• • •

42. Chapter Two, Part N, Subpart 2: Section 2403 of the Anti-Drug Abuse Act of 1988 (codified as 21 U.S.C. § 333(e)) prohibits distributing or possessing with intent to distribute anabolic steroids. The statute authorizes a maximum sentence of 3 years' imprisonment for "any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician." A maximum sentence of 6 years' imprisonment is authorized for "any person who distributes or possesses with intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than treatment of disease pursuant to the order of a physician." The Commission intends to promulgate an offense guideline to address this statute based upon the type and amount of steroids involved. The Commission seeks public comment on how to structure a guideline that will best accomplish this result, and as to the appropriate offense levels.

• • •

Chapter Two, Part P (Offenses Involving Prisons and Correctional Facilities)

43. Proposed Amendment: The Commentary to §2P1.1 captioned "Application Notes" is amended by the insertion of the following additional note:

> "5. Where the defendant was serving a sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(d), or §4A1.1(d) and (e), may apply. The addition of criminal history points on the basis of the defendant's custody status at the time of the escape is expressly authorized by the guidelines and does not constitute inappropriate double counting.".

Reason for Amendment: This amendment clarifies that, where the instant offense is escape, points from §4A1.1(d) or (e), or both, may be applicable and do not constitute unintended double counting. Although the 3rd Circuit U.S. v. Ofchinick, 1989 W.L. 59365, 1989 U.S. App. LEXIS 7819 (3d Cir. June 7, 1989) and 10th Circuit U.S. v. Goldbaum, No. 88-2239, 1989 U.S. App. LEXIS 10304, 2 Fed. Sent. R. 103 (1989)(10th Cir. July 21, 1989) have upheld the addition of criminal history points in such cases, several district courts have held to the contrary, e.g., U.S. v. Bell, Cr. File No. 5-88-021-01, 2 Fed. Sent. R. 106 (1989)(D. Minn. June 30, 1989), U.S. v. Cassidy, Crim. File No. 3-88-066 (D. Minn.) statement of reasons (no opinion), January 18, 1989 (Chief Judge Alsop), U.S. v. Evidente, Cr. File No. 5-88-003 (D. Minn.) order (no opinion), May 26, 1988 (Judge Renner). Because this issue is one of the Commission's intent, this amendment will resolve this issue and conserve judicial resources.

• • •

44. §2P1.1 - Offense Levels for Certain Escapes: Under the current guidelines, an escape from custody resulting from a conviction or a lawful arrest for a felony has a base offense level of 13. If, however, the escape is from non-secure custody and the defendant returns voluntarily within 96 hours, the base offense level is reduced by 7 levels to level 6. If the defendant does not return voluntarily within 96 hours, there is no difference in offense level between an escape from secure or non-secure custody.

The Commission seeks comment on whether an additional distinction should be made between escape from secure and non-secure custody for cases not covered by the 7 level

reduction for voluntary return from an escape from non-secure custody within 96 hours.

The Commission also seeks comment on whether there should be any reduction for voluntary return and, if such a reduction is appropriate, whether the 96 hours distinction currently used is appropriate. Comment is also sought on whether any distinction between escape from secure and non-secure custody should take into account the nature of the offense for which the defendant is confined, or the security level of the institution in which the defendant is confined. If a distinction between escape from secure and non-secure custody is appropriate, should or should not this distinction apply in the case of all offenders or should such a distinction not apply to certain offenders such as drug traffickers or violent offenders? Should a failure to return from a furlough from a secure institution be treated differently than a failure to return from a furlough from a non-secure institution? Where a defendant is returned to custody following an arrest for a new crime while on escape status, such return does not constitute a voluntary return for guideline purposes. Should the guidelines, however, provide an additional distinction to cover cases in which the defendant returns voluntarily from an escape and is later discovered to have committed a new offense while on escape status? If additional distinctions to the guidelines are believed warranted, comments are sought as to the most appropriate structure to accommodate such distinctions.

• • •

Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting)

45. Proposed Amendment: The Introductory Commentary to Chapter Two, Part S, is deleted in its entirety.

Reason for Amendment: The introductory commentary to this part is outdated, inconsistent with the commentaries to other sections, and better covered in the individual commentaries to the offenses contained in the part.

• • •

Chapter Two, Part T (Offenses Involving Taxation)

46. Proposed Amendment: The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 5 by deleting:

> "'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

> "conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.2 captioned "Application Notes" is amended in Note 1 by deleting:

> "'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

Reason for Amendment: The current application notes provide that where subsection (b)(1) produces an offense level of 12, §4B1.3 (Criminal Livelihood) which produces an offense level of 13 is not to be applied. This conflicts with the principle in Application Note 5 of the Commentary to §1B1.1 which provides that when two guideline provision are equally applicable, the one producing the greater offense level controls.

In addition, although the guidelines in §§2T1.1, 2T1.2, and 2T1.3 use the term criminal activity, the application notes refer to "racketeering activity" as defined in 18 U.S.C. § 1961. Although the definition in 18 U.S.C. § 1961 is quite broad, it is jurisdictional for some conduct (e.g., theft from interstate shipment is covered, but other felonious theft does not appear to be covered). This appears anomalous. This amendment deletes the portions of the application notes prohibiting application of §4B1.3. In addition, the amendment revises the definition of criminal activity to cover any criminal violation of federal, state, or local law.

• • •

Chapter Two, Part X (Other Offenses)

47. Proposed Amendment: Section 2X5.1 is amended by inserting immediately before the period at the end of the second sentence:

", except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable".

The Commentary to §2X5.1 is amended by inserting immediately after "Commentary" the following:

"Application Notes:

1. Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5B1.4 (Recommended Conditions of Probation and Supervised Release); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); subsection (c)(1)(B) of §5E1.2 (Fines for Individual Defendants) as a lower limit; §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics);

Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

2. Where there is no sufficiently analogous Chapter Two offense guideline, the court may find it helpful to estimate a Chapter Two offense level by comparing the seriousness of the instant offense with the offense levels for offenses that are listed. This estimated offense level, although not a formal guideline determination, may be used in conjunction with reference to Chapters Three, Four, and Five to provide guidance for the determination of an appropriate sentence.".

Reason for Amendment: This amendment inserts an application note (Note 1) to clarify that in the case of an offense for which there is no sufficiently analogous offense guideline, any guidelines and policy statements that can be meaningfully applied in the absence of a Chapter Two offense guideline remain applicable. This amendment also provides an application note (Note 2) to assist the court in fashioning an appropriate sentence where there is no specifically analogous offense guidance.

• • •

Chapter Three, Part A (Victim-Related Adjustments)

48. Proposed Amendment: The Introductory Commentary to Chapter Three, Part A is amended by deleting the second sentence as follows: "They are to be treated as specific offense characteristics.".

Reason for Amendment: This amendment eliminates an unnecessary and confusing sentence. Chapter Three adjustments are adjustments to the offense level determined under Chapter Two, not specific offense characteristics. This sentence creates confusion in respect to Chapter Two cross references because, when read in conjunction with §1B1.5 (Interpretation of References to Other Guidelines), it can create the impression that a Chapter Three adjustment must somehow be taken out of sequence to become part of the Chapter Two offense level.

• • •

49. Proposed Amendment: Chapter Three, Part A is amended by inserting the following additional section:

"§3A1.4 Victim Due To Race, Color, Religion, Alienage, Or National Origin Or On Account Of Exercise Of Federal Rights

If the offense--

(a) involved the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin; or

(b) was motivated at least in part by a victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the

United States,

increase by 2 levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the defendant is sentenced under Chapter 2, Part H, subpart 1 (Civil Rights), or where the offense guideline specifically incorporates this factor.

2. If the court determines that, under the circumstances of the offense, the race, color, religion, alienage, or national origin of the victim rendered the victim vulnerable under §3A1.1 (Vulnerable Victim), do not apply this guideline.

3. Subsection (b) applies both to actions taken by private persons as well as public officials and should be construed broadly to protect the rights of free speech and assembly, the free exercise of religion, and other rights guaranteed under the Constitution or laws of the United States.

Background: This adjustment applies to 'hate crimes;' that is, offenses where the victim is made a target of criminal activity by the defendant on account of the victim's status with respect to race, color, religion, alienage, or national origin or because of the victim's exercise or intended exercise of a right guaranteed under the Constitution or laws of the United States. For example, this adjustment would apply to assaults committed against individuals on account of their race or color, offenses committed against organizations because of their exercise of the right to speak or assemble, and to crimes committed against religious entities on account of their beliefs or practices. This section also applies to political candidates and others who are targeted as victims of crime at least in part because of the beliefs which they espouse or other forms of advocacy in which they engage.".

Reason for Amendment: This amendment provides a general penalty enhancement for "Hate Crimes" that are not prosecuted and sentenced under the civil rights laws and corresponding guidelines. The amendment provides an enhanced sentence for offenses motivated by the victim's race, national origin, etc. or where the offense was motivated by the victim's exercise of rights secured under the Constitution or laws of the United States, whether or not the defendant was acting under color of law. See also questions 2 and 3 at amendment 26.

• • •

50. Proposed Amendment: Chapter Three, Part B, is amended by deleting the text of the "Introductory Commentary" in its entirety and inserting in lieu thereof:

"This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under §3B1.1 or §3B1.2. Where there are multiple participants or individuals, however, some participants in a criminal organization

may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants may receive no adjustment. Because the guideline ranges are determined based upon the culpability of an average participant in the offense, the court should not presume that a defendant had either an aggravating or mitigating role. As with all Chapter Three adjustments, the determination of role is made in the context of relevant conduct. Role must, therefore, be determined by assessing a particular defendant's culpability in relation to the acts and omissions within the relevant conduct for which he is accountable. In some cases the relevant conduct will be identical for each defendant, encompassing the same acts and omissions and participants. However, relevant conduct may differ for defendants such that the acts and omissions for which one defendant is accountable will not be the same as those acts and omissions for which another defendant is accountable. Likewise, the number of participants included in the relevant conduct for different defendants may vary.

The proper adjustment for role will therefore assess a defendant's culpability relative to those other participants and individuals within the parameters of his own relevant conduct as opposed to attempting to assess relative culpability of co-defendants in the overall criminal enterprise. Thus, when an offense involves more than one individual, §3B1.1 or §3B1.2 (or neither) may apply. In applying this part, §3B1.1 and §3B1.2 are to be applied sequentially. Thus, §3B1.2 is to be considered only if the defendant is not subject to an adjustment under §3B1.1. If §3B1.1 applies then §3B1.2 may not be applied.

To illustrate: Defendants A and B are among 20 co-defendants who are convicted of a drug conspiracy involving 40 participants. Defendant A organized the enterprise which involved the importation of 10 kilograms of drugs on 10 occasions. Defendant B was involved in only one of the importations of 10 kilograms along with four other participants and took orders from Defendant A. The other 9 shipments were beyond the scope of and not reasonably foreseeable in connection with the one shipment Defendant B agreed to jointly undertake with the other participants. Additionally, Defendant B managed two participants during this importation. Both are convicted of importation of drugs, 21 U.S.C. §952.

Defendant A would be the organizer in the context of his relevant conduct of importation of 100 kilos of drugs involving 40 participants and subject to a four-level increase under §3B1.1(a) based upon 100 kilos of drugs. Defendant B would be a manager in the context of his relevant conduct of importation of 10 kilos of drugs involving six participants and subject to a three-level increase under §3B1.1(b), based upon the ten kilos. The relative culpability of Defendant A and Defendant B would be assessed, but such assessment is accomplished separately for each defendant and only in the context of the relevant conduct of the particular defendant under consideration. As both Defendants A and B warranted an increase under §3B1.1, mitigating role adjustments are not considered for them.".

Section 3B1.1(a) is amended by deleting "a criminal activity" and inserting in lieu thereof "an offense.".

Section 3B1.1(b) is amended by deleting "criminal activity" and inserting in lieu thereof: "offense.".

Section 3B1.1(c) is amended by deleting "criminal activity" and inserting in lieu thereof: "offense.".

The Commentary to §3B1.1 captioned "Application Notes" is amended by deleting Notes 1-3 in their entirety and inserting in lieu thereof:

"1. 'Offense' means the offense of conviction and all relevant conduct attributable to the defendant under Section 1B1.3 of Chapter One.

2. Section 3B1.1 should not be applied to those offenses that have incorporated such an adjustment into the base offense level or specific offense characteristics. These instructions will be noted in the Chapter Two guidelines and Commentary. For example, an adjustment for an aggravating role under this Part is not authorized for a defendant convicted of Continuing Criminal Enterprise, because the offense level for this guideline already reflects an adjustment for role in the offense. See §2D1.5 and Application Note 1.

3. A 'participant' is a person who takes part in the commission of the offense and is or would be criminally responsible for the commission of the offense, but need not have been convicted or even charged. The defendant is to be considered one of the participants when determining whether there were five participants in the offense.

In a drug trafficking offense, for example, drug users who purchased drugs from the defendant solely for their own personal use would not be considered 'participants' for the purposes of applying §3B1.1(a). Similarly, in a case where the defendant was convicted of smuggling aliens into the United States, the aliens would not be considered 'participants' unless they actively assisted in the smuggling of others.

4. Section 3B1.1(a) is also applicable if the criminal activity was 'otherwise extensive,' irrespective of the number of participants. In assessing whether an organization is 'otherwise extensive,' all persons involved in the offense, who can be described as participants and/or unwitting individuals, are to be considered. At least five individuals must be involved in the offense to meet the definition of otherwise extensive. Thus, a fraud that involved only three participants, but used the unknowing services of two or more outsiders could be considered otherwise extensive under §3B1.1(a) or (b). If the offense involved less than five other persons, a two-level increase under §3B1.1(c) may be warranted if the defendant was an organizer, leader, manager or supervisor.

5. In determining the role of the defendant, the following factors although not intended to be exclusive may be considered: an organizer or leader of a criminal activity is one who brings together the participants, is in charge or in command of others, exercises a very high level of decision making authority, claims a larger share of the fruits of the crime, and exerts the highest degree of control and authority over others. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as 'kingpin' or 'boss' are not controlling. There can, of course, be more than one person who qualifies as a leader or organizer

of a criminal association or conspiracy.

6. A manager or supervisor for the purposes of applying §3B1.1 is one who carries out the orders of a higher authority figure, directs and watches over the work and performance of any other individual, and who exerts less control than that described above for an organizer or leader.

7. In relatively small criminal enterprises involving less than five participants or which are not considered otherwise extensive, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

8. This adjustment does not apply to a defendant who merely suggests committing the offense.".

The Commentary to Section 3B1.1 captioned "Background" is deleted in its entirety.

Section 3B1.2 is amended by deleting "any criminal activity" wherever it appears and inserting in lieu thereof: "the offense".

The Commentary to section 3B1.2, captioned "Application Notes" is amended by deleting Notes 1-3 in their entirety and inserting in lieu thereof:

"1. The 'offense' is defined in Application Note 1 to §3B1.1.

2. In order for the defendant to be eligible for a mitigating role under this part he must have been managed, organized, supervised or lead by another participant and must not have exercised any such authority with respect to another person. If the defendant exercised such authority, §3B1.2 may not be applied. Similarly, if the defendant committed the offense alone or with others of roughly equal culpability no adjustment applies.

3. Not all persons who are managed by others are entitled to a mitigating role adjustment. If the defendant is eligible for the reduction within the meaning of Application Note 2, the court must then determine whether, within the relevant conduct of the particular defendant, that defendant, in fact, had a mitigating role in regard to the offense.

4. In determining the role in the offense of the defendant, the following factors, although not intended to be exclusive, may be considered: whether the defendant received substantially less of the profits or fruits of the crime than other participants, whether the defendant performed a peripheral function in the commission of the offense (such as a lookout, driver, offloader), whether he has engaged in the criminal conduct on only one occasion.

5. Role adjustments under §3B1.2 should not be applied to those offenses that have incorporated such adjustment into the base offense level or specific offense characteristics. These instructions will be noted in the Chapter Two guidelines and Commentary. For example, an adjustment for mitigating role

under this Part normally would not apply to a defendant convicted of Accessory After the Fact, because the offense level for this guideline already reflects an adjustment for role in the offense. See §2X3.1 and Application Note 2.

6. For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants in the offense, but whose role could not be described as minimal. For example, if a defendant was a one-time offloader of one shipment of marijuana (or is a one-time courier, or one-time lookout) and received a small portion of the value of the contraband and meets the qualifications of Application Note 2 above, he could be considered a minimal participant. However, if the same defendant performed the same tasks on two or more occasions he would not be considered a minimal participant. In such case, he could get no more than the two-level reduction for minor role.".

The Commentary to Section 3B1.2 captioned "Background" is deleted in its entirety.

Section 3B1.4, including accompanying Commentary, is deleted in its entirety.

Reason for Amendment: The amendment clarifies the application and scope of adjustments for a defendant's role in the offense under §§3B1.1 and §§3B1.2. Section 3B1.4 is eliminated as unnecessary.

51. §3B1.3 (Abuse of Trust). The Commission requests comment concerning whether this section should be amended to provide that an increase in the offense level under this section should be in addition to, and irrespective of, the application of §3B1.1. In addition, comment is requested as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply.

• • •

Chapter Three, Part C (Obstruction)

52. Proposed Amendment: Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Investigation, Prosecution, or Sentencing of the Instant Offense".

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede,", by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing", and by deleting "during" and inserting in lieu thereof "in respect to".

Reason for Amendment: The proposed amendment substitutes a title more descriptive of the coverage of the section. In addition, the amendment expressly provides that obstructing or impeding the sentencing of the instant offense is covered, inserts a missing comma, and conforms the phraseology of the guideline to the title by reversing the order of impeding and obstructing. In addition, the current guideline and first paragraph of Commentary use different terminology: the guideline uses "during"; the Commentary uses

"in respect to". The proposed amendment substitutes "in respect to" for "during" in the guideline as the more appropriate phraseology.

• • •

53. Obstructing or Impeding the Investigation, Prosecution, or Sentencing of the Instant Offense. The Commission notes that obstructive conduct can vary widely in nature, degree of planning, and seriousness, and that the current guideline has led to differing interpretations as to the specific types of conduct, that , absent a separate count of conviction, are sufficiently serious to warrant a 2-level enhancement under this section. The Commission solicits comment on whether application note 1 should be amended to provide additional examples of what conduct should be counted, and whether this note should be expanded to include examples of what conduct should not result in an enhancement under this section.

The following is a listing of various forms of conduct that, absent a separate count of conviction, may or may not warrant a 2-level enhancement under this section. Comment is requested whether the conduct in each of these examples should or should not result in a 2-level enhancement under this section. Bracketed language indicates that an example might be formulated in more than one way or interacts with another example. Recommendations as to how the examples set forth below could be improved, or as to additional examples, are also requested:

(1) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(2) testifying untruthfully as to a material fact, or suborning or attempting to suborn untruthful testimony as to a material fact;

(3) producing a false, altered, or counterfeit document or record during an investigation or judicial proceeding, or attempting to do so;

(4) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an investigation or judicial proceeding (e.g. shredding a document or destroying a ledger upon learning that an investigation has commenced or is about to commence), or attempting to do so;

(5) [attempting to conceal, throw away, or otherwise dispose of evidence contemporaneously with arrest (e.g. attempting to throw away a weapon or controlled substance)][, except where such conduct results in a material hinderance to the investigation or prosecution of the offense].

(6) escaping from custody before trial or sentencing, or attempting to do so; or willfully failing to appear, as ordered, for a judicial proceeding;

(7) providing a fraudulent identification document at arrest;

(8) [providing a false name at arrest] [not accompanied by a fraudulent identification document].

(9) providing a materially false written, signed statement to a law enforcement officer;

(10) providing materially false information to a law enforcement officer that significantly obstructs or impedes the investigation of the offense (e.g., a defendant upon questioning admits guilt in a credit card scheme, but provides false detailed information that diverts law enforcement officers from apprehending co-conspirators who are thereby able to continue the operation of the scheme and flee the country).

(11) [making false oral exculpatory statements, not under oath, to law enforcement officers][, other than described above].

(12) providing materially false information to a judge or magistrate (including false information as to the defendant's identity);

(13) providing materially false information to a probation or pretrial officer in respect to a presentence or other investigation for the court (e.g., providing false information concerning prior criminal history; concealing assets to avoid paying restitution or a fine).

(14) providing misleading or incomplete information, not amounting to a material falsehood, in respect to a pretrial or presentence investigation.

(15) recklessly endangering the safety of another in fleeing from arrest.

(16) [avoiding or fleeing from arrest][other than as described above].

Comment is also requested on the addition of a separate guideline (§3C1.2) providing a 2-level enhancement for reckless endangerment during flight from arrest (i.e., where the defendant recklessly created a substantial risk of bodily injury to another person in the course of flight from arrest or questioning in connection with instant offense).

• • •

Chapter Three, Part D (Multiple Counts)

54. Proposed Amendment: Section 3D1.1 is amended by inserting "(a)" immediately before "When"; by deleting "(a)", "(b)", and "(c)", and inserting in lieu thereof "(1)", "(2)", and "(3)" respectively; and by inserting the following additional subsection:

"(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Sentences for such counts are governed by the provisions of §5G1.2(a).".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 1 by deleting:

"Certain offenses, e.g., 18 U.S.C. § 924(c) (use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See §3D1.2.",

and inserting in lieu thereof:

"Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Conviction on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to §2K2.4. Example: The defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See §5G1.2(a).".

Section 3D1.2 is amended by deleting:

"A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5.".

The Commentary to §3D1.2 captioned "Application Notes" is amended by deleting Note 1 in its entirety.

Reason for Amendment: The provisions concerning consecutive sentences that are statutorily required most appropriately belong in the first section of this Part §3D1.1. In the current guidelines, this provision is contained in a paragraph in §3D1.2, and is cross referenced by Application Note 1 of §3D1.1. In addition, Application Note 1 to §3D1.2 further explains this provision. This amendment moves the provisions dealing with statutorily required consecutive sentences to a separate subsection of §3D1.1 where they more appropriately belong.

• • •

55. Proposed Amendment: Section 3D1.2(b) is amended by deleting:

" , including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(l)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(v)".

Section 3D1.2(d) is amended by deleting "Counts are grouped together if" and inserting in lieu thereof "When".

Section 3D1.2(d) is amended by deleting "specifically included" and inserting in lieu thereof "grouped".

The Commentary to §3D1.2 captioned "Application Notes" is amended by inserting the following as Note 1:

> "1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See §3D1.1(b).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in the first sentence of Note 4 by deleting "states the principle" and inserting in lieu thereof "provides".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by inserting the following as the second paragraph:

> "When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following as the second sentence:

> "This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following as the second paragraph:

> "When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).".

Reason for Amendment: Because this Part is inherently complex, it is especially important that each provision be as clear as possible. Inclusion of the examples in (b)(1), (2), and (3) tend to confuse the reader because these are not the most typical examples of the rule. Also, these examples are inaccurate as part of the conduct covered (a count charging an attempt to commit an offense and a count charging the commission of that offense; a count charging a violation of a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition) should actually be grouped under §3D1.2(a), not §3D1.2(b). In addition, this amendment makes editorial improvements in §3D1.2(d), and clarifies the Commentary of §3D1.2 by making explicit that offenses such as multiple robberies do not fit within the parameters of

§3D1.2(b).

• • •

56. Proposed Amendment: Section 3D1.2(d) is amended in the second paragraph by inserting in the appropriate place: "§2K2.2".

Section 3D1.2(d) is amended in the third paragraph by inserting "Chapter Two," immediately before "Part A".

Reason for Amendment: This amendment makes the listing of offenses more comprehensive and corrects a clerical error.

• • •

57. Proposed Amendment: Section 3D1.4 is amended in the fourth line of the Unit table by inserting "2 1/2-" immediately before "3" the first time it appears, and in the fifth line of the Unit table by deleting "4 or" and inserting in lieu thereof "3 1/2-".

Section 3D1.4 is amended by deleting:

"(d) Except when the total number of Units is 1/2, round up to the next large whole number.".

The Commentary to §3D1.4 captioned "Background" is amended in the first paragraph by deleting "When this approach produces a fraction in the total Units, other than 1/2, it is rounded up to the nearest whole number.".

Conforming Amendment: The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 is amended in example 1 by deleting "(rounded up to 3)", and by deleting "18" and "4-" and inserting in lieu thereof "20" and "2-" respectively.

Reason for Amendment: Because the Multiple Count rules are inherently complex, any unnecessary complexity is particularly to be avoided. This amendment simplifies the operation of this guideline. The amendment also conforms that illustrations of the operation of the multiple-count rules and corrects a clerical error.

• • •

Chapter Three Part E (Acceptance of Responsibility)

58. Acceptance of Responsibility. The Commission requests comment concerning a number of aspects of this guideline. First, comment is requested as to whether this guideline should be amended to expressly provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Second, comment is requested as to whether the Commission should more clearly indicate the weight that should be given to the entry of a guilty plea in determining acceptance of responsibility and, if so, the appropriate weight to be given, and whether the timing of the plea should affect this weight. Third, the Commission requests comment on whether this guideline should be reformulated to give varying weights to different indicia of acceptance of responsibility, and, if so, how this might be accomplished.

• • •

Chapter Four, Part A (Criminal History)

59. Proposed Amendment: The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the fourth sentence as follows:

"Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by inserting the following immediately before the period at the end of the second sentence:

", including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction".

The Commentary to §4A1.2 is amended by inserting at the end:

"Background

Except as expressly provided, all sentences resulting from constitutionally valid convictions (including misdemeanor convictions where imprisonment was not imposed and, thus, provision of counsel was not constitutionally required) are counted. To exclude prior sentences resulting from constitutionally valid convictions on the basis of whether the convictions were counseled or uncounseled would create wide disparity (e.g., some jurisdictions routinely provide counsel in all misdemeanor cases; others do not). To avoid such disparity by prohibiting use of all misdemeanor convictions not resulting in imprisonment would deprive the court of significant information relevant to the purposes of sentencing. Therefore, the Commission's criterion for inclusion of a prior sentence in the criminal history score is whether the prior sentence resulted from a constitutionally valid conviction, not whether the conviction was counseled or uncounseled. The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by Baldasar v. Illinois, 446 U.S. 222 (1980).".

The Commentary to §4A1.2(d) captioned "Application Notes" is amended in the second sentence of Note 6 by deleting "in a" and inserting in lieu thereof "from a".

Reason for Amendment: There appears to be confusion as to the Commission's instructions regarding the counting of sentences resulting from constitutionally valid, although uncounseled, misdemeanor convictions under Chapter Four, Part A. This confusion seems to have been created by the Commission's failure to make clear its instruction on the counting of constitutionally valid, uncounseled misdemeanor convictions. This confusion may result in considerable disparity in guideline application, and the failure of the criminal history score to adequately reflect the defendant's failure to learn from the application of previous sanctions and potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A.

• • •

60. Proposed Amendment: Section 4A1.2(a)(3) is amended by inserting "or execution" immediately following "imposition".

Reason for Amendment: This amendment clarifies that, for the purpose of computing criminal history points, there is no difference between the suspension of the "imposition" and "execution" of a prior sentence.

• • •

61. Proposed Amendment: Section 4A1.2(c)(1) is amended by inserting "Careless or reckless driving" in the list of offenses contained therein in the appropriate place by alphabetical order.

Section 4A1.2(c)(1) is amended by inserting in the appropriate place by alphabetical order:

"Insufficient funds check".

Section 4A1.2(c)(1) is amended by inserting "(excluding local ordinance violations that are also criminal offenses under state law)" immediately following "Local ordinance violations".

Section 4A1.2(c)(2) is amended by inserting "(e.g., speeding)" immediately following "minor traffic infractions".

The Commentary to §4A1.2 captioned "Application Notes" is amended by inserting the following additional note:

"12. Local ordinance violations. A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.1(c) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.".

The Commentary to §4A1.2 captioned "Application Notes" is amended by inserting the following additional note:

"13. 'Insufficient funds check,' as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.".

Reason for Amendment: This amendment makes the provisions of §4A1.2(c) more comprehensive in respect to certain vehicular offenses, and clarifies the application of §4A1.2(c)(1) in respect to certain offenses prosecuted in municipal courts. In addition, this amendment expands the coverage of §4A1.2(c)(1) to include a misdemeanor or petty offense conviction for an insufficient funds check.

• • •

62. Vacated, Set Aside, Expunged, and Pardoned Convictions. A number of jurisdictions have various procedures pursuant to which a defendant's conviction may be vacated, "set aside," or "expunged," or the defendant may be pardoned, for reasons unrelated to innocence or legal defect (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). Currently, the guidelines authorize the counting of criminal history points for prior convictions that have been vacated, "set aside," or for which the defendant has been pardoned, where such action was for reasons unrelated to innocence or legal defect. However, convictions which have been expunged are not counted in the criminal history score but may be considered under §4A1.3 (Adequacy of Criminal History).

The Commission notes that Rule 609 of the Rules of Evidence authorizes the admission of an adult prior conviction that has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based upon a finding of the rehabilitation of the person convicted if the defendant has been subsequently convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year. In the context of use of a conviction in the criminal history score, each defendant will have been convicted of a subsequent offense (the instant offense).

The Commission seeks comment on whether the Commission should retain the current treatment of expunged convictions, or whether the Commission should treat expunged convictions (other than for reasons of innocence or legal defect) the same as "set aside" or pardoned convictions; and if so on whether such convictions should or should not be counted in determining prior criminal history.

One amendment proposal under consideration would authorize the use of prior expunged adult convictions in counting criminal history points. Expunged juvenile adjudications would not be counted in accord with the distinction currently made at §4A1.2(j). This proposal is as follows:

Section 4A1.2(j) is deleted in its entirety as follows:

"(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).",

and the following inserted in lieu thereof:

"(j) Reversed, Vacated, Pardoned, or Expunged Convictions

(1) Sentences resulting from convictions that have been reversed are not counted. Sentences resulting from convictions that have been vacated, 'set aside,' or expunged, or for which the defendant has been pardoned, are not counted if such action was based on a determination that the conviction was legally defective or on evidence exonerating the defendant.

(2) A number of jurisdictions have various procedures pursuant to which

the defendant's conviction may be vacated, 'set aside,' or expunged, or the defendant may be pardoned, for reasons unrelated to innocence or legal defect (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). Sentences for such convictions are counted. Provided, however, that a sentence resulting from a juvenile adjudication for an offense committed prior to the defendant's eighteenth birthday that has been vacated, 'set aside,' or expunged is not counted.".

The Commentary to §4A1.2 captioned "Application Notes" is amended in the first sentence of Note 6 by deleting:

"Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted. Any other sentence resulting in",

and inserting in lieu thereof:

"Except as expressly provided, a sentence resulting from".

The Commentary to §4A1.2 captioned "Application Notes" is amended by deleting Note 10 in its entirety and renumbering Note 11 as Note 10.

• • •

63. §4A1.2 - Definitions and Instructions for Computing Criminal History. The Commission has received feedback from probation officers and others that certain definitions in this section are difficult to apply in certain cases. The definition of related offenses in Application Note 3, and the treatment of a revocation of probation where the defendant is under supervision for multiple unrelated offenses in Application Note 11, have been reported to be particularly difficult to apply. Some have expressed the view that the definition of related offenses in Application Note 3 is too inclusive (e.g., where otherwise unrelated federal cases are consolidated under Rule 20) and that distinctions should be made for different types of offenses (e.g., that previous offenses should be treated as related or unrelated by applying rules similar to those in Chapter Three, Part D (Multiple Counts)). The Commission seeks comment on how any of the definitions and instructions of this section might be improved. The Commission also seeks comment on whether §4B1.2 (Definitions of Terms Used in Section 4B1.1) should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses under this section to allow the counting of such convictions unrestricted by the applicable time periods of §4A1.2.

In addition, comment is requested on whether the Commission should develop a specific guideline enhancement for prior similar criminal conduct in lieu of the current provision for consideration of this factor under §4A1.3 (Adequacy of Criminal History Category).

• • •

Chapter Five, Part A (Sentencing Table)

64. Proposed Amendment: Chapter Five, Part A, is amended in the Sentencing Table by deleting "(13 or more)" and inserting in lieu thereof "(13-15)", and by inserting the

following additional column:

Offense Level	"VII (16 or more)
1	2-8
2	4-10
3	6-12
4	9-15
5	12-18
6	15-21
7	18-24
8	21-27
9	24-30
10	27-33
11	30-37
12	33-41
13	37-46
14	41-51
15	46-57
16	51-63
17	57-71
18	63-78
19	70-87
20	77-96
21	84-105
22	92-115
23	100-125
24	110-137
25	120-150
26	130-162
27	140-175
28	151-188
29	168-210
30	188-235
31	210-262
32	235-293
33	262-327
34	292-365
35	324-405
36	360-life
37	360-life
38	360-life
39	360-life
40	360-life
41	360-life
42	360-life
43	life".

Reason for Amendment: This amendment would create an additional criminal history category to address cases that have criminal history score substantially above 13 points.

Although the proportion of cases is small (approximately 3%) the Commission believes that an additional category for cases having such extensive criminal records is warranted to adequately punish and incapacitate such offenders.

Conforming Amendments: Section 4A1.3 is amended in the fourth paragraph by deleting "Category VI" and inserting in lieu thereof "Category VII".

The proposed amendment would also require a conforming amendment to the career offender provision in Chapter Four, Part B. Comment is requested as to the two options shown below:

Option 1: Section 4B1.1 is amended by deleting "Category VI" and inserting in lieu thereof "the category corresponding to the defendant's criminal history points, or Category VI, whichever is greater". This would ensure that a defendant with criminal history points sufficient for placement in new Category VII would not receive a benefit from this revision. That is, this option would increase the guideline range for all career offenders with Category VII criminal histories but would otherwise not affect the guideline ranges for such cases. Under this option, the guideline range for a non-career offender with a Category VII criminal history could be higher than that for a career offender with a Category VII criminal history (but this would happen only where the offense level for a career offender determined from Chapters Two and Three was greater than the offense level from the chart in §4B1.1).

Option 2: Section 4B1.1 is amended by substituting "Category VII" for Category VI" and by conforming the offense levels in §4B1.1 (which are geared to the statutory maxima) by reducing each offense level by 1 level (e.g., level 37 would become level 36, thereby producing the same guideline range). This option would automatically increase the guideline ranges for all career offenders where the offense level was determined by the offense level for the underlying offense rather than the chart in §4B1.1 whether or not the defendant's criminal history points were sufficient for placement in new Category VII, but would retain the current guideline range where the offense level is determined from the chart in §4B1.1.

* * *

Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures)

65. Proposed Amendment: Section 5E1.1(a) is amended by deleting ", and may be ordered as a condition of probation or supervised release in any other case", by redesignating subsections (b) and (c) as (c) and (d) respectively, and by inserting the following as subsection (b):

> "(b) In the case of a conviction not covered under subsection (a), the court shall provide for restitution by imposing a term of probation or supervised release with a condition requiring restitution, unless the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims.".

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by

deleting "An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. § 3663 where victims require relief more promptly than the civil justice system provides.".

The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by deleting "Subsection 5E1.1" and inserting in lieu thereof "Section 5E1.1(a)".

The Commentary to §5E1.1 captioned "Background" is amended in the last paragraph by deleting "how and to whom" and by inserting "the manner and the persons to whom".

The Commentary to §5E1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

> " Section 5E1.1(b) requires restitution for offenses not covered under 18 U.S.C. §3663(a) as a condition of probation or supervised release.".

Reason for Amendment: This amendment expands restitution as a guideline remedy for convictions other than those under Title 18 and 49 U.S.C. § 1472(b),(ii), (j), and (h). Section 3663(d) of Title 18 provides for restitution for convictions under Title 18 and 49 U.S.C. § 1472(b), (ii), (j), or (h). The present guideline permits restitution as a condition of probation or supervised release in other cases not covered by 18 U.S.C. § 3663(d), but does not require restitution in such cases. This amendment requires that restitution be ordered as a condition of probation or supervised release for offenses not covered by 18 U.S.C. § 3556, provided that the same standards are met, i.e., unless the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any victims.

* * *

66. Proposed Amendment: Section 5E1.2 is amended by deleting subsections (a) through (c) of §5E1.2 in their entirety and inserting in lieu thereof:

> "(a) The court shall impose a fine in each case except as provided by subsection (b) below.
>
> (b) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by subsections (c) and (h) below, or (2) the imposition of such fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. [In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.]
>
> (c) (1) The minimum of the guideline fine range is:
>
> (A) the amount shown in Column A of the table in subdivision (3) below[; plus

(B) any pecuniary gain to the defendant from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and that otherwise will not be ordered disgorged].

(2) The maximum of the guideline fine range is:

(A) the greater of:

(i) the amount from column B or C of the table in subdivision (3) below. Column C shall be used where the statute setting forth the offense of conviction authorizes (i) a fine of more than $250,000 on a single count of conviction; or (ii) a fine for each day of violation. Column B shall be used in all other cases;

(ii) twice the gross pecuniary loss caused by the offense or specifically intended; or

(iii) twice the gross pecuniary gain to [the defendant] [all participants in the offense] from the offense;

plus

(B) any pecuniary gain to the defendant from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and that otherwise will not be ordered disgorged.

(3) Table

Offense Level	A Minimum	B Maximum	C Maximum-Specified Offenses
3 and below	$100	$5,000	$5,000
4-5	$250	$5,000	$7,500
6-7	$500	$5,000	$10,000
8-9	$1,000	$10,000	$20,000
10-11	$2,000	$20,000	$40,000
12-13	$3,000	$30,000	$90,000
14-15	$4,000	$40,000	$160,000
16-17	$5,000	$50,000	$250,000
18-19	$6,000	$60,000	$360,000
20-22	$7,500	$75,000	$550,000
23-25	$10,000	$100,000	$1,000,000
26-28	$12,500	$125,000	$1,500,000
29-31	$15,000	$150,000	$2,250,000
32-34	$17,500	$175,000	$3,000,000
35-37	$20,000	$200,000	$5,000,000
38 and above	$25,000	$250,000	$8,000,000

(4) Special Instruction

Where the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subdivisions (1)-(3) of this subsection.".

Subsection 5E1.2(e) is amended by inserting "(Policy Statement)" immediately after "e" and by inserting "Where the defendant has derived pecuniary gain from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and otherwise will not be ordered disgorged, the amount of the fine should not be less than any such gain plus the minimum from the table in subsection (c)(3) herein." at the end.

Section 5E1.2 is amended by deleting subsection (f) in its entirety and relettering subsections (g), (h), and (i) as (f), (g), and (h) respectively.

Section 5E1.2 is amended in relettered subsection (f) in the third sentence by inserting "normally" after "defendant" and in the last sentence by inserting "or restricting" after "prohibiting".

Section 5E1.2 is amended in relettered subsection (h) by deleting "(f)" and inserting "(b)" in lieu thereof.

The Commentary to §5E1.2 captioned "Application Notes" is amended by deleting Note 2 in its entirety and inserting in lieu thereof:

"2. Subsection (c)(1) provides that the minimum of the fine range includes any pecuniary gain to the defendant from the offense that has not been disgorged (e.g., by reparation, restitution, or forfeiture) or that otherwise will not be ordered disgorged. When it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the minimum from column A of the table in subsection (c)(3), calculation of pecuniary gain is unnecessary. In such cases, a statement that 'the pecuniary gain was not calculated because it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the minimum provided in the fine table,' in lieu such calculations, is recommended.".

The Commentary to §5E1.2 captioned "Application Notes" is amended by deleting Note 3 in its entirety and inserting in lieu thereof:

"3. Subsection (c)(2) provides that the maximum of the fine guideline range is the greatest of the three alternatives set forth in subdivisions (c)(2)(A), (c)(2)(B), and (c)(2)(C). Where it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the maximum from Column B or C, as applicable, of the table in subsection (c)(3), calculation of the alternatives in subsections (c)(2)(B) and (c)(2)(C) is unnecessary. In such cases, a statement that 'the alternative maximums to the fine table were not calculated because it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the maximum provided in the fine table,' in lieu of such calculations, is recommended.".

The Commentary to §5E1.2 captioned "Application Notes" is amended by deleting Note 4 in its entirety and inserting in lieu thereof:

"4. Subsection[s (c)(1)(B) and] (c)(2)(B) [are][is] designed to increase the [minimum and the] maximum of the fine guideline range by any gain derived by the defendant from the offense that has not been disgorged and otherwise would not be ordered disgorged. This provision would not be applicable in a typical theft offense, for example, because the defendant's gain would normally be disgorged by law enforcement seizure of the stolen property, by voluntary restitution prior to sentencing, or by an order of restitution. This provision might apply, for example, in an offense involving the transportation of unlawful aliens because the defendant's pecuniary gain would not be subject to a restitution order.".

The Commentary to §5E1.2 captioned "Application Notes" is amended in numbered Note 5 by deleting "Subsection" and inserting in lieu thereof "Column C of the fine table in subsection" and by deleting "; the guidelines do not limit maximum fines in such cases".

The Commentary to §5E1.2 captioned "Application Notes" is amended by renumbering Application Note 7 as Application Note 9, and by adding new Notes 7 and 8:

"7. 'Gross pecuniary loss,' for the purposes of this guideline, has the same meaning as 'loss,' as used in Chapter Two (Offense Conduct). See the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). In the case of an attempt, conspiracy, or solicitation, loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy).

8. 'Gross pecuniary gain [to the defendant],' for the purposes of this guideline, means the additional before-tax profit to [the defendant][all participants in the offense] resulting from the relevant offense conduct. [Use the gross pecuniary gain to all participants in lieu of the gross pecuniary gain to the defendant if the gain has not been divided or if the manner of the division is unknown.]".

The Commentary to §5E1.2 captioned "Background" is amended by deleting the first paragraph in its entirety and inserting in lieu thereof:

"In general, the maximum fine permitted by law as to each count of conviction is $250,000 for a felony or for any misdemeanor resulting in death; $100,000 for a Class A misdemeanor; and $5,000 for any other offense. 18 U.S.C. § 3571(b)(3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).".

The Commentary to §5E1.2 captioned "Background" is amended by deleting the third and fourth paragraphs.

The Commentary to §5E1.2 captioned "Background" is amended in the second paragraph by deleting "Recent legislation provides for substantial increases in fines." and inserting in

lieu thereof "Legislation enacted in 1984 substantially increased maximum authorized fines.".

Reason for Amendment: The purposes of this amendment are to provide guidance to courts in setting fines when the defendant is convicted under a statute authoring a maximum fine greater than $250,000 a fine for each day of violation, to clarify the meaning of "gross pecuniary loss" and "gross pecuniary gain", to clarify and simplify the setting of fines when the defendant is unable to pay all or part of fine that could otherwise be imposed, and to clarify and rationalize the relationships between pecuniary gain, pecuniary loss, and the minimum and maximum of the guideline fine range.

The Commission is considering deleting the bracketed language in subsection (c)(1). If that language is deleted, the Commission proposes to add the second sentence of subsection (e); otherwise, the second sentence of subsection (e) will be deleted. The Commission requests comment on these options.

The Commission is considering alternative language in subsection (c)(2)(A)(iii) and in renumbered Application Note 8. If the second alternative is selected, the Commission proposes to use the bracketed sentence in renumbered Application Note 8; otherwise, the bracketed sentence will be deleted. The Commission requests comment on these options.

• • •

Chapter Five, Part H

67. Proposed Amendment: The Introductory Commentary to Chapter Five, Part H is deleted in its entirety and the following inserted in lieu thereof:

"The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range, and in certain cases to the determination of a sentence within the applicable guideline range.

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release).

In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.".

Section 5H1.1 is amended by inserting "(including youth)" immediately following "Age", and by deleting "guidelines. Neither is it ordinarily" and all that follows through the end of the section and inserting in lieu thereof "applicable guideline range. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition). The guidelines are not applicable to persons sentenced as juvenile delinquents under the

provisions of 18 U.S.C. § 5037".

Section 5H1.2 is amended in the first sentence by deleting "guidelines" and inserting in lieu thereof "applicable guideline range"; and by deleting "Neither are education and vocational skills" and all that follows through the end of the section, and inserting the following as additional paragraphs:

"In addition, education and vocational skills are not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. § 994(e)).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type of community service appropriate.".

Section 5H1.3 is amended in the first sentence by deleting "guidelines" and inserting in lieu thereof "applicable guideline range", and by deleting "the general provisions in Chapter Five." and all that follows through the end of the section, and inserting in lieu thereof:

"Chapter Five, Subpart 2 (General Provisions).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release (e.g., participation in a mental health program, see recommended condition (24) at §5B1.4 (Recommended Conditions of Probation and Supervised Release))."

Section 5H1.4 is amended by deleting "guidelines or where within the guidelines a sentence should fall" and inserting in lieu thereof "applicable guideline range", by deleting "other than imprisonment" and inserting in lieu thereof "below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment", by deleting ". If participation in a substance abuse program" and all that follows through the end of the paragraph and inserting in lieu thereof "(see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release). Similarly, where a defendant who is a substance abuser is sentenced to probation, it is highly recommended that such probation contains a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release))", and by deleting the last paragraph.

Section 5H1.4 is amended in the caption by deleting "Dependence and" immediately following "Drug" and inserting in lieu thereof "or", and by inserting "Dependence or" immediately following "Alcohol".

Section 5H1.4 is amended in the first sentence of the second paragraph by deleting "dependence or alcohol abuse" and inserting in lieu thereof "or alcohol dependence or abuse".

Section 5H1.5 is amended by deleting "guidelines or where within the guidelines" and all that follows through the end of the section and inserting in lieu thereof "applicable

guideline range.", and by inserting the following additional paragraphs:

"In addition, employment record is not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. § 994(e)).

Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).".

Section 5H1.6 is amended by deleting "guidelines. Family responsibilities that are" and all that follows through the end of the section and inserting in lieu thereof "applicable guideline range.", and by inserting the following as an additional paragraphs:

"In addition, family ties and responsibilities, and community ties, are not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. § 994(e)).

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution (§5E1.1 (Restitution)) and fine (§5E1.2 (Fines for Individual Defendants)).".

Reason for Amendment: This amendment revises policy statements §§5H1.1-5H1.6 to make them clearer, to eliminate inconsistencies in the treatment of similar factors, and to more clearly highlight the relationship of these policy statements to the statutory directive to the Commission in 28 U.S.C. § 994(e).

• • •

Chapter Five, Part K (Departures)

68. Proposed Amendment: Chapter Five, Part K, Subpart 2, is amended in the title by deleting "GENERAL PROVISIONS" and inserting in lieu thereof "OTHER GROUNDS FOR DEPARTURE".

Section 5K2.0 is amended in the first paragraph by inserting "that should result in a sentence different from that described" immediately following "the guidelines" in the first sentence; by deleting the third sentence; by deleting "the present section" and inserting in lieu thereof "this subpart", by deleting "fully" immediately before "take", by inserting "fully" immediately following "account", and by deleting "precise" and inserting in lieu thereof "the" in the fourth sentence; and by deleting "judge" and inserting in lieu thereof "court" in the sixth sentence.

Section 5K2.0 is amended in the second paragraph by inserting ",for example," immediately following "Where", by deleting "guidelines, specific offense characteristics," and inserting in lieu thereof "offense guideline", by deleting "part" and inserting in lieu thereof "subpart", by deleting "guideline" and inserting in lieu thereof "applicable guideline range", and by deleting "of conviction" immediately following "offense" in the first sentence; by deleting "offense of conviction" and inserting in lieu thereof "applicable offense guideline" in the second sentence"; by deleting "offense of conviction is theft" and inserting in lieu thereof "theft offense guideline is applicable", by deleting "when" immediately before "the theft", and by inserting "range" immediately before "more readily"

in the third sentence; and by deleting "offense of conviction is robbery" and inserting in lieu thereof "robbery offense guideline is applicable", and by deleting "sentence" immediately before "adjustment" in the fourth sentence.

Section 5K2.0 is amended by deleting the fourth paragraph.

Reason for Amendment: This amendment deletes surplus language, and improves the clarity of the policy statement.

• • •

Chapter Seven (Violations of Probation and Supervised Release)

69. Guidelines for Revocation of Probation and Supervised Release. Two options have been developed to address this issue. These proposals are quite different in operation and result. Under Option 1, violations of probation and supervised release would be divided into three grades, with a different guideline range for each. In the case of a conviction for a new offense committed on probation or supervised release, the court would impose the revocation penalty to run consecutively to any penalty imposed for the new offense by a federal, state, or local court. The revocation penalty would be a separate penalty and the guidelines would not attempt to coordinate the revocation penalty with the penalty for the new offense. Under Option 2, in contrast, the court would in the case of a finding of new criminal conduct be directed to apply the guideline system exactly as if the defendant had been convicted of that new criminal conduct in federal court and recalculate the criminal history score (e.g., the revocation offense would be treated as the instant offense, and the offense resulting in probation or supervised release would be treated as prior criminal history). The resulting guideline range would coordinate the revocation penalty with any sentence imposed by a federal, state, or local court for that conduct. For example, if the applicable guideline range for the new criminal conduct was 12-18 months, and the defendant received a state sentence of 8 months, a revocation term of either 12-18 months to be served concurrently, or 4-10 months to be served consecutively would produce an appropriate sentence within the guideline range.

The Commission requests comment on the feasibility and appropriateness of both options, or on a combination thereof.

The two options follow:

Option 1: "Chapter Seven - Violations of Probation and Supervised Release" is deleted in its entirety and the following inserted in lieu thereof:

"CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

Introductory Commentary

This chapter provides rules for violations and revocations of probation and supervised release. To the extent permitted by statute, the guidelines treat violations of probation and supervised release as functionally equivalent. The sentence imposed upon revocation is envisioned as a sanction for failure to abide by the conditions of supervision and not as a sanction for new criminal conduct that may be the basis for the violation. The

guidelines envision that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction. The determination of the appropriate punishment is unrelated to the sentence imposed upon revocation. When a defendant fails to abide by the technical conditions of supervision or commits new criminal conduct of a petty or minor nature, the guidelines provide flexible alternatives to revocation and incarceration. However, a sentence of imprisonment is mandated when the violation constitutes criminal conduct that is more serious. The sentence imposed upon revocation is to be served consecutively to any sentence imposed for new criminal conduct.

§7A1.1 Classes of Violations

(a) Class I: Violation of any condition of probation or supervised release that constitutes new criminal conduct involving a crime of violence or violation of the drug laws.

(b) Class II: Violation of any condition of probation or supervised release that constitutes new criminal conduct not described in Class I or Class III; new criminal conduct not described in Class I that is punishable by imprisonment for a term exceeding one year.

(c) Class III: Violation of any technical condition of probation or supervised release; and new criminal conduct for the following offenses and offenses similar to them, by whatever name they are known:

minor theft and minor property offenses
minor assault without striking or beating
contempt of court
disorderly conduct or disturbing the peace
driving while intoxicated
driving without a license or with a revoked or suspended license
careless or reckless driving
leaving the scene of an accident
minor traffic infractions
false information to a police officer
gambling
hindering or failure to obey a police officer
local ordinance violations
non-support
prostitution
resisting arrest
trespassing
hitchhiking
juvenile status offense and truancy
loitering
public intoxication
vagrancy

Commentary

Application Notes:

1. When the violation involves new criminal conduct, the court shall determine the class of violation based upon the defendant's actual conduct. The court is not limited by whether a conviction exists for this conduct. However, where the defendant is convicted of a felony, the violation will be deemed to be Class I or II violation.

2. "Crime of violence" includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) involves conduct that includes the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

3. "Violation of the drug laws" includes a broad range of offense behavior, i.e., any offense under a federal or state law that prohibits the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with or without intent to manufacture, import, export, or distribute. This definition includes conspiracies to commit such offenses and simple possession of a controlled substance.

4. "Minor thefts" and "minor property offenses" include offenses involving a loss of $200 or less that did not result in any threat or injury to a person. Purse snatching, pick-pocketing, burglary, and arson are among the offenses not covered by this definition.

§7A1.2 Reporting Violations

(a) Class I and II: The probation officer shall report in writing to the court all Class I and II violations of probation or supervised release;

(b) Class III: The probation officer shall report in writing to the court all Class III violations of probation and supervised release unless the officer determines that non-reporting:

(1) will not present an undue risk to the public;

(2) will not depreciate the defendant's or the public's respect for the justice system; and

(3) is consistent with the sentencing court's intention for placing the defendant on supervision.

§7A1.3 Warrants and Violation Hearings

(a) Class I and II: The court shall issue a violator's warrant or a summons to appear and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all Class I and II violations of probation or supervised release;

(b) Class III: The court shall assess the purposes of sentencing, the nature and circumstances of the violation, and the criminal history and other characteristics of the defendant in determining whether to issue a violator's warrant or a summons to appear. If deemed appropriate, the court shall conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all Class III violations of probation and supervised release.

Commentary

Application Note:

1. Rule 32.1 requires that "whenever a probationer is held in custody on the ground that the probationer has violated a condition of probation, the probationer shall be afforded a prompt hearing before a... judge or magistrate to determine whether there is probable cause to hold the probationer for a revocation hearing."

§7A1.4 Sanctions Imposable for Violations of Probation and Supervised Release

(a) Class I

(1) Upon finding of a violation, the court shall revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 18 - 24 months.

(b) Class II

(1) Upon finding of a violation, the court shall revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 12 - 18 months.

(c) Class III

(1) Upon finding of a violation, the court shall:

(A) revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 1 - 7 months; or

(B) continue or extend the term of supervision (not to exceed the maximum sentence authorized by statute) and modify the conditions to afford more intensive supervision.

(d) Class I, II, and III

(1) To the extent permissible by law, the court shall impose a term of supervised release to follow the term of imprisonment imposed upon revocation.

Commentary

Application Notes:

1. The court shall revoke supervision and impose a new sentence of imprisonment for new criminal conduct described as Class I and II violations. Class III violations do not require the imposition of a new sentence of imprisonment. This distinction permits the court sufficient flexibility to impose sentences that include community confinement and treatment programs in appropriate cases. Revocation and imposition of a sentence of imprisonment should result, however, regardless of the class of the violation, when a defendant with a previous violation for new criminal conduct violates the terms of supervision by committing additional criminal conduct.

2. Title 18 USC §§ 3565 and 3583 require that supervision be revoked for possession of a controlled substance and the court impose a sentence of at least one-third the term of the original sentence. (E.g., a five year term of supervised release was imposed and the defendant is found to be in possession of a controlled substance; the statute requires the court to impose a prison sentence not less than one-third of the term of supervised release, or twenty months in this example.) When the statute and the guidelines conflict, the statute controls. (See §5G1.1.)

3. A court considering revocation need not await a defendant's conviction on the new criminal conduct that serves as the basis of the revocation. If the court finds that a violation has occurred, it may revoke probation or supervised release. This is particularly important where it appears that a pending criminal charge which is the basis for the violation will not be disposed of prior to the expiration of supervision. Under those circumstances, the court should proceed with violation/revocation absent a new conviction.

4. If violation/revocation occurs while the defendant has not completed service of the original sentence, the defendant must first satisfy the original sentence.

5. Community confinement, intermittent confinement, and home detention are not available as substitutes for imprisonment for the sentence imposed upon revocation. To the extent permitted by statute, these alternatives are available when the court has not revoked the sentence of supervision but instead modifies the conditions of supervision or extends the period of supervision.

§7A1.5 Imposition of Sentence for Violations

(a) Upon revocation, no credit shall be given for time served under probation or supervised release.

(b) Incarceration imposed upon revocation shall run consecutively to any period of custody the defendant is serving, whether or not the

custody is related to the conduct serving as the basis of the probation or supervised release violation.

Commentary

Application Note:

1. In general, the sentence imposed for new criminal conduct and the sentence imposed upon revocation are to be served consecutively. When supervision is revoked for criminal conduct that represents a new federal offense, the sentence imposed for the new federal offense is to be served consecutively to the sentence imposed at revocation. In this limited instance, the provisions of §5G1.3 do not apply.".

Option 2: Sections 7A1.2, 7A1.3 and 7A1.4 are deleted in their entirety and the following inserted in lieu thereof:

"§7A1.2. Revocation of Probation

(a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.

(b) Upon a finding of a violation of probation involving conduct other than conduct described in subsection (a) above, the court may: (1) revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

(c) (1) In the case of a revocation under subsection (a) above, the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense and the defendant had been convicted of that offense, or 6-12 months, whichever is greater.

(2) In the case of a revocation under subsection (b) above, the guideline range of imprisonment shall be 6-12 months.

(d) (1) The provisions of §5C1.1 shall apply to any term of imprisonment required under subsection (c) above.

(2) Where a term of imprisonment is imposed, provisions of §§5D1.1-1.3 shall apply to the imposition of a term of supervised release.".

(e) Any restitution, fine, community confinement, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be added to the sanction imposed under subsection (c) above, and any such period of community confinement or intermittent confinement may be converted to an equivalent

period of imprisonment.

Commentary

This guideline provides that probation is to be revoked in the case of new criminal conduct other than conduct constituting a petty offense. For lesser violations, the guideline provides that the court may revoke probation, extent the term of supervision, or modify the conditions of supervision.

When probation is revoked for new criminal conduct, it may be revoked prior to, at the same time as, or subsequent to, the imposition of a sentence on the new offense. The new offense may be a federal or, state, or local offense. There may be a conviction for the new offense, a pending charge, or no active prosecution. This section addressed these issues by setting forth the guideline that would have been applicable to the new criminal conduct had that conduct constituted a federal offense of which the defendant had been convicted, or a guideline of 6-12 months imprisonment, whichever is greater. This guideline will take into consideration that the defendant is a probation violator because the criminal history score will be recomputed (the conviction for the offense resulting in probation will count as prior criminal history and the defendant will receive 2 points under §4A1.1(d) for being on probation).

In the case of a revocation for conduct constituting a petty offense or a technical violation, the guideline range will be 6-12 months of imprisonment.

Whether a term of imprisonment imposed upon revocation of probation should run consecutively or concurrently to any term of imprisonment that the defendant is serving at time of revocation as a result of an offense committed during the instant period of supervision shall be determined in accordance with §5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment). Because the guidelines for probation revocation in the case of new criminal conduct incorporate an enhancement for the fact the defendant committed the offense while on probation through the recalculation of the criminal history score, the goal is to ensure that the combined term of imprisonment imposed for the new offense and the probation violation is in accordance with the guideline range determined under this section.

§7A1.3. Revocation of Supervised Release

(a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.

(b) Upon a finding of a violation of supervised release involving conduct other than conduct described in subsection (a) above, the court may: (1) revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

(c) (1) In the case of a revocation under subsection (a) above, the guideline range of imprisonment shall be the guideline range

that would have been applicable if the new criminal conduct had constituted a federal offense and the defendant had been convicted of that offense, or 6-12 months, whichever is greater.

(2) In the case of a revocation under subsection (b) above, the guideline range of imprisonment shall be 6-12 months.

(d) The provisions of §5C1.1 shall apply to any term of imprisonment required under subsection (c) above.

(e) Any restitution, fine, community confinement, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be added to the sanction required under subsection (c) above, and any such period of community confinement or intermittent confinement may be converted to an equivalent period of imprisonment.

(f) If a term of imprisonment imposed under this section is less than the time remaining on supervised release, the defendant shall be ordered to recommence supervised release upon his release from imprisonment, and the term of supervised release shall be the term of supervised release remaining at the time of revocation less the term of imprisonment imposed upon revocation.

Commentary

This guideline provides that supervised release is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the guideline provides that the court may revoke supervised release, extend the term of supervision, or modify the conditions of supervision.

When supervised release is revoked for new criminal conduct, it may be revoked prior to, at the same time as, or subsequent to, the imposition of a sentence on the new offense. The new offense may be a federal, state, or local offense. There may be a conviction on the new offense, a pending charge, or no active prosecution. This section addresses these issues by setting forth the guideline that would have been applicable to the new criminal conduct had that conduct constituted a federal offense of which the defendant had been convicted, or 6-12 months, whichever is greater. This guideline will take into consideration that the defendant is a supervised release violator because the criminal history score will be recomputed (the conviction for the offense resulting in supervised release will count as prior criminal history and the defendant will receive 2 points under §4A1.1(d) for being on supervised release).

In the case of a revocation for conduct constituting a petty offense or a technical violation, the guideline range will be 6-12 months of imprisonment.

Whether a term of imprisonment imposed upon revocation of supervised release should run consecutively or concurrently to any term of imprisonment that the defendant is serving at time of revocation as a result of an offense committed

during the instant period of supervision shall be determined in accordance with §5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment). Because the guidelines for supervised release revocation in the case of new criminal conduct incorporate an enhancement for the fact the defendant committed the offense while on supervised release through the recalculation of the criminal history score, the goal is to ensure that the combined term of imprisonment imposed for the new offense and the supervised release violation is in accordance with the guideline range determined under this section.

§7A1.4. No Credit for Time Under Supervision

(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

Commentary

This guideline provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation.".

* * *

Appendix A

70. Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"18 U.S.C. § 34	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 35(b)	2A6.1",
"18 U.S.C. § 219	2C1.3",
"18 U.S.C. § 281	2C1.3",
"18 U.S.C. § 332	2B1.1, 2F1.1",
"18 U.S.C. § 335	2F1.1",
"18 U.S.C. § 372	2X1.1",
"18 U.S.C. § 608	2H2.1",
"18 U.S.C. § 647	2B1.1",
"18 U.S.C. § 650	2B1.1",
"18 U.S.C. § 665(b)	2B3.3, 2C1.1",
"18 U.S.C. § 667	2B1.1, 2B1.2",
"18 U.S.C. § 712	2F1.1",
"18 U.S.C. § 753	2P1.1",
"18 U.S.C. § 915	2F1.1",
"18 U.S.C. § 917	2F1.1",
"18 U.S.C. § 970(a)	2B1.3, 2K1.4",
"18 U.S.C. § 1023	2B1.1, 2F1.1",
"18 U.S.C. § 1024	2B1.2",
"18 U.S.C. § 1030(b)	2X1.1",

"18 U.S.C. § 1031	2F1.1",
"18 U.S.C. § 1091	2H1.3",
"18 U.S.C. § 1115	2A1.4",
"18 U.S.C. § 1167	2B1.1",
"18 U.S.C. § 1168	2B1.1",
"18 U.S.C. § 1364	2K1.4",
"18 U.S.C. § 1422	2C1.2, 2F1.1",
"18 U.S.C. § 1541	2L2.3",
"18 U.S.C. § 1716C	2B5.2",
"18 U.S.C. § 1860	2R1.1",
"18 U.S.C. § 1861	2F1.1",
"18 U.S.C. § 1864	2Q1.6",
"18 U.S.C. § 1991	2A2.1, 2X1.1",
"18 U.S.C. § 1992	2A1.1, 2B1.3, 2K1.4, 2X1.1",
"18 U.S.C. § 2072	2F1.1",
"18 U.S.C. § 2118(d)	2X1.1",
"18 U.S.C. § 2197	2B5.2, 2F1.1",
"18 U.S.C. § 2232	2J1.2",
"18 U.S.C. § 2233	2B1.1, 2B3.1",
"18 U.S.C. § 2272	2F1.1",
"18 U.S.C. § 2276	2B1.3, 2B2.2",
"18 U.S.C. § 2331(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 2331(b)	2A2.1",
"18 U.S.C. § 2331(c)	2A2.2".

Appendix A is amended by deleting:

"18 U.S.C. § 32(a)(1)(4)	2K1.4, 2B1.3
18 U.S.C. § 32(b)	2A1.1-2A2.3, 2A4.1, 2A5.1-2A5.2, 2K1.4, 2B1.3",

and inserting in lieu thereof:

"18 U.S.C. § 32(a),(b)	2A1.1-2A2.3, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2K1.4";

in the line beginning "18 U.S.C. § 33" by inserting "2A2.1, 2A2.2," immediately before ""2B1.3";

in the line beginning "18 U.S.C. § 112(a)" by inserting "2A2.1," immediately before "2A2.2," and by inserting ", 2A4.1, 2B1.3, 2K1.4";

in the line beginning "18 U.S.C. § 152" by deleting "2F1.1," and by inserting ", 2F1.1, 2J1.3" immediately following "2B4.1";

in the line beginning "18 U.S.C. § 201(b)(1)" by deleting ", 2J1.3, 2J1.8, 2J1.9";

in the line beginning "18 U.S.C. § 474" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 476" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 477" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 496 by deleting "2T3.1" and inserting in lieu thereof "2F1.1";

in the line beginning "18 U.S.C. § 545" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "18 U.S.C. § 549" by inserting "2B1.1," immediately before "2T3.1" and by inserting ", 2T3.2" following "2T3.1";

in the line beginning "18 U.S.C. § 551" by inserting "2J1.2," immediately before "2T3.1";

in the line beginning "18 U.S.C. § 642" by inserting ", 2B5.2" following "2B5.1";

by deleting:

"18 U.S.C. § 666(a)	2B1.1, 2C1.1, 2C1.2, 2F1.1",

and by inserting in lieu thereof:

"18 U.S.C. § 666(a)(1)(A)	2B1.1, 2F1.1
18 U.S.C. § 666(a)(1)(B)	2C1.1, 2C1.2
18 U.S.C. § 666(a)(1)(C)	2C1.1, 2C1.2";

in the line beginning "18 U.S.C. § 755" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 756" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 757" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 842(a)" by deleting ",(h),(i)" by inserting in lieu thereof "-(g)";

in the line beginning "18 U.S.C. § 844(f)" by inserting ", 2X1.1" following "2K1.4";

by deleting:

"18 U.S.C. § 922(a)(1)-(5)	2K2.3
18 U.S.C. § 922(6)	2K2.1
18 U.S.C. § 922(b)(1)-(3)	2K2.3
18 U.S.C. § 922(d)	2K2.3
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)	2B1.2, 2K2.3
18 U.S.C. § 922(j)	2B1.2, 2K2.3
18 U.S.C. § 922(k)	2K2.3
18 U.S.C. § 922(l)	2K2.3
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 923	2K2.3
18 U.S.C. § 924(c)	2K2.4",

and by inserting in lieu thereof:

"18 U.S.C. § 922(a)(1)	2K2.1,2K2.2
18 U.S.C. § 922(a)(2)	2K2.2
18 U.S.C. § 922(a)(3)	2K2.1

18 U.S.C. § 922(a)(4)	2K2.1
18 U.S.C. § 922(a)(5)	2K2.2
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)-(d)	2K2.2
18 U.S.C. § 922(e)	2K2. 1, 2K2.2
18 U.S.C. § 922(f)	2K2.1, 2K2.2
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)-(l)	2K2.1, 2K2.2
18 U.S.C. § 922(m)	2K2.2
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 922(o)	2K2.1, 2K2.2
18 U.S.C. § 923(a)	2K2.2
18 U.S.C. § 924(a)(1)(A)	2K2.2
18 U.S.C. § 924(a)(1)(C)	2K2.1, 2K2.2
18 U.S.C. § 924(a)(3)(A)	2K2.2
18 U.S.C. § 924(b)	2K2.3
18 U.S.C. § 924(c)	2K2.4
18 U.S.C. § 924(f)	2K2.3
18 U.S.C. § 924(g)	2K2.3";

in the line beginning "18 U.S.C. § 1012" by inserting "2C1.3," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1028" by inserting ", 2L2.4 " following "2L2.3";

by inserting in the appropriate place according to statutory title and section number "18 U.S.C. §1201(c),(d) 2X1.1";

in the line beginning "18 U.S.C. § 1362" by inserting ", 2K1.4" following "2B1.3";

in the line beginning "18 U.S.C. § "1363" by inserting ", 2K1.4" following "2B1.3";

in the line beginning "18 U.S.C. § 1426" by inserting ", 2L2.2" following "2L2.1";

in the line beginning "18 U.S.C. § 1460" by inserting "2G2.2," immediately before "2G3.1";

in the line beginning "18 U.S.C. § 1512(a)" by inserting "2A1.3," following "2A1.2,";

in the line beginning "18 U.S.C. § 1512(b) by inserting "2A1.2," immediately before "2A2.2";

in the line beginning "18 U.S.C. § 1704" by inserting ", 2F1.1" following "2B5.2";

in the line beginning "18 U.S.C. § 1751(c)" by inserting ", 2X1.1" following "2A4.1";

in the line beginning "18 U.S.C. § 1751(d)" by inserting ", 2X1.1" following "2A4.1";

in the line beginning "18 U.S.C. § 1909" by inserting "2C1.3," immediately before "2C1.4";

in the line beginning "18 U.S.C. § 1951" by deleting "2B3.1, 2B3.2, 2C1.1,";

in the line beginning "18 U.S.C. § 1952A" by deleting "2A2.1,";

in the line beginning "18 U.S.C. § 1958" by deleting "2A2.1,";

in the line beginning "18 U.S.C. § 2271" by deleting "2F1.1,";

by deleting "18 U.S.C. § 4082(d) 2P1.1";

by deleting:

"26 U.S.C. 5861(a)	2K2.3
26 U.S.C. 5861(b)-(l)	2K2.2",

and by inserting in lieu thereof:

"26 U.S.C. § 5861(a)	2K2.2
26 U.S.C. § 5861(b)	2K2.1
26 U.S.C. § 5861(c)	2K2.1
26 U.S.C. § 5861(d)	2K2.1
26 U.S.C. § 5861(e)	2K2.2
26 U.S.C. § 5861(f)	2K2.2
26 U.S.C. § 5861(g)	2K2.2
26 U.S.C. § 5861(h)	2K2.1
26 U.S.C. § 5861(i)	2K2.1
26 U.S.C. § 5861(j)	2K2.1, 2K2.2
26 U.S.C. § 5861(k)	2K2.1
26 U.S.C. § 5861(l)	2K2.2";

and in the line beginning "26 U.S.C. § 5871" by deleting "2K2.2, 2K2.3" and inserting in lieu thereof "2A2.1, 2A2.2".

Reason for Amendment: This amendment conforms the statutory index to amended guidelines, and makes the statutory index more comprehensive.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

GEORGE E. MACKINNON
UNITED STATES CIRCUIT JUDGE

February 6, 1990

MEMORANDUM

TO: Phyllis Newton

CC: Chairman Wilkins
Commissioner Corrothers
Commissioner Nagel
John Steer

I believe the suggestion contained in the attached letter has great merit.

G.E.M.

Attachment

LEWIS D. FRAZIER
CHIEF PROBATION OFFICER

U. S. COURT HOUSE
11 GRAND AVENUE
KANSAS CITY
MISSOURI 64106-1970
816-426-3921
(FTS: 867-3921)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI
PROBATION OFFICE

July 12, 1989

REPLY TO: Springfield

131 WEST HIGH STREET
POST OFFICE BOX 1764
JEFFERSON CITY
MISSOURI 65101-1764
314-634-3293

SUITE 1300
222 NORTH JOHN Q. HAMMONS PARKWAY
SPRINGFIELD
MISSOURI 65806-2530
417-831-6421
417-831-6896

Guidelines Comment
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Re: Clarification of Section 4A1.2(a)(3) of Guidelines Manual

Dear Commissioner:

Recently we had an objection to our criminal history computation by an Assistant United States Attorney. Enclosed is a copy of same. I believe that it would be helpful if the words, "or execution," were inserted following the word, "imposition," in 4A1.2(a)(3) on page 4.4 of the Guidelines Manual.

The section would read as follows:

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

This would clarify the guideline and alleviate similar objections in the future.

Sincerely,

Charles L. Clark

Charles L. Clark, Ph.D.
Senior U.S. Probation Officer

CLC:cac
(Typed 07/12/89)
Enclosure
cc: Lewis D. Frazier, Chief U.S. Probation Officer, Kansas City, Missouri.

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

MEMORANDUM

TO: Senior Staff
Technical Assistance Staff
Legal Staff
Rusty Burress

FROM: Phyllis Newton

SUBJECT: Meeting Regarding Low Priority Amendments

DATE: 23 February 1990

Attached for your information is the material for discussion at the Commission meeting February 27th. The last attachment is a tentative staff timeline for preparation and final review of amendments.

The first meeting on the timeline is Tuesday, February 27, 9:00 a.m., in the 10th Floor Conference Room. Please look at the amendments on List I and be prepared to discuss. If all agree that these amendments should remain on the low priority, non-controversial list, they will be ready for final testing and preparation for vote pending possible public comment.

If you do not have copies of the Federal Register material, check with your supervisor who should have copies.

Thanks for your assistance in attempting to move through this cycle in an organized fashion. If you have comments or suggestions, please let me know.

Attachment

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

COMMISSION MEETING
2/27/90
AGENDA ITEM 3

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis Newton

SUBJECT: Organizing the Proposed Amendment Work in Preparation for a May 1 Submission to Congress

DATE: 21 February 1990

In an effort to address the proposed amendments in a timely fashion, staff have attempted to meaningfully categorize the amendments according to the degree of controversy and priority. Priority has been subjectively defined to reflect the need for an amendment from a guideline application perspective, dependent upon the extent to which the Commission wishes to propose amendments during this cycle. This is not to suggest that the Commission make decisions about particular guidelines at this time; rather, it is aimed at organizing staff work and Commission review over the next two months.

The attached lists are designed for discussion purposes. They represent an attempt to order the work assignments for the next several weeks. Amendments appearing on the low priority and non-controversial list (List I) would receive the least staff attention. Barring problems identified through public comment, these amendments are basically ready for a final vote should the Commission elect to go forward with them. At the other end of the spectrum, the high priority and controversial list (List IV) would receive major attention from staff. A number of the amendments on List IV remain in question form at this time, requiring drafting as well as testing time from the staff.

Commissioners may disagree with the status afforded certain amendments. It is particularly important to move amendments to the high priority, controversial list (List IV) if Commissioners view amendments in a more essential light than indicated on the attached lists. Staff would like to begin working on those amendments on List IV as early

as possible. Considerable public comment is anticipated on these amendments as well, so any head start on this work would better organize the staff efforts following the public comment period.

Appendix A provides a listing of proposed amendments that remain in question form only. These will require both drafting and testing time, suggesting earlier staff attention.

A tentative timeline for the scheduled work on amendments is attached for your review. Please let me know if you think a different emphasis should be placed on particular amendments, or if you think other alterations in the schedule is required.

In addition to the attached lists, there is a proposed form to summarize amendments for the convenience of Commissioners. If this is not an aid to the process or if changes to the form would be helpful, the staff is prepared to adjust or discard it.

Public comment will be reviewed by staff according to each proposed amendment. Notebooks will be prepared for Commissioners that include comments and summaries. As soon as comment is received, the staff will begin organizing materials; however, we do not expect much comment to arrive prior to the public hearing on March 15. The end of the public comment period is not until March 30. This leaves little time to finalize proposed amendments, but with sufficient organization it is manageable.

The March 14 Commission meeting is designed to serve as a formal briefing for the March 15 Public Hearing. If Commissioners would also appreciate individual briefings by Peter Hoffman prior to the hearing, please give me a call and I will arrange a briefing.

Attachments:
List I (Low priority/Non-controversial Amendments)
List II (Low priority/Controversial Amendments)
List III (High priority/Non-controversial Amendments)
List IV (High priority/Controversial Amendments)
Appendix A (Amendments in Question Form Only)
Amendment Summary Form
Staff Timeline

PROPOSED GUIDELINE AMENDMENTS

I. Low Priority Amendments: Non-controversial

Should the Commission elect to go forward on May 1 with a minimal number of amendments that include only essential changes, the training and technical assistance staff believe the amendments on List I are non-essential. These amendments represent an improvement over the present guidelines; however, they are designated as low priority because they do not generate questions or controversy in the field, indicating little or no application problem.

In addition to the low priority status, staff members view these as non-controversial as presently drafted; that is, unless public comment suggests otherwise, these amendments present little staff effort to prepare for final vote.

Amendment #	Guideline(s)
3 (p. 14)	Ch. 1, Part B; Ch. 3, Part D
5 (pp. 16-17)	Ch. 2, Part B
7 (p. 18)	§2B1.3
9 (p. 19)	§2B3.1
29 (p. 35)	§2K1.6
36 (p. 44)	§2L2.1, §2L2.2
37 (pp. 44-45)	§2M4.1(b)(1)
39 (p. 46)	§2N1.1
40 (p. 46)	§2N1.2(a)
41 (p. 46)	§2N2.1
45 (p. 48)	Ch. 2, Subpart S
65 (pp. 66-67)	§5E1.1
67 (pp. 71-73)	Ch. 5, Part H
68 (pp. 73-74)	Ch. 5, Part K

II. Low Priority Amendments: Controversial Issues

Like List I, List II are viewed as non-essential amendments; i.e., little need for the amendment from the field perspective. The amendments do, however, require considerable staff effort to prepare for final vote and are designated controversial.

* See Appendix A for amendments that appeared in the Federal Register in question form.

Amendment #	Guideline(s)
1 (pp. 3-13)	Ch. 1, Part A
38 (p. 45)	§2M5.2
*58 (p. 60)	Ch. 3, Part E
62 (pp. 63-64)	§4A1.2(j)
64 (pp. 64-66)	Ch. 5, Part A

III. High Priority Amendments: Non-controversial

The following amendments are viewed as essential, because they address concerns and questions raised by the field, implement Congressional directives, and clarify issues that might otherwise result in disparity in sentencing. Essential does not necessarily require change, rather, it suggests issues that require attention.

List III should also be viewed as non-controversial as presently drafted. Unless public comment suggests otherwise, these amendments require little additional attention from the staff.

Amendment #	Guideline(s)
2 (p. 13)	§1B1.8
4 (pp. 15-16)	Ch. 2, Part A
6 (p. 17)	§2B1.1
8 (p. 18)	§2B3.1
11 (p. 20)	§2B3.2(a)
13 (pp. 21-22)	§2D1.1, application note 11
14 (pp. 22-23)	§2D1.1, application note 10
17 (p. 25)	§2D1.11
18 (p. 25)	§2D2.1
19 (pp. 25-26)	§2F1.1
20 (pp. 26-27)	§2G1.1
21 (pp. 27-28)	§2G1.2
22 (pp. 28-29)	§2G2.1
24 (pp. 31-32)	§2G3.1
30 (pp. 35-36)	§2K1.7
32 (pp. 40-41)	§2K2.1(b)(1)
33 (p. 41)	§2K3.2

34	(pp. 41-42)	§2L1.1(b)(1)
35	(pp. 42-44)	§2L1.1(b)(1)
43	(p. 47)	§2P1.1
46	(pp. 48-49)	Ch. 2, Part T
47	(pp. 49-50)	§2X5.1
48	(p. 50)	Ch. 3, Part A
52	(pp. 55-56)	Ch. 3, Part C
54	(pp. 57-58)	Ch. 3, Part D
55	(pp. 58-60)	§3D1.2(b)
56	(p. 60)	§3D1.2(d)
57	(p. 60)	§3D1.4
59	(p. 61)	Ch. 4, Part A
61	(p. 62)	§4A1.2(c)(1)
66	(pp. 67-71)	§5E1.2
70	(pp. 82-86)	Statutory index

IV. High Priority Amendments: Controversial Issues

Like List III, these amendments are viewed as essential, because they address concerns and questions raised by the field, implement Congressional directives, and clarify issues that might otherwise result in disparity in sentencing.

In addition to their high priority status, these amendments are designated as controversial in that considerable staff effort is required to prepare them for a vote. A number of these amendments were published in the form of a question rather than as a proposed amendment, requiring considerable drafting effort.

* See Appendix A for amendments that appeared in the Federal Register in question form.

Amendment #	Guideline(s)
10 (pp. 19-20)	§2B3.1
12 (pp. 20-21)	Ch. 2, Parts B and F
*15 (p. 23)	§2D1.2
16 (pp. 23-24)	§2D1.6
23 (pp. 29-31)	§2G2.2
25 (p. 32)	Ch. 2, Part H
*26 (pp. 32-33)	Ch. 2, Part H
27 (p. 34)	§2J1.6
28 (pp. 34-35)	§2K1.4
31 (pp. 36-40)	§2K2.6
*42 (p. 47)	Ch. 2, Part N, Subpart 2
*44 (pp. 47-48)	§2P1.1
49 (pp. 50-51)	§3A1.4
50 (pp. 51-55)	Ch. 3, Part B
*51 (p. 55)	Ch. 3, Part B
*53 (pp. 56-57)	Ch. 3, Part C

60	(p. 62)	§4A1.2(a)(3)
*63	(p. 64)	§4A1.2
69	(pp. 74-82)	Revocation of Probation and Supervised Release

APPENDIX A: AMENDMENTS PUBLISHED IN QUESTION FORMAT

15. §2D1.2 - Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals. Comment is requested on whether the Commentary to §2D1.2 should be amended to provide that the offense level from §2D1.1 refers to the offense level from §2D1.1 applicable to the entire quantity of drugs involved in the same course of conduct or common scheme or plan (see §1B1.3(a)(2)). Or, should §2D1.2 be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline (e.g., an offense involving several sales, only one of which is near a "protected" location); and if so, how should this be accomplished?

* * *

26. Chapter Two, Part H, Subpart 1 - The Commission takes note of an increase in the frequency of "hate crimes" and other offenses intended to deprive persons of civil or political rights. The Commission seeks comment on whether the sentencing guidelines in part H, subpart 1 of chapter 2 provide penalties that adequately reflect the severity of felony violations of the Federal civil rights statutes contained in title 18 and title 42 of the United States code.

Specifically, section 241 of title 18, which prohibits conspiracies to interfere with civil rights, provides a maximum penalty of 10 years imprisonment, increased to life imprisonment where death results from the offense. Sections 242 through 245 of title 18 and section 3136 of title 42 include felony provisions carrying penalties of a maximum of 10 years imprisonment for various civil rights offenses that involve bodily injury and any term of years or life imprisonment where death results from the commission of such offenses. Additionally, section 247 of title 18 prohibits destruction of religious property and the obstruction of the free exercise of religious belief and includes felony provisions carrying penalties of a maximum of 10 years imprisonment where serious bodily injury occurs and any term of years or life imprisonment where death results from the commission of the offense.

Generally, the guidelines in part H, subpart 1 of chapter 2 provide penalties for violations of those statutes based upon the following calculation. First, alternate base offense levels are available whereby the greater of a fixed base offense level(s) or 2 levels in addition to the offense level applicable to any underlying offense is selected. Additionally, a specific offense characteristic providing a 4 level increase is provided where the defendant was a public official at the time of the offense. For example, if a defendant were sentenced under §2H1.2 (Conspiracy to Interfere with Civil Rights) his base offense level would be the greater of level 13 or 2 levels plus the offense level applicable to any underlying offense (e.g., aggravated assault, kidnapping, or arson). If the defendant was a public official at the time of the offense, an additional 4 levels would be added to the offense level.

The Commission solicits comments on whether the guidelines in part H, subpart 1 of chapter 2 adequately reflect the seriousness of felony violations of Federal civil rights statutes. Specifically, the Commission seeks comments on the following issues:

1. whether an increase (as currently provided) of 2 levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm such crimes inflict on society when they are used as a means of insidious discrimination or to suppress the exercise or enjoyment of Federal rights; if not, should the Commission amend sections 2H1.1(a)(2), 2H1.2(a)(2), 2H1.3(a)(3) and 2H1.5(a)(2) by deleting "2" and inserting "4" in lieu thereof and by making comparable revisions to section 2H1.4;

2. whether any chapter 3 general adjustment the Commission may adopt for offenses that are not prosecuted as civil rights offenses yet nevertheless involve the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin or by the victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States (see proposed amendment 49) should have the same or a comparable structure and/or adjustment levels as the guidelines in part H, subpart 1 of chapter 2.

3. Whether the Commission should provide a general adjustment in chapter 3 where offenses have been committed by public officials under color of law or otherwise under the cloak of official duty or authority (in cases other than described above) that is distinct from the provision in §3B1.3 (Abuse of Position of Trust or Use of Special Skill); and, if so, whether the amount of such an adjustment should be the same as the 4-level increase for public officials contained in the guidelines in part H, subpart 1 of chapter 2.

Finally, the Commission welcomes comments concerning any issues relevant to the operation of the guidelines in part H, subpart 1 of chapter 2.

* * *

42. Chapter Two, Part N, Subpart 2: Section 2403 of the Anti-Drug Abuse Act of 1988 (codified as 21 U.S.C. § 333(e)) prohibits distributing or possessing with intent to distribute anabolic steroids. The statute authorizes a maximum sentence of 3 years' imprisonment for "any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician." A maximum sentence of 6 years' imprisonment is authorized for "any person who distributes or possesses with intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than treatment of disease pursuant to the order of a physician." The Commission intends to promulgate an offense guideline to address this statute based upon the type and amount of steroids involved. The Commission seeks public comment on how to structure a guideline that will best accomplish this result, and as to the appropriate offense levels.

* * *

* * *

44. §2P1.1 - Offense Levels for Certain Escapes: Under the current guidelines, an escape from custody resulting from a conviction or a lawful arrest for a felony has a base offense level of 13. If, however, the escape is from non-secure custody and the defendant returns voluntarily within 96 hours, the base offense level is reduced by 7 levels to level 6. If the defendant does not return voluntarily within 96 hours, there is no difference in offense level between an escape from secure or non-secure custody.

The Commission seeks comment on whether an additional distinction should be made between escape from secure and non-secure custody for cases not covered by the 7 level reduction for voluntary return from an escape from non-secure custody within 96 hours.

The Commission also seeks comment on whether there should be any reduction for voluntary return and, if such a reduction is appropriate, whether the 96 hours distinction currently used is appropriate. Comment is also sought on whether any distinction between escape from secure and non-secure custody should take into account the nature of the offense for which the defendant is confined, or the security level of the institution in which the defendant is confined. If a distinction between escape from secure and non-secure custody is appropriate, should or should not this distinction apply in the case of all offenders or should such a distinction not apply to certain offenders such as drug traffickers or violent offenders? Should a failure to return from a furlough from a secure institution be treated differently than a failure to return from a furlough from a non-secure institution? Where a defendant is returned to custody following an arrest for a new crime while on escape status, such return does not constitute a voluntary return for guideline purposes. Should the guidelines, however, provide an additional distinction to cover cases in which the defendant returns voluntarily from an escape and is later discovered to have committed a new offense while on escape status? If additional distinctions to the guidelines are believed warranted, comments are sought as to the most appropriate structure to accommodate such distinctions.

* * *

51. §3B1.3 (Abuse of Trust). The Commission requests comment concerning whether this section should be amended to provide that an increase in the offense level under this section should be in addition to, and irrespective of, the application of §3B1.1. In addition, comment is requested as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply.

* * *

* * *.

53. Obstructing or Impeding the Investigation, Prosecution, or Sentencing of the Instant Offense. The Commission notes that obstructive conduct can vary widely in nature, degree of planning, and seriousness, and that the current guideline has led to differing interpretations as to the specific types of conduct, that , absent a separate count of conviction, are sufficiently serious to warrant a 2-level enhancement under this section. The Commission solicits comment on whether application note 1 should be amended to provide additional examples of what conduct should be counted, and whether this note should be expanded to include examples of what conduct should not result in an enhancement under this section.

The following is a listing of various forms of conduct that, absent a separate count of conviction, may or may not warrant a 2-level enhancement under this section. Comment is requested whether the conduct in each of these examples should or should not result in a 2-level enhancement under this section. Bracketed language indicates that an example might be formulated in more than one way or interacts with another example. Recommendations as to how the examples set forth below could be improved, or as to additional examples, are also requested:

(1) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(2) testifying untruthfully as to a material fact, or suborning or attempting to suborn untruthful testimony as to a material fact;

(3) producing a false, altered, or counterfeit document or record during an investigation or judicial proceeding, or attempting to do so;

(4) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an investigation or judicial proceeding (e.g. shredding a document or destroying a ledger upon learning that an investigation has commenced or is about to commence), or attempting to do so;

(5) [attempting to conceal, throw away, or otherwise dispose of evidence contemporaneously with arrest (e.g. attempting to throw away a weapon or controlled substance)][, except where such conduct results in a material hinderance to the investigation or prosecution of the offense].

(6) escaping from custody before trial or sentencing, or attempting to do so; or willfully failing to appear, as ordered, for a judicial proceeding;

(7) providing a fraudulent identification document at arrest;

(8) [providing a false name at arrest] [not accompanied by a fraudulent identification document].

(9) providing a materially false written, signed statement to a law enforcement officer;

(10) providing materially false information to a law enforcement officer that significantly obstructs or impedes the investigation of the offense (e.g., a defendant upon questioning admits guilt in a credit card scheme, but provides false detailed information that diverts law enforcement officers from apprehending co-conspirators who are thereby able to continue the operation of the scheme and flee the country).

(11) [making false oral exculpatory statements, not under oath, to law enforcement officers][, other than described above].