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March 9, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments to the Firearms Guideline, § 2K2.1

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders, we write to provide our comments on the proposed amendments to the firearms guideline, § 2K2.1.1

As of 2003, firearms offenders comprised approximately 10% of offenders sentenced in federal court, the fourth largest proportion of the federal docket.² Average time served for illegal firearms trafficking and possession under 18 U.S.C. § 922(g) doubled from the guidelines' inception to 2002.³ From 2002 to the present, average sentence length for offenders sentenced under § 2K2.1 increased from 53 months to 58 months.⁴

¹ Thanks to Assistant Federal Defenders John Reichmuth and Richard Ely for their technical expertise and research. Thanks to Steve Jacobson, Brian Rademacher, John Rhodes, and Kristen Rogers for their practical and legal input.

² The Commission has acknowledged that, to date, the Guidelines have been used to increase sentence severity, but that they *could be* used to reduce sentence severity for targeted offenses or offenders, and *could be* used to carry out its statutory duty to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g).

³ U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 139 (2004).

⁴ U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Table 7 (average sentence length for firearms offenders receiving prison sentence increased from 71 to 75.8 months from 2002 to 2003) (2002-2003), <http://www.ussc.gov/JUDPACK>; U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence length for all firearms offenders increased from 65.8 to 70 months from 2002 to 2003 (2002-2003), <http://www.ussc.gov/JUDPACK>; U.S.

As of 2004, the Bureau of Prisons was 40% overcapacity,⁵ with over 188,000 inmates,⁶ at a cost to the taxpayers of over \$4 billion a year.⁷ The Commission is required by statute to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,”⁸ to assure that the purposes of sentencing, including proportionate punishment, are met, and to avoid unwarranted disparity and inappropriate uniformity.⁹

Yet, most of the proposed amendments would raise penalties for less serious conduct. As set forth below, by following Congress’ lead in the firearms area and relying on accurate information about firearms, the Commission can and should lower firearms sentences, or at least not indiscriminately raise them, and assure that any enhancements in this area are appropriately focused and narrowly drawn.

(A) § 921(a)(30)

The proposed amendment sets forth two options. Option One would replace a “firearm described in [the now-repealed] 18 U.S.C. § 921(a)(30)” with a “high-capacity, semiautomatic firearm” in the enhanced base offense levels set forth in § 2K2.1(a).¹⁰ Option Two would encourage upward departure if the offense involved a “high-capacity, semiautomatic firearm.” Under either option, “high capacity, semiautomatic firearm” would be defined as a “semiautomatic firearm that has a magazine capacity of more than [15] cartridges,” the same definition as in § 5K2.17 (upward departure if possessed in connection with a crime of violence or controlled substance offense), except that the threshold magazine capacity in § 5K2.17 is “more than 10 cartridges.”

Sentencing Commission, Special Post-Booker Coding Project at 13-15 (average sentence length for offenders sentenced under § 2K2.1 increased from 53 to 58 months from 2002 to 2005) (Prepared Feb. 14, 2006), http://www.ussc.gov/Blakely/postBooker_021406.pdf.

5 U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

6 <http://www.bop.gov/news/quick.jsp#1>.

7 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) (\$22,632 per federal inmate in FY 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt>.

8 28 U.S.C. § 994(g).

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28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

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The enhanced base offense levels are 26 for any firearms offender with two prior felony convictions of a crime of violence or controlled substance offense, U.S.S.G. § 2K2.1(a)(1), 22 for any firearms offender with one such prior conviction, U.S.S.G. § 2K2.1(a)(3), 20 for possession by or transfer to a prohibited person, U.S.S.G. § 2K2.1(a)(4)(B), and 18 for any other firearms offense. U.S.S.G. § 2K2.1(a)(5).

The Commission seeks comment on (1) whether an alternative definition should be considered, (2) whether there are other categories of firearms that should form the basis for an enhanced base offense level or upward departure, and (3) whether the Commission should make similar changes to the definition of "high capacity, semiautomatic firearm" in § 5K2.17.

Congress allowed the semiautomatic assault weapons legislation to lapse because there was no empirical justification for it while it was in effect.¹¹ The Commission has a non-controversial opportunity to simplify and lower penalties in what appears to be a small number of cases. Thus, the Commission should delete the references to the repealed legislation, and take no action unless and until a particular action is demonstrated to be necessary based on (1) analysis of sentencing data, and (2) research about the types of weapons it is considering for more severe punishment. In the meantime, courts can take into account under § 3553(a) in any case any heightened seriousness of the offense or need to protect the public flowing from the type of weapon. Further, upward departure is available for multiple "military type assault rifles," § 2K2.1, comment. (n.13), and for "high capacity, semiautomatic firearms" possessed "in connection with" a crime of violence or controlled substance offense, § 5K2.17.

As set forth in subsection (c), the proposed definition of "high capacity, semiautomatic weapon" would sweep in ordinary firearms with legitimate uses, including target shooting at Boy Scout camps, quite *unlike* the bombs, machine guns and sawed-off shotguns described in 26 U.S.C. § 5845, and also well beyond the firearms described in 18 U.S.C. § 921(a)(30) which Congress has repealed. If the Commission feels compelled to act in this amendment cycle for reasons that seem contrary to congressional intent and are not apparent in any reason offered in support of the amendment or in any data of which we are aware, it should provide for an upward departure for involvement of a semiautomatic assault weapon, as defined in former 18 U.S.C. § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3).

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A study mandated by Congress to be performed thirty months after enactment of the semiautomatic assault weapons ban concluded that, "[a]t best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never used in more than a fraction of all gun murders," and that there was no detectable reduction "in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim." See Roth, Koper, et. al, Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 at 2, 97 (March 13, 1997), http://www.urban.org/UploadedPDF/aw_final.pdf. Semiautomatic assault weapons are used in only 1-2% of crimes. See David B. Kopel, Rational Basis Analysis for "Assault Weapon" Prohibition, 20 J. Contemp. L. 381 (1994) (SAWs used in 1% of gun crime); U.S. Department of Justice, Bureau of Justice Statistics, Survey of State Prison Inmates 1991 (3/93) ("fewer than 1% of all violent inmates, were armed with a military-type weapon, such as an Uzi, AK-47, AR-15, or M-16"), <http://www.ojp.usdoj.gov/bjs/pub/ascii/sospi91.txt>; U.S. Department of Justice, Bureau of Justice Statistics, Firearm Use by Offenders (2/5/02) ("about 2% had a military-style semiautomatic gun or machine gun"), <http://www.ojp.usdoj.gov/bjs/pub/ascii/fuo.txt>.

1. **Consistent with congressional intent and the Commission's duty to revise guidelines based on data and research, the Commission should delete the reference to weapons described in 18 U.S.C. § 921(a)(30) and take no further action unless indicated by sentencing data and research regarding semiautomatic weapons.**

The Violent Crime Control and Law Enforcement Act of 1994 ("the Act") became law on September 13, 1994. Subtitle A of Title XI of the Act, among other things, criminalized the manufacture, transfer or possession of a "semiautomatic assault weapon," 18 U.S.C. § 922(v)(1) (repealed September 13, 2004), defined in 18 U.S.C. § 921(a)(30) (repealed September 13, 2004) with numerous exemptions set forth in 18 U.S.C. § 922(v)(2)-(4) (repealed September 13, 2004), subject to a maximum penalty of five years, 18 U.S.C. § 924(a)(1)(B) (amended to delete § 922(v) September 13, 2004); enacted a ten-year mandatory minimum for a violation of § 924(c) with a "semiautomatic assault weapon," 18 U.S.C. § 924(c)(1)(B)(i) (repealed September 13, 2004); and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm," defined as "any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge." Pub. L. 103-322 § 110501 (repealed September 14, 2004).

In response to the congressional directive, the Commission provided for a potential upward departure in § 5K2.17 in recognition that any increased risk of harm from a "high capacity, semiautomatic firearm" would vary substantially with the inherent dangerousness of the weapon and the circumstances of the offense.¹² Without a congressional directive, the Commission amended § 2K2.1 to subject "semiautomatic assault weapons" as defined in 18 U.S.C. § 921(a)(30) to the same enhanced base offense levels as the sawed-off firearms, machine guns, bombs and silencers described in 26 U.S.C. § 5845(a).¹³

By the terms of the Act, Subtitle A in its entirety was repealed effective September 13, 2004.¹⁴ Congress has taken no action to reinstate any of its provisions. Nonetheless, the Commission proposes to either maintain the enhancements or replace them with an upward departure, and in either case to vastly broaden the definition of the enhancing type of firearm. Compared to firearms offenses *not* involving a "semiautomatic firearm with a magazine capacity of more than 15 cartridges," Option One would increase sentences for offenders with prior drug trafficking or crime of violence convictions by 20-25%, more than double sentences for most other offenders, and place offenders convicted of record-keeping offenses otherwise subject to probation in prison for more than two years. Taking two common offenses, Option One would more than double the sentence for a first time offender convicted of possession by or transfer to a

¹²
U.S.S.G., App. C., amend. 531.

¹³
U.S.S.G., App. C., amend. 522.

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Pub. L. 103-322 § 110105(2).

prohibited person (from 15-21 months to 33-41 months),¹⁵ and more than double the sentence for a first time offender convicted of possession or transfer of a stolen firearm or one with an altered serial number (from 10-16 to 27-33 months).¹⁶ Further, the six-level reduction for sporting or collection purposes would be precluded for any offense involving a semiautomatic firearm with a magazine capacity of more than 15 cartridges. This reduction is not precluded for many such weapons now.

The only explanation offered for these substantial sentences is that "possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level." This begs a number of questions: Which certain firearms warrant aggravating status? What is the rationale for doing so? Why does the proposal apply to all firearms offenses if the concern is possession by a prohibited person? Is the cost justified? When the Commission equalized penalties for semiautomatic assault weapons with bombs, machine guns and sawed-off shotguns in 1995, it estimated that this would increase the prison population by 82 inmates,¹⁷ which, at today's rates, would cost nearly \$2 million annually.¹⁸ Pursuant to the Commission's duty to formulate guidelines that are "effective" in meeting the purposes of punishment and that minimize prison overcrowding,¹⁹ the Commission should answer these questions before taking any action.

a. The proposal is unsupported by published data.

Recently published data on the frequency of use of different base offense levels and specific offense characteristics does not separate enhancements for weapons described in 18 U.S.C. § 921(a)(30) from those for firearms described in 26 U.S.C. § 5845(a), or from enhancements under § 2K2.1(a)(4)(A) that involved neither.²⁰ Thus, at present, the frequency and circumstances of offenses involving weapons described in 18 U.S.C. § 921(a)(30) appears to

¹⁵ 18 U.S.C. § 922(d), (g).

¹⁶ 18 U.S.C. § 922(j), (k).

¹⁷ U.S. Sentencing Commission, 1995 Annual Report at 149, http://www.ussc.gov/ANNRPT/1995/CH5_95.PDF.

¹⁸

FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) (\$22,632 per federal inmate in FY 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt>.

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²⁰ 28 U.S.C. § 991(b)(1)(A), (2); § 994(g).

²⁰ Guideline Application Frequencies for Fiscal Year 2003 at 35, http://www.ussc.gov/GAF/03_guideline_application_frequency.htm.

be unknown. According to anecdotal reports from Defenders, the enhanced base offense levels are rarely if ever used for weapons described in 18 U.S.C. § 921(a)(30).

According to the Commission's Sourcebooks, the upward departure in § 5K2.17 for a "high capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense," in which the weapon is defined the same as in the proposed new definition for § 2K2.1 but with a lower threshold magazine capacity, has never been used.²¹

As explained in subsection (c) below, the proposed definition would sweep in numerous ordinary firearms with legitimate uses, unlike those described in 26 U.S.C. § 5845, and well beyond those Congress temporarily included in the now-repealed 18 U.S.C. § 921(a)(30). Thus, Option One would require unwarranted uniformity among dissimilarly situated offenders. Option 2 would invite upward departure when there is no apparent basis for it. The Commission should devote careful study to the attributes and common uses of whatever weapon it is considering for enhanced punishment.

b. The proposal is contrary to congressional intent.

All firearms potentially could be used as instruments of unlawful violence, but § 2K2.1 applies to firearms offenses, not crimes of violence. The offenses covered by § 2K2.1 are prophylactic in nature, *i.e.*, to prevent violent crimes by prohibiting possession and transfers that would be legal but for the individual's criminal record, mental health or drug addiction background, or failure to comply with various licensing or record-keeping requirements.²² The question for purposes of *enhanced* punishment based on certain weapons is whether those certain weapons are largely used for violent purposes or have substantial legitimate uses.

Congress requires registration of any sawed-off shotgun or rifle, machine gun, silencer or bomb, and failure to register is a crime punishable by up to ten years.²³ This reflects Congress' judgment that these devices have a very high likelihood of use for unlawfully violent purposes.²⁴ Congress has never required blanket registration of semiautomatic firearms, not as narrowly defined in 18 U.S.C. § 921(a)(30) much less as broadly defined in the Commission's proposal. This demonstrates Congress' recognition that, unlike machine guns, sawed-off shotguns, silencers and bombs, semiautomatic firearms have lawful uses, such as target shooting, hunting, defense of self, property or others, and as collectibles, and are less likely than sawed-off shotguns, machine guns and bombs to be used as instruments of unlawful violence. Even while

²¹ U.S. Sentencing Commission Sourcebooks, Table 24 (1996-2003).

²² United States v. Lewis, 249 F.3d 793, 796-97 (8th Cir. 2001).

²³ 26 U.S.C. §§ 5841, 5845, 5862(d), 5871.

²⁴ United States v. Serna, 435 F.3d 1046 (9th Cir. 2006); United States v. Brazeau, 237 F.3d 842, 845 (7th Cir. 2001); United States v. Jennings, 195 F.3d 795, 799 (5th Cir. 1999).

the semiautomatic assault weapons legislation was in effect, any firearm lawfully possessed before its passage as well as over 650 semiautomatic weapons were exempt.²⁵ Further, Congress indicated that when semiautomatic weapons *are* used for unlawful purposes, the offense is still less serious than an offense involving a machine gun, sawed-off shotgun or bomb, providing in § 924(c) for a thirty-year mandatory minimum for the latter, and a ten-year mandatory minimum for the former (now repealed). The Commission too has recognized that weapons described in 26 U.S.C. § 5845(a) are *sui generis*, having deemed mere possession of such a weapon, but no other kind of weapon, a “crime of violence” for career offender purposes.²⁶

Congress has allowed all of the semiautomatic weapons provisions to lapse, finding them unnecessary and placing semiautomatic weapons on the same footing as any other firearm other than those described in 26 U.S.C. § 5845.²⁷ It would be unwarranted for the Commission to continue to equate these weapons with those described in 26 U.S.C. § 5845, much less to broaden the category to include ordinary firearms with substantial legitimate uses.

- c. The proposed definition would include even more ordinary firearms with substantial legitimate uses and with little risk of unlawful violence than did 18 U.S.C. § 921(a)(30) before it was repealed.**

The Commission proposes to replace the references to § 921(a)(30) in the enhanced base offense levels in § 2K2.1 with a “firearm that is a high-capacity, semiautomatic firearm,” defined as a “semiautomatic firearm that has a magazine capacity of more than 15 cartridges,” or to create an upward departure in § 2K2.1 for offenses involving a firearm so defined. The definition is both artificial and exceedingly broad.

A “semiautomatic firearm that has a magazine capacity of more than 15 rounds”

²⁵ 18 U.S.C. § 922(v)(2)-(3).

²⁶ U.S.S.G. § 4B1.2, comment. (n. 1).

²⁷ As Judge Kozinski of the Ninth Circuit recently wrote:

The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant’s] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn’t require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.

Serna, 435 F.3d at 1049.

encompasses many weapons that have never been considered “assault weapons.” Among others, it describes several standard-sized pistols not within the scope of former § 921(a)(30). These include the Glock 17,²⁸ the Beretta 92-SB,²⁹ the Heckler and Koch USP 9,³⁰ and the Smith and Wesson Sigma SW9F.³¹ There is nothing remarkable about these guns; they were all commercially available self-defense handguns released by major manufacturers. They are not considered to be examples of “paramilitary design.”³² They are completely distinct in appearance from all of the weapons included within § 921(a)(30).

The proposed amendment would divide the category of full-sized 9 mm semi-automatics arbitrarily down the middle. It is extremely common for full-sized 9 mm handguns to have a magazine capacity at or near 15 rounds. Those sold with factory magazines holding greater than 15 rounds are mentioned above. Those with 15-round magazines are also extremely common, including, but not limited to, popular models like the Ruger P85,³³ Sig-Sauer P226,³⁴ Smith and Wesson 915,³⁵ Taurus PT-92,³⁶ Beretta 92F,³⁷ Glock 19,³⁸ and Springfield P9.³⁹ Since the proposed change would only affect guns with magazines holding more than 15 rounds, it would not affect these common guns, thereby creating an artificial, inexplicable distinction between virtually identical handguns.

No handgun of the type mentioned above was included in 18 U.S.C. § 921(a)(30). Guns included in the ban were marketed with larger magazine capacities. The Tec-9 came with a 32-

2817 rounds. S.P. Fjestad, Blue Book of Gun Values (19th Ed.) 544 (hereinafter “Blue Book”).

2916 rounds. Id. at 206.

3016 rounds. Id. at 579.

3117 rounds. Id. at 1056.

32 See id. at 631, referring to Intra-Tec Tec-9, a weapon included within § 921(a)(30), as of “paramilitary design.”

33Id. at 1093.

34Id. at 1017.

35Id. at 1050.

36Id. at 1114.

37Id. at 207.

38Id. at 544.

39Id. at 1067.

round magazine.⁴⁰ The Tec-22, also of “paramilitary design,” came standard with a 30-round magazine.⁴¹ The Cobray/SWD M-11 was issued and sold with a 32-round magazine.⁴² The Uzi pistol came with a 20-round magazine.⁴³ Nearly all of the firearms included in the former ban are based on military designs and have fully automatic analogues. They are essentially semiautomatic versions of submachine guns. Placing standard 9 mm handguns in that category and giving them the same enhanced base offense levels as machine guns would significantly broaden the guideline’s scope.

A significant problem with the proposed definition is that many, indeed most, semiautomatic firearms do not have a magazine capacity inherent to them. Instead, *magazines* have a capacity, and a number of different magazines may fit any specific gun.⁴⁴ Would the proposal be interpreted to apply where a firearm is found without a magazine or with a magazine that holds 15 or fewer rounds? The government could argue that an SWD M-11 found without a magazine has a magazine capacity of more than 15 rounds, because there exists a factory-made magazine holding more than 15 rounds. But there also exist factory and after-market ten-round magazines for this gun. Read one way, enhanced base offense levels would hinge on what magazine a defendant was caught possessing. Read another way, the enhanced base offense levels would apply based on a firearm’s ability to accept a greater-than-15 round magazine. Aftermarket high-capacity magazines are available for more than a dozen models,⁴⁵ so the enhanced base offense levels could be creatively applied to vastly more cases of firearm possession than ever before, including to firearms never actually outfitted with a 15+-round magazine.

The proposed definition would thus elevate any firearm that accepts a detachable box magazine to the status of a machine gun, sawed-off shotgun, or bomb. In contrast, 18 U.S.C. § 921(a)(30)(B) and (C) described semiautomatic rifles and pistols that accepted a detachable magazine *and* had at least two constant physical features (e.g., bayonet mount, pistol grip, flash suppressor, etc.). To illustrate, the Ruger 10/22 .22LR rifle is a semi-automatic firearm that shoots .22LR cartridges.⁴⁶ The .22LR cartridge is not a military round. It is commonly used for recreational target shooting and to teach marksmanship to new shooters and children, and is used at Boy Scout camp shooting ranges. Aftermarket twenty-five round magazines are available for

⁴⁰Id. at 633.

⁴¹Id. at 632.

⁴²Id. at 971.

⁴³Id. at 1150.

⁴⁴See www.brownells.com (Well known shooting supply company offering high-capacity magazines for numerous firearms).

⁴⁵Id.

⁴⁶Blue Book at 1101.

this rifle to allow extended target shooting sessions without reloading.⁴⁷ Under the proposed definition, possession of this firearm would be treated the same as the possession of a machine gun, sawed-off shotgun, or bomb.

Similarly, magazine capacity for rifles varies widely; they may be 10, 12, 15, 20, 25, 30, or 40 rounds, to name only a few. Does the definition require that 15+ rounds be inserted in the rifle, present in the area of the rifle, or merely potentially used in the rifle even if no such rounds had ever been used in the rifle? The government could argue, and some judges would accept, that the definition encompasses all rifles and pistols that accept a detachable magazine, vastly expanding the application of the enhanced base offense levels without a reasoned justification. Increased litigation and inconsistency in application would result.

In sum, reacting to the lapse of the assault weapons ban by creating heightened base offense levels for an even broader range of weapons makes no sense.

If the Commission feels compelled to act at this time without more careful study and despite apparently contrary congressional intent, the Commission should, at most, provide for a discretionary upward departure for firearms offenses involving firearms described in former § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3). If so, the Commission should provide an application note stating that the statute has been repealed, explaining that conduct involving firearms previously identified in it may warrant an upward departure, and providing the text of the former statute. This would at least provide clear guidance as to when the upward departure may apply.

2. There is no other category of firearms that should form the basis of an enhanced base offense level or upward departure.

As explained above, Congress treats weapons described in 26 U.S.C. § 5845, and only those weapons, as requiring registration and deserving of increased penalties. The Commission should accept Congress' judgment in this regard. As Justice Breyer has advised, the Commission should not add further adjustments, but should "act forcefully to diminish significantly the number of offense characteristics attached to individual crimes," because the existing Guidelines already make distinctions without a difference and create a false façade of precision.⁴⁸ Moreover, further adjustments seem particularly wasteful of judicial resources now that the overarching sentencing mandate is to impose a sentence that is sufficient but not greater than necessary to achieve sentencing purposes, with the Guidelines "advisory" within that framework.

⁴⁷Id.

⁴⁸ See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999).

• If the Commission has any particular weapons in mind, we would appreciate the opportunity to comment on them specifically.

3. **The Commission should either delete § 5K2.17, revise the definition to focus on features more pertinent to dangerousness than magazine capacity, or at least increase the magazine capacity.**

The Commission has asked for comment on whether it should make “similar changes” to the definition of “high capacity, semiautomatic firearm” in § 5K2.17. Since the legislation that prompted § 5K2.17 has been repealed, see Pub. L. 103-322 §§ 110501, 110105(2), and the departure appears never to have been used, the Commission should delete § 5K2.17. If retained, based on the information in section 1(c), infra, and further study, the definition should be revised to capture increased dangerousness. Failing that, the threshold magazine capacity should be increased to at least “more than 15 cartridges.”

4. **The Commission should promulgate a downward departure for inoperable firearms and firearms and ammunition with no intended use.**

There is a difference relevant to the purposes of sentencing in § 3553(a)(2), which § 2K2.1 does not recognize, between possession of a loaded gun and possession of an unloaded gun, as well as between possession of an operable gun and possession of an inoperable gun. Further, there is unwarranted uniformity between the punishment for possession of a single bullet and that for possession of a loaded firearm. These disparities should be addressed in an application note inviting downward departure. C.f. U.S.S.G. § 2B5.1, comment. (n.4) (enhancement does not apply to “persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny”). We propose the following language:

When the firearm involved was inoperable, or the firearm was unloaded and the defendant did not intend to load it in the future, a downward departure may be warranted. Similarly, possession of only a small amount of ammunition and no firearm, where the defendant did not intend to use the ammunition in the future, may justify downward departure.

(B) Trafficking SOC

1. **The proposed amendment lacks any criteria that would limit the SOC to “firearms trafficking.”**

The proposed amendment would add a specific offense characteristic at § 2K2.1(b)(7) as follows:

- (7) If the defendant engaged in trafficking of (A) [[2]-24] firearms, increase by [2][4] levels; or (B) [25 or more] firearms, increase by [6][8] levels.

The proposed corresponding application note 13 would state:

- (A) Definition of "Trafficking".—For purposes of subsection (b)(7), "trafficking" means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.
- (B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

There is no description in the synopsis of what kind of activity this proposed specific offense characteristic is intended to cover, nor can one be discerned from the language of the proposal. We assume the Commission would want to confine this specific offense characteristic to offenses that involved engaging in the business of selling firearms, for monetary profit or a criminal purpose, consistent with commonsense understanding, legal definitions, and the nature of the cases subject to sentencing under § 2K2.1.

The essence of the definition of "illicit trafficking in firearms" is the "business or merchant nature" of the defendant's firearms conviction.⁴⁹ In the firearms chapter itself, Congress defined the concept of "in the business" as meaning one who "devotes time, attention, and labor ... as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution" of firearms or, alternatively, one who engages in the "regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism," specifically defined. See 18 U.S.C. § 921(a)(21)(A-F) & (a)(22). Using Congress' definitions in the firearms area is appropriate, while borrowing from entirely dissimilar areas like identity theft and counterfeit labels is a mis-match and not in keeping with congressional intent.⁵⁰

Similarly, if the purpose is to focus on firearms trafficking, the only scheme that should be considered for enhancement is one involving the regular and repeated unlawful dealing in firearms for profit or a criminal purpose, i.e., an ongoing "firearms trafficking scheme." See U.S.S.G. § 2B1.1(b)(11) & comment. (n.10) (an increase for trafficking in stolen goods – the "chop shop" enhancement – must be based on a scheme involving the offense at issue, i.e., the unlawful "organized scheme to steal vehicles or vehicle parts").⁵¹

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Kuhali v. Reno, 266 F.3d 93, 107-08 (2d Cir. 2001) (analyzing the meaning of "illicit trafficking in firearms" under 8 U.S.C. § 1101(a)(43)).

50 Under other guidelines, trafficking connotes "for profit." See U.S.S.G. § 2L1.1(b)(1) & comment. (n.1); § 2L2.1(b)(1) & comment. (n.1) (immigration offenses, involving trafficking in persons).

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As proposed below, the unlawful scheme should be confined to the transport, transfer or disposition of firearms to an individual whose possession, receipt, or use the defendant knows or has reason to know will be either (i) unlawful (consistent with Congress' rationale that a prohibited possessor is more likely

As presently written, the proposal lacks any limiting criteria and this would commonly apply to activity well beyond the scope of any commonsense understanding or legal definition of "firearms trafficking." For example, a licensed dealer in firearms who violates (with respect to two or more firearms) any one of a host of regulatory directives in 18 U.S.C. § 922, such as selling firearms to an adult who did not appear in person or submit a sworn statement as to his age, § 922(c), though the buyer is a lawful possessor planning to use the firearms for a lawful purpose, since dealers dispose of firearms for pecuniary gain. A legitimate common carrier that violates (with respect to two or more firearms) a regulatory directive, such as delivering firearms without obtaining a receipt from the recipient, § 922(f), though the recipient is a lawful possessor planning to use the firearms for a lawful purpose would be a firearms trafficker, as common carriers transport firearms for pecuniary gain.

Any individual who violated the law with respect to two or more firearms he bought for personal use and without any intent at the time to profit would be a firearms trafficker if he later disposed of them in exchange for money or something of value. This would include a lawful possessor who sells personal firearms to a relative, friend or neighbor he knows to be law-abiding but is a juvenile only days shy of turning 21 or was dishonorably discharged from the Armed Forces, or whom he knows has a drug problem or a prior conviction for misdemeanor domestic violence. See §§ 922(x)(1); 922(d)(3), (6), (9). It would include an individual who is an unlawful possessor but sells, trades, or pawns his personal firearms, acquired before he was a prohibited person, to a lawful possessor for rent money or to meet other financial needs, not unusual among the poor, or trades them for farm equipment, car parts, or other necessary items, quite common in rural America. See §922(g). This was the situation in United States v. VanLeer, 270 F.Supp.2d. 1318 (D. Utah 2003). VanLeer was a felon who, because he "was destitute and needed money for rent," took a gun he had purchased before he was a felon then later gave to a friend and sold it to a pawn shop, using his own name and fingerprints. Id. at 1319. These facts, and that he was divesting himself of the gun rather than keeping it, showed he was less culpable and less harmful than the typical felon-in-possession at which the statute was aimed. Id. at 1326-27. Under this proposal, if he had divested himself of two guns instead of one, he would be punished as a "firearms trafficker," a ludicrous result.

As demonstrated by these examples, it makes no meaningful difference whether "pecuniary gain" or "anything of value" is used. Moreover, if "pecuniary gain" were defined as elsewhere in the Guidelines, it is the same as "anything of value." See § 2B1.5, comment. (n.5(A)).

Further, an individual who transferred firearms "even if nothing of value was exchanged" would be a "firearms trafficker" if done as part of *any* "ongoing unlawful scheme," regardless of its nature.

In addition, the proposal suffers from a serious double counting problem. The defendant should not receive, in addition to the additional 2 to 10 levels based on the number of guns

to use the firearm in an illegal manner) or (ii) in connection with another felony offense.

involved under subsection (b)(1), another 2 to 8 levels for the number of guns involved under subsection (b)(7).

2. Defenders' Proposed Substitute

To avoid application to persons who simply are not "firearms traffickers," we suggest the following modification to the proposed amendment and accompanying application note, which relies on statutory language in the firearms area and avoids double counting:

The proposed amendment should be modified to read:

- (7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

- (13) Application of Subsection (b)(7).--

- (A) Definition of "engaged in the business of trafficking." —For purposes of subsection (b)(7), "engaged in the business of trafficking" means a defendant who (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms, (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

"Livelihood and profit" is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

"Terrorism" is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

- (B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused,
- (C) An increase to the offense level under § 2K2.1(b)(7) is in addition to any increase to the offense level under § 2K2.1(b)(1) for the number of firearms involved in the offense.
- (C) If an increase of 4 levels is made under § 2K2.1(b)(5), and § 2K2.1(b)(7) would otherwise apply because the defendant trafficked in firearms to

another individual or individuals whose possession or receipt the defendant knew or had reason to believe would be used or possessed in connection with another felony offense, [do not apply § 2K2.1(b)(7)] [increase the offense level by 1 level rather than 2 levels under § 2K2.1(b)(7)].

3. Issues for Comment

1) As in our proposed Application Note 13(A), the definition of trafficking should be restricted to offenses in which the defendant knew or had reason to believe that the transfer would be to an individual whose possession or receipt would be unlawful. It should not include offenses in which the defendant was willfully blind to the fact that the transfer would be to an individual whose possession or receipt would be unlawful. Willful blindness is not the standard under § 2K2.1(b)(5), nor is it used in any other guideline in the Manual, for good reason. Many courts have cautioned against use of the willful blindness standard in criminal cases because it essentially holds defendants responsible for mere negligence, and entails a presumption of guilt. See United States v. Alston-Graves, 435 F.3d 331, 341 n.10-n.14 (D.C. Cir. 2006) (citing cases); United States v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005); United States v. de Francisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). When combined with the elastic and exceedingly forgiving preponderance of the evidence standard that remains in § 6A1.3 (despite the likelihood of unconstitutionality under guidelines with “substantial weight”/a “presumption of reasonableness”), a willful blindness standard for firearms trafficking would result in intolerably unfair and unreliable enhancements.

2) The definition should not include merely receiving firearms from another individual. A trafficker is one who distributes an illegal product after first acquiring (i.e., receiving) it, not one who only receives it. One who simply receives without taking any further action with respect to the firearm, though he may be an unlawful possessor, is not a “firearms trafficker.”

(C) Stolen Firearms/Altered or Obliterated Serial Numbers

The Commission proposes changing § 2K2.1(b)(4), which currently provides for a two-level enhancement for a firearm that either is stolen or has an altered or obliterated serial number regardless of knowledge or reason to believe, see comment. (n.16), to require the greater of a two-level enhancement for a stolen firearm or a four-level enhancement for an altered or obliterated serial number regardless of knowledge or reason to believe.

We object to the proposed increase, and instead recommend that the Commission either make no change to subsection (b)(4), or provide that the altered/obliterated serial number enhancement not be applied at all where the serial number is recovered. In either event, a *mens rea* requirement should be added in order to assure punishment *proportionate* to the defendant’s culpability. See 18 U.S.C. § 3553(a)(2)(A).

The increased enhancement for an altered or obliterated serial number -- which, depending on the base offense level, other SOCs, and criminal history, would result in anywhere

from six months to eight years additional time in prison at a cost to the taxpayers of approximately \$23,000 per year -- is said to "reflect[] the difficulty in tracing firearms with altered or obliterated serial numbers."

The addition of any number of levels (two or four) in every case based on this rationale assumes that altered or obliterated serial numbers are unable to be restored. In fact, in many cases, they are restored by a simple laboratory procedure:

Serial numbers are usually stamped on a metal frame or plate, with hard steel dies. These dies are applied with enough force to sink each digit into the metal. Restoration of obliterated serial numbers can *many times* be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers. *If* the number is ground to a depth that removes the strained crystals, or if the area has been impressed with a different strain pattern, it is *usually* not possible to restore.

See Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, <http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm> (emphasis supplied). According to anecdotal reports from Defenders, the number is recovered more often than not because the numbers are removed very superficially.

An altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable. An additional hour of routine laboratory work, whether to recover a serial number, to lift fingerprints from an object, or to determine the type or quantity of drugs, is not an additional harm to society warranting increased punishment.

We therefore recommend that the Commission make no increase in the adjustment for an altered or obliterated serial number, or revise subsection (b)(4) as follows:

- (4) If any firearm was stolen, or had an altered or obliterated serial number that was unable to be recovered, increase by two levels.

By way of explanation, the following could be added to Application Note 9:

The adjustment under subsection (b)(4) for an altered or obliterated serial number seeks to address the harm of the firearm being rendered untraceable by the alteration or obliteration. Thus, for the adjustment in subsection (b)(4) to apply on the basis that the offense involved a firearm that had an altered or obliterated serial number, the serial number must have been unable to be recovered.

We also urge the Commission to delete application note 16, and to provide for a *mens rea* requirement for the adjustment in subsection (b)(4) to apply. The Commission is required to assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met. One of those

purposes is “just punishment” in light of the “seriousness of the offense,” a concept that entails personal culpability. When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment. When the same punishment is required for a person who does not know or have reason to believe that a firearm is stolen or has an obliterated serial number as one who does have knowledge or reason to know, this creates punishment that is disproportionate to the seriousness of the offense and unwarranted disparity. As the Commission has said, “Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.” See Fifteen Year Report at 113 (emphasis in original).

We assume that the reason for not requiring any *mens rea* for this adjustment is that the government does not want to have to prove it. But the Commission was not instructed to assure that the government was relieved of any burden of proof as to facts that increase punishment to reflect increased seriousness of the offense. Moreover, the Commission’s advice that the preponderance of the evidence standard meets due process requirements remains in § 6A1.3. While we believe this advice is wrong in light of the Appendi to Booker line of cases and particularly in light of the Commission’s instructions to the courts to give the Guidelines “substantial weight,” see Letter from Federal Defenders Regarding Report on Federal Sentencing Since United States v. Booker at 18-21 (January 10, 2006), that is the standard most courts are applying. It is not too much to ask that the government prove the facts that put people in prison for months or years by a mere preponderance.

We therefore propose that Application Note 16 be deleted and that § 2K2.1(b)(4) be changed as follows:

(4) (A) If the defendant knew or had reason to believe that any firearm was stolen, increase by 2 levels.

(B) If the defendant knew or had reason to believe that any firearm had an altered or obliterated serial number, and the serial number was unable to be recovered, increase by 2 levels.

(D) “In Connection With” in Burglary and Drug Offenses (and other offenses)

The proposed amendment provides that subsections (b)(5) and (c)(1) of § 2K2.1 apply if the firearm “facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.”

We generally support the adoption of the “facilitation” test. A substantial majority of courts have concluded that the firearm must “facilitate” the other felony offense. These courts treat the “in connection with” language as coterminous with the “in relation to” language in §

924(c)(1),⁵² as interpreted by the Supreme Court in Smith v. United States, *infra*. See United States v. Blount, 337 F.3d 404 (4th Cir. 2003); United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003); United States v. Brown, 314 F.3d 1216, 1222 (10th Cir. 2003); United States v. Letts, 264 F.3d 787, 791 (8th Cir. 2001); United States v. Spurgeon, 117 F.3d 641 (2d Cir. 1997); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996); United States v. Thompson, 32 F.3d 1, 7 (1st Cir. 1994); United States v. Routon, 25 F.3d 815 (9th Cir. 1994).

The Eleventh Circuit has rejected the facilitation test and interpreted the “in connection with” language more broadly. United States v. Rhind, 289 F.3d 690, 694 (11th Cir. 2002). The Fifth Circuit did the same, United States v. Condren, 18 F.3d 1190, 1195-96 (5th Cir. 1994), then limited that approach to drug cases, United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995), then made clear that there was no “*ipso facto* nexus rule between firearms and illicit drugs every time a defendant who is convicted of the abuse of one has some relationship with the other, no matter how attenuated.” United States v. Mitchell, 166 F.3d 748, 753-56 (5th Cir. 1999). In any event, some of these cases (and some earlier cases in the Eighth Circuit as well) appear to treat the “in connection with” language as interchangeable with the standard in § 2D1.1(b)(1) and its commentary. This is inappropriate. First, § 2D1.1(b)(1) requires only that a weapon “was possessed” with no “in connection with” or “in relation to” requirement; its commentary states that it does not apply only if it is “clearly improbable that the weapon was connected with the offense.”⁵³ Second, § 2K2.1(b)(5) and (c)(1) reference and cross-reference offenses other than drug offenses. Thus, the policy underlying the commentary accompanying § 2D1.1(b)(1), *i.e.*, an “increased danger of violence when drug traffickers possess weapons,”⁵⁴ is inapplicable in many cases to which § 2K2.1(b)(5) and (c)(1) apply. Third, the § 2K2.1(b)(5) and (c)(1) adjustments are more substantial than the § 2D1.1(b)(1) adjustment, *i.e.*, four levels or a cross-reference compared to two levels, and thus should require more culpable conduct. Fourth, some courts have interpreted U.S.S.G. § 2D1.1, comment. (n.3), to place the burden on the defendant to disprove a connection between the drugs and the firearm. See United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); *Contra* United States v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994). We believe that this is an incorrect and unconstitutional interpretation in any case, but an additional danger of equating “in connection with” in § 2K2.1 with “mere possession unless a connection is clearly improbable” in § 2D1.1, comment. (n.3) is

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Section 924(c)(1) prohibits the use of a firearm during and “in relation to” the commission of a drug trafficking or violent crime.

53 Section 2D1.1(b)(1) provides for a 2-level upward adjustment “[i]f a dangerous weapon (including a firearm) was possessed” in a drug manufacturing, importing, exporting, or trafficking offense. Application note 3 to § 2D1.1 provides: “The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.”

54 U.S.S.G. § 2D1.1, comment. (n.3).

that the burden would be shifted to the defendant to disprove the even more substantial adjustments under § 2K2.1(b)(5) and (c)(1).

While we generally support adoption of a facilitation test, we believe the phrase “had the potential of facilitating” requires a narrowing clarification, because a firearm always “has the potential of facilitating” another offense. The language comes from Smith v. United States, 508 U.S. 223 (1993) (quoted below), in which the Supreme Court articulated the facilitation test, but the Court made clear in Smith that “potential of facilitating” does not include mere possession or presence of a firearm during another offense, even a drug trafficking offense. Id. at 238. While clarification is needed, the cases are highly fact specific, such that examples may only confuse matters. A simple statement that “mere possession or presence of a firearm is not enough to establish a ‘potential of facilitating’” should be adequate.

The proposed amendment also addresses a circuit split regarding “whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense ‘facilitated or had the potential of facilitating’ another offense.”

Both Option One (applicable to all “other felony offenses” or “other offenses”) and Option Two’s Application Note 14(C) (applicable to other offenses that are drug offenses) are inconsistent with the facilitation test. In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court interpreted the phrase “in relation to” as follows:

The phrase “in relation to” thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he “in relation to” language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm’s presence is coincidental or entirely unrelated to the crime. Instead, the gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense.

Id. at 238 (internal citations and quotation marks omitted). In short, the facilitation test excludes both mere coincidence and mere possession or presence even when the other offense is a drug trafficking offense. Further, a firearm cannot be coincidentally present, and at the same time facilitate or potentially facilitate another offense. Thus, the Commission cannot adopt Option One or Option Two’s Note 14(C) consistent with the facilitation test.

Option Two’s Note 14(C) has further problems. Even if one accepts that “the mere presence” of a firearm presents a heightened risk of violence in connection with drug *trafficking*, it sweeps too broadly. First, subsection (b)(5) is not limited to drug trafficking. “Another felony offense” for purposes of subsection (b)(5) is any federal, state or local offense punishable by more than one year. Simple drug possession is punishable by more than one year in many states. Thus, subsection (b)(5) would add four levels to the sentences of drug *users* who possess firearms for reasons unrelated to the drugs. See § 2D1.1, comment. (n.3) (“enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess

weapons”; compare § 2D2.1 (no gun enhancement for simple possession). Second, the note is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense.

Option Three is the only option that is consistent with the facilitation test and with the purposes underlying § 2K2.1(b)(5) and (c)(1). Sections 2K2.1(b)(5) and (c)(1) were created in response to a concern about the *increased* risk of violence when firearms are used or possessed during commission of another offense. See United States v. McDonald, 165 F.3d 1032, 1037 (6th Cir. 1999). Because there is no *increased* risk of violence when a firearm’s presence is merely coincidental, see Smith, *supra*, § 2K2.1(b)(5) and (c)(1) should apply only when there is evidence that the firearm was not merely coincidentally present, but was used, possessed or intended to be used or possessed to facilitate the other offense.

Finally, the last sentence of Option Two’s Application Note 14(B) should be added to Option Three after the second sentence, amended with the language in bold as follows: “However, if the defendant subsequently **uses or possesses the firearm in connection with another felony offense (under subsection (b)(5)) or another offense (under subsection (c)(1))** that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) **may** apply.”

(E) Lesser Harms and Felon in Possession

This proposal would prohibit a downward departure under § 5K2.11 (Lesser Harms) “in any case in which a defendant is convicted under 18 U.S.C. § 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm.” No explanation is given for this proposal, but we understand that it was proposed by the Department of Justice based on a single case, United States v. VanLeer, 270 F. Supp.2d 1318 (D. Utah 2003), about which the Department is unhappy.

In VanLeer, Judge Cassell relied on § 5K2.11 to grant a four-level downward departure in a felon-in-possession case. The facts were as follows:

VanLeer has a history of non-violent criminal offenses, all apparently stemming from his use of illegal drugs. On September 10, 2002, VanLeer was released from prison after serving time connected with a forgery charge. Several weeks after his release, he met a friend who was in possession of a shotgun that VanLeer had purchased and owned before acquiring a felony conviction. As VanLeer was destitute and needed money for rent, he took the firearm—a Ted Williams 12 gauge shotgun—to a local pawn shop and sold it. During this transaction on October 1, 2002, VanLeer gave his correct name, address, and an inked fingerprint to verify his identity as owner of the firearm to the pawn shop clerk. On November 5, 2002, an investigator from the Salt Lake City Police Department conducted a record check and determined that VanLeer was a previously convicted felon. This led to the filing of a one-count indictment, charging felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Id. at 1319. Finding that VanLeer's conduct -- briefly possessing the gun so that he could dispose of it to obtain money for rent, giving his own name and fingerprints -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death -- and was less harmful and less culpable than a felon continuing to possess a gun, Judge Cassell departed by four levels and sentenced Mr. VanLeer to 18 months in prison. Id. at 1326-27.

This proposal is indefensible for several reasons. First, it would fly in the face of Booker for the Commission to prohibit departure based on a factor that is plainly relevant to the statutory mandate to impose a sentence minimally sufficient to achieve the purposes of sentencing, and would represent a move by the Commission to reinstate mandatory guidelines. Second, judges who blindly adhere to the Guidelines despite Booker would not depart or vary in any felon-in-possession case, unnecessarily using prison space in the already overcrowded Bureau of Prisons and wasting tax dollars. Third, other judges would impose a sentence below the guideline range for the reasons prohibited by this proposal, citing the lesser seriousness of the offense, see § 3553(a)(2)(A). This would result in different treatment in different courts, with the latter approach *required* by the governing law. See 18 U.S.C. § 3553(a). Fourth, such a move would marginalize and foster disrespect for the Guidelines. Before Booker, the Commission prohibited or restricted consideration of many offender characteristics and offense circumstances that were relevant to the purposes of sentencing.⁵⁵ To continue in that vein after Booker is contrary to the statute that now governs sentencing. As Justice Breyer said at the Guidelines' inception and again recently, the Commission was intended to learn from judicial departures.⁵⁶ The Commission should not begin anew to eliminate departures, especially based on the Department of Justice's unhappiness with a plainly justified result.

(F) "Brandished" or "Otherwise Used"

The proposed amendment addresses a circuit conflict regarding whether waiving a firearm or pointing it at a specific person constitutes "brandishing" or "otherwise using." This normally comes up in the robbery guideline, where there is a several tiered system of increases for threats and weapons in § 2B3.1(b)(2). Currently, the three tiers for firearms are a 7 level increase for discharge, a 6 level increase for "otherwise used," and a 5 level increase for "brandish" or possess.

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Without any congressional directive to do so, the Commission prohibited consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, and post-sentencing rehabilitation on re-sentencing, and strictly limited consideration of age, mental and emotional conditions, physical condition or appearance, and military, civic, charitable or public service, and good works.

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Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988); Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, *30 (Jan./Feb. 1999).

The interpretive difficulty has been in deciding where to draw the line between “brandishing” and “otherwise used” on the continuum of factual possibilities. This has been made particularly difficult by the definition of “otherwise used,” which merely states that it is less than discharging, but “more than brandishing, displaying or possessing.” § 1B1.1, App. Note 1(I).

The typical scenario in which this issue comes up is a bank robbery where the defendant waves a firearm about or points the firearm at a specific bank employee. A majority of courts have held that “pointing a weapon at a specific person or group of people in a manner that is explicitly threatening is sufficient to make out ‘otherwise use’ of that weapon.” United States v. Orr, 312 F.3d 141, 145 (3d Cir. 2002); see also United States v. LaFortune, 192 F.3d 157 (1st Cir. 1999); United States v. Nguyen, 190 F.3d 656 (5th Cir. 1999); United States v. Warren, 279 F.3d 561 (7th Cir. 2002); United States v. Fuller, 99 F.3d 926 (9th Cir. 1996); United States v. Rucker, 178 F.3d 1369 (10th Cir. 1999). These courts do not require that the defendant physically contact the victim or victims with the firearm or dangerous weapon for the “otherwise use” adjustment to apply. Some courts have made clear that explicit threats need not be verbal for the conduct to qualify as “otherwise use.” See, e.g., Nguyen, 190 F.3d at 661; Orr, 312 F.3d at 145.

A minority position holds that “the pointing of [a] weapon in a threatening manner, even when coupled with a verbal threat, constitutes ‘brandishing,’ rather than ‘other use’ of the weapon.” United States v. Matthews, 20 F.3d 538, 554 (2d Cir. 1994). At the time of the Matthews case, the definition of brandishing specifically stated that brandishing meant “that the weapon was pointed or waved about, or displayed in a threatening manner.” § 1B1.1, App. Note 1(C). Since Matthews, the Commission amended the definition of brandishing, excising the language about pointing or waving a firearm and using a new definition imported from 18 U.S.C. § 924(c), which emphasizes situations where the firearm is not seen at all, or only partially visible, so long as its presence is made known in order to intimidate. The reason for the amendment evinces no intention that the deletion of the language about pointing, waving or displaying in a threatening manner to alter the meaning of brandishing or to move those fact patterns to “otherwise used.” See U.S.S.G. App. C, amend. 601.

A middle ground has been struck by other courts by not applying the “otherwise used” enhancement when a firearm was pointed at a person with orders to open the register, but no other threats were made. United States v. Gonzales, 40 F.3d 735 (5th Cir.), cert. denied, 514 U.S. 1074 (1995); United States v. Moerman, 233 F.3d 279 (6th Cir. 2000). These decisions emphasize that a broader interpretation of “otherwise used” would subsume all brandishing cases and make that intermediate increase meaningless.

Option 1 of the proposed amendment “combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual.” It effectively broadens the definition of “otherwise used” to include what has classically been

described as “brandishing” (pointing or waving the firearm).⁵⁷ It then moves brandishing to the same 6 level increase as otherwise used in the robbery and extortionate threat guidelines.

Option 1 is inappropriate for several reasons. Under this proposal, a defendant who allows a firearm to be seen in a holster during a robbery will be punished the same as one who waves a firearm about in a threatening manner, and the same as a defendant who strikes a bank employee with a firearm or holds a firearm to the head of a bank employee during a robbery. The latter examples present both a greater risk of harm to, and a greater fear by, the targeted employee(s). This option simply collapses any attempt to have a continuum and appropriately graded penalties when a firearm is involved. If the Commission chooses to expand the definition of “otherwise used” to clearly encompass general pointing and waving in order to address the circuit conflict, then brandishing should be left at a level 5 increase. It should be noted that the only brandishing cases remaining would be those in which the firearm was not taken out and used other than to make its presence known.

Option 1 also calls for comment as to whether, if the Commission chooses this approach, it should make similar changes in other guidelines with weapon increases. The other guidelines at issue do not have the same set of increases as §§2B3.1 and 2B3.2. Rather, they treat dangerous weapons and firearms the same and only deal with 3, 4, and 5 level increases. Therefore, the same solution would not work. More important, the same observation would apply to the collapsing of the graded responses to a continuum of behavior. Moving all “brandishing” cases to the “otherwise used” level punishes a wide range of less culpable behavior more harshly than necessary. Therefore, this solution should not be applied to other guidelines.

Option 2A is unsatisfactory because, while it purports to distinguish between “otherwise using” and “brandishing,” it blurs the distinction by including “implicit threats” in the definition of “otherwise used,” while including “generally point[ing] or wav[ing a firearm] in a threatening manner” in the definition of “brandished.” It appears that rather than solve the circuit conflict, these definitions will perpetuate it. As one court has concluded, “When a robber points a gun, or what appears to be a gun, at a robbery victim or bystander, that gesture is inherently threatening . . . [W]e should not have to point out, for it is tautological, that there can be no ‘display of the gun in a threatening manner’ . . . without an implicit threat.” Matthews, 20 F.3d at 554. Thus, it appears that the same actions are covered by both definitions. This will likely generate extensive litigation and additional circuit splits rather than solving the problem.

We urge the Commission to adopt Option 2B. Defining “otherwise used” to require physical contact (or attempted physical contact) with the victim creates a bright-line rule that

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“Brandish” is defined by Merriam-Webster as:

- 1 : to shake or wave (as a weapon) menacingly
- 2 : to exhibit in an ostentatious or aggressive manner

<http://www.m-w.com/dictionary/brandish>.

would reduce litigation. It also incrementally increases punishment for more culpable offenders. It accords with a common sense definition of brandishing, which includes showing and pointing a firearm, but leaves room for greater punishment for those who do more than that.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee
AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
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March 27, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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Washington, DC 20002-8002

Re: Comment on Proposed Emergency Amendments to Anabolic Steroids Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment further on the Commission's proposed emergency amendments to the anabolic steroids guidelines.

In written testimony presented to the Commission on March 15, 2006, Jodi L. Avergun, Chief of Staff of the Drug Enforcement Administration, argued against using a purity-based scheme to measure anabolic steroids. In her testimony, Ms. Avergun acknowledged that there are other controlled substances which are currently measured by purity. Written Testimony of Jodi L. Avergun, 03/15/06 ("Avergun Testimony") at 12. Those substances are: methamphetamine, amphetamines, PCP and oxycodone. Avergun Testimony at 13. Ms. Avergun supports using a purity-based measure for these substances because it is "particularly crucial to ensure that the resulting sentences are justified by the offense conduct" in light of the fact that the maximum penalty for trafficking in any of these substances is life imprisonment. Avergun Testimony at 13.

The implication of Ms. Avergun's testimony is that it is less crucial to ensure that the resulting sentences are justified in cases involving trafficking in anabolic steroids because the maximum penalty is only five years imprisonment. We strongly object and urge the Commission to adopt a purity-based measure precisely because it is crucial to ensure that all sentences – including those for trafficking in anabolic steroids – are justified by the offense conduct.

Ms. Avergun also stated that using a dosage methodology instead of a purity-based one would only result in a two-level increase regardless of whether Option 1 or Option 2 is adopted. Avergun Testimony at 15. The costs and delays Avergun suggested would result if a purity-based model were adopted would, in her opinion, far outweigh the "cost" of a two-level increase for anabolic steroid traffickers. Avergun Testimony at 15. This aspect of the testimony fails to appreciate both human and institutional costs of increased punishment. A two-level increase is

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approximately six (6) additional months of a person's life. Given that it costs the Bureau of Prisons approximately \$25,000/year to incarcerate someone, the cost/benefit analysis set forth in Avergun's testimony does not capture the real costs of using a dosage rather than purity-based method of measurement.

Finally, Ms. Avergun explained that most penalties for drug offenses rely on the weight of the mixture or substance containing a controlled substance and not the actual amount of controlled substance in the mixture and that Congress adopted such an approach with street drugs in mind. Avergun Testimony at 11. Anabolic steroids are not street drugs and the reasons for using the weight of the total quantity distributed rather than the amount of pure drug involved do not apply to steroids. For one thing, street drugs do not carry labels indicating the amount of pure steroid.

The Commission has recognized that "the weight of different inactive ingredients mixed with the drug – dilutants, carrier media, and even humidity – can result in disparate sentences for offenders who sell similar numbers of doses of a drug" and that "arbitrary variations due to the weight of inactive ingredients remain." Fifteen Years of Guideline Sentencing at 50. Using the "mixture or substance" approach urged by Ms. Avergun to determine the quantity of anabolic steroid involved only ensures more disparity and more arbitrary variations – a result the Commission cannot permit.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Sincerely,



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Federal Public Defender

ANNE BLANCHARD
Sentencing Resource Counsel

AMY BARON-EVANS
Sentencing Resource Counsel

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March 13, 2006

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Re: 2006 Proposed Amendments to the Sentencing Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the proposed amendments pertaining to the Transportation Act, the Intelligence Reform and Terrorism Prevention Act of 2004, False Registration of Domain Names, Miscellaneous Laws, Application Issues, Obstruction of Justice Circuit Conflicts, Privilege Waiver, Crime Victims' Rights, and Reductions in Terms of Imprisonment Based on Bureau of Prisons Motion.¹

We incorporate by reference the comments we submitted regarding proposed amendments pertaining to Steroids (see letter dated February 28, 2006); Immigration (see written and oral testimony, February 21 and March 6, 2006); Firearms (see letter dated March 9, 2006); Intellectual Property (see letter dated August 3, 2005); and Obstruction of Justice in terrorism investigations (see letter dated October 7, 2005).

We thank you for the opportunity to comment and hope that our input is useful.

I. Transportation Act

Section 4210 of the Transportation Act creates a new offense at 49 U.S.C. § 14915 for failure to give up possession of household goods, defined as "the knowing and willful failure, in violation of a contract" to deliver or unload household goods, with a maximum penalty of two years. The Commission proposes to implement 49 U.S.C. § 14915 by referring it to § 2B1.1. Section 2B1.1 covers offenses involving theft, embezzlement, property destruction, fraud and deceit. This Class E Felony is essentially

¹ Thanks to Assistant Federal Defenders Randy Alden, Alan DuBois, Beverly Dyer, Corey Endo, Lisa Freeland, Steve Jacobson, Esther Salas, and Fredilyn Sison for their assistance in preparing these comments.

a civil contract breach that Congress criminalized. A violation occurs merely by failure to deliver; no theft or destruction of property, fraud or deceit is required. Disputes between trucking companies and individuals are typically resolved and household items returned, causing no lasting harm.

A first offender who failed to deliver \$125,000 worth of household goods (a reasonable estimate for a middle class household), though later returned, would, if the court interpreted the "intended pecuniary harm" to be the value of the property not delivered in compliance with the contract, be punished by 21-27 months, at the statutory maximum, and the same as an embezzler or thief who permanently stole \$125,000. In many cases, the guideline sentence would exceed the statutory maximum. In short, the punishment would be disproportionate to the offense. The appropriate solution would be to promulgate a new guideline for this unique offense with a graduated table that goes no higher than two years. Alternatively, the Commission should promulgate an application note in § 2B1.1 stating that in cases under 49 U.S.C. § 14915, the loss is "actual loss" as defined in Application Note 3(A)(i).

The Commission requests comment on whether, and if so how, it should implement section 7121 of the Transportation Act. Section 7121 amends 49 U.S.C. § 5124, which already criminalizes knowing and willful violations, to increase the maximum penalty to ten years if a release of hazardous materials occurs and results in death or serious bodily injury. Congress did not direct the Commission to increase penalties, and rightly so.

Under the current guideline, § 2Q1.2, which provides for a 9-level increase for a substantial likelihood of death or serious bodily injury and a 2-level increase for any violation of 49 U.S.C. § 5124, a release of hazardous materials resulting in death or serious bodily injury results in a base offense level of 23, 25, 27, 29, 31 or 33. In Criminal History Category I, the corresponding guideline ranges are 46-57 months, 57-71 months, 70-87 months, 87-108 months, 108-135 months, and 135-168 months. Thus, we think it is obvious that the Commission should not increase penalties under the guideline. If anything, the Commission should reduce the 9-level increase for a substantial likelihood of death or serious bodily injury, and provide for a 9-level increase if death or serious bodily injury actually results.

II. Intelligence Reform and Terrorism Prevention Act of 2004

A. Section 5401: 8 U.S.C. § 1324

Section 5401 of the Act added a new subsection (a)(4) to 8 U.S.C. § 1324 as follows:

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

- (A) the offense was part of an ongoing commercial organization or enterprise;
- (B) aliens were transported in groups of 10 or more; and
- (C)(i) aliens were transported in a manner that endangered their lives; or
- (ii) the aliens presented a life-threatening health risk to people in the United States.

The Commission proposes three options. Option One would create a specific offense characteristic that would add 2 levels if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." Option Two would create a specific offense characteristic that would add 2 levels if "the offense was part of an ongoing commercial organization or enterprise." One version of Option Three would provide for a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." The other version of Option Three would provide for a potential upward departure if "the offense was part of an ongoing commercial organization or enterprise."

Option Two and the latter version of Option Three would be contrary to congressional intent, on the face of the statute which requires that all three requirements are met, and in the legislative history which rejected a prior version that would have enhanced the sentence if any one of the requirements was met. See H. Rep. No. 108-724, § 3041. We recommend a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)."

As to the Issue for Comment, the Commission should not define "ongoing commercial organization" in a vacuum. It should wait until fact patterns develop and it appears that a definition is necessary based, for example, on an unfair interpretation by the courts or a circuit split.

B. Section 6702: 18 U.S.C. § 1038(a)

Section 6702 creates a new offense at 18 U.S.C. § 1038(a), entitled "False Information and Hoaxes," prohibiting "conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute" a variety of violations of the law ranging from minor firearms offenses to aircraft piracy,² and prohibiting "a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces" during a war or armed conflict. The maximum penalties are 5 years, 20 years if serious bodily injury results, or life if death

² *i.e.*, Title 18, chapter 2 (destruction of aircraft or motor vehicles, violence at international airports, fraud involving aircraft parts), 10 (biological weapons), 11B (chemical weapons), 39 (explosives and combustibles), 40 (explosive materials), 44 (firearms), 111 (shipping), or 113B (terrorism); 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel); Title 49 §§ 46502 (aircraft piracy), 46504 (use of dangerous weapon in assaulting or intimidating flight crew member or attendant), 46505(b)(3) (explosive or incendiary device on aircraft) or (c) (weapon or explosive on aircraft willfully or with reckless disregard for human life), 46506 (commission of homicide or attempted homicide on an aircraft), or 60123(b) (damaging or destroying pipeline facility).

results. Most convictions would be subject to a maximum punishment of five years, since it is unlikely that serious bodily injury or death would result from a hoax or false information.

The proposed amendment would refer an offense under 18 U.S.C. § 1038(a) to § 2A6.1. It is inappropriate to equate a hoax or false statement with a threat. A threat, at minimum, is a “statement that *expresses an intent* to inflict bodily harm,” in addition to being susceptible to reasonable belief.³ Based on our experience, many of these offenses are going to involve mentally unstable people who either believe that some disaster is afoot or who think that the hoax is a joke. A false report that a neighbor or estranged spouse is a convicted felon or drug user and possesses a gun would also be subject to prosecution under 18 U.S.C. § 1038(a). Many of these offenses, in other words, will be akin to a harassing telephone call, which has a base offense level of 6 rather than 12 if it “did not involve a threat to injure a person or property.” § 2A6.1(a)(2).

If the Commission is going to include hoaxes and false statements in a threats guideline, it should likewise distinguish it from a threat by providing for a lesser base offense level, or an invited downward departure, if the offense did not involve an expression of intent to injure a person or property. We suggest two alternatives:

Defenders’ Option One would amend § 2A6.1(a)(2) as follows:

- (2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E), or 18 U.S.C. § 1038, that did not involve a threat to injure a person or property.

Defenders’ Option Two would create an application note stating as follows:

If the defendant is convicted of an offense under 18 U.S.C. § 1038 that did not involve a threat to injure a person or property, a downward departure may be warranted.

We strongly object to the proposal to create a cross reference to §2M6.1 for conduct “evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).” This would permit “relevant conduct” which could have been but was not charged, was dismissed, or of which the defendant was acquitted, rather than the offense of conviction, to increase the sentence dramatically based on a mere preponderance of the evidence. Title 18 U.S.C. § 2332a prohibits, *inter alia*, “threaten[ing]” to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), which is punishable by imprisonment for life (or the death penalty), and is already referenced to §2M6.1. If the government obtains a conviction under 18 U.S.C. § 2332a for a threat to use a weapon of mass destruction, the guideline range will be determined under §2M6.1. If the government does not obtain

³ United States v. Fulmer, 108 F.3d 1486, 1495 (1st Cir. 1997).

such a conviction, a cross reference to that guideline is not currently and should not be made available. Nothing in Section 6702 suggests that the Commission should "implement" the new hoax statute by creating a cross reference for a threat to use weapons of mass destruction. Thus, we fail to see why the Commission would expand the most criticized and constitutionally suspect features of the Guidelines.⁴ See Blakely v. Washington, 542 U.S. 296, 306 (2004).

C- F. Sections 6803, 6903, 6905, 6906: 18 U.S.C. §§ 832, 2332g, 2332h, 175c

Part C of the proposal would reference the new offense in 18 U.S.C. § 832 to § 2M6.1. This new offense includes participating in or providing "material support or resources" to a nuclear or weapons of mass destruction program or attempting or conspiring to do so, with a statutory maximum of 20 years, and also development, possession, threats to use, or use of a radiological weapon, with a statutory maximum of life. "Material support or resources" is defined to include a broad range of support or resources,⁵ which (as indicated by the lower statutory maximum) defines much less serious conduct than developing or using a radiological weapon. Yet, under § 2M6.1, a person who was convicted of conspiring to provide material support or resources to such a program (for example, by providing lodging to a relative involved in developing a nuclear weapon), would be punished exactly the same as the person who actually developed or used the weapon. Since this offense is new and it is difficult to predict the fact patterns to which it may be applied, we recommend that the Commission promulgate an Application Note providing for downward departure as follows:

If the defendant was convicted under 18 U.S.C. § 832(a), a downward departure may be warranted if the offense level overstates the seriousness of the offense.

⁴ American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

⁵ "Material support or resources" is defined in 18 U.S.C. § 2339A(b) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

Parts C, E and F of the proposal would reference the new offenses in 18 U.S.C. §§ 832, 2332h and 175c to § 2M6.1. The first two statutes include threats to use radiological weapons or dispersal devices; the third includes threats to use the variola virus. At present, § 2M6.1(a)(4) provides for a base offense level of 20 if the offense involved a threat to use a list of weapons or materials if there was no intent or ability to carry out the threat. Though “nuclear weapon” in this list probably includes a “radiological weapon” (as in § 832(c)) and might include a “radiological dispersal device” (as in § 2332h), and “biological agent” probably includes the variola virus (as in § 175c), it would be clearer if “radiological weapon,” “radiological dispersal device,” and “virus” were specifically added to § 2M6.1(a)(4).

Part D would reference the new offense in 18 U.S.C. § 2332g to U.S.S.G. § 2K2.1. This offense includes a threat to use a rocket, missile, launching device or parts, but § 2K2.1 would result in an offense level of at least 31 even if there was no intent or ability to carry out the threat. See § 2K2.1(a)(5), (b)(3)(A). This is in stark contrast to § 2M6.1(a)(4), which provides for a base offense level of 20 for threats under those circumstances involving equivalent weapons and materials. Thus, we recommend that the Commission amend § 2K2.1(b)(3)(B) to provide for a 2-level rather than a 15-level increase under those circumstances:

- (B) a destructive device other than a destructive device referred to in subdivision (A), or a threat to use a destructive device referred to in subdivision (A) that did not involve any conduct evidencing an intent or ability to carry out the threat, increase by two levels.

III. False Registration of Domain Name

Section 204(b) of Pub. L. 108-482 directs the Commission to “review and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense *carried out online* that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts,” and, specifically, to “provide sentencing enhancements for anyone convicted of any felony offense *furthered* through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used *in connection with* the violation.”

The proposed amendment would create a new Chapter Three adjustment, whenever a “statutory enhancement under 18 U.S.C. § 3559(f)(1) applies,” of 1, 2, 3 or 4 levels.

18 U.S.C. § 3559(f)(1) provides for an increased statutory maximum (the lesser of doubling the maximum or an additional seven years) if a defendant who is “convicted of a felony offense (other than an offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that

domain name in the course of that offense.” Under (f)(2), “falsely registers” means “registers in a manner that prevents the effective identification of or contact with the person who registers.”

We have two concerns with the proposal. First, while it incorporates the requirement of a felony and the statutory definition of “falsely registers,” it omits certain requirements from the statutory directive, italicized above. The Commission should not go further than Congress required. Second, it does not exclude the possibility that this adjustment would apply in addition to an adjustment for obstruction of justice, resulting in impermissible double counting. U.S.S.G. §2B1.1, Application Note 8(C) addresses an analogous double counting concern by precluding the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

We believe that a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add two levels would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples.

We recommend the following replacement language:

If (1) a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, (2) the felony offense was carried out online, and (3) the felony offense was furthered through knowingly falsely registering a domain name, increase by 1 level. If the conduct that forms the basis for an adjustment under this section is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

IV. Miscellaneous Laws

A. Section 9(A): 18 U.S.C. § 1369

The Veterans’ Memorial Preservation and Recognition Act of 2003, section 2, codified at 18 U.S.C. § 1369(a), prohibits the destruction of veterans’ memorials and establishes a ten-year maximum sentence. The proposed amendment would (1) refer violations of the new offense to USSG §§ 2B1.1 (Theft, Property, Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources), and (2) establish an enhancement of two, four, or six levels if the offense involved a national cemetery or veteran’s memorial.

The Commission should use a uniform two-level enhancement rather than raising it (for both national cemeteries and veterans' memorials) to four or six levels. The Commission previously determined that a two-level increase was appropriate for offenses involving the property of a national cemetery. See USSG §§ 2B1.1(b)(6), 2B1.1(b)(2). Both the Veterans' Cemetery Protection Act, which called for a two-level enhancement for property offenses against cemeteries, and the Veterans' Memorial Preservation and Recognition Act, were enacted by Congress to punish offenders who willfully injure or destroy protected property of the United States. Congress did not instruct the Commission to increase penalties for either national cemeteries or veterans' memorials. No explanation is offered for an increased enhancement. Sentences are too high already; they should not be increased without a congressional directive or very compelling reason.

B. Section 9(B): 7 U.S.C. § 7734

The Plant Protection Act of 2002 increased the maximum penalties available for certain violations of 7 U.S.C. § 7734. Specifically, the Act increased the maximum penalty for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale "in violation of this chapter" to five years for the first offense and ten years for any subsequent offense. The Act did not change the maximum one-year penalty for other knowing violations of Title 7 and other offenses involving documents covered by Title 7.

In response to the legislative change, the Commission has proposed two options. Option One would increase the base offense level to either 8 or 10; Option Two would provide for an upward departure.

We believe the current reference to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6, is sufficient and object to both proposed options. Although Congress increased the maximum punishment for such offenses, Congress did not instruct the Commission to increase the applicable guideline ranges. When Congress decides that an increase in the guideline range is necessary, it passes legislation suggesting or mandating such an increase. Congress has not done so here and thus the Commission should make no change.

The proposed amendment is unnecessary because the guideline already provides for an upward departure if "death or bodily injury, extreme psychological injury, property damage or monetary loss resulted." USSG § 2N2.1, comment. (n.3). Sentencing courts therefore have the means to increase the sentence in unusual circumstances. Moreover, because the guidelines are now advisory, see United States v. Booker, 125 S. Ct. 738 (2005), courts have the flexibility to increase the sentence if the movement of the plants resulted in some greater harm other than those addressed in the departure provision. See 18 U.S.C. § 3553(a)(1) (instructing courts to consider "nature and circumstances of the offense"); § 3553(a)(2)(A) (instructing courts that sentence must "reflect the seriousness of the offense").

If the Commission believes it is necessary to adopt one of the two proposed options, Option Two is more appropriate, for the reasons the Commission stated: "because of the expected infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis."

In addition to imposing unnecessary rigidity, Option One would also lead to unnecessarily severe sentences. Individuals convicted of violating the Plant Protection Act are likely to be first-time offenders. Increasing the base offense level from a six to a ten would increase the guideline range, for an individual with a criminal history category I, from 0-6 months to 6-12 months. Such an increase would contravene the Commission's mandate to "insure that guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 18 U.S.C. § 994(j).

C. Section 9(D): 18 U.S.C. § 1841

The Unborn Victims of Violence Act of 2004 created a new offense, codified at 18 U.S.C. § 1841, for causing death or serious bodily injury to a fetus while engaging in conduct that violates one of several enumerated statutes. The statute provides that the maximum penalty for the offense shall be the penalty "for that conduct had that injury or death occurred to the unborn child's mother." 18 U.S.C. § 1841(a)(2)(A). In cases where the person "intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111 [murder], 1112 [manslaughter], and 1113 [attempted murder or manslaughter]." 18 U.S.C. § 1841(a)(2)(C).

The proposed amendment refers violations of 18 U.S.C. § 1841(a)(1) to USSG § 2X5.1 (Other Offenses), which instructs courts to apply "the most analogous offense guideline." Thus, if the defendant is convicted under 18 U.S.C. § 1841(a)(1), the court would apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

We object to the proposed upward departure provision set forth in proposed Application Note 2(B). This proposal states that "an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero."

The upward departure provision is contrary to Congress's intent. A violation of the Unborn Victims of Violence Act "does not require proof that . . . the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying crime was pregnant" or proof that "the defendant intended to cause the death of, or bodily injury to, the unborn child." 18 U.S.C. §§ 1841(a)(2)(B)(i) and (ii). In all circumstances other than the intentional killing or attempted killing of the unborn child, which is covered separately by 18 U.S.C. § 1841(a)(2)(C), Congress mandated that the

punishment for the new offense be the same as that provided under Federal law had the injury or death occurred to the child in utero's mother. See 18 U.S.C. § 1841(a)(2)(A). Thus, the enhancement is contrary to Congress's intent. Again, the Commission should not encourage higher sentences than Congress intended or required.

Moreover, in light of the nature of the offense, a defendant convicted under 18 U.S.C. § 1841(a)(1) will likely be exposed to emotional and other volatile influences at sentencing. The proposed invitation for an upward departure is objectionable because of the risk that these influences might provoke inappropriately harsh sentences. Finally, given the highly-charged nature of the offense, the proposed upward departure provision would invite unwarranted sentencing disparities among different defendants in different districts sentenced by different judges with different views.

We strongly oppose the proposed upward departure.

D. Section 9(E): Proposed Guideline § 2X5.2

Title 18 U.S.C. § 3559(a)(6) classifies as a Class A misdemeanor an offense punishable by one year or less but more than six months. The Commission has proposed guideline USSG § 2X5.2 to apply to five new Class A misdemeanor offenses⁶ -- one of which, the Social Security Administration Act, 42 U.S.C. § 1129, we have been unable to locate on Westlaw or <http://thomas.loc.gov/> -- and any Class A misdemeanor not referenced to a more specific Chapter Two guideline.

Proposed § 2X5.2 provides a base offense level of six and a specific offense characteristic of two for subsequent convictions under the same provision of law as the instant offense of conviction.

We believe that a base offense level of four, rather than six, is appropriate, consistent with guidelines for other Class A misdemeanors. See, e.g., USSG § 2B2.3 (base offense level 4 for criminal trespass); § 2D2.1(a)(3) (base offense level 4 for simple possession of certain controlled substances and list I chemicals); § 2J1.5 (base offense level 4 for material witness's failure to appear at misdemeanor trial); § 2P1.2 (base offense level 4 for providing or possessing certain contraband in prison); § 2T1.7 (base offense level 4 for failing to deposit collected taxes in trust account as required after notice); § 2T2.2 (base offense level 4 for regulatory offenses); § 2T3.1 (base offense level 4 for smuggling if tax loss did not exceed \$100).

⁶ As listed in the Synopsis, these are (1) the interstate movement of animals for fighting, in violation of 18 U.S.C. § 2156; (2) the corrupt and forcible interference with the administration of the Social Security Administration Act committed by threats of force, in violation of 42 U.S.C. § 1129(a); (3) illegal tampering with a consumer product, in violation of 18 U.S.C. § 1365(f); (4) the misuse or illegal disclosure of DNA analyses, in violation of 42 U.S.C. § 14133; and (5) the knowing capture of an image of an individual's "private area" without that person's consent and under circumstances in which the person has a reasonable expectation of privacy, in violation of 18 U.S.C. § 1801.

No explanation is given as to why some Class A misdemeanors should be subject to a base offense level 1 ½ times higher than that for other Class A misdemeanors. As the Commission points out, many misdemeanors not covered by another Chapter Two guideline are regulatory violations. Moreover, a base offense level of four would, and should, reflect the fundamental difference between a misdemeanor and a felony.

The proposed two-level SOC for subsequent offenses would import the unwise policy in the immigration area of double counting criminal history into a broad range of Class A misdemeanors. This would foster litigation, and the Commission has not offered any justification for it.

We do not believe that the Commission should reference any Class A misdemeanors currently referenced to a guideline with a lower base offense level to proposed § 2X5.2, and have not identified any Class A misdemeanors not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed §2X5.2.

Again, with sentences that are already too severe and the BOP 40% overcapacity, we do not believe that the Commission should be raising penalties absent a congressional directive or a very compelling reason to do so.

V. Application Issues

A. Cross Reference to Second Degree Murder Guideline in § 2D1.1

The Commission proposes adding another cross reference to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Possession with Intent to Commit These Offenses; Attempt or Conspiracy) to permit courts to apply § 2A1.2 (Second Degree Murder) in drug cases in which the conduct involved is second degree murder if the resulting offense level is greater than that determined under the drug guideline.

We oppose any expansion of unconvicted conduct because it is unfair and only serves to transfer sentencing power to the government. The resulting guideline range would be severe -- 20 years to life, depending on criminal history -- based on a mere preponderance of the evidence. If death results and the conduct does not amount to first degree murder, the court can use its discretion to increase the sentence commensurate with the seriousness of the offense and other relevant factors. See 18 U.S.C. § 3553(a). Again, we strongly urge the Commission not to expand one of the most pernicious aspects of the Guidelines, criticized by most participants, disinterested observers, and the Supreme Court. See Blakely v. Washington, 542 U.S. 296, 306 (2004).

B. § 3C1.3 (Offenses Committed While on Release)

The Commission proposes eliminating § 2J1.7 and moving the three-level enhancement for cases in which the statutory sentencing enhancement at 18 U.S.C. §

3147 applies, to a new Chapter Three Adjustment, § 3C1.3 (Offenses Committed While on Release), but eliminating important commentary protective of defendants' rights.

Without explanation, the proposal would eliminate the commentary explaining, based on the legislative history, that the sentence must be consecutive but that there is no requirement as to any minimum term. The commentary should be retained. Otherwise, some courts (but not others) will believe that a substantive change was intended, when that is not the case. This will complicate sentencings by requiring the parties and courts to try to divine the meaning of the change, resulting in different interpretations, and unwarranted disparity.

Without explanation, the Commission proposes to eliminate the commentary stating that the enhancement may be imposed "only in the case of a conviction for a federal offense that is committed while on release on another federal charge." This commentary is consistent with the statutory definition of "offense." See 18 U.S.C. § 3156(a)(2). As above, eliminating it would create confusion and unwarranted disparity. The commentary should be retained.

The proposal would also eliminate the commentary requiring "sufficient notice to the defendant by the government or the court," claiming that a majority of courts have found that there is no notice requirement for 18 U.S.C. § 3147 to apply. This is not correct. Three circuits have squarely held that the statutory enhancement may not be applied unless the court gave the defendant specific warning *in the pretrial release order* of potential enhancement under 18 U.S.C. § 3147. See United States v. Cooper, 827 F.2d 991, 994 (4th Cir. 1987); United States v. Onick, 889 F.2d 1425, 1434 (5th Cir. 1989); United States v. DiCaro, 852 F.2d 259, 264-65 (7th Cir. 1988). Five circuits have held that pre-release notice is not required but that *pre-sentence* notice is required by the Guideline and/or the Due Process Clause. United States v. Kentz, 251 F.3d 835, 840-41 (9th Cir. 2001) (citing guideline and due process); United States v. Hecht, 212 F.3d 847, 849 (3^d Cir. 2000) (citing guideline) (Alito, J.); United States v. Bozza, 132 F.3d 659, 661 (11th Cir. 1998) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Browning, 61 F.3d 752, 757 (10th Cir. 1995) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Feldhacker, 848 F.2d 293, 299 (8th Cir. 1988) (citing guideline and due process). The Second Circuit has not decided if pre-release notice must be given, but recognized that notice must be given before sentencing. United States v. Vazquez, 113 F.3d 383, 389-90 (2^d Cir. 1997). The Sixth Circuit has stated in *dicta* that pre-release notice was not required, and declined to decide whether pre-sentence notice was required because the defendant waived the argument. United States v. Lewis, 991 F.3d 322, 324 (6th Cir. 1993).

Particularly in light of the Appendi to Booker line of cases, the Commission should not eliminate any notice requirement when a *majority of circuits has held that pre-sentence notice* is required by the Guideline or both the Guideline and the Due Process Clause and *no circuit has ever held that pre-sentence notice is not required*. This, of course, makes sense, because a defendant must prepare to defend himself against an

allegation of an entirely separate offense. Instead, the Commission should change the sentence to read as follows:

An enhancement under 18 U.S.C. § 3147 may be imposed only if the defendant is given sufficient notice prior to sentencing, and applies only in the case of a conviction for a federal offense committed while on release on another federal charge.

Defendants do not always receive notice, see Lewis, supra, and this enhancement is not covered by Rule 32(h). As with elimination of the other commentary noted above, elimination of the notice provision could be interpreted as meaning that no pre-sentence notice need be given, and will create confusion, unfairness, and unwarranted disparity.

VI. §3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

We have a number of serious concerns about the Commission's proposed amendments to U.S.S.G. § 3C1.1. An enhancement for obstruction of justice should apply when the purpose of the conduct is to obstruct or impede the investigation, prosecution or sentencing of the offense of conviction, the defendant's relevant conduct or a closely related offense. In other words, it should apply only to conduct which is intended to thwart the truth-seeking function of the proceeding. It should not apply to obstructive conduct related to administrative or ancillary matters, such as pre-investigation conduct not directed at thwarting the investigation itself, to perjury in a civil proceeding between private parties, or to misrepresentations on CJA applications, since such conduct does not have the purpose or potential to impede the investigation or subvert the outcome of the case. Dishonesty of this sort may be dealt with through denial of the acceptance of responsibility reduction or through the district court's discretionary choice of sentence either within or outside the advisory guideline range. Therefore, we support the addition of language which makes it clear that, in order for the obstruction enhancement to apply, the conduct must have been "intended to prevent or hinder the investigation, prosecution, or sentencing" of the offense of conviction. For the reasons below, we oppose expanding the reach of the obstruction enhancement to include conduct that occurs before the onset of an official investigation, to non-governmental civil proceedings or to CJA applications. The current guideline, which limits the enhancement to post-investigation conduct, provides a clear, bright-line rule for courts to follow.

By contrast, the proposed amendment would open up an essentially unlimited range of conduct for courts to scrutinize for some sign of obstructive intent. Such an inquiry would present a host of evidentiary and epistemological problems. How would a court go about determining whether an act was intended to hinder an investigation that did not exist at the time the act was committed? Does a defendant who hides questionable bookkeeping decisions from an employer to avoid being fired commit obstruction, even if no criminal investigation has begun and the defendant is unaware of the relevant law? Does the defendant have to know that an investigation is likely or merely that there is a possibility the conduct will be investigated? Can obstruction take

place before the crime if, for instance, the defendant lays the groundwork for an alibi or obtains false identification in case of apprehension?

The problem with expanding the enhancement to pre-investigation conduct is the inevitable dilution of the bond between the allegedly obstructive conduct and the offense, as well as the difficulty of accurately discerning an obstructive intent in pre-investigative conduct which may have been motivated by a host of factors at the time it occurred, but will invariably be viewed through the distorting lens of post-conviction hindsight (and the preponderance of the evidence standard) at sentencing. Though some courts have criticized the temporal requirement contained in the current guideline, even they have recognized it serves a purpose. For instance, the Sixth Circuit has noted that it served "to require, at least in an indirect sense, a nexus between the acts of obstruction and the crime of conviction. With no causal link to the crime of conviction, obstructive conduct could conceivably include acts wholly unrelated to the crime of conviction or conduct that should have been the subject of separate criminal charges." United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003).

The temporal requirement also serves to limit the reach of what could otherwise be an extraordinarily broad enhancement. Offenders hide their loot, destroy their disguises, discard their weapons. All of these acts are part and parcel of the offense itself, but arguably "obstructive" in the sense that they make discovery of the crime more difficult. Rare is the criminal who does not attempt to cover his tracks in some way. Absent some means of singling out defendants who act with the specific purpose of obstructing justice, the §3C1.1 enhancement could be applied in almost every case. Requiring that the obstructive conduct take place after the investigation began is the most reasonable and reliable way of ensuring that the enhancement captures something more than the offense conduct itself.

Simply put, the balance struck by the existing guideline is the proper one. The Commission has considered this issue in the past and decided that the obstruction enhancement should be limited to post-investigation conduct. This rule has the value of clarity, simplicity and ease of application. In any case where a court sees a clear instance of pre-investigation obstruction, it may upwardly depart or impose a non-Guideline sentence. There is no need to amend the current Guideline.

In addition, the Commission should limit any consideration of perjury during the course of a civil proceeding to material matters in proceedings brought by or involving a governmental agency. While issues involved in an action brought by an administrative agency might be closely related to those later involved in a criminal case, a civil lawsuit between private parties typically involves issues unrelated to criminal justice. Therefore, perjury occurring in a civil suit should not be the subject of an obstruction of justice enhancement even if facts at issue in the lawsuit overlap with conduct required to prove a criminal offense. Cf. United States v. Kirkland, 985 F.2d 535, 537-38 (11th Cir. 1993) (U.S.S.G. § 3C1.1 inapplicable to obstructive conduct occurring during internal bank audit). In addition, perjury should not be considered obstruction unless it pertains to

material issues that hinder the investigation, prosecution or sentencing in the case. The proposed requirement that the perjury “pertain” to the offense of conviction is too broad.

We recommend that subsection (b) of application note 4 be amended to read:

- (b) committing, suborning, or attempting to suborn perjury regarding material evidence in the case, including during the course of a civil proceeding brought by or involving a government agency and pertaining to conduct constituting the offense of conviction.

To limit its otherwise overly broad application, application note 6, which defines “material” evidence or information, should be amended to replace the phrase “the issue under determination” with “an issue under determination affecting the investigation, prosecution or sentencing of the offense of conviction.”

Making false statements on a financial affidavit in order to obtain court-appointed counsel does not warrant an obstruction enhancement because that conduct is not aimed at impeding justice or at affecting the outcome of the case. Instead, it affects only the allocation of resources. In United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004), the Second Circuit rejected an enhancement for a false CJA financial affidavit, describing “a common sense definition of what constitutes obstruction of justice [as] conduct that willfully interferes with or attempts to interfere with the disposition of the criminal charges against a defendant.” Continuing, the court stated:

An enhancement for obstruction is therefore only warranted “if the court finds that the defendant willfully and materially impeded *the search for justice in the instant offense*.” Or, as we have written, the “conclusion that obstruct,’ in this context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law.” For a defendant’s conduct to qualify as obstruction of justice, it must have the “potential to impede” the investigation, prosecution, or sentencing of the defendant. It cannot simply be a misrepresentation.

Id. (citing United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (emphasis added in Khimchiachvili); United States v. Stroud, 893 F.2d, 504, 507 (2d Cir. 1990); and United States v. McKay, 183 F.3d 89, 95 (2d Cir. 1999)). Of the circuits that have considered this issue, the Second Circuit’s decision is the most extensively reasoned. Compare United States v. Hernandez-Ramirez, 254 F.3d 841, 843-44 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 125 (11th Cir. 1996). As the Second Circuit explained, the defendant did not want to pay for a lawyer, but “[h]e was not seeking to prevent justice or even delay it.” Id. The Second Circuit recognized that “[w]hat happened here may amount to fraud” and that it was “reprehensible,” “possibly deserving a higher sentence,” but that it nonetheless did not require an enhancement for obstruction of justice. Id.

The misrepresentation of financial information to obtain appointment of counsel is even less apt to have any affect on the outcome of the case than other behavior not

subject to the obstruction enhancement, such as lying about drug use while on pretrial release, providing false identification to the police upon arrest, or fleeing from arrest. See § 3C1.1, comment. (n.5). It is in no way similar to conduct that typically constitutes obstruction of justice by attempting to alter the outcome of a case, such as destroying evidence, tampering with witnesses, or lying on the stand about facts necessary to prove a criminal offense, or to delay justice, such as failure to appear at a court hearing. *Id.*, comment. (n.4).

Moreover, many defendants who are potentially eligible for court-appointed counsel complete financial affidavits shortly after arrest and without access to their bank statements and other financial records, increasing the risk of mistakes that may be construed as intentional. In addition, requiring a court to enhance the sentence for obstruction of justice where a defendant misrepresented assets to obtain court-appointed counsel creates a conflict of interest between counsel and the defendant. Finally, a court can easily remedy a defendant's understatement of assets by ordering the defendant to repay amounts used to appoint counsel under the Criminal Justice Act.

Therefore, the Commission should not list making false statements on a financial affidavit in order to obtain court-appointed counsel under application note 4 as proposed. Instead, that conduct should be listed under application note 5, as an example of conduct that does not justify an enhancement for obstruction.

VII. Privilege Waiver

We join in the comments of the Practitioners' Advisory Group. While we do not represent organizations, we believe that the current commentary contributes to the undue pressure placed on organizations by the government to waive the attorney-client and work product privileges, and thus threatens those fundamental basics of our adversary system and the right to counsel.

VIII. Crime Victims' Rights

This proposal would add a new guideline, § 6A1.5, stating that "[i]n any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and any other provision of Federal law pertaining to the treatment of crime victims," with "crime victim" defined as in 18 U.S.C. § 3771(e).

The Crime Victim Rights Act (CVRA) reflects a careful balancing of the rights of defendants, the discretion of prosecutors, and new rights for victims. The Commission should therefore strictly adhere to the statutory language. Requiring the court "in any case" to ensure that the crime victim is afforded the statutory rights departs from the statute, which states that "[i]n any *court proceeding* involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." Beyond that, the statute states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged

in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” The Federal Rules Advisory Committee has interpreted this to mean that the government is in charge of giving notice of proceedings.⁷ Another good reason for the Commission to strictly adhere to the statutory language is that the Rules Committee has not yet even published for comment its rules implementing the CVRA.

The phrase “and any other provision of Federal law pertaining to the treatment of crime victims” should be deleted. It is undefined and undefinable. It could be interpreted by victims and their counsel in unexpected and unforeseeable ways to enforce “rights” that may not exist in the CVRA, inviting litigation, an undue burden on the courts, and either disappointment for victims or unwarranted incursions on defendants’ rights. The phrase should be deleted.

We suggest the following substitute:

A crime victim, as defined in 18 U.S.C. § 3771(e), shall be afforded the rights described in 18 U.S.C. § 3771(a).

IX. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

The proposed amendment is the Commission’s first attempt to provide guidance for court consideration of Bureau motions to reduce sentences based on extraordinary and compelling reasons as provided in 18 U.S.C. § 3582(c)(1)(A)(i). We applaud that attempt and offer suggestions which we believe may improve the initial draft and respond more definitively to the congressional directive in 28 U.S.C. § 994(t). We also respond to the issues for comment regarding release after age 70 pursuant to 18 U.S.C. § 3582(c)(1)(A)(ii). First, we offer some background regarding the “extraordinary and compelling” reduction statute.

A. Background of Reduction for “Extraordinary and Compelling Reasons”

Many people who work in the federal criminal justice system are unfamiliar with this statute. It is little known and little utilized. However, some of us have learned of it after a client, already sentenced, inquires whether some radical change of circumstance can qualify him or her for some relief or reduction of sentence. Sometimes, the circumstance is some sort of family emergency, sometime a matter of life or death, sometime concern about the welfare of a child, which the prisoner can only assist with if released early. Initially, the provisions of 18 U.S.C. § 3582(c)(1)(A)(i) appear to offer relief, if the situation truly appears compelling and extraordinary. However, that hope is quickly dashed when we learn that the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. This state of affairs and unduly cramped usage of the statute could be altered by this Commission’s policy

⁷ Report to Standing Committee at 5-6 (December 8, 2005), <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

statement. The policy statement should reflect congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could even be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the courts in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system which provided more certainty, finality and uniformity.⁸ However, Congress also recognized that post-sentencing developments might provide appropriate grounds to reduce a sentence. Using §4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments, which is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(ii) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the United States Sentencing Commission, created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

⁸ See, generally, Mistretta v. United States, 488 U.S. 361, 363-370 (1989).

The legislative history of these provisions demonstrates that Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of legislative history on the SRA, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described.⁹

B. History of Sentence Reductions

Despite the broad language of the statutory provision, the BOP has historically used §3582(c)(1)(A)(i) only to seek release of dying inmates. See, Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001). Originally, BOP policy allowed consideration of release when death was predictable within six months. In 1994, the policy was amended to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. Although there is nothing in the statute or in the BOP policy statement to disqualify a reduction based on something other than medical condition of the inmate, the BOP has never acted on any other basis.

During the first two decades of the SRA, the Sentencing Commission has not responded to the congressional directive to issue policy statements and give examples of extraordinary and compelling reasons. A Vice Chairman of the Commission opined that the lack of policy statements might be partly responsible for the BOP's narrow use of this provision:

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

⁹ S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.). The actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through 2000. The numbers for 2001 through 2004 continue to be quite low despite a growing prison population.¹⁰

C. The Proposed Amendment; Extraordinary and Compelling Reasons

The Commission's proposed amendment provides a first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions. However, it does not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons, nor does it provide examples as required by statute. 28 U.S.C. § 944(t). We believe the Commission should tackle this admittedly difficult task and we provide our suggestions for doing so below, along with other comments on the draft. Luckily, there is already a very good model for addressing these difficult issues in the Appendix of Ms. Price's previously cited article (copy attached).

First, as a drafting matter, proposed U.S.S.G. § 1B1.13(1)(A) should be amended to state "reasons" in the plural, as in the statute, instead of singular. Otherwise, this drafting change would alter the clear intent of the statute to allow consideration of multiple reasons and their combination as opposed to one single reason. In the alternative, the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

This option has the advantage of clearly restating the statutory intent that reasons may be plural, to prevent a mechanistic approach to this broadly worded provision.

Second, the proposed draft, in § 1B1.13(2), requires that the person not be a danger. This imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to § 3582(c)(1)(A)(i) as well. As a practical matter, this expanded requirement will probably have little effect, since it is difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. In our experience, the BOP takes great care to eliminate any prisoners from early release consideration if they are considered a danger to the community. However, we believe the proposal should insert the word "present" before the word "danger" in order to assure the proper interpretation stated in the Synopsis, *i.e.*, that the person is "no longer" a danger.

Third, the Synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. Presumably, this refers to proposed Application Note 1A, where the only definition of "extraordinary and compelling reasons" appears. The actual language used--"shall be considered as such"--does not

¹⁰ The 2001 through 2004 figures received from BOP are attached.

appear to operate to create a rebuttable presumption. If that is what is intended, it should be stated simply and in those words. More importantly, this definition provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission.

We believe that providing only a circular definition of extraordinary and compelling reasons, i.e. they presumptively exist when BOP makes a motion, does not comport with the Commission's directive from Congress. We suggest that such reasons should be broadly defined to include all basic post-sentencing changes that could support a reduction, as was intended by Congress. These should not be limited to terminal illness or other extreme medical conditions of the inmate, as has been BOP policy.

Again, Ms. Price's article contains a description of extraordinary and compelling reasons in the proposed policy statement:

An "extraordinary and compelling reason" is a reason that involves a situation or condition that—

- (1) was unknown to the court at the time of sentencing;
- (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or
- (3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

This proposed language covers the basics of changed conditions or circumstances which could support a reduction of sentence consistent with the SRA and the guidelines. As previously outlined, the §3583(c)(1)(A)(i) provision was placed in the Act to allow some safety valve for post-sentencing changed circumstances. Congress clearly understood that in enacting a determinate sentencing system, there had to be some outlet for compelling changed circumstances after sentencing. This definition provides a flexible model which does not unduly emphasize or confine itself to extreme illness of the inmate. It would allow the court to consider facts or law which changed after sentencing and which present a compelling case for a reduction of the sentence.

Finally, we believe that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the list proposed in Ms. Price's article appears to offer an excellent starting place in an application note:

The term "extraordinary and compelling reason" includes, for example, that—

- (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
- (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;

- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

These examples do not purport to be exhaustive, but can provide some guidance as to possible categories of changed circumstances which could provide extraordinary and compelling reasons for a reduction in sentence.

D. Issues for Comment

The Commission solicits comment regarding whether the suggested policy statement regarding release of those over 70 years old who have already served 30 years should be expanded to include those sentenced under statutes other than 18 U.S.C. § 3559(c). Further, the Commission asks whether, if so, certain offenses should be excluded, such as terrorism or sexual offenses involving minors.

Extending the possibility of release for aged inmates to sentences outside of 3559(c) sentences would be good policy.¹¹ There are many other statutes which provide for extremely long, even life terms, e.g., the drug statutes found in 21 U.S.C. § 841(b)(1)(A). As the Commission has concluded, risk of recidivism drops dramatically after age 50, and surely even more dramatically after age 70.¹² With increased sentence severity over the past twenty years has come an aging prison population, with medical problems, and little risk of re-offense.¹³ It has been estimated that housing an elderly prisoner costs \$60,000 annually.¹⁴ It would make just as much sense to expand the release possibility to other cases.

¹¹ This portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which is the only reason it was restricted to those sentenced under that statute.

¹² U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 & Exhibit 9.

¹³ U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2003 8 (85% increase in inmates 55 or older since 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>; U.S. Department of Justice, Bureau of Justice Statistics, Medical Problems of Inmates (1997) (48% of federal inmates age 45 or older reported medical problems), <http://www.ojp.usdoj.gov/bjs/pub/ascii/mpi97.txt>.

¹⁴ Sentencing Project, Aging Behind Bars: "Three Strikes" Seven Years Later (August 2001) 12, <http://www.sentencingproject.org/pdfs/9087.pdf>.

If the expansion were available, it would be unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter. The statute and policy statements requiring a current lack of dangerousness fully address the concerns about public safety implicit in the issue for comment. After 30 years served and with defendants over 70 years old, there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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