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PROPOSED SUBMISSION TO SENTENCING COMMISSION ON IMMIGRATION OFFENSES

I. INTRODUCTION

The Department of Justice understands that the Sentencing Commission is currently considering amendments to specific sentencing guidelines, as part of the Commission's ongoing effort to develop comprehensive guidelines which fully and fairly reflect the realities of criminal law enforcement. The Department welcomes the opportunity to contribute to this effort by proposing the following amendments to the Sentencing Guidelines for immigration offenses. These proposed revisions are based upon experience gained by the Department over the course of the past year, experience which suggests that amendment of several immigration offense guidelines is now needed.

II. DISCUSSION

A. Proposed Amendment to Section 2L1.1 of the Sentencing Guidelines -- Alien Smuggling

At the outset, we recommend several changes to the sentencing guideline which applies to alien smuggling offenses. See 8 U.S.C. § 1324. The Department submits that the current alien smuggling guideline, which appears at Section 2L1.1 of the Sentencing Guidelines, does not fully consider three recurring, aggravating factors found in these cases. First, this guideline does not provide for any enhancement of the offense level based upon the number of unlawful aliens involved in the offense. Instead, the guideline simply deals with this issue through a

general commentary which suggests that an upward departure may be appropriate in cases involving large numbers of aliens.

In our view a guideline commentary, while useful, does not fully address this issue. Commentaries of this type are merely permissive. Therefore they do not completely reflect law enforcement realities. We believe that the number of aliens smuggled is always a relevant, aggravating factor to be considered at sentencing. Since the number of aliens involved in an offense is an important consideration in every case, the guidelines should establish uniform standards which can be applied in this area. Indeed, without such standards the guidelines may invite disparate treatment of defendants, since courts may often differ in the importance which they choose to attach to this factor. Therefore, in order to ensure that the number of aliens smuggled is consistently treated as an aggravating factor in these cases, we propose that Section 2L1.1 be amended to include a new subsection (3). This new subsection (3) would establish a graduated scale, which would provide uniformly harsher sentences for large-scale alien smugglers. In arriving at this scale, we have based these enhancements on the experience gained by United States Attorneys' offices in various border states. Thus, the enhancement levels reflected in this proposed guideline represent the most commonly observed distinctions in the size of various alien smuggling operations.

In addition, we propose two other amendments to Section 2L1.1, which address several aggravating factors found in a small

but significant number of alien smuggling cases. These factors are the use of dangerous weapons by alien smugglers and the inhumane treatment of aliens by smugglers. The use of weapons and harsh or inhumane treatment present a grave risk of harm both to law enforcement officials and to the aliens being transported. The Department believes that specific sentencing enhancements directed at these aggravating factors are essential to ensure that sentences adequately reflect the gravity of this misconduct. Accordingly, we recommend that Section 2L1.1 also contain new subsections (4) and (5), which would provide specific enhancements for defendants who use weapons or physically harm individuals in the course of smuggling aliens. It should be noted that these proposed subsections are modelled after similar guideline provisions which are currently in effect. See Sentencing Guidelines, §§ 2A2.2 (Assault) and 2B3.1 (Robbery).

Finally, we propose two technical amendments to the commentary for Section 2L1.1. First, we submit that Application Note 8 should be revised to ensure that courts still retain the discretion to make sentencing departures in smuggling cases involving extremely large numbers of aliens, inhumane treatment which does not result in physical injury, or other aggravating circumstances. In addition, a new Application Note 9 should be added to this guideline, which would define some of the terms included in the amended guideline.

B. Proposed Amendments to Sections 2L2.1 and 2L2.3 of the Guidelines -- Document Trafficking

The Department also wishes to propose amendments to Sections 2L2.1 and 2L2.3 of the Sentencing Guidelines. These two guidelines relate to offenses involving illegal trafficking in passports, visas, entry documents or citizenship papers. See 18 U.S.C. §§ 1425-27, 1542, 1544, and 1546. Experience has shown that these offenses typically are related to alien smuggling violations. Once aliens illegally enter this country, they frequently turn to document "brokers" to obtain fraudulent documentation which will permit them to remain in the United States. Thus, these alien smuggling and document trafficking offenses simply represent two aspects of the same illegal trade.

For this reason, the Department submits that these offenses should receive uniform treatment under the sentencing guidelines. Indeed, we note that the Commission has recently taken steps to promote uniformity in this area by recommending that the base offense level for document trafficking offenses be made consistent with that prescribed for alien smuggling. In order to further promote uniform treatment of these related crimes, we recommend that a graduated scale, like that which we have proposed for alien smuggling, also be added to Sections 2L2.1 and 2L2.3 of the guidelines. Including such a graduated scale in these two guidelines would have two positive consequences. First, it would continue to ensure that

smuggling and document trafficking offenses were treated in a similar fashion. In addition, these amendments would permit courts to impose consistently harsher sentences on those who most clearly merit punishment -- the large scale traffickers.

III. CONCLUSION

Experience gained over the past year has shown that the current Sentencing Guidelines in the immigration field can be improved in several respects. Accordingly, the Department of Justice has prepared the following proposed amendments to the Immigration Sentencing Guidelines for consideration by the Sentencing Commission. In order to assist the Commission we have identified our proposed amendments by underscoring them. We trust that this submission will be of assistance to the Commission in weighing the need for further amendment of these guidelines.

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PART L - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

1. IMMIGRATION

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

(1) If the defendant committed the offense other than for profit, and without knowledge that the alien was excludable under 8 U.S.C. §§1182(a)(27), (28), (29), decrease by 3 levels.

(2) If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.

(3) If the offense committed by the defendant involved the smuggling, transportation or harboring of multiple aliens, increase in accordance with the following table:

Number of Unlawful Aliens Involved in Offense	Offense Level
5-10	2
11-30	4
31 or more	6

(4) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(5) If any person sustained bodily injury, increase the offense level according to the seriousness of the injury:

	Degree of Bodily Injury	Increased in Level
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6

Provided, however, that the cumulative adjustments from (4) and (5) shall not exceed 9 levels.

COMMENTARY

Statutory Provisions: 8 U.S.C. §§1324(a), 1327.

Application Notes:

1. "For profit" means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation.

2. "Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense" includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.

3. If the defendant was convicted under 8 U.S.C. §1328, apply the applicable guideline from Part G (see Statutory Index) rather than this guideline.

4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.

5. For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting or harboring of others.

6. For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the enhancement at §2L1.1(b)(1) does not apply to such a defendant.

7. 8 U.S.C. §§1182(a)(28) and (a)(29) concern certain aliens who are excludable because they are subversives.

8. The Commission has not considered offenses involving extremely large numbers of aliens, dangerous or inhumane treatment which does not result in bodily injury, or the risks to safety caused by smugglers' efforts to flee and avoid apprehension. An upward departure should be considered in those circumstances.

9. "Firearm," "dangerous weapon," "brandished" and "otherwise used" are defined in the Commentary to §1B1.1 (Application Notes).

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§2L2.1 Trafficking in Evidence of Citizenship or Documents Authorizing Entry

(a) Base Offense Level: 9 (October, 1988 proposed revision)

(b) Specific Offense Characteristic

(1) If the defendant committed the offense other than for profit, decrease by 3 levels. (October, 1988 proposed revision)

(2) If the offense committed by the defendant involved multiple documents evidencing citizenship or authorizing entry, increase in accordance with the following table:

Number of documents	Offense Level
5-10	2
11-30	4
31 or more	6

COMMENTARY

Statutory Provisions: 18 U.S.C. §§1425-1427, 1546.

Application Note:

1. "For profit" means for financial gain or commercial advantage

2. The Commission has not considered offenses involving extremely large numbers of documents. An upward departure should be considered in those circumstances.

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§2L2.3. Trafficking in a United States Passport

(a) Base Offense Level: 9 (October, 1988 proposed revision)

(b) Specific Offense Characteristic

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(1) If the defendant committed the offense other than for profit, decrease by 3 levels. (October, 1988 proposed revision)

(2) If the offense committed by the defendant involved multiple passports, increase in accordance with the following table:

Number of Passports	Offense Level
5-10	2
11-30	4
31 or more	6

Commentary

Statutory Provisions: 18 U.S.C. §§ 1542, 1544.

Application Note:

1. "For profit" means for financial gain or commercial advantage.

2. The Commission has not considered offenses involving extremely large numbers of passports. An upward departure should be considered in those circumstances.

Amendment 169. Guideline §2P1.1. Escape, Instigating or Assisting Escape

In addition to the views expressed in the written statement to the Commission of Assistant Attorney General Dennis on the proposed guideline amendments, we believe the Commission should consider the following with respect to the escape guideline. We recommend the addition of at least a 3-level enhancement if the escape is from a sentence being served for a crime of violence or a drug offense. The nature of the underlying offense and the need to protect the public from further crimes of the defendant fully justify an enhancement for individuals escaping from such sentences, whether from secure or nonsecure facilities. Furthermore, if the defendant commits an offense while on escape status, an enhancement should be provided for this additional offense.

Amendment 176. Guideline §2Q1.6 Hazardous or Injurious Devices on Federal Lands

AMMENDMENT: The proposed guideline adds a new guideline to cover a new offense created by §6254 (f) of the Omnibus Anti-Drug Abuse Act of 1988. 18 U.S.C. §1864. The new offense generally addresses the use of spring guns and similar booby traps on federal lands in order to further violations of the Controlled Substances Act or "with reckless disregard to the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk." 18 U.S.C. §(a)(3).

COMMENT: We believe that the penalty under guideline §2Q1.6(a)(3) should equal the offense level in §2A2.2 (aggravated assault) (base level 15). By way of comparison guideline §2Q1.1 Knowing Endangerment has a base level of 24, and guideline ¶2Q1.4 Tampering with a Public Water System has a base level of 18. Therefore base level 15 is not excessive.

Amendment 182. Guideline §2S1.1. Laundering of Monetary Instruments

In proposed amendment 182 the Commission seeks comment on two options for incorporating into the guidelines a statutory amendment to 18 U.S.C. §1956(a)(1)(A), which creates a new provision, 18 U.S.C. §1956(a)(1)(A)(ii), proscribing money laundering with the intent to violate 26 U.S.C. §7201 (attempted tax evasion) or 26 U.S.C. §7206 (false returns). The first option treats a conviction under subparagraph (A)(ii) the same as a conviction under subparagraph (A)(i) (i.e., base offense level 23). The second option would treat a conviction falling under the new provision the same as a conviction for tax evasion and apply the tax evasion guideline, §2T1.1.

We strongly support the first option, which plainly implements the legislative intent in incorporating the new tax-related money laundering provision as part of the money laundering statutory scheme in 18 U.S.C. §1956. The maximum penalty under this provision is 20 years; this penalty applies to money laundering offenses committed with either the intent to violate the tax laws or to promote the carrying on of specified unlawful activity. To treat the new provision less seriously for sentencing purposes than the other portions of the same statutory provision would undermine the legislative effort to enhance the effectiveness of the money laundering statutes and to subject tax-related money laundering to a higher maximum penalty than pure tax offenses.

It is important to understand that the effect of option 2 would be not to punish an offender for the money laundering portion of his offense. Two tax evaders would receive the same punishment, despite the fact that one also engaged in and was convicted of money laundering. A failure to punish money laundering committed with an intent to violate the tax laws in accordance with the money laundering guidelines that otherwise apply would amount to a failure to implement the recent amendment of 18 U.S.C. §1956 for tax-related money laundering.

Amendment 186 Guideline §2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

This amendment proposes adding to the Commentary to §2S1.3 captioned "Statutory Provisions" a reference to "26 U.S.C. §7203 (if a willful violation of 26 U.S.C. §6050I)." The purpose of the amendment is to conform the guideline to a revision of the relevant statute.

We support this proposed amendment. (See our comments to Proposed Amendment 194.)

Amendment 187. Guideline §2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

This amendment relates to the guideline on reporting requirements for monetary transactions. The proposed amendment deals mainly with the commentary to §2S1.3. We are concerned, however, that there is a flaw in the existing guideline which should be corrected. Specifically, an offense level of 13 applies if the defendant (A) structured transactions to evade reporting requirements; (B) made false statements to conceal or disguise the activity; or (C) reasonably should have believed that the funds were the proceeds of criminal activity. Otherwise, the base offense level is only 5. If a defendant failed to file forms, as distinguished from making false statements, to conceal or disguise activity, it appears that he would be subject only to an offense level of 5. Such an offense may involve the failure to file, for example, the Currency and Monetary Instrument Report to conceal the sending of money out of the United States. In our view failing to file statements to conceal or disguise activity should not be punished less severely than filing false statements. This is not simply negligent conduct. Thus, §2S1.3(a)(1)(B) should be expanded to cover a failure to file a required report to conceal or disguise the activity.

It is unclear in our view what activity should be subject to the low offense level of 5 under the current guideline. The proposed amendment of the commentary states: "A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources." We do not believe that this language captures the essence of the less serious offenses that the Commission believes should have a base offense level of 5. The fact that the defendant reasonably believed the funds at issue emanated from legitimate sources is not enough if the defendant, having engaged in a legitimate business, violated reporting requirements in order to understate his income for tax purposes or otherwise to conceal the true extent of his business. Therefore, we recommend deleting the second quoted sentence from the proposed commentary amendment.

Finally, we note that the existing guideline contains another anomaly. There is a 5-level enhancement if the defendant knew or believed that the funds were criminally derived. The proposed commentary explains that this 5-level enhancement is in addition to the enhanced base offense level of 13 if the defendant reasonably should have believed that the funds were the proceeds of criminal activity. If the defendant actually knew that the funds were criminally derived, the government should not have to prove in addition that such knowledge was reasonable in

order for offense level 18 under the guideline to apply. If a subjective test is met -- the defendant's actual knowledge -- there should be no need to meet an objective test as well. However, in cases where the actual knowledge of the defendant as to the criminal roots of the funds cannot be shown, an objective standard -- that he should have believed the funds were the proceeds of criminal activity -- should apply.

Amendment 188. Guideline §2T1.1 Tax Evasion

Proposed Amendment 188 (and related Amendments 196 and 199) generally deals with the determination of the so-called tax loss (we would rename this term "criminal tax deficiency" and redefine it -- see our response to Request for Comments 205). In general, it provides that the tax loss is to be determined by the same rules applicable in determining any other sentencing factor and that in determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The stated reason for the amendment is to clarify the determination of tax loss and to make this instruction consistent among §§2T1.1-2T1.3.

We do not believe that this amendment does anything to clarify the determination of what is the "total tax loss attributable to the offense." The language of the proposed amendment (i.e., "unless the evidence demonstrates that the conduct is clearly unrelated") and the language in §1B1.3(a)(2) (i.e., "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction") is vague and not particularly helpful insofar as tax offenses are concerned. For example, undoubtedly, in a continuing fraudulent tax shelter scheme, all of the conduct would be considered in determining the tax loss. Similarly, where an individual fails to report income in two successive years from the same business, undoubtedly this would be considered clearly related and part of the same course of conduct or common scheme or plan. However, if an individual fails to report income from one business in one year and another business in another year, it might be argued that this is not clearly related. Nor is it necessarily clear that in the case of an individual who fails to file a tax return in one year and several years later attempts to evade his tax for several years, the tax loss from all years would be included in the determination of tax loss. The possible combinations of individuals, entities, types of tax offenses, and years involved in tax violations are infinite and a "presumption" that all conduct violating the tax laws is to be considered in determining the tax loss provides courts with no guidance in dealing with all the various possible combinations. In short, we believe that this language will only generate litigation and delay what should otherwise be a rather summary proceeding.

We believe that all tax offenses, regardless of the individuals, entities, statutory violations, or years involved, can be classified as part of the same course of conduct. At bottom, any such violation evidences a disregard of the taxing statutes of the United States. Courts presently consider all such conduct now, even where prosecution might be foreclosed for some reason like the running of the statute of limitations. This insures that the punishment imposed is commensurate with the defendant's actions and prior history. Indeed, Section 3553 of Title 18 provides that in imposing sentence, the court shall

consider the nature and circumstances of the offense and the history and characteristics of the defendant to insure that the sentence reflects the seriousness of the offense; promotes respect for the law; affords adequate deterrence to criminal conduct; and protects the public from further crimes of the defendant. Consequently, we believe that the Guidelines should provide that all conduct constituting a willful (i.e., criminal) violation of the tax laws should be considered in determining the tax loss if that conduct has not been considered before in a prior sentencing.

In light of the foregoing, we propose the following:

1. As proposed, amend §2T1.1 by deleting "When more than one tax year is involved, the tax losses are to be added." If, however, our recommendation for replacing the term "tax loss" with the phrase "criminal tax deficiency" and making corresponding changes in the Guidelines and commentary (see our response to Request for Comments 205) is not accepted, then we do not believe that this language (i.e., "When more than one tax year is involved, the tax losses are to be added.") should be deleted. Indeed, in the event our recommendation is not accepted, we believe that this language should also be inserted in §§2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7 and 2T1.9. This will avoid all confusion concerning whether losses resulting from more than one year are to be added whether or not the defendant is convicted of multiple counts.
2. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 2 in its entirety and replacing with new language (see our response to Request for Comments 205).
3. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 3 in its entirety and replacing with "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan."
4. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 4 and renumbering Notes 5 and 6 as Notes 4 and 5, respectively (see our response to Requests for Comments 205).

Amendment 189 Guideline §2T1.1 Tax Evasion

This amendment proposes to delete interest from the calculation of tax loss in §2T1.1. A similar amendment is proposed for §2T1.6 (see Proposed Amendment 202).

We do not oppose the deletion of interest from the calculation of tax loss (which we would rename "criminal tax deficiency" and redefine -- see our response to Request for Comments 205). While we do not believe that the calculation of interest would be particularly difficult, we believe that including an interest calculation would result in more contests over the exact amount of tax evaded and also could lead to much litigation over the speed with which the government investigated the violation and filed charges. However, we submit that in many cases the interest figure will not be insubstantial and, in most cases, the deletion of interest will decrease the offense level by one level.

Consequently, to compensate for the deletion of interest, we propose that the Tax Table (§2T4.1) be increased by one level at all levels. We recognize that the Commission is proposing an increase in the offense levels for various portions of the Tax Table (§2T4.1), but those increases do not affect amounts below $70,000 and the vast majority of tax cases fall at this figure or below (for example, according to Internal Revenue Statistics, somewhere around 75% of the convictions returned in FY '87 for General Enforcement Program cases involved amounts less than $70,000).

We recognize that the Commission is attempting to make the Tax Table consistent with the theft and fraud loss table (see Proposed Amendment 115). We do not, however, believe that these two tables must necessarily be consistent. In fact, we view the threatened loss of revenue resulting from tax violations as more serious than the loss of revenue from fraud or theft. The tax laws affect nearly every citizen in the country and, potentially, everyone has the opportunity to commit an offense against the revenue. The same cannot be said for federal theft or fraud offenses. Moreover, the federal government has limited resources and cannot possibly investigate or prosecute every tax violation. Indeed, an extremely small number of criminal tax violations are actually prosecuted. Consequently, the need for deterrence is extremely high. Imposing sentences for tax violations which are more severe than sentences for theft or fraud violations is justified by the difference in the nature of the offenses and by the heightened need in the tax area to have sentences send a clear message that tax violations will be handled severely. Deterrence is the primary purpose for the criminal tax enforcement program in this country. All taxpayers are potential defendants so the need to secure voluntary compliance by limited examples of strong deterrence is acute.

Amendment 190 Guideline §2T1.1 Tax Evasion

This proposed amendment would change the specific offense characteristic found in §2T1.1(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment.

Amendment 191 Guideline §2T1.1 Tax Evasion

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment.

Amendment 192 Guideline §2T1.1 Tax Evasion

This amendment is designed to correct a clerical error by deleting the term "Tax Table" wherever it appears in the Comentary to §2T1.1 captioned "Background" and replacing it with "Sentencing Table."

We support this proposed amendment.

Amendment 193 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This proposed amendment would change the specific offense characteristic found in §2T1.2(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment. (See our response to Proposed Amendment 190).

Amendment 194 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

In essence, this amendment proposes to add a cross reference to §2T1.2, providing that if the defendant is convicted of a willful violation of 26 U.S.C. §6050I, the court should apply §2S1.3 (Failure to Report Monetary Transctions) in lieu of Guideline §2T1.2.

As the Commission notes, this change was made necessary by the Omnibus Anti-Drug Abuse Act of 1988, which amended Section 7203 of the Internal Revenue Code of 1986 to provide for a maximum term of imprisonment of five years for a person willfully violating a provision of 26 U.S.C. 6050I, rather than the one-year maximum prison term for other violations of Section 7203. Section 6050I requires the filing of reports of certain types of monetary transactions. To deal with this increased penalty for failure to file certain internal revenue forms, the Commission proposes to have the court sentence under §2S1.3. We have no problem with that approach. But we do perceive a potential loophole in §2S1.3. That guideline sets the base offense level at 13 if the defendant (1) structured transactions to evade reporting requirement; (2) made false statements to conceal or disguise the activity; or (3) reasonably should have believed that the funds were the proceeds of criminal activity. In all other situations, the base offense level is 5. Thus, if the government can show that a defendant knew of the reporting requirement and knew that the transaction was covered by the reporting requirement, but willfully failed to file the necessary report, the base offense level will be 5 if there is no proof that the defendant structured transactions, made false statements, or reasonably should have believed that the funds were the proceeds of criminal activity. If such a defendant's violation is a failure to file the report required by Section 6050I of the Internal Revenue Code of 1986, he would be sentenced no more severely under §2S1.3 than he would under §2T1.2. This anomaly can be avoided if §2S1.3 is amended to provide that any willful failure to comply with reporting requirements will be punished at a base offense level of 13, whether the result of structured transactions or not.

Amendment 195 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191)

Amendment 196 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This amendment is intended to clarify the definition of tax loss in §2T1.2. It does so by adding a note in the Commentary to §2T1.2 captioned "Application Notes."

Instead of the language proposed by the Commission, we propose the following language for the new application note: "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan." (See our response to Proposed Amendment 188.)

Amendment 197 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This proposed amendment would change the specific offense characteristic found in §2T1.3(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment. (See our response to Proposed Amendment 190).

Amendment 198 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191.)

Amendment 199 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This amendment is intended to clarify the definition of tax loss in §2T1.3. It does so by adding a note in the Commentary to §2T1.3 captioned "Application Notes."

Instead of the language proposed by the Commission, we propose the following language for the new application note: "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan." (See our response to Proposed Amendment 188 and 196.)

Amendment 200 Guideline §2T1.4 Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

We support this amendment designed to correct a clerical error. We point out, however, that in explaining the reason for the amendment, the Commission states that if proposed amendment is 199 adopted, this amendment is withdrawn as unnecessary. We believe that the Commission meant to say that this amendment was withdrawn as unnecessary if proposed amendment 201 is adopted.

Amendment 201 Guideline §2T1.4 Aiding, Assisting, Procuing, Counseling, or Advising Tax Fraud

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191.)

Amendment 202 Guideline §2T1.6 Failing to Collect or Truthfully Account for and Pay Over Tax

This amendment proposes to delete the phrase "plus interest" from §2T1.6.

We support this proposed amendment if the corresponding changes which we suggest in our response to Proposed Amendment 189 are adopted.

Amendment 203 Guideline §2T1.9 Conspiracy to Impair, Impede or Defeat Tax

This proposed amendment is designed to correct a clerical error by replacing the phrase "either of the following adjustments" with the phrase "more than one."

Because more than two adjustments are involved, we support the proposed amendment.

Amendment 204 Guideline §2T1.9 Conspiracy to Impair, Impede or Defeat Tax

The purpose of this Proposed Amendment is to clarify Application Notes 2 and 3.

We agree that Application Notes 2, 3, and 4 should be deleted. We support the proposed new language for Application Note 3. However, for the language proposed by the Commission for the new Application Note 2, we would substitute the following language: "The base offense level is the offense level corresponding to the criminal tax deficiency if that offense level is greater than 10. Otherwise, the base offense level is 10." (See our response to Requests for Comments 205.)

Request for Comments 205. Chapter Two, Part T, Subpart 1

In Request for Comments 205, the Commission states that if the calculation of interest is deleted from §2T1.1 (amendment 189), the offense levels for sections 2T1.1, 2T1.3, and 2T1.4 will be similar and will all depend upon the level of the "tax loss" Consequently, the Commission seeks comment on whether the term "tax loss" should be standardized and, if so, on how this might best be accomplished. The Commission also seeks comment on how this term might be clarified and on whether the offense level for §2T1.2 should be more similar to, or the same as, §2T1.1.

Currently, §2T1.1 provides, in pertinent part, that "[f]or purposes of this guideline, the 'tax loss' is the greater of: (A) the total amount of the tax that the taxpayer evaded or attempted to evade, including interest to the date of filing of an indictment or information; and (B) the 'tax loss' as defined in §2T1.3." Section 2T1.3 defines the "tax loss" as "28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent." This definition of "tax loss" is also incorporated in §2T1.4.

If the calculation of interest is deleted from §2T1.1, we believe there will be few, if any, cases where the amount of the tax evaded will be greater than 28 percent (34 percent in the case of a corporation) of the amount by which the greater of gross income or taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. Therefore, it makes no sense to retain part (A) of the definition of "tax loss" in §2T1.1. If the amount of tax evaded or attempted to be evaded is eliminated as a basis for determining "tax loss" in §2T1.1, then the definition of "tax loss" in §§2T1.1, 2T1.3, and 2T1.4 will be the same.

We believe that the best way to accomplish the objective of standardizing the term "tax loss" is to define "tax loss" in §2T1.1 and then simply reference that definition in the remaining sections of Part T, Subpart 1 where the base offense level calculation depends upon a determination of "tax loss." This would include referencing the definition of "tax loss" contained in §2T1.1 in §§2T1.2, 2T1.3, 2T1.4, and 2T1.9.

The base offense level for §2T1.2 (Willful Failure to File Return, Supply Information, or Pay Tax) (26 U.S.C. 7203) is currently set at one level less than the level from the Tax Table (§2T4.1) corresponding to the tax loss. The tax loss is defined as the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any one year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000. As the definition of tax loss in §2T1.2 is already keyed, in part, to the amount of tax evaded, no great change is worked by having the base offense level of §2T1.2 depend upon the definition of tax loss in §2T1.1.

The floor currently provided by the "not less than 10 percent" language can be retained simply by providing a minimum

base offense level when there is no ascertainable tax loss. Similarly, keying the definition of tax loss in §2T1.9 (Conspiracy to Impair, Impede, or Defeat Tax) (18 U.S.C. 371) to the definition in §2T1.1 will not be a serious break with the current version of §2T1.9, which, in part, now defines that tax loss as the tax loss defined in §2T1.1 or §2T1.2, as applicable.

We believe that the term "tax loss" is best clarified by replacing it with the phrase "criminal tax deficiency." There is some confusion among those most likely to be involved in applying the guidelines in Part T, Subpart 1 concerning whether purely civil items (e.g., understatements due to an honest dispute over a taxing provision) might be used in calculating the base offense level. Using the phrase "criminal tax deficiency" (and explaining the meaning of that phrase in the Application Notes) should dispel all confusion and make it clear that only items resulting in an understatement of tax which are due to willful actions are to be used in determining the base offense level.

Despite the fact that we believe that the same definition of "tax loss" ("criminal tax deficiency") should be used throughout the sections of Part T, Subpart 1 where the base offense level calculation depends upon a determination of "tax loss," we think that the Guidelines in Part T, Subpart 1 should still differentiate between offenses by assigning differing base offense levels to different offenses. We would accomplish this by providing that the base offense level for §2T1.1 is one level greater than the level from §2T4.1 (Tax Table) corresponding to the "criminal tax deficiency;" the base offense level for §§2T1.3 and 2T1.4 is the level from §2T4.1 (Tax Table) corresponding to the "criminal tax deficiency;" and, the base offense level for §2T1.2 is one level less than the level from §2T4.1 (Tax Table) corresponding to the deficiency. Currently, the Guidelines set the base offense level for §2T1.2 at one level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss. Consequently, our proposal in this regard works no change in the approach now taken by the Guidelines insofar as §2T1.2 is concerned. Setting the base offense level for §2T1.1 at one level greater than the level from §2T4.1 (Tax Table) corresponding to the "tax loss" ("criminal tax deficiency") is justified by the fact that §2T1.1 is the Guideline for sentencing the most serious violations of the Internal Revenue Code (26 U.S.C. 7201) and will better reflect the different maximum sentences provided by Section 7201 (five years' imprisonment) and by Section 7206 (three years' imprisonment), to which Guidelines §§2T1.3 and 2T1.4 relate.

In light of the foregoing, we propose the following:

1. Paragraph (a) of §2T1.1 be deleted and be replaced with the following:

> "(a) Base Offense Level: One level greater than the level from §2T4.1 (Tax Table) corresponding to the criminal tax deficiency.

"For purposes of this guideline, the 'criminal tax deficiency' is: (1) 28 percent (34 percent in the case of a corporation) of the greater of gross or taxable income which has been understated, reduced, or unreported as a result of a willful violation of the tax laws by the defendant, plus 100 percent of the amount of any false claims of credit against tax; or (2) 100 percent of the total amount of unpaid taxes in a case involving willful evasion of payment or willful failure to pay.

"The 'criminal tax deficiency' shall not include any amount which has been used previously in determining the 'criminal tax deficiency' in a prior case; or, as to amounts owing from tax years prior to the effective date of these Guidelines, an amount previously considered in imposing a sentence in any criminal tax case. Such prior convictions, however, are properly considered in computing criminal history under §4A1.2.

"The 'criminal tax deficiency' shall otherwise include an amount falling in one of the above categories which can be established to have resulted from a willful violation of the tax laws. The term "tax laws" includes, in addition to a violation of a provision of Title 26, U.S.C., a violation of 18 U.S.C. 2 or 371 relating to an attempt or conspiracy to commit a violation of Title 26 or to impede the IRS and/or the Department of the Treasury in the performance of its duties."

2. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 2 in its entirety and replacing it with the following:

"The basic theory behind the concept of 'criminal tax deficiency' is that a violator is to be sentenced based on tax losses to the Government resulting from a criminal violation of the tax laws by the taxpayer, not just any tax deficiency. What the IRS internally calculates as the 'criminal computations' in a given criminal investigation for all years under investigation would be in a majority of cases the basis for determining the 'criminal tax deficiency' for the prosecution period. However, the 'criminal tax deficiency' is not limited to amounts contained in any particular investigative report (e.g., Special Agent's Report or Revenue Agent's Report), but rather includes any deficiency established to have been willful.

"It may very well be that an act of evasion, false statement, or the like may not be provable beyond a reasonable doubt but only by a preponderance of the evidence. Hence, the 'criminal tax deficiency' could embrace any tax loss caused by a criminal violation even

though it was not covered by the activity to which the defendant pleaded guilty or even the activity covered by the indictment. The court may consider nonindictment years where the violation is established to have been willful. However, it is contemplated that in the majority of cases the scope of the 'criminal tax deficiency' would not extend beyond the violations revealed in the investigation which led to the indictment and in any additional background information, including information from other investigations, involving the defendant. It is not the intent of the Commission to require either the Internal Revenue Service or the Probation Department to conduct additional investigation in a typical tax case to ascertain if there is a greater deficiency beyond that revealed by the investigation which led to the indictment."

3. Amend the Commentary to §2T1.1 captioned "Application Note" by deleting Notes 3 and 4 in their entirety and thereafter renumber Notes 5 and 6 as Notes 4 and 5, respectively (see our response to Proposed Amendment 188).
4. In paragraph (a)(1) of §2T1.2, delete the words "tax loss" and replace with "criminal tax deficiency."
5. Delete paragraph (a)(2) of §2T1.2 in its entirety and the language following and replace it with:

   "(a)(2) 5, if no criminal tax deficiency is ascertainable.

   "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency'as defined in §2T1.1."

6. In paragraph (a)(1) of §2T1.3 delete "tax loss, if the offense was committed in order to facilitate evasion of a tax;" and replace with "criminal tax deficiency;"
7. In paragraph (a)(2) of §2T1.3 delete the language following "6, otherwise." and replace it with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1"
8. In paragraph (a)(1) of §2T1.4 delete the words "resulting tax loss, if any" and replace with "criminal tax deficiency;"
9. In paragraph (a)(2) of §2T1.4, delete the language following "6, otherwise." and replace it with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1"
10. In §2T1.9, delete the language of (a)(1) and replace with "Level from §2T1.4 (Tax Table) corresponding to

the criminal tax deficiency; or".

11. In paragraph (a)(2) of §2T1.9, delete the language following "10." and replace with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1".

Amendment 220. Guideline §3A1.2. Official Victim

One of the changes made by amendment 220 is to include within the official victim guideline certain assaults against law enforcement or corrections officers committed during the course of an offense or immediate flight therefrom. This amendment includes conduct not expressly included in the current guideline. The amendment is particularly important in light of another change to the current language narrowing the applicability of the guideline to situations in which the "offense of conviction" rather than the "crime" was motivated by the victim's official status.

The proposed enhancement for assaults against law enforcement and corrections officers applies to conduct committed during the course of the offense or immediate flight therefrom and includes assaults committed "in a manner creating a substantial risk of serious bodily injury." This proposed amendment could be improved by: (1) broadening its application beyond assaults committed during the course of an offense or immediate flight therefrom to include assaults committed in connection with an arrest for the offense; and (2) applying the enhancement to assaults which create a substantial risk of bodily injury, even if not serious. As to the first issue, if a defendant commits an offense and during the course of an arrest assaults the arresting officer, the defendant should be sentenced more severely than one who does not commit an assault. This enhancement should apply whether or not the defendant is immediately arrested for the offense. As to our second suggestion, if during the course of a bank robbery a defendant knocks a law enforcement officer to the floor and injures him but not seriously, the assault should enhance the applicable offense level. The nature of the conduct may be similar to conduct that risks serious bodily injury and should be similarly punished in this context. Prosecutors would be involved in needless litigation over whether an assault created a risk of serious bodily injury or lesser forms of bodily injury if the proposed language were adopted.

In this regard, we object to proposed application note 5 to the extent it limits the application of the proposed guideline amendment to assaults that are proximate in time to the offense and excludes the risk of less-than-serious bodily injury. We believe that the proposed amendment language for new subsection (b) should be revised to read: "during the course of the offense, immediate flight therefrom, or in connection with apprehension for the offense, the defendant ...." In addition, the word "serious" should be deleted from the guideline amendment.

Amendment 234. Guideline §3E1.1. Acceptance of Responsibility

Amendment 234 deletes application note 4 from the commentary to the acceptance-of-responsibility guideline. This application note states that an adjustment for acceptance of responsibility "is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice ... regardless of other factors." The amendment would instead provide language to the effect that the adjustment for acceptance of responsibility ordinarily would not apply when §3C1.1 (willfully obstructing or impeding proceedings) applies, but that in extraordinary cases both the acceptance and obstruction adjustments may apply.

We object to the deletion of the current application note and the insertion of the proposed language. We are at a loss to imagine any set of facts in which both the acceptance and obstruction adjustments could logically apply. The proposed language is an invitation to judges to view the acceptance guideline as applicable to nearly every case and improperly to reduce sentences for acceptance of responsibility. We believe that the acceptance guideline may currently be routinely over-applied and that steps need to be taken to narrow its applicability. A clear statement barring the application of the acceptance guideline as in current application note 4 simplifies application of the guidelines and reduces potential litigation.

AMENDMENT 243

Amendment 243 deals with career offenders. On the issue of career criminals, the Subcommittee was bothered by the current definitions in 4B1.2(3) which define prior felony covictions. This current definition as applied to the career criminal and criminal history scores seems, at times, to produce an arbitrary result.

For example, an individual who many years apart commits two unarmed bank robberies using a note, would qualify for career offender status upon his third note job and would be sentenced with an offense level of 32. On the other hand, a individual who commits five armed bank robberies over a five-year period is caught, pleads not guilty, and is convicted of all five bank robberies, would be deemed to have only one conviction and would ot qualify for the career offender status. He could also have a criminal history level as low as II. It appears to us to be much more logical and consistent with the Congressional intent for the Commission to provide that prior felony convictions will be counted separately, where for sentencing purposes they would not have been grouped but counted separately. Thus, in the example that I cited, the individual convicted of five separate bank robberies would not have had those five robberies grouped together but would have received a sentence based upon these offenses being treated separately. To arbitrarily limit prior offenses to those which do not occur at a consolidated trial or consolidated plea seems unreasonable. An individual committing bank robberies in two states will normally be tried and convicted separately. An individual committing two bank robberies in the same locality will often have his cases tried or sentenced together. The different treatment given these situations, particularly when it moves the defendant from a normal criminal history into the criminal career category seems to induce a tremendous disparity in the sentencing process.

However, the Subcommittee strongly recommends that a 2 level adjustment for acceptance of responsibility be permitted under the career offender provision. Otherwise, the prosecutors will have no incentive to induce a plea of guilty without engaging in wholesale departures which should not be encouraged.

The Subcommittee also strongly disapproved the senior citizen provision which would have resulted in lower guidelines for defendants who were at age 50 or above. Based on our experience, we simply do not see this as being viable particularly when the Commission has stated that normally, age is not a factor to be considered. 5H1.1

AMENDMENT 260

Amendment 260 deals with guidelines to allow home detention. The Subcommittee was unenthusiastic about substituting home detention for incarceration. We felt that home detention would be publicly perceived as a rich man's punishment and would diminish the impact of even short incarceration on white collar criminals. Home detention, if used at all, should be a substitute for a half-way house or work release but not for true incarceration. If home detention were used, we would recommend a ratio of two days home detention for one day of other forms of restraint.

Amendment 260. Guideline §5C2.1. Home Detention

The Commission is seeking comments on home detention.

The Antitrust Division recommends that the Department oppose the use of home detention for white collar criminals such as antitrust offenders. Although white collar criminals often do not receive long prison sentences, the probabilty of even relatively short terms of incarceration in a penal institution is a powerful deterrent to antitrust and similar offenses. Being sentenced to 3 or 4 months of home detention would not be an effective deterrent. In addition to having the comforts of perhaps a very comfortable home, a defendant may be able effectively to run his business out of the house, further minimizing the penalty. Moreover, home detention for white collar criminals would send the wrong signal to society at large that these sorts of offenses are not taken seriously by the federal government and that well-to-do white collar criminals receive favorable treatment from the criminal justice system.

Amendment 265. §5G.1.2. Sentencing on Multiple Counts of Conviction

Amendment 265 proposes adding to the commentary on §5G1.2 a statement to the effect that the rules on sentencing multiple counts of conviction apply to multiple counts of conviction whether (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The treatment of counts contained in separate indictments sentenced at the same time was not previously clarified by the guidelines, and we believe the existing provisions do not require consolidation of counts of separate indictments under the multiple count rules of Chapter Three. The amendment would expressly reject this theory.

We agree that counts of separate indictments should often be sentenced as though they were counts of the same indictment if sentenced at the same time or consolidated for sentencing, but only if under the joinder rules the counts of the separate indictments could have been charged in the same indictment (leaving venue issues aside). Under these rules two or more offense may be charged in the same indictment or information if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rules 8, Fed.R.Cr.P. See also Rule 14, Fed. R. Cr. P. on relief from prejudicial joinder. That is, if the government could have charged the counts in one indictment (venue questions aside) but did not, it makes sense to sentence the counts as though they had been joined. However, if the rules do not permit joinder of offenses for reasons relating to the differing nature of the offenses and in essence force the government to carry out separate proceedings, then the same separate treatment should apply to sentencing. This approach would decrease the incentive for prosecutors to proceed on separate indictments purely for sentencing purposes but would not unfairly affect the government where it is put to the test twice under the Criminal Rules.

While we agree that the above would be a fair treatment for purposes of the present sentencing of counts of separate convictions, we would not want this approach adversely to affect criminal history or career offender calculations when separate convictions result in consolidated sentencing. That is, we do not believe that the separate convictions should be treated as one prior conviction or sentence because one sentencing proceeding occurs under the above proposal. We believe an amendment of the criminal history guideline §4A1.2(a)(2), defining "prior sentence" is necessary in this regard. Without a clear statement that prior convictions consolidated for sentencing are to be treated for purpose of criminal history and career offender provisions as separate prior sentences, we would oppose any

change to §5G1.2 treating sentences for separate convictions as multiple counts of the same conviction.

Amendment 267. §5G1.3. Conviction on Counts Related to Unexpired Sentences

This amendment proposes deleting current guideline §5G1.3, which provides that if at the time of sentencing the defendant is serving an unexpired sentence, then the sentence for the instant offense is to run consecutively to the unexpired sentence, unless one or more of the instant offenses arose out of the same transactions or occurrences as the unexpired sentence. In the latter case the instant sentence is to run concurrently with the unexpired one, except if otherwise required by law. In its place would be a guideline not covering the above situation involving unexpired sentences at the time of sentencing for the instant offense but rather the limited situation of an instant offense committed while the defendant was serving a term of imprisonment. The proposed guideline would require consecutive sentencing for the instant offense in this case. The judge would have discretion in all other cases to determine whether a sentence should be consecutive to or concurrent with a sentence previously imposed.

We believe the rule on consecutive sentencing should be much broader than the proposed amendment and broader than the existing rule provides. It should provide that a new sentence of imprisonment shall be consecutive to one previously imposed, whether the defendant is currently serving such sentence or has not begun serving it. The general presumption under 18 U.S.C. §3584 is that multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently. If the court is silent on the issue, the terms are to run consecutively. The one exception is that terms may not run consecutively for an attempt and for another offense that was the sole object of the attempt. In our view the guidelines should implement this presumption, particularly in light of our recommendation regarding amendment 265. That is, if our recommendation is adopted that separate proceedings sentenced at the same time should be subject to the multiple count rules if the separate offenses could have been joined in one indictment, then most cases meeting the joinder criteria will likely result in a consolidated sentencing proceeding, given the benefit to the defendant such treatment provides. However, where the separate indictments are not consolidated for sentencing, then the offenses presumably are unrelated or are not of a same or similar character. In this situation the sentences should be consecutive because of the separate nature of the offenses and the fact that more than one proceeding was involved all the way through sentencing.

It is possible that some cases may not reflect this intended scheme. For example, even though counts under two indictments may be eligible under our proposal regarding §5G1.2 for consolidated sentencing, for some reason the indictments may have been handled in separate sentencing proceedings. Moreover, the prior sentence may relate to a State offense. To protect against

unfair results in this situation, the Commission could provide that the rule requiring consecutive sentences for separate sentencing proceedings does not apply if the instant offense arose out of the same acts or transactions as the offenses previously sentenced.

We propose that §5G1.3 be amended to read as follows: "Multiple terms of imprisonment imposed at different times shall run consecutively unless they are imposed for offenses involving the same act or transaction."

AMENDMENT 271

Amendment 271 deals with terrorism. The Subcommittee believes that this term needs to be defined. We would recommend that the Sentencing Commissicnconsult with the Department of Justice Criminal Division in order to adopt a working definition of "terroristic action." We do not know of an accepted definition of the term.

Suggested New Amendment. Guideline §3D1.2(d). Grouping of Counts.

Section 3D1.2(d) was substantially amended as of June 15, 1988. The phrase "same general type of offense" was edited out. This concept is important in applying §3D1.2(d), and is still interpreted in the Commentary, see Application Note 6. Currently, there is no language in the guideline that carries the "same general type of offense" concept. Some editing should be done here.

NEW CRIMINAL HISTORY CATEGORY

The Subcommittee believes that a criminal history category VII should be adopted for all offenses. This new category VII would be that listed as Option 1 of Proposed Amendment 243. We believe this should be applied across the board.

Many of us are seeing pre-sentence reports which indicate that defendants have criminal history points in excess of 20. The current category does not take into account criminal history points above 13. While it is always possible for the court to use a departure, an upward departure almost assures a defense appeal. The Subcommittee believes that there are a number of individuals who are in fact habitual criminals but who do not meet the violent or drug offense career test. These criminals are individuals who have committed repeated property, immigration, and fraud related offenses. The Subcommittee was particularly concerned in the immigration area that offenders with a history of many many violation are simply not adequately punished. Given the fact that recent studies by the Department of Justice indicate that a large number of defendants, in fact, do come back into the criminal justice system within three years after release, we believe that those defendants who continue to commit crimes even though not violent, reach a point where they need to be incapacitated for increased periods of time. The range set for a new category VII would accomplish this.

TIME OF ACCEPTANCE OF PLEA (6B1.1(c))

The Subcommittee is worried that using this rule, many judges defer accepting any part of a plea until the pre-sentence report is completed. This leaves the government in an awkward position for a couple of months until the PSI is completed. A defendant can withdraw his plea at any time for no real reason during this period. We recommend that the court be advised to accept the plea itself at the time it is offered and only defer accepting the plea agreement until later. One the plea itself is accepted, the defendant will have to show good cause to withdraw his plea. Should the court reject the plea, the defendant would have good cause to withdraw, but would not have two months or more to think about withdrawing for any reason that was not fair and just.

SETTING LEVELS WHERE THERE IS A MINIMUM MANDATORY SENTENCE

The Commission in several cases has asked for comment on where offense levels involving minimum mandatory sentences should be set (Amendment 96). The Subcommittee recommends these be set above the minimum so there can be a reduction to the minimum mandatory sentences upon acceptance of responsibility. Without some flexibility and give, these minimum mandatory sentences risk clogging the system with trials.

Amendment 273. Guideline §6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

This amendment is intended to clarify the Commentary to §6B1.2 to make clear that a plea agreement that departs from the Guidelines may be accepted only where the departure is in accordance with the law governing departures rather than in instances where a departure is merely consistent with the purposes of sentencing.

To achieve this result, the Commission proposes to state in the Commentary that any departure in a plea agreement must be authorized by 18 U.S.C. § 3553(b). That section requires that sentences be imposed within the appropriate guidelines range "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."

There may be some question whether one departure that the Department is likely to seek--the departure for substantial assistance to authorities under §5K1.1-- is covered by § 3553(b). The Commission notes in the Commentary to that section that the substantial assistance departure is authorized by 18 U.S.C. § 3553(e) (where it is below a statutory minimum) and (generally) by 28 U.S.C. § 994(n).

There is a semantic issue here that really need not be resolved. In any case, the Commission's proposed insertion to the Commentary to §6B1.2 should be revised to read: "(i.e., that such departure is authorized by 18 U.S.C. §§ 3553(b), (e) or 28 U.S.C. § 994(n)). See generally Chapter 1, Part A(4)(b)(Departures).".

90-30259

UNITED STATES COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

CHAMBERS OF
[redacted]ENA RAGGI
STRICT JUDGE

January 23, 1990

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I enclose for the Commission's consideration the pre-sentence report in the case of United States v. Juan Ortiz, 89 CR 512, in which I must impose sentence.

I think the guideline range of 0-6 months imprisonment is much too low for the serious criminal conduct at issue. This is, afterall, a defendant who was prepared illegally to sell sixteen or more handguns, and who actually sold four. No one living in New York City can think that such conduct can lead to anything but the most tragic consequences.

In this case, I have the option to depart upward because of the defendant's cocaine dealing, which is not calculated into the guidelines. Nevertheless, I think a significantly higher sentence than 0-6 months would be appropriate even without such aggravating circumstances.

I know that the amended guidelines, effective November 1, 1989, do provide for a slightly higher offense level calculation for multiple gun dealers. Since in this case, these amendments would only have brought Mr. Ortiz within the 2-8 months sentence range, I hardly think the amendments go far enough.

I enclose for your consideration and comparison to the Ortiz guideline calculation the pre-sentence report in the case of United States v. Mario Martinez, 89 CR 609, a case involving the unlawful use of a "blue box" to make long distance telephone calls. Because the scheme at issue resulted in a loss of over $50,000, Martinez's guideline range called for a sentence of 8-14 months. Does the Commission really think that someone using a "blue box," even on a significant scale, poses more of a danger to this

community, and therefore needs to be incarcerated for a longer term, than someone trafficking in 9 mm automatics?

I look forward to any guidance the Commission may wish to give me in dealing with such matters in the future.

Very truly yours,

Reena Raggi

REENA RAGGI
UNITED STATES DISTRICT JUDGE

Enclosure
As Stated.

8/22 Steer talked w/ D. Maggio dept. to 21 mo. sentencing about basis for upward departure

UNITED STATES SENTENCING COMMISSION

16 I

6 + 2 = 2-

(718) 330-2028

Q - Could Δ possessed a firearm legally = Level 12

- Supply cocaine = at least level 12

Multi-count analysis 2 level

12 counts = Level 14

or

if firearm count was 8 + ~~marijuana~~ cocaine was 12 = multi-count = 14