

COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED 1997 AMENDMENTS TO
THE SENTENCING GUIDELINES

Respectfully submitted,

**NEW YORK COUNCIL OF
DEFENSE LAWYERS**

**950 Third Avenue
New York, New York 10022
(212) 308-7900**

**Robert Hill Schwartz, President
Marjorie J. Peerce and David Wikstrom
Co-Chair, Sentencing Guidelines Committee**

March 7, 1997

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1994 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred and twenty-five attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Our membership includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address a number of proposed amendments of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Peerce and David Wikstrom, Co-Chair, and Frederick H. Cohn, Minna Schrag, Nicholas De Feis, John J. Tigue, Brian Maas, Jack Arsenault, William Schwartz, Peter Kirchheimer, Audrey Strauss, Jeh Johnson, William Brodsky and Mark Pomerantz.

PROPOSED AMENDMENT 6

Application Instructions (§ 1B1.1) -- (A) corrects a technical error in § 1B1.1(b); (B) expands the definition of "offense" to specify what is meant by "instant offense"; and (C) makes conforming amendments to §§ 3C1.1, 4B1.1 and 4B1.2.

Although we support generally the Commission's efforts to ensure that the obstructive conduct subject to enhancing the sentence be the conduct of conviction, we believe that the Commission's proposal is inconsistent with its stated intention when it proposes to punish for conduct in a related "civil violation" "committed by the defendant or another person." We submit that obstructive conduct in a civil case, although no doubt objectionable and sanctionable, should not be included within the zone of possible enhancement of a criminal sentence. The language "civil violation" requires more precision, to make clear that it relates solely to civil proceedings ancillary to the criminal process and not all civil proceedings related in substance to criminal proceedings. We also urge that it be made clear that Proposed Application Note 8's reference to "other person" be governed by the language of correct Application Note 7. We agree with the proposed changes to § 1B1.1 (expanding definition of offense to include "instance offence") and 4B1.1 and 4B1.2(3) (clarify that the offense at issue is the offense of conviction).

PROPOSED AMENDMENT 9

Whether acquitted conduct may be considered for sentencing purposes.

This proposed amendment provides three options addressing the issue of whether and to what extent acquitted conduct may be considered for sentencing purposes.

Whether conduct for which a defendant has been acquitted can be considered by a court in imposing sentence, and, if so, to what extent it should be given effect, are issues which vex the theoretician and practitioner alike. Clearly, the consideration of acquitted conduct enjoyed judicial support under the prior, indeterminate sentencing scheme, which relied on the wisdom and experience of District Judges to fashion just sentences based upon all relevant factors, including even conduct of which a particular defendant might have been found not guilty. Following the Sentencing Reform Act of 1984, and as jurisprudence under the determinate sentencing scheme of the Sentencing Guidelines has developed, however, policy and definitional choices have led, logically and inexorably, to sentences in which a defendant's imprisonment is multiplied -- sometimes tenfold and more -- because of conduct of which he or she has been acquitted. These situations, aptly described by one Circuit Judge as "reminiscent of Alice in Wonderland," (United States v. Frias, 39 F.3d 391 (2d Cir. 1994) (Oakes, Senior J., concurring)), cry out for the attention of the Commission. Only two months ago, in United States v. Watts, 65 LW 3461, 3462 (1/6/97), concurring Supreme Court Justice Stephen Breyer pointedly noted the power of the Sentencing Commission to modify the relevant conduct rules to limit or prohibit the use of acquitted conduct in determining sentences under the Guidelines.¹

¹ While concurring Justice Scalia voiced doubt as to the power of the Commission to overturn Watts, we believe that he is mistaken. It is true that, under 18 U.S.C. § 3661, "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." We do not suggest that the Commission can overturn the statute; nor do we suggest that the Commission can decree that information concerning acquitted conduct may not be "received and considered" by a sentencing court. What weight is to be accorded that information, and what effect, if any, it is to be given by the sentencing court, however, are different issues. Those are precisely the determinations delegated to the Commission by 28 U.S.C. § 994. Pursuant to this authority, the Commission has often

(continued...)

The NYCDL believes that the criminal justice system must, at sentence, distinguish between those who are acquitted and those who are convicted, and strongly supports the Commission's effort to address the issues now.

The use of acquitted conduct in the imposition of sentence represents the inexorable, but logical extreme of the Commission's formulation of relevant conduct under § 1B1.3. The Guidelines provide that a court shall determine an offender's base offense level on all "relevant conduct." Relying on the Background Commentary to § 1B1.3, which states that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range," courts unanimously hold that a defendant need not have been charged with a particular crime in order for the court to consider the activity in determining the sentencing range. Under that rule, courts have upheld offense level determinations based upon uncharged narcotics transactions, uncharged gun counts, uncharged income tax evasion, uncharged fraud losses, uncharged thefts, uncharged RICO predicates, and so on. And if, under § 1B1.3, a defendant need not have been charged with a particular crime in order for the court to consider the conduct in fixing the range, then that rule readily subsumes cases in which conduct underlying dismissed charges is counted, conduct underlying counts plea-bargained away is counted, and so on. And, finally, the argument goes,

¹(...continued)

limited the use of certain kinds of reliable information in determining a defendant's offense level or criminal history category. (For example, forbidding reliance on information provided in certain cooperation contexts in determining a defendant's offense level (§ 1B1.8), or prohibiting reliance on reversed or expunged convictions in determining criminal history category (§ 4A1.3).)

since a conviction is not required, and since an acquittal means only that the evidence did not establish guilt beyond a reasonable doubt, then acquitted conduct should be counted too.

Prior to the enactment of the Guidelines, sentencing courts were vested with the authority to rely on any reliable information in determining whether to exercise their broad discretion to impose probation, the maximum term authorized by Congress, or a sentence anywhere in between. The sentencing court was free to consider information concerning a defendant's misconduct even though not resulting in a conviction. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). The weight to be accorded the various sentencing factors was a decision for the sentencing court alone. Disputed sentencing factors were decided by reference to the "preponderance of the evidence" standard of proof.

The principle in Williams, that in fashioning an appropriate criminal sentence the sentencing judge should be in receipt of the fullest information possible concerning an offender's background and characteristics, was codified by 18 U.S.C. § 3661, which was enacted in 1970. But the enactment was merely designed to clarify that otherwise inadmissible evidence could nevertheless be considered by judges in exercising their sentencing discretion, as Justice Stevens observed in his Watts dissent.²

With the Sentencing Reform Act of 1984, most of the sentencing discretion that sentencing courts theretofore had was eliminated. Sentencing courts no longer had the unfettered discretion to impose a sentence at the bottom of the statutorily-authorized term, or at the top; instead, judges were confined to imposing sentences within sentencing ranges, in which "the

² In Watts, supra, the majority opinion mistakenly suggests that Williams "reiterated" the principle of § 3661. In fact, it was the other way around; the holding in Williams predates the enactment of § 3661 by 21 years.

maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25% or 6 months." 28 U.S.C. 994(b)(2). Title 18, Section 3661 was not repealed, but incorporated into § 1B1.4, which governs those portions of the sentencing decision in which the judge retains discretion, i.e., where within the applicable range to sentence a defendant, and whether to depart from the range.

But the well-established principle that the court, in the exercise of its discretion to determine where within a range to impose a sentence, is free to consider the broadest possible range of information relevant to an offender, does not mean that the broadest possible range of information must be used to formulate the range in the first place. Put in other words, the rules governing an indeterminate sentencing scheme cannot simply be incorporated wholesale into a determinate sentencing scheme without creating anomalies. That is precisely the situation confronting sentencing courts, and the Commission, today.³

The NYCDL believes that defendants should not be punished for the commission of conduct of which they have been acquitted. We believe that permitting such punishment

³ In United States v. Frias, 39 F.3d 391 (2d Cir. 1994), for example, the defendant was charged with participation in a narcotics conspiracy, with possession of a firearm in relation to his participation in the conspiracy, with possession of an unregistered firearm, and with possession of a firearm by a convicted felon. At trial, he was acquitted of the narcotics conspiracy and the narcotics-related weapons possession, and convicted only on the two remaining weapons charges. His guideline range on the weapons alone was 12-18 months' imprisonment; however, because of the cross-referencing provision of § 2K2.1, the sentencing court applied the guideline applicable to the narcotics conspiracy for which he was acquitted, producing a sentencing range of 262-327 months. The court sentenced Frias to 20 years; he could impose no more under the two counts of conviction. The Second Circuit reversed, not because of the inappropriateness under § 1B1.3 of sentencing Frias for acquitted conduct, but only to permit the judge to consider a downward departure. On remand, the court imposed a 144-month term, and the Circuit later affirmed, with Judge Oakes, reluctantly concurring, nevertheless noting that "[t]his case is an anomaly that should not be permitted to stand." 39 F.3d at 394.

represents an affront to fundamental constitutional precepts our citizens -- including even criminal defendants who have been convicted of other charges -- enjoy. We therefore endorse so much of Option 1B that specifies that acquitted conduct shall not be deemed relevant conduct under § 1B1.3 for purposes of sentencing. We believe that maximization of criminal punishment is not the only purpose served by the criminal justice system, and in some instances it is not the most important.

Reliance on unlimited information in fixing a mandatory sentence under a determinate sentencing scheme dilutes the protection that the jury system was designed to provide, risks the imposition of punishment and loss of individual liberty by eliminating evidentiary and procedural rules designed to ensure the reliability and integrity of factual findings, and destroys the notion that defendants who are not proven guilty beyond a reasonable doubt are to be treated as innocent. We thus believe that defendants who are acquitted should not be subject to mandatory punishment for their acquitted conduct.

It might be asked whether, since an acquittal does not mean innocence, the system should recognize any difference between conduct which is uncharged, versus conduct as to which a jury has acquitted a defendant. We believe that the answer is yes. To be just, a system for the allocation of criminal penalties must make a distinction between those who are convicted and those who are acquitted. In addition, the penalty structure must be perceived to be just, both by the public, and by the participants in the system. ("When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice." Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers,

101 Yale L.J. 1681, 1687 (1992)). As Justice Stevens noted in his Watts dissent, 65 LW at 3463 n.3, "respected jurists all over the country have been critical of the interaction between the Sentencing Guidelines' mechanical approach and the application of a preponderance of the evidence standard to so-called relevant conduct (citations omitted)."

It is possible that a prohibition against using acquitted conduct to determine the offense level will cause prosecutors to refrain from bringing an indictment on counts as to which the evidence is thin, hoping to rely on the conduct at sentence as "uncharged" -- as opposed to "acquitted" -- conduct. From our vantage point, that is not a significant downside risk. And from the vantage point of the Court, the streamlining of indictments is in all likelihood a salutary effect.

We therefore support Proposed Amendment 9, Option 1B. That proposal provides that acquitted conduct shall not be considered relevant conduct under § 1B1.3, and shall not be used to determine the offense level. We do not, however, endorse Option 1(B)'s proposed addition to Application Note 10, providing that acquitted conduct may be used as the basis for an upward departure. For the same reasons that acquitted conduct should not be deemed relevant conduct under § 1B1.3, we believe that it should not be permitted to justify any increase in a defendant's sentence.

The other proposed approaches to the problem are less workable. Permitting reliance on acquitted conduct when "established by evidence not admitted at trial" (Option 1A) does not meet our basic objection, which is that acquitted conduct should not be utilized in determining the offense level under any circumstance. In addition, a separate proceeding, calling for the introduction of evidence not admitted at trial seems unwieldy and as inviting a

host of procedural problems. Finally, Option 1A does not alter the objectionable "preponderance of the evidence" standard. Increasing the standard of proof from a preponderance of the evidence to "clear and convincing evidence" (Option 2) -- a proposal which we endorse in general as to other sentencing enhancements -- also fails to meet our basic objection, which is that acquitted conduct should not be considered in determining the offense level under any standard of proof.

Option 3 essentially restates Watts, providing that acquitted conduct "shall" be considered under § 1B1.3, but authorizing the court to consider a downward departure if "considering the totality of circumstances, the use of such conduct as a sentencing enhancement raises substantial concerns of fundamental fairness." Again, we believe that acquitted conduct should not be considered relevant conduct under § 1B1.3, and we oppose this Option. We note also that in the absence of any definition of what "raises a substantial concern of fundamental fairness," the amelioration that the proposal linguistically promises is rather illusory.⁴ What is more, this mechanism will effectively preclude appellate review of these situations, inasmuch as a sentencing court's discretionary refusal to depart downward is not reviewable. It is unfair in our view to impose upon the prevailing party, the acquitted defendant, the burden of establishing his entitlement to a downward departure from the punishment for the very conduct of which he has been acquitted.

⁴ It is worth noting that this provision would be small solace to Mr. Frias, supra, serving a 12-year sentence on his acquitted conduct, with a range of 12-18 months applicable to the conduct he was actually convicted of. Furthermore, under Option 3, Frias could not have appealed his 144 month sentence, since he was the beneficiary of a downward departure.

For all of these reasons, the NYCDL supports Option 1B, and urges the Commission to correct the anomaly created by sentencing defendants for conduct of which they have been acquitted.

PROPOSED AMENDMENT 12

The NYCDL endorses the Proposed Amendment which clarifies the connection between the financial institution, the conduct and the defendant.

PROPOSED AMENDMENT 18

Proposals to amend the fraud, theft and tax guidelines.

An amendment similar to proposed Amendment 18 to eliminate the 2 point enhancement for more than minimal planning, adjust the Fraud and Theft Tables upward to reflect that elimination and add a 2 point enhancement for use of sophisticated means was proposed in 1993. The NYCDL submitted a comment that opposed that amendment.⁵ In the end, the Commission made no changes.

Whether or not the tables are amended again, we believe that the 2 point enhancement for more than minimal planning is unnecessary. In practice, application of the enhancement has become routine. No distinction has been made between those whose criminal acts consist of simple but repetitive, perhaps compulsive, behavior and those whose theft or

⁵ The NYCDL comment to the 1993 proposed amendment 5 is attached. It accurately predicted "... virtual mandatory imprisonment for first offenders who commit relatively minor property offenses." The proposed 1997 amendment would remove the possibility of probation for any offender who stole more than \$20,000 by any means other than impulse.

fraud is carefully planned. For example, a bank employee who embezzled a total of \$18,000 in small increments 20 separate events would not be eligible for probation under the current table, while an employee who embezzled the same amount in one event, perhaps a less sympathetic person by heartland standards, (depending on the motivation for the crime) would be eligible for probation.

The NYCDL believes that the sophisticated means enhancement only makes sense if it is applied to the criminal who acts in an unusually sophisticated or pernicious manner. The enhancement should be redefined in such a way as to prevent it from being used as an automatic increment to the base offense level, since almost every crime contains an element of concealment. We urge that application notes make clear that the enhancement should not be applied as a matter of course.

Regarding the tables, the NYCDL recognizes the legislatively-mandated mission of the Commission to eliminate sentencing disparity and reduce the impact of offender characteristics. At the same time, we are concerned that sentencing tables, at least in the area of financial crimes, have lost sight of the notion that there is a difference in the quality of particular crimes that is not subject to a bright line test. We believe that the legislative intention is best realized when very long jail sentences are awarded for crimes that are so far reaching as to require particularly hard punishment.

The areas where the Commission calls for comment indicate the difficulty in creating a coherent test. We believe that most judges recognize, fairly uniformly, those offenders and offenses at either end of the spectrum. Those who have stolen relatively small amounts for comparatively benign reasons, at one end of the scale, and those whose criminal

activity, for its harm caused and disregard of social obligations, at the other, receive sentences so similar that there is no real disparity.

However, the NYCDL believes that impact of each of the tables proposed in the amendment is unduly harsh, especially in the middle ranges. Sentences at the upper reaches exceed those applicable to crimes involving threat of violence. As a result, in our view none of the proposed tables is satisfactory. If a choice among the three proposed tables is required, we would choose table 3. Only in table 3 is there a cliff effect that recognizes that there is a significant qualitative difference between thefts of \$20,000 and \$60,000, reflected in a 2 point increase between these amounts. We believe that this structure is more realistic than the increases at much closer intervals (at the low levels) in the other proposed schedules.

Finally, in light of our comment regarding the sophisticated means enhancement, the NYCDL suggests that the base level be 10 points, not 12.

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 2

The Commission seeks comment on whether the definition of market value in determining loss should be clarified to specify retail, wholesale, or black market, depending on the nature of the offense. Since the Commission offers no examples in seeking comment on this issue, it is difficult to understand precisely the problem of interpretation the Commission seeks to redress. Absent more specific focus, we believe that the issue of which market most appropriately gauges the actual economic loss to the victim is generally a fact-intensive inquiry that should be left to the courts to determine on a case-by-case basis. We believe, however, that where property is obtained by theft or fraud for the purpose of resale at an enhanced value on

a black market, the black market value should determine the offense level. In such cases, it is not only the economic harm caused to the victim, but also the use of illegal markets, which goes to the heart of the offense.

PROPOSED AMENDMENT 18 -- ISSUE FOR COMMENT 3

The NYCDL opposes amending the Guidelines to include reasonably foreseeable consequential damages and administrative costs in determination of loss in fraud cases. Typically, the direct damages sustained by the victim are a fair indicator of the culpability of a defendant, and provide for adequate punishment under the Guidelines, even if such a measure of damages would not lead to complete recovery for the victim under familiar principles of tort law. We see no reason to incorporate those tort principles into a determination of the proper guideline range. Focusing on consequential damages, as opposed to direct injury, replaces the notion of loss as a reliable measure of culpability with an open-ended measure that depends more on chance than on the defendant's conduct. This will inevitably lead to disparate sentences for similar conduct. Thus, courts should consider consequential damages only in determining the proper restitution to be made.

For the same reasons, the NYCDL favors the deletion of the special rule in procurement fraud and product substitution cases. Instead, courts should have discretion to depart upward in cases where reasonably foreseeable consequential damages and administrative costs are so substantial that the direct damages sustained by the victim do not adequately reflect the defendant's culpability.

The Commission also seeks comment with respect to the inclusion of interest in loss calculation. We believe that the decisions in United States v. Gilberg, 75 F.3d 15, 18-19 (1st Cir. 1996) and United States v. Henderson, 19 F.3d 917, 928-29 (5th Cir. 1994), permitting the inclusion of interest in certain circumstances, are contrary to the definition stating that "loss does not include the interest that could have been earned had the offense not occurred," and were incorrectly decided. Sentencing should not be based on frustrated expectations. For purposes of calculating loss, we do not believe there is a meaningful distinction between the time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. In the end, the culpability of the offender should be measured by the out-of-pocket loss. This is particularly true when the bargained for return is itself part of the fraudulent misrepresentation. A defendant who steals \$100 on the promise that he will repay \$125 is no less culpable than one who steals \$100 on a promise to repay \$150. Therefore, we believe the definition should be clarified to eliminate the distinction set forth in the cases cited above.

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 4

The NYCDL believes that, in general, in determining the amount of loss, benefits received by the victim of an offense (including, e.g., money returned to investors in a Ponzi scheme) should be used to reduce the amount of that loss. However, where benefits are theoretical or intangible (e.g., in cases involving fraudulent representations of a defendant's license), the computation of those benefits is often speculative and uncertain and would

necessarily involve difficult fact-finding exercises. In those circumstances, the NYCDL does not believe that benefit should be used to reduce the amount of the loss.

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 6

The NYCDL believes that loss caused by understating the value of pledged collateral should be determined by the actual market value at the time the property was pledged, subtracted from the loss to the pledgee on sale of the collateral. This minimizes the action of market forces, which cannot be foreseen and are fortuitous, on the assessment of loss. Moreover, this test has simplicity to recommend it.

We do not believe there should be a consequential damages assessment. Payments made on the obligation before the discovery of the crime should continue to be credited.

This approach eliminates consideration of benefits or detriments caused by unintended and uncontrollable intervening factors that tend to exacerbate or mitigate loss. We agree with the Seventh and Third Circuits that sentencing calculations should not turn into tort or contract litigation. United States v. Marlatt, 24 F.3rd 1005, 1007-8 (7th Cir. 1994), quoted with approval United States v. Daddona, 34 F.3rd 163, 172 (3rd Cir.) cert. denied ____ U.S. ____, 115 S.Ct. 515, 130 L.Ed.2d 421 (1994).

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 7

The Commission seeks comment on the rule that permits gain to be used in lieu of loss in certain circumstances under § 2F1.1. We believe that the decision in United States v. Kopp, 951 F.2d 521, 530 (3rd Cir. 1991), is correct. The fraud table is victim-oriented. To

permit the defendant's gain to serve as an alternative measure of loss even in cases where the victim's loss can be precisely measured would undermine this premise. Thus, the rule should be clarified to provide that gain may be used as an alternative measure of loss only where actual loss cannot be calculated.

Further, we do not believe that the Guidelines should be amended to permit gain to be used whenever it is greater than actual or intended loss. In our experience, loss calculations typically lead to adequate sentences, and there is no need to change the rule. However, the discretion now given to the courts in application note 10 to consider an upward departure where the loss calculation "does not fully capture the harmfulness or seriousness of the conduct," should be amended to make explicit reference to cases in which the defendant's gain far exceeds the victim's loss. Such a change will help assure that unjust results are avoided where, in the Court's view, the defendant's gain is more indicative of culpability than the victim's loss.

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 8

For reasons similar to those set forth in our comment regarding Issue for Comment 6, the NYCDL urges that loss should be based primarily on actual loss. Ordinarily, that amount accurately reflects the seriousness of the criminal conduct. Intended loss, a cumbersome and necessarily imprecise factor to establish, should be considered as a ground for departure in those unusual circumstances where the actual loss does not accurately reflect the seriousness of the crime.

In the event the Commission decides to retain the current rule's application of intended loss, we believe that in fairness that application should be limited by economic reality and impossibility, even in government sting operations.

PROPOSED AMENDMENT 18 -- ADDITIONAL ISSUE FOR COMMENT 10

The NYCDL understands that the Commission's concern with definitions of loss reflects the Commission's approach that loss is most often an accurate reflection of culpability. The NYCDL agrees with that approach, assuming that the loss considered is actual loss. However, because of the extraordinary variety of financial crimes, inevitably there are unusual circumstances where the actual loss understates or overstates the seriousness of the crime. We believe that departures should be permitted in those circumstances, but with application notes that make clear that the departures are to be applied sparingly.

PROPOSED AMENDMENT 18 -- [TAX LOSS TABLES]

The NYCDL is opposed to increasing the tax loss tables and consolidating them with the theft and fraud loss tables. In 1993, the Commission considered increasing the tax guideline tables and eliminating the sophisticated means enhancement. The result was that the tax tables were increased two levels and the sophisticated means enhancement was retained. The change was effective for tax returns filed on or after November 1, 1993. The change applied for the most part to tax returns filed on April 15, 1994 for individuals and March 15, 1994 for corporations. It was common for tax return filing dates to be extended to October 15, 1994 and

September 15, 1994, respectively. The vast majority of those returns would not be selected for audit until 1995 and 1996. Tax offenses traditionally take years to detect and prosecute.

It is the view of the NYCDL that there is as yet insufficient experience or evidence of the effect the 1993 changes on deterrence or punishment. Until that information is obtained and made public in sufficient time to obtain informed comment, it is unwise to arbitrarily increase further the punishment for tax offenses.

The stated purpose of the tax guidelines in 1987 was to increase the number of tax offenders who are sentenced to terms of imprisonment. That goal has been achieved. In 1987, about 50% of tax offenders were sent to prison. The latest published figures for 1994 show that about 75% of tax offenders are sent to prison, a 50% increase. This figure will be higher for 1995, 1996 and 1997. The 1993 changes are not yet substantially reflected in these numbers. The proposed tax tables will result in a percentage of tax offenders sentenced to prison approaching 100%. This is further illustrated by the fact that the Internal Revenue Service prosecution guidelines for income tax evasion are \$10,000 of evaded tax for each of two or more years. Guideline tax loss tables, which result in almost all tax offenders being imprisoned, are unduly harsh and unnecessary to adequately deter potential tax offenders.

PROPOSED AMENDMENT 21

Proposed Amendments addressed to adjustments for Role in the Offense

PROPOSED AMENDMENT 21(A)

Recognizing that the current Introductory Commentary to Section 3, Part B, has been in previous versions of the Guidelines, we question the need for any Introductory Commentary in light of the extensive commentary following each of the guidelines. Therefore, we suggest that the Introductory Commentary be eliminated rather than expanded.

If the Introductory Commentary remains, however, we have the following observations concerning the proposed amendments: We note that the Commentary includes consideration of relevant conduct in determining role in the offense. While recognizing that the provision has been in previous versions of the Guidelines, we nonetheless strongly oppose consideration of "relevant conduct" in the role adjustments and urge that that provision be stricken from the current and proposed commentary. We believe that the offense of conviction is the only conduct which should be considered in calculating one's role for sentencing purposes. Inclusion of matters in the role calculation which are "relevant conduct" but not proven by the government beyond a reasonable doubt is yet another dismemberment of a defendant's constitutional rights. Should this trend continue, careful charging instruments will essentially result in a defendant being sentenced almost entirely on conduct proven only by a preponderance of the evidence. We urge that the Commission stem this ongoing erosion of defendants rights.

With respect to the last proposed paragraph in the Introductory Commentary, we believe it should either be eliminated as unnecessary, or balanced by the observation that the fact that one participant receives a mitigating role adjustment does not necessarily mean that someone else must receive an aggravating role adjustment.

PROPOSED AMENDMENT 21(B)

Aggravating Role in the Offense (§ 3B1.1) -- (A) revises the Introductory Commentary to Chapter Three, Part B; and (B) presents three options revising § 3B1.1.

With respect to the proposed changes in § 3B1.1, we support adoption of Option 1, subject to comments below on certain aspects. We applaud the Commission's efforts in that Option to attempt to ensure that aggravating role adjustments are more equitably applied than under current practice. We do not believe Option 2 achieves this same result and therefore oppose it. We are also opposed to Option 3. Although we recognize that with Option 3 the Commission is attempting to make the aggravating role criteria parallel to the mitigating role criteria, we believe that the effect will be undue confusion and the undoing of a decade of caselaw. Moreover, the reality is that with the proposed Commentary accompanying that Option, the analysis the court will undertake will be somewhat comparable to its analysis now, and question the need for such a dramatic change in language.⁶

We question the need for the proposed language changes of Options 1 and 2 which simply restate what the Guidelines already say concerning the number of participants. We believe that the language as currently drafted adequately defines the number of participants, although we urge the elimination of the criteria in § 3B1.1 that the criminal activity be "otherwise extensive," which can be unwieldy and creates confusion in application. We also oppose the suggestion in Option 1 to reduce the number of participants in sub-section (b) from

⁶ Even though we have opposed Options 2 and 3, we address below some particular issues presented in those Options, in case the Commission nonetheless is contemplating adoption of either of those Options.

5 to 4. In theory, if this change were adopted, a defendant who is an organizer of an offense involving fewer than 5 participants would be treated more favorably than an organizer of a 4 participant offense. There is no rationale for the change and it should be rejected.

We oppose the suggestion in Options 1 and 2, Proposed Application Note 1, that one can be held responsible as a manager or supervisor if they "indirectly" supervise another. This is vague to the point of being potentially incomprehensible and has the potential of sentencing someone for the conduct of another, without any apparent requirement that the defendant knew of or participated in the actions of the person for whom the defendant is now being held responsible.

We endorse the Application Notes in all 3 options (Option 1, Note 3; Option 2, Note 4; Option 3, Note 5), which clarify that the supervisor enhancement should not apply to those otherwise worthy of mitigating role reductions. If a person's responsibility is so low as to merit reduction, limited supervisory authority does not signify enhanced culpability. We question, however, whether the Commission should be limiting the scope of the mitigating role adjustment if the person had some supervisory responsibility, and suggest that this determination should be left to the individual case. In this connection, perhaps the Commission should consider placing some commentary on this question in the Mitigating Role section to the effect that in determining the entitlement to and the amount of a reduction the court should look to the scope of supervision rendered by the defendant, if any, and then make an appropriate determination.

With respect to Option 1, Note 3, and Option 2, Note 4, we believe that the last two sentences are unnecessary, especially in the unusual case. Similarly, with respect to the

proposal in those same Application Notes that a § 3B1.1 adjustment precludes a § 3B1.2 adjustment, although we recognize that it generally would be inconsistent to apply both of these sections to the same person, we believe that any categorical prohibition would potentially and unfairly preclude appropriate application in unusual cases, and urge that that unusual possibility be provided for in the amendment. Consistent with 28 U.S.C. § 994(j) we also urge that consideration be given to directing courts in the first instance to consider mitigating role adjustments before consideration of aggravating role adjustments, at least in the case of first time non-violent offenders.

With respect to Option 1, Note 4, and Option 2, Note 5, we oppose the suggestion that the court may consider upward departures if someone does not otherwise fit within an aggravating role adjustment. We believe that if someone does not fit with the criteria already set out, then the Court should sentence them within the already applicable guideline range.

In both Options 1 and 2 we question why the Commission proposes eliminating current Application Note 4, which we believe provides guidance to the courts, and is the basis for existing caselaw upon which future cases will rely.

PROPOSED AMENDMENT 22

Mitigating Role in the Offense (§ 3B1.2) -- (A) clarifies the application of § 3B1.2; and (B) issues for comment regarding (1) a single role guideline; (2) aggravating role characteristics in specific reference to Option Three of the proposed aggravating role amendments; and (3) mitigating role characteristics.

We endorse usage of the phrase "offense" rather than "criminal activity," which we believe provides clarity and better guidance to courts and practitioners alike. We oppose, however, inserting the phrase "substantially less culpable participant." A body of caselaw and practice exists applying the prior definition. Change will merely re-introduce disparity and uncertainty by invalidating prior court applications of the existing definition. The use of the phrase will also create redundancy and confusion since the phrases minimal and minor are very well defined and the phrase "substantially less culpable" is subject to varying interpretations.

We oppose eliminating the option currently available which permits a three-level reduction under § 3B1.2 if the court finds that a defendant's role in the offense falls somewhere between minimal and minor conduct. We believe that the court should continue to have the option to sentence defendants between the two levels, so that defendants who have different levels of culpability are sentenced appropriately to different sentences.

The NYCDL endorses the Commission's proposed definitions of minimal role in Proposed Application Note 2, although we suggest modification of Note 2(i) to ensure that if a defendant had some or minimal knowledge of the scope or structure of the offense or the identity of some other participants that would not be disabling by itself. We note in this regard that in every instance a defendant is going to know who recruited him. We are also opposed to

Proposed Application Note 2(v) because we believe it injects too much subjectivity, and will only lead to further uncertainty and litigation.

We also object to the bracketed language in Proposed Application Note 4, which alludes to the "average participant," as being too vague and subjective. Moreover, the last sentence of Proposed Application Note 4 is redundant and unnecessary. It is a first principal of Federal sentences that the court should consider, and may or may not accept, all available information and so we also urge that that sentence be stricken. We endorse Proposed Application Note 6.

PROPOSED AMENDMENT 22(B) -- ADDITIONAL ISSUES FOR COMMENT

ISSUE FOR COMMENT 1

Whether to adopt a single or unitary role guideline with aggravating, mitigating and no role adjustments.

With respect to Issue for Comment 1, we believe that at this point in the guidelines history such a change would only lead to confusion.

ISSUE FOR COMMENT 2

Additional characteristics for Option 3

With respect to Issue for Comment 2, we have noted our opposition to Option 3 because we believe it will only lead to confusion and in any event we do not believe additional characteristics are necessary.

ISSUE FOR COMMENT 3

Additional characteristics for Mitigating Role adjustments

With respect to Issue for Comment 3, we believe that the characteristics already provided in the existing guideline or suggested by the Commission in its Proposed Amendments (subject to the proposed language changes noted in this Submission), more than adequately provide guidance to the courts and parties to determine entitlement to such adjustments.

With respect to the question of whether carriers or mules should receive minimal, minor or no role adjustment, we strongly urge that they are entitled to a minimal role adjustment. In this connection the couriers are usually paid small amounts of money. They are usually met upon arrival. They are rarely aware of the extent of the conspiracy beyond the recruiter. They are frequently from rural parts of Latin America or Africa with no awareness of the nature of this country's drug problems or of the significance and impact of their acts. Most are deported after serving their sentence and permanently barred from re-entry into the U.S. They almost always meet all minimal role definitions.

These first offenders are non-violent people who frequently will never be permitted to return to the U.S. and therefore bear little threat of future danger to the public. They swallow cocaine and heroin wrapped in condoms to import it into the U.S. Subsequently they retrieve the drug filled condoms from their bowel movements. The entire process from start to finish is disgusting and degrading to the defendants. Moreover, it is highly dangerous to the courier. Blocked intestines and burst balloons which spill large amounts of drugs into

their bodies occur regularly. This requires emergency surgery. Numbers of these couriers die.

The manner of apprehension of these mules frequently demonstrates their minimal involvement. They are often apprehended after the customs inspector notices these novice criminal's extreme nervousness. Alternatively they arrive knowing no English, without funds, not knowing where they are going. The owners of the drugs do not trust them with this knowledge. There is common agreement among prosecutors, the defense bar and judges in the E.D.N.Y., where many of these mule cases arise because of Kennedy Airport, that these mules are the definition of what constitutes minimal involvement and we urge that that be made explicit in the Guidelines.

PROPOSED AMENDMENT 23

Comment has been requested on proposed amendments to the commentary to § 3C.1 Obstructing or Impeding the Administration of Justice. The Commission proposes striking present language requiring the court to evaluate conduct triggering the obstruction enhancement, to evaluate the testimony or statements in a "light most favorable to the defendant." The Commission seeks to substitute, therefore, language taken from the Supreme Court's decision in United States v. Dunnigan, ___ U.S. ___, 113 S.Ct. 1111, 122, L.Ed.2d 445 (1993).

The Commission's proposed language is:

. . . the Court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

In making this change the Commission appears to be seeking to resolve the conflicts between the circuits on the standard of evidence to be used in determining obstructive behavior, and to honor the request made by the D.C. Circuit in United States v. Montague, 40 F.3d 1251, 1256 (D.C. Cir. 1994) which, in a postscript, after finding the standard of proof to be clear and convincing evidence, invited the Commission to clarify its language.⁷

We believe that the consideration underlying the inclusion of the original language has not changed and a substitution of the Supreme Court's caution, therefore, is not sufficient to protect criminal defendants who, recognizing the necessity for their testimony, brave additional penalties in order to testify should their testimony not carry the day.

The caution embodied in the proposed additional language is not sufficient protection. It begs the question of who has the burden of proof to show that the discredited testimony fits within one of the exceptions to the obstruction or some other exception and insures that the next round of litigation, should the substitution take place, will be over who has the burden to prove the "exceptions."

While the circuits are in disagreement over whether or not the standard of proof should be something higher than a preponderance of the evidence because of the language proposed to be stricken, the mere striking of that language will not change the court's obligations imposed by Dunnigan to make particularized findings on each obstructive act to enable reviewing courts to examine the district court's fact finding.

⁷ The Montague court did not imply it was dissatisfied with its conclusion, only that it felt current language was unclear.

The imposition of particularization, which seems not to occur with great frequency within the guidelines, implies that the Dunnigan court, in fact, believed that there was some high standard that should apply in this case. If the standard is greater than a preponderance but less than clear and convincing, then the Commission should invite comment as to what standards should be applied with clarity by the Commission. We believe that clear and convincing evidence is appropriate where a two point enhancement is being imposed for criminal behavior which would normally be subject to the rule of proof beyond a reasonable doubt. In this particular case, any other standard would so dilute the right to testify as to make the exercise of that right problematical.

PROPOSED AMENDMENTS 24, 25 AND 26

PROPOSED AMENDMENTS REGARDING ACCEPTANCE OF RESPONSIBILITY

CREDIT

Proposed amendments 24, 25 and 26 change or clarify the standards for adjustments based on a defendant's "acceptance of responsibility." Proposal 24 seems to lower the standards for receipt of a two-level reduction in offense level for acceptance of responsibility, while increasing the requirements for receipt of an additional one-level reduction. As in current practice, only offenses punished at offense level 16 or greater would be eligible for a three-point reduction. Proposal 25 states that it seeks to clarify that the commission of a new offense while pending trial or sentencing is a "negative indicant" of acceptance of responsibility, whether or not the new offense is similar to the charged offense. Proposal 26

would permit a three-point reduction for acceptance of responsibility for offenses at all levels, thereby permitting the Court to consider alternatives to incarceration for defendants at offense level 15 or lower who receive the maximum reduction for acceptance. While proposals 24 and 25 have some laudable features, the NYCDL believes that only Proposed Amendment 26 contains net benefits for implementation of the guidelines.

Proposed Amendment 24 would lessen the standards for receipt of a two-level offense adjustment for acceptance of responsibility. Rather than requiring a defendant to "clearly demonstrate[]" acceptance of responsibility, the proposal calls for reduction based on mere acceptance of responsibility and eliminates the long list of considerations that the court must currently weigh in awarding the reduction. Application Note 1(a) remains substantially the same, calling for the truthful admission of conduct comprising the offense (and disqualifying those defendants who "falsely den[y] or frivolously contest[]" relevant conduct that the court determines to be true). Application Note 1(b) is new, but reminiscent of current application note 1(b), which requires the court to consider the defendant's behavior after the filing of criminal charges. Under the proposal, obstructive conduct or the commission of an additional defense may negate an inference of acceptance of responsibility and disqualify the defendant for the reduction.

The new application note recognizes the "great deference" that is to be accorded to the sentencing judge's determination of whether a defendant has accepted responsibility. See current Application Note 5. Notably, there is no presumption against the reduction based upon particular types of post-charge behavior, as there is in current Application note 4 (noting that obstructive conduct will "ordinarily indicate[]" that a defendant has not accepted responsibility,"

making the reduction available only in "extraordinary cases."). The new application Note would not unduly constrain the sentencing court from awarding the reduction based on post-charge conduct, and thus, recognizes the judge's "unique position to evaluate a defendant's acceptance of responsibility." The NYCDL concurs solely with this feature of proposed Amendment 24.

The remainder of proposed Amendment erects additional hurdles for those defendants at level 16 or greater, who seek an additional 1-level reduction. These defendants are required to "clearly" demonstrate "extraordinary acceptance of responsibility." To determine whether a defendant made this showing the court is directed to a number of considerations, comprising all of the considerations that are currently listed for the reduction and then some (including a voluntary stipulation to deportation for deportable aliens).

The NYCDL opposes proposed Amendment 24 because it imposes substantial additional requirements for the three-point reduction, and accordingly, undercuts the guidelines' goal of providing strong incentives for offenders at high offense levels to consider guilty pleas. In permitting a three-level reduction, the Commission recognized that due to the structure of the guidelines a two-level reduction had a greater proportional effect for those defendants at lower offense levels than for those at higher levels. The proposed amendment ignores the structural reason for permitting a greater reduction for acceptance at higher offense levels and invites a new series of litigation over the meaning of "extraordinary acceptance."

Under current practice, the determination of whether a defendant receives a two-level or three-level reduction for acceptance of responsibility rests largely, if not exclusively, on the offense level prior to the adjustment. Experience suggests that the entry of a guilty plea in a timely fashion and cessation from additional criminal activity will suffice to earn most

defendants either a two or three-level reduction depending upon the applicable offense level. The NYCDL believes this should be the case and that it would be unwise to require a clear demonstration of "extraordinary acceptance" from those defendants at level 16 or greater who would seek the additional one-point reduction. If the proposed amendment means what it says, cases of truly "extraordinary acceptance" will be rare and 3E1.1 will no longer effectively address the structural anomalies of the guidelines. If judges and prosecutors read "extraordinary acceptance" loosely, the standards for the additional one-point reduction will vary from courtroom to courtroom. The NYCDL might feel differently about crediting so-called "extraordinary acceptance," if the credit amounted to something greater than a one-point reduction. As drafted, however, the proposal invites more problems than it addresses.

Proposed Amendment 25 would amend Application Note 4 by inserting a sentence providing that the commission of new offense by a defendant pending trial or sentencing "whether or not that offense is similar" to the offense already charged, "ordinarily" indicates that the defendant has not accepted responsibility for the offense charged. The NYCDL opposes this amendment as unnecessary. The guidelines already direct the sentencing court to consider post-arrest criminal conduct to determine whether a defendant qualifies for a reduction under 3E1.1. See, e.g., Application Note 1(b) ("termination or withdrawal from criminal conduct or associations"); 1(g) ("post-offense rehabilitative efforts"). The proposal largely states the obvious. There is no reason to believe that the proposal will resolve a so-called "circuit split." Those courts that have granted the reduction in the face of post-offense conduct will still be able to do so given the looseness of the proposed language. A proposal that set forth clearer

standards for application of the reduction in certain circumstances might have been more welcome.

The NYCDL strongly supports Proposed Amendment 26, which would make the three-level offense reduction available on the same terms to all defendants regardless of offense level. As currently drafted, 3E1.1 contains no obvious incentive for offenders at offense level 15 or lower to enter timely guilty pleas. These defendants are entitled to a maximum two-level reduction and obtain no greater benefit from entering an early plea than from waiting to plead guilty until the eve of trial. (The timeliness of a defendant's plea, however, is one of the "considerations" listed in Application Note 1(a) to be weighed by the Court in determining whether there should be a sentence reduction of any amount.) The proposal removes this disparity and further permits offenders at level 15 to be eligible for alternatives to incarceration. The change should encourage more timely dispositions and give the courts an additional limited amount of discretion to consider sentencing options for low-level offenders. The NYCDL recognizes that permitting a three-level reduction for offenders at all levels may not take sufficient account of the proportional effect of a reduction at various offense levels. The current guidelines, however, only marginally adjust for this effect. Further, a court may well consider this effect in fashioning a sentence. To address this effect completely, the Commission might consider adopting an "across-the-board" proportional reduction for acceptance of responsibility or (as in current practice) permit additional point adjustments for the higher offense levels.

ISSUE FOR COMMENT 28

Proposed Amendment 28 invites public comment upon a number of circuit court conflicts in the application of sections of the Guidelines Manual. The NYCDL has the following commentary concerning selected issues:

ISSUE FOR COMMENT 28 -- PARAGRAPH 1

- (1) Whether an upward departure may be based on dismissed or uncharged conduct that is related to the offense of conviction but is not relevant conduct.

In light of the broad authority vested in the sentencing court under § 1B1.4, and the holding of the Supreme Court in United States v. Watts, 65 LW 3461 (1/6/97), the statement in United States v. Thomas, 961 F.2d 1110, 1121 (3d Cir. 1992) that "[i]t would be a dangerous proposition to allow district courts to base upward departures on crimes that were not actually charged," is questionable. First of all, Thomas dealt with a government agreement not to bring an 18 U.S.C. §924(e) count (which would have triggered a mandatory minimum 15-year term of imprisonment) as part of a plea negotiation involving essentially the same course of conduct. Thus, Thomas did not actually involve conduct which was related, but not relevant, conduct. Furthermore, the Thomas opinion was published several months before the effective date of Amendment 467, which specifically provided that a plea agreement not to pursue a potential charge shall not prevent the conduct underlying that charge from being considered under the provisions of 1B1.3 in connection with the counts of conviction.

We therefore believe that it is unnecessary for the Commission to resolve this particular conflict.

ISSUE FOR COMMENT 28 -- PARAGRAPH 5

Section 2F1.1(b)(3)(A) of the Guidelines provides for a two-level enhancement in cases in which the defendant "misrepresents" his authority to act on behalf of a charitable or governmental organization. The NYCDL is of the view that this enhancement does not apply to a defendant whose conduct does not in fact involve a false representation, *i.e.*, to a defendant who does indeed have authority to act on behalf of a charitable organization, but who abuses this actual authority in the commission of a crime. United States v. Frazier, 53 F.3d 1105, 1111-14 (10th Cir. 1995), persuasively holds that to interpret the guideline and explanatory notes to cover this type of conduct impermissibly expands the scope of the guideline beyond that which was contemplated by the Sentencing Commission.

ISSUE FOR COMMENT 28 -- PARAGRAPH 9

Whether convictions that are erased for reasons unrelated to innocence or errors of law (regardless of whether they are termed by statute as "set aside" or "expunged") should be counted for purposes of criminal history.

The Commission has requested comment on whether the Guidelines should be amended in any way to address the split in the Circuits over the application of Section 4A1.2(j) to convictions which are subsequently "set aside" after the successful completion on some form of probationary or rehabilitative sentence. The NYCDL believes that the Ninth Circuit decision

in United States v. Hidalgo, 932 F.2d 805, 806-07 (9th Cir. 1991), and the Second Circuit decision in United States v. Beaulieu, 959 F.2d 375, 380-81 (2d Cir. 1992), correctly applied the Guideline provision and that the Hidalgo court also correctly noted the confusing and misleading language included in Note 10 to the Commentary. The NYCDL also believes that all juvenile or youthful offender convictions that are excused under state law are in essence expunged and that the Commission should amend Section 4A1.2(j) to clarify that all such set aside convictions should not be counted for criminal history purposes.

The refusal of the D.C. Circuit to apply Section 4A1.2 to a juvenile conviction set aside under the District of Columbia's Youth Rehabilitation Act, see United States v. McDonald, 991 F.2d 866, 871-73 (D.C. Cir. 1993), demonstrates the potential inequities that will arise unless the Guidelines provision is amended. The public policy goal of the Youth Rehabilitation Act -- to excuse young first offenders from the many potential disabilities of a criminal record -- appears to be identical to the goal of both the California and the Vermont statutes which have been held by the Hidalgo and the Beaulieu courts respectively to be covered by the expungement provision of 4A1.2(j). See also New York Criminal Procedure Law, Section 720.35 (youthful offender conviction set aside and sealed). Thus, the fact that Vermont chooses to seal the record of such convictions while the District of Columbia provides that the conviction should be automatically set aside should not result in disparate treatment of subsequently convicted federal offenders in calculating their Criminal History Category depending on the state of conviction.

Moreover, no juvenile or youthful offender conviction which is excused, either through sealing or through a set aside, can be used by the jurisdiction as a predicate for applying

sentence enhancement statutes for multiple felony offenders. Under these circumstances, it would be appropriate for the Commission to honor the public policy determinations of these jurisdictions and find that such excused convictions also cannot be used for calculating Criminal History under the Guidelines.

At a minimum, the language of Note 10 of the Comments to Section 4A1.2 must be clarified to eliminate the confusion noted by the Hidalgo court.

"The commentary sheds little light on the proper outcome and appears to be somewhat internally contradictory." Id. at 807.

The confusion stems from the fact that the reference in the commentary to convictions which are set aside for reasons unrelated to guilt or innocence clearly include convictions which are expunged under state law either through sealing (Vermont) or through dismissal of criminal charges (California). Moreover, the net effect on a defendant of sealing or dismissal is no different than of a set aside such as is applied under the Youth Rehabilitation Law in the District of Columbia. Thus, the Commission should recognize that state law prohibitions on using set aside convictions for purposes of sentence enhancement should be honored by the Guidelines and Section 4A1.2(j) should be amended to clarify this point.⁸

⁸ Such a position would not preclude the sentencing court from considering the set aside conviction in deciding on the appropriate sentence within the otherwise applicable Guidelines range. See Barnes v. United States, 529 A.2d 284, 286-89 (D.C. 1989) (holding that conviction set aside under the Youth Rehabilitation Act can be considered when sentencing the defendant for a subsequent offense). However, considering the set aside conviction in deciding on an appropriate sentence is very different from counting the sentence as a predicate for multiple offender sentencing enhancement statutes or for raising a defendant's Criminal History Level under the Sentencing Guidelines.

ISSUE FOR COMMENT 28 -- PARAGRAPH 11

- (11) Whether an upward departure should be measured from a defendant's guideline range or from a statutorily required mandatory minimum sentence.

The structure of the guidelines, as well as the explicit language of § 5K2.0, instruct that departures are to be made from the applicable guideline range. In §5K2.0, which sets forth the policy statement applicable to departures, the phrases "departure from the guidelines" "a sentence outside the range" or "outside the applicable range" are repeated at least ten times. Nowhere does the section discuss, let alone mandate, departures from a congressionally-imposed mandatory minimum sentence.

The NYCDL strongly urges the Commission to add language clarifying this precept, and correcting the (we believe) mistaken results in cases such as United States v. Carpenter, 963 F.2d 736 (5th Cir. 1992)(guideline range of 33-41 months, but 15-year mandatory minimum applicable; court grants upward departure to 230 months, starting from a hypothetical guideline range of 151-188 months, which bracketed the mandatory minimum); United States v. Doucette, 979 F.2d 1042 (5th Cir. 1992)(same). We believe the approach taken in United States v. Rodriguez-Martinez, 25 F.3d 797 (9th Cir. 1994), expressly rejecting Carpenter and Doucette, is correct.

PROPOSED AMENDMENT 28 -- ISSUE FOR COMMENT 13

Whether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure.

The NYCDL urges that the views of the First, Ninth and Tenth Circuits are correct in terms of what constitutes aberrant behavior, and believes that the Guidelines should be amended accordingly to make it clear that the crime of conviction, rather than the number of acts committed in the course of the crime, is the relevant consideration. In this regard, the language of the First Circuit in United States v. Grandmaison, 77 F.3d 555, 563 (1st Cir. 1996) is instructive. There the court said that "[w]e think the Commission intended the word single to refer to the crime committed and not to the various acts involved. . . . [F]ocusing on the crime of conviction instead of the criminal acts committed in carrying out that crime best comports with what the Commission intended." We submit that there are very few crimes which only take one act and that the consideration should be whether the entire crime which brings the person before the court signifies an aberrant act in an otherwise good and law abiding life and not whether the defendant undertook more than one step in order to commit the crime.

This interpretation is particularly appropriate in light of the language of 28 U.S.C. 994(j), in which Congress stated that the Commission shall "insure that the 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." Congress clearly intended that non-violent first offenders should be given

another chance, and we believe the First, Ninth and Tenth Circuits try to achieve this result with their analyses. We urge that the views of the above referenced circuits be adopted.

ISSUE FOR COMMENT 28 -- PARAGRAPH 15

Whether the definition of "violent offense" under § 5K2.13 (Diminished Capacity) is the same as "crime of violence" under § 4B1.2.

We believe that the rationales of the D.C. Circuit in United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) and the Fourth Circuit in United States v. Weddle, 30 F.2d 532 (4th Cir. 1994) correctly resolve this question. In particular, we believe that there is and should be a difference in approach between a section of the guidelines which attempts to incarcerate for longer periods of time those offenders who have a history of violence (the career offender section) and a section of the guidelines which addresses whether a defendant whose capacity is diminished because of some mental or psychological infirmity should receive a reduced sentence to account for the extent to which his or her mental infirmity may have contributed to the commission of the offense.

Moreover, we believe that when one has a mental infirmity, the need or capacity to satisfy the traditional purposes of sentencing is absent since the mental infirmity in some way affected the actions in the first place. Some of the reasons career criminals are sentenced for longer periods of time is to punish them and to make sure that society is protected from them for longer periods of time. The offender suffering from a mental infirmity, however, does not need punishment, and society does not need protection, so long as the infirmity can be and is addressed by appropriate psychological counseling, inpatient or out patient.

The cases in which this issue generally arises are those in which someone, because of a history of abuse or some sort of mental infirmity makes threats that he or she never intend to carry out -- either because he or she is not capable of doing so because they do not have physical capacity to do so, or because the threats are part of the psychology of his or her illness. Those are the circumstances of each of the cases cited in the issue for comment. In each of those cases we suggest that the district court should have had the discretion to consider whether to depart downward, under the particular circumstances of the case. We are aware of one case in particular in which a defendant suffered from a documentable mental illness, made some threats that this person never intended to nor could carry out and was deprived of the ability to seek this departure because of the interpretation in the applicable circuit as to the meaning of the term "violent offense." We urge this be changed.

PROPOSED AMENDMENT 34 -- ISSUE FOR COMMENT

Departures (Chapter Five, Part K); issue for comment regarding departures based on collateral consequences

In Koon v. United States, 116 S. Ct. 2035, 2052 (1996), the Supreme Court held that collateral employment consequences could, in an appropriate case, provide grounds for downward departure under U.S.S.G. § 5K2.0. The court acknowledged that the defendant's socioeconomic status does not provide grounds for departure, and that the defendant's career may be "linked" to his or her socioeconomic status. Id. However, the court noted, "the link is not so close as to justify categorical exclusion of the effect of conviction on a career." Id. The court continued, "socio-economic status and job loss are not the semantic or practical

equivalents of each other." Id. In the case before it, the court rejected employment consequences as a ground for departure, because "career loss is not so unusual for a public official convicted of using governmental authority to violate a person's rights." Id. Naturally, an offense of misusing governmental authority necessarily carries with it employment consequences. Nonetheless, the court held the door open for departures in cases where the offense did not necessarily have those consequences.

Cases in the courts of appeals are consistent with Koon. In United States v. Milikowsky, 65 F.3d 4, 8-9 (2d Cir. 1995), the Second Circuit upheld a downward departure based on the "extraordinary hardship" that a jail sentence would cause to the defendant's employees. The court stated: "Extraordinary effects on an antitrust offender's employees" is appropriate grounds for departure.

In all of the cases cited in the Issue for Comments, the courts specifically recognized that collateral consequences may be appropriate grounds for departure. See United States v. Smith, 27 F.3d 640, 644 (2d Cir.) (alienage may be grounds for downward departure based on extraordinary facts; rejecting departure on the facts before the court), cert. denied, 501 U.S. 954 (1993).

The NYCDL believes that departures based on collateral consequences should be permitted in cases which are not inconsistent with the guidelines' policy that disparity in sentencing would not be occasioned by socio-economic factors, i.e., not based on wealth, privilege or status in society (U.S.S.G. § 5H1.10). Where substantial additional punishment is likely to result from conviction for the crime for which the defendant is sentenced (i.e., beyond

imprisonment, fine and forfeiture), sentencing courts should be permitted to grant downward departures.

Various state laws frequently impose substantial additional punishment on convicted felons. Defendants who hold or wish to hold state issued licenses are often prevented from doing so by a felony conviction. Additional punishment in the form of a suspension, revocation or disqualification of license is regularly meted out to certified public accountants, dentists, medical doctors, lawyers, stock brokers, investment advisors, hair dressers, taxi drivers, architects, holders of liquor licenses, gambling casino operators, real estate brokers, morticians and many other licensed persons.

Convicted felons are often precluded from bidding on government contracts, prohibited from holding public office, being fiduciaries, holding government jobs and, can be deported, under certain circumstances. These punishments are in addition to the laws of some states which take away the convicted felon's right to vote or to serve on juries.

Convicted lawyers and certified public accountants are subject to discipline by the office of director of practice of the Internal Revenue Service. Defendants convicted of tax evasion are collaterally estopped from litigating issues relating to underlying tax liability, interest and various penalties. Felony convictions are often admissible in subsequent related legal proceedings such as law suits and disciplinary proceedings.

Indeed, corporations (especially publicly held corporations) successfully argue that the prospective collateral consequences are so severe that they avoid prosecution altogether. These additional punishments are in many cases far more severe than a prison sentence and a fine.

Defendants who demonstrate fact-specific substantial additional punishment should be able to present these factors to the sentencing court to arrive at a "just punishment for the offense" 18 U.S.C. § 3553(a)(2)(A), including a downward departure.

PROPOSED AMENDMENT 36

We question the wisdom of eliminating the last clause of the sentence in § 6A1.3(b), as well as the last paragraph of the Commentary, which require the court to notify the parties of its tentative findings and afford an opportunity for objections and correction before imposition of sentence. The disclosure of the court's tentative findings in advance of sentencing allows the parties to formulate objections, and, perhaps, convince the court that its views are wrong on either the facts or the law, which can thereby reduce appellate litigation. Moreover, we believe that the language the Commission proposes to strike is consistent with other remaining provisions of the Policy Statements in this area which suggest the court clearly identify areas in dispute in advance of sentencing, as well as the new Proposed Application Note 1 in § 6A1.2 which requires reasonable notice of the court's intention to consider sentencing outside the areas previously identified.