multiple causation" situation. In a "multiple causation" case, the defendant's criminal conduct may both actually and proximately cause a loss, but it does so in combination with other factors--for example, a sharp downturn in the economy or unrelated criminal conduct by another person. To hold the defendant responsible for the entire loss in such a case could overstate his culpability. Although an express proximate cause requirement would produce a fair measure of culpability in most "multiple causation" cases, we suggest that the commentary to the fraud guideline include authority to depart downward in exceptional cases.

VII. What amounts are credited and when credits are valued.

A. Amounts credited.

The PAG believes that the actual loss figure should be reduced by all amounts received or readily recoverable from the defendant at the time law enforcement authorities discover the offense. This would include, for example, (1) any services, goods, or money furnished by the defendant before authorities discover the offense; (2) any security pledged by the defendant before authorities discover the offense; and (3) any other thing of value belonging to the defendant that the victim is in a position to recover through reasonable effort before authorities discover the offense, provided that the defendant does not interfere with the victim's recovery. Category (3) would include, for example, the defendant's money in an account with a victim bank at the time authorities discover the offense and the defendant's goods in the possession of a victim bailee at the time authorities discover the offense.

Reducing actual loss by these amounts will help ensure that the loss figure provides a rough measure of the defendant's culpability. Value that the defendant has already furnished to the victim at the time authorities discover the offense (category (1) above) plainly reduces his culpability; by the act of furnishing the value, the defendant has, to that extent, diminished the harm to the victim and provided tangible evidence of his own good faith. Similarly, value that the defendant has placed at the victim's disposal before authorities discover the offense (categories (2) and (3) above) reduces culpability, since

the defendant presumably expects the victim to recover that amount.

The PAG believes that discovery of the offense by law enforcement authorities should represent the cut-off point for credits against loss. Discovery of the offense by the victim or another non-law enforcement person should not be used as the cut-off for two reasons. First, it usually will be easier to prove when law enforcement authorities discovered an offense than when some other person or entity did so, since law enforcement authorities generally keep records of information received and no resort to third-party witnesses will be necessary. Second, value given after law enforcement authorities have discovered the offense often will be viewed as an attempt by the defendant to buy his way out of trouble. Although such a post-detection payment may merit a downward adjustment or departure for acceptance of responsibility, it does not otherwise diminish the defendant's culpability. By contrast, value given before law enforcement authorities have discovered the offense (whether or not the victim has discovered it) is more likely to reflect the defendant's genuine desire to make the victim whole and thus to reduce the defendant's culpability.

B. When credits are valued.

The PAG suggests that goods and services furnished to the victim before law enforcement authorities discover the offense (category (1) above) should be valued as of the time they are provided. Goods that are pledged as security or that are otherwise readily recoverable at the time authorities discover the offense (categories (2) and (3) above) should be valued as of the time pledged or otherwise put at the victim's disposal. Valuing such goods in this manner will ensure that the defendant does not receive an undeserved windfall or suffer an unjustified penalty from increases or decreases in value after he has made the goods available to the victim.

VIII. Impossibility.

The "impossibility" (or "economic reality") doctrine limits intended loss. The doctrine has significance only to the extent that the guidelines base the loss figure on intended loss when intended loss is greater than actual loss (for example, setting the loss figure at \$100,000 when the defendant intends to cause a \$100,000 loss but causes no actual loss). As set forth above, the PAG believes the guidelines should not continue using intended loss as an alternative to actual loss for determination of the base offense level. Instead, intended loss should only be used as an encouraged departure ground where it differs significantly from actual loss. If the PAG's position were adopted, the impossibility issue would largely be eliminated except in determining the appropriateness or extent of a possible upward departure, the PAG believes that the impossibility

doctrine should play a critical role in preventing unfair sentences based on unrealistically high intended loss figures. This is particularly so in "sting" cases, where the government can manipulate the intended loss figure almost at will to produce a higher sentence. We suggest that the impossibility doctrine be expressly included in the commentary to the fraud guideline, with allowance for upward departures in exceptional cases where the actual loss figure does not fully capture the defendant's culpability. See United States v. Gailbrath, 20 F.3d 1054, 1059 (10th Cir. 1994) (Tacha, J.).

Amendment 19
(biological weapons; terrorism)

Part A

Amendment 19(A) invites comment on how to amend the guidelines in response to sections 511 and 521 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Section 511 of the Act revises 18 U.S.C. § 175 (prohibitions with respect to biological weapons) to include attempts and conspiracies. Section 521 creates a new offense (18 U.S.C. § 2332c), to prohibit the use of chemical weapons. The maximum penalty for this new offense is life, or if death results, death.

We suggest that the Commission refrain from creating a new guideline to cover the new offenses. Those offenses are unlikely to occur with any frequency, and when they do occur, can be sentenced using the most analogous guideline. See § 2X5.1 If the offense involved terrorism, an adjustment under § 3A1.4 (terrorism) would be available.

Part B

Amendment 19(B) invites comment in response to section 702 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Section 702 creates a new offense (18 U.S.C. § 2332b) prohibiting "acts of terrorism transcending national boundaries." The amendment seeks comment on how to amend the guidelines to cover violations of 18 U.S.C. § 2332b.

We recommend that violations of 18 U.S.C. § 2332b be addressed by the guideline applicable to the underlying offense and, when appropriate, an adjustment under § 3A1.4 (terrorism).

Amendment 20
(§ 2X3.1, § 2X4.1)

Part 1

Amendment 20 consists of three parts. We do not oppose the amendment in part 1.

Part 2

We support the amendments in part 2.

Part 3

We do not oppose the amendment in part 3.

Amendment 21 **(Ch. 3, part B, Introduction; § 3B1.1)**

Introductory Comments

We believe that the current guideline operates reasonably well but has two shortcomings. The principal shortcoming concerns the use of the term "otherwise extensive" in subsections (a) and (b). The Commission has not defined that term, and it is difficult to imagine how the extensiveness necessary for the enhancement can exist in an organization with fewer than five participants. Ironically, none of the proposals in amendment 21 address that problem. Deletion of the term "otherwise extensive" would bring clarity to the guideline and forestall litigation. We recommend that the Commission delete "otherwise extensive" in subsections (a) and (b).

The second shortcoming is the possibility of anomalous results. Under the present guideline, a defendant who manages or supervises one other person in a five-participant offense receives a three-level enhancement, while a defendant who organizes a four-participant offense receives a two-level enhancement. We do not know the frequency with which anomalous results occur.

Part A

Part A of amendment 21 would revise the introductory commentary to chapter three, part B. We do not oppose part A of the amendment.

Part B

Part B of amendment 21 would sets forth three options for revising § 3B1.1. Options one and two would modify the current guideline, and there are elements common to both of those options, such as definitions of organizer, leader, manager, and supervisor. Option three, on the other hand, would abandon the current guideline. We believe that all three options are flawed and that the Commission should not adopt any of them at this time.

Amendment 22 **(§ 3B1.2)**

Introductory Comments

Amendment 22 has two parts. Part A would amend § 3B1.2 to "clarif[y] the operation of the mitigating role adjustment in § 3B1.2" Part B invites comment on several matters.

Part A

The explanation of Part A of the amendment sets forth ten ways in which Part A clarifies the operation of the mitigating role guideline. We support some of the proposed changes and oppose some.

The first clarification identified in the explanation would standardize terminology, changing "criminal activity" to "offense." We do not oppose that cosmetic change.

The second clarification concerns the three-level reduction for a defendant whose role was less than minor but more than minimal. The explanation suggests that this reduction does not provide a meaningfully distinct category and "is unnecessary in view of the overlapping ranges feature of the Sentencing Table." The latter reason is nonsensical -- while ranges for adjacent offense levels overlap, the range applicable to the lower offense level will authorize a lower sentence than the range applicable to the higher offense level. The Commission uses intermediate levels in a number of situations, such as in § 3B1.1. However, only one of the three options in Amendment 21 for revising that guideline would delete that intermediate adjustment. If the overlapping range justification were to be applied consistently, all three options should delete the intermediate adjustment.¹ We do not agree with the view that the intermediate category is not "meaningfully distinct." The key concepts of this guideline presently are defined in a rather subjective way. The existence of the intermediate adjustment provides the sentencing court with a continuum along which to place the defendant.² We oppose deleting the intermediate adjustment.

The third clarification identified in the explanation is the addition of "a common, umbrella definition for mitigating role," which "should assist the court in distinguishing mitigating role defendants from those who receive an aggravating or no role adjustment." That explanation, however, masks a significant change in policy that makes it more difficult to find that a defendant is entitled to a two-level reduction.

Application note 3 presently states that a defendant, to qualify for a two-level reduction, must be "a participant who is

¹ The explanation of Amendment 21 does not indicate a reason for deleting the intermediate adjustment of § 3B1.1.

² The Commission's proposal later in Amendment 21 to add more objective elements only underscores the purpose served by the intermediate adjustment. Under the proposal, to receive a four-level reduction, a defendant must "typically" possess five characteristics. To receive a two-level reduction, the proposal requires that a defendant possess "some" of those characteristics ("some" being less than most, we assume two of the five would suffice). The intermediate level would permit a three-level reduction for a defendant who possessed four of the five characteristics.

less culpable than most other participants" The language proposed in Part B would require, for the two-level reduction, that the defendant be "a substantially less culpable participant" (emphasis added). No reason has been given for the change in policy. We believe that the present standard is the appropriate standard, so we oppose this revision of § 3B1.2.

The fourth clarification is to delete "overly-restrictive" commentary and replace that commentary with "a non-exhaustive list of typical characteristics associated with minimal role" We do not oppose this change.

The fifth clarification is that "a somewhat more helpful but still flexible definition of minor role is provided." Again, we oppose raising the standard for a two-level reduction. We also do not find the statement that a minor participant "typically possess[es] some of the characteristics associated with a minimal role" We believe that current application note 3 adequately explains what is required for a two-level adjustment.

The sixth clarification is the addition of language "to reflect the Commission's intention that district court assessments of mitigating role should be reviewed deferentially." We do not see a need for such language. Adding such language here suggests that in other guidelines without such language, the Commission intends that there be greater appellate scrutiny.

The seventh clarification is the resolution of a circuit conflict over whether the mitigating role adjustment should be applied based upon relevant conduct or upon comparing defendant's conduct to a hypothetical, average defendant. The proposed language calls for the sentencing court to look at relevant conduct. Bracketed language states that the court "may wish" to compare the defendant's conduct with "the conduct of an average participant in an offense of the same type and scope." We support addressing the matter, but we think that the proposed language needs to be revised. The structure of the proposed new application note 4 suggests that the sentencing court should first decide whether the defendant qualifies for a reduction by looking to relevant conduct. If, after that analysis, the court cannot conclude that the defendant is entitled to the adjustment, or is entitled to a two- or three-level adjustment, the court may then compare the defendant's conduct to that of an average participant in an offense of the same type and scope. The result of that comparison can be beneficial to the defendant, increasing a two- or three-level reduction or taking a two-level reduction when the relevant conduct analysis does not call for any reduction). The result of such a comparison could not be to take away or diminish the amount of the reduction. We believe that the proposal should be modified to spell out this intention more clearly. Further, we believe that the use of the phrase "may wish" is ill-advised. That phrase authorizes, but does not require, the court to consider comparable offenses. The result can only in disparity, as some courts will accept the invitation to consider comparable offenses and other courts will not.

The eighth clarification would add language "to address the

burden of persuasion in a common-sense fashion consistent with the overall guidelines structure." We do not oppose adding language stating that the defendant has the burden of persuasion. We suggest, however, that this sentence be deleted, "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." Nothing anywhere in the guidelines suggests that the judge is required to make any finding "based solely on the defendant's bare assertion." The proposed sentence seems to be a gratuitous criticism of judicial fact-finding ability.

The ninth clarification would resolve a circuit conflict concerning whether a sentencing court, by analogy to mitigating role, can depart downward when a defendant is directed to some extent by another who is not a criminally responsible participant. We find the proposed language appropriately resolves the matter, and we support its promulgation.

The tenth clarification would delete the background commentary as "largely redundant and unnecessary." We do not oppose deleting the background note.

Part B

Part B invites comment on three issues. First, part B seeks comment on whether the Commission should amend the guidelines to provide a single guideline to encompass adjustments for both mitigating and aggravating role. We think it worthwhile to attempt to draft such a guideline.

Second, part B seeks comment on "characteristics . . . that reliably distinguish among aggravating role adjustments, as well as those characteristics that reliably distinguish defendants with an aggravating role from those warranting no role adjustment or a mitigating role adjustment." Part B also requests comment on characteristics that distinguish defendants with a mitigating role from defendants with no such role and that distinguish between minor and minimal roles. We believe that it is unwise for the Commission to attempt to set forth a complete list of such characteristics. As an amendment under part A would make clear, whether a defendant qualifies for a mitigating role adjustment depends upon the totality of the relevant circumstances. Indicating what some of those circumstances are by way of illustration is helpful. A lengthy list, however, suggests completeness and may discourage thoughtful analysis.

Finally, part B invites comment on whether the guidelines should expressly state whether "couriers" or "mules" should receive a mitigating role adjustment. One of the major failings of the current guidelines is that offense levels for couriers and mules are too high. Couriers and mules frequently are citizens of other countries with depressed economies. The lure of quick and apparently-easy money tempts many whose present is bleak and whose future is dismal. The unpleasant fact is that there is no shortage of people whose lot in life makes bringing drugs into

the United States for a fee an attractive proposition. The work requires no great skill or preparation; anybody can do it. Even life imprisonment for couriers and mules would not appreciably diminish the supply of people willing to be couriers and mules. In short, the war on drugs cannot be won by locking up, for long periods of time, people who serve as couriers and mules. We believe that § 3B1.2 should provide that couriers and mules receive a four-level reduction. Most couriers and mules possess the five characteristics of minimal participation that the amendment in Part A identifies -- they generally are unaware of the scope and structure of the drug operation of the identity of participants other than the person who recruited them or another courier or mule traveling with them; they perform unsophisticated tasks; they have no material decision-making authority; they have no supervisory responsibility; and they receive small compensation in relation to the street-value of what they bring in.

Amendment 23
(§ 3C1.1)

Amendment 23 has four parts. The first part seeks to resolve a conflict among the circuits over the appropriate burden of persuasion when § 3C1.1 is applied based on the alleged perjury of a defendant. Some circuits use a clear and convincing evidence standard, and others use the preponderance of evidence standard. The first part of Amendment 23 would signal a preference for the preponderance standard by deleting part of the last sentence of application note 1 (the part stating "such testimony should be evaluated in a light most favorable to the defendant"). We oppose this part of Amendment 23 because we believe that a clear and convincing evidence standard is the more appropriate standard.

The second part of Amendment 23 would delete part of application note 3(I) as unnecessary. We support this part of the amendment.

The third part of the amendment would add language to application note 4 to clarify the meaning of the phrase "absent a separate count of conviction." We believe that this part of the amendment improves application note 4, and we support it.

The fourth part of Amendment 23 would modify and move part of application note 6 into a new application note 7. We support this part of the amendment.

Amendment 24
(§ 3E1.1)

Amendment 24 would amend § 3E1.1 (acceptance of responsibility) to revise the requirements for receiving a two-level reduction under subsection (a) and also would change the requirements for receiving an additional one-level reduction. We oppose the amendment.

The proposed amendment confuses and complicates § 3E1.1. It injects subjective terms, such as "extraordinary," into the guideline, thereby assuring frequent litigation. The term "extraordinary" has traditionally been used in the context of departures, adding further confusion to this guideline. Proposed new commentary suggests that meetings with probation officers are required if a defendant is to receive the full benefit of the adjustment. Such a requirement would be wholly inappropriate in a myriad of circumstances and would burden defendants and defense counsel unnecessarily. By suggesting that a defendant must provide criminal history information to receive the full benefit of the adjustment, the proposed commentary would interfere with the fundamental requirement that sentencing enhancements must be proved by the government. Further, this requirement would interfere with a defendant's constitutional right to effective assistance of counsel. No lawyer should advise a client to discuss matters that will necessarily increase his or her sentence.

The PAG has in the past encouraged the Commission to revise § 3E1.1 to provide a standard reduction for a defendant who pleads guilty. (Indeed, in 1990, the Commission amended § 3E1.1 to make clear the significance of a guilty plea in assessing a defendant's acceptance of responsibility, U.S.S.G. App. C, amend. 351.) Even after the amendment, this guideline has provoked a significant number of appeals. Instead of simplifying § 3E1.1, however, the proposed amendment would make it harder for a court to assess whether a defendant has accepted responsibility.

In the past, we have also encouraged the Commission to authorize the additional one-level reduction for defendants whose offense level is below level 16. Instead of making this simple change, the proposed amendment would make application of the additional one-level reduction more complicated. The current guideline provides a bright-line rule. If the defendant qualifies for a two-level reduction, then an additional level is deducted if the defendant (with an offense level of 16 or higher) either timely provides the government complete information about his involvement in the offense or timely notifies his the authorities of his intention to plead guilty. The proposed amendment would authorize an additional one-level reduction only for "extraordinary" acceptance of responsibility which would be determined based on the "totality of circumstances." The proposed amendment would list factors (including some that are currently listed as considerations for granting a two-level reduction) that the court should consider in determining whether an additional one-level reduction is warranted. This only would transfer any difficulty in applying the guideline from stage one (the two-level reduction) to stage two (the additional one-level reduction).

Proposed application note 2(a) is particularly bothersome because it would authorize denying a defendant an additional one-level reduction for failing to provide accurate information

"regarding the defendant's juvenile and adult criminal record." Anyone with real experience in the criminal justice system knows that many defendants honestly do not have an accurate understanding of the disposition of their prior cases. This proposed application note will only serve to penalize defendants whose memories are faulty or whose understanding of the criminal justice system is limited. The proposed test has no bearing on a defendant's acceptance of responsibility for the offense.

Amendment 25
(§ 3E1.1)

Amendment 25 would amend the commentary to § 3E1.1 to state explicitly that "the commission of an offense while pending trial or sentencing on the instant offense, whether or not that offense is similar to the instant offense, ordinarily indicates that the defendant has not accepted responsibility for the instant offense." We oppose the amendment.

In 1992, the Commission amended § 3E1.1 to make clear that to qualify for a reduction, the defendant must accept responsibility for the offense of conviction -- failure to admit to relevant conduct is not grounds for denial of the reduction. U.S.S.G. App. C, amend. 459. Thus, the focus of the inquiry should be on whether the defendant has accepted responsibility for his offense -- not whether the defendant has, before sentencing, successfully overcome his propensity to commit any criminal act.

The proposed amendment incorporates the position taken by the Fifth Circuit in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990), which stated that additional criminal conduct unrelated to the offense may provide grounds for denying credit for acceptance of responsibility. Watkins, however, was decided when credit for "acceptance of responsibility" required a defendant to accept responsibility for "his criminal conduct." U.S.S.G. § 3E1.1 (Nov. 1, 1989). After the Watkins decision, the Commission promulgated amendments 351 and 459 to make clear that the defendant need accept responsibility only for the offense of conviction. To be consistent with amendments 351 and 459, the Commission should not promulgate the proposed amendment.

Amendment 26
(§ 3E1.1)

Amendment 26 would revise § 3E1.1 by deleting the requirement in subsection (b) that limits the additional one-level reduction to defendants with an offense level of 16 or higher. We support this amendment. A defendant who meets the criteria under § 3E1.1(b) should not be denied the reduction simply because the defendant failed to commit an offense serious enough to warrant an offense level of 16.

Amendment 27

Introductory Commentary

Amendment 27 seeks to expand the scope of the career offender guideline. We think expanding the scope of that guideline is inconsistent with the central purposes of the Sentencing Reform Act of 1984, and we urge the Commission to take a cautious approach to expanding the career offender guideline.

Part A

Part A of Amendment 27 deals with whether either or both of the offenses of possessing a listed chemical with intent to manufacture a controlled substance and possessing a prohibited flask with intent to manufacture a controlled substance should be a "controlled substance offense" within the meaning of the career offender guideline. We believe that neither offense should be classified as such.

The justification for treating these two offenses as controlled substance offenses under the career offender guideline is that these offenses are tantamount to attempting to manufacture a controlled substance. Because an attempt to manufacture a controlled substance is expressly made a controlled substance offense for purpose of the career offender guideline, the argument goes, those two offenses should also be controlled substance offenses for that purpose.

Congress, however, has not treated those offenses as tantamount to an attempt to manufacture a controlled substance. Congress in 21 U.S.C. § 846 specifically provides that an attempt to manufacture a controlled substance" shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . attempt." Manufacture of a controlled substance has a maximum prison term of at least 20 years under 21 U.S.C. § 841. By contrast, possession of a listed chemical with intent to manufacture a controlled substance has a maximum prison term of ten years under 21 U.S.C. § 841(d)(1), and possession of a prohibited flask with intent to manufacture has a maximum prison term under 21 U.S.C. § 843(d) of four years for a first offense and eight years if the defendant has a prior conviction for a federal drug offense.

Making the possession with intent offenses subject to the career offender guideline would likely curtail most of the utility those provisions have for plea negotiating and could result in an increase in the number of cases taken to trial. Plea agreements are beneficial to the government and to the defendant. The government obtains a swift and certain conviction with a minimum of resources. The defendant gets a more favorable sentence than would have been imposed had the defendant not decided to plead. Both parties also give up something. The government gives up the opportunity to obtain a greater sentence, and the defendant gives up the possibility of gaining an

acquittal. Any plea agreement is subject to judicial approval, and the Commission's policy statements in chapter six call upon the court not to accept pleas that subvert the guidelines. Plea agreements are important in a system where the vast majority of cases are disposed of by the defendant pleading guilty. The Commission should not adopt a rule that will inhibit legitimate plea negotiating.

If the government believes that the defendant was attempting to manufacture a controlled substance, the government can charge a violation of 21 U.S.C. § 846. If convicted, a defendant with qualifying priors will then be sentenced as a career offender because that offense is a controlled substance offense for the purpose of the career offender guideline. We urge the Commission not to promulgate the amendment in Part A.

Part B

Part B of amendment 27 would make a number of changes to § 4B1.2 and its commentary. First, part B would add commentary adopting a flow-through approach to determining whether the offenses of maintaining a drug house (21 U.S.C. § 856) and using a communication device to facilitate a drug offense (21 U.S.C. § 843(b)) are "controlled substance offenses" for the purpose of the career offender guideline. Whether those offenses are controlled substance offenses would be determined by ascertaining whether the underlying offense -- the offense facilitated by operating the drug house or by using the communication device -- was itself a controlled substance offense. We oppose this provision of part B.

This provision of part B would likely eliminate most of the utility those offenses have for plea negotiating and could result in an increase in the number of cases taken to trial. As we indicated above, plea agreements serve the interests of the government and the defendant and are an important part of the federal criminal justice system. The offense level for both the maintaining a drug house and the communications device offenses will be determined by the quantity of drug involved, so the penalties will not be minor.

Part B also proposes a flow-through approach for the offense of carrying or using a firearm during and in relation to a crime of violence or a drug trafficking offense (18 U.S.C. § 924(c)). A section 924(c) offense would be a crime of violence or controlled substance offense within the meaning of the career offender guideline if the offense during and in relation to which the firearm was carried or used is a crime of violence or controlled substance offense under the career offender guideline.

A section 924(c) offense does not fit well with the career offender guideline for technical reasons. The minimum punishment for a section 924(c) violation is also the maximum punishment, and any section 924(c) sentence must run consecutively to any other sentence imposed. Those factors render immaterial whether the section 924(c) offense is an "instant offense of conviction"

under the career offender guideline -- the sentence the court must impose will not change. There will be an impact, however, if the section 924(c) offense constitutes a prior conviction for a crime of violence or a controlled substance offense under the career offender guideline. One impact is that an offense of which the defendant has been acquitted can become a prior conviction for purposes of the career offender guideline. A defendant can be convicted under section 924(c) and acquitted of the underlying offense, drug trafficking, for example. If a flow-through approach is taken with regard to section 924(c), then the drug trafficking of which the defendant was acquitted becomes the basis for finding that the defendant is a career offender. We oppose this aspect of Part B.

Part B also makes minor revisions in what is now § 4B1.2(2) and application note 2. We do not oppose this aspect of Part B.

Amendment 28
(resolving circuit court conflicts)

Amendment 28 contains fifteen issues for comment, each inviting comment upon whether, and in what manner, the Commission should resolve a circuit conflict. We believe it appropriate for the Commission to resolve circuit conflict concerning what a guideline, policy statement, or commentary is intended to mean. The Commission, as the author of the guidelines, is in the best position to state what a provision of the guidelines was intended to mean. The Commission, however, was not established to be a super court of appeals to review circuit sentencing decisions, nor was it established to render advisory opinions on matters of constitutional law.

The circuit conflicts are presented as issues for comment, rather than as proposed language to be added to guidelines or commentary. We believe that at this juncture, the Commission should limit itself to determining if the Commission believes that a conflict exists that merits resolution. If the Commission so determines, then proposed language should be developed to address the matter and published for public comment during the 1998 or a later amendment cycle.

Amendment 29
(§ 5B1.3, § 5B1.4, p.s., § 5D1.3, § 8D1.3)

Amendment 29(A) would revise § 5B1.3 (conditions of probation), § 5B1.4, p.s. (recommended conditions of probation and supervised release), § 5D1.3 (conditions of supervised release), and § 8D1.3 (conditions of probation - organizations). The amendment would add conditions of probation or supervised release required by statute. We do not oppose the amendment.

Amendment 29(B) seeks comment on whether to reorganize § 5B1.3, § 5B1.4, p.s., and § 5D1 to distinguish more clearly between statutorily required, standard, and special conditions of

probation and supervised release. We have not had problems with the current organization of the relevant guidelines and policy statement, so from our standpoint there is no need to revise their organization. If others have had difficulty with the current organization of these provisions, we would not object to reorganizing them.

Amendment 30
(§ 5D1.2)

Amendment 30 would revise the commentary in § 5D1.2 (term of supervised release) to clarify that a defendant who meets the criteria of § 5C1.2 is not subject to a statutory minimum term of supervised release. We support the amendment.

Amendment 31
(§ 5E1.1, § 8B1.1)

Amendment 31 would revise the guidelines applicable to restitution by individual defendants (§ 5B1.1) and by defendants that are organizations (§ 8B1.1). The Commission is acting in response to provisions enacted by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. We do not oppose the amendment.

Amendment 32
(special assessment)

Amendment 32 responds to section 210 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Section 210 amends 8 U.S.C. § 3013(a)(2) to provide a special assessment in the case of a felony of not less than \$100 for an individual and not less than \$400 for an organization. The amendment would incorporate the provisions of section 210. We do not oppose the amendment.

Amendment 33
(Chapter 5, part H)

Amendment 33 would add a policy statement (§ 5H1.13, p.s.) providing that "neither susceptibility to abuse in prison nor the type of facility designated for service of a term of imprisonment is ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." We oppose this amendment as unnecessary and inconsistent with the Commission's goal of simplifying the guidelines.

We also think it unwise to address the type of facility designated for service of the prison term imposed. Designation is a matter within the discretion of the Federal Bureau of Prisons and cannot be known for certain at the time sentence is imposed. Unless the Commission has data suggesting that there is a problem, we recommend that the Commission not address the designation matter.

Amendment 34
(§ 5K2.0, p.s.)

Amendment 34 would revise § 5K2.0, p.s. (grounds for departure) by including a discussion of departure policies derived from the introduction to the Guidelines Manual. The amendment would also add language stating that in reviewing a district court's decision to depart, appellate courts apply an abuse of discretion standard, citing Koon v. United States, ___ U.S. ___, 116 S.Ct. 2035 (1996). We do not oppose the amendment.

Amendment 35
(successive federal prosecution)

Amendment 35 creates a new policy statement (§ 5K2.19, p.s.) to state that "prosecution and conviction in federal court following prosecution in another jurisdiction for the same or similar offense conduct is not ordinarily relevant in determining whether a sentence below the guideline range is warranted." We oppose this amendment; the issue should be left to the courts to deal with.

Amendment 36
(presentence report)

Amendment 36 would revise § 6A1.1, p.s. (presentence report), § 6A1.2, p.s. (disclosure of presentence report) and § 6A1.3, p.s. (resolution of disputed factors) in response to certain changes in Rule 32 of the Federal Rules of Criminal Procedure. We do not oppose this amendment.

Amendment 37
(Consolidation)

Part A

Amendment 37(A) would merge § 2E1.4 (use of interstate commerce facilities in the commission of murder for hire), which is applicable to convictions under 18 U.S.C. § 1958, into § 2A1.5 (conspiracy or solicitation to commit murder). This consolidation would not effectively change the offense level for section 1958 convictions; however, the consolidation would subject section 1958 defendants to a two- or four-level enhancement for injury to a victim³ that is not automatically

³ Unlike the injury adjustment in several other guidelines, e.g., §§ 2A2.2(b)(3), 2A3.1(b)(4), 2B3.1(b)(3), the adjustment here does not permit the use of intermediate levels of adjustment and therefore is inconsistent with the adjustment in other guidelines.

available⁴ under the current version of § 2E1.4. Defendants being sentenced for § 1958 convictions also would be subject to an upward departure for "substantial risk of death or serious bodily injury to more than one person" that also is not automatically available under the current version of § 2E1.4.

We oppose this amendment. Defendants convicted under section 1958 would be sentenced more harshly under this proposal than they currently are. The Commission has not provided any justification for this increase. The Commission should leave § 2A1.5 as it is currently written, delete § 2E1.4, and change the statutory index listing for section 1958 from § 2E1.4 to § 2A1.5 and § 2A2.1. The statutory index would indicate that § 2A1.5 applies when a defendant is subject to the ten-year statutory maximum, and § 2A2.1 applies when a defendant is subject to the twenty-year or life or death maximum. This approach would require fewer changes in the guidelines and less work.

Part B

Amendment 37(B) would merge § 2A2.4 (obstructing or impeding officers) into § 2A2.3 (minor assault). This merger would not affect the offense level for sentences presently treated under § 2A2.4; however, those sentences would be subject to an upward adjustment for substantial bodily injury to a person under age sixteen⁵ that is not presently available under § 2A2.4. In addition, sentences currently handled under § 2A2.3 would be subject to a three-level enhancement for obstructing or impeding a governmental officer (although if it applies, § 3A1.2 would not apply). In addition, § 2A2.3 sentences would be subject to a cross-reference to § 2A2.2 (aggravated assault), that would be carried over from § 2A2.4, and to an upward departure for significant disruption of governmental functions, also carried over from § 2A2.4.

We oppose this amendment. Carrying over into § 2A2.3 the cross-reference from § 2A2.4 runs contrary to the purported goals of this amendment to consolidate and simplify, and contrary to the specific goal of reducing the number of cross-references and corresponding calculations. Further, inclusion of a cross-reference may inhibit plea negotiations. The government has the jurisdiction to charge an offense covered by the cross-referenced guideline, § 2A2.2. The cross-reference would compromise the government's ability to charge a lesser offense in order to reach a plea bargain. If the Commission concludes that the cross-

⁴ It would be available if included in the guideline applying to the underlying unlawful conduct. See § 2E1.4(a)(2).

⁵ The wording of this enhancement would also be changed from "If the offense resulted in substantial bodily injury" to "If the offense involved substantial bodily injury"

reference should remain, then its application should be limited to only those cases involving obstructing or impeding an officer.

Part C

We do not oppose this amendment.

Part D

Amendment 37(D) would merge § 2C1.6 (offers and acceptances of gratuities or loans by bank examiners) into § 2C1.2 (offering, giving, soliciting, or receiving gratuities). The base offense would remain the same, at 7, but sentences currently handled under § 2C1.6 would be subject to enhancements not presently available, such as a two-level enhancement when the offense involves more than one gratuity, or an eight-level enhancement where the official is elected or holds a high-level decision-making or sensitive position.

In addition, the amendment would change some, but not all, occurrences of the word "gratuity" to "unlawful payment," and would add an application note explaining that "an unlawful payment may be anything of value; it need not be a monetary payment." This note purports to clarify the term "unlawful payment;" however, because the word "payment" connotes a transfer of money, this change may only confuse matters further, particularly because other parts of this guideline, and other guidelines (e.g., § 2E5.1) continue to use "gratuity."

We do not oppose this amendment.

Part E

Amendment 37(E) would merge § 2C1.4 (payment or receipt of unauthorized compensation) and § 2C1.5 (payments to obtain public office) into § 2C1.3 (conflict of interest).

We do not oppose the consolidation of §§ 2C1.4 and 2C1.5 into § 2C1.3. We oppose the addition of a cross-reference. Adding a cross-reference runs contrary to the general goals of this amendment of consolidation and simplification, and contrary to the specific goal of reducing the number of cross-references and corresponding calculations. Moreover, the Commission has not provided any justification for a cross-reference. Finally, inclusion of a cross-reference may inhibit plea negotiations. The government has the jurisdiction to charge an offense covered by the cross-referenced guidelines, § 2C1.1 and § 2C1.2. The amendment would compromise the government's ability to charge a lesser offense in order to reach a plea bargain.

Part F

Amendment 37(F) would merge § 2D1.9 (placing or maintaining dangerous devices on federal property to protect the unlawful production of controlled substances) into § 2D1.10 (endangering

human life while illegally manufacturing a controlled substance) and renumber § 2D1.10 as § 2D1.9. The current version of § 2D1.9 provides a base offense level of 23. The current version of § 2D1.10 provides a base offense level of the greater of 20 or 3 plus the offense level from the drug quantity table in § 2D1.1. The amendment would keep this latter structure, with a possible increase in the base offense level from 20 to 23. For offenses currently sentenced under § 2D1.10, increasing the alternative offense level from 20 to 23 would increase the offense level. For offenses currently sentenced under 2D1.9, offense levels could remain at level 23 if 23 is used as the alternative base offense level, could be reduced to 20 if 20 is used as the alternative base, or could be increased if the type and quantity of drug involved put the offense level higher than 20 or 23.

We do not oppose this amendment if the residual offense level is 20, but we oppose the amendment if level 23 is used. The Commission should not change the alternative base offense level to 23 for offenses currently sentenced under § 2D1.10 without a showing that the current alternative level of 20 is insufficient to adequately punish defendants.

Part G

We do not oppose this amendment.

Part H

Amendment 37(H) would merge § 2D3.2 (regulatory offenses involving controlled substances or listed chemicals) into § 2D3.1 (regulatory offenses involving registration numbers and unlawful advertising relating to schedule I substances). This merger would increase the offense level in § 2D3.2 from four to six, "the base offense level most typical for regulatory offenses." This change would not affect defendants whose criminal history category is I, but would shift other defendants into a higher zone within the sentencing table. For example, a defendant with a criminal history category VI is currently in Zone B of the sentencing table. Under the amendment, that defendant would be in Zone D, and would therefore not be eligible for the alternative sentences available under Zone B.

We oppose this amendment. The amendment would increase the base offense level for sentences presently handled under § 2D3.2 without a showing that the current sentences are inadequate to achieve the goals of sentencing under 18 U.S.C. § 3553(a). Raising an offense level simply to bring it into conformity with other guidelines is an insufficient reason to justify this change.

Part I

We do not oppose this amendment.

Part J

Amendment 37(J) would merge § 2E2.1 (extortionate extension of credit) into § 2B3.2 extortion by force or threat of injury or serious damage). Defendants convicted of offenses under 18 U.S.C. §§ 892-94 (to which § 2E2.1 currently applies) would be affected in four ways.

First, although the present base offense level of 20 would be effectively retained (base offense level of 18 plus 2 levels under (b)(6)), a defendant would be subject to a new enhancement if the offense involved an express or implied threat of death, bodily injury, or kidnapping. This enhancement is not available under the current version of § 2E2.1. Second, although enhancements for involvement of a dangerous weapon would remain the same, the enhancements for involvement of a firearm would increase by two levels. Third, defendants would be subject to a three-level enhancement if there were evidence of preparation or ability to carry out certain kinds of threats. This enhancement is not available under the current version of § 2E2.1. Finally, defendants would be subject to a cross-reference to § 2A2.1, for assault with intent to commit murder, that is not available under § 2E2.1.

The amendment would add a new cross-reference to § 2B3.3, the blackmail guideline, when the offense does not involve a threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat.

We oppose this amendment. As both the current § 2B3.2 and the proposed § 2B3.2 are written, enhancements are available for making certain threats (two levels under (b)(1)) and for evidencing the ability to carry out those threats (three levels under (b)(3)(B)). Application of both enhancements yields the anomalous result that a defendant who threatens to do something without actually doing it is punished as harshly as a defendant who brandishes, displays, or possesses, a firearm (five-level enhancement), and more harshly than a defendant who uses a dangerous weapon (four levels). Moreover, because displaying or brandishing a dangerous weapon or firearm would invariably constitute the making of a threat, these enhancements would be cumulative. To avoid double-counting problems and to make this line of enhancements consistent with § 2B3.1(b)(2) (*i.e.*, alternative), subsection (b)(1) of § 2B3.2 should be moved to the end of subsection (b)(3)(A) of that guideline.

Part K

Amendment 37(K) would merge § 2E5.3 (record-falsification offenses under ERISA and LMRDA) into 2F1.1 (fraud and deceit). Currently, § 2E5.3 provides for a base offense level of 6 with a cross-reference to § 2B1.1 or § 2E5.1 if the offense was committed to facilitate or conceal a theft, embezzlement, bribe, or gratuity. Defendants now subject to this guideline would

receive a base offense level of 6 under the fraud guideline and be subject to any applicable enhancements such as more than minimal planning that are not available under § 2E5.3 unless a cross-reference applies. (That cross-reference would be incorporated into § 2F1.1 comment.(n.13)).

Amendment 37(K) would also expand Application Note 13 of § 2F1.1, and include a new cross-reference to formalize the note: "If the offense conduct is addressed more specifically by another offense guideline, apply that guideline." Notably, this cross-reference would not contain the usual condition "if it results in a higher offense level." Consequently, it is possible that the cross-reference would result in lowering the offense level of some offenses. However, inclusion of this cross-reference would be out of line with the goals of simplifying the guidelines and reducing the number of cross-references.

We oppose this amendment. The amendment would increase sentences currently addressed under § 2E5.3(a)(1) without any showing that those sentences are too low to accomplish the goals of § 3553(a). We support the inclusion of the new cross-reference if it includes at the end the language "instead of the above."

Part L

We do not oppose this amendment.

Part M

Amendment 37(M) would merge § 2K1.6 (licensee recording violations involving explosive materials) into § 2K1.1 (failure to report the theft of explosive materials; improper storage of explosive materials). The current § 2K1.6 provides a base offense level of 6 with a cross reference to § 2K1.3 if the offense reflects an effort to conceal a substantive explosive offense. The current version of § 2K1.1 provides an offense level of 6, with no cross-references.

Offenses under § 2K1.6 would be unaffected by the consolidation. The base offense level would remain at 6 and the cross-reference would be incorporated into § 2K1.1. Certain offenses under 2K1.1, particularly those involving failure to report theft, would be affected by the consolidation because they be subject to the cross-reference. Application of the cross-reference to § 2K1.3 would increase the offense level from 6 to a minimum of 12, thus eliminating probation for what is otherwise a misdemeanor offense.

We oppose this amendment. The Commission has not produced any evidence that punishments for § 2K1.1 offenses need to be increased.

Part N

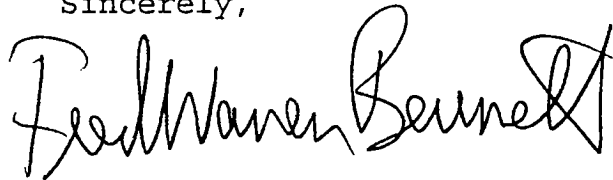
Amendment 37(N) would merge § 2L2.5 (failure to surrender

We do not oppose this amendment.

[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

A handwritten signature in cursive script that reads "Fred Warren Bennett". The signature is written in dark ink and is positioned above the printed name and title.

Fred Warren Bennett
Chairman
Practitioners' Advisory Group



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March 24, 1997

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment, 1997 Cycle--Part II

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the Proposed Amendment #10 (dealing with increasing the penalties for Methamphetamine) for Part II of the 1997 proposed guidelines and issues for comment. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. Depending on time constraints I may send you an additional letter on other proposed amendments that are included in Part II, but I wanted to make sure that the Commission received our views on Amendment #10.

Proposed Amendment #10--Part II
(increasing penalties for Methamphetamine)

The PAG believes the Commission would be well advised to conduct a study on problems associated with the manufacturing and distribution of Methamphetamine and postpone dealing with this proposed amendment (Parts A.-D.) and the issue for comment (Part E.) during this amendment cycle. We believe the Commission needs more time on this issue in light of the uncertainty of near term Commission and Congressional action on crack cocaine--we strongly feel it would be wrong to propose increased penalties for this drug without "fixing" the drug guidelines and statutes dealing with crack cocaine.

Nevertheless, if the Commission feels that it **must** act at this time I am enclosing herewith the PAG proposal dealing with proposed amendment #10, along with a corresponding drug quantity table

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showing how our proposal would work.

[END OF COMMENTS ON PROPOSED AMENDMENT #10--PART II]

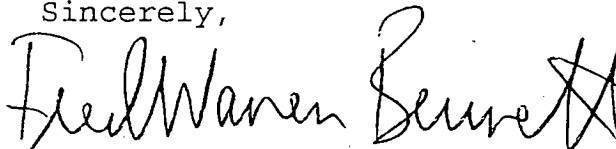
Crack Cocaine

After the Public Hearing held on Tuesday, March 18, 1997, PAG members Lyle Yurko, Esq., Carmen Hernandez, Esq., and I met with Commissioner Budd in regards to crack cocaine proposals. Mr Yurko delivered to Commissioner Budd what was at that time a "working draft" document prepared by PAG member Yurko outlining a crack cocaine proposal. As both Mr. Yurko and I mentioned to Commissioner Budd, this "working draft" document had **not** been approved or agreed upon by the PAG; in fact, a significant number of members of the PAG are not in accord with any proposal to increase at this time the penalties for powder cocaine--at any level--in light of the uncertainty in the Commission and in Congress with how to "fix" the problems with the penalties for crack cocaine. Commissioner Budd did note at the Commission meeting held on Wednesday, March 19, 1997, that this document had not been approved by the members of PAG.

To the extent any copies of the "working draft" document has been circulated by Commissioner Budd to other Commissioners or staff members, I wish to strongly reiterate that this "working draft" document is just that--a proposal drafted by Mr. Yurko which has not yet been finalized or approved by members of the PAG.

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment further on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,



Fred Warren Bennett
Chairman
Practitioners' Advisory Group

METHAMPHETAMINE AMENDMENT

PART A

The Practitioner's Advisory Group has proposed changes in the drug table which call for an increase in penalty for offenders at quantity levels above Level 26. Those who deal in quantities of 400 grams of mixtures and 40 grams of pure methamphetamine and lower should not have their sentence increased. When concepts of relevant conduct are factored into the proposal, these offenders generally are distributing very small amounts of these drugs over time. Dealers who distribute a few grams of substances per week are currently punished adequately (100 grams equals 5 years). However, for the dealer who possesses more than one pound of a mixture of methamphetamine over time or on one occasion, the Practitioner's Advisory Group has proposed an increase which is 50 percent of the Commission Proposal. This proposal should satisfy the Congressional mandate which we frankly believe was purely politically motivated. If any increase in methamphetamine punishment is justified at all, we believe our proposal, which increases penalties for larger dealers but which does not change sanctions for the already harsh punishment for street dealers, represents a sane response to the Congressional mandate.

PART B

Many controlled substances consumed in the United States are imported from other countries. Until now, no increase for

importation has been thought necessary to adequately punish controlled substance offenders. The Practitioner's Advisory Group believes that treating importation of methamphetamine offenses differently from all other offenses would disproportionately penalize those who possess and sell this substance. We would favor only an import enhancement which applied equally to all substances if there were evidence that clearly established that such drug crimes were being currently inadequately sanctioned. But no evidence has been shown to justify such an increase, rather for at least five years, the Commission has been presented with a barrage of overwhelming evidence which justifies lowering penalties for those who commit drug crimes, and especially for offenders corresponding to Level 26 and lower. The Practitioner's Advisory Group believes that Congress currently lacks the political courage to accept lower drug penalties. Therefore, we believe that the Commission should not submit decreases in drug penalties at this time because while such an act would evidence the Commission's political fortitude, it would not maintain the credibility of the Commission with Congress. However, the Practitioner's Advisory Group strongly urges the Commission not to contribute to the atmosphere of hysteria by increasing penalties whenever Congress suggests higher punishment. No importation increase is necessary to adequately sanction the distribution of controlled substances above the harsh levels which are currently prescribed by the Guidelines and, therefore, no increase should be proposed by the Commission.

PART C

Likewise, little evidence has been presented warranting any sanction increase for environmental damage caused by methamphetamine production. Unless convincing evidence is presented, no Guidelines changes should be established.

PART D

The current special skills sanction embodied in §3B1.3 has functioned adequately for ten years. No special methamphetamine section needs to be created, rather, in the spirit of "simplification," methamphetamine cases should simply continue to be subjected to §3B1.3, unless evidence is presented which overwhelmingly demands special treatment.

PART E

No aggravating factors are warranted and therefore no proposals to modify need be made.

CONCLUSION

The Practitioner's Advisory Group understands that the issues embodied in the methamphetamine proposal go beyond simply prescribing sanctions for methamphetamine offenders. The broader

question of who should control punishment, Congress by mandatory minimums or the Commission by more proportional guidelines is at issue. However, by increasing methamphetamine penalties only at the high levels and only one-half as heavily as Congress was contemplating, the Commission can respond to what has become an increasingly demagogic anti-drug atmosphere in Washington and elsewhere with a degree of sanity. Commissioner Gelacak has proposed defiance of Congress's methamphetamine mandate in the face of evidence that drug penalties are already too harsh. The Practitioner's Advisory Group proposal dilutes the Congressional increases, saving for another day the fight for a complete return to sane drug policies.

Proposed Amendment ____: Part A (The Drug Quantity Table)

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) • 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 38
• 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
• 1.5 KG or more of Cocaine Base;
• 30 KG or more of PCP, or 3 KG or more of PCP (actual)
• ~~30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice";~~
22.5 KG or more of Methamphetamine, or 2.25 KG or more of Methamphetamine (actual), or 2.25 KG or more of "Ice"
• 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
• 12 KG or more of Fentanyl;
• 3 KG or more of a Fentanyl Analogue;
• 30,000 KG or more of Marihuana;
• 6,000 KG or more of Hashish;
• 600 KG or more of Hashish Oil.
- (2) • At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 36
• At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
• At least 500 G but less than 1.5 KG of Cocaine Base;
• At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
• ~~At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice";~~
At least 7.5 KG but less than 22.5 KG of Methamphetamine, or at least .750 KG but less than 2.25 KG of Methamphetamine (actual), or at least .750 KG but less than 2.25 KG of "Ice"
• At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
• At least 4 KG but less than 12 KG of Fentanyl;
• At least 1 KG but less than 3 KG of a Fentanyl Analogue;
• At least 10,000 KG but less than 30,000 KG of Marihuana;
• At least 2,000 KG but less than 6,000 KG of Hashish;
• At least 200 KG but less than 600 KG of Hashish Oil.
- (3) • At least 3 KG but less than 10 KG of Heroin Level 34

(or the equivalent amount of other Schedule I or II Opiates);

- At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- At least 150 G but less than 500 G of Cocaine Base;

- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);

- ~~At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";~~

- At least 2.25 KG but less than 7.5 KG of Methamphetamine, or at least 225 G but less than 750 G of Methamphetamine (actual), or at least 225 G but less than 750 G of "Ice"

- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 1.2 KG but less than 4 KG of Fentanyl;

- At least 300 G but less than 1 KG of a Fentanyl Analogue;

- At least 3,000 KG but less than 10,000 KG of Marihuana;

- At least 600 KG but less than 2,000 KG of Hashish;

- At least 60 KG but less than 200 KG of Hashish Oil.

(4) • At least 1 KG but less than 3 KG of Heroin Level 32
(or the equivalent amount of other Schedule I or II Opiates);

- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- At least 50 G but less than 150 G of Cocaine Base;

- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);

- ~~At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 KG of Methamphetamine (actual), or at least 100 G but less than 300 KG of "Ice";~~

- At least 750 G but less than 2.25 KG of Methamphetamine, or at least 75 G but less than 225 G of Methamphetamine (actual), or at least 75 G but less than 225 G of "Ice"

- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 400 G but less than 1.2 KG of Fentanyl;

- At least 100 G but less than 300 G of a Fentanyl Analogue;

- At least 1,000 KG but less than 3,000 KG of Marihuana;

- At least 200 KG but less than 600 KG of Hashish;

- At least 20 KG but less than 60 KG of Hashish Oil.

(5) • At least 700 G but less than 1 KG of Heroin Level 30
(or the equivalent amount of other Schedule I or II Opiates);

- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- ~~At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";~~
- At least 225 G but less than 750 G of Methamphetamine, or at least 22.5 G but less than 75 G of Methamphetamine (actual), or at least 22.5 G but less than 75 G of "Ice";
- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil.

- (6) • At least 400 G but less than 700 KG of Heroin **Level 28**
 (or the equivalent amount of other Schedule I or II Opiates);
- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 - At least 20 G but less than 35 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - ~~At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";~~
 - At least 125 G but less than 225 G of Methamphetamine, or at least 12.5 G but less than 22.5 G of Methamphetamine (actual), or at least 12.5 G but less than 22.5 G of "Ice";
 - At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 - At least 160 G but less than 280 G of Fentanyl;
 - At least 40 G but less than 70 G of a Fentanyl Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;
 - At least 80 KG but less than 140 KG of Hashish;
 - At least 8 KG but less than 14 KG of Hashish Oil.

- (7) • At least 100 G but less than 400 G of Heroin **Level 26**
 (or the equivalent amount of other Schedule I or II Opiates);
- At least 500 G but less than 2 KG of Cocaine

(or the equivalent amount of other Schedule I or II Stimulants);

- At least 5 G but less than 20 G of Cocaine Base;

- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);

- ~~At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";~~

- At least 100 G but less than 125 G of Methamphetamine, or at least 10 G but less than 12.5 G of Methamphetamine (actual), or at least 10 G but less than 12.5 G of "Ice"

- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 40 G but less than 160 G of Fentanyl;

- At least 10 G but less than 40 G of a Fentanyl Analogue;

- At least 100 KG but less than 400 KG of Marihuana;

- At least 20 KG but less than 80 KG of Hashish;

- At least 2 KG but less than 8 KG of Hashish Oil.

(8) • At least 80 G but less than 100 G of Heroin Level 24
(or the equivalent amount of other Schedule I or II Opiates);

- At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- At least 4 G but less than 5 G of Cocaine Base;

- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);

- At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of "Ice";

- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 32 G but less than 40 G of Fentanyl;

- At least 8 G but less than 10 G of a Fentanyl Analogue;

- At least 80 KG but less than 100 KG of Marihuana;

- At least 16 KG but less than 20 KG of Hashish;

- At least 1.6 KG but less than 2 KG of Hashish Oil.

COMMENTS ON PROPOSED 1997 GUIDELINE AMENDMENTS

Submitted by: Richard Crane
Attorney and Member of Practitioners Advisory Group
2200 Hillsboro Road
Suite 310
Nashville, TN 37212

Proposed amendment number 7. I object to the narrowing of a judge's discretion to use a different guideline than the one set forth in the statutory index. I believe that there are occasionally "atypical" cases where another guideline section is more appropriate.

To my knowledge there has been no abuse of this authority to use other guidelines in atypical cases and I wonder why the Sentencing Commission has chosen this time to make this particular change.

Proposed amendment number 8. I support incorporating the holding in *U.S. v Hill* into the application note.

Proposed amendment number 9. I believe that Option 1a is the fairest way to handle acquitting conduct. However, I would incorporate that part of Option 2 which requires that the conduct be established by clear and convincing evidence.

Proposed amendment number 11. It is bad enough that the Commission must designate an amendment for retroactive application. Now the Commission would suggest that any reduction only be in the term of imprisonment. In fact, if a defendant has already served a lengthier term of imprisonment than the retroactive guideline would require, then a reduction in some other aspect of the sentence might be the only way that the defendant could be treated in a fair and consistent manner with others so situated.

Proposed amendment number 16. I have no objection to this amendment.

Proposed amendment number 18a. The major changes seems to be in replacing the more than minimal planning increase with an increase for use of sophisticated means. If more than a minimal planning is arguably unclear or ambiguous, why does the Commission feel that an enhancement based on "sophisticated means" will be any less so?

I object to all changes in the loss tables and find that the justification that it will reduce probation officer and judicial workload to be nonsense. Most cases are pled and the Commission should encourage plea agreements to stipulation the amount of the loss. Also, I think arriving at a just sentence is more important than reducing probation officer and judicial work.

I do, however, agree that there is no reason why there are different base offense levels for 2B1.1 and 2F1.1 and, with proper study, the two guidelines could probably be consolidated.

As for the definition of loss, it needs a lot of work and certainly is an area that generates the most controversy in white collar cases. The use of "intended" loss is widely misinterpreted as is the use of "gain".

Proposed amendment number 21. Of the three options, I prefer option three. However, I think that the number of participants should be considerably more than 4 and I think the "otherwise extensive" language ought to be deleted. Offenses which are otherwise extensive usually involve money or drugs and the extensiveness is addressed by the increase related to quantity. In the rare situations where that is not the case, and upward departure might be warranted.

I also think that organizing one other participant should not result in a 2 level increase. Come on, not many offenses involve only a sole offender!

Proposed amendment number 23. I oppose the proposed amendment. I suggest a amendment that says that the Court has to find beyond a reasonable doubt that perjury was committed.

Proposed amendment number 24. I support this amendment. I would combine it with proposed amendment number 26.

Issues for comment: I support a statement in § 1B1.8 that information provided not be included in the pre sentence report. I would also like § 1B1.8 to immunize information given by the defendant at the time of arrest, if he later enters into a cooperation agreement.

I also believe that multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting a departure in that the collateral consequences of a defendant's conviction can be the basis for a downward departure.

Proposed amendment number 33. I oppose this amendment. I know of no study as to why these factors are not relevant considerations for downward departure.

Proposed amendment number 34. Why not include the rest of the departure language from the introduction in § 5K2.0? I specifically refer to that portion of § 4(a) of chapter 1 part A dealing with manipulation of the indictment.

Proposed amendment number 35. I oppose this amendment.

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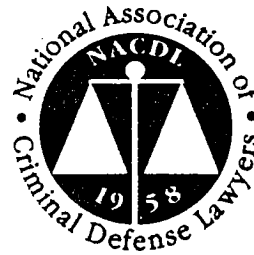
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March 17, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

Thank you for your consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

A handwritten signature in cursive script that reads 'Judy Clarke' followed by a small mark that appears to be 'for' or 'cc'.

Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

00155

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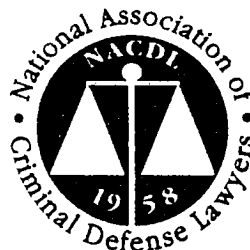
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COMMENTS ON THE 1997 AMENDMENTS - Part I

Amendment 5 - § 3A1.4 (Terrorism)

NACDL does not support this amendment for three reasons. First, it appears to have broader applicability than the enhanced penalties in 18 U.S.C. § 2332b, the section which defines a "Federal crime of terrorism". Second, it is inconsistent with the structure of the guidelines because it creates a criminal history adjustment in chapter three, the only such adjustment to be found in the guidelines. Third, because it is structured as a mandatory minimum offense level and criminal history adjustment this enhancement carries with it the evils of mandatory minimum sentencing -- it employs a "tariff-like approach" which disproportionately raises the punishment for a number of relatively less serious offenses, it may be subject to prosecutorial manipulation, and it may give rise to disparate application against minorities. See U.S. Sentencing Commission, "Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" 26, 32, ii (1991).

NACDL recommends that the Commission revise the § 3A1.4 adjustment so that it applies only under the same circumstances as the enhanced penalties under 18 U.S.C. § 2332b, *i.e.*, where the title 18 offense (1) involved conduct transcending national boundaries and (2) involved a killing, kidnapping, maiming, or conduct resulting in serious bodily injury or that created a substantial risk of serious bodily injury. The adjustment should also be graduated to conform to the graduated penalties applicable under § 2332b which range from life imprisonment to a term of not more than 10 years imprisonment. See 18 U.S.C. § 2332b(c)(1).

00156

This amendment proposes to make permanent a 1996 emergency amendment implementing § 730 of the Antiterrorism and Effective Death Penalty Act of 1996.¹ The amended § 3A1.4 adjustment applies in each case where the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g). The adjustment increases by 12 the offense level to a minimum offense level 32 and imposes a criminal history category VI. U.S.S.G. § 3A1.4. Thus in each case where this adjustment applies, the guideline range will be a minimum of 210 - 262 months (OL 32 & CH VI), before any adjustment for acceptance of responsibility.

Section 2332b(g) provides for enhanced penalties for "[a]cts of terrorism transcending national boundaries" where the offender "kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon...or creates a substantial risk of serious bodily injury to any other person...", or threatens, attempts or conspires to do so. 18 U.S.C. §§ 2332b(a). In the definitional section, a "Federal crime of terrorism" is defined as an offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"

¹ Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), provides:

§. 730. Directions to Sentencing Commission.

The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code.

The adjustment for international terrorism (amendment 526) was promulgated in response to § 120004 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994) which directed the Commission to:

amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

and is a violation of certain specified sections of title 18. 18 U.S.C. § 2332b(g)(5)(A). Not all of the title 18 offenses specified in the definitional section, however, necessarily involve killing, kidnapping, or acts which create a substantial risk of serious bodily injury. Furthermore, many of the specified title 18 offenses can be committed wholly within the United States without involving conduct "transcending national boundaries".

The § 3A1.4 adjustment does not require any finding that (1) the conduct involved "transcend[ed] national boundaries" or (2) the offender killed, kidnapped or created a substantial risk of serious bodily injury. Yet, a number of relatively less serious offenses which are not likely to involve those two requirements are specified as "federal crime[s] of terrorism". For example, one such offense is 18 U.S.C. § "1361 (relating to injury of Government property or contracts)" which, absent the two additional requirements necessary for enhancement under § 2332b, is punishable by a fine or imprisonment up to a maximum of ten years. 18 U.S.C. § 2332b(g)(5)(B)(i). Similarly, 18 U.S.C. § 2280(a)(2) which relates to certain threats of violence against maritime navigation is punishable, absent the two additional requirements necessary for enhancement under § 2332b, by a maximum term of imprisonment of 5 years. Because of the tariff-like approach of this § 3A1.4 adjustment, conduct involving relatively less serious acts of protest may be prosecuted under these statutes and result in a guideline range harsher than intended or necessary.

Amendment 6- §§ 1B1.1, 3C1.1, 4B1.1, 4B1.2 (Application Instructions)

NACDL does not oppose the first part of this amendment which amends § 1B1.1.

NACDL opposes the second part of the amendment because it does not simplify the definition of "offense" as it purports to do. Further, the amendment which adds a new application note to § 3C1.1, though denominated a "conforming amendment", expands the scope of "during the investigation or prosecution of the instant offense" to include obstructive conduct beyond the offense of conviction. As amended, the obstruction adjustment would apply

in relation to, the investigation or prosecution of the federal offense of which the defendant is convicted and any offense or related civil violation, committed by the defendant or another person, that was part of the same investigation or prosecution, whether or not such offense resulted in

conviction or such violation resulted in the imposition of civil penalties. It is not necessary that the obstructive conduct pertain to the particular count of which the defendant was convicted.

Proposed § 3C1.1, comment (n.8). This expanded scope is inconsistent with the manner in which most circuits have interpreted this adjustment. E.g., United States v. Yates, 973 F.2d 1, 4-5 (1st Cir. 1992) (holding that obstruction must occur during the investigation, prosecution, or sentencing of the offense of conviction); United States v. Perdomo, 927 F.2d 111, 118 (2d Cir. 1991) (same); United States v. Woods, 24 F.3d 514, 516-18 (3d Cir. 1994) (same); United States v. Haddad, 10 F.3d 1252, 1266 (7th Cir. 1993); United States v. Barry, 938 F.2d 1327, 1332-35 (D.C. Cir. 1991) (same). As the 10th Circuit explained in United States v. Gacnik, 50 F.3d 848, 852-53 (10th Cir. 1995):

A plain reading of U.S.S.G. § 3C1.1 compels the conclusion that this provision should be read only to cover willful conduct that obstructs or attempts to obstruct "the investigation . . . of the instant offense". . . . [T]he obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution, or sentencing; or as regards a completely unrelated offense, does not fulfill this nexus requirement.

The Commission should not undertake to expand the scope of this adjustment in derogation of the manner in which it has been interpreted by the majority of circuit courts of appeals through this back-door "conforming" amendment. The Commission certainly should not expand the scope without some explanation of the need for the revision and empirical support for its view. Furthermore, in expanding the scope of the obstruction adjustment to include related civil violations and offenses that may not be prosecuted or as to which the defendant is not found guilty, the Commission should bear in mind that in most cases imposition of the obstruction adjustment serves to preclude a reduction for acceptance of responsibility. This has the effect of a 4- or 5-level swing in the offense level, a severe enhancement that should not be expanded lightly.

Amendment 8 - § 1B1.3 (Relevant Conduct - "same course of conduct")

NACDL does not oppose this amendment which adds language to the relevant conduct commentary that explains that "if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information is insufficient to show that they are part of the same course of conduct or common scheme or plan". Proposed amendment to § 1B1.3, comment (n.9(B)). This language, derived from the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), provides a helpful illustration of the outer limits of "same course of conduct" in drug transactions.

Indeed, NACDL recommends that the commentary be expanded to explain that the mere fact that the same controlled substance is involved in other transactions is never enough, without more information, to show that the other transactions are part of the same course of conduct as the offense of conviction. Other factors, including "the degree of similarity of the offenses, [and] the regularity (repetitions) of the offenses," that provide a nexus with the other transactions should be present for multiple transactions to be deemed part of the "same course of conduct". U.S.S.G. § 1B1.3, comment. (n.9(B)).

Amendment 9 - § 1B1.3 (Relevant Conduct - Acquitted Conduct)

Of the options published by the Commission pertaining to the use of acquitted conduct in determining a defendant's offense level, NACDL prefers option 1B. This option creates a new subsection in the relevant conduct guideline which provides that:

Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section.

Proposed amendment Option 1B (§ 1B1.3(c)).

Option 1B also proposes to create new commentary which would explain that acquitted conduct may be used to establish an enhancement under the guidelines when the elements of the enhancement differ from the elements of the offense as to which the defendant was acquitted. See Proposed § 1B1.3, comment. (n.10). The amended commentary cites as an example, that after an acquittal on a § 924(c) charge for using and carrying a firearm in connection with a drug offense the court may impose the gun bump

in U.S.S.G. § 2D1.1(b)(1) which requires only that "a dangerous weapon . . . was possessed". See e.g., United States v. Watts, ___ U.S. ___, 117 S.Ct. 633 (1997) (reversing and remanding where lower court refused to impose § 2D1.1(b)(1) gun bump because of acquittal on § 924(c) charge)).

The only issue before the Supreme Court in Watts is that addressed in the first part of the proposed amended commentary. The statements of Justice Scalia with respect to the import of 18 U.S.C. § 3661 as prohibiting any restriction by the Commission of the use by the sentencing court of acquitted conduct in determining the sentence are dicta, not part of the opinion of the court, and if correct would undo much of the sentencing guidelines which time and again restrict the use of information by courts in determining the appropriate punishment. See e.g., U.S.S.G. § 5K1.1 (requiring government motion before a court may depart based on substantial assistance; § 5K2.13 (permitting departures based on diminished capacity only where the offense is non-violent); Koon v. United States, ___ U.S. ___, 116 S. Ct. 2035, 2047 (1996). Furthermore, the Supreme Court expressly declined to address whether a sentence enhancement that results in a substantially higher punishment so as to amount to "a tail which wags the dog of the substantive offense" would violate due process of law. United States v. Watts, 117 S. Ct. At 637-38 n.2, citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

NACDL opposes the last sentence of the amended commentary, however, which provides that "acquitted conduct ...may provide a basis for an upward departure". Proposed § 1B1.3, comment. (n.10). NACDL opposes the use of acquitted conduct as basis for an upward departure and opposes the other published options which would permit the use of acquitted conduct in calculating the offense level because it believes that "[t]here is something fundamentally wrong with such a result." United States v. Baylor, 97 F.2d 542, 549 (D.C. Cir. 1996) (Wald, J., concurring specially).

The NACDL's position on this issue may best be summarized by reference to Judge Wald's concurring opinion in Baylor:

Guideline "law," I am well aware, runs overwhelmingly against Baylor's claim that a sentencing court should not use the core conduct underlying an acquittal to increase an offender's base offense level for the crimes of which he was convicted. This circuit has gone along with most other circuits in ruling that the guidelines and the law authorizing

their creation permit such use, and that this practice is constitutional. See *United States v. Boney*, 977 F.2d 624, 635-36 (D.C. Cir.1992) (citing cases from all circuits except the Ninth). Only the Ninth Circuit has held to the contrary, claiming that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *United States v. Brady*, 928 F.2d 844, 851 (9th Cir.1991).

But this consensual surface is eroded by a growing body of resistance to what commentators and scholars recognize as a blatant injustice. Despite the near unanimity of the circuit holdings, many individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice.

[FN2]

FN2. See, e.g., *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir.1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Hunter*, 19 F.3d 895, 897-98 (4th Cir.1994) (Hall, J., concurring) ("[A]s regards charges on which the jury has acquitted the defendant, ['pricing' these charges at the same level of severity as convicted conduct for sentencing purposes] is just wrong."); *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir.1992) (Newman, J., dissenting from the denial of a request for rehearing in banc) ("In some way, the law must be modified. A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); *Boney*, 977 F.2d at 637-47 (D.C. CIR.1992) (Randolph, J., dissenting in part and concurring in part) ("My analysis, and my colleagues'

... rests somewhat uneasily with the 'special weight' the Supreme Court has accorded acquittals in its Double Jeopardy jurisprudence."); United States v. Galloway, 976 F.2d 414, 436-44 (8th Cir.1992) (Bright, J., dissenting) ("If the former Soviet Union or a third world country had permitted [the practice of punishing people for conduct that had not been the subject of indictment or trial] human rights observers would condemn those countries."); United States v. Restrepo, 946 F.2d 654, 664-79 (9th Cir.1991) (Norris, J., dissenting) (arguing that the 'preponderance of the evidence' standard for counting conduct underlying acquitted charges in sentencing should be rejected) ("Circuit has followed circuit without, in some cases, even a vestige of independent analysis. ... There are signs, however, that the dam is finally cracking, signs of an emerging awareness of the truly profound implications of the changes the Guidelines have wrought." (citing Brady)); United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir.1990) ("This [twelve-fold increase in the sentence] is perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.' (Quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986))). In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations."); United States v. Jones, 863 F.Supp. 575, 578 (N.D. Ohio 1994) ("The right to a trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that charge." (citing Brady)); United States v. Cordoba-Hincapie, 825 F.Supp. 485, 487 (E.D.N.Y.1993) ("Can the guarantees of a jury trial to determine the substantive predicates of criminality be shortcircuited

by characterizing a critical element of great significance in deciding punishment as one for the judge to determine in fixing sentence--a sentence predetermined under fixed guidelines, not one imposed under a discretionary regime? ... Congress could not have intended such a bizarre and dangerous result when it adopted guideline sentences").

A parallel body of work condemning sentencing based on acquitted conduct has been growing in the academic community. See, e.g., Kein R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 STAN. L.REV. 523 (1993); David Yellen, Illusion, Illogic, and Injustice: Real- Offense Sentencing and the Federal Sentencing Guidelines, 78 MINN. L.REV. 403 (1993); Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L.REV. 1179 (1993); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681 (1992); Michael Tonry, Salvaging the Sentencing Guidelines in Seven Easy Steps, 4 FED. SENTENCING REP. 355, 356-57 (1992); Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM.CRIM. L.REV. 161, 208-20 (1991).

Although I fully recognize that Boney requires affirmance on this issue, to my mind the use of acquitted conduct in an identical fashion with convicted conduct in computing an offender's sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, either through a grant of certiorari to resolve the circuit split, or a revision of the guidelines by the Sentencing Commission, or legislation to bar such a result; in Chief Judge Newman's words "the law must be modified." [FN3] Time and experience show us increasingly that the assumptions underlying the decisions upholding the use of acquitted conduct to enhance sentencing are not sound.

FN3. Concepcion, 983 F.2d at 396 (Newman, J., dissenting from the denial of a petition for rehearing).

The practice of sentencing defendants on the basis of crimes for which the defendant has been acquitted has been plausibly attacked along many jurisprudential fronts, including double jeopardy, [FN4] failure to honor the right to a jury trial, [FN5] failure to satisfy the "notice" requirement of a grand jury indictment, [FN6] and due process. [FN7] The explanation offered to defendants who object that they are being punished for crimes of which they have not been convicted is invariably that they "misperceive[] the distinction between a sentence and a sentence enhancement," and that by adding the full measure of punishment specified in the guidelines for crimes of which they are not convicted, the court is merely "enhancing" the penalty for the crime of which they are convicted, not imposing liability for a separate crime. Boney, 977 F.2d at 636 (quoting United States v. Mocchiola, 891 F.2d 13, 17 (1st Cir.1989)). [FN8] The "enhanced" sentence, after all, still must fall within the statutory range set out for the crime of conviction. See Boney, 977 F.2d at 636.

FN4. See, e.g., United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181- 82 (2d Cir.), cert. denied, 498 U.S. 844 (1990).

FN5. See, e.g., Jones, *supra* note 2.

FN6. See Lear, *supra* note 2, at 1229-33.

FN7. See, e.g., Restrepo, *supra* note 2, at 664-79 (Norris, J., dissenting).

FN8. In his separate concurring opinion, Judge Randolph recognized that "this conceptual nicety might be lost on a person who ... breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at

sentencing, the court finds him responsible for the same misconduct. That the Double Jeopardy Clause protects him from reprosecution on the acquitted count, or that his acquittal means that his maximum potential sentence will be determined solely on the basis of the count on which he was convicted is doubtless of little comfort." Boney, 977 F.2d at 647 (Randolph, J., dissenting in part and concurring in part).

Some of our own judges have recognized that this justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. [FN9] The "law," however, has retreated from that standard into its own black hole of abstractions. The fact remains that when the conduct which serves as the basis for a sentence "enhancement" is in fact treated by the criminal statutes and the sentencing guidelines as a discrete crime, separately charged in the indictment, and subjected to a separate determination of guilt or innocence by a jury, treating it subsequently at the sentencing stage as just another "factor" to be considered in "enhancing" the sentence for the crime of conviction introduces an artificiality into the process that violates time honored constitutional principles designed to protect criminal defendants.

FN9. See supra note 8.

The fact that the ultimate sentence based on both convicted and acquitted conduct falls below the statutory maximum for the crime of conviction does little, if anything, to counteract the basic unfairness of counting acquitted conduct. The statutory maxima for many felonies, which can run as high as 30 or 60 years, were originally set in an era of indeterminate sentencing and parole; the prevailing ideology of punishment was rehabilitation, and the system was designed to provide that offenders would remain in prison only until they had been "rehabilitated," meaning prisoners often would be released after serving as little as one-third of their original sentences.

[FN10] The concept of guideline sentencing, on the other hand, was motivated by Congress' determination that indeterminate sentencing and parole discretion resulted in unwarranted sentence disparities, and must be replaced by more rigid formulas allowing little or no discretion on the part of the judge. [FN11] Thus the escape valves attached to the long sentences originally prescribed by statute have been slammed shut, and statutory maxima that were designed to cover the most egregious conceivable manifestations of particular crimes, and thus to far exceed the appropriate sentence in the average case, [FN12] cannot be relied on to cabin within reasonable limits the cumulative penalties for convicted and acquitted charges.

FN10. See Michael H. Tonry, Real Offense Sentencing: The Model Sentencing and Corrections Act, 72 J.CRIM. L. & CRIMINOLOGY 1550, 1593 (1981).

FN11. See 18 U.S.C. § 3553(a)(6) (1994).

FN12. See Michael Tonry, Sentencing Guidelines and the Model Penal Code, 19 RUTGERS L.J. 823, 845 (1988).

Some courts have felt themselves constrained by the Supreme Court's decision in McMillan v. Pennsylvania [FN13] to respect the "punishment/enhancement" fiction that underlies the authorization for counting acquitted conduct in § 1B1.3(a)(2). [FN14] A close reading of that opinion, and of the Specht v. Patterson [FN15] decision to which it refers, however, suggests that even that fiction has boundaries which this portion of the guidelines has crossed over.

FN13. 477 U.S. 79 (1986).

FN14. See, e.g., United States v. Mobley, 956 F.2d 450, 455 (3d Cir.1992).

FN15. 386 U.S. 605 (1967).

The statute reviewed in Specht authorized a sentencing court to determine that a person convicted of enumerated sex offenses constituted a threat to the public, or was an habitual offender and mentally ill, and on this basis to increase the sentence from the term specified in the crime of conviction to an indeterminate term between one day and life imprisonment. [FN16] The statute made no provision for notice or hearing preceding this determination. The Court held that the statute was "deficient in due process" as it provided for "the making of a new charge leading to criminal punishment" without affording the defendant the safeguards considered essential to a fair trial. [FN17]

FN16. See id. at 607-08.

FN17. Id. at 611.

In McMillan, the Supreme Court addressed a challenge to Pennsylvania's Mandatory Minimum Sentencing Act [FN18] based in the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment. The Act provided that anyone convicted of certain felonies must be sentenced to at least five years' imprisonment if the judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense. [FN19] Individuals subjected to this sentence enhancement argued that the firearm possession was actually an element of the crime, and thus under In re Winship [FN20] must be proved beyond a reasonable doubt, and in the alternative that due process required that the firearm component be subject to a higher standard of proof than preponderance of the evidence. [FN21]

FN18. 42 Pa.C.S.A. § 9712 (1982).

FN19. See McMillan, 477 U.S. at 81-82.

FN20. 397 U.S. 358 (1970).

FN21. See McMillan, 477 U.S. at 83-84.

The Court found merit in neither claim, holding that Pennsylvania's "chosen course in the area of defining crimes and prescribing penalties" did not violate the standard articulated in Specht. [FN22] The Court noted that it had "never attempted to define precisely the constitutional limits noted in [Specht], i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases," and declined now to proffer any such definition, in light of other factors making it unnecessary to reach this issue. [FN23] The Court noted, first, that the Pennsylvania Act created no presumptions of guilt and did not relieve the government of its burden of proving guilt, but rather became applicable only "after a defendant has been duly convicted of the crime for which he is to be punished." [FN24] Next, the Court observed that the Act enumerated felonies carrying maximum sentences of ten or twenty years, "upp[ing] the ante" for these felonies only insofar as the minimum sentence could not fall below five years; the Court concluded that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." [FN25] The Court rejected the petitioners' invocation of Specht, noting that the statute struck down in Specht subjected the defendant to a "'radically different situation' from the usual sentencing proceeding," whereas the Act merely raised the minimum sentence that may be imposed by the trial court. [FN26] Finally, the Court rejected the petitioners' warning that States would use any leeway the Court allowed them to restructure existing crimes in such a way as to evade the due process requirements announced in Winship, observing that Pennsylvania's legislature had not changed the definition of any existing

offense. [FN27]

FN22. See id. at 86, 91-93.

FN23. See id. at 86.

FN24. Id. at 87.

FN25. Id. at 88.

FN26. See id. at 89.

FN27. See id. at 89-90.

The Court then turned to the petitioners' "subsidiary" claim that visible possession of a firearm should be subjected to a higher standard of proof than "preponderance of the evidence." Citing to the 1949 decision in Williams v. New York, [FN28] the Court quickly dispensed with this argument on the basis of that decision's holding that due process is not violated by the sentencing court's "traditional[]" practice of hearing evidence and finding facts "without any prescribed burden of proof at all." [FN29]

FN28. 337 U.S. 241 (1949).

FN29. McMillan, 477 U.S. at 91-92.

In addressing both sets of arguments pressed by the petitioners, the McMillan Court not only affirmed the continued vitality of Specht, but also used language that limited its holding regarding the inapplicability of Specht to situations in which the sentence "enhancement" relates to the particular event on which the conviction is based. The Court held that the Act did not fall under Specht because it "only bec[ame] applicable after a defendant has been duly convicted of the crime for which he is to be punished." McMillan, 477

U.S. at 87 (emphasis added). Rejecting the claim that a higher burden of proof should apply, the Court noted that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92, (emphases added).

The Court's apparent assumption that punishment will relate to the crime of conviction, rather than to crimes for which the defendant has been acquitted, reflects a commonality of understanding about fundamental fairness shared by scores of judges and academics, [FN30] as well as every nonfederal jurisdiction in the nation that has implemented guideline sentencing. [FN31] The Federal Guidelines stand alone in perpetuating their anomalous treatment of acquittals in sentencing.

FN30. See supra note 2.

FN31. See Tonry, supra note 2, at 356-57 (noting that the Federal Sentencing Commission is the only sentencing commission in the nation to reject the "charge offense" model, whereby sentences are based solely on crimes for which a defendant has been convicted, in favor of the "real offense" model, which allows sentencing courts to consider unconvicted and even acquitted crimes in setting the sentence).

In sum, I do not believe the Supreme Court has yet sanctioned the intolerable notion that the same sentence can or must be levied on a person convicted of one crime, and acquitted of three "related" crimes, as can be imposed on his counterpart convicted of all four crimes. The result of such a system is subtly but surely to eviscerate the right to a jury trial or to proof beyond a reasonable doubt for many defendants.

Yet we appear to have relentlessly, even mindlessly progressed down the path. It is time to turn back. The British novelist G.K. Chesterton once said: "[W]hen two great political parties agree about something, it is generally wrong." [FN32] I am afraid the same can be said in this one instance about great circuit courts.

FN32. JONATHON GREEN, THE CYNIC'S LEXICON 46 (1984).

United States v. Baylor, 97 F.2d at 549 -553.

Amendment 10, Part B - § 2X1.1 (Attempts, Solicitation, or Conspiracy)

NACDL opposes this amendment which would eliminate the three-level reduction for certain attempts, conspiracies and solicitations. In the guise of simplification, this amendment ignores the reduced culpability of those defendants who qualify for the § 2X1.1 reduction.

Amendment 11 - § 1B1.10 (Retroactivity)

NACDL opposes this amendment because it resolves a purported conflict between two circuits in a manner that disregards fundamental fairness. The amendment provides that henceforth in reducing a defendant's sentence pursuant to an amendment which the Commission has designated for retroactive application, a court may not reduce the sentence in excess of the time the defendant has already served. The practical effect of this amendment is that courts may no longer credit a defendant for the excess time he served in jail by reducing the defendant's term of supervised release.

Ironically, the Commission proposes to add background commentary which states that the designation of an amendment for retroactive treatment "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing. . ." This proposed amendment seemingly ignores the first purpose of sentencing, "just punishment". 18 U.S.C. § 3553(a). If the reduced term of incarceration reflects just punishment then there is no good reason why the defendant should not receive credit for each excess day which he spent in prison. To accomplish this simple act of justice places absolutely no added burden on courts, the Bureau of

Prison, or the system -- it involves a simple process of addition and subtraction. Indeed, society is more likely to reap benefits from its fair and equitable treatment of defendants who are fully credited for their excess prison time.

NACDL also opposes this amendment because the Commission should not be resolving "circuit conflicts" where the conflict arises out of differing judicial interpretations of statutory language, namely 18 U.S.C. § 3624. Compare United States v. Blake, 88 F.3d 824, 825-26 (9th Cir. 1996) (holding that in view of the language of § 3624 respecting when a term of supervised release begins to run, the defendant's term of supervised release began to run on the date when he should have been released from imprisonment under the retroactive guideline calculation) with United States v. Douglas, 88 F.3d 533, 534 (8th Cir. 1996) (holding that the court was required to impose a two-year term of supervised release for the class C felony pursuant to 18 U.S.C. § 3553(a)(3) and that § 3624 did not require a different result). It is significant, moreover, that the district court judge in Douglas imposed a two-year rather than a three-year term of supervised release because the court believed that the defendant "should be given some credit for the fact that he's actually served a sentence in excess of what he would have otherwise have served." Id. at 534. In fact, no court has resolved the issue in the manner which the Commission proposes -- by absolutely precluding any credit for the excess prison time.

Where as here, the issue does not arise out of an interpretive dispute concerning a guideline, the Commission should not interfere with the quintessentially legal question of statutory construction and congressional intent.

Amendment 12 - §§ 2F1.1 & 2B1.1 (Affected A Financial Institution)

NACDL supports this amendment because it clarifies ambiguous language.

Amendment 13 - § 5A1.1 (Sentencing Table & Offense Level 43)

NACDL supports the parts of this amendment which rectify the unwarranted "cliff" between offense level 42 and 43 and which eliminate the mandatory life provision for defendants who are convicted of offenses other than first degree murder or treason.

NACDL opposes that part of the proposed commentary to § 5A1.1 which permits imposition of life without parole pursuant to a cross-reference to the first degree murder guideline. As it has in the past, NACDL strongly objects to the imposition of a sentence of life without parole by way of a cross-reference from another guideline to the first degree murder guideline. Imposition of a sentence of life imprisonment is the harshest penalty, short of the death penalty, that a sovereign may impose upon an individual. Under federal law, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive.

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances, even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she committed murder in the absence of a grand jury indictment, the right to confrontation, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

A sentence of life imprisonment pursuant to a cross-reference would amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). The Supreme Court has never upheld imposition of such a harsh sentence on the basis of a mere preponderance of the evidence. See United States v. Watts, 117 S.Ct. 633, 637-38 n.2 (1997) (declining to address the issue under the circumstances of that case but acknowledging divergence of opinion among the Circuits as to whether due process prohibits imposition of a dramatically increased penalty on a preponderance standard). Imposition of life without parole, or some other statutory maximum penalty, based on a preponderance of the evidence is simply wrong and violates the constitutional guarantee to due process of law.

Amendment 14 - § 2B3.1 ("Express Threat of Death")

NACDL opposes this amendment because it dilutes the requirement that the threat be express in a class of cases -- robberies -- that by their nature necessarily require an element of threat or intimidation.

Amendment 15 - § 2B3.1 ("Carjacking Correction Act")

NACDL opposes option 2 which would apply the definition of "serious bodily injury" that Congress enacted for carjackings to all offenses. NACDL agrees with the revised definition of "serious bodily injury" proposed by the Federal Public Defenders.

Amendment 17 - §§ 2D1.6, 2E1.1, 2E1.2, 2E1.3

NACDL supports the proposed amendments to the commentary to each of these guidelines. In each case, the amended commentary clarifies the operation of the pertinent guidelines.

Amendment 18 - §§ 2B1.1, 2F1.1 and 2T1.4

NACDL agrees with the comments submitted by the Practitioner's Advisory Group concerning this amendment and the issues for comment. NACDL also agrees with the Federal and Community Defenders that these issues warrant further consideration.

Amendment 21 - Role in the Offense

Aggravating Role

NACDL opposes the proposals that would reduce the number of participants necessary to trigger the aggravating role adjustments. The Commission has not provided any empirical evidence that indicates that the current number of participants fails to capture adequately the greater culpability of certain defendants. Additionally, the Commission should consider that the aggravating role adjustments often apply in non-violent drug offenses that already receive relatively severe sentences when compared to violent crimes. For example, an armed bank robbery where a dangerous weapon was brandished results in an offense level of 25 (no bodily injury and loss of less than \$10,000). U.S.S.G. §§ 2B3.1(a), (b)(1) & (b)(2). A distribution of 5 grams of cocaine base (\$575 street value) or 100 grams of methamphetamine (\$9500 street value) results in an offense level of 26. U.S.S.G. § 2D1.1(c)(7). Cocaine Report, table 19.

NACDL also recommends that the Commission delete the "otherwise extensive" language in the aggravating role adjustments. This language provides little guidance in assessing this adjustment and gives rise to disparate application. The proposed language

that provides for an upward departure for persons who do not qualify for aggravating roles because though "function[ing] at a relatively high level in a drug distribution network", do not exercise supervisory control over others suffers from the same lack of specificity. Furthermore, the fact that certain persons occupy a relatively high level in a drug network will likely be reflected in a relatively high offense level based on the quantity of drugs.

Mitigating Role

NACDL opposes the inclusion of the phrase "a substantially less culpable defendant". The term "substantially" involves a qualitative assessment which does not simplify application of the guideline, will likely lead to disparate application of the adjustment, and seems to impose a higher standard than currently in use to qualify for a mitigating role adjustment.

NACDL also opposes deletion of the three-level intermediate adjustment. It permits district courts to exercise informed judgment when warranted.

NACDL strongly recommends that the Commission include language that provides for a four-level reduction for mules and couriers. Very often such defendants are young, vulnerable, and paid a small percentage of the value of the drugs. In many districts, couriers and mules rarely receive any mitigating role adjustment because they are arrested by themselves, cannot provide enough information to implicate others, and are deemed essential participants in the transaction for which they are being prosecuted. Yet, as the Commission pointed out in the Cocaine Report it submitted to Congress, such persons, who are easily replaced, are less culpable and dangerous than the dealers and organizers. See Cocaine Report at 168-175.

The Commission should also include language that permits a mitigating role adjustment for retail street dealers who traffic within a limited geographic area for relatively small profits. Id.

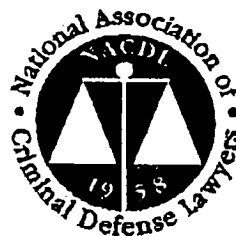
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March 28, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments, Part II.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

Thank you for your consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke/csh

Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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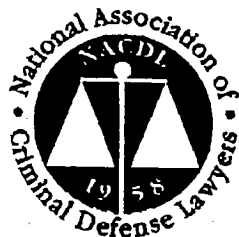
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COMMENTS ON THE 1997 AMENDMENTS - Part II

Amendment 1 - § 2D1.11 (Listed Chemicals)

As we stated in our comments when this amendment was published as an emergency amendment, NACDL does not support it because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it as a permanent amendment. See Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302.

Amendment 2 - §§2L1.1, 2L2.1, 2L2.2, 2H4.1

For the reasons we stated in our comments when these amendment were published as emergency amendments, NACDL objects to certain of the provisions that are being re-promulgated in these permanent amendments. In particular we object to those provisions that enhance the sentence beyond that which Congress mandated in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. 104-208, Div.C. NACDL recommends that the Commission heed the comments of the Honorable George P. Kazen, who (partially based on his "handling of countless cases of this kind over seventeen years") wrote on behalf of the Committee on Criminal Law of the Judicial Conference of the United States that:

In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences

are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. . . .

The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial detainees has become a major problem for the Marshals Service -- in absolute numbers, in medical needs, and in transportation needs.

It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings.

Letter to Honorable Richard P. Conaboy, dated February 4, 1997.

Three provision are of particular concern.

a. Prior Offenses - § § 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2)

In providing an increase of 2 or 4 offense levels if the defendant has prior convictions, these permanent amendments define the predicate priors more broadly than Congress intended when it directed an enhancement for certain priors.

Congress directed the Commission, in § 203(e)(2)(C) & (D) of IIRIRA, to

impose an appropriate sentencing enhancement upon an offender with . . . prior felony conviction[s] arising out of . . . separate and prior prosecution[s] for offense[s] that involved the same or similar underlying conduct as the current offense . . .

(emphasis added).

The proposed amendment provides an increase of 2 (or 4, if there are two or more prior convictions) offense levels if

the defendant committed any part of the instant offense after sustaining . . . conviction[s] for . . . felony immigration and naturalization offense[s] . . .

U.S.S.G. §§ 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2). By including as predicate priors any felony "immigration and naturalization offense," the Commission includes offenses that do not involve the "same or similar conduct" as the offense of conviction. As we pointed out in our comments to the emergency amendments, this broadening of the congressional mandate is unfair, unsupported by any empirical evidence, and not in keeping with the requirement that sentences be "sufficient, but not greater than necessary" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a). The unfairness is exacerbated because these priors are being double-counted both as criminal history and as part of the offense level.

b. Vicarious Liability for Firearms and for Causing Bodily Injury - § 2L1.1(b)(4)-(6)

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others who possess or use a firearm, or who cause bodily injury. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E).¹ For the reasons that we stated above and in our comments on the emergency amendments, the NACDL recommends that the Commission not exceed the

¹ Section 203(e)(2)(E) of IIRIRA directs the Commission to impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--

(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;

(ii) uses or brandishes a firearm or other dangerous weapon; . . .

enhancements mandated by Congress.

c. Cross-Reference to Murder Guidelines - § 2L1.1(c)

NACDL opposes a cross-reference to the murder guideline under any circumstances, but especially under a theory of vicarious liability. NACDL opposes a cross-reference to the murder guideline even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she committed murder in the absence of a grand jury indictment for the murder, the right to confront the witnesses who allege the murder, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

Amendment 3 - § 2L1.2 (Unlawful Entering or Remaining in the United States)

NACDL commends the Commission for recognizing that in imposing an enhancement if the defendant was deported after a conviction for an aggravated felony, it must differentiate among the wide-range of felonies that now fit the broadened definition of "aggravated felony" established in IIRIRA. "Aggravated felonies" now include conduct as serious as "murder, rape, or sexual abuse of a minor",² or as relatively minor as receipt of stolen property for which the court suspends the execution of a one-year term of imprisonment and imposes a term of probation.³

NACDL agrees generally with the comments of the Federal Public Defenders respecting this amendment. In particular, NACDL agrees that the Commission should further refine this amendment to differentiate the severity of "aggravated felonies" by reference to the prison term served by the defendant for the prior felony. NACDL concurs that the Commission should adopt the provision proposed by the public defenders which utilizes criminal history scoring to reduce unwarranted enhancements on defendants whose past criminal conduct reflects much less serious criminal behavior.

² 8 U.S.C. § 1101(a)(43)(A).

³ 8 U.S.C. § 1101(a)(43)(G).

Amendment 5 - § 3C1.2 (Reckless Endangerment During Flight)

NACDL opposes this amendment which creates a mandatory minimum offense level of either 18, 19 or 20 for any offense where the "defendant recklessly created a substantial risk of death or seriously bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. As currently formulated, this guideline provides a two-level offense enhancement but does not provide for a minimum offense level. The current formulation is better than the proposed tariff approach which focuses on a single factor and disregards other factors relevant to culpability and just punishment.

The Commission itself has explained why it should not adopt a mandatory minimum approach in promulgating amendments.

This tariff approach has been rejected historically primarily because there were too many defendants whose important distinctions were obscured by this single flat approach to sentencing. A more sophisticated, calibrated approach that takes into account gradations of offense seriousness, ... and level of culpability has long since been recognized as a more appropriate and equitable method of sentencing.

U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 27 (1991).

Amendment 10 - § 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking - Methamphetamine)

NACDL opposes the increased penalties for methamphetamine offenses which the Commission has published in this amendment. The amendment purports to "implement[] sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996." Synopsis of Proposed Amendment, 10(A); see Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, §§ 301 & 303 (hereinafter "the Methamphetamine Act"). The amendment proposes to double the current quantity ratio in U.S.S.G. § 2D1.1 to the very same ratio that the 104th Congress considered

in two bills but did not enact.⁴

The proposed amendment fails, however, to do what Congress directed. The Methamphetamine Act provides:

(a) In General.--Pursuant to its authority under section 994 of title 28, United States Code, the United States Commission shall determine whether the Sentencing Guidelines adequately punish the offenses described in subsection (b) and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense.

Pub. L. 104-237, § 303. Congress directed the Commission first to determine whether the current guidelines "adequately punish" methamphetamine offenses. Only if the Commission finds that the current guidelines do not provide adequate punishment, is it directed to increase the guidelines penalties for methamphetamine offenses.

Congress enacted the Methamphetamine Act on October 3, 1996. There is no indication that since that time the Commission has conducted any studies, held any hearings or otherwise deliberately considered whether the current methamphetamine guidelines "adequately punish the offenses". Until the Commission undertakes such consideration and makes a reasoned determination that methamphetamine penalties are inadequate, it should not raise the penalties. Certainly, until such time, it is not correct for the Commission to state that the enhanced penalties it proposes "implement" the congressional directive.

Indeed, as the Commission explained in the Cocaine Report,

In tying mandatory minimum penalties to the quantity of drug involved in trafficking offenses, Congress apparently intended that these penalties most typically would apply to discrete categories of traffickers -- specifically, "major" traffickers (ten-year minimum) and "serious" traffickers (five-year minimum). In other words, Congress had in mind a tough penalty scheme under which, to an extent, drug quantity would serve as a proxy to identify those traffickers of greatest concern.

⁴ In the summer of 1996, bills were introduced in both the House and the Senate which would have increased the penalties for methamphetamine offenses to the levels now proposed by the Commission. See e.g., 1995 S.B. 1965; H.R. 3852. Both the House and the Senate bills were amended to delete the provisions that increased the penalties.

U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 118 (1995); see also Chapman v. United States, 111 S.Ct. 1919, 1927 (1991) (explaining that Congress used a market-oriented scheme in establishing the penalties for drug trafficking offenses).⁵ The Cocaine Report also reflects that only crack cocaine offenses are being punished more harshly than methamphetamine offenses when considered in terms of the street-level value of the drug quantities that trigger the mandatory minimums. See Cocaine Report at 173, Table 19.⁶ Absent some hard scientific evidence that methamphetamine is a more dangerous drug than heroin or powder cocaine the Commission should not deviate from the congressional purpose of targeting the mid-level and kingpin methamphetamine traffickers that Congress targeted when it established the current penalties.

⁵ The Supreme Court in Chapman explained the market-driven rationale enacted by Congress:

We find that Congress had a rational basis for its choice of penalties for LSD distribution. The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level. It assigns more severe penalties to the distribution of larger quantities of drugs. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

111 S. Ct. at 1927-28 (internal citations omitted).

⁶ As reported in table 19 of the Cocaine Report, the street level value of different drugs at the 5-year and 10-year mandatory minimum quantities is:

Base Offense Level/Quantity	Powder Cocaine	Crack Cocaine	Heroin	Marijuana	Methamphetamine
26	\$ 53,500	\$ 575	\$ 100,000	\$ 838,000	\$ 9,500
32	\$535,000	\$5,750	\$1,000,000	\$8,380,000	\$95,000

The Commission is charged with developing sentencing guidelines that "provide certainty and fairness" based on rational distinctions. 28 U.S.C. § 991. As the Supreme Court explained just last summer:

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.

Koon v. United States, 116 S.Ct. 2035, 2053 (1996). Anecdotal reports that are driving the concern about methamphetamine offenses cannot and should not form the basis for the Commission's proposed enhanced penalties for methamphetamine offenses.

The proposed revised ratio for methamphetamine offenses is not tied to any principled rationale. For example, it does not purport to reflect the "true" mid-level and kingpin dealers at the five- and ten-year mandatory minimum levels. It does not reflect dosage ratios more properly attributable to those dealers. It does not reflect profit ratios of those dealers. It does not reflect a "harm" or "addictiveness" scale. In any event, the Commission does not appear to have made any such determinations based on empirical data.

It is said that those who ignore history are doomed to repeat their mistakes. A number of parallels exist between the now universally renounced crack cocaine ratio and the proposed enhanced methamphetamine ratio. As with the proposed methamphetamine enhancements, the 100-to-1 powder/crack cocaine quantity ratio was selected without any known rational basis from among other ratios (50-to-1 and 20-to-1) contained in a number of bills introduced in Congress at the time. Cocaine Report at 117. A number of now substantially discredited assumptions about the extraordinarily addictive nature of crack and its physiological effects drove Congress to increase the penalties for crack cocaine. *Id.* at 118. Similar anecdotal reports about the extraordinary perils of methamphetamine use have surfaced. Methamphetamine is rumored to be the drug of choice of the less affluent, especially young women, just as users of crack cocaine were believed to include an underclass particularly vulnerable to drug abuse. Prosecution of crack cocaine cases has impacted disparately on African-American in a manner that presages the alarm over the manufacturing and importation of methamphetamine by Mexican nationals.

For all these reasons, NACDL strongly urges the Commission to follow the congressional directive and make an informed determination of whether the current penalties for methamphetamine offenses are inadequate before it undertakes to enhance willy-nilly the penalties for these offenses.

Thank you for your consideration of NACDL's comments.

February 27, 1997

Alan Chaset, Chair
Committee on Federal Sentencing Guidelines
Criminal Justice Section
American Bar Association
740 15th Street, N.W.
Washington, D.C. 20005-1009

Dear Alan:

The following are my comments on the current Proposed Guideline Amendments for Public Comment -- Part I. My comments are similar to a September 26, 1996 submission to the Commission, made in my individual capacity.

I shall begin by stating my views as to the principles that should govern two of the most important subjects addressed in the proposed amendments, (1) the topic of 'departures' (amendment number 34), especially departures based on offender characteristics, and (2) the topic of so-called "relevant conduct," along with the subtopic of acquitted conduct (amendment number 9). I consider the need for simplification of the

Guidelines to be closely related to these two topics, and I understand the Commission is considering that problem, so I shall state my views concerning it as well.

I. Departures and offender characteristics

In the long run, the Guidelines should be radically revised to permit or require judges (1) to base sentences on offender characteristics that they now are forbidden to consider or strongly discouraged from considering, and (2) to give greater weight than now to many offender characteristics judges currently are allowed to consider.

I say this should be done "in the long run," because probably it would not be practical to adopt such a radical change comprehensively within the next year or two. On the other hand, it would not be wise to delay the change entirely for a period longer than that. The best course would be to try this change for a few selected categories of offenses and offenders, evaluate the results, and then make additional trials.

My principal concern is that the current Guidelines unduly forbid or minimize judges' reliance on offender characteristics that would justify greater severity of sentences, especially longer terms of imprisonment designed to incapacitate and to deter specifically and generally. However, my reasons for suggesting this change apply also to many offender characteristics that would justify more lenient sentences in some cases. Thus my concern does extend also to the unwisdom of forbidding or minimizing reliance on mitigating facts about

offenders.

The most basic reason for this recommendation is that the predominant purpose of criminal punishment should be to protect society from future crimes, through incapacitation, deterrence, and rehabilitation. The concept of "just deserts" should serve only to place a ceiling on the penalties used to serve the purpose of public protection.

Many of the facts that are most instructive, when a judge is selecting a sentence designed to protect the public, are facts about the offender (other than facts about the crime or crimes for which he is now being sentenced). Such facts about the offender include other crimes or non-criminal, anti-social acts he has committed (whether he was convicted for them or not); his current motivations and skills; his past personal and economic experiences; and many other facts shedding light on his current and likely future character and personality, and thus on his future behavior.

Many federal judges have understood these things. Before 1987 many of them deemed crime prevention the main purpose of their sentences. They relied heavily in selecting sentences on information about crimes of which an offender had not been convicted, on various kinds of information tending to show that another offender was unlikely to offend again, and on many other types of offender characteristics that the current Guidelines place off-limits or give only slight weight. The Guidelines should be revised to permit, and in many kinds of cases to

require, that judges give great weight to many offender characteristics of various kinds.

It would be a red herring to respond that such a change would cause disparity in sentences. The word "disparity," when used to disparage differences in sentences, is always understood to mean unjustified differences. Furthermore, members of Congress and the Commission have often acknowledged that unjustified parity not only is as bad as unjustified disparity, but really is just a different manifestation of the same problems.

The most basic command Congress gave the Commission was to devise Guidelines such that every sentence would be based on all the important facts about each offense and offender, in such a way that the sentence would serve the purposes of crime prevention and just punishment as well as possible in view of economic limitations. Under revised Guidelines such as I recommend, when important differences between two offenders cause them to receive different sentences for the same type of offense, there is no unjustified disparity.

Conversely, under the current Guidelines, when important differences between two offenders are ignored or given trivial weight, and consequently the two receive about the same sentences even though one poses a greater threat of future crime, there is unjustified parity. More importantly, one of the similar sentences fails adequately to prevent crimes.

Research the Commission did before promulgating the initial

Guidelines, and its later research, have obscured the true incidence of both unjustified disparity and unjustified parity among sentences.

Before the first Guidelines, the Commission chose to focus its data collection and analysis only on hard sentencing variables, those that could be defined precisely and objectively, and measured quantitatively. Soft variables were largely ignored, despite their great importance in explaining sentences actually imposed before the Guidelines. As a result, although the initial Guidelines purported to track past practices in most respects, in fact they treated similarly cases that judges wisely had been treating very differently.

After promulgation of the first set of Guidelines, the Commission has persisted in this error. Its data-gathering and analysis have focused almost exclusively on the few, artificially defined offense characteristics to which the Commission had unwisely confined the attention of sentencing judges. Since judges' discretion to depart from the Guidelines is limited and many of them seem timid about departing (especially upward), the data gathered have necessarily given the false impression that the Guidelines have caused almost universal sentencing parity.

The result is that the Commission has overstated the incidence of unjustified disparity that occurred before the Guidelines, and has both understated the incidence of unjustified parity and overstated that of justified parity after the Guidelines took effect. If all the variables that judges

formerly deemed important in sentencing were studied, both for the period before 1987 and for later cases, one would find that the Commission has brought about a very drastic change in the criteria on which federal sentences are based, and in the average time served for some kinds of offenders (and even for some kinds of crimes). This revolution was neither commanded by Congress, nor necessary to the reduction of unjustified disparity. On the contrary, the Commission's relentless course of demanding similar sentences for dissimilar cases has impaired the effectiveness of sentencing to prevent crime, without producing a substantial net improvement in real parity of sentences.

Without doubt, there were plenty of both unjustified disparity and unjustified parity among federal sentences before 1987, for several reasons. There were no substantive standards for sentencing, not even general ones. There were almost no specified procedures. Judges did not have to give reasons for sentences. There was virtually no appellate review of sentences.

The drastic deficiency of that system and of the results it produced was not a good reason, though, for the Commission to build unjustified parity into the Guidelines by ascribing little or no significance to offender characteristics that shed light on the likelihood of future crimes. The Commission should begin expanding the power and duty of judges to rely on such facts.

The issue of offender characteristics is functionally related to that of judicial departures from the specific dictates of the Guidelines. In theory the two issues have no peculiar,

intrinsic interrelationship. However, the current Guidelines' banishing or downplaying of many offender characteristics has created a practical interrelationship between these two issues, in the sense that departures are an escape valve by which a judge can in some circumstances try to ameliorate the Guidelines' deficient treatment of offender characteristics. If the Commission were to conclude, as it should, that the current Guidelines unduly bar or restrict reliance on some important offender characteristics, the most cautious way to experiment with allowing wider and heavier reliance on them would be for the Commission expressly to invite or even encourage specified kinds of departures in this area.

Even if the Commission does so, it would be advisable also to select some kinds of offenses and some kinds of offenders as to which the Guidelines themselves would provide for weighty reliance on certain offender characteristics that the current Guidelines give little or no significance. More would be learned from an experiment with both techniques than with only the former, especially since many judges seem loath to depart, especially upward.

Proposed amendment number 34 seems to permit departures a bit more broadly than do the current Guidelines, but not enough. No proposed amendment would give offender characteristics substantially greater weight than now, in the more specific ways that should be tried. Thus this batch of proposed amendments as a whole does not represent an implementation of the approach I

recommend.

II. Relevant conduct and acquitted conduct

Phrases such as "relevant conduct" are in wide usage, and it is common for people to link the phrase "relevant conduct" with the phrase "real offense sentencing." However, I have long considered use of such phrases confusing and even misleading, for the following reasons.

All can agree that sentences should be based only on relevant facts, not irrelevant ones. Likewise all agree that, among the facts relevant to sentencing, some are best described as facts about the offense or offenses for which this sentence is to be imposed, while the other facts are best described as facts about the offender. Thus, there are relevant offense characteristics and relevant offender characteristics, both of which should be considered, while irrelevant offense and offender characteristics should be disregarded.

However, the relevant offense and offender characteristics are not all facts about the "conduct" of the offender and his accomplices. This is true even when we examine only relevant offense characteristics. For example, some of these are facts about the offender's state of mind at the time that he or an accomplice engaged in a particular bit of conduct that is one element of the offense. Others are facts about the results of certain conduct, or about the circumstances existing at the time of certain conduct. Thus, even as to offense characteristics, the phrase "relevant conduct" is misleading.

The point is even plainer when we examine relevant offender characteristics. Some of these, such as prior convictions, are amalgams of prior conduct, states of mind, circumstances, and results. Others, such as an offender's traits of character and personality, are not facts about his conduct at all, but facts inferred from various sources including his conduct, his utterances, and things that others have done to him.

The current Guideline entitled "Relevant Conduct," section 1B1.3, covers not only conduct, but also resulting harm, "any other information specified in the applicable guideline," and "the conduct and information specified in the respective guidelines." The latter phrases cover numerous and various provisions, many of which describe mental states, circumstances, and results, rather than conduct.

The real function of section 1B1.3, beyond merely cross-referencing other Guidelines, is to prescribe the extent to which offenders will be held responsible at sentencing for the conduct of others and for resulting harms. This function is much narrower than the title "Relevant Conduct" suggests. More importantly, section 1B1.3 barely scratches the surface of the issues encompassed by the idea of "real offense sentencing," as the Commission discusses it in Chapter 1 Part A.4.(a) of the current Guidelines.

I therefore suggest different terms in which to frame the issues that people usually have in mind when they use phrases such as "relevant conduct," "acquitted conduct," and "real

offense sentencing." The essential concerns regarding these issues are procedural. That is, on what kinds of evidence should a finding be based that certain alleged facts are true, when a sentencing court will rely on the finding? See, e.g., United States v. Shonubi, 1997 WL 2540 (2d Cir. 1997). How heavy a burden of persuasion should the proponent of the finding carry? See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996). Otherwise what procedures should be used to make the finding? See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981); Specht v. Patterson, 386 U.S. 605 (1967). Whatever the answers are to those questions, is there unfairness in letting the government propose such a finding where the offender has obtained an acquittal of a charge in which the government alleged the same or similar facts?

Terms such as "relevant conduct" are misleading ways in which to refer to these procedural issues, because the same procedural concerns should be raised not only when the facts to be found are covered by the "relevant conduct" guideline (e.g., acts committed by the offender during the offense of the current conviction (sec. 1B1.3)), but also when the facts to be found are facts about offender characteristics. Under the current Guidelines, for example, they might be facts (a) about other crimes of the offender (e.g., the offender's prior similar crimes not resulting in conviction, sec. 4A1.3(e)), (b) about the offender's lack of legitimate economic resources (e.g., his dependence on criminal activity for a livelihood, sec. 5H1.9), or

(c) about his mental and emotional condition (sèc. 5H1.3).

Consequently, one should not refer to this as an issue of "relevant conduct." This phrase would not be apt unless expanded to cover various other kinds of facts, e.g., "relevant harms." Nor should one refer to it as an issue of "real offense" sentencing. This phrase would likewise have to be expanded to cover the analogous question of "real offender" sentencing: should we, for procedural reasons, make judges close their eyes to some facts about the offender that bear on the risk of his offending again?

Instead of using these misleading phrases, one should simply address this topic as a set of interrelated issues in the law of sentencing procedure. There are constitutional limits, and within such limits these issues of procedure should be resolved as a matter of policy.

This is not a semantic quibble; these choices of terms have practical consequences. Discussion of these issues of policy and of constitutional law is impeded by use of misleading phrases such as "relevant conduct" and "real offense sentencing." The persons who initially chose these phrases apparently believed in the implicit premise they convey: that the sole or dominant purpose of sentencing is to give offenders their "just deserts," that is, sentences designed entirely to be proportional to the specific crimes for which they are being sentenced. However, the premise that "just deserts" are the purpose of sentencing is unsound, as Congress, judges, and most experts have recognized

for most of American history. I shall explain below why the premise is unsound. For now, it suffices to observe that, for those who view the primary purpose of sentencing as prevention of future crimes, phrases such as "relevant conduct" and "real offense sentencing" impede rational discussion of issues of sentencing procedure.

The discussion is facilitated when the procedural issues are identified more precisely: What kinds of evidence should be usable? What burdens of production of evidence and of persuasion should each party bear? What other procedures should be used? Are crimes of which an offender was previously acquitted a special case for these purposes? What does the Constitution require on each point?

The proper starting place to address these issues is recognition of the functions of procedural rules. In the context of sentencing, there are two principal functions.

First, the procedures should strike a wise balance between (a) reducing the risk of error by using thorough, careful procedures, on the one hand, and (b) reducing delay and expense by using simple, informal procedures, on the other hand. The most important factor in striking this balance is that federal sentencing is done by judges, not juries. Federal judges generally are good at evaluating evidence and applying informal procedures in a sensible and fair manner. For that reason, it has been wise for Congress and the courts to conclude, as they always have, that the rules of evidence applicable in trials

should not govern sentencing, and that simple, informal procedures are wise.

The second principal function of rules of sentencing procedure is to allocate the risk of error between the parties. Since errors will certainly occur under any set of procedures, the procedures should wisely allocate the risk of such errors as between the parties.

The most important factor in allocating the risk of error is that (a) errors in favor of the offender typically increase the danger of future crimes by him and by other prospective offenders, due to inadequate incapacitation and deterrence, while (b) errors in favor of the prosecution typically increase the punishment of an offender above the optimal level, i.e., the level that best achieves crime prevention while limiting the economic costs of punishment and preventing greater punishment than is fair to the offender.

Sentencing procedures should be designed to place most of the risk of error on the offender, rather than on the public. After all, this problem of allocating the risk of error in sentencing would never have arisen but for the offender's admitted or already proven criminal behavior. His presumption of innocence has been waived or rebutted. The current Guidelines unwisely refer to him as the "defendant," a term that ignores the crucial change in his status when he pled or was found guilty. That misleading appellation tempts one to draw unsound analogies between sentencing procedures and trial procedures.

Contrary to the implication carried by the word "defendant," the offender being sentenced is guilty of the crime for which he is about to be sentenced. The prospective victims of his and others' future crimes are innocent, or at least strongly presumed so. Wise procedures would be designed, in cases where facts and predictions bearing on the sentence are in doubt and errors may occur, to protect innocent members of society more than may be necessary, rather than to give convicted offenders undue leniency.

This principle should lead us, for example, to establish burdens of persuasion of sentencing facts different from the preponderance standard currently endorsed by the Commission (sec. 6A1.3) and used by most federal courts. When a convicted offender tries to prove a fact that would mitigate his sentence, he should have to prove it by more than a preponderance. Clear and convincing proof might wisely be required, for example.

Conversely, when the government tries to prove a fact that would support a more severe sentence, the burden of persuasion should be less than a preponderance. There are, of course, other contexts in which a standard lower than a preponderance is used. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555 (1995) (holding that a defendant claiming a violation of the prosecutorial disclosure requirement articulated in United States v. Bagley, 473 U.S. 667 (1985), need only adduce less than a preponderance of evidence that the undisclosed evidence would have been likely to prevent a conviction). "Substantial likelihood" of an aggravating fact

describes pretty well the showing that should justify greater protection of the innocent public from a guilty offender.

Congress has not forbidden this general approach, i.e., allocating most of the risk of sentencing error to offenders. It remains to be seen what constitutional limits the courts will set on the resolution of most specific issues of sentencing procedure. Certainly the Supreme Court has not categorically rejected the general approach I suggest. The Commission, the Congress, and the courts should do all in their power to adopt sentencing procedures that limit the risk of error to the degree that best makes practical sense, and that then allocate most of the remaining risk to the guilty offenders who have created the problem.

An acquittal should not be treated as a special matter for this purpose. Current constitutional precedents make it quite clear that it need not be so treated. See, e.g., United States v. Watts, 117 S.Ct. 633 (1997); Dowling v. U.S., 110 S. Ct. 668 (1990). All an acquittal shows is that the government failed, under the especially rigorous rules of procedure and evidence that govern the trial of one who is presumed innocent, to prove at least one element of the charged offense beyond a reasonable doubt. The acquittal creates no reasonable expectation in the defendant (who later becomes the offender being sentenced for another crime), or in the public, that the same misconduct will not later be proven under less rigorous procedural and evidentiary rules, to a lower degree of probability, at the

subsequent sentencing.

All three of the options in proposed amendment number 9 are unsatisfactory, even Option 3. It provides no articulation of the "substantial concerns of fundamental fairness" that supposedly might arise. Attempts by courts and commentators to identify and explain the nature of any perceived unfairness have not been specific or cogent. There should be no general invitation to depart downward on such a vague ground and, unless the Commission can articulate the purported unfairness specifically and persuasively, there should be no such invitation at all.

III. Simplification of the Guidelines

It may seem that my suggestion to add more offender characteristics is incompatible with simplification of the Guidelines. The impression that my views are contrary to simplification may be strengthened when I add that, in my view, the current Guidelines unduly limit the number of offense characteristics courts can consider, and their ways of doing so. It may also seem that the Congressional limit on ranges of terms of imprisonment to the lesser of six months or a 25% span obstructs simplification.

Despite these likely impressions, simplification is indeed possible and desirable. The Commission's attempt to simplify the Guidelines should be based on the following fundamental observations and principles.

Criminal behavior is enormously voluminous, varied, and

complex. Likewise, the character traits and other personal qualities that lead offenders to commit crimes are extremely varied, complex, and subtle, and the facts about an offender's life that shed substantial light on these traits and qualities are even more numerous, varied, and complex.

Crime prevention is extremely important. Therefore, it is wise to design the criminal justice system so that the public actors (e.g., legislatures, prosecutors, judges, and jurors) who make decisions about criminal law, prosecutions, convictions, and sentences can consider every important fact about each crime and each defendant. Only in that way can crime prevention be made as effective as practically possible, while at the same time unjust convictions and excessive sentences are avoided.

However, it would be impracticable to consider every significant offense and offender characteristic at every stage of the criminal process. Dealing sensibly with information that is so voluminous, varied, complex, and subtle requires great flexibility and discretion to handle every case in a unique way. The presumption of innocence and other important procedural protections would be impossible to enforce adequately if every stage of a criminal case were handled with great flexibility and discretion.

The basic solution to this problem that the federal and all state governments have followed for most cases, for almost the entire history of the Republic, is as follows. To protect the presumption that one accused of crime is innocent until proved

guilty by overwhelming evidence under rigorous procedures, the middle stage of the criminal process, that of formal adjudication of guilt, is designed in peculiar way.

First, the facts to be proved at this middle stage relate only to the charged offense, not to the character or personality of the defendant. Then, those facts are deliberately selected and worded so as to be few in number and relatively simple and specific in content. These elements are chosen and defined in such a way as to make them provable in a very technical and rigorous trial process; the other side of the same coin is that these elements lack realistic richness and subtlety. For example, the defendant is alleged to have possessed something specified (burglar tools, or a specified drug, for example) with a specified state of mind (e.g., the intention to make an unauthorized entry of another's property, or to transfer the drug).

These few facts, deemed the elements of the crime, must be proved to a very high probability, through rigorous evidentiary and procedural rules. Harmful errors in application of these requirements can almost always be identified and remedied on direct or collateral review of the conviction.

As a result of these rules for the stage at which guilt is adjudicated, it is extremely rare for innocent defendants to be convicted of crimes. A collateral result is that, during this middle stage of the criminal process, the decisionmaker (the judge or jury deciding whether guilt has been proven) learns very

little about the defendant's character and personality. In addition, the decisionmaker makes findings that describe even this particular crime in a peculiar way: the findings leave out many significant facts about the crime, and they oversimplify or state very generally even the facts the findings do cover.

For example, the jury returning a guilty verdict may find only that the offender possessed at least one object designed to open a locked door. The jury may find it unnecessary to decide whether the offender also possessed a large kit of other, highly sophisticated devices indicating great professional skill at such a crime. He may or may not, as far as the verdict indicates, have possessed also equipment for disabling alarm systems, a case designed for transporting valuable crystal without damage, and the like.

In the other hypothetical case mentioned above, the jury may find only that the offender possessed heroin, not also facts about its quantity, purity, and packaging that indicate his role in its distribution. In neither of these two cases does the jury find the offender's ultimate motive for the crime, nor his character or propensity to commit similar or different kinds of crimes in the future.

Thus, in the stage of a criminal case where guilt is adjudicated, an unrealistically simplified presentation is made of some of the key facts about the crime. No facts at all are presented about other offense characteristics or about the characteristics of the offender that should inform the selection

of a punishment.

This partial blindness and complete oversimplification during the middle stage of a criminal case did little harm in the traditional American system, because the first and third stages allowed consideration of all relevant facts, as well as discretion to respond to all of them. At the first stage, that of charging, the prosecutor had almost complete discretion (1) not to charge at all, (2) to charge a less serious offense than the evidence would justify if the narrow view taken during the middle stage governed, or (3) to accept a bargain for a lesser conviction. He could base such leniency on details of the offense that are ignored or oversimplified in the middle stage, and on facts about the offender that could not be proved at all at trial.

In view of these facts, the prosecutor could be lenient when more aggressive prosecution would strike an unwise balance among competing factors such as the seriousness of the offense in all its real, complex details; the degree of likelihood that the defendant or others would commit future crimes of various kinds in the absence of any criminal conviction or punishment; the likelihood that the defendant would respond well to probation or various kinds of treatment or training; and various other facts and predictions too numerous, varied, complex, and subtle to be considered during the much more formal and structured middle stage.

Similarly, the third stage of a criminal case, sentencing,

traditionally allowed another consideration of any kind of information bearing on the whole gamut of offense and offender characteristics. Cases that appeared identical, if one looked only at the indictment and verdict, were examined again at the sentencing stage and found to be very different, as the judge took a more thorough and subtle look at the facts of the offense, as well as his first thorough look at the character of the offender. This system thus had a first and third stages in each of which a decisionmaker had discretion to consider and act upon all relevant information about the offense and the offender, and a middle stage where artificially narrow factual allegations must be proved through rigorous evidentiary and procedural methods.

This system is excellent in conception. It allows potential criminal defendants to be screened out of the process before being tried or even charged, or to receive other forms of leniency, where the specifics of the offense or the offender make this a wise resolution of the competing demands of crime prevention, economy, and justice. This system also minimizes the chance that an innocent defendant will be convicted, by requiring very strong proof of just a few important facts under very demanding procedures. And then it creates an opportunity for wise crime prevention and punishment of the guilty offender, by basing the sentence on all significant information about the crime and the offender.

Under this basic, traditional system, sentencing should not be simple. There are methods by which to achieve simple

sentencing, but each of them fails to accomodate adequately the needs for effective crime control, economy, and justice.

One such failed method is embodied by the current Guidelines. The Guidelines preclude or strongly discourage consideration of many facts, such as an offender's unadjudicated crimes dissimilar to the one for which sentence is to be imposed, that are of substantial importance in selecting a sentence to prevent future crimes. As to facts the Guidelines do allow judges to consider, i.e., the offense characteristics comprising most of the current Guidelines' great bulk, they are defined in ways that are artificially narrow and discontinuous; they inadequately reflect the true variety and subtlety of such facts. The result is that the Guidelines unduly restrict and oversimplify sentencing criteria.

Consequently, the current Guidelines set a task for sentencing judges that is much more technical than before the Guidelines, but is also simpler in substance, for two reasons. First, judges must ignore or give trivial weight to much important information. Second, even the information that the Guidelines do make significant in sentencing is broken into artificially defined and discontinuous bits, and given predetermined interrelationships. Judges must use this information more to make a calculation than to make a judgment.

Thus, the difficult and complex judicial sentencing process, which formerly involved weighing many, varied, interrelated factors having different degrees of importance, is replaced in

the current Guidelines by a computation. This computation has only the technical complexity of a math problem, not the substantial complexity of an attempt to evaluate human behavior and character, to predict criminal conduct and the reactions of criminals to sanctions, and thus to prevent and punish crime with optimal effectiveness.

The ultimate results of the current Guidelines are that crime prevention is less effective than it should be, that unjustified disparity and unjustified parity of sentences are unduly frequent, and that all we gain is an illusion of sentencing parity.

It is also true that the pre-Guidelines system of federal sentencing was grossly inadequate. There, too, unjustified disparity and unjustified parity were both rampant. Also, many sentences were surely ill-designed to prevent crime or to punish wisely. Sentencing was lawless, unreviewable, and insufficiently explained. There were inadequate processes for Congress and courts to create data, analyze them, and improve sentencing by learning from experience.

The concepts of Guidelines to be announced and then amended regularly, of limits on departures from the Guidelines, of stated reasons for sentences, and of appeals by both parties were sound. These concepts could have led to a great improvement in sentencing. Instead, the Commission has implemented these concepts in a way that (1) has definitely impaired crime prevention and just sentencing by barring or minimizing reliance

on some important sentencing factors, (2) has probably increased the problem of unjustified parity, (3) has not necessarily reduced that of unjustified disparity, and (4) has produced sentencing law that is excessively technical and complicated.

The wise approach to simplification, which also is the wise approach to solving the other problems just mentioned, would be as follows. Sentencing cannot be both simple and wise. We therefore must choose between having either (1) relatively simple Guidelines or (2) relatively simple judicial application of them. So far, the Commission has made the latter choice.

The Commission designed the initial Guidelines, effective in 1987, so as to limit courts to simple functions of factfinding and technical application of relatively precise rules. It tried also to make the Guidelines themselves rather simple, by leaving out important sentencing factors and by unduly quantifying the ones it put in. Even so, the initial Guidelines were rather complicated. Then the Commission promulgated annual sets of amendments making the Guidelines ever longer, more precise, and more complicated. At present, we therefore have a system where the judicial function is more mechanical (and thus easier in substance) than before the Guidelines; where the Guidelines are so technical as to be hard to use; and where, ironically, these complicated Guidelines are so much more simple than the real world of crimes and criminals that they do not produce sufficiently effective, economical, and fair crime prevention and punishment.

At this time, the Commission should begin experimenting with an approach that is virtually the opposite of the approach it has used to date. To be cautious, it should try this new approach at first only for a few kinds of offenses and a few kinds of offenders. The Commission should replace some of the current provisions with new ones so designed that the new Guidelines will be relatively simple and their use by the courts will be as complex as good crime prevention and just punishment demand.

Application of this approach should begin with the following observation: Although the statute requires that each range of imprisonment prescribed by the Guidelines cannot be wider than the greater of 25% or six months (sec. 994(b)(2)), the act does not require that the Guidelines employ narrow or specific factual categories or calculations in the preceding steps by which a judge considers facts relevant to the sentence. Offense and offender characteristics can be described in general language. The numerical values assigned to them can consist of ranges.

For example, the Commission might choose to experiment with this new approach by replacing the Guideline for the offense of Failure to Appear by Offender (sec. 2J1.6). The Commission might also create a new Offender Characteristics Category Guideline to apply to this offense instead of the current Criminal History Category Guideline (sec. 4A1.1).

The new Failure to Appear Guideline could begin, as does the current one, by making 11 the base offense level for failure to report for service of sentence, and 6 the base level otherwise.

Then the new Guideline could authorize the sentencing judge, for example, to "decrease the offense level by 4 levels or less, or increase it by 6 or less, because of offense characteristics warranting the decision, including but not limited to the gravity of the charge or conviction in the case in which he failed to appear, the stage of the proceedings when he failed to appear, the kind of facility to which a sentenced offender was ordered to report, how long after he was scheduled to report he surrendered or was apprehended, and the circumstances under which he surrendered or was captured."

This draft adds offense characteristics that the current Guideline omits, such as the gravity of the offense for service of whose sentence the offender failed to appear. It also eliminates arbitrary discontinuities in the weight given to offense characteristics covered by the current Guideline, such as the 3-level difference between a pending charge punishable by 15 years imprisonment and one punishable by any less. In addition, it eliminates the unjustified parity of giving the same significance to a pending capital case as to a pending case where the maximum punishment is as little as 15 years.

The new Guideline for Offender Characteristics, to be adopted only for use with the new Failure to Appear Guideline, could direct the judge to determine the offender's "offender characteristics points" in a similar fashion. The court would choose from a wide range of points by considering a wide variety of facts, such as the nature, seriousness, and recency of prior

convictions and sentences and of prior crimes established for the first time in this sentencing proceeding.

To combine this new set of offense levels with this new set of offender points, the Commission could use a Sentencing Table very similar in substance to the current one. However, for this offense the vertical column would be headed "offender characteristics category," not "criminal history category."

These proposals are simpler than the current Guidelines, and they encourage judicial consideration of all significant offense and offender characteristics in their true subtlety and interrelatedness. They facilitate use of the kinds of procedures I recommend in the previous section of these comments, because they treat most sentencing facts as evidentiary rather than ultimate facts. They thereby confine the issue of burdens of persuasion, as well as other crucial procedural issues, to a manageably narrow scope of application.

At the same time, my proposals confine and guide judicial discretion vastly more than the pre-Guidelines law of sentencing. Coupled with the requirement of stated reasons for sentences, the authorization of appeals from sentences, and the roles of the Commission in gathering data and learning from experience, Guidelines drafted in this manner could promote effective sentencing while making unjustified disparity of sentences much less common than before 1987, and unjustified parity of sentences much less common than after 1987.

It would at least be worthwhile experimenting with this

approach. The current Guidelines comprise a lurch from the pre-1987 extreme of completely lawless sentencing, to the current extreme of artificial, unrealistic sentencing. It is time to try a more humble, cautious, and incremental method of reform.

It must be clear by now how interrelated are my views on the three sets of issues addressed above. Federal sentencing will not become as effective as it should be to prevent crime until offender characteristics are made much more important determinants of sentences than under the current Guidelines, nor until offense characteristics are described more comprehensively and in terms that encompass all their important variations. The only way the Guidelines can adequately cover all important offense and offender characteristics, and cover them with language that is reasonably simple, is to describe them in general terms and to provide ranges of numerical values for them. Procedures for finding sentencing facts and for applying Guidelines to the facts should be relatively informal, and should place most of the risk of error on convicted offenders, not on a public entitled to protection from crime.

This approach is so different from the current Guidelines that it should be tried in small steps. The results of both approaches should be studied carefully. In the long run, it will be found that the current Guidelines produce only illusory parity and indiscriminate prevention of crime, while the new approach produces more effective crime control, fairer sentences, relatively little unjustified parity or disparity, and a more

workable system.

Very truly yours,

Russell M. Coombs

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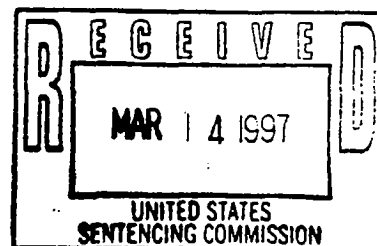
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COMMITTEES:
APPROPRIATIONS
JUDICIARY
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March 14, 1997

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information



Dear Mr. Conaboy:

I applaud the Commission's efforts to revise the Sentencing Guidelines for white-collar criminals. Although the Sentencing Guidelines originally increased the sentences for white-collar criminals, these proposed amendments address discrepancies between white and blue-collar criminals that have come to light since the Guidelines' enactment. For example, litigators frequently assert that the Guidelines allow for criminal antitrust defendants to receive shorter sentences than blue-collar criminals who have committed offenses of equal severity. We must eradicate this kind of sentencing disparity to foster public confidence in the Guidelines and to create a legal system in which justice is truly blind.

Although all of the proposed amendments deserve careful scrutiny before enactment, my comments speak to only a few of the proposals. Specifically, my comments address proposed Amendments Number 18 for Sections 2B1.1 and 2F1.1, the Theft and Fraud provisions respectively. These proposed amendments effectively work toward equalizing sentences for theft and fraud offenses, so I support the Commission's enactment of these changes.

COMMENT ON AMENDMENT NUMBER 18

The Commission should agree to eliminate the "more-than-minimal-planning" enhancement found in Sections 2B1.1 and 2F1.1 and other guidelines. The Commission found that judges apply the enhancement unevenly, resulting in "unwarranted disparities." To correct this problem, the Commission proposes a corresponding increase in the loss tables, and creates a two-level increase for criminals who use "sophisticated means" to impede discovery or determining the extent of the offense. This amendment reflects the common-sense notion that more planning and mental preparation on the part of criminals should result in longer sentences.

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The Commission should also agree to amend the base offense level of Section 2B1.1 from level four to level six. By making the base offense level for theft cases equal to that of Section 2F1.1 Fraud cases, this amendment would take an important step toward redressing the disparity between light sentences received by white-collar criminals relative to their blue-collar counterparts.

I also urge the Commission to enact Option One of the revisions to the loss tables. Although most base offense levels and specific offense characteristics increase by at least two level increments, the current loss tables increase by only a one level increment. Option One responds to this discrepancy by changing the current one-level increment in the loss tables to two-level increments. Option Two only contains a combination of one and two-level increments, and Option Three retains the old one-level increment. Thus, in order to make the Theft and Fraud loss tables more consistent with other guidelines, the Commission should choose Option One's two-level increment.

In addition, only Option One provides for severity levels at higher loss amounts, permitting loss amounts up to \$90 million. In contrast, the loss amounts for options two and three stop at \$50 million and \$40 million respectively, making no distinction between a defendant who stole \$40 million and one who stole \$100 million. It makes sense to increase the severity level for defendants who steal more because their actions result in significantly more harm. Ultimately, Option One, unlike either of the other two options, responds to the most severe theft and fraud cases with a punishment that fits the crime.

In closing, I would like to reiterate my appreciation to the Commission for undertaking the difficult task of reassessing the Sentencing Guidelines. The proposed amendments, if enacted, are a significant next step towards eradicating discrepancies in sentences among criminals and improving public confidence in the fairness of our judicial system.

Sincerely,

A handwritten signature in black ink that reads "Herb Kohl". The signature is stylized with a large, looped "H" and a cursive "Kohl".

Herb Kohl
U.S. Senator

HK:rjk



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION)

MAR 21 1997

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed is an 8-page document prepared by Office of Chief Counsel, Criminal Tax Division. It contains technical explanations and legal citations which support our position on the proposed 1997 amendments to the Federal Sentencing Guidelines.

Simply summarized, the enclosed document expresses our long-standing position that criminal tax offenders should be sentenced to longer periods of incarceration at lower tax loss thresholds. We believe that the existing guidelines do not always provide adequate punishment for white collar crimes in general, and tax crimes in particular.

The document also expresses our position that the loss tables for tax offenses should be set at identical amounts as those for theft and fraud. By the same token, we oppose any amendment which would measure the offense level based on the amount of potential benefit to the perpetrator rather than on the potential harm to the victim(s).

Thank you for the opportunity to comment on these matters. If you need further information, please contact Ed Delehanty, Office of Tax Crimes (CP:CI:O:T) at 202-622-5755.

Sincerely,

Ted F. Brown

Enclosure

00217



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

MAR 21 1997

MEMORANDUM FOR TED F. BROWN, ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION) CP:CI

FROM: Office of Chief Counsel
Criminal Tax Division

SUBJECT: Public Comment on Proposed 1997 Amendments

This document expresses the Internal Revenue Service's views on the proposed 1997 non-emergency amendments to the sentencing guidelines. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

The Service has increased efforts to help taxpayers comply rather than relying solely on after the fact enforcement. However, we recognize that, despite our most aggressive efforts, some segments of the population refuse to voluntarily comply. To this end, tough but fair sentencing rules permit courts to send the message, tax offenses are serious, and intentional violators will be punished seriously.

With this view in mind, our comments are offered in regard to the following proposed amendments:

Proposed Amendment 9 - Relevant Conduct (§1B1.3)

Proposed Amendment 9 addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1(A) adds language providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for an upward departure. Option 2 excludes conduct from consideration in determining the guideline range unless such conduct is established by the "clear and convincing" standard. Option 3 provides that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct.

The Service supports the traditional view of sentencing, *i.e.*, acquitted conduct may be considered by a sentencing court because a verdict of acquittal demonstrates a lack of proof sufficient to meet "beyond a reasonable doubt" standard, a standard higher than that required for considering relevant conduct at sentencing. United States v. Averl, 922 F.2d 765, 766 (11th Cir. 1991). Cf. United States v. Karterman, 60 F.3d 576, 580 (9th Cir. 1995). Consequently, we oppose any amendment that places a limit on the use of acquitted conduct either by definition or standard of proof.

Proposed Amendment 18(A) - Fraud, Theft, and Tax Offenses

Proposed Amendment 18(A), as set forth in the Proposed Guideline Amendments for Public Comment - Part I and the Federal Register (Vol. 62, No. 1, 152-19), the Sentencing Commission, *inter alia*, proposed to make the following changes to §§ 2B1.1, 2F1.1 and 2T1.4: (1) eliminate the more than minimal planning enhancement in §2B1.1 and §2F1.1 and other guidelines, build a corresponding increase into the loss tables, and create a two level enhancement like the one in § 2T1.4¹ for offenses involving "sophisticated means" and provide a level floor of 12 in such cases; (2) increase the base offense level of §2B1.1 (theft guideline) and §2B1.3 (property damage guideline) from level four to level six, and revise the loss tables in §2B1.1, §2F1.1 and §2T4.1 (theft, fraud and tax offenses, respectively); (3) change the current one level increments in the aforementioned loss tables to two level increments or to a combination of one and two level increments; (4) increase the severity of the three loss tables at higher loss amounts.

Subsequently, the Sentencing Commission prepared an "Unofficial Staff Alternative" combined loss table for §§ 2B1.1 and 2F1.1 which includes two options pertaining to "sophistication", and deletes more than minimal planning from both guidelines.

Considering the various loss table options and assuming that the proposed Unofficial Staff Alternative loss table will be modified so as to be applicable to the tax loss table, the latter is our preference. Our preference is based on the fact that, in most instances, tax losses result in higher offense levels in this table than in the existing tax loss table which is consistent with the Commission's intent of treating tax violations as serious crimes. We note that this proposed table incorporates two level increases as opposed to the one level increments in the present tax loss table but we do not find this objectionable. In fact, this table seems to provide a somewhat smoother progression through the loss amounts than the current table. Notwithstanding our endorsement of this proposed table if it is equally applicable to tax losses, if it is not, we oppose the Unofficial Staff Alternative on the ground that we strongly believe that identical loss amounts should be sentenced at least as severely under the tax loss table as losses are under the fraud and theft tables. Any change that would provide for higher sentences for identical amounts under the fraud and theft tables than under the tax table, would clearly send the wrong message as to the seriousness of criminal tax violations.

¹ The same two level enhancement for sophisticated means which the proposed amendment addresses and identifies as appearing in §2T1.4, also appears in §2T1.1 and is set forth in the subsequent text of Proposed Amendment 18(A).

If the Commission considers its original loss table options under proposed amendment 18(A)2 as opposed to the Unofficial Staff Alternative, we favor the proposed tax table for § 2T4.1 as set forth in Option One. We believe that the tax table as set forth in Option One will result in more significant periods of confinement for most of our cases, a result which is vital to our ability to maintain an acceptable level of voluntary compliance. Nevertheless, by way of reiteration, our primary preference between the proposed tables is the one set forth as the Unofficial Staff Alternative.

Proposed Amendment 18(A)1 provides for the elimination of more than minimal planning in the fraud and theft guidelines and replacing it with a two level enhancement, with a floor level of 12, for sophisticated means. This would also include a definitional amendment, concerning "sophistication," to Application Note (f) of §1B1.1. Likewise, §§ 2T1.1 and 2T1.3 which currently contain a two level enhancement for "sophisticated means" would be amended, to provide for a floor level of 12. We are in favor of this amendment.

The Unofficial Staff Alternative also contains two options for sophistication. Option One of the Unofficial Staff Alternative is virtually the same as the sophistication enhancement of proposed amendment 18(A)1, and it contains a provision for conforming §2T1.1(b)(2). We assume there will also be a conforming aspect for §2T1.4(b)(2) and, accordingly, we endorse Option One of the Unofficial Staff Alternative. However, we oppose Option Two of the Unofficial Staff Alternative because it seems to limit its scope of sophistication to the use of foreign bank accounts and transactions, thus making it an unnecessarily restrictive enhancement. Nevertheless, if it is determined that the fraud guideline is to be amended to include a specific offense characteristic with a floor level of 16 for the use of foreign bank accounts or transactions to conceal, we believe that a similar change should be made to the tax guideline.

Another area concerning sophisticated means which we would like the Commission to address is the inclusion of clarifying language that the sophisticated means enhancement is offense specific rather than offender specific. In other words, the enhancement should be applied based on the nature of the scheme and not on the defendant's role in the scheme. This clarification would resolve a circuit conflict between the Second Circuit and the Sixth Circuit. The Second Circuit has held that a sophisticated means enhancement is to be applied regardless of whether the defendant devised the sophisticated means involved in the scheme. United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Richman, 93 F.3d 1085 (2d Cir. 1996). By contrast, the Sixth Circuit has refused to apply the enhancement where the individual defendant's role in an admittedly complex scheme was nominal. United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). From our perspective, if a defendant takes advantage of a scheme involving the use of sophisticated means to conceal the nature or existence of an offense, the enhancement should be applied even if the defendant had no role in devising the sophisticated means. Typically, a defendant's

role in the offense is addressed by other guidelines. U.S.S.G. §§3B1.1 and 3B1.2.

Proposed Amendment 18(C)(8) - Issue for Comment

This issue for comment is, in essence, how to deal with an intended loss pursuant to §2F1.1. More broadly stated, the issue becomes whether the current rule should be changed to provide that a loss should be based primarily on the actual loss, with the intended loss available only as a possible ground for departure or whether, if the substance of the current rule is retained, the magnitude of the intended loss should be limited by the amount that a defendant realistically could succeed in obtaining. In other words, whether the intended loss should be limited by concepts of "economic reality" or "impossibility." We believe that the current rule should be retained with no modification for the amount that the defendant realistically could have succeeded in obtaining.

Basing loss on actual loss has the potential to reward defendants for factors beyond their control. For instance, a defendant who intended a large loss but who was discovered before he/she could consummate the offense would be treated less seriously than a defendant who was not discovered until after the offense was completed. Sentencing a defendant based on the intended loss still permits courts to take into account the value of pledged collateral in cases involving fraudulently obtained loans and actual performance in cases involving falsification to obtain contracts.

In addition, basing a determination of loss on the economic reality of a defendant's scheme would require courts to make speculative judgments and quite probably would lead to similarly situated defendants being treated differently.

Proposed Amendment 18(C)(10) - Issue for Comment

This issue for comment is, in essence, whether it is necessary to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense within the meaning of Application Note 10 to §2F1.1. We believe that Application Note 10 is, in its present form, adequate to address the issue without encumbering the courts with restrictive definitions and special rules. However, we are concerned about the situation where the loss amount included pursuant to §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant and the court might depart down to an offense level corresponding to the loss amount that the court determines to more appropriately measure the defendant's culpability. We believe that the potential harm or loss to the victim should be the measure of the seriousness of the offense rather than the actual benefit to the criminal. For instance, a defendant who prepares 100 fraudulent tax returns for \$100 each, may only realize a personal benefit in the amount of \$10,000 while causing hundreds of thousands of dollars of loss to the government.

Consequently, we oppose any language which advocates a downward departure based on the personal benefit derived by a defendant when it is less than the harm caused to the victim.

Proposed Amendments 24, 25 and 26 - Acceptance of Responsibility

Proposed Amendment 24 is purportedly designed to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional one level reduction in subsection (b). Proposed Amendment 26 is designed to allow consideration of the additional one level reduction for defendants at all offense levels. We oppose both of these proposed amendments. In regard to Proposed Amendment 24, there is no evidence that the proposed changes are needed. Furthermore, the removal of the presently listed factors from §3E1.1(a) will make it more difficult for probation officers to make informed recommendations to trial courts concerning the appropriateness of this reduction.

We are even more opposed to Proposed Amendment 24 which, in essence, dramatically raises the acceptance of responsibility reduction in all cases from two levels to three levels. We note that the factors that would engage the additional one level reduction are of the type which would ordinarily be applicable to the basic two level reduction in its current form. More significantly, if the three level acceptance of responsibility is applied to all offense levels, the potential exists whereby a defendant's sentence can be reduced as many as two sentencing zones. For instance, if a defendant is sentenced at a Zone C offense level of 11 where he/she would serve at least four months, a three level acceptance of responsibility reduction would result in the defendant being sentenced at a Zone A offense level of 8 and possibly receiving no sentence of imprisonment. Once again, this sends the wrong message in regard to all serious crimes and, specifically, to tax crimes where the sentences often fall within the sentencing zones set forth in the foregoing example.

Proposed Amendment 25 resolves a conflict in the circuits by providing an addition to Application Note 4 that commission of an offense while awaiting trial or sentencing, whether or not the new offense is similar to the instant offense, ordinarily indicates that a defendant has not accepted responsibility for the instant offense. We support this amendment which will resolve the conflict consistent with the holding in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990).

Proposed Amendment 28(6) - Issue for Comment

The issue for comment is whether and how to address the circuit conflict of whether "victim of the offense" under §3A1.1 refers only to the victim of the offense of the conviction or to the victim of any relevant conduct. If this issue is to be addressed, we favor the view of the Second Circuit in United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) which held that a vulnerable victim need not be the victim of the offense of

conviction, as opposed to the limiting view toward relevant conduct taken by the Sixth Circuit in United States v. Wright, 12 F.3d 70 (6th Cir. 1994).

We believe that Wright clearly demonstrates a situation where a victim can be a victim of an offense without being a direct victim of the offense of conviction. In this case, the defendant used the economic vulnerability of several people to induce them to participate in his scheme to defraud the government through the filing of false tax refund claims. In Echevarria, the defendant held himself out as a physician to defraud health insurance providers. The patients were victims of the offense because they believed they were receiving effective medical attention; however, they were not victims of the offense of conviction. In both of these cases, the defendant "used" individuals for their particular criminal scheme based on those peoples' vulnerability and, as such, we believe that this conduct deserves to be dealt with severely through the use of a two level enhancement. One way to resolve this conflict is making it clear in the guideline commentary that the enhancement is meant to encompass such conduct.

Proposed Amendment 28(14) - Issue for Comment

This issue for comment concerns the circuit conflict of whether the collateral consequences of a defendant's conviction can be the basis of a downward departure. We believe that granting a downward departure on the basis of collateral consequences undermines the Congress' goal of achieving uniformity in sentencing. Prosecution of white collar crimes often involve professionals and business persons who, as a result of their convictions and/or sentences, encounter loss of licenses and closure of businesses. To allow these defendants to take advantage of this additional potential windfall which is unavailable to nonprofessional and employee defendants, promotes the unequal treatment of the defendants that the guidelines sought to eliminate.

In addition to the cases cited in Proposed Amendment 28(14), a recent tax case, United States v. Olbres, 99 F.3d 28 (1st Cir. 1996), involved a husband and wife defendants who appealed the denial of a downward departure based on the fact that their business would fail and their 12 employees would lose their jobs if the defendants were imprisoned. The District Court denied the departure because it did not believe that business failure and third party job loss could legally serve as the basis for a downward departure. The first Circuit applying Koon v. United States, 116 S.Ct. 2035 (1996) remanded the case and noted that only a "rare case" falls outside the heartland that "the mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland."

Consequently, we believe that collateral consequences should not be the basis for a downward departure.

Proposed Amendments 37(S) and (T) - Consolidation of §§2T1.1 and 2T1.6:

Consolidation of §§2E4.1, 2T2.1 and 2T2.2

Proposed Amendment 37(S) consolidates §§2T1.1 and 2T1.6. Section 2T1.6 applies to 26 U.S.C. § 7202 (Failing to Collect or Truthfully Account for and Pay Over Tax). The consolidation of these guidelines is logical and, therefore, we have no objection to this proposed amendment.

Proposed Amendment 37(T) consolidates §2E4.1 (contraband cigarettes) with §2T2.1 (nonpayment of alcohol and tobacco taxes) and with §2T2.2 (regulatory offenses). All of these are infrequently applied guidelines and we have no objection to this proposed amendment.

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UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF COUNSEL

March 14, 1997

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attention: Michael Courlander
Public Information Officer

Dear Mr. Courlander:

The United States Postal Inspection Service respectfully submits its comments to the proposed amendments published by the Commission in the January 2, 1997, Federal Register.

Generally, we support the Commission's efforts to consolidate and simplify the guidelines, especially in the area of loss determination for theft and fraud offenses. Over the last four years, we have proposed amendments for calculating the economic loss for theft of mail generally and the theft of mail containing credit cards. In our submission this year, we again recommended changes to address these problems. In particular, we proposed alternative means to determine the economic loss for stolen credit cards and large volume mail thefts based on the principles of intended loss and risk of loss. Specific provisions that authorize an upward departure for these offenses would address the shortcomings of the current guidelines. Furthermore, there are inconsistent interpretations among the circuits in the application of the theft guidelines for stolen, but unused, credit cards that we believe the Commission should address.

Although our proposed amendments were not published, the reasons we gave in their support are similar to those cited by the Commission in its proposed amendments for 1997.

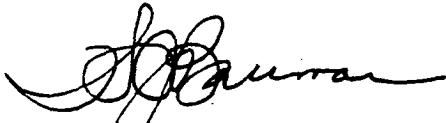
We are in favor of increasing the base offense level for theft and fraud offenses as proposed in Amendment 18. However, we have a concern with the deletion of §2B1.1(b)(3), the specific offense characteristic that provides for a two-level increase for the theft of undelivered United States mail. We do not support the elimination of this guideline and disagree with the narrative accompanying its proposed deletion: "[b]ecause the floor of 6 for offenses involving the theft of mail is unnecessary given the proposal to increase the base offense level for offenses from 4 to 6."

The federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. We believe this distinction was the basis for §2B1.1(b)(3) when it was promulgated and feel strongly that it should be maintained in any general offense level increase proposed for the theft guidelines. The current guideline considers the inherent value of mail that cannot always be measured in dollars, the government's fiduciary role in this public communications service, and the mail as an integral part of our nation's commerce. Moreover, the commentary to the mail theft guideline states: "[t]hat the theft of undelivered mail interferes with a government function and the scope of the theft may be difficult to ascertain." For these reasons, we request the Commission maintain a two-level increase for theft or destruction of United States mail above any new base offense level established for theft offenses.

As a final matter, we agree with Amendment 37 that would consolidate the mail theft and obstruction guidelines and the corresponding change to the commentary.

If you have any questions, or need additional information, please feel free to contact me at (202) 268-4415.

Sincerely,



H. J. Bauman
Counsel
Office of Chief Inspector

March 17, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums to comment on the 1997 proposed guideline amendments. The three amendment proposals which FAMM considers to be of the highest priority, acquitted conduct (Proposed Amendment 9), the cliff between offense levels 42 and 43 (Proposed Amendment 13), and mitigating role (Proposed Amendment 22), have been addressed in FAMM's previously submitted written testimony. For your convenience, this letter also includes the text of that submission. Seven additional amendment proposals of importance to FAMM are addressed herein: controlled substance transactions separated by more than one year (Amendment Proposal 8), aggravating role in the offense (Amendment Proposal 21), acceptance of responsibility (Amendment Proposals 24, 25 and 26), aberrant behavior (Amendment Proposal 28), and the effect of the safety valve on supervised release terms (Proposed Amendment 30).

Controlled Substance Transactions Separated by More than One Year
(Amendment Proposal 8)

As recognized by some courts, "careful practice [in assessing drug quantities] is essential where a defendant's sentence depends in such large measure on the amount of drugs deemed attributable to his conduct." *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993). Application of U.S.S.G. §1B1.3 (relevant conduct) is among the guideline issues most frequently appealed and results in the greatest number of reversals. United States Sentencing Commission, 1995 Annual Report 132, 142-43. The example derived from *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996), may avert the erroneous counting of temporally remote and unrelated drug transactions. Therefore, FAMM does not oppose this amendment.

However, additional language may be required to avoid the inference that two drug deals eleven months apart are, *ipso facto*, part of the "same course of conduct." If the Commission goes forward with this amendment, the commentary should also state that even when shorter time intervals are involved (i.e., one year or less), transactions are not necessarily part of the "same course of conduct" simply because they involved the same controlled substance.

Acquitted Conduct as Relevant Conduct
(Proposed Amendment 9)

Public participation -- through the jury system -- is vital to our system of law. A sentencing guideline which nullifies the effect of jury verdicts is offensive to our participatory democracy. FAMM supports Proposed Amendment 9, Option 1B, excluding acquitted conduct from relevant conduct.

The rationale used to support the current approach to acquitted conduct, based upon pre-Guidelines cases such as *Williams v. New York*, 337 U.S. 241 (1949), is that sentencing judges have always been free to consider all relevant and reliable evidence. *Williams* held that judges in sentencing *may*, if they choose, take account of nonconviction behavior; the Guidelines, on the other hand, mandate pre-determined sentence increases for such conduct. In addition, it has been suggested that 18 U.S.C. § 3661 prohibits erecting a bar to the required use of acquitted conduct. If this were true, many other guidelines that cabin judicial discretion at sentencing would constitute impermissible limitations under 18 U.S.C. § 3661. *See, e.g.*, U.S.S.G. §5H1.12 ("Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.").

It is often noted that people first exposed to the Sentencing Guidelines find it troubling that they require judges to calculate sentences based upon conduct that was the subject of charges resulting in acquittal. Michael Tonry, *Sentencing Matters* 94 (1996). This particular criminal process does not satisfy the appearance of justice. With surprising hubris, Senators Abraham and Hatch, in their letter to Commissioner Goldsmith, write that they would "be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to the *untutored* reactions of such persons by modifying the Guidelines to limit the use of conduct underlying an acquittal." Criticism of the sort appearing in a recent Washington Post series is a poignant reminder that the Commission must be *seen* to do justice, even by the "untutored." Mary Pat Flaherty and Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Washington Post, October 6, 1996, at A1, A21.

The "Cliff" Between Level 42 and Level 43
(Proposed Amendment 13)

FAMM believes that life sentences without parole are totally inappropriate for drug offenses. This country's most severe punishment, save execution, should be reserved for our most dangerous offenders, for whom permanent incapacitation is the only way to ensure public safety. Through a combination of enhancements under the current Guidelines, non-violent offenders are easily ensnared by the natural life sentence mandated by offense level 43.

Submitted for the Commission's consideration is the case of Sharvonne McKinnon, who at age 27 began serving her life sentence for a crack cocaine conspiracy. (*See United States v. McKinnon*, 102 F.3d 1120 (11th Cir. 1997)). Ms. McKinnon was romantically involved with a

crack kingpin, who was also the father of her toddler son. For three years prior to her arrest, she had been employed as a bus driver. Although not reflected in her sentence, she was apparently not a sufficient threat to the community to warrant detention pending trial. Ms. McKinnon was held accountable for the total amount of crack involved in the entire conspiracy, although her alleged participation primarily consisted of counting rocks of cocaine, counting money, and acting as a lookout. With a 2-level enhancement for possession of a firearm, Ms. McKinnon's adjusted offense level was 44. She received no upward adjustment for aggravating role in the offense.

Although Sharvonne McKinnon may now be eligible for less than a life sentence pursuant to Guidelines Amendment 505 (capping the Drug Quantity Table at offense level 38), the Commission's staff has identified approximately 30-40 other individuals who received life sentences in cases not involving death of a person or treason. FAMM supports the proposed amendment to abolish "mandatory" natural life sentences in these cases.

Aggravating Role in the Offense (Amendment Proposal 21)

Part A of this proposal would add the following to the introductory commentary concerning role in the offense: "the fact that the conduct of one participant warrants an upward adjustment for aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for mitigating role." For the sake of parity, the commentary should explain that the converse is also true; that is, a *mitigating* role adjustment for one participant does not require that another participant receive an *aggravating* role adjustment. Aside from this flaw, FAMM does not oppose the amendments to the introductory commentary proposed in Part A.

Because Options One and Two of Part B threaten to increase the number of aggravating role adjustments in controlled substance cases, FAMM opposes these amendments. These proposals would reduce the number of participants necessary for a four-level upward adjustment. Some observers and Commission staff have noted that the number of participants is not a reliable indicator of role because this factor varies depending upon the offense type. As illustrated in one staff discussion paper, five-person drug conspiracies are relatively common but a five-person robbery is unusually large. Reducing the number of participants required will only enhance the disproportionate application of aggravating role adjustments to controlled substance offenses.

Furthermore, while weight often overstates culpability in drug cases, calling for liberal application of mitigating role adjustments, the converse is not true with respect to aggravating role adjustments. The Guidelines' excessive reliance upon weight negates any concern that guideline sentences, combined with mandatory minimums, will fail to adequately punish higher ranking drug offenders. Therefore, aggravating role adjustments should be infrequent.

Both Options One and Two contain an application note entitled "Illustrations of

Circumstances That May Warrant an Upward Departure.” Here again, this amendment lacks symmetry with the proposed mitigating role guideline. The analogous departure provision set forth in the mitigating role amendment states that “[s]uch a departure should not result, without more, in a lower sentence than would result if the defendant had received a mitigating role adjustment under this section.” Upward departures for aggravating role in the offense should be limited in the same way.

Option Three adopts a flexible approach to aggravating role in the offense similar to the proposed amendment of the mitigating role guideline. FAMM does not oppose this option.

Mitigating Role in the Offense
(Proposed Amendments 21 and 22)

FAMM applauds the Commission for reducing emphasis on drug weight through a more flexible mitigating role guideline. The Guidelines often require judges to impose severe sentences on “mules” and other minimally involved participants. In such cases, drug quantity already overstates culpability and should not also preclude mitigating role reductions. Assessment of role should not, as suggested by the commentary in application note 2, be affected by drug amount. FAMM supports the elimination of this commentary.

Nonetheless, Proposed Amendment 22 remains unduly restrictive in other respects. The proposed definition, requiring that the defendant be “a *substantially* less culpable participant,” inexplicably raises the current standard for the two-level reduction; that is, a minor role reduction is now authorized under the Guidelines for a participant who is simply “less culpable than most other participants.” The commentary regarding burden of persuasion may also undermine the flexibility aimed for by the Commission. That is, the proposed amendment instructs, “As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.” The chilling effect of this commentary may be particularly pronounced in jurisdictions where the current practice is to deny reductions for mitigating role if the defendant’s post-arrest statements are the only evidence thereof. *See* Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993). This provision does not appear elsewhere in the Guidelines and is equally unnecessary in the mitigating role guideline.

FAMM also objects to the elimination of the three-level reduction. By eliminating an adjustment deemed appropriate in 298 cases in a recent year, this proposal reduces sought-after flexibility. United States Sentencing Commission, 1995 Annual Report 73. Secondly, the intermediate adjustment may facilitate plea negotiations, allowing the parties to resolve differences of opinion as to mitigating role.

Concerning the additional issues for comment, FAMM urges the Commission to expressly sanction minimal role adjustments for mules. Although these participants have no role other than delivery, wide disparity exists in the application of the mitigating role guideline to

mules. See Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993) (reporting that the Eastern District of New York routinely affords four-level reductions for mules, while other port cities only occasionally afford two-level reductions for such defendants). Consider the case of Donaldo Munoz-Vallejo, a mule who was arrested on a vessel in Houston, Texas, carrying cocaine-packed sardine cans. (*United States v. Munoz-Vallejo*, No. H-95-00220-01 (S.D. Tex.) (on file with FAMM)). Mr. Munoz admitted responsibility and immediately cooperated with the Customs agents, but the other participants in the offense were never apprehended or formally identified. Mr. Munoz, who had been lawfully employed on merchant ships in Colombia for several years, explained that he was approached by a man who asked him to deliver the sardine cans. As with all mules, Mr. Munoz was promised a flat fee and had no proprietary interest in the cocaine. While the probation officer and the sentencing court apparently accepted Mr. Munoz's explanation of his part in the offense, he did not receive a downward adjustment for his mitigating role. Consequently, Mr. Munoz was sentenced to 87 months imprisonment. FAMM contends that a flexible mitigating role guideline, combined with commentary explicitly identifying mules as minimal participants, would result in more appropriate sentences for individuals like Mr. Munoz.

Acceptance of Responsibility (Amendment Proposal 24)

Based upon the Commission's 1995 Annual Report, it appears that approximately six percent of all defendants who plead guilty are denied an adjustment for acceptance of responsibility. United States Sentencing Commission, 1995 Annual Report 53, 74. A bright line rule that all defendants who plead guilty receive the acceptance of responsibility adjustment would reduce litigation and reward individuals who do not put the government to the considerable expense and burdens of trials and appeals.

Instead, Amendment Proposal 24 further complicates the operation of this guideline. For the two-level reduction, the amendment imposes a timeliness requirement and, for the extra one-level reduction, the amendment requires that the defendant demonstrate "extraordinary" acceptance of responsibility. Both of these provisions are far too restrictive and are likely to result in fewer adjustments. Another flaw is the suggestion that the defendant must provide accurate "information regarding the defendant's juvenile and adult criminal record." The connection between a defendant's accurate account of his criminal history and acceptance of responsibility for the present offense is tenuous in many cases. Moreover, this provision is simply unnecessary in light of the fact that probation officers uniformly rely upon other, generally more accurate, sources for criminal history information. For these reasons, FAMM opposes this amendment proposal.

Acceptance of Responsibility (Amendment Proposal 25)

FAMM opposes this amendment which would effectively bar a reduction for acceptance

of responsibility based upon the commission of a new offense while pending trial or sentencing for the offense of conviction. Like the preceding amendment, this proposal would divert the sentencing judge's focus from the defendant's guilty plea. The commission of a new offense does not necessarily negate the defendant's genuine contrition for the offense of conviction. While new offenses may suggest a likelihood on the part of the defendant to recidivate, this factor may be adequately considered by the judge in determining the proper sentence within the guideline range.

Acceptance of Responsibility
(Amendment Proposal 26)

FAMM supports this amendment proposal, which eliminates the offense level threshold for the additional one-level reduction. Simply stated, low level offenders should not be denied a reduction available to higher level offenders. Inasmuch as a lower offense level indicates involvement in a small scale offense, a defendant with an offense level less than 16 is perhaps less likely to benefit from a mitigating role adjustment or a substantial assistance departure.

Issue for Comment: Aberrant Behavior
(Amendment Proposal 28)

Part Thirteen of Amendment Proposal 28 invites comment on "[w]hether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure." In its proposed amendments, FAMM recommended that §5K2 include a new section to read as follows:

If the defendant's conduct constitutes a single episode of aberrant behavior, a downward departure may be warranted. Departure from the guidelines may be justified even where the conduct is the result of some planning and preparation.

This proposal would resolve two closely-related conflicts regarding aberrant behavior departures: (1) Whether aberrant behavior must be spontaneous and unplanned, and (2) whether aberrant behavior may involve multiple acts. The current reference in the Guidelines to aberrant behavior has been interpreted too narrowly by some courts. In resolving the circuit conflict, the Commission should encourage departures in a broader category of cases where the criminal conduct involves multiple acts and/or some preparation but nonetheless is completely out of character for the defendant.

Safety Valve and Supervised Release
(Proposed Amendment 30)

FAMM supports this proposed amendment and commends the Commission for clarifying application of the safety valve.

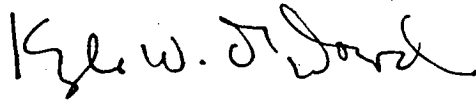
Conclusion

FAMM appreciates this annual opportunity to propose amendments to the Guidelines and to comment on published proposals. To safeguard the value of this process, we urge the Commission to voice its opposition to mandatory minimums and other legislative measures that diminish the role of the Commission and the Guidelines.

Sincerely yours,



Julie Stewart
President



Kyle W. O'Dowd
General Counsel

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6690

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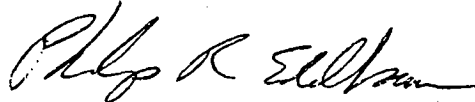
March 13, 1997

United States Sentencing Commission
1 Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002
Attention Public Information

Dear Sirs:

On behalf of the Association of the Bar of the City of New York, I enclose the comments of the Committee on Criminal Advocacy, on the Proposed Amendments to the United States Sentencing Guidelines. If there are any questions feel free to contact me. Thank you.

Very truly yours,



Philip R. Edelbaum

Enc.

**REPORT OF THE CRIMINAL ADVOCACY COMMITTEE
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK CONCERNING
PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES**

INTRODUCTION

The Committee on Criminal Advocacy (the "Committee") has reviewed the proposed changes to the Sentencing Guidelines which are being considered by the Sentencing Commission. This report describes the proposed changes to the Sentencing Guidelines on which the Committee reached consensus.

**THE PROPOSED CHANGES TO THE GUIDELINES
AND THE CONSENSUS REACHED**

1. The Issue of Including or Excluding Acquitted Conduct From The Calculation of "Relevant Conduct" Under Sentencing Guidelines Section 1B1.3.

The proposed changes to Section 1B1.3 of the Sentencing Guidelines ("Relevant Conduct") include three proposals which would affect the inclusion of acquitted conduct in the calculation of "relevant conduct" for sentencing purposes. As the law now stands, see United States v. Watts, 117 S.Ct. 633 (1997), acquitted conduct is included in the calculation of relevant conduct. The Sentencing Commission solicits comment on three new "options" for dealing with this issue. Under the first option, acquitted conduct would not be considered relevant conduct. A "sub-option" proposed by the Commission would exclude acquitted conduct, unless proven by independent evidence not submitted at trial. Under the second option, acquitted conduct would not be considered relevant conduct unless "established by clear and convincing evidence." (This option does not appear to require explicitly that the evidence be independent of the evidence submitted at trial). Under the third option, acquitted conduct would be considered relevant conduct, but the District Judge would be permitted to depart downward to a degree equal to the amount of relevant conduct associated with the acquitted conduct, to ensure "fundamental fairness."

The Committee believes the Sentencing Commission's Option 2 should be endorsed, with the proviso that the "clear and convincing" evidence establishing the conduct be evidence other than the evidence presented by the Government at trial. The presently drafted version of Option 2 appears to the Committee's members to permit the Court to include acquitted conduct in virtually any case in which an acquittal occurs.

**2. The Proposed Amendment to Sentencing Guidelines
Section 2X1.1 (Conspiracies and Attempts).**

The Commission invites comment on its proposal to eliminate this section from the Guidelines, which allows for a downward adjustment of three levels in limited circumstances relating to conspiracies that are interrupted by an arrest prior to nearing the

completion of the object of the conspiracy. The Commission expresses the view that this situation may be better addressed by a downward departure, given the relatively rare circumstances in which this adjustment has been granted.

The Committee's consensus view is that this section should be left in place, and that replacing this section with a departure will add to confusion in this area.

3. The Proposal to Amend the "Financial Institution"
Adjustment to the Larceny Guideline, Sentencing Guidelines Section 2B1.1(b)(6).

As presently drafted, the Larceny Guideline requires an upward adjustment of four levels if a defendant steals more than \$1,000,000 from a financial institution, and a minimum base offense level of 24 in such circumstances. The Commission proposes to delete the four level upward adjustment, but keep in place the floor of a base offense level of 24. Thus, under the proposed change in Section 2B1.1 of the Guidelines, in the event a defendant steals more than \$1,000,000 from a financial institution, his or her base offense level will be no less than 24, but won't be adjusted upward another four levels simply because the defendant's victim was a financial institution.

The Committee agrees that the proposed change was a good one. A base offense level of 24 requires a sentencing range of at least 51-63 months absent a downward departure, and the Committee believes this sentencing level is adequate to deter and punish a defendant who steals \$1,000,000 from a financial institution.

4. The Proposal to Amend the Sentencing Table,
Sentencing Guidelines Section 5A1.1.

The Commission proposes to amend the Sentencing Table to reduce the number of automatic life sentences required by the Guidelines. As it presently works, the Sentencing Guidelines Sentencing Table often requires a life sentence for serious narcotics traffickers whose base offense levels are adjusted upward for a management role, firearms and other adjustments. The proposed amendment will generally limit automatic life sentences under the Guidelines to treason and homicides, and will cap a narcotics defendant's (or other defendant's) exposure at a range of 360 months to life. Thus, the District Court will still have the discretion to impose a life sentence if it sees fit, but will not be required to do so.

The Committee agrees that the proposed amendment to the Sentencing Table was a good one, and would like to recommend the amendment to the Commission.

5. The Proposed Amendments to the Fraud Guideline,
Sentencing Guidelines Section 2F1.1.

There are many proposed amendments to the Fraud Guideline, and the Committee's discussion of them was lively. The Committee agreed on the following issues raised by the Commission:

a. The Committee agrees with the Commission that repayments to victims in a Ponzi scheme or other scheme, which are made prior to the discovery of the scheme by law enforcement, should be used to reduce the calculation of "loss" under Section 2F1.1. If accepted, the amendment to the Sentencing Guidelines that would express this view would effectively overrule United States v. Mucciante, 21 F.3d 1228 (2d Cir.), cert. denied, 115 S.Ct. 361 (1994) and its progeny. The Committee believes that it is unfair to extend a defendant's prison term for monies he has already repaid.

b. The Commission raises the issue of whether, in certain fraud schemes, the "retail market," "wholesale market" or "black market" prices of goods, and consequential damages and costs should be used in calculating loss in a fraud. The Committee was of the view that either the "retail" or "wholesale" market value of goods can be appropriate measures of loss in some cases, but the Committee was also of the view that the "black market" measure of loss would be impossible to prove and should not be incorporated in the Guidelines. The Committee was also of the view that consequential damages, costs and interest should not be included in the measure of "loss" under the fraud guideline. The Committee believes that a simple, "bright line" measure of loss is best, and will reduce the amount of litigation and confusion that exists in this area.

c. The Commission also raises the issue of whether "gain" to a wrongdoer should be used to calculate the base offense level in some frauds rather than "loss" to a victim. The Commission invites comment on whether a disparity between "gain" and "loss" should be a ground for an upward departure in cases where the gain to the wrongdoer exceeds loss to his victim. The Committee agreed that the Guidelines should permit "gain" to be used as a substitute measure to determine a defendant's base offense level, where there is a significant disparity between the wrongdoer's gain and a victim's loss or the intended loss. The Committee further proposes, that a gross disparity between "gain" and "loss" might also be a basis for a downward departure in some circumstances -- for example, where an employee of a business operated as a Ponzi scheme knows the full extent of the scheme, but gains only his salary from the fraud, and the amount of the loss caused by the scheme vastly exceeds the amount of salary obtained by the employee.

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Dated: New York, NY
March 13, 1997

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February 11, 1997

Dear Commissioners...

I write regarding §5C1.2, limitation on applicability of statutory minimum sentences in certain cases, commonly referred to as the "safety valve" provision.

The guideline became effective on September 23, 1994 however it was not made retroactive. The Congress and the Commission recognized the injustice inherent in the original law, however by only allowing the safety valve to be applied to sentencings after September 23, 1994, certain individuals received excessively harsh punishments right up to that date, with no recourse.

I represented an individual named Jorge Espinal in the Middle District of Florida, Tampa Division, Case No. 93-255CRT-25B who was sentenced on April 12, 1994 to a minimum mandatory 10 years for violation of Title 21 U.S.C. § 841(a)(1) involving cocaine hydrochloride.

Mr. Espinal had a guideline exposure of 87-108 months and would have otherwise qualified for the safety valve. Since he had the misfortune of being sentenced in April, rather than after September 23, he received the excessive time by default.

Rather than rely on good fortune, I believe the commission should allow the court to decide whether or not §5C1.2 should apply to this defendant.

Should you need further information, please feel free to contact me directly.

Cordially,

Arthur L. Wallace III

Richard P. Conaboy
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8002
Attention: Public Information Office

00239

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February 3, 1997

U.S. Sentencing Commission
Attention: Public Information
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comment on USSG on Consideration of Acquittals

Gentlemen:

I am responding to the January 2, 1997 Federal Register proposal on considering in sentencing prior charges for which a defendant was acquitted.

I have recently had a client in this very position in a state capital murder case, and clearly relitigation of the acquitted offenses resulted in a grave misjudgment and immoral imposition of the death penalty.

Arnold was acquitted of a double murder in his mid-teens. The facts were simple. A former boyfriend of his mother entered their home three times after Arnold had gone to bed. Toxicology tests showed the boyfriend was legally intoxicated and heavy concentrations of cocaine were in his body. Arnold awoke when the boyfriend was robbing and beating up his mother. The unarmed 15-year-old stood up to this thug to protect his mother. The thug pulled a pistol on Arnold, who skidded across the room and grabbed a handgun from under the living room sofa. Both men exchanged shots. The intoxicated, coked-up thug failed in his aim. Arnold did not.

The family had no phone. They lived in a neighborhood where police were not trusted. The mother insisted that the body be removed. While Arnold went to dump the body on some railroad tracks, one of Arnold's homeboys drove up and killed the boyfriend's girlfriend, who was outside in a car. Arnold had no knowledge or involvement in the second shooting.

Arnold testified at trial. The jury quickly found him not guilty.

Several years later, the State charged Arnold on an accomplice theory in the capital murder of a drug dealer who had a long history of assaults. The State spent more time and argument on the prior case involving the acquittals than on the death of the drug dealer dirtbag. Arnold could not testify to raise the self-defense issue. The prior acquittals--totally justified--meant nothing. All jurors saw was that this kid killed three persons, and assessed the death penalty.

I am not at all impressed with the antiseptic reasoning and legal fictions of Dowling v. United States and United States v. Watts, in which the U.S. Supreme Court has approved use in court of matters where the accused was acquitted.

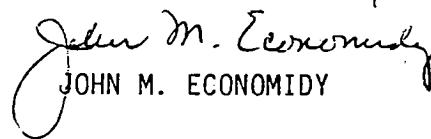
The use in sentencing of conduct where the defendant was acquitted is immoral. Such use detracts public respect for the law and for justice. It betrays the core values of our nation. It smacks of the quality of justice expected from Nazi Germany or a third world dictatorship, not in the pejorative sense, but in the actual ethical sense.

Reuse of conduct resulting in acquittals assumes that an accused will be on equal footing as the prosecution. Invariably, the accused will not. In my case and in others with which I have knowledge, witnesses for the defense are often dead, absent, in prison wanting a deal and thus hurting their credibility as a witness, or beset with memory problems over the years. You might suggest that there would be a record of trial from the acquittal to use. No so. Court reporters do not transcribe a record for a trial that resulted in an acquittal for obvious reasons. Court reporters do not save their notes after so many years (Texas: 3 years). Evidence is discarded.

On August 9, 1916, my grandfather as a county clerk in a rural Texas county tried vainly to stop a mob from lynching a Negro who killed the county sheriff. Without a trial, the accused was tarred and feathered, hung until death in the county square, and then his body was dragged behind a Model A Ford.

When I see proposals like yours to use acquittals for sentencing, it is clear that the lynch mob mentality of overpaid, bloated bureaucrats inside the Beltway still persists.

Sincerely,


JOHN M. ECONOMIDY

KIBBEY & BARLOW

ATTORNEYS AT LAW

February 25, 1997

U.S. Sentencing Commission
One Columbus Circle
Suite 2-500
Washington, DC 20002-8002

Dear Commission Members:

As a former prosecutor and now an attorney who regularly represents criminal defendants, I write to give you my input on guideline modifications for acquitted defendants.

It is without question that the current legal ability for a judge to consider and then add points for acquitted offenses is abhorrent to the entire notion that a man should be punished only for what he is convicted of. Such a practice runs afoul of the common perception of justice to the average American layman. It is this average American layman that we are all counting upon to trust the government and to support the important institutions of the judiciary. Public erosion and confidence of our judiciary can only lead to further erosion of the basic foundations that we all rely upon.

Simply put, a federal sentencing judge should not be allowed to consider acquitted offenses for enhancement of sentencing ranges. However, if the Commission is going to give a judge the discretion to consider such acquittals, I believe the standard should be a very tough one: a combination of requiring that the defendant's guilt be proven by "clear and convincing evidence," as well in so doing that such considerations "would not raise substantial concerns of fundamental unfairness to the average American." It is important that these matters be viewed from the eyes and minds of the average citizen, because otherwise legal sophistry would enable prosecutors and judges to convince themselves that such consideration did not seem fundamentally unfair to them.

RICHARD D. KIBBEY

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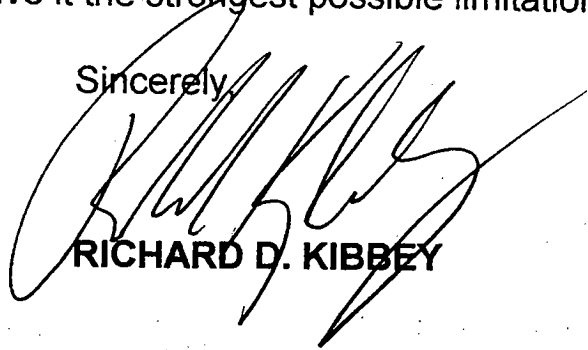
U.S. Sentencing Commission

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February 25, 1997

Thank you for considering this, and I urge you not to allow it, but if you are going to allow it, to give it the strongest possible limitations.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Kibbey', written over the typed name.

RICHARD D. KIBBEY

RDk:ksw