
PUBLIC COMMENT

2003 AMENDMENT CYCLE

(February 18, 2003 Submissions)



United States Sentencing Commission

February 2003



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

February 18, 2002

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on December 18, 2002. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

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TERRORISM

I. REMAINING USA PATRIOT ACT AMENDMENTS

A. Terrorism Enhancement in Money Laundering Guideline

We have no objection to this proposed amendment which addresses the overlap between the terrorism adjustment in §3A1.4 and the terrorism adjustment in the money laundering guideline, §2S1.1. We think an additional amendment to Application Note 2 in §3A1.4, however, may be warranted, to ensure that an offense that involves the laundering of funds that were the proceeds of a federal crime of terrorism offense shall be considered to have involved, or to have been intended to promote, a federal crime of terrorism and thus shall trigger the application of the terrorism adjustment in §3A1.4.

B. Reference of 18 U.S.C. 1960 to Money Laundering Guideline

We prefer a combination of both Options 1 and 2 of this proposed amendment. On the one hand, we believe guideline application will be easier with a direct and appropriate statutory

reference to §2S1.1 for offenses under 18 U.S.C. § 1960(b)(1)(C) rather than with indirect guideline application through a different statutory reference followed by cross-reference from the one guideline to the other. On the other hand, as suggested in the issue for comment, we do think it appropriate for the Commission to provide a cross-reference to §2S1.1 for any offense referenced to §2S1.3 where the government can prove the offense involved the intent to promote unlawful activity, knowledge or belief that the funds were proceeds of unlawful activity, or a reckless disregard of the illicit source of the funds. Thus, we suggest that § 1960(b)(1)(C) offenses be referenced to §2S1.1 and that a cross-reference be added to §2S1.3 as suggested above.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

Under current law, the offense level for those convicted of accessory after the fact is capped at level 20 in certain cases, such as those in which the conduct is limited to harboring a fugitive, and at level 30 otherwise. Under the proposed amendment, the maximum offense level under §2X3.1 for harboring a fugitive would be level 30 rather than level 20 if the defendant was convicted under 18 U.S.C. § 2339 (harboring or concealing terrorists) or 18 U.S.C. § 2339A (providing material support to terrorists), or if the defendant harbored persons who had committed specified offenses (i.e., an offense listed in 18 U.S.C. § 2339 or 18 U.S.C. § 2339A, or an offense involving or intended to promote a federal crime of terrorism).

We support this proposal. Harboring a fugitive in the terrorism-related contexts specified in the guideline is a very serious offense. Furthermore, under the amendment, the final Chapter Two offense level may still be lower than level 30, (see §2X3.1 – the offense level is 6 levels lower than the offense level for the underlying offense); the amendment merely ensures that Chapter Two offense level will not be artificially capped at level 20.

We would point out a few technical issues with the proposal. First, a parenthetical in the explanatory text introducing the amendment incorrectly states that predicate offenses listed in 18 U.S.C. § 2339A are the same as the offenses listed in 18 U.S.C. § 2332b(g)(5). Second, the maximum sentence for a § 2339A offense is life imprisonment if death results from the offense, and 15 years otherwise; the explanatory text is therefore imprecise when it lists the maximum punishment as 15 years. Finally, there is a minor issue with the text of the amendment itself. The text would apply the maximum base offense level of 30 to certain obstructive or perjurious conduct. We believe this language is unnecessary and that its inclusion may cause confusion. Hence, we recommend deleting “; or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I)”.

II. AMENDMENTS REQUIRED BY THE PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

A. Biological Agents and Toxins

The primary thrust of this amendment is to integrate new offenses pertaining to biological weapons into the guidelines. Specifically, 18 U.S.C. § 175b, as recently amended, criminalizes the unregistered possession of certain biological agents subject to special regulation, as well as the transfer of such agents to unregistered persons. The amendment would reference these offenses to §2M6.1 with a base offense levels of 22. The amendment would also make certain technical changes to §2M6.1.

We support these amendments. We agree that §2M6.1 is the appropriate guideline for these offenses and that level 22 is an appropriate base offense level for these offenses. We note, in this connection, that these offenses will play a pivotal role in maintaining the new statutory registration scheme.

B. Safe Drinking Water Provisions

This amendment would consolidate the guidelines covering tampering or threatening to tamper with consumer products (§§2N1.1 & 2N1.2) with the guidelines applicable to tampering or threatened tampering with a public water system (§§2Q1.4 & 2Q1.5).

While we agree that the base offense levels and specific offense characteristics for offenses under 42 U.S.C. § 300i-1(a) and (b) should be amended to account for the substantially increased maximum punishment, we do not believe the way to accomplish this is by taking those crimes out of the environmental crimes guidelines and merging them with a guideline covering entirely unrelated offenses. The amendment and issue for comment suggests merging Safe Drinking Water Act offenses with the consumer product tampering crimes because of the rareness of prosecutions of these offenses, a view that the offenses are similar, and the supposed promotion of proportionality if the environmental terrorism and consumer products crimes are in the same guideline. We do not believe these are sufficient reasons for breaking up the environmental crimes guidelines in Part 2Q.

While it is true that the types of crimes covered by Parts 2Q and 2N fortunately have been relatively rare to date, there is little similarity beyond that, except perhaps for the fact that the means of tampering in either medium could be poison of some nature. (In the case of drinking water tampering, the contaminant – that is, the “poison” – could be a chemical, biological, or radiological agent.) Tampering with a drinking water supply, though, also might be by interfering with a system’s operation, for example, by blowing up a water pipeline. There is a great difference between the two crimes, though, in terms of scale of possible effect. It is difficult to think of any consumer products that are used by everyone in a community; hence it is hard to conceive of a product tampering crime that would have an effect beyond the consumers

of one discrete product. Public drinking water, on the other hand, is used by virtually every member of any community. A single act would put at risk an entire community (perhaps 10 million or more people in one of our larger metropolitan areas), not just the users of a particular pain reliever, for example. This potential broad effect of a Safe Drinking Water Act offense is characteristic of many of the environmental crimes that are covered by Part 2Q.

As to proportionality of punishment, that can be achieved by parallel amendments to Part 2Q and 2N without combining them into guidelines under a Part entitled "Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws". Public drinking water does not come within any of those categories, and the environmental laws are not a subset of any of those laws. A basic organizational concept of the sentencing guidelines from the beginning has been that related offenses would be treated together. Therefore, all of the environmental crimes were included within a single sub-part of the guidelines, 2Q1 (while wildlife offenses, which have a tie with environmental violations, are in 2Q2).¹ This grouping of similar crimes together is logical and is consistent with the guideline drafting principles to organize rules logically and clearly so that referring to them is relatively easy.

The Safe Drinking Water Act crimes certainly share more with other environmental crimes than they do with food, drug, agricultural product, and odometer violations. The same activity that might be prosecuted as drinking water tampering also could constitute a violation of the Federal Water Pollution Control Act, the Resource Conservation and Recovery Act, and/or the Comprehensive Environmental Response, Compensation and Liability Act, and those crimes might well be charged in the same indictment.² This proposed shifting of Safe Drinking Water Act violations to a part of the guidelines treating consumer products would compromise the organization of Part 2Q with two crimes under one environmental statute separated entirely from all of the other environmental crimes, including at least one other under the same statute. See, 42 U.S.C. § 300h-2(b)(2). We do not believe that this fragmentation is a sound approach.

¹Granted, some offenses that are not environmental crimes per se are covered by 2Q1, specifically hazardous materials transportation crimes under 2Q1.2 and hazardous or injurious devices on federal lands under 2Q1.6; however, these are crimes that very well may be related to environmental crimes. An unlawful hazardous materials transportation also may be an unlawful hazardous waste transportation, and the hazardous device left on a federal land could be a container of hazardous waste.

²All of those other crimes would be sentenced under 2Q1.2 and possibly 2Q1.3 (depending upon the nature of a contaminant). Given their nature, there should be overlap among the specific offense characteristics for those crimes. The Commission's proposal would eliminate from the Safe Drinking Water Act guideline the specific offense characteristic for on-going, continuous, or repetitive offense, attributing that elimination to "definitional difficulties." It is not at all clear to what "definitional difficulties" the Commission is referring.

In sum, we do not believe that the tampering/attempt crimes under the Safe Drinking Water Act should be consolidated with unrelated crimes. The guidelines for those crimes should be revised because of amendments to the law, but the Commission's purpose of proportionality in punishment can be achieved by separate guidelines that track one another. As to the issue of consolidating the tampering and attempt crimes, that seems a reasonable proposal.

We believe the better course would be to raise the base offense level in §2Q1.4 to 25 (as in 2N1.1); retain the §2Q1.4(1) specific offense characteristic in order to capture risk, which is key in environmental law, whether or not a person is successful in causing harm; retain the specific offense characteristics in §2Q1.4(b)(2)-(4); and add the cross-references and special instruction from 2N1.1(c) and (d).

C. Animal Enterprise Terrorism

We support the proposed amendment to Application Note 15 in §2B1.1 – adding an upward departure consideration – to account for enhanced statutory penalties under 18 U.S.C. § 43 (animal enterprise terrorism) for cases involving death or serious bodily injury.

III. AMENDMENTS REQUIRED BY THE TERRORIST BOMBINGS CONVENTION IMPLEMENTATION ACT OF 2002

This amendment relates to three new offenses recently created by Congress.

First, 18 U.S.C. § 2332f criminalizes the unlawful delivery, placement, discharge, or detonation of an explosive or other lethal device against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction where that destruction results in major economic loss.

We fully agree with the Commission's proposal to reference this offense to §§2K1.4 and 2M6.1 of the guidelines. If the offender uses a biological, chemical, radiological, or nuclear weapon, then §2M6.1 would apply; otherwise, §2K1.4 would apply. These guidelines will provide, we believe, the appropriate punishment for this offense, particularly in light of the proposed amendment to §2K1.4, whereby the enhanced base offense level set forth in §2K1.4(a)(1) will be applicable to an offense that involves the destruction or attempted destruction of a public transportation system, a state or government facility, an infrastructure facility, or a place of public use.

Second, 18 U.S.C. § 2339C(a)(1) criminalizes certain types of terrorist financing. The Commission proposes to reference violations of § 2339C(a)(1)(A) to §2X2.1 (aiding and abetting), such that the defendant would receive the same offense level as that for the underlying offense. This seems sensible to us and tracks the treatment of similar offenses under § 2339A.

The Commission proposes to reference violations of § 2339C(a)(1)(B) to §2M5.3. (Unlike § 2339C(a)(1)(A) offenses, § 2339C(a)(1)(B) offenses are not tied to a specific federal predicate offense). This would result in a base offense level of 26, a two-level enhancement if the defendant knew that the funds would be used to purchase weapons, and a cross-reference to other guidelines if the offense resulted in death, was tantamount to attempted murder, or involved nonconventional weapons of mass destruction. We would suggest one addition to the Commission proposal. We believe a two-level enhancement for the provision of funds or other material support or resources with the intent or knowledge that they are to be used to commit a violent act should be added. We believe the defendant who acts with that knowledge or intent (a category that includes all § 2339C(a)(1)(B) offenders, and some § 2339B offenders) is significantly more culpable than other defendants, and should be punished more severely. This suggested enhancement could be integrated into existing § 2M5.3(b)(1) by the addition of a new subsection (E), such as the following: "(E) funds or other material support or resources with the intent or knowledge that they are to be used to commit or assist in the commission of a violent act".

The third statute is 18 U.S.C. § 2339C(c)(2), which prohibits (A) knowingly concealing material support or resources provided in violation of 18 U.S.C. § 2339B, and (B) knowingly concealing any funds provided or collected in violation of § 2339C(a). The Commission proposes to reference violations of § 2339C(c)(2)(A) to §2X3.1 (accessory after the fact), with 18 U.S.C. § 2339B as the underlying offense. This seems sensible to us. For clarity, we suggest, in proposed Application Note 1 to §2X3.1, striking "material support, resources, or funds" and substituting "material support or resources."

With regard to 18 U.S.C. § 2339C(c)(2)(B), the Commission proposes to treat some of these violations differently from others. Specifically, the Commission proposes (1) to reference offenses under (c)(2)(B) that involve the concealing of funds collected in violation of (a)(1)(A) to §2X3.1 (accessory after the fact), since they can be tied to a specific underlying federal offense; and (2) to reference (c)(2)(B) violations that involve the concealing of funds collected in violation of (a)(1)(B) to §2M5.3. We think this is a reasonable approach.

IV. MISCELLANEOUS AMENDMENTS

The Commission has proposed amending the applicable guidelines for offenses under 18 U.S.C. § 842(p)(2) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction) in several ways. Currently, offenses under 18 U.S.C. § 842(p)(2) are referenced to §2K1.3 if the information relates to conventional ordnance, and to §2M6.1 if the information relates to biological, chemical, radiological, or nuclear weapons or devices. We support the Commission's proposals and believe the penalty increases contained in them are suitable for this twenty year offense.

Finally, the Commission is proposing minor amendments to the statutory provisions following §2M6.1. We suggest deletion of the phrase " , but including any biological agent,

toxin, or vector” both times it appears; we believe this phrase is no longer needed in light of statutory amendments to 18 U.S.C. § 2332a(c)(2)(C).

IMMIGRATION

We appreciate the Commission’s efforts to address various application issues that have come to its attention surrounding §2L1.2 of the guidelines. We have two comments on the Commission proposal.

First, we believe the definition of “child pornography offense” should include offenses described in sections 2252A and 2260 of title 18, United States Code. Section 2252A criminalizes the possession, receipt, and distribution of child pornography. Section 2260 criminalizes the production of child pornography for importation into the United States. Both of these sections seem to clearly fit within the categories of defendants the Commission is trying to capture with the 16-level adjustment in §2L1.2(b)(1)(A); the latter being especially relevant in light of the relationship between that offense and the immigration laws for which this guideline is applicable.

Second, we believe the definition of “human trafficking offense” should include offenses described in sections 1589, 1590, and 1591 of title 18, United States Code. Sections 1589 which covers forced labor, section 1590 which addresses trafficking with respect to slavery, and particularly section 1591, which covers sex trafficking of children or by force, also seem to clearly fall within the category of human trafficking offenses intended to be captured, and we believe all should be included.

§5G1.3 (IMPOSITION OF A SENTENCE ON A DEFENDANT SUBJECT TO AN UNDISCHARGED TERM OF IMPRISONMENT)

This amendment attempts to clarify and expand the formula through which prior periods of imprisonment are accounted for in sentencing.

First, §5G1.3(b) would be amended to allow the court “to adjust the length of the sentence for any prior period of imprisonment that ‘resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense,’” for both discharged and undischarged periods of prior imprisonment. (The current subsection (b) applies only to undischarged prior terms of imprisonment.) The proposal eliminates the “fully taken into account” language, which has been the subject of litigation, and instead provides two options setting forth parameters to address prior periods of imprisonment. Option One A would impose concurrent sentencing for undischarged prior terms of imprisonment in situations where the prior offense is (1) relevant conduct to the instant offense and (2) the basis for an increase in the offense level for the instant offense. Option Two A would impose concurrent sentencing for undischarged prior terms of imprisonment where the prior offense is (1) incorporated in the base offense level for the instant offense, (2) covered by a specific offense characteristic in the

guideline for the instant offense, or (3) covered by a Chapter Three adjustment applicable to the instant offense. Thus, unlike Option One A, Option Two A does not require that the offense level be increased by the prior offense in order for concurrent sentencing to apply. We believe Option One A is preferable, because it ensures that only when a defendant's guideline offense level for the instant offense has actually been impacted by the offense underlying the prior term of imprisonment will a concurrent sentence apply.

Through an amendment to subsection (a) and Application Note 6, the proposal also attempts to resolve a circuit conflict in cases in which the defendant has committed the instant offense while on federal or state probation, parole, or supervised release that has been subsequently revoked; with Option One A requiring that the sentence for the instant offense be imposed to run consecutively to the undischarged term of imprisonment, and Option One B merely suggesting that the sentence run consecutively. We support Option One A – and the majority of the circuits addressing the issue. We believe it is extremely serious when an offender under criminal justice supervision commits a new crime and that consistent with Chapter Four of the guidelines, some incremental punishment should be imposed in such circumstances.

Finally, the Commission invites comment as to whether it should resolve a circuit split regarding subsection (c) (policy statement on concurrent versus consecutive sentencing) and, specifically, “whether the sentencing court may grant ‘credit’ for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the remaining portion of the defendant’s preexisting state sentence.” We think that the Commission should resolve the circuit split on this question. We believe that subsection (c) appropriately does not, and should not, authorize such credit, for the reasons given in *United States v. Fermin*, 252 F.3d 102, 108-110 (2d Cir. 2001). We also believe that such a credit would be bad public policy, because in a subsection (c) case, “the defendant is sentenced for an offense involving criminal conduct that differs from that which produced the undischarged sentence,” *Fermin*, 252 F.3d at 109. Providing credit for an unrelated offense would bring about the strange result of an offender with recent other offenses serving a shorter period of incarceration than an offender with no other recent convictions.

MISCELLANEOUS AMENDMENTS

Free Speech Amendments to §§ 2A3.1, 4B1.5 and 2G2.4.

These proposed amendments are intended by the Commission to address the definition of “child pornography” in §2A3.1 (Criminal Sexual Abuse) and §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), as well as the definition of “visual depiction” in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct), in light of *Ashcroft v. Free Speech Coalition, et al.*, 122 S.Ct. 1389 (2002). Previously, §§2A3.1 and 4B1.5 defined “child pornography” as having “the meaning given that term in 18 U.S.C. § 2256(8).” The proposed amendment to Application Note 1 of §2A3.1 would define “child pornography” as follows:

“Child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image of picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which -

(A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

The proposal appears to be simply following the language from the surviving portions of 18 U.S.C. § 2256(8). Subsection (A) above is identical to 18 U.S.C. § 2256(8)(A), subsection (B) mirrors 18 U.S.C. § 2256(8)(B), minus the “or appears to be” language after the word “is” that was problematic for the Supreme Court in *Free Speech*, and subsection (C) is identical to 18 U.S.C. § 2256(8)(C). The proposed definition excludes the language in 18 U.S.C. §§ 2256(8)(B) and (D) that was found problematic in *Free Speech*.

We believe, however, that defining child pornography in this way may create significant problems and that this amendment should be tabled for the current amendment year. First, by not citing specifically to § 2256, the guideline eliminates any indication of the meaning of “sexually explicit conduct,” which we believe is critical, or of “visual depiction.” In addition, legislation is currently moving quickly through the Congress to address the *Free Speech* decision. Rather than amending the definition now and perhaps being required to do so again as early as this spring (and thus creating significant confusion for all), we think the Commission should wait to see both the progress of the legislation as well as how courts address relevant cases. We believe that in the mean time, the reference to 2256(8) will be interpreted by courts to refer to all parts of 2256(8) that have not been held unconstitutional.³

The proposed amendment to § 2G2.4 adds another wrinkle. The guideline states that “[i]f the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a *visual depiction* involving the sexual exploitation of a minor, increase by 2 levels.” Application Note 1 currently defines “visual depiction” as “any visual depiction

³In §4B1.5 (establishing adjustments for Repeat and Dangerous Sex Offender Against Minors), “child pornography” was previously defined with reference to 18 U.S.C. § 2256(8); it is now defined with an internal cross-reference to Application Note 1 of § 2A3.1, analyzed above. Thus any adjustment to Application Note 1 of § 2A3.1 will automatically apply to § 4B1.5 as amended.

described in 18 U.S.C. § 2256(5) and (8).” Notably, “sexual exploitation of a minor” is not defined in the guideline.

The proposed amended definition for “visual depiction” in §2G2.4, in an attempt to address Free Speech, still refers to 18 U.S.C. § 2256(5), but replaces the reference to 18 U.S.C. § 2256(8) with the same three-part narrative used above in the proposed amendment to §2A3.1. For the reasons stated above, we believe the Commission should wait and see how the pending legislation is resolved before amending the definition here.⁴

Mitigating Role Cap for Offenses Sentenced Under §2D1.11

First, we think this is very significant and substantive amendment to the guidelines and as such, is inappropriate for the miscellaneous/consent calendar. There are a variety of issues that the Commission should consider, including the fact that this amendment intersects (and perhaps conflicts) with at least one congressional directive. Second, for reasons which we spelled out in detail during the last amendment cycle, we oppose any mitigating role cap for drug offenders. Last year, we opposed the mitigating role cap when it was promulgated by the Commission for offenses sentenced pursuant to §2D1.1. We now oppose the mitigating role cap being proposed for offenders sentenced pursuant to §2D1.11. We think given the significant opposition in Congress to the Commission’s actions on this issue last year regarding §2D1.1 as well as the existing and relevant congressional directives, the Commission should at the very least consult further with Congress and seriously reconsider this proposal.

Red Phosphorous

Effective November 16, 2001, red phosphorous, along with white phosphorous, and hypophosphorous acid, became DEA-regulated List I chemicals. All three listed chemicals are used, along with iodine, in the illicit production of methamphetamine; they are chemical catalysts to drive the conversion of ephedrine or pseudoephedrine to methamphetamine. The combination of red phosphorous, for example, and iodine substitutes in the production process for hydriodic acid, which became more scarce on the illicit market after it was made a listed chemical about a decade ago. Quantity guidelines are set forth in §2D1.11 for iodine – which was made a List II chemical as a result of the Comprehensive Methamphetamine Control Act of 1996 – but no guidelines exist for red phosphorous, white phosphorous, or hypophosphorous acid.

Moreover, the proposed amendment creates a strange phenomenon: “visual depiction involving the sexual exploitation of a minor” is defined by the guideline either under § 2256(5) (definition for “visual depiction”) or under the three-part, post-*Free Speech* narrative above (which is not a definition for “visual depiction,” but rather, is derived from the surviving portions of the § 2256(8) definition for “child pornography”), which is then defined as “visual depiction . . . of sexually explicit conduct,” neither of which are further defined, because the narrative does not refer to the statute.

The Commission's proposed amendment for red phosphorous is based on the ratio of the chemical used to the methamphetamine yield in clandestine laboratories. It assumes a ratio of 1:1.4 red phosphorous to methamphetamine. The proposal does not address, however, white phosphorous or hypophosphorous acid. We believe the Commission's methodology and proposal on red phosphorous are reasonable. However, we ask the Commission to (1) add white phosphorous to the chemical quantity table in the same quantities as proposed for red phosphorous, since these two chemicals are used interchangeably in the same quantities, and (2) add hypophosphorous acid (50% solution) at a ratio of 1:1 with current sentences for iodine since these two chemicals are used together in the same quantities. Additionally, we suggest an application note allowing departure for any significantly more or less concentrated solution of hypophosphorous acid.

Application note of §2G2.1

This proposal would amend the departure provision in Application Note 6 of §2G2.1 to conform to Application Note 12 of §2G1.1.

Section 2G1.1 relates to Promoting A Commercial Sex Act or Prohibited Sexual Conduct. It provides a base offense level of 14 – and 19 if the offense involved a minor – for offenses under 8 U.S.C. § 1328 (importation of alien for immoral purpose), 18 U.S.C. §§ 1591 (sex trafficking of children), and 18 U.S.C. §§ 2421, 2422, 2423(a) and 2425 (travel statutes). The guideline contains a specific offense characteristic such that “[i]f the offense involved a victim who had (A) not attained the age of 12 years, increase by 4 levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels.” Application Note 12 provides for an upward departure if the offense involved more than 10 victims.

Section 2G2.1 relates to Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material and other related offenses. It provides a base offense level of 27 for offenses under 18 U.S.C. §§ 1591 (sex trafficking of children), 2251(a), (b), and (c)(1)(B) (sexual exploitation of children), and 2260 (production of child pornography for importation). This guideline contains a specific offenses characteristic such that “[i]f the offense involved a victim who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.” Application Note 6 currently allows for upward departures in two circumstances: (A) if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (B) if the offense involved more than 10 victims. The proposed amendment would eliminate circumstance (A), so that the only basis for departure would be if an offense involved more than 10 victims, in conformity with Application Note 12 of §2G1.1, discussed above.

While we understand the Commission's desire to address overlapping departure and specific offense provisions, we nonetheless oppose the elimination of the upward departure provision based on the age of the child at this time. As we outlined in our annual letter of

priorities to the Commission, we believe significant penalty increases are warranted for offenses sentenced under this guideline. Until such increases are put in place, we believe some upward departure language and invitation should remain in the guideline for the age of the victim. Legislation has also been proposed in Congress to address these issues, and we believe this strongly suggest that the Commission table this amendment at this time.

Subsection (b)(5) of §2G2.2

This proposal involves broadening the increase for certain child pornography-related activities to the extent they involve use of a computer. We support this proposed amendment.

INVOLUNTARY MANSLAUGHTER

As we stated in our annual letter of priorities to the Commission, we believe the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. While the number of homicides prosecuted in federal court is relatively few because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes involved.

The guidelines for second degree murder and attempted murder are particularly problematic. Under the guideline for second degree murder, §2A1.2, a defendant who accepts responsibility for a second degree murder and falls within either Criminal History Category I or II is eligible to receive a sentence of less than 10 years' imprisonment. Even a defendant who falls within the most serious criminal history category is eligible to receive a sentence of just 14 years. A thorough examination of the second degree murder guideline by the Commission, we believe, is in order.

The guidelines applicable to voluntary and involuntary manslaughter (§§2A1.3 and 2A1.4) are also in need of improvement. Currently, the guideline for voluntary manslaughter establishes an offense level of 25, with no adjustments for specific offense characteristics. This offense level results in a guideline sentence of as low as three-and-a-half years of imprisonment for a defendant in Criminal History Category I who accepts responsibility for the offense. But voluntary manslaughter, such as a killing in the heat of passion, is a serious offense for which incapacitation should be an important goal of sentencing.

Under the sentencing guidelines for involuntary manslaughter, the base offense level is 10 if the conduct was criminally negligent or 14 if it was reckless, §2A1.4. Thus, for example, vehicular homicide resulting from reckless driving brought about by intoxication can result in a guideline sentence of just five months of imprisonment and five months of home detention for a first offender who accepts responsibility for the offense.

The involuntary manslaughter guideline has no specific offense characteristics that take into account the heightened culpability or increased danger present in some cases. Thus, in addition to examining the base offense level for this offense, the Commission should consider the inclusion of specific offense characteristics. For example, the guideline could include for vehicular manslaughter cases such factors as the offender's past driving history and current license status, because an offender who commits involuntary manslaughter while driving on a suspended license deserves a stiffer sentence than one who is on the road legally.

We believe that at a minimum, the base offense levels for involuntary manslaughter should be raised to level 16 if the homicide was criminally negligent, and level 20 if it was reckless (the maximum offense levels proposed by the Commission in the Federal Register notice). We think the Commission, following the report on this issue of the Native American Working Group, should revisit all of the homicide guidelines and make further adjustments as warranted.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Eric H. Jaso
Counselor to the
Assistant Attorney General