
WRITTEN TESTIMONY

PUBLIC HEARING

March 18, 1997



UNITED STATES SENTENCING COMMISSION

Statement of

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

on behalf of

Federal Public and Community Defenders

before the

**United States Sentencing Commission
Washington, D.C.**

March 18, 1997

Amendment 5
(§ 3A1.4)

In 1995, the Commission promulgated § 3A1.4 (international terrorism) in response to section 120004 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, which directed the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism. U.S.S.G. App. C, amend. 526 . Using emergency authority, the Commission amended § 3A1.4 in November 1996, in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. U.S.S.G. App. C, amend. 539. The emergency amendment broadened the scope of § 3A1.4 (by deleting "international") to apply to a federal crime of terrorism. Amendment 5 would repromulgate § 3A1.4 (terrorism) as a permanent guideline. We understand that the guidelines must provide an adjustment for acts that involve or promote terrorism, but we oppose the type of enhancement provided by § 3A1.4.

The amended version of § 3A1.4 provides the same enhancement as the original. The adjustment imposes a 12-level increase in the offense level, a minimum offense level of 32, and a criminal history category VI. We believe that mandatory minimums are counterproductive and inconsistent with the guideline system, and therefore oppose establishing a mandatory minimum offense level of 32. Mandatory minimum sentences increase disparity in sentencing and often result in over-punishing relatively less serious offenders. For similar reasons, we believe it is inappropriate for a chapter three adjustment to raise the criminal history category. The guidelines are set up in a logical order -- chapters two and three address the offense conduct; chapter four captures the defendant's criminal history. Under § 3A1.4, however, every defendant

will have the same criminal history category. This renders chapter four virtually meaningless and results in unwarranted disparity between defendants with a serious criminal record and defendants with a less serious or no criminal record. A 12-level adjustment for terrorism is a significant increase to any offense level. If, however, there is a justification for a greater enhancement, then the penalty should be reflected in the offense level and not in the criminal history category.

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

Part One

Amendment 6 has two parts. The first part corrects a technical error in the application instructions guideline, § 1B1.2. We support that amendment.

Part Two

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

The explanation of the amendment concerning "instant offense," for example, indicates that the purpose of the amendment is "to distinguish the current or 'instant' offense from prior criminal offenses." The proposed language, however, only results in confusion. The Commission has defined the term "offense" to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n. 1(l)). The term "instant offense,"

therefore, must mean "the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." Is there a difference between "offense of conviction" and "instant offense of conviction"? If there is no difference, is there really a need for both terms? If the Commission believes it necessary to define "instant offense," we offer the following suggestion: "The term 'instant offense' means the violation for which the defendant is being sentenced."

The explanation of the amendment to the commentary of § 3C1.1 indicates that the amendment is a conforming amendment, meaning that § 3C1.1 is being amended to make certain that the obstruction guideline uses the term "instant offense" to include all relevant conduct under § 1B1.3. The explanation does not indicate how the amendment conforms § 3C1.1 to the definition of "instant offense." The willful obstruction guideline already uses the term "instant offense." Moreover, the proposed language, once untangled, would change § 3C1.1 substantively. Under the present guideline, the adjustment applies only to the conduct of the defendant or conduct that the defendant aids and abets, see application note 7; U.S. Sentencing Com'n, Questions Most Frequently Asked about the Sentencing Guidelines ques. 62 (June 1, 1994), and only to efforts to obstruct justice with respect to the offense for which the defendant is being sentenced, see Fed. Judicial Center, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues 91 (Sept. 1995) (citing cases).. The proposed "conforming" language would permit application of the enhancement beyond conduct for which the relevant conduct rules of § 1B1.3 hold a defendant accountable. For example, the proposal would call for an obstruction of justice based upon conduct that obstructed the investigation of a civil violation committed by another person, even though the conduct that triggers application of the adjustment

(1) did not occur during the offense of conviction, or in preparation for or attempting to evade responsibility for the offense of conviction, and (2) was not part of the same course of conduct as or part of a common scheme or plan with the offense for which the defendant is being sentenced. In other words, absent the proposed amendment, the obstruction enhancement would not apply because the relevant conduct rules of § 1B1.3 would not call for application of the enhancement. We do not believe that the obstruction guideline should be a vehicle for sanctioning conduct so far removed from the offense of conviction.

Amendment 7
(§ 1B1.2)

Amendment 7 would revise the commentary in § 1B1.2 to state that “the Statutory Index specifies the offense guideline section(s) in Chapter Two most applicable to the offense of conviction.” The revised commentary would include two exceptions to this general rule. “If the statute of conviction (1) is not listed in this index; or (2) is listed in this index but the guideline section referenced for that statute is no longer appropriate to cover the offense conduct charged because of changes in law not yet reflected in this index, use the most analogous guideline.” We do not oppose the amendment.

Amendment 8
(§ 1B1.3)

Amendment 8 would amend the commentary in § 1B1.3 to provide an example of what is meant by “same course of conduct.” The example incorporates the holding in *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996), by amending application note 9(B) to state that “if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information, is insufficient to

show that they are part of the same course of conduct or common scheme or plan." We do not oppose the amendment.

The proposed amendment would provide a useful example to illustrate that similar offenses are not necessarily part of the same course of conduct, particularly when there is a lapse of time between them. In such cases, there must be a stronger showing of a connection between the offenses. The language from Hill provides a useful counterpart to the tax evasion example in application note 9(B), which illustrates how the time between offenses does not necessarily preclude a finding that the offenses are part of the same course of conduct.

Amendment 9
(§ 1B1.3)

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

circumstances, the use of such conduct as a sentencing enhancement raises substantial concerns of fundamental fairness, a downward departure may be considered." We prefer option 1(B).

The Commission, however, must first decide if it has the authority to limit or preclude use of acquitted conduct to determine the guideline range. We believe that the Commission has the power to do so.

Congress has given the Commission great discretion to determine federal sentencing policy. A sentencing rule promulgated by the Commission must be complied with, 18 U.S.C. § 3553(b), unless the rule conflicts with the Constitution or a statute. We are unaware of any constitutional provision that prohibits the Commission from adopting a rule that precludes or limits the use of acquitted conduct to determine sentence. The only statutory authority that has been suggested as doing so is 18 U.S.C. § 3661, which provides that "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." See *United States v. Watts*, __ U.S. __, 117 S.Ct. 633, 638 (1997) (Scalia, J. concurring).

Section 3661 was enacted in 1970,¹ when judges had virtually unfettered discretion to select sentence within the statutory parameters.² The Commission addressed the question of what section 3661 means in a sentencing system that greatly curtails judicial discretion to select

¹Pub. L. No. 91-452, § 1001(a), 84 Stat. 951. Congress originally designated the provision as 18 U.S.C. § 3577. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987, redesignated the provision as 18 U.S.C. § 3661.

²See *Mistretta v. United States*, 488 U.S. 361, 363-66, 109 S.Ct. 647, 650-51 (1989).

sentence. The Commission's interpretation, set forth in § 1B1.4, is that "in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."

Based upon that interpretation, the Commission has developed relevant conduct rules that limit judicial consideration of defendant's conduct in determining the guideline range. A rule precluding the use of acquitted conduct to determine the guideline range would be no different from those rules. Under § 1B1.3(a)(2), for example, a judge, in determining the offense level for an offense that does not group under § 3D1.2(d), cannot take into account conduct of the defendant that was part of the same course of conduct or common scheme or plan as the offense of conviction. In short, the Commission itself has determined that the guidelines, without violating section 3661, can limit a judge's consideration of defendant's background, character, and conduct when determining the guideline range.

Justice Scalia, however, seems to have suggested a greater meaning for section 3661 in *United States v. Watts*, __ U.S. __, 117 S.Ct. 633, 638 (1997) (Scalia, J. concurring). After pointing out that the Commission, under 28 U.S.C. § 994(b)(1), must promulgate guidelines that are consistent with the provisions of title 18 of the United States Code and quoting section 3661, Justice Scalia concluded that "neither the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines, may not be considered for that purpose (or may be considered only after passing some higher standard of probative worth than the Constitution and laws require) if it pertains to acquitted conduct." *Id.* (Scalia, J. concurring).

Unless Justice Scalia is using the term "enhancement of sentence" in a highly-technical sense -- to mean a provision in the Guidelines Manual that requires an increase in the offense level -- the Commission's interpretation of section 3661 is consistent with Justice Scalia's. The Commission, which has limited use of the factors in determining the guideline range but allowed use of the factors in selecting a particular sentence within the range or in departing, has not "decree[d] that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines, may not be considered for that purpose"

If Justice Scalia is using the term in a highly-technical sense, then his interpretation would render invalid substantial portions of the guidelines. Chapter four, part A, for example, places time limits upon prior convictions. If that violates section 3661, a judge is free to ignore these limitations without going through the departure analysis of § 4A1.3, p.s. The Commission has provided in § 5H1.12, p.s. that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range." If that violates section 3661, a judge is free to sentence on the basis of those factors because they relate to a defendant's background and character. Similarly, the government motion limitation of § 5K1.1, p.s. becomes ineffectual under because a defendant's assistance to authorities constitutes a part of the defendant's conduct. A judge, therefore, could impose a sentence below the guideline range, even in the absence of a government motion under § 5K1.1, p.s., if the judge concluded that the defendant had substantially assisted authorities. That result would fly in the face of two Supreme Court

decisions that have assumed the validity of requiring a government motion under § 5K1.1, p.s.³

We believe that an interpretation of section 3661 that prevents the Commission from prohibiting the use of acquitted conduct is incorrect. Such an interpretation would defeat the congressional goal of sharply limiting judicial discretion.⁴ Such an interpretation would also be inconsistent with the Supreme Court's decision in *Koon v. United States*, __ U.S. __, 116 S.Ct. 2035 (1996), a decision in which Justice Scalia was part of the majority. The Court in *Koon* adopted an analysis of departures that indicates that the Commission has the authority to forbid departures entirely and to discourage departures. *See id.* at 2045 (quoting from *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (per Breyer, C.J.)). Such authority could not exist if section 3661 means that the Commission lacks "authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines may not be considered for that purpose"

In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's

³*United States v. Melendez*, __ U.S. __, 116 S.Ct. 2057 (1996); *United States v. Wade*, 504 U.S. 181, 112 S.Ct. 1840 (1992).

⁴18 U.S.C. § 3553(b) requires judges to impose a sentence within the guideline range unless there is an aggravating or mitigating factor for which the guidelines do not adequately account. The guideline range, moreover, must be relatively narrow. 28 U.S.C. § 994(b)(2) provides that the top of a guideline range cannot exceed the bottom of the range by more than the greater of six months or 25 percent. *See Mistretta v. United States*, 488 U.S. 361, 367-68, 109 S.Ct. 647, 652-53 (1989).

The Supreme Court, in *Burns v. United States*, 501 U.S. 129, 132, 111 S.Ct. 2182, 2184 (1991), stated that the Sentencing Reform Act of 1984, which established the present sentencing scheme, "revolutionized" federal sentencing policy. *See also Koon v. United States*, __ U.S. __, 116 S.Ct. 2035, 2043 (1996) ("The Sentencing Reform Act of 1984 . . . made far-reaching changes in federal sentencing").

sentence on conduct of which the defendant has been acquitted. Most people equate acquittal with vindication and do not perceive using acquitted conduct as fair or just. We recognize the differing burdens of persuasion rationale that supports the use of acquitted conduct, but the use of acquitted conduct to determine the guideline range is neither compelled by the Constitution or by statute. We think it unwise policy to have a rule that can render a jury's verdict meaningless.

Amendment 10
(§ 1B1.5, § 2X1.1)

Part A

Amendment 10 consists of two parts. Part A would amend § 1B1.5 (interpretation of references to other offense guidelines) to require the use of the guideline that results in the "greater Chapter Two offense level," when two or more guidelines apply to a given case -- usually through a cross reference. The amended commentary would provide an exception for offenses covered by § 2C1.1 (bribes), § 2C1.7 (fraud involving deprivation of the right to honest services of public officials), § 2E1.1 (unlawful conduct relating to racketeer influenced and corrupt organizations) and § 2E1.2 (interstate or foreign travel or transportation in aid of racketeering enterprise). In cases involving any of those guidelines, the "greater offense level" would mean the greater offense level calculated under chapter three as well as chapter two.

The proposed amendment should simplify the comparative analysis required when two or more guidelines apply. We support the amendment.

Part B

Part B of amendment 10 would amend § 2X1.1 to eliminate the three-level reduction available for certain attempts, conspiracies, and solicitations. Instead of the three-level

reduction, the amended commentary would state that a downward departure of up to three levels may be warranted "if the defendant is arrested well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense." We oppose the amendment.

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

Amendment 11
(§ 1B1.10)

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

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

The Ninth Circuit case involved defendants whose sentences had been reduced because of a guideline amendment given retroactive application by § 1B1.10, p.s. Their new sentences called for terms of imprisonment that were less than the time they actually had served. The defendants argued that their terms of supervised release should be considered to have begun on the dates that they would have been released from imprisonment, and the Ninth Circuit agreed. *United States v. Blake*, 88 F.3d 824 (9th Cir. 1996).

The Eighth Circuit case, *United States v. Douglas*, 88 F.3d 533 (8th Cir. 1996), involved a defendant who had appealed sentence and whose original sentence had been overturned by the Court of Appeals. The district court, on remand, then imposed a lower sentence. At the time of resentencing, the defendant had served 46 months. The district court sentenced the defendant to 33 months, the top of the applicable guideline range. The defendant requested credit for the excess time served in prison. In response, the district court imposed the minimum term of supervised release required by § 5D1.2(a)(2), two years. (The maximum term authorized by § 5D1.2(a)(2) is three years.) The district court indicated that the excess time had been taken into consideration in the determination of the term of supervised release. The defendant appealed. The Eighth Circuit sustained the decision of the district court, holding that "the district court properly imposed a two-year term of supervised release." 88 F.3d at 534. The propriety of the imposition of the term of supervised release does not implicate 18 U.S.C. § 3624. To have imposed less than two years would have required the district court to have departed from the

supervised release guideline. The Eighth Circuit's decision, however, pointed out section 3624 and indicated that the term of supervised release cannot run during a period when the defendant is imprisoned in connection with a federal crime. This dictum suggests that the Eighth Circuit, if asked directly whether a term of supervised release should be considered to have begun when the defendant should have been released from prison, would reach a result different from the Ninth Circuit's result..

The Eighth Circuit noted that the purpose of imprisonment is different from the purpose of supervised release. 88 F.3d at 534. That was true at the time the Sentencing Reform Act was enacted, but the purpose of supervised release has changed over time. See generally Paula Kei Biderman & Jon M. Sands, A Prescribed Failure: The Lost Potential of Supervised Release, 6 Fed. Sent. Reporter 204 (1994).

As originally contemplated, supervised release served purely to help reintegrate defendants into the community. Indeed, as originally enacted, the supervised release provisions did not authorize revocation of supervised release. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1999 (enacting 18 U.S.C. § 3583). The Senate Judiciary Committee's report on that Act states that the legislation

did not provide for revocation proceedings for violation of a condition of supervised release because [the Committee] does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense.

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

Congress has changed its view of supervised release, however, and has made supervised

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

The proper interpretation of section 3624 must be determined in the context of a case or controversy. If the interpretation suggested by the Eighth Circuit prevails, the proposed amendment of § 1B1.10, p.s. is unnecessary because any excess time in prison will not be credited against the defendant's term of supervised release. If the Ninth Circuit's interpretation prevails, then the proposed amendment will deprive a defendant of the full benefit of the reduction in the guidelines. The ultimate arbiter of the proper interpretation of section 3624 is the Supreme Court.

In any event, we believe that amendment 11 represents unjust and unsound public policy. The amendment turns a blind eye to the fact that the defendant has been in prison longer than the defendant should have been. If a fine is reduced, any excess money paid by the defendant can be returned. Excess time in prison cannot be returned. The least that can be done is to give the defendant credit against the term of supervised release for the excess time in prison.

Amendment 12
(§ 2F1.1, § 2B1.1)

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

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

Amendment 13
(Ch. 5, part A)

Amendment 13 consists of two parts. The first part would create a new guideline (§ 5A1.3) to cover the sentencing table. We do not oppose this part of the amendment. The second part of the amendment would include in § 5A1.3 commentary making level 42 the highest applicable offense level, unless the offense level was calculated under § 2A1.1 (first degree murder), § 2M1.1 (treason), or a guideline provision that provided a level 43 because death resulted from the offense. The proposed amendment would increase judicial discretion and alleviate the problem of the unwarranted cliff between offense levels 42 and 43. We support this part of the amendment.

Amendment 14
(§ 2B3.1)

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

Robbery necessarily includes instilling some kind of fear in the victim. Under the Hobbs Act, for example, robbery means "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property" The purpose of the enhancement in § 2B3.1(b)(2)(F) is to increase the punishment for a threat that a reasonable person would understand as a threat of death. The enhancement is inapplicable in situations where there can be no doubt about the existence of such a threat -- where a gun or dangerous weapon is used or possessed, or a toy weapon or an object appearing to be a weapon is displayed or possessed -- because in those situations a greater enhancement supersedes the two-level enhancement of § 2B3.1(b)(2)(F). The requirement of an express threat in the situation where there is in fact no weapon (or even a toy weapon or an object that appeared to be a weapon) helps ensure that the perception of a threat is a reasonable perception. For the perception to be reasonable in such a situation, the threat must have been unambiguous and a direct statement of the defendant's intention.

Amendment 15
(§ 2B3.1)

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

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

The proposed definition of serious bodily injury defines "injury" to include "conduct" constituting criminal sexual abuse or sexual abuse offenses -- an illogical proposition. Those offenses may result in varying degrees of injury, which is why the guideline covering criminal

sexual abuse includes enhancements for injury ranging from permanent or life-threatening bodily injury to serious bodily injury. The proposed definition, by encompassing injury as well as criminal conduct, would cause unnecessarily complicated application problems. We therefore suggest that the proposed addition to the definition of serious bodily injury be rewritten. We recommend that the new language recognize that an artificial definition is being used and provide that, "For purposes of subdivision (b)(3)(B), serious bodily injury is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242 or a similar offense under state law."

Amendment 16
(§ 2B5.1, § 2F1.1)

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

We support the first and third parts of this amendment and oppose the second part. The second part of the amendment would move offenses involving altered bearer instruments from §

2F1.1 to § 2B5.1, which results in at least a one-level increase in the offense level. The Commission's explanation for the increase is that the "higher offense level reflects the lower level of scrutiny realistically possible in transactions involving currency." There has been no showing, however, that the current levels of punishment are inadequate. Absent such a showing, there is no justification for the increase.

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

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

This issue involves the determination of a base offense level under the four affected guidelines. That kind of determination ordinarily is controlled by § 1B1.2, which requires the court to use the offense of conviction. We believe the amendment resolves the split consistently with § 1B1.2. A determination of whether to use the first-degree or second-degree murder

guideline, for example, is based upon the offense of conviction when that choice is to be made directly. It is not clear to us why the choice between those guidelines should be based upon relevant conduct, rather than the offense of conviction, when the choice of guidelines is to be made when determining the base offense level under the four affected guidelines. We support the amendment.

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

Amendment 18 sets forth several proposed amendments involving § 2B1.1, § 2F1.1, § 2T1.4, and § 2T4.1, as well as ten issues for comment. The issues raised by the proposed amendments and the issues for comment are complicated and important. The Commission has an opportunity to simplify and clarify the guidelines and to reduce unjustified sentencing disparity. Unfortunately, it appears to us that the time available to the Commission this amendment cycle is insufficient to allow the Commission to deal adequately with all of the issues involved. We therefore recommend that the Commission postpone consideration of this amendment until the next cycle. We suggest that the Commission, because of the importance, complexity, and extent of the changes proposed in Amendment 18, take up the amendment as soon as feasible after completion of work on this cycle's amendments.

We believe that significant revisions in the fraud and theft guidelines are called for. The offense levels generated by those guidelines are, to a large extent, driven by loss. That results in a sort of accounting approach, where the focus of the inquiry is to ascertain the exact amount of loss. As a consequence, a defendant's culpability gets overlooked, and offense levels can be too high for less culpable defendants, even for those defendants who receive a reduction for role

under § 3B1.2. For example, the guidelines currently treat a defendant who intends to cause a \$1,000 loss but actually causes a \$20,000 loss the same as a defendant who intends to, and does, cause a \$20,000 loss.

We do not think that loss is irrelevant, but rather that loss is overemphasized and needs to be redefined. The Commission, in our judgment, should adopt a causation standard for loss, adjust loss based upon amounts that the victim has received from the defendant before discovery of the offense, and exclude consequential damages and interest from loss. We also support elimination of the more-than-minimal-planning enhancement in the fraud guideline. We have in the past support replacing that enhancement with the sophisticated planning enhancement in the tax evasion guideline.

Amendment 19 (biological weapons; terrorism)

Part A

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

We suggest that the Commission refrain from creating a new guideline to cover the new offenses. Those offenses are unlikely to occur with any frequency, and when they do occur, they

can be sentenced using the most analogous guideline. See § 2X5.1 If the offense involved terrorism, an adjustment under § 3A1.4 (terrorism) would be available.

Part B

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

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

Amendment 20 (§ 2X3.1, § 2X4.1)

Part One

Amendment 20 consists of three parts. The first part of the amendment would revise the commentary in § 2X3.1 (accessory after the fact) to explain what is meant by the term “underlying offense” when the application of § 2X3.1 results from a cross-reference or instruction from another chapter two guideline. The amended commentary would state that “the underlying offense is the offense determined by that cross reference or instruction.” For example, the cross reference in § 2J1.2 (obstruction of justice) states, “if the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that

determined above.” If the defendant obstructed the investigation of a drug trafficking offense, then under the proposed amendment to § 2X3.1, the “underlying offense” would refer to the drug trafficking offense — not to the obstruction of justice offense. We do not oppose the amendment in part 1.

Part Two

The second part of the amendment would revise the commentary in § 2X3.1 and § 2X4.1 (misprision of felony) to clarify that when a guideline for the underlying offense has alternative base offense levels, the calculation of the offense level “(base offense level, specific offense characteristics, and cross references)” is determined “based on conduct that was known, or reasonably should have been known, by the defendant.” The proposed commentary will make clear that, consistent with application note 10 of § 1B1.3, the selection of the base offense level must be based on the defendant’s knowledge of the conduct involved. We support the amendments in part two.

Part Three

The third part of the amendment would revise the commentary in § 2X3.1 and § 2X4.1 to state that when determining the offense level of the “underlying offense,” the term “the defendant” means “the defendant who committed the underlying offense.” We do not oppose the amendment in part three.

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

Introductory Comments

The Commission has been looking at § 3B1.1 for several years, but has only amended it

twice. The first amendment, effective November 1, 1991, excluded undercover law enforcement personnel from the definition of the term "participant." U.S.S.G. App. C, amend. 414. The second amendment, effective November 1, 1993, added current application note 2 to resolve a conflict in the circuits over whether an upward departure was possible based upon a defendant's management of the property, assets, or activities of a criminal organization. U.S.S.G. App. C, amend. 500. The Commission has not otherwise altered the guideline or its commentary.

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

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

Part A

Part A of amendment 21 would revise the introductory commentary to chapter three, part B. We do not oppose part A of the amendment, although we believe that the revisions are unnecessary and repetitive.

Part B

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

Option one. The most significant change made by option one is to subsection (b), which option one would modify to apply "if the defendant was a manager or supervisor (1) of at least [three][four] other participants in the offense, or (2) in an offense that was otherwise extensive" New subsection (b)(1) would preclude the anomalous results mentioned above by permitting a three-level enhancement under subsection (b) only if the defendant managed or supervised "at least [three][four] other participants in the offense."⁵ New subsection (b)(2), however, would call for a three-level enhancement if the defendant managed or supervised only one other participant.⁶

Proposed application note 4 seeks to illustrate circumstances that may warrant an upward departure because the "defendant has a more culpable role in the offense but does not qualify for an upward adjustment" under § 3B1.1. Illustration (A) carries forward language in present

⁵If the Commission decides to adopt this offense, we believe that the number of other participants should be four so that subsection (b) parallels subsection (a).

⁶There is a drafting ambiguity in subsection (b)(2). That subsection does not specify that the defendant manage or supervise any participant. All that is required is that the defendant be a manager or supervisor. Who or what must the defendant manage or supervise. Because option one proposes to carry forward the application note that indicates that management of property, assets, or activities of a criminal organization constitute a basis for an upward departure, proposed subsection (b)(2) must be premised upon the defendant managing or supervising another participant in an offense that was otherwise extensive.

application note 2 that the Commission added effective November 1, 1993. Illustration (B) adds new language that we find to be unhelpful and confusing. Illustration (B) does not provide much concrete information that would assist a court to determine if an upward departure is warranted. The operative phrase is "functions at a relatively high level." The note does not indicate what sort of conduct constitutes functioning at a relatively high level. How can a defendant function at a relatively high level without managing or supervising at least one other participant -- which results in a two-level enhancement under proposed subsection (b)(2) -- or without exercising management responsibility over the property assets, or activities of a criminal organization -- which current application note 2 (and proposed application note 4(A)) already indicate is a basis for departing upward?

Option two. Option two deletes present subsection (b), redesignates present subsection (c) as new subsection (b), and adds an undesignated provision stating that "in cases falling between (a) and (b), increase by 3 levels." The undesignated provision works, at least theoretically, for organizers or leaders but not (even theoretically) for managers or supervisors. Organizers and leaders receive a four-level enhancement under subsection (a) if the offense involved at least four other participants or was otherwise extensive, and a two-level enhancement under subsection (b) if there was one other participant. There is, therefore, a "between" (offenses involving two or three other participants). There is, however, no "between" for managers and supervisors because the guideline as amended would provide only one enhancement for managers and supervisors.

Option two also adds an application note to illustrate circumstances that may warrant an upward departure because the "defendant has a more culpable role in the offense but does not

qualify for an upward adjustment" under § 3B1.1. The new application note is identical to, and has the same problems as, the new application note that option one would add.

Option three. Option three would scrap the present guideline in favor of a new approach. The new guideline would ask the sentencing court to determine, first, whether the defendant was a "substantially more culpable participant." If the court found the defendant to be such, then the court would decide if the defendant "had [a major aggravating] role in [the][a large-scale] offense," requiring a four-level enhancement, or "[a lesser aggravating] role in the offense," requiring a two-level enhancement. The term "large-scale offense," if used, would be defined as "an offense that involves at least five participants, including the defendant, or an offense that involves at least two participants, including the defendant, and is otherwise extensive." If "large-scale offense" is not used, it is not clear whether the new guideline would call for an enhancement for any offense or whether at least one other participant would be required.⁷

Amendment 22

(§ 3B1.2)

Introductory Comments

Amendment 22 has two parts. Part A would amend § 3B1.2 to "clarif[y] the operation of

⁷Neither the proposed guideline nor the proposed commentary expressly provides that there be at least one other participant, but that would seem to be implied by proposed application note 2, which states that for the four-level enhancement to apply, "the defendant must be (A) a substantially more culpable participant" That could mean substantially more culpable than the other participants in the offense. Proposed application note 4, however, introduces some ambiguity. That proposed application note contains bracketed language indicating that the court can "compare the conduct of the defendant to the conduct of an average participant in an offense of the same type and scope." That comparison could conceivably result in an enhancement for a defendant who was the only participant in the offense. If the Commission decides to proceed with option three, we recommend that the Commission clarify whether another participant is required for the two-level enhancement.

the mitigating role adjustment in § 3B1.2” Part B invites comment on several matters.

Part A

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

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

The second clarification concerns the three-level reduction for a defendant whose role was less than minor but more than minimal. The explanation suggests that this reduction does not provide a meaningfully distinct category and “is unnecessary in view of the overlapping ranges feature of the Sentencing Table.” The latter reason is nonsensical -- while ranges for adjacent offense levels overlap, the range applicable to the lower offense level will authorize a lower sentence than the range applicable to the higher offense level. The Commission uses intermediate levels in a number of situations, such as in § 3B1.1. However, only one of the three options in Amendment 21 for revising that guideline would delete that intermediate adjustment. If the overlapping range justification were to be applied consistently, all three options should delete the intermediate adjustment.⁸ We do not agree with the view that the intermediate category is not “meaningfully distinct.” The key concepts of this guideline presently are defined in a rather subjective way. The existence of the intermediate adjustment provides the sentencing

⁸The explanation of Amendment 21 does not indicate a reason for deleting the intermediate adjustment of § 3B1.1.

court with a continuum along which to place the defendant.⁹ We oppose deleting the intermediate adjustment.

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

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

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

The fifth clarification is that “a somewhat more helpful but still flexible definition of

⁹The Commission’s proposal later in Amendment 21 to add more objective elements only underscores the purpose served by the intermediate adjustment. Under the proposal, to receive a four-level reduction, a defendant must “typically” possess five characteristics. To receive a two-level reduction, the proposal requires that a defendant possess “some” of those characteristics (“some” being less than most, we assume two of the five would suffice). The intermediate level would permit a three-level reduction for a defendant who possessed four of the five characteristics.

minor role is provided.” Again, we oppose raising the standard for a two-level reduction. We also do not find the statement that a minor participant “typically possess[es] some of the characteristics associated with a minimal role” improves the clarity of the guideline. We believe that current application note 3 adequately explains what is required for a two-level adjustment.

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

The seventh clarification is the resolution of a circuit conflict over whether the mitigating role adjustment should be applied based upon relevant conduct or upon comparing defendant’s conduct to a hypothetical, average defendant. The proposed language calls for the sentencing court to look at relevant conduct. Bracketed language states that the court “may wish” to compare the defendant’s conduct with “the conduct of an average participant in an offense of the same type and scope.” We support addressing the matter, but we think that the proposed language needs to be revised. The structure of the proposed new application note 4 suggests that the sentencing court should first decide whether the defendant qualifies for a reduction by looking to relevant conduct. If, after that analysis, the court cannot conclude that the defendant is entitled to the adjustment, or is entitled to a two- or three-level adjustment, the court may then compare the defendant’s conduct to that of an average participant in an offense of the same type and scope. The result of that comparison can be beneficial to the defendant, increasing a two- or three-level reduction or taking a two-level reduction when the relevant conduct analysis does not call for any reduction). The result of such a comparison could not be to take away or diminish

the amount of the reduction. We believe that the proposal should be modified to spell out this intention more clearly. Further, we believe that the use of the phrase "may wish" is ill-advised. That phrase authorizes, but does not require, the court to consider comparable offenses. The result can only be disparity, as some courts will accept the invitation to consider comparable offenses and other courts will not.

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

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

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

Part B

Part B invites comment on three issues. First, part B seeks comment on whether the Commission should amend the guidelines to provide a single guideline to encompass

adjustments for both mitigating and aggravating role. We think it worthwhile to attempt to draft such a guideline.

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

Finally, part B invites comment on whether the guidelines should expressly state whether "couriers" or "mules" should receive a mitigating role adjustment. One of the major failings of the current guidelines is that offense levels for couriers and mules are too high. Couriers and mules frequently are citizens of other countries with depressed economies. The lure of quick and apparently-easy money tempts many whose present is bleak and whose future is dismal. The unpleasant fact is that there is no shortage of people whose lot in life makes bringing drugs into the United States for a fee an attractive proposition. The work requires no great skill or preparation; anybody can do it. Even life imprisonment for couriers and mules would not appreciably diminish the supply of people willing to be couriers and mules. In short, the war on drugs cannot be won by locking up, for long periods of time, people who serve as couriers and

mules. We believe that § 3B1.2 should provide that couriers and mules receive a four-level reduction. Most couriers and mules possess the five characteristics of minimal participation that the amendment in Part A identifies -- they generally are unaware of the scope and structure of the drug operation of the identity of participants other than the person who recruited them or another courier or mule traveling with them; they perform unsophisticated tasks; they have no material decision-making authority; they have no supervisory responsibility; and they receive small compensation in relation to the street-value of what they bring in.

Amendment 23
(§ 3C1.1)

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

Penalizing a defendant for what the defendant says at trial deters defendants from testifying on their own behalf because they fear that what they say could, if they are convicted, increase their sentence. We recognize that there is no constitutional right to lie, but as Justice Stewart has observed, there can be a chilling effect on the exercise of the right to testify because of "a defendant's rational fear that his truthful testimony will be perceived as false." *United*

States v. Grayson, 438 U.S. 41, 57, 98 S.Ct. 2610, 2619 (1978) (Stewart, j. dissenting).

Applying the obstruction enhancement routinely whenever a defendant has testified and been convicted would tend to discourage defendants from testifying.

The current language in application note 1 is intended to preclude that sort of occurrence. The commentary seeks to induce caution in applying the obstruction enhancement based upon what the defendant has said. The Supreme Court in United States v. Dunnigan, __ U.S. __, 113 S.Ct. 1111 (1993), endorsed a cautious approach while upholding application of the obstruction enhancement based upon defendant's perjury at trial. The Court stated that when application of the enhancement based upon defendant's testimony is challenged, the sentencing court "must review the evidence and make independent findings necessary to establish a willful impediment to or an obstruction of justice, or an attempt to do the same," under a perjury definition requiring false testimony concerning a material matter. __ U.S. at __, 113 S.Ct. at 1117. "[I]t is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." Id.

Requiring separate findings on each element of the enhancement helps prevent routine application of § 3C1.1 whenever a defendant testifies and is convicted. That alone, in our judgment, is not sufficient. Therefore, we recommend that the last sentence of application note 1 be revised to read: "To base the application of this provision on the defendant's alleged false testimony or statements, the court must find, by clear and convincing evidence, that (1) the testimony or statements (A) were false and (B) pertained to a material matter; and (2) the defendant acted with the willful intent to provide false information rather than as a result of faulty memory, mistake, confusion, or other similar reason."

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

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

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

Amendment 24 (§ 3E1.1)

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

The proposed amendment confuses and complicates § 3E1.1. It injects subjective terms, such as "extraordinary," into the guideline, thereby assuring frequent litigation. The term "extraordinary" has traditionally been used in the context of departures, adding further confusion to this guideline. Proposed new commentary suggests that meetings with probation officers are required if a defendant is to receive the full benefit of the adjustment. Such a requirement would be wholly inappropriate in a myriad of circumstances and would burden defendants and defense counsel unnecessarily. By suggesting that a defendant must provide criminal history information to receive the full benefit of the adjustment, the proposed commentary would interfere with the fundamental requirement that sentencing enhancements must be proved by the government. Further, this requirement would interfere with a defendant's constitutional right to effective

assistance of counsel. No lawyer should advise a client to discuss matters that will necessarily increase his or her sentence. Moreover, as discussed below, this amendment would penalize defendants, especially poorly educated defendants, who do not fully understand the details of their criminal history. Stated simply, the proposed commentary has little, if anything, to do with the concept of acceptance of responsibility.

We have in the past encouraged the Commission to revise § 3E1.1 to provide a standard reduction for a defendant who pleads guilty. (Indeed, in 1990, the Commission amended § 3E1.1 to make clear the significance of a guilty plea in assessing a defendant's acceptance of responsibility, U.S.S.G. App. C, amend. 351.) Even after the amendment, this guideline has provoked a significant number of appeals. Instead of simplifying § 3E1.1, however, the proposed amendment would make it harder for a court to assess whether a defendant has accepted responsibility. To warrant a two-level reduction, the amendment would impose an additional requirement that the defendant express his acceptance of responsibility in a "sufficiently prompt manner."

In the past, we have encouraged the Commission to authorize the additional one-level reduction for defendants whose offense level is below level 16. Instead of making this simple change, the proposed amendment would make application of the additional one-level reduction more complicated. The current guideline provides a bright-line rule. If the defendant qualifies for a two-level reduction, then an additional level is deducted if the defendant (with an offense level of 16 or higher) either timely provides the government complete information about his involvement in the offense or timely notifies the authorities of an intention to plead guilty. The proposed amendment would authorize an additional one-level reduction only for "extraordinary"

acceptance of responsibility, which would be determined based on the "totality of circumstances." The proposed amendment would list factors (including some that are currently listed as considerations for granting a two-level reduction) that the court should consider in determining whether an additional one-level reduction is warranted. This only would transfer any difficulty in applying the guideline from stage one (the two-level reduction) to stage two (the additional one-level reduction).

Proposed application note 2(a) is particularly bothersome because it would authorize denying a defendant an additional one-level reduction for failing to provide accurate information "regarding the defendant's juvenile and adult criminal record." Anyone with real experience in the criminal justice system knows that many defendants honestly do not have an accurate understanding of the disposition of their prior cases. We have often encountered defendants who believe the charges were dismissed because they received probation or a sentence of time-served. (Indeed, as defense attorneys, we find this situation frustrating. We are often unable to advise our clients of the implications of a conviction because of the client's inaccurate understanding of his or her record and the lack of access to an official record of a defendant's prior convictions.) While we recognize that probation officers must receive accurate information about a defendant's criminal record, this information is readily available in court records. We have never seen a presentence report that calculated a criminal history score based on the defendant's recollection. This proposed application note will only serve to penalize defendants whose memories are faulty or whose understanding of the criminal justice system is limited. The proposed test has no bearing on a defendant's acceptance of responsibility for the offense.

Amendment 25
(§ 3E1.1)

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

In 1992, the Commission amended § 3E1.1 to make clear that to qualify for a reduction, the defendant must accept responsibility for the offense of conviction -- failure to admit to relevant conduct is not grounds for denial of the reduction. U.S.S.G. App. C, amend. 459. Thus, the focus of the inquiry should be on whether the defendant has accepted responsibility for the offense — not whether the defendant has, before sentencing, successfully overcome a propensity to commit any criminal act. As the Sixth Circuit stated, “an individual may be truly repentant for one crime yet commit other unrelated crimes Considering unrelated criminal conduct unfairly penalizes a defendant for a criminal disposition, when true remorse for specific criminal behavior is the issue.” *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993). Indeed, a defendant who commits a new offense while pending trial or sentencing already faces significant penalties, including a sentence for the new conviction, an increase in criminal history points, and a prosecution under 18 U.S.C. § 3147 for committing a new crime while on bail.

The proposed amendment incorporates the position taken by the Fifth Circuit in *United States v. Watkins*, 911 F.2d 983 (5th Cir. 1990), which stated that additional criminal conduct unrelated to the offense may provide grounds for denying credit for acceptance of responsibility. Watkins, however, was decided when credit for “acceptance of responsibility” required a defendant to accept responsibility for “his criminal conduct.” U.S.S.G. § 3E1.1 (Nov. 1, 1989).

After the Watkins decision, the Commission promulgated amendments 351 and 459 to make clear that the defendant need accept responsibility only for the offense of conviction. To act consistently with the promulgation of amendments 351 and 459, the Commission should not promulgate the proposed amendment.

Amendment 26
(§ 3E1.1)

Amendment 26 would revise § 3E1.1 by deleting the requirement in subsection (b) that limits the additional one-level reduction to defendants with an offense level of 16 or higher. We support this amendment. A defendant who meets the criteria under § 3E1.1(b) should not be denied the reduction simply because the defendant failed to commit an offense serious enough to warrant an offense level of 16. It makes little sense to reward more serious offenders with a reduction while denying less culpable defendants -- those less likely to commit another crime -- any incentive to do more than minimally required to receive a two-level reduction.

Amendment 27
(§ 4B1.1, § 4B1.2)

Introductory Commentary

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

The Sentencing Reform Act of 1984 seeks to bring about a more equitable sentencing system by requiring judges to impose sentences called for by the guidelines unless the guidelines fail adequately to account for a significant factor that warrants a sentence different from that

called for by the guidelines. Congress directed the Commission to base those guidelines upon two primary factors -- the nature and circumstances of the offense, see 28 U.S.C. § 994(c), and the history and characteristics of the defendant, see 28 U.S.C. § 994(d).

The Commission accounts for the first factor by means of the offense level. The Commission has assigned a base offense level to the offense guidelines of chapter two. The Commission directs that the base offense level be increased and (occasionally) reduced based upon specific offense characteristics. The specific offense characteristics permit the court to adjust the base offense level to account for factors that took place during the offense that aggravate or mitigate the offense. Thus, the base offense level for robbery is increased for such things as whether a weapon was present and if so what the weapon was and how it was used; whether anyone was injured and the extent of the injury; and the amount of the loss. The adjustments of chapter three permit the court to adjust the offense level based upon factors that can occur as part of any offense, such as whether the defendant selected a vulnerable victim or played a minor or minimal role in the offense. The offense level, in short, represents the seriousness of the offense as determined by factors particular to that offense and factors applicable to all offenses generally.

The Commission accounts for the second factor by means of the criminal history score. The Commission has drafted rules for assigning weight to various factors related to a defendant's criminal history, factors such as the length of a sentence imposed for a prior conviction and whether the offense for which the defendant is being sentenced was committed while the defendant was on parole or probation for another offense. These rules are detailed and represent a careful effort by the Commission to determine the relative weight to assign to the defendant's

criminal record.

The career offender guideline overrides all of the carefully calibrated factors that the Commission has used to determine the applicable guideline range. The career offender guideline is not a product of the Commission's independent judgment, but is the result of a congressional mandate in 28 U.S.C. § 994(h). That mandate requires a sentence at or near the maximum term authorized if the defendant is convicted of a crime of violence or a controlled substance offense and has two prior convictions for such offenses. The result of the Congressional mandate is that a defendant can have a guideline range of, say, 51-63 months, representing the sentencing range that the guidelines find to be appropriate for a person with the defendant's criminal history committing the particular offense for which the defendant is being sentenced. If the defendant is a career offender, however, the guideline range becomes 210-262 months.

In our judgment, the Commission should seek to minimize the impact of a provision that overrides the Commission's carefully constructed rules for determining an appropriate sentencing range. The career offender guideline is a crude measure of offense severity -- an offense involving the sale of five grams of cocaine powder is treated the same as an offense involving the importation of 500 pounds of heroin. We believe that the Commission should seek to minimize the impact of such a crude and frequently inaccurate measure of punishment.

Part A

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

classified as such.

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

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

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

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

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

Part B

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

This provision of part B would likely eliminate most of the utility those offenses have for plea negotiating and could result in an increase in the number of cases taken to trial. As we

indicated above, plea agreements serve the interests of the government and the defendant and are an important part of the federal criminal justice system. The offense level for both the maintaining a drug house and the communications device offenses will be determined by the quantity of drug involved, so the penalties will not be minor.

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

A section 924(c) offense does not fit well with the career offender guideline for technical reasons. The minimum punishment for a section 924(c) violation is also the maximum punishment, and any section 924(c) sentence must run consecutively to any other sentence imposed. Those factors render immaterial whether the section 924(c) offense is an "instant offense of conviction" under the career offender guideline -- the sentence the court must impose will not change. There will be an impact, however, if the section 924(c) offense constitutes a prior conviction for a crime of violence or a controlled substance offense under the career offender guideline. One impact is that an offense of which the defendant has been acquitted can become a prior conviction for purposes of the career offender guideline. A defendant can be convicted under section 924(c) and acquitted of the underlying offense, drug trafficking, for example. If a flow-through approach is taken with regard to section 924(c), then the drug trafficking of which the defendant was acquitted becomes the basis for finding that the defendant

is a career offender. We oppose this aspect of Part B.

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

Amendment 28
(resolving circuit court conflicts)

Introductory Comments

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

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

Part One

Part one of Amendment 28 inquires about “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,” citing three cases. This statement of the issue suggests that the answer is in the

affirmative. 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." The Commission, in § 1B1.4, has interpreted this language to mean that the sentencing court can consider a factor related to defendant's conduct that is not accounted for in the calculation of the guideline range when the court is deciding whether to depart. If that is so, then a court can consider dismissed or uncharged conduct related to the offense of conviction but not constituting relevant conduct under § 1B1.3.

The matter is not quite so simple, however, because of the impact of plea negotiating. In *United States v. Thomas*, 961 F.2d 1110 (3d Cir. 1992), one of the cases cited in the issue for comment, the defendant, a convicted felon, had purchased five firearms after falsely completing the AT forms required to purchase the weapons. Under a plea agreement, defendant pleaded guilty to four counts of making false statements in connection with the purchase of a firearm in return for the government's agreement not to charge the defendant with being a felon in possession of a firearm, conviction of which would have called for a mandatory minimum prison term of 15 years. The district court departed upward for several reasons related to the adequacy of defendant's criminal history category. On appeal, the government suggested that a different basis supported the departure, namely that defendant "could have been charged with possession of a firearm by a convicted felon." *Id.* at 1119. The Third Circuit rejected this suggestion, pointing out that "there is a major difference between saying that [defendant] could have been charged with possession of a firearm and his actually having been charged and convicted of this offense." *Id.* at 1121. "[F]airness dictates that the government not be allowed to bring the firearm possession

crime through the "back door" in the sentencing phase, when it had previously chosen not to bring it through the "front door" in the charging phase. Id.

We agree with the court and believe that the guidelines should impose on the government an obligation to abide by the letter and spirit of plea agreements by providing that if there is a plea agreement, the government cannot seek an upward departure unless the government expressly has reserved that right as part of the plea agreement.

Part Two

Part two of the amendment inquires "whether information provided in connection with an agreement under § 1B1.8 . . . may be placed in the presentence report or used to affect conditions of confinement," citing three cases. We believe that this matter is not appropriate for Commission action.

In the Eighth Circuit case cited in the issue for comment, the court concluded that

once the United States has agreed to a grant of immunity and the would-be defendant has testified, that testimony is useless against the testifier, and it may not be used to affect a subsequent sentence of the testifier (or allowed to affect conditions and terms of confinement). The Fifth Amendment to the Constitution, see *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), and the Sentencing Guidelines, § 1B1.8 App. n. 1, require no less.

United States v. Abanatha, 999 F.2d 1246, 1249 (8th Cir. 1993). The Commission has no authority to overturn the Eighth Circuit's interpretation of the Fifth Amendment.

Part Three

Part three of Amendment 28 inquires "whether drug quantities possessed for personal use should be aggregated with quantities distributed or possessed with intent to distribute." We believe that the Commission should address the matter.

In our judgment, drugs intended for personal use should not be counted when calculating the offense level of a defendant being sentenced for drug trafficking. Only those quantities with which a defendant intends to traffick should be counted in establishing the base offense level for drug trafficking offenses under the drug trafficking guideline, § 2D1.1. First, counting quantities of drugs possessed for personal use as distribution quantities is inconsistent with the statutory language of title 21, United States Code. Under 21 U.S.C. § 841(a)(1), for example, it is unlawful knowingly or intentionally to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." A quantity that is possessed for personal use is not possessed with the "intent to manufacture, distribute, or dispense." A personal-use quantity, therefore, cannot logically be said to have been "involved" in the trafficking offense. Including person use quantities, in short, will overstate the seriousness of the drug trafficking offense.

Second, including personal-use quantities in the calculation of trafficking quantities is inconsistent with the distinct penalty scheme that Congress has established in title 21, United States Code. Congress created different penalties for trafficking offenses and simple possession offenses. Trafficking offenses are major felonies, carrying a maximum of life imprisonment. Simple possession offenses are misdemeanors under 21 U.S.C. § 844(a), with a maximum prison term of one year, although repeat offenders can receive a felony prison term of up to three years.¹⁰ The Commission has adopted this distinction for calculating the offense level for drug offenses under the guidelines. For trafficking offenses, § 2D1.1 provides a range of base offense levels

¹⁰21 U.S.C. § 844(a) has created an irrebuttable presumption that possession of more than five grams of crack is the equivalent of possession with intent to distribute. Consequently, this rationale would not apply to simple possession of more than five grams of crack.

from six to 38, depending on the quantity and type of controlled substance involved in the offenses. For these misdemeanor offenses, § 2D2.1 designates a base offense level of eight, six, or four, depending on the type of controlled substance involved. The quantity of drugs possessed does not increase the base offense level. Thus, including personal-use quantities will over-punish simple possession.

In rejecting a rule that would have included personal-use quantities in the calculation of distribution quantities, the court in *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1496 (9th Cir. 1994) explained that

Such a rule would thwart the intent to punish distributors more harshly than consumers of drugs and to make sentence proportional to the amount of harm to society represented by the quantity of drugs to be distributed.

This reasoning is more persuasive than that of *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993), which explained its holding by stating that “the defendant’s purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy.” Because knowledge of the scope of a conspiracy is not alone sufficient to hold a person liable under relevant conduct theories, this rationale is suspect. See 1B1.3, comment. (n.2) (“With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.”). It does not follow that by purchasing drugs one undertakes to distribute them as part of a conspiracy. Cf. *United States v. Torres*, 53 F.3d 1129, 1143 (10th Cir. 1995) (buyer-seller relationship does not establish supervisory-relationship with the buyer).

Part Four

Part four of the amendment inquires "whether a federal prison camp is a 'similar facility' under §2P1.1(b)(3)." We believe that the Commission should address the matter.

Subsection (b)(2) of § 2P1.1 authorizes a seven- or five-level reduction in the offense level (depending on the base offense level used) if a defendant escapes from "non-secure" custody and returns within 96 hours. If that reduction is not applicable, subsection (b)(3) of that guideline authorizes a lesser reduction (four or two levels, depending on the base offense level used) if the defendant escaped "from the non-secure custody of a community corrections center, community treatment center, "halfway house," or similar facility" Subsections (b)(2) and (3) were drafted at different times. The former was a part of the guideline as originally drafted, and the latter was added effective November 1, 1990, see U.S.S.G. App. C, amend. 341.

There is nothing in the explanation of the 1990 amendment that added subsection (b)(3) to indicate whether the Commission, by using a different phrase, intended to make subsection (b)(3) apply to fewer institutions than subsection (b)(2). There is no apparent policy reason to do so. A prison camp, for example, meets the definition of "non-secure custody" in application note 1 to § 2P1.1. See § 2P1.1, comment. (n.1)(citing as an example of non-secure custody "a work detail outside the security perimeter of an institution"). A defendant who walks away from such a camp and returns within 96 hours is entitled to a seven- or five-level reduction. There would seem to be no good reason to deny a defendant who walks away from such a camp and returns 100 hours later the lesser reduction of subsection (b)(3). We recommend that the Commission amend subsection (b)(3) to delete "the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility," and insert in lieu "non-secure custody".

Part Five

Part five of Amendment 28 inquires "whether the 2-level enhancement at §2F1.1(b)(3)(A) requires that the defendant misrepresent his authority to act on behalf of a charitable or governmental organization." Application note 4 to § 2F1.1 sets forth examples of conduct to which § 2F1.1(b)(3)(A) should apply:

Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

U.S.S.G. § 2F1.1, comment. (n.4). The background commentary explains the purpose behind the enhancement:

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victim's charitable impulses or trust in government create particular social harm.

U.S.S.G. § 2F1.1, comment. (backg'd).

Very few appellate court opinions address the application of § 2F1.1(b)(3)(A),¹¹ and the

¹¹See *United States v. Ferrera*, ___ F.3d ___, 1997 WL 76147 (7th Cir. Feb. 24, 1997); *United States v. Vili*, No. 94-10511, 1995 WL 267554 (9th Cir. May 5, 1995) (unpublished); *United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995); *United States v. Fletcher*, No. 93-50515, 1995 WL 77416 (9th Cir. Feb. 24, 1995) (unpublished); *United States v. Lilly*, 37 F.3d 1222 (7th Cir. 1994); *United States v. Echevarria*, 33 F.3d 175 (2d Cir. 1994); *United States v. Marcum*, 16 F.3d 599 (4th Cir. 1994); *United States v. Hall*, 996 F.2d 284 (11th Cir. 1993); *United States v. Starr*, 986 F.2d 281 (8th Cir. 1993); *United States v. Penrod*, No. 91-30373, 1992 WL 98770 (9th Cir. May 8, 1992) (unpublished); *United States v. O'Brien*, No. 91-1181, 1991 WL 270121 (6th

the vast majority of them involve defendants who claimed to hold a position within the organization they purportedly represented. Only three cases, seem to have involved defendants who actually held a position within the organizations. See *United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995) (president of nonprofit organization serving American Indians who used federal money meant for job training to buy computers for organization) (enhancement does not apply); *United States v. Lilly*, 37 F.3d 1222 (7th Cir. 1994) (church pastor who told investors their money would go toward improvement of church facilities but used money for personal expenses) (enhancement applies); *United States v. Marcum*, 16 F.3d 599 (4th Cir. 1994) (president of charitable organization that ran bingo games to benefit the organization who used some of bingo proceeds for personal use) (enhancement applies).

To the extent there is a split among the circuits over this enhancement, it is between Frazier, on the one hand, and Lilly and Marcum on the other. However, the Lilly and Marcum opinions affirm the application of § 2F1.1(b)(3) to the appellants' cases with practically no discussion of the propriety of that application. Thus, the real split lies within the Frazier opinion, where two judges found that the phrase "acting on behalf of" an organization requires a defendant to state that he or she holds a position in the organization he or she represents, and one judge in dissent who concluded that the enhancement applies when a defendant claims simply to be acting in the interest of the organization. Further, the majority in Frazier relied on the fact that the defendant made misrepresentations to the federal government, not the general public (as in Marcum and Lilly). That is, the defendant in Frazier did not take advantage of anyone's charitable impulses or trust in government (a fact ignored by the dissent). In addition, the defendant in

Cir. Dec 13, 1991) (unpublished); *United States v. Bakhtiari*, 913 F.2d 1053 (2d Cir 1990).

Frazier did not realize any personal gain from the misrepresentation, again unlike the defendants in Marcum and Lilly. On this basis, the result in Frazier is perfectly consistent with the result in Marcum and Lilly.

We suggest that the Commission clarify the meaning of the phrase "acting on behalf of" by adding to application note 4 of § 2F1.1 a new second sentence stating, "In order for subsection (b)(3)(A) to apply, a defendant must misrepresent that he or she holds a position in an organization or agency specified in that subsection." Such a requirement comports with the ordinary meaning of "on behalf of" and with the examples set forth in application note 4.

Part Six

Part six of the amendment inquires "whether 'victim of the offense' under § 3A1.1 refers only to victim of the offense of conviction or to victim of any relevant conduct." The Second and Fifth Circuits have interpreted the phrase "victim of the offense" to include a victim of any relevant conduct. The First and Sixth Circuits have interpreted the phrase to refer only to the victim of the offense of conviction. We believe that latter interpretation is better, and suggest that the Commission amend § 3A1.1 to specify that result.

We also suggest that § 3A1.1 be amended to provide that the enhancement applies if the offense of conviction was motivated by the victim's vulnerable status. Thus, we propose that § 3A1.1(b) be amended to require a two-level enhancement "if the victim of the offense of conviction was unusually vulnerable due to age or physical or mental condition or was otherwise particularly susceptible to the criminal conduct, and the offense of conviction was motivated by the victim's unusual vulnerability." This would conform the enhancement in § 3A1.1 with the enhancement in § 3A1.2 (official victim), which requires that the offense of conviction be

motivated by the victim's status as a government officer or employee, or a member of the immediate family of a government officer or employee. See U.S.S.G. § 3A1.2(b), and id., comment. (n. 4).

Part Seven

Part seven of Amendment 28 inquires "whether a defendant's failure to admit to use of a controlled substance amounts to willful and material obstruction of justice under § 3C1.1." We believe that a defendant's failure to admit to using illegal drugs should not be grounds for an enhancement for obstruction of justice.

In *United States v. Thompson*, 944 F.2d 1331, 1348 (7th Cir. 1991), cert. denied, 502 U.S. 1097 (1992), the Seventh Circuit held that the adjustment for obstruction of justice cannot apply to defendants "who simply exercise their constitutional right to refrain from incriminating themselves to authorities by denying wrongdoing." The defendants in *Thompson* had denied using cocaine while on bail during their trial. In support of the decision, the Seventh Circuit noted that the obstruction of justice guideline had been amended to make clear that "[a] defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision." U.S.S.G. § 3C1.1, comment. (n.1). The Third Circuit in *United States v. Belletiere*, 971 F.2d 961, 968 (3d Cir. 1992), added further that the defendant's misstatements about using drugs "had nothing to do with the offenses for which he was convicted," the statements were not material, and routine drug tests easily reveal whether a person on bail is using drugs. Indeed, in *Belletiere*, the defendant's bail was revoked as a separate punishment for his use of drugs.

The Seventh Circuit's interpretation of § 3C1.1 makes sense and avoids a conflict with the constitutional protection against self-incrimination. A defendant should not be required to provide incriminating information beyond the offense of conviction to avoid an enhancement for obstruction of justice. Indeed, the Fifth Amendment implications of this matter echo issues raised by interpretations of the guideline for acceptance of responsibility before § 3E1.1 was amended in 1992 to require a defendant to accept responsibility for the offense of conviction only:

To require a defendant to accept responsibility for crimes other than those to which he has pled guilty or of which he has been found guilty in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration.

United States v. Oliveras, 905 F.2d 623, 628 (2d Cir. 1990). See United States v. Frierson, 945 F.2d 650 (3d Cir. 1991); United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989). To avoid impinging on the right against self-incrimination, the obstruction of justice guideline should be amended to make clear that to avoid an enhancement, a defendant is not required to make self-incriminating statements about matters unrelated to the offense of conviction.

Part Eight

Part eight of the amendment inquires "whether time in a community treatment center is a 'sentence of imprisonment' under §4A1.2(e)(1)." We believe that the Commission should review the manner in which the criminal history guidelines deal with sentences to community treatment centers and halfway houses and other sentences involving less control over the defendant than imprisonment involves, such as a sentence of home confinement.

The background note to § 4A1.1 presently expresses what we think is the appropriate policy. A sentence to a halfway house, without regard to the length of commitment, is treated as

the equivalent of a sentence of imprisonment for a term of less than 60 days. A halfway house sentence is of a lesser order of magnitude than a sentence of imprisonment for more than 60 days.¹² Different considerations suggest that the Commission may want to modify the policy if residency in a halfway house occurs in conjunction with a term of imprisonment. For example, 18 U.S.C. § 3624(c) requires, "to the extent practicable," that a defendant serve a reasonable portion of the last ten percent of a term of imprisonment (but not more than six months) "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community," specifically including placement in home confinement. Whether such a period of home confinement should be included for purposes of calculating criminal history points should be addressed in the guidelines directly.

Part Nine

Part nine of Amendment 28 inquires "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." We believe that the Commission should review the manner in which the guidelines deal with the various types of "erased" convictions that states have adopted to minimize the impact of a criminal conviction. In our view, the Commission should revise its policy about how to count erased convictions.

At present, § 4A1.2 contains an artificial distinction between convictions that are "expunged" and convictions that are "set aside" or "vacated," even when the terms are in reality

¹²Although the background note to § 4A1.2 refers to a sentence to a halfway house, there is no good reason why a sentence to a community treatment center or similar residential facility or a sentence to home confinement should be treated differently from a sentence to a halfway house. The Commission, in § 5C1.1(e), treats similarly commitment to a community treatment center, a halfway house, a similar residential facility, and home confinement.

synonymous. States employ different methods for setting aside certain convictions and prohibiting or restricting the later use of such convictions. States use different terms for those methods. Under § 4A1.2, however, the term used is controlling. If the state uses the term "expunged," § 4A1.2(j) provides that the conviction is not counted, but if instead the state uses "set aside," application note 10 to § 4A1.2 provides that the conviction is counted. We believe that a better policy would be to respect the state policies and count an "erased" conviction, whether termed "expunged" or "set aside," only if the conviction could be used under the law of the state of conviction for the purposes of later imposing a sentence.

Part Ten

Part ten of the amendment inquires "whether a court may impose a fine costs of imprisonment under § 5E1.2(c)." We believe that a fine for the cost of imprisonment can only be imposed if a punitive fine is imposed and if the defendant has the ability to pay.

The Tenth Circuit set forth the most sensible approach to determine the appropriateness of requiring a defendant to pay the cost of imprisonment in *United States v. Labat*, 915 F.2d 603 (10th Cir. 1990). The sentencing court must impose a punitive fine under § 5E1.2(c), using the table in § 5E1.2(c)(3), unless the defendant, under § 5E1.2(f), establishes an inability to pay the fine. Once the punitive fine is imposed, the defendant, under § 5E1.2(I), may be required to pay an "additional" fine to cover the costs of imprisonment -- again subject to the defendant's ability to pay the additional fine as determined under § 5E1.2(f).

We believe the Commission should amend § 5E1.2 to make clear that (1) a fine under § 5E1.2(c) is mandatory, if the defendant has the ability to pay the fine or if a fine is required by statute; and (2) if the defendant does not have the ability to pay a fine determined under §

5E1.2(c), the court may not impose a fine under § 5E1.2(I). As the Tenth Circuit has pointed out, "it makes no sense to waive the punitive fine and impose the 'additional' fine." 915 F.2d at 606.

Part Eleven

Part eleven of Amendment 28 inquires "whether a departure above a statutorily required minimum sentence should be measured from defendant's guideline range or the applicable statutory minimum." The issue arises if the top of the guideline range is less than the mandatory minimum. In such cases, under § 5G1.1(b) the mandatory minimum becomes the "guideline sentence." The reverse situation arises when the bottom of the guideline range is higher than the statutory maximum. In such cases, § 5G1.1(a) provides that the statutory maximum becomes the "guideline sentence." The parallel issue in that situation is whether a downward departure should be measured from the guideline range or the applicable statutory maximum.

Both § 5K2.0 and § 4A1.3 contemplate departures above or below the "guideline range." The problem is how to reconcile the statutes and guidelines in a departure situation where they appear to be incompatible. The first situation -- where the guideline range is lower than the mandatory minimum -- provides yet another illustration of how mandatory minimums "trump" the guidelines. The second situation illustrates how guideline calculations can result in sentences that are too high.

We believe that this problem is worth review, and suggest that the Commission study this problem carefully to come up with a suitable proposal to address the clash between the statutorily required sentences and the procedure for guideline departures.

Part Twelve

Part twelve of the amendment inquires "whether the district court can depart to the career

offender level based on the defendant's criminal history, although the defendant does not otherwise qualify for the career offender enhancement." We oppose creating an upward departure for a pseudo-career offender.

The career offender guideline exists because Congress in 28 U.S.C. § 994(h) directed the Commission to incorporate into the guidelines a recidivist provision to apply to defendants who commit certain offenses and who have two prior convictions for specified types of offenses. The resulting career offender guideline overrides the carefully calibrated factors that the Commission has used to determine the applicable guideline range. The career offender guideline makes irrelevant the elaborate set of rules that the Commission has crafted to calculate the seriousness of a defendant's criminal history and the severity of the defendant's offense.. (See discussion of amendment 27.) Thus, a guideline calculation may call for a defendant to receive a sentence of 51-63 months, but the career offender guideline would subject that same individual to 210-262 months. In addition, the career offender guideline produces disparity by treating dissimilar offenders the same. For instance, a defendant with two prior street sales of a small amount of drugs is treated the same as a defendant with two prior murders, if both are sentenced as a career offender for a similar offense. The career offender guideline also produces disparity by treating dissimilar offenses the same. An offense involving the sale of five grams of cocaine powder is treated the same as an offense involving the importation of 500 pounds of heroin.

The career offender guideline already produces enough inequity in its treatment of defendants who meet that guideline's criteria. Encouraging departures up to the career offender guideline's penalty level would only exacerbate the disparity. Rejecting a departure to the career offender guideline, the Ninth Circuit pointed out in *United States v. Faulkner*, 952 F.2d 1066,

1073 (9th Cir. 1991):

A final reason for refusing to allow analogy by reference to the career criminal provisions is that they are too blunt an instrument to serve that purpose. Unlike the ordinary criminal history provisions, they do not function as a sliding scale fit for incremental measurements. Rather, they function as an on/off switch. Once the prerequisites for becoming a career offender are met, the sentence takes an extraordinary leap; both the base offense level and the criminal history category simultaneously increase. No other enhancement in the guidelines operates that way. Sui generis provisions, by their very nature, are not useful as analogues.

In our view, the Commission should seek to minimize rather than expand the impact of a provision that is already incompatible with the structure and purpose of the guidelines.

Part Thirteen

Part thirteen of Amendment 28 inquires “whether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure.” We believe that the Commission should clarify what constitutes the basis for a departure for aberrant behavior.

The present reference to aberrant behavior is in the Commission’s discussion of probation in Chapter one, part A(4)(d): “The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.” That statement recognizes that (1) sometimes criminal conduct is so out of character for a person that the conduct is aberrant behavior and (2) such conduct is deserving of less punishment than behavior that is not aberrant.

The Commission’s articulation of that concept, however, has caused some confusion over whether the Commission literally meant that a departure was possible only if the offense consisted of one act. We believe that the First Circuit’s analysis of the matter is correct:

We think the Commission intended the word "single" to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to "single acts of aberrant behavior" to include multiple acts leading up to the commission of a crime. . . . Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts.

United States v. Grandmaison, 77 F.3d 555, 563 (1st Cir. 1996).

We suggest that the Commission delete the sentence from Chapter one, part A(4)(d) quoted above and promulgate a new policy statement in Chapter five, part K providing that if the offense of conviction is aberrant, the court may depart. The determination of whether the offense is aberrant should, consistent with *Koon v. United States*, __ U.S. __, 116 S.Ct. 2035 (1996), be made on the basis of all of the facts and circumstances of the case.

Part Fourteen

Part fourteen of the amendment inquires "whether collateral consequences of a defendant's conviction can be the basis of a downward departure." We believe the decision as to whether the "collateral consequences" of a conviction justify a departure should be left to the determination of the sentencing court. We see no reason why the Commission should categorically exclude consideration of "collateral consequences" as a possible basis for departure.

In *Koon*, the Supreme Court made clear that whether a circumstance justifies a departure requires a determination of "whether the particular factor is within the heartland given all the facts of the case." *Koon*, 116 S.Ct. at 2047. The phrase "collateral consequences" is a broad category. Conceivably, there may be situations where the consequences of a conviction in a

particular case make that case so unusual as to warrant a departure from the otherwise applicable guideline range. The converse may also be true. For instance, in reviewing the facts in Koon, the Supreme Court found that the collateral employment consequences for the defendants (police officers convicted of violations under color of law) were not sufficiently unusually to warrant a downward departure. "It is to be expected that a government official would be subject to the career-related consequences petitioners faced after violating § 242, so we conclude these consequences were adequately considered by the Commission in formulating § 2H1.4 (interference with civil rights under color of law)."

Most of the conceivable collateral consequences of a conviction are already treated as discouraged departure factors in § 5H1.1 (age), § 5H1.2 (education and vocational skills), § 5H1.3 (mental and emotional conditions), § 5H1.4 (physical condition), § 5H1.12 (employment record), § 5H1.12 (family ties and responsibilities and community ties). Only in the most extraordinary case, therefore, will a particular collateral consequence warrant a departure. As pointed out in Koon, the district court is in the best position to determine whether a particular case is unusual enough to warrant a downward departure:

[the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases.

Koon, 116 S.Ct. at 2046-47.

We suggest that the Commission refrain from further limiting the ability of courts to display their "special competence about the 'ordinariness' or unusualness' of a particular case."

Koon, 116 S.Ct at 2047 (citing letter from Pamela G. Montgomery, Deputy General Counsel, United States Sentencing Commission (Mar. 29, 1996)).

Part Fifteen

Part fifteen of Amendment 28 inquires "whether the definition of 'violent offense' under § 5K2.13 (Diminished Capacity) is the same as 'crime of violence' under § 4B1.2." This matter was before the Commission during the 1994 cycle, but the Commission at that time decided not to act.

Section 5K2.13, p.s. provides that a defendant who at the time of the offense had a "significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" could receive a departure sentence, but only if the offense of conviction was for a "non-violent offense." The Commission in § 5K2.13, regrettably, introduced a new term into guidelines lexicon, "non-violent offense," and, predictably, there has been litigation about what that term encompasses. We believe that the Commission should clarify the policy statement.

We recommend that the policy statement be revised to read as follows: "The court may sentence below the authorized guideline range if the defendant, at the time of the offense of conviction, had a significantly reduced mental capacity that did not result from voluntary use of drugs or other intoxicants." We believe that diminished capacity makes a defendant less culpable than other defendants who commit the same offense, whether that offense is fraud or bank robbery. If a departure is warranted when the offense does not involve violence, and we believe that it is warranted if the defendant acted with diminished capacity, then a departure is also warranted when the offense does involve violence. We would expect that departures for defendants who commit violent offenses would be less frequent than for defendants who commit

nonviolent offenses, and we would also expect that the extent of departure for defendants who commit violent offenses would tend to be less than for defendants who commit nonviolent offenses. Public safety is protected by the requirement in 18 U.S.C. § 3553(a) that when imposing sentence the court consider the nature and circumstances of the offense and the history and characteristics of the defendant. We believe that federal judges can be trusted to make departure determinations under such a standard in a responsible manner.

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

Part A

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

Part B

Part B of Amendment 29 seeks comment on whether to reorganize § 5B1.3, § 5B1.4, p.s., and § 5D1 to distinguish more clearly between statutorily-required, standard, and special conditions of probation and supervised release. We have not had problems with the current organization of the relevant guidelines and policy statement, so from our standpoint there is no need to revise their organization. If others have had difficulty with the current organization of these provisions, we would not object to reorganizing them.

Amendment 30
(§ 5D1.2)

Amendment 30 would revise the commentary in § 5D1.2 (term of supervised release) to clarify that a defendant who meets the criteria of § 5C1.2 is not subject to a statutory minimum term of supervised release. We support the amendment. A defendant who meets the criteria of 18 U.S.C. § 3553(f) (safety valve) is entitled to be sentenced "pursuant to the guidelines" and "without regard to any statutory minimum sentence" otherwise mandated by certain provisions of title 21 of the United States Code. Those mandatory sentencing provisions include as part of the sentence a mandatory term of supervised release. Thus, a defendant who qualifies for the "safety valve" is not subject to any statutory minimum term of supervised release otherwise mandated by those same statutes. We believe that the proposed application note expresses that policy in an appropriate manner.

Amendment 31
(§ 5E1.1, § 8B1.1)

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

Amendment 32
(special assessment)

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

oppose the amendment.

Amendment 33
(Chapter 5, part H)

Amendment 33 would add a policy statement (§ 5H1.13, p.s.) providing that "neither susceptibility to abuse in prison nor the type of facility designated for service of a term of imprisonment is ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." We oppose this amendment as unnecessary and inconsistent with the Commission's goal of simplifying the guidelines. As matters now stand, under Koon, a sentencing court can depart for susceptibility to abuse in prison only in unusual circumstances. Proposed § 5H1.13, p.s., by making susceptibility in prison a discouraged factor, does not change the analysis that a sentencing court would have to make. In our experience susceptibility to prison abuse is rarely used as a departure ground. There is no need to make it a discouraged factor. We also think it unwise to address the type of facility designated for service of the prison term imposed. Designation is a matter within the discretion of the Federal Bureau of Prisons and cannot be known for certain at the time sentence is imposed. Unless the Commission has data suggesting that there is a problem, we recommend that the Commission not address the designation matter.

Amendment 34
(§ 5K2.0, p.s.)

Amendment 34 would revise § 5K2.0, p.s. (grounds for departure) by including a discussion of departure policies derived from the introduction to the Guidelines Manual. The amendment would also add language stating that in reviewing a district court's decision to depart, appellate courts apply an abuse of discretion standard, citing Koon v. United States, __ U.S. __,

116 S.Ct. 2035 (1996). We do not oppose the amendment.

Amendment 35
(Ch. 5, part K)

Amendment 35 would create a new policy statement (§ 5K2.19, p.s.) to state that "prosecution and conviction in federal court following prosecution in another jurisdiction for the same or similar offense conduct is not ordinarily relevant in determining whether a sentence below the guideline range is warranted, except as authorized by § 5G1.3." The amendment is in reaction to Koon, in which the Supreme Court upheld a departure for a federal prosecution that followed a state acquittal based on the same underlying conduct. We oppose the amendment.

First, the amendment is unnecessary. We know from experience that departures based on successive prosecutions seldom occur, making it unnecessary for the Commission to promulgate a policy statement addressing the matter. To create a separate policy statement to address this rare situation would unnecessarily clutter the guidelines.

Second, the proposed policy statement, as drafted, is flawed. Proposed § 5K2.19, p.s. would state that a prior acquittal "is not ordinarily relevant in determining whether a sentence below the guideline range is warranted, except as authorized by § 5G1.3" A departure sentence, by definition, see 18 U.S.C. § 3553(b), is a sentence not authorized by the guidelines. It is, therefore, a logical impossibility for a guideline to authorize a departure. Further, § 5G1.3 does not purport to authorize a departure, but rather is at pains to indicate that a sentence imposed under § 5G1.3(b) that is less than the otherwise-authorized guideline range is not a departure. Application note 2 states, "for clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under § 5G1.3(B). . ."

Amendment 36
(presentence report)

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

Amendment 37
(Consolidation)

Part A

Part A of Amendment 37 would merge § 2E1.4 (use of interstate commerce facilities in the commission of murder for hire), which is applicable to convictions under 18 U.S.C. § 1958, into § 2A1.5 (conspiracy or solicitation to commit murder). This consolidation would not effectively change the offense level for section 1958 convictions; however, the consolidation would subject section 1958 defendants to a two- or four-level enhancement for injury to a victim¹³ that is not automatically available¹⁴ under the current version of § 2E1.4. Defendants being sentenced for section 1958 convictions also would be subject to an upward departure for "substantial risk of death or serious bodily injury to more than one person" that also is not automatically available under the current version of § 2E1.4.

We oppose this amendment. Defendants convicted under section 1958 would be

¹³ Unlike the injury adjustment in several other guidelines, e.g., § 2A2.2(b)(3), § 2A3.1(b)(4), and § 2B3.1(b)(3), the adjustment here does not permit the use of intermediate levels of adjustment and therefore is inconsistent with the adjustment in those guidelines.

¹⁴ The enhancement would be available if included in the guideline applying to the underlying unlawful conduct. See § 2E1.4(a)(2).

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

Part B

Part B of Amendment 37 would merge § 2A2.4 (obstructing or impeding officers) into § 2A2.3 (minor assault). This merger would not affect the offense level for sentences presently treated under § 2A2.4; however, those sentences would be subject to an upward adjustment for substantial bodily injury to a person under age sixteen¹⁵ that is not presently available under § 2A2.4. In addition, sentences currently handled under § 2A2.3 would be subject to a three-level enhancement for obstructing or impeding a governmental officer (although if it applies, § 3A1.2 would not apply). In addition, § 2A2.3 sentences would be subject to a cross-reference to § 2A2.2 (aggravated assault), that would be carried over from § 2A2.4, and to an upward departure for significant disruption of governmental functions, also carried over from § 2A2.4.

We oppose this amendment. Carrying over into § 2A2.3 the cross-reference from § 2A2.4 runs contrary to the purported goals of this amendment to consolidate and simplify, and contrary to the specific goal of reducing the number of cross-references and corresponding calculations.

¹⁵The wording of this enhancement would also be changed from "If the offense resulted in substantial bodily injury . . ." to "If the offense involved substantial bodily injury"

Further, inclusion of a cross-reference may inhibit plea negotiations. The government has the jurisdiction to charge an offense covered by the cross-referenced guideline, § 2A2.2. The cross-reference would compromise the government's ability to charge a lesser offense in order to reach a plea agreement. If the Commission concludes that the cross-reference should remain, then its application should be limited to only those cases involving obstructing or impeding an officer.

Part C

Part C of Amendment 37 would merge § 2B1.3 (property damage or destruction), § 2B6.1 (altering motor vehicle identification numbers), and § 2H3.3 (obstructing correspondence) into § 2B1.1 (theft).

Effect on § 2B1.3. The incorporation of § 2B1.3 should not affect the offense levels presently available under § 2B1.3. Theoretically, some of the enhancements available under § 2B1.1 that are not available under § 2B1.3, such as § 2B1.1(b)(6) (financial institution), could apply to property damage cases. Conversely, the cross-reference in § 2B1.3(c)(1) to § 2K1.4 (arson) could apply to cases other than property damage or destruction.

Effect on § 2B6.1. Merging § 2B6.1 into § 2B1.1 would have no effect on the base offense level for offenses involving altered or obliterated motor vehicle identification numbers. The base offense level of eight in the current § 2B6.1, according to the Commission, reflects more than minimal planning and a value of up to \$2,000. Under § 2B1.1, the base offense level would be four, with an automatic adjustment for more than minimal planning (see proposed application note 16), and an appropriate adjustment for the value of the vehicles or vehicle parts. The proposed version of § 2B1.1 would not incorporate the definition of loss in VIN cases (the retail value of the vehicles or parts) that currently exists in application note 2 of § 2B1.3.

Subsection (b)(2) of the current version of § 2B6.1, "if the defendant was in the business of receiving and selling stolen property, increase by 2 levels," is also contained in the present version of § 2B1.1, albeit in slightly different language: "If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels." Subsection 2B1.1(b)(4(B) appears narrower than § 2B6.1(b)(2), because it would require that the offense involve receiving stolen property, but it is harsher, in that it requires a four- rather than a two-level increase.

Effect on § 2H3.3. Merging § 2H3.3 (applicable to convictions under 18 U.S.C. § 1702) into § 2B1.1 would in effect maintain the base offense level at six for correspondence-obstruction cases, adding a two-level enhancement to the § 2B1.1 base offense level of four. Further, the merger would not affect section 1702 convictions involving theft or destruction of mail, because the current § 2H3.3 already references § 2B1.1 and § 2B1.3 respectively. However, in cases involving only obstruction, the merger could increase the offense level by subjecting a defendant to adjustments not available under § 2H3.3, such as more than minimal planning or loss adjustments.

We do not oppose this amendment.

Part D

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

elected or holds a high-level decision-making or sensitive position.

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

We do not oppose this amendment.

Part E

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

Effect on § 2C1.4. Presently, § 2C1.4 provides a base offense level of six, with no enhancements or cross-references. A merger with § 2C1.3 would retain that base offense level, but would subject a defendant to enhancements such as four levels "if the offense involved actual or planned harm to the government."

Effect on § 2C1.5. Presently, § 2C1.5 provides for a base offense level of eight, with no enhancements or cross-references. A merger with § 2C1.3 would reduce the base offense level to six, but add two levels in a new enhancement designed to cover cases currently handled under § 2C1.5. Consequently, the offense level would effectively remain at eight.

Effect on all three guidelines. None of the three guidelines affected by this amendment currently contain a cross-reference. As part of the consolidation, however, a cross-reference to § 2C1.1 and § 2C1.2, as appropriate, would be added. In cases of payments to obtain public office,

the application of the cross-reference to § 2C1.2 would be virtually automatic, resulting in an increase in the offense level from eight to 15 (base offense level of seven and enhancement for elected or high-level decision-making official of eight) and an increase in the guideline range from 0-6 months to 18-23 months for offenses with a statutory maximum of 12 months. 18 U.S.C. §§ 210-11.

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

Part F

Part F of Amendment 37 would merge § 2D1.9 (placing or maintaining dangerous devices on federal property to protect the unlawful production of controlled substances) into § 2D1.10 (endangering human life while illegally manufacturing a controlled substance) and renumber § 2D1.10 as § 2D1.9. The current version of § 2D1.9 provides a base offense level of 23. The current version of § 2D1.10 provides a base offense level of the greater of 20 or three plus the offense level from the drug quantity table in § 2D1.1. The amendment would keep this latter structure, with a possible increase in the base offense level from 20 to 23. For offenses currently sentenced under § 2D1.10, increasing the alternative offense level from 20 to 23 would increase

the offense level. For offenses currently sentenced under 2D1.9, offense levels could remain at level 23 if 23 is used as the alternative base offense level, could be reduced to 20 if 20 is used as the alternative base, or could be increased if the type and quantity of drug involved put the offense level higher than 20 or 23.

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

Part G

Part G of Amendment 37 would merge § 2D2.2 (acquiring a controlled substance by forgery, fraud, deception, or subterfuge) into § 2D2.1 (unlawful possession of a controlled substance). This merger would effectively retain the base offense level of eight in § 2D2.2, but would also subject defendants convicted of 21 U.S.C. § 843(a)(3) to cross-references not currently available under § 2D2.2.

We do not oppose this amendment.

Part H

Part H of Amendment 37 would merge § 2D3.2 (regulatory offenses involving controlled substances or listed chemicals) into § 2D3.1 (regulatory offenses involving registration numbers and unlawful advertising relating to schedule I substances). This merger would increase the offense level in § 2D3.2 from four to six, "the base offense level most typical for regulatory offenses." This change would not affect defendants whose criminal history category is I, but would shift other defendants into a higher zone within the sentencing table. For example, a

defendant with a criminal history category VI is currently in Zone B of the sentencing table.

Under the amendment, that defendant would be in Zone D, and would therefore not be eligible for the alternative sentences available under Zone B.

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

Part I

Part I of Amendment 37 would merge § 2E1.3 (violent crimes in aid of racketeering) into § 2E1.2 (travel or transportation in aid of racketeering). At present, the base offense level in each guideline is the higher of either the offense level applicable to the underlying offense or level six under § 2E1.2 and level 12 under § 2E1.3. The merger would eliminate the alternative base offense level, leaving only the offense level for the underlying offense. The Commission justifies this change in part on the basis that only a minority of cases under each guideline use six or 12 as the offense level (i.e., that six or 12 is higher than the offense level for the underlying conduct).¹⁶

We do not oppose this amendment.

Part J

Part J of Amendment 37 would merge § 2E2.1 (extortionate extension of credit) into

¹⁶The data presented in the explanation is confusing. The first paragraph of the explanation indicates that "in FY 95 . . . one of the 19 cases sentenced under §2E1.3 (or 5.3%) had a base offense level of 12." The last paragraph of the explanation, however, reports that there were only six cases sentenced under § 2E1.3 in FY 95, and in three of those § 2E1.3 was the primary guideline. That suggests that the actual rate was 33% (one of three).

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

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

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

We oppose this amendment. As both the current § 2B3.2 and the proposed § 2B3.2 are written, enhancements are available for making certain threats (two levels under (b)(1)) and for evidencing the ability to carry out those threats (three levels under (b)(3)(B)). Application of both enhancements yields the anomalous result that a defendant who threatens to do something without actually doing it is punished as harshly as a defendant who brandishes, displays, or possesses, a firearm (five-level enhancement), and more harshly than a defendant who uses a dangerous

weapon (four levels). Moreover, because displaying or brandishing a dangerous weapon or firearm would invariably constitute the making of a threat, these enhancements would be cumulative. To avoid double-counting problems and to make this line of enhancements consistent with § 2B3.1(b)(2) (i.e., alternative), subsection (b)(1) of § 2B3.2 should be moved to the end of subsection (b)(3)(A) of that guideline.

Part K

Part K of Amendment 37 would merge § 2E5.3 (record-falsification offenses under ERISA and LMRDA) into § 2F1.1 (fraud and deceit). Currently, § 2E5.3 provides for a base offense level of six with a cross-reference to § 2B1.1 or § 2E5.1 if the offense was committed to facilitate or conceal a theft, embezzlement, bribe, or gratuity. Defendants now subject to this guideline would receive a base offense level of 6 under the fraud guideline and be subject to any applicable enhancements such as more than minimal planning that are not available under § 2E5.3 unless a cross-reference applies. (That cross-reference would be incorporated into § 2F1.1 comment. (n.13)). Part K would also amend § 2F1.1 by adding a new cross reference and expanding application note 13.

We oppose this amendment. The amendment would increase sentences currently addressed under § 2E5.3(a)(1) without any showing that those sentences are too low to accomplish the goals of 18 U.S.C. § 3553(a). We support the inclusion of the new cross-reference if it includes at the end the language "instead of the above."

Part L

Part L of Amendment 37 would merge § 2J1.3, (perjury, subornation of perjury, and witness bribery) into § 2J1.2 (obstruction of justice). This merger would have no substantive

effect on either guideline.

There are two changes to the application notes worth mentioning. First, in application note 2, addressing the application of § 3C1.1, the second line would read "the defendant obstructed the investigation, trial, or sentencing of the . . . count." This change would make the note consistent with the language used in § 3C1.1. Second, application note 6 is new. The first paragraph of the new note would articulate what courts have previously held. See, e.g., *United States v. Salinas*, 956 F.2d 80, 83 (5th Cir. 1992); *United States v. Rude*, 88 F.3d 1538 (9th Cir. 1996); *United States v. McQueen*, 86 F.3d 180, 182-83 (11th Cir. 1996). The second paragraph would clarify the language contained in the second paragraph of the background commentary, and is also reflected in the case law. See, e.g., *United States v. Gay*, 44 F.3d 93, 95 (2d Cir. 1994); *United States v. Ortiz*, 84 F.3d 977, 980 (7th Cir. 1996).

We do not oppose this amendment.

Part M

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

Offenses under § 2K1.6 would be unaffected by the consolidation. The base offense level would remain at six and the cross-reference would be incorporated into § 2K1.1. Certain offenses under § 2K1.1, particularly those involving failure to report theft, would be affected by the

consolidation because they be subject to the cross-reference. Application of the cross-reference to § 2K1.3 would increase the offense level from six to a minimum of 12, thus eliminating probation for what is otherwise a misdemeanor offense.

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

Part N

Part N of Amendment 37 would merge § 2L2.5 (failure to surrender canceled naturalization certificate) into § 2L2.2 (immigration document fraud). Currently, § 2L2.5 uses a flat offense level of six. If these guidelines were consolidated, a defendant would still receive a base offense level of six (subject, of course, to the results of the proposed emergency amendment to § 2L2.2), but would be subject to the two-level enhancement presently contained in § 2L2.2 for committing the offense after being previously deported. The explanation of the amendment is that these enhancements would not apply to conduct presently covered under § 2L2.5; however, unless § 2L2.2 or its application notes contain a specific proviso to that effect, a sentence for failing to surrender a canceled naturalization certificate could increase dramatically from present levels.

We do not oppose this amendment if language is included in the guideline stating that the specific offense characteristics do not apply to the offense of failing to surrender a canceled naturalization certificate.

Part O

Part O of Amendment 37 would merge § 2M2.3 (destruction of, or production of defective, national defense materials) into § 2M2.1 (destruction of, or production of defective, war materials). The merger would not change the current offense levels. A proposed application note

would address departures.

We do not oppose this amendment.

Part P

Part P of Amendment 37 would delete § 2M3.4 (losing national defense information). A defendant convicted under 18 U.S.C. § 793(f) would be sentenced under § 2X5.1, addressing offenses not otherwise covered under the Guidelines.

We do not oppose this amendment.

Part Q

Part Q of Amendment 37 would merge § 2M3.5 (tampering with restricted data concerning atomic energy) into § 2M6.2 (violations of atomic energy laws). The consolidation would not affect sentences already covered under § 2M6.2. The consolidation could result in increasing the offense levels of sentences now covered under § 2M3.5 from level 24 to level 30, if the offense was committed with the intent to injure the United States or to aid a foreign nation.

We do not oppose this amendment.

Part R

Part R of Amendment 37 would merge § 2N3.1 (odometer tampering) into § 2F1.1 (fraud and deceit). The present version of § 2N3.1 sets the base offense level at 6, with a cross-reference to § 2F1.1 if the offense involved more than one vehicle. According to the Commission, one-vehicle cases occur infrequently; consequently, the merger would have no practical effect on cases sentenced under § 2N3.1. To account for the one-vehicle cases, however, the Commission should provide a flat offense level of six, with no upward adjustments contained in the fraud guideline.

We do not oppose this amendment if the amendment is revised to carry forward the

current treatment of defendants convicted of tampering with the odometer of only one car.

Part S

Part S of Amendment 37 would merge § 2T1.6 (failure to collect or truthfully account for and pay over tax) into § 2T1.1 (tax evasion and related offenses). Sentences now covered under § 2T1.6 would be subject to a two-level increase under § 2T1.1(b)(2) if sophisticated means were used to impede discovery of the existence or extent of the offense. The amendment would, however, delete the cross-reference to § 2B1.1 in § 2T1.6, that currently applies if the tax withholding constitutes embezzlement.

We do not oppose this amendment.

Part T

Part T of Amendment 37 would merge § 2E4.1 (unlawful conduct relating to contraband cigarettes) and § 2T2.2 (regulatory offenses,) into § 2T2.1 (non-payment of taxes).

Effect on § 2E4.1. The offense level for offenses currently sentenced under § 2E4.1 would not change under the amendment.

Effect on § 2T2.1. The offense level for offenses currently sentenced under § 2T2.1 would remain the same (that is, the level from the tax table corresponding to the tax loss), unless the offense involved contraband cigarettes, in which case the offense level would be nine if nine is greater than the offense level determined from the tax loss table.

Effect on § 2T2.2. The offense level for offenses currently sentenced under § 2T2.2 would increase from four to six.

We do not oppose this amendment.

OFFICERS

PRESIDENT

Judy Clarke
Spokane, WA

PRESIDENT ELECT

Gerald B. Lefcourt
New York, NY

FIRST VICE PRESIDENT

Larry S. Pozner
Denver, CO

SECOND VICE PRESIDENT

William B. Moffitt
Washington, DC

TREASURER

Edward A. Mallett
Houston, TX

SECRETARY

Irwin H. Schwartz
Seattle, WA

PARLIAMENTARIAN

Laurie Shanks
Albany, NY

IMMEDIATE

PAST PRESIDENT

Robert Fogelnest
New York, NY

DIRECTORS

Julie B. Aimen
Chicago, IL

Henry W. Asbill
Washington, DC

James A.H. Bell
Knoxville, TN

Michael V. Black
Phoenix, AZ

Stephen B. Bright
Atlanta, GA

Juanita R. Brooks
San Diego, CA

Raymond M. Brown
Newark, NJ

Peter A. Chang, Jr.
Santa Cruz, CA

Mary E. Conn
Bellaire, TX

Richard K. Corley
Providence, RI

Charles W. Daniels
Albuquerque, NM

Drew Findling
Atlanta, GA

John P. Flannery, II
Leesburg, VA

David Dean Fussell
Orlando, FL

Lawrence S. Goldman
New York, NY

Gary G. Guichard
Atlanta, GA

M. Cristina Gutierrez
Baltimore, MD

Tova Indritz
Albuquerque, NM

Frank Jackson
Dallas, TX

Richard Kammen
Indianapolis, IN

Helen Leiner
Fairfax, VA

Jack T. Litman
New York, NY

Shaun McCrea
Eugene, OR

Jeralyn E. Merritt
Denver, CO

G. Fred Metos
Salt Lake City, UT

Marvin D. Miller
Alexandria, VA

Daniel E. Moonat
Wichita, KS

George H. Newman
Philadelphia, PA

Martin S. Pinale
Cincinnati, OH

Dennis Roberts
Oakland, CA

David S. Rudolf
Chapel Hill, NC

Natman Schaye
Tucson, AZ

Barry C. Scheck
New York, NY

Elisabeth Semel
San Diego, CA

Burton H. Shostak
St. Louis, MO

Theodore Simon
Philadelphia, PA

Richard J. Troberman
Seattle, WA

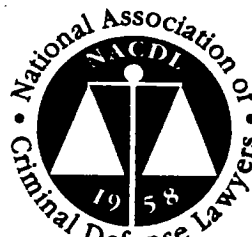
Lawrence A. Vogelman
Concord, NH

Martin G. Weinberg
Boston, MA

.....

EXECUTIVE DIRECTOR

Stuart M. Statler



February 4, 1997

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

Dear Chairman Conaboy and Commissioners:

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

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

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

Disturbing Rate of Incarceration

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

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

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

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

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

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

Disparate Application & Impact of Criminal Penalties

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

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

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

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

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

Id. at ii.

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

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

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

Just Punishment

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

Three other matters are also of concern.

Emergency Amendments

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

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

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

Vacancies on the Commission

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

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

Congressional Directives

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

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

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

Very truly yours,

A handwritten signature in cursive script that reads "Judy Clarke". To the right of the signature, there is a small, handwritten mark that appears to be "JCA".

Judy Clarke
President

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



Families Against Mandatory Minimums

F O U N D A T I O N

Statement of
Kyle W. O'Dowd, General Counsel
Families Against Mandatory Minimums

Before the
United States Sentencing Commission

Public hearing on
Proposed Guideline Amendments
March 18, 1997

Mr. Chairman and Distinguished Members of the Commission:

Thank you for the opportunity to address the Commission on this year's proposed guideline amendments. FAMM hopes that the Commission will continue to foster annual progress in the development of the Guidelines and resist proposals to decrease the frequency of the amendment process.

Acquitted Conduct as Relevant Conduct
(Proposed Amendment 9)

Public participation -- through the jury system -- is vital to our system of law. A sentencing guideline which nullifies the effect of jury verdicts is offensive to our participatory democracy. FAMM supports Proposed Amendment 9, Option 1B, excluding acquitted conduct from relevant conduct.

The rationale used to support the current approach to acquitted conduct, based upon pre-Guidelines cases such as *Williams v. New York*, 337 U.S. 241 (1949), is that sentencing judges have always been free to consider all relevant and reliable evidence. *Williams* held that judges in sentencing *may*, if they choose, take account of nonconviction behavior; the Guidelines, on the other hand, mandate pre-determined sentence increases for such conduct. In addition, it has been suggested that 18 U.S.C. § 3661 prohibits erecting a bar to the required use of acquitted conduct. If this were true, many other guidelines that cabin judicial discretion at sentencing would constitute impermissible limitations under 18 U.S.C. § 3661. *See, e.g.*, U.S.S.G. § 5H1.12 ("Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.").

It is often noted that people first exposed to the Sentencing Guidelines find it troubling that they require judges to calculate sentences based upon conduct that was the subject of charges

resulting in acquittal. Michael Tonry, Sentencing Matters 94 (1996). This particular criminal process does not satisfy the appearance of justice. With surprising hubris, Senators Abraham and Hatch, in their letter to Commissioner Goldsmith, write that they would "be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to the *untutored* reactions of such persons by modifying the Guidelines to limit the use of conduct underlying an acquittal." Criticism of the sort appearing in a recent Washington Post series is a poignant reminder that the Commission must be *seen* to do justice, even by the "untutored." Mary Pat Flaherty and Joan Biskupic, Despite Overhaul, Federal Sentencing Still Misfires, Washington Post, October 6, 1996, at A1, A21.

Mitigating Role in the Offense
(Proposed Amendments 21 and 22)

FAMM applauds the Commission for reducing emphasis on drug weight through a more flexible mitigating role guideline. The Guidelines often require judges to impose severe sentences on "mules" and other minimally involved participants. In such cases, drug quantity already overstates culpability and should not also preclude mitigating role reductions. Assessment of role should not, as suggested by the commentary in application note 2, be affected by drug amount. FAMM supports the elimination of this commentary.

Nonetheless, Proposed Amendment 22 remains unduly restrictive in other respects. The proposed definition, requiring that the defendant be "a *substantially* less culpable participant," inexplicably raises the current standard for the two-level reduction; that is, a minor role reduction is now authorized under the Guidelines for a participant who is simply "less culpable than most other participants." The commentary regarding burden of persuasion may also undermine the flexibility aimed for by the Commission. That is, the proposed amendment instructs, "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." The chilling effect of this commentary may be particularly pronounced in jurisdictions where the current practice is to deny reductions for mitigating role if the defendant's post-arrest statements are the only evidence thereof. See Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993). This provision does not appear elsewhere in the Guidelines and is equally unnecessary in the mitigating role guideline.

FAMM also objects to the elimination of the three-level reduction. By eliminating an adjustment deemed appropriate in 298 cases in a recent year, this proposal reduces sought-after flexibility. United States Sentencing Commission, 1995 Annual Report 73. Secondly, the intermediate adjustment may facilitate plea negotiations, allowing the parties to resolve differences of opinion as to mitigating role.

Concerning the additional issues for comment, FAMM urges the Commission to expressly sanction minimal role adjustments for mules. Although these participants have no role other than delivery, wide disparity exists in the application of the mitigating role guideline to

mules. See Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993) (reporting that the Eastern District of New York routinely affords four-level reductions for mules, while other port cities only occasionally afford two-level reductions for such defendants). Consider the case of Donaldo Munoz-Vallejo, a mule who was arrested on a vessel in Houston, Texas, carrying cocaine-packed sardine cans. (*United States v. Munoz-Vallejo*, No. H-95-00220-01 (S.D. Tex.) (on file with FAMM)). Mr. Munoz admitted responsibility and immediately cooperated with the Customs agents, but the other participants in the offense were never apprehended or formally identified. Mr. Munoz, who had been lawfully employed on merchant ships in Columbia for several years, explained that he was approached by a man who asked him to deliver the sardine cans. As with all mules, Mr. Munoz was promised a flat fee and had no proprietary interest in the cocaine. While the probation officer and the sentencing court apparently accepted Mr. Munoz's explanation of his part in the offense, he did not receive a downward adjustment for his mitigating role. Consequently, Mr. Munoz was sentenced to 87 months imprisonment. FAMM contends that a flexible mitigating role guideline, combined with commentary explicitly identifying mules as minimal participants, would result in more appropriate sentences for individuals like Mr. Munoz.

The "Cliff" Between Level 42 and Level 43 (Proposed Amendment 13)

FAMM believes that life sentences without parole are totally inappropriate for drug offenses. This country's most severe punishment, save execution, should be reserved for our most dangerous offenders, for whom permanent incapacitation is the only way to ensure public safety. Through a combination of enhancements under the current Guidelines, non-violent offenders are easily ensnared by the natural life sentence mandated by offense level 43.

Submitted for the Commission's consideration is the case of Sharvonne McKinnon, who at age 27 began serving her life sentence for a crack cocaine conspiracy. (See *United States v. McKinnon*, 102 F.3d 1120 (11th Cir. 1997)). Ms. McKinnon was romantically involved with a crack kingpin, who was also the father of her toddler son. For three years prior to her arrest, she had been employed as a bus driver. Although not reflected in her sentence, she was apparently not a sufficient threat to the community to warrant detention pending trial. Ms. McKinnon was held accountable for the total amount of crack involved in the entire conspiracy, although her alleged participation primarily consisted of counting rocks of cocaine, counting money, and acting as a lookout. With a 2-level enhancement for possession of a firearm, Ms. McKinnon's adjusted offense level was 44. She received no upward adjustment for aggravating role in the offense.

Although Sharvonne McKinnon may now be eligible for less than a life sentence pursuant to Guidelines Amendment 505 (capping the Drug Quantity Table at offense level 38), the Commission's staff has identified approximately 30-40 other individuals who received life sentences in cases not involving death of a person or treason. FAMM supports the proposed amendment to abolish "mandatory" natural life sentences in these cases.

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.

**TESTIMONY FOR PUBLIC HEARING BEFORE
THE UNITED STATES SENTENCING
COMMISSION**

MARCH 18, 1997

**Federal Paralegal Services
P.O. BOX 8244
CORAL SPRINGS, FLORIDA
33075-8244
PH: 954-340-7987
FAX: 954-340-7418
POINT OF CONTACT: Steven Shaw**

RELEVANT CONDUCT

First of all, I would like to thank you for allowing me to testify before this Commission this morning. It is, indeed, an honor. My name is Steven Shaw. I represent Federal Paralegal Services of Coral Springs, Florida. Federal Paralegal Services is a paralegal firm specializing in post-conviction relief for federal inmates. We assist federal inmates in the preparation of the Habeas Corpus pursuant to 28 U.S.C. 2255, commonly known as "a 2255." We have been providing legal assistance in this area for about three (3) years now. The purpose of my presence here today is to bring to your attention, among other things, a common problem which we have discovered, relevant conduct and the criminal history. But first, let me tell you a short story.

A SHORT STORY ABOUT PRESTON GARY

Preston was born and raised in Ft. Myers, Florida. He worked there, got married there, and had children there. Although most people will say

that Preston is warm-hearted and a kind person, nevertheless Preston made a mistake. He got involved with drugs.

In 1986, he was arrest for possession of crack cocaine by the local police. He entered a plea of guilty, was placed on probation, but later violated and subsequently sent to prison. Again, he May 1990, Preston was arrested for sale and delivery of one rock of crack cocaine. By then, Preston was smoking crack; he did not earn enough money from work to support his habit, so he sold for consumption purposes. Again, he entered a plea of guilty, was placed on probation, violated it, then placed on house arrest, violated house arrest, and finally sentenced to prison. In 1992, he was released. Even though Preston had been punished for his crimes, he had not been cured of his addiction.

Hence, in 1993 he sold crack cocaine again. He was arrested by the same police officers, but this time the arrest was part of a join task force with federal and local authorities. In short, the Feds were involved. Preston was charged in a conspiracy to sell crack cocaine. The Indictment charged that the conspiracy began as early as January 1990 until his arrest in 1993. Of course, Preston entered a plea of guilty.

When the probation office had completed its pre-sentence report, Preston was scored as a career offender pursuant to section 4B1.1 of the

USSG. They concluded that based upon Preston's two prior drug arrests in 1986 and 1990, he could be sentenced as a career offender. Counsel did not object and the court adopted the PSI and consequently sentenced Preston to 22 years. End of Story.

THE PROBLEM

Preston should never have been sentenced as a career offender. Section 1B1.3(1)(A) of the USSG states, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (b) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonable foreseeable acts and omission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." In short, if it's related then it should be taken into account.

Please indulge me. I am not here to retry the case of Preston Gary before you. Rather, I want to demonstrate what is happening in the federal district courts around the country. Preston's case is typical of what has been happening to many unfortunate federal inmates. This relevant conduct has

been used as a tool to enhance the offense level and/or criminal history of an individual.

RELEVANT CONDUCT IS NOT A ONE-WAY STREET

Section 1B1.3 of the USSG should be revised. Relevant conduct should not be used as a tool for enhancement purposes only. Rather relevant conduct should be used as a device to derive a proper sentence. Too many times are prior drug convictions used against the defendants; when the prior convictions, according to the definition of relevant conduct, are clearly related and relevant to the instant offense. True, in section 4A1.2, application note 3, something is mentioned about related cases; but obviously this is not clear enough. Again, too many people are being enhanced to career offenders, or statutorily enhanced pursuant to section 21 USC 851 for prior arrest which are clearly related to, part of and relevant to the instant offense. For example, under section 21 USC 841, if a person is convicted for more than 50 grams of crack cocaine, he faces a minimum mandatory sentence of ten years. But, "if any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be

less than 20 years...," If he has two or more prior convictions, then he shall be sentenced to life. As you can see, the consequences are serious. Therefore, relevant conduct must be used to cover situations just like these. The vast majority of inmates in federal prison are drug offenders. Many of these offenders "graduated" to the federal level simply because local law enforcement, frustrated with arresting them previously for the same drug problems, referred the case to Federal authorities. The Feds make the arrest and get the conviction; then the probation office prepares the PSI. Thereafter, all previous drug convictions are counted against the defendant and thus, he receives an enhanced sentence. Unfortunately, many of these sentences are illegal.

In my professional opinion, in drug cases, the instant offense many times is directly related to the prior convictions. Typically, the sheriff arrests a person first for selling drugs, then years later the Feds get involved. Thereafter, the main focus seems to be on how much time the defendant could be enhanced to. Relevant conduct is used primarily for enhancement purposes as it relates to drug quantity. No one considers that the prior convictions are related to the instant offense. The majority of the time, during sentencing, counsel never objects to the issue. In my experience, counsel makes no objection because he/she is not aware that an argument

exists. Even the probation officer is ignorant to this subject. Once it has been explained, then suddenly the "lights goes off" and the corrections are made. My concerns are simple. How many people have been sentenced illegally because of this error? How many PSI's are incorrectly prepared? How many more attorneys, probation officers and prosecutors are ignorant to this issue? It has happened far too often for this to be dismissed as an isolated incident. My experience has shown that many of these errors have occurred during the period 1988 to 1992, although it still happens today. And the most distressing thing is the enactment of the Habeas Corpus Reform in 1996.

As you know, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in April 1996. This law places a limitation on the filing of the 2255. For many, after April 24, 1997, they are time-barred from filing a motion 2255. Let's just assume that there are some men/women who have been sentenced erroneously because their prior convictions were counted against them in the PSI. These sentences should never have been counted, yet due to ignorance at the time, no one knew this, the probation officer, the attorney, the prosecutor or even the Court. Then, after April 24, 1997, the inmate discovers the mistake. Under the current

provision, he would be time-barred from filing a habeas corpus motion for relief. Your actions today could help prevent this from happening.

Therefore, I implore you to clarify language in the sentencing guidelines to reflect that relevant conduct can be used to link the prior convictions to the instant offense, if it is related. Make it clear to the U.S. Probation office, U.S. Attorney office and all parties concerned.

If we must use relevant conduct as a "barometer" for sentencing purposes, then let's do it, but let's do it justly and accurately. I am now prepared to answer any questions.