TESTIMONY BY: REVEREND ANDREW L. GUNN
President, Clergy for Enlighten Drug Policy
Pastor, St. Luke's UMC, Washington, D.C.

DATE: Thursday, March 31, 1994

TO: U.S. SENTENCING COMMISSION

Members of the Commission, we know that in order to have peace and tranquility in our land, we have to have good laws. Laws that are based on common sense and fairness and justice. Our democracy has elected officials to make those laws. When these elected officials create laws out of fear or anger, or vindictiveness, then we no longer have good and just laws.

I am here this morning to witness to the growing number of clergy and citizens who have become more and more disenchanted with the criminal justice system and the law and the way it is being enforced. There is growing anger towards mandatory sentences. Particularly against those who are non-violent offenders. There is growing hostility, resentment and disrespect for the injustices of our mandatory sentences and the legal manipulation of the law by legal professionals, and by the seizure laws and the drug laws that often are counter-productive and are doing more harm than good.

We citizens are spending 23 billion dollars on prisons and law enforcement with little positive results. The "Draconian" mandatory sentences are unfair and unjust, and they lack, in many cases, common sense. They do far more harm than good in the long run. They destroy families and individuals. We have demonized drug offenders and the whole drug problem. During the time of Christ, those who had leprosy were demonized; but Jesus did not demonize them, instead he healed them and helped them. I am the

President of Clergy for Enlighten Drug Policy and we receive letters from all over the country. Here is one from Columbia County Jail, Bloomsburg, PA. This woman is in jail for two and a half years. She is a widow with three children. She writes, "Where I live the courts prove over and over that violent crimes are the thing to do. A drunken woman serves eleven and a half months for vehicle homicide. A man kills an infant and gets three years. It really makes a person wonder what is wrong with the system. It is obvious that any alcohol related crime or crimes against innocent children will get you a slap on the wrist. Yet a drug offender who hurts no one gets a very stiff mandatory sentence".

As a citizen and as a clergy man, I am against alcohol, nicotine, marijuana, cocaine and all the other hard drugs. But on the other hand we recognize that alcohol, if appropriately used on social occasions, is acceptable. And that marijuana and cocaine can and should be used for medical reasons. In my judgement, we need to rethink our failed drug policies. They have become an excuse for police violence and corruption. In sentencing, the sentencing guidelines must be based on accurate facts. I am told that one thousand grams per marijuana plant is totally unreasonable and way off the mark. It should be one hundred grams per plant. Thus on this matter the guidelines should be changed and made retroactive. I've seen a chart where there is a cliff between certain numbers of plants of marijuana plants. I hope the Commission will consider rectifying this so that there are not these steep cliffs. I thank the Commission for this opportunity to appear before them and bring to you my testimony. Thank you very much.

Statement of

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

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

March 28, 1994

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My name is Thomas W. Hillier. I am the Federal Public Defender for the Western District of Washington, and I appear today to present the views of the Federal Public and Community Defenders.

There are presently Federal Public and Community Defender organizations serving 56 federal judicial districts. Federal Public and Community Defender organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services to federal defendants financially unable to afford counsel. We appear before United States Magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of federal criminal defendants. We represent persons charged with frequently-prosecuted federal crimes, like drug trafficking, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders, therefore, have a great deal of experience with the guidelines. Based upon that experience, we are pleased to comment upon the proposed amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.[1]

Amendment 1
(Computer-related offenses)

Amendment 1 would revise the commentary to three guidelines to deal with computer-related cases. We believe that the amendment

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[1]58 Fed. Reg. 27,148 (1993).

makes some appropriate adjustments in the commentary, but we believe that parts of the commentary need to be modified or deleted.

Proposed new application note 5 to § 2B1.3 uses an unrealistic and inappropriate example. A valuable data base would be backed up much more frequently than once a year.

Proposed new application note 10(g) to § 2F1.1 indicates that an upward departure may be warranted for "a substantial invasion of a privacy interest." We believe that there should be additional language in new application note 10(g), either referencing or repeating the discussion of the term "a substantial invasion of a privacy interest" that this amendment adds to the commentary to § 2B1.1.

Proposed new application note 10(h) to § 2F1.1 indicates that an upward departure may be warranted if "the offense involved a conscious or reckless risk of harm to a person's health or safety." We oppose proposed new application note 10(h) as unnecessary and misleading.

The Commission, in response to a Congressional directive, added subsection (b)(4) of § 2F1.1, effective November 1, 1989.[2] Subsection (b)(4) calls for a two-level enhancement (or an offense level of 13 if the two-level enhancement does not yield an offense level of at least 13) "if the offense involved the conscious or reckless risk of serious bodily injury." We think that "risk of

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[2]U.S.S.G. App. C, amend. 156. The Congressional directive is in the Major Fraud Act of 1988, Pub. L. No. 100-700, § 2(b), 102 Stat. 4632.

harm to a person's health or safety" is equivalent to a "risk of serious bodily injury." If the court finds that there was a conscious or reckless risk of harm to a person's health or safety, the court must apply subsection (b)(4). If the court applies subsection (b)(4), the court has no legal authority to depart.

Finally, application note 4 to § 2B1.3, after setting forth a factual scenario, states that an upward departure "would be warranted." Although the Commission has not published an amendment to that part of application note 4, we recommend that the phrase "would be warranted" be changed to "may be warranted." The Commission's practice has been to use "may," and we see no reason to deviate from that practice in application note 4.

Amendment 2
(Consolidation of public corruption offense guidelines)

Amendment 2(A) would consolidate § 2C1.3 and § 2C1.4 and also add a new cross reference calling for use of § 2C1.1, if the offense involved a bribe, or § 2C1.2, if the offense involved a gratuity. We do not oppose simply consolidating the guidelines, but we object to the cross-reference. The proliferation of cross-reference subsections is changing the nature of the guidelines from charge-offense with real offense elements, to predominantly real offense. The Commission's first effort to draft a set of guidelines incorporated a pure real offense system, but the Commission found that a real offense system was impractical and "risked return to wide disparity in sentencing practice".[3] The

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[3]U.S.S.G. ch. 1, pt. A(4)(a).

Commission then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".[4] The Commission, for good reasons, rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to alter the system fundamentally, the Commission should tackle the issue directly and across-the-board. The problems that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.

Amendment 2(C) invites comment upon whether bribery and gratuity guidelines should be consolidated. In our view, bribery offenses should be punished differently from gratuity offenses. Bribery, which requires a corrupt intent and a quid pro quo, is the more serious offense, and the current guidelines reflect that. We doubt that a single consolidated guideline that maintains a distinction in punishment between bribery and gratuity offenses, will be any easier to apply than the present two guidelines. We oppose consolidating the bribery and gratuity guidelines.

Amendment 3
(Offense levels in bribery and gratuity offense guidelines)

Amendment 3 invites comment upon whether the offense levels in the bribery and gratuity guidelines should be increased to require sentences of imprisonment, as recommended by the Justice Department. Current offense levels generally will yield sentencing ranges that require a period of incarceration, even if probation is

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[4] Id.

ordered. The Justice Department has presented no evidence that the present offense levels are inadequate. Given the crowded condition of federal prisons,[5] increasing the prison population with nonviolent, often first-time offenders is unwise.

Amendment 4
(Multiple bribes and gratuities)

Amendment 4(A) sets forth two options for amending the bribery and gratuity guidelines in response to Commission data indicating that a majority of bribery and gratuity cases involve more than a single incident. Option 1 would retain the two-level adjustment if more than one bribe or gratuity is involved. Option 2 would delete those specific offense characteristics. We support option 2.

The seriousness of bribery and gratuity offenses is better captured by the amount of the bribe or gratuity than by the number of payments. It is not clear to us, for example, why a defendant who pays two bribes totalling $25,000 should have a higher offense level (offense level 16) than a defendant who pays a single bribe of $50,000 (level 15).

Amendment 4(B) invites comment upon revising "the discussion of the adjustments for multiple payments" in the commentary to the bribery and gratuity guidelines. Promulgation of option 2 of amendment 4(A) would call for deleting commentary concerning multiple payments.

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[5]Federal Prisons are presently 37% over capacity. U.S. Dep't of Justice, Fed. Bur. of Prisons, Monday Morning Highlights (Mar. 14, 1994).

Amendment 5
(Treatment of public officials in public corruption cases)

Amendment 5(A) would make cumulative, rather than alternative, the specific offense characteristics in the bribery and gratuity guidelines for value of the payment and status as an elected or "high-level" public official. We oppose amendment 5(A) and suggest instead the deletion of the specific offense characteristic for status as an elected or high-level public official.

In our judgment, the seriousness of both bribery and gratuity offenses is best measured by the value of the bribe or gratuity. Except in very rare circumstances (which, of course, can be dealt with by departure), a large bribe is not paid for a small favor. The more important the favor sought, the more important the public official required to do the favor, and the greater the bribe will have to be.

Gratuity cases do not involve a corrupt intention or a quid pro quo, so the harm cannot be the extent to which the public trust has been betrayed. Rather, the harm is the likelihood that the recipient's judgment will be corrupted in the future and the appearance of impropriety. The greater the amount of the gratuity, the greater the likelihood of such corruption in the future and the more likely the gratuity will be perceived as improper.

For both bribery and gratuity cases, then, the amount of the payment is an appropriate measure of seriousness. The recipient's status as a high-level public official is accounted for by the specific offense characteristic for the amount of the payment. An additional enhancement for status as an elected or high-level

public official is inappropriate and unfair double counting. Making the two enhancements cumulative would only compound the unfairness. We suggest eliminating the status enhancement. Deleting the status enhancement will not depreciate the seriousness of bribery and gratuity offenses involving public officials. The base offense level for commercial bribery is eight, two levels less than the base offense level of § 2C1.1. While the base offense level for commercial bribery is one level more than the base offense level for a gratuity offense involving a public official, this is appropriate because the gratuity offense does not involve a corrupt intention or a quid pro quo.

Amendment 5(B) invites comment upon whether the definition of high-level public official should be revised. If there is to be an adjustment for defendant's status as a high-level official, we support adoption of a more objective definition. Because the status of most public officials is directly related to that official's salary, the best objective test probably is salary.

The present definition is overly broad. Not all elected offices are equivalent in importance. The adjustment currently applies if the defendant is a Member of Congress or the elected coroner of a county whose population is 6,000. Further, the definition of "official holding a high-level decision-making or sensitive position" in application note 1 to § 2C1.1 merely lists certain officials who are covered by the definition. There is no apparent principle that explains the inclusion of these officials or that would justify including or excluding other officials. In

short, the commentary does not clearly identify who qualifies for the eight-level enhancement.

Amendment 6
(Definition of "payment" in public corruption cases)

Amendment 6(B) invites comment upon whether application note 2 to § 2C1.1 should be revised "to address varying approaches among the circuits as to the extent to which the defendant is to be held accountable for relevant conduct of others."

Only four cases appear to bear upon the issue for comment,[6] and only one of those may reach a result inconsistent with what the Commission intends in the guidelines. The facts of the case that may reach an inconsistent result are complex, and the basis for the sentence imposed is not fully explained.[7] We believe that Commission action at this time would be premature.

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[6]United States v. Muldoon, 931 F.2d 282 (4th Cir. 1991); United States v. Kant, 946 F.2d 267 (4th Cir. 1991); United States v. Ellis, 951 F.2d 580 (4th Cir. 1991), cert. denied, 112 S.Ct. 3030 (1992); United States v. Narvaez, 995 F.2d 759 (7th Cir. 1993).

[7]United States v. Ellis, supra note 6. In Ellis, the defendant was convicted of bribing state legislators to obtain enactment of legislation favorable to racetracks. The defendant was a 20% limited partner in a track that would benefit from the legislation. The district court held the defendant accountable for $500,000 that he was promised if the legislation was enacted plus the defendant's 20% interest in the racetrack. The opinion does not indicate if that 20% was applied to the net worth of the track, the track's proceeds from racing, or the track's net profits. The government had argued that the court should have held the defendant accountable for the total profit to the two tracks that benefitted from the legislation (some $11 million). The Fourth Circuit rejected the government's argument and sustained the district court. This result would be consistent with the guidelines if the defendant's partners in the track were not participants in the offense, and inconsistent otherwise. The report does not discuss whether the defendant's partners were participants.

Amendment 6(C) invites comment upon whether the commentary to § 2C1.1 should be amended to suggest that an upward departure may be warranted "if the offense involved ongoing harm, or a risk of ongoing harm" to a governmental entity or program. We oppose the amendment because we believe that the amount of the payment is the best measure of the seriousness of the offense. In addition, the proposed language is overly broad -- a risk of harm is all that is required, without regard to how serious or substantial the risk is. An agency is harmed by a bribery offense because the judgment of an official of the agency has been corrupted. The official who has taken a bribe is likely to be a target of further bribes, until no longer in office. Does this constitute a risk of ongoing harm?

Lastly, the amendment is unnecessary. Application note 5 to § 2C1.1 states that an upward departure may be warranted if the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office. How does "systematic or pervasive corruption" differ from "ongoing harm, or a risk of ongoing harm?" Further, § 5K2.7, p.s. (disruption of a governmental function) indicates that an upward departure may be warranted if the defendant's conduct resulted in "a significant disruption of a governmental function." That provision also states that "departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery and obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines

will reflect the appropriate punishment for such interference." Application note 5 can be consistent with § 5K2.7 if the term systematic and pervasive corruption (a relatively objective standard by comparison to the language of amendment 6(C)) is interpreted to be the unusual circumstances referred to in § 5K2.7. It probably is not possible to interpret the language of amendment 6(C) to be consistent with § 5K2.7.

Amendment 7
(Departures in public corruption cases)

Amendment 7 notes that 28 U.S.C. § 994(d) requires the Commission to assure that the guidelines are neutral as to race, sex, national origin, creed, and socioeconomic status. Amendment 7 also notes that some courts have based departures on cultural characteristics of a defendant or the collateral consequences to a defendant who is a public official. Amendment 7 then invites comment upon "how it might resolve these competing policy concerns." We do not see a need for Commission action.

The Commission has responded to 28 U.S.C. § 994(d) by providing that the factors set forth in section 994(d) "are not relevant in the determination of a sentence."[8] We believe that federal judgegs, when imposing sentence, are mindful of the need to avoid discrimination based upon the factors set forth in section 994(d). An appeal is the way to resolve whether a particular sentence is based upon an improper factor. If a judge does impose

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[8]U.S.S.G. § 5H1.10, p.s. The mandate to the Commission in 28 U.S.C. § 994(d) is to assure that "the guidelines and policy statements" are "entirely neutral" as to the listed factors. The Commission's policy statement thus goes beyond the mandate.

a sentence based upon an improper factor, the aggrieved party can appeal.

Amendment 8
(§ 2D1.1)

Amendment 8(A) would revise the drug quantity table of § 2D1.1 to make the mandatory minimum levels 24 and 30, instead of 26 and 32, and to set the upper limit of the table at level 38. We support the amendment.

The Commission has based the drug quantity table on the mandatory minimum quantities established by Congress.[9] In doing so, the Commission selected offense level 26 for five-year mandatory minimum quantities and offense level 32 for ten-year mandatory minimum quantities. The sentencing ranges for those offense levels, however, start above the five and ten years required by Congress. The Commission can continue to base the drug quantity table on the mandatory minimum quantities enacted by Congress by using offense levels 24 and 30 because the sentencing ranges for those offense levels include the five years and ten years mandated by Congress.

We support making level 38 the top level of the drug quantity table. At present, an organizer, leader, manager, or supervisor of a large scale drug offense receives no sentencing benefit from a plea of guilty. For example, a leader of a level 42 drug offense has an offense level of 46 (offense level of 42 from § 2D1.1

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[9]Ronnie M. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50, 52-54 (1990).

enhanced four levels under § 3B1.1). If the defendant does not accept responsibility, life imprisonment is required in all criminal history categories. If the defendant pleads guilty and accepts responsibility, life imprisonment is still required in all criminal history categories because the defendant's offense level would be level 43. If the top of the drug quantity table were 38, that same defendant would have an adjusted offense level of 42, which could be reduced to level 39 by pleading guilty and accepting responsibility. Level 39 yields a guideline range of 262-327 months in criminal history category I and 360 months to life in criminal history category VI.

Amendment 8(B) contains two options for amending § 2D1.1 with regard to weapon use and assault. Option 1 would add two enhancements -- a four-level enhancement if a firearm was discharged or a dangerous weapon otherwise used, and a two-level enhancement if the offense resulted in serious bodily injury (other than serious bodily injury covered by subsections (a)(1) and (2)). Option 2 would add a special instruction calling for creation of an artificial count by applying the attempted murder or aggravated assault guideline if the offense involved attempted murder or aggravated assault, and not grouping the artificial count with the drug trafficking count.[10] We oppose both options.

There has been no evidence of any problem with the gun

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[10]Option 2 would also define the term "aggravated assault" to include discharge of a firearm under circumstances creating a risk of serious bodily injury, without regard to whether the defendant intended to create such a risk, or knew that such a risk would result.

enhancement of the drug trafficking guideline. Unless there is evidence that courts are frequently departing for gun use, and those departures are resulting in disparate punishment, or evidence that the circumstances covered by the proposed new enhancement do not provide a basis for departing, we see no need to revise the gun enhancement. For similar reasons, we see no need to add an enhancement for serious bodily injury or the proposed special instruction.

Amendment 8(C) would cap the chapter two offense level for a defendant who receives a mitigating role adjustment. We support the amendment and suggest that the cap be level 30.

In our view, the guidelines result in inappropriately high offense levels for persons who are minimal or minor participants in most offenses. The large number of drug trafficking cases, however, makes the problem most acute with respect to drug offenses. Capping the offense levels for minor and minimal participants in drug trafficking offenses not only is consistent with the Commission's action in capping offense levels for minor and minimal participants in § 2D1.8 cases, but it also would result in more appropriate punishment for minor and minimal participants.

Amendment 8(D) invites comment upon whether the Commission should increase the enhancement for weapons, add an enhancement for violence, and use a broader range of quantity at each level in the drug quantity table. For a number of years, various Commissioners have stated that they believe that the drug guidelines are tied too closely to quantity. They have not, however, come forward with any

concrete proposal to remedy that perceived problem.

Quantity is not an inappropriate basis for measuring the severity of a drug trafficking offense. Congress has based mandatory minimum penalties primarily on quantity, so any proposal to use another measure of severity faces a difficult practical impediment. The offense levels produced by a revised guideline will have to yield offense levels high enough so that they are not routinely overridden by the mandatory minimums. Failure to yield such offense levels will result in increased and unjustified sentencing disparity. The difficulty in devising such a provision may explain why there has been talk but no concrete proposals have been put forth. We do not at this time support a broad redrafting of the drug trafficking guideline.

Amendment 9
(Aggravating role guideline)

Amendment 9 would revise § 3B1.1 by redefining the term "participant" and require that, to qualify for a three-level upward adjustment, the defendant manage or supervise four other participants. We support portions of this proposal.

We support the amendments to subsections (b) and (c). The changes to those subsections will prevent the odd result that a defendant who supervises one other person in an offense involving five persons gets a three-level enhancement, while a defendant who organizes and leads a four-person offense receives only a two-level enhancement. We also support the amendment to subsection (a), although we believe that the amendment should be modified. The amendment to subsection (b) deletes the phrase "or was otherwise

extensive." The amendment to subsection (a) does not. Subsections (a) and (b) should be coextensive, so we suggest modification of the amendment to subsection (a) so that it, too, deletes the phrase "or was otherwise extensive."

We also support the addition of new application note 4. A defendant should not receive adjustments under both the aggravating role and mitigating role guidelines. The sentencing court should weigh all of the circumstances to determine which of the two adjustments, if either, to apply. New application note 4 calls for such a result.

We oppose redefinition of the term "participant." We believe it inappropriate to include undercover law enforcement personnel as participants. The threat to society form a criminal enterprise penetrated by law enforcement is significantly less than the threat from a criminal enterprise that has not been so penetrated. In the former instance, law enforcement can act at any time to thwart the criminal enterprise from reaching its objectives, while in the latter instance law enforcement is virtually powerless until after the enterprise undertakes to accomplish its objectives. Sentencing policy should reflect the lesser threat. The cases where an innocent agent is utilized for criminal ends are few and can better be handled by departure.

Amendment 10
(Mitigating role guideline)

Amendment 10 would revise the introductory commentary to chapter 3, part B and § 3B1.2 and its commentary regarding who qualifies for a mitigating role adjustment. While there are parts

of the amendment that we support because they improve the guideline, there are other parts that we oppose as ill-advised.

We support the proposed revision of the introductory commentary to chapter 3, part B. The revised version would explain the relationship of the guidelines of chapter 3, part B, to the relevant conduct rule and the rationale behind those guidelines, and would make clear that the determination of whether a defendant qualifies for a mitigating role adjustment is to be based upon the defendant's behavior in relation to the relevant conduct for which the defendant is accountable. The court is not to look to some hypothetical offense to determine if the defendant qualifies for a mitigating role adjustment. The revised commentary is an improvement over the present introductory commentary.

We support the revised version of application note 1. The revised version, like the revised introductory commentary, underscores the role of the relevant conduct rule in applying the mitigating role adjustment.

We oppose revised application notes 2, 6, and 7. They are inconsistent with the approach to applying this guideline that is spelled out in the revised introductory commentary and revised application note 1. Whether a defendant qualifies for a mitigating role adjustment requires consideration of the defendant's conduct, the relevant conduct for which the defendant is being held accountable, and other relevant circumstances of the case. To single out certain factors supplants reasoned judgment of federal judges with rote application of a check list.

We support application note 3. The proposed language sets forth a principled basis for limiting a mitigating role adjustment.

We oppose revised application note 4 and new application note 5 for the same reason. A defendant's role in the offense turns upon the specific facts of the case. A defendant who possessed a gun, for example, can, in the context of the entire offense, be a minor participant in fact. The defendant's possession of the gun is a factor that will increase the defendant's offense level, so using gun possession to preclude a mitigating role adjustment is a form of unfair double counting.

We have no objection to new application note 8, although it seems somewhat insulting to federal judges to imply that they would find that a defendant qualified for a mitigating role adjustment "based solely on the defendant's bare assertion." It has not been our experience that a federal judge bases a determination upon a bare assertion, especially if that assertion comes from a defendant in a criminal case.

We support the amendment to the background note. The revision makes clear that the mitigating role determination is to be made solely on the basis of defendant's relevant conduct.

Amendment 11
(§ 2S1.1)

Amendment 11 would revise § 2S1.1 and § 2S1.2 to tie the offense levels more closely to the underlying offense. The amendment would consolidate the two guidelines, and the consolidated guideline would call for an offense level that is the greatest of three options -- (1) the offense level for the

underlying offense that produced the funds, if that offense level can be determined; (2) 12 plus an adjustment from the fraud table, if the defendant knew or believed the funds were the unlawful proceeds of an unlawful activity involving drug trafficking; and (3) eight plus an adjustment from the fraud table. The consolidated guideline also would have enhancements if (1) the defendant knew or believed that the transactions were designed to conceal the proceeds of criminal conduct or were to be used to promote further criminal activity; and (2) if the base offense level is determined by use of the offense level assigned to the underlying offense, the offense involved offshore transfer of funds or a sophisticated form of money laundering.

We find the consolidated guideline to be a reasonable method of determining offense severity, and we support this amendment.

Amendment 12
(More than minimal planning; loss in theft and fraud cases)

Amendment 12(A) -- More than minimal planning

Amendment 12(A) would revise the two-level enhancement found in several guidelines for "more than minimal planning." The amendment would authorize an enhancement when the offense involved "sophisticated planning" and would revise the commentary to explain when the enhancement should apply. We support this amendment.

The skill with which a defendant planned an offense is legitimately an aggravating factor. Skillful planning can make offense hard to detect and solve, and can make it less likely that defensive measures taken by potential victims will be effective. It is, therefore, appropriate to increase the offense levels of

those whose offenses were skillfully planned.

The Commission has attempted to do so by the enhancement for more than minimal planning. The Commission's attempt, unfortunately, has not worked out well. The term "more than minimal planning" is poorly defined, and as a result, the enhancement for "more than minimal planning" is routinely applied.[11] The shortcomings of the present definition are most pronounced in cases involving "repeated acts." The commentary defining more than minimal planning includes a statement that "'more than minimal planning' is deemed present in any case involving repeated acts over a period of time . . . ." That statement makes it possible to apply the enhancement in virtually every fraud or theft case where there was more than one theft or fraudulent representation -- even in simple cases which required little or no planning. We believe that the amendment will make clear that the two-level enhancement is to be based on the sophisticated nature of the offense rather than on the number of acts. Further, we believe that the amendment will avoid unwarranted disparity by ensuring that the enhancement will apply only to those who are particularly skillful at planning and executing offenses.

Amendment 12(B) would raise the base offense level of § 2B1.1 to six to conform with the base offense level of § 2F1.1. We do

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[11]From October 1, 1991 through September 30, 1992, the enhancement for more than minimal planning was applied in 71.2% of the sentences imposed under § 2F1.1 using the 1989-1991 guidelines, and in 78% of the cases sentenced under the 1988 guidelines. U.S. Sentencing Com'n, 1992 Annual Report, at table 56.

not oppose equalizing the two base offense levels. It is not clear, however, why the Commission did not seek comment on an equally valid way to make the base offense levels consistent -- reducing the base offense level of § 2F1.1 to four. There is no indication that the current base offense level of four in § 2B1.1 is inappropriate, and we fail to understand why it should be raised to six.

Amendment 12(C) asks for comment as to whether the loss tables should be revised to provide for a "more uniform slope." The options set forth would achieve more uniformity by increasing offense levels for loss. There is no evidence to suggest that increasing offense levels is necessary or appropriate.

We therefore oppose options 1 and 2. We believe, however, that the loss tables can be revised to address a real problem. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. We believe that the loss tables can be improved by using two-level increments, as is done in the drug quantity table of § 2D1.1. The simplest way to achieve that result is to delete all entries in the tables that call for an odd-numbered enhancement.

Amendment 13
(Career offender guideline)

Amendment 13(B) -- Offense statutory maximum

Amendment 13(B) would amend the commentary in § 4B1.1 to

revise the definition of "offense statutory maximum" for purposes of the career offender guideline. As revised, the definition would state that "offense statutory maximum" means the maximum term of imprisonment before any enhancement based upon the defendant's prior convictions. We support this amendment.

The offense level and criminal history category under the career offender guideline is determined by the statutory maximum of the offense. To use the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category is inappropriate double-counting.

Amendment 13(C) -- Definition of prior felony convictions

Amendment 13(C) offers two options that would revise the definition of the term "two prior felony convictions" in subsection (3) of § 4B1.2. Option 1 would require that the two predicate convictions result from offenses separated by an intervening arrest. Option 2, in addition to the language in Option 1, would require that certain prior felony convictions be counted separately.

Congress in the Sentencing Reform Act of 1984 directed the Commission to insure that career offenders receive a sentence "at or near the maximum term authorized for categories of defendants."[12] The Commission has interpreted this phrase to require the career offender guideline to provide a sentence at or

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[12]28 U.S.C. § 994(h) (enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2021).

near the statutory maximum.[13] Such severe penalties should be reserved for those serious repeat offenders who have failed to respond to punishment.

Recidivist statutes have traditionally been based on the theory that a defendant who continues to commit crimes after being punished deserves harsher sanctions. We support Option 1 as a step toward focusing the application of the career offender penalties on three-time recidivists by requiring that predicate convictions be separated by an intervening arrest. As amended, the career offender guideline would apply to other than true recidivists (because there is no requirement that the offenses be separated by a conviction), but it would at least be limited to those defendants who continued to commit crimes after some criminal justice system intervention.[14]

We oppose Option 2. The exception to the intervening arrest requirement proposed in Option 2 is inconsistent with making the career offender guideline a recidivist provision. Instead, this would make the career offender provision a multiple offense enhancement for one category of offenses, and not for others.

Amendment 13(D) would add language to the commentary to § 4B1.2 to make clear that to be a crime of violence, a burglary must

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[13]U.S.S.G. § 4B1.1, comment. (backg'd).

[14]The Commission has, in another context, considered arrest to be a significant contact with the criminal justice system. Amendment 382, which took effect November 1, 1991, revised the related case doctrine to provide that prior sentences cannot be considered related (and therefore must be counted separately when determining criminal history score) if they were for offenses that were separated by an intervening arrest.

be "of a dwelling (including any adjacent outbuilding considered part of the dwelling)." We support the amendment.[15]

As originally promulgated, the career offender guideline defined "crime of violence" to include all burglaries, but in 1989 the Commission revised the definition to include only burglary of a dwelling.[16] By limiting the applicability of § 4B1.1 to burglaries of a dwelling, the Commission acted to effectuate the Congressional purpose of insuring that the harsh penalties called for by the career offender guideline be reserved for recidivist defendants with the most serious criminal records. Residential burglary traditionally has been considered a more serious offense than other types of burglary because of the increased threat to people in their own homes.

Amendment 13(E) would revise the commentary to § 4B1.2 to clarify that crimes of violence that "otherwise involve a serious risk of physical injury" be confined to those offenses that are similar to the enumerated offenses. We support this amendment.

If the goal of the career offender guideline is to punish those recidivist defendants with serious criminal records, then the applicability of the guideline should focus on those enumerated offenses. In the rare instance when the prior offense is clearly a crime of violence, but not similar to one of the enumerated

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[15]We believe that the term "adjacent" in the phrase "any adjacent outbuilding" renders the parenthetical ambiguous and likely to foster litigation. We therefore recommend using the phrase "any attached building."

[16]U.S.S.G. App. C, amend. 268.

offenses, U.S.S.G. § 4A1.3 authorizes the court to depart accordingly.

Amendment 14
(Departures)

Amendment 14 would revise the introductory commentary to chapter five, part H, to state that although certain factors are not ordinarily relevant to a departure decision, "they may be relevant to this determination in exceptional cases." In addition, amendment 14 would revise § 5K2.0, p.s. to state that a factor not ordinarily relevant to a decision to depart may be relevant to such a decision if the factor is present to an unusual degree. Finally amendment 14 would revise the commentary to § 5K2.0 to set forth "a useful analytic framework for the consideration of circumstances that may warrant a departure from the applicable guideline range." We support the revisions of the introductory commentary and the text of § 5K2.0. We oppose the revision of the commentary to § 5K2.0.

We would have thought that logic and common sense indicate that a statement that a factor is not ordinarily relevant implies that there are circumstances when that factor is relevant. A Seventh Circuit case, however, has undercut our faith in logic and common sense by holding that "not ordinarily" really means never.[17]

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[17]United States v. Thomas, 930 F.2d 526, 529-30 (7th Cir.), cert. denied, 112 S.Ct.171 (1991). In an appeal from the district court's sentence following the remand in Thomas, the Seventh Circuit suggested that it might no longer adhere to the earlier decision. United States v. Thomas, 11 F.3d 732, 736 (7th Cir. 1993) (noting that the prior decision in the case was based on language in § 5H1.6 that has been deleted).

We believe that the revision of the introductory commentary and the text of § 5K2.0 is necessary to make clear even to the Seventh Circuit that although a given factor is not ordinarily relevant to a departure decision, that factor can be relevant to such a decision in extraordinary circumstances.

We oppose the amendment to the commentary to § 5K2.0 because we do not believe it appropriate for the Commission to tell federal courts how to analyze a case to decide if a departure is warranted. The Commission's role is to set forth what factors have been considered, and the extent to which they have been considered. It is up to the sentencing court to determine if a factor present in the case was inadequately considered by the Commission. We also believe that some of the language set forth in the proposed new commentary is not a correct statement of the law. The second question, for example -- "Has the Commission forbidden departures based on those features?" -- assumes that the Commission has been delegated the authority to preclude a departure entirely. We do not believe that the Commission has such authority.

Congress has directed sentencing courts to impose a sentence called for by the guidelines unless there is an aggravating or mitigating circumstance that the guidelines do not adequately account for. At bottom, then, the sentencing court must determine whether it has the legal authority to depart, that is whether a circumstance of the case has been adequately accounted for by the guidelines. Such a determination can only be made in the context of an actual case -- as the Commission itself recognizes in the

text of § 5K2.0.[18] Policy statements in chapter 5, part H, that state that a factor is not relevant to a departure decision either stem from a Congressional mandate to include such a statement (as in the case of § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status)) or else must be interpreted as a statement by the Commission that the factor involved has been considered by the Commission. A sentencing court, however, could depart if the court found that factor to be present to an unusual degree not contemplated by the Commission in formulating the guidelines.

Amendment 15
(Consolidation of guidelines)

The synopsis of amendment 15 claims that the purpose of the amendment is to "simplify further the operation of the guidelines." In many instances, the changes to the guidelines made by amendment 15 do much more than simplify application. Many of the consolidations also make a change in policy by expanding the use of cross-references, thereby shifting the guidelines closer toward a real offense sentencing system . The effect of the proliferation of cross-references is to reduce the government's burden of proof and to have facts found by a judge instead of a jury.

When formulating the initial set of guidelines, the Commission found that there was no practical way to construct a pure "real

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[18]"The controlling decision as to whether and to what extent departure is warranted can only be made by the courts." See also U.S.S.G. ch. 6, pt. B, intro. comment. ("the policy statements [of chapter 6, part B] make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge").

offense" system, and instead "moved closer to a charge offense system."[19] If the Commission wants to have a real offense system, it ought to do so directly, rather than on an ad hoc basis. The increased use of cross-references is rendering the count of conviction almost meaningless.

We support those parts of amendment 15 that simply consolidate. We oppose the following parts of amendment 15 because they also make a change in policy.

Amendment 15(A) would consolidate § 2A2.3 and § 2A2.4, the guidelines that apply to obstructing or impeding officers and minor assault. The consolidated guideline would include a cross-reference that calls for use of § 2A2.2 if the offense involves an aggravated assault. At present, § 2A2.4 has a cross-reference to § 2A2.2, but § 2A2.3, the guideline for minor assault, does not. The effect of this amendment is to make § 2A2.3 a mere conduit to § 2A2.2. We oppose this amendment for the reasons stated above.

Amendment 15(C) would consolidate § 2D2.1 (acquiring a controlled substance by forgery, fraud, deceit, or subterfuge) with § 2D2.1 (unlawful possession; attempt or conspiracy). The amendment would add a specific offense characteristic to § 2D2.1 to require an offense level of eight if the offense involved what is an essential element of 18 U.S.C. § 843(a)(3) -- acquiring a controlled substance by forgery, fraud, deception, or subterfuge. The amendment would make the statute obsolete by reducing the burden of proof to a mere preponderance for the essential element

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[19]U.S.S.G. ch. 1, pt. A(4)(a).

that distinguishes simple possession from a violation of 18 U.S.C. § 843(a)(3).

Amendment 15(E) would consolidate § 2G1.2 (transportation of a minor for the purpose of prostitution or prohibited sexual conduct) with § 2G1.1 (transportation for the purpose of prostitution or prohibited sexual conduct). We oppose this amendment.

The consolidated guideline will result in rendering the offense of conviction irrelevant in many cases. For example, if a defendant is convicted of 18 U.S.C. § 2421 and the persons transported are 17 years old, the defendant's offense level is 14 if there were no threats, force or drugs involved. Under consolidated guideline, the defendant's offense level would be 16.

Amendment 15(F) would consolidate § 2N3.1 (odometer laws and regulations) with § 2F1.1 (fraud and deceit, forgery, counterfeit instruments). The cross-reference to § 2F1.1 will now apply in those cases where only one vehicle is involved. This amendment changes the treatment of one vehicle cases without any stated justification. We oppose this amendment.

Amendment 15(G) would consolidate § 2T2.2 (regulatory offenses) and § 2T1.1 (tax evasion; willful failure to file return). Regulatory offenses would now be subject to the tax table and the base offense level would be raised from four to six. Without some explanatory rationale for this shift in policy, we oppose this amendment.

Amendment 16
(Aging prisoners)

This amendment invites comment on whether and how the Commission should act to allow for greater sentencing flexibility or for modification of sentences for older, infirm defendants. We suggest that the Commission exercise its authority under 28 U.S.C. § 992(t) to describe circumstances based on health or age that would warrant modifying a sentence. The Commission should encourage the Bureau of Prisons and the courts to exercise their authority under 28 U.S.C. § 3582(c) to adjust sentences of defendants with deteriorating physical conditions. Because the Commission has no direct authority to shorten sentences, we suggest that the Commission provide for more flexibility at the initial sentencing so that the sentencing court can take into account more fully factors such as age and deteriorating health which are present or foreseeable at the sentencing.

Amendment 17
(Miscellaneous amendments)

Amendment 17(A) -- § 1B1.3

Amendment 17(A) would add commentary to § 1B1.3 to clarify that a defendant's relevant conduct does not include conduct of members of a conspiracy that occurred before the defendant joined the conspiracy. In addition, this amendment would add language to define "same course of conduct." We support this amendment.

The relevant conduct rule of § 1B1.3(a)(1)(B) makes a defendant, in the case of jointly undertaken criminal activity, accountable for conduct of others in furtherance of that activity

if the conduct was reasonably foreseeable. In ordinary usage, the term "foreseeable" refers to something that will occur in the future.[20] No one can "foresee" something that happened in the past. Thus, the literal meaning of § 1B1.3(a)((1)(B) is that a defendant is accountable for conduct that occurs after the defendant enters into the jointly undertaken activity if that conduct was reasonably foreseeable and in furtherance of the joint activity.

Several circuits, however, have chosen not to adopt ordinary usage and have held a defendant accountable for conduct taking place before the defendant entered the jointly undertaken criminal activity. In doing so, the Seventh Circuit acknowledged that "the concept of foreseeability (a forward-looking concept) must be turned around 180 degrees."[21] The Seventh Circuit's approach has been sharply criticized by other circuits[22] and seems to be at odds with the Commission's intention.[23] Amendment 17(A) will forestall

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[20]The American Heritage Dictionary 524 (2d college ed. 1991) (foresee means "to see or know beforehand").

[21]United States v. Edwards, 945 F.2d 1387 (7th Cir. 1991), cert. denied, 112 S.Ct. 1590 (1992).

[22]See United States v. O'Campo, 973 F.2d 1015, 1024 (1st Cir. 1992) ("we decline to engage in a construction of the language of foreseeability that requires such a forced linguistic volte-face"); United States v. Petty, 992 F.2d 887, 890 (9th Cir. 1993) ("we do not see how a court has authority to turn a concept 'around 180 degrees'").

[23]An earlier version of the relevant conduct rule for concerted activity had made a defendant accountable for what the defendant knew or reasonably should have known, but that language was deleted effective November 1, 1989, U.S.S.G. App. C, amend. 78, indicating that the Commission did not want such broad accountability.

further litigation on the issue.

We also support expanding the commentary to describe "same course of conduct." At present, there is no real definition of the term "same course of conduct," and the proposed language should help in the application of the guideline.

Amendment 17(C) -- § 2B5.1

Amendment 17(C) would amend § 2B5.1 (offenses involving counterfeit bearer obligations of the United States) to clarify that § 2B5.1(b)(2) can apply to photocopying of notes and that discarded or defective items are not to be counted when applying § 2B5.1(b)(1). We support the amendment. Technological improvements make it possible for a photocopy to produce items that are not "so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." Items that are not intended for circulation pose no risk of harm and should not be used to calculate the severity of an offense.

Amendment 17(D) -- Hashish; moisture in marijuana

Amendment 17(D) would, inter alia, revise application note 1 to § 2D1.1 to state that for marijuana with a moisture content that renders the marijuana unsuitable for consumption, "an approximation of the weight of the marijuana without such excess moisture content is to be used." We support that revision.

The Commission last year amended application note 1 to state that the term "mixture or substance" does not include material that must be separated from the controlled substance before the

controlled substance can be used.[24] While the language added by that amendment should cover marijuana with excess moisture -- the moisture is a material that must be removed before the marijuana can be used -- in light of cases approving use of the weight of the moist marijuana, it seems advisable to include language specifically addressing marijuana.[25]

Amendment 17(E) -- § 2D1.2 and § 3B1.2

Amendment 17(E) would revise commentary to § 2D1.2 to state that the aggravating role guideline applies independently of § 2D1.2. We oppose the amendment as unnecessary in view of the Commission's amendment last term to § 1B1.1.[26]

Amendment 17(I) -- § 2K2.2

Amendment 17(I) would add an application note to § 2K2.1 to address the operation of the cross-reference provision of that guideline. The amendment would require that when § 2K2.1(c)(1) calls for application of another offense guideline, the entire guideline must be applied. Thus, any enhancement for use or possession of a weapon would be added.

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[24]U.S.S.G. App. C, amend. 484.

[25]United States v. Garcia, 925 F.2d 170 (7th Cir. 1991); United States v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992). These cases were decided before the amendment 484 took effect. The Commission did not expressly refer to moisture in marijuana in the published materials concerning amendment 484, so specifically addressing the matter would forestall litigation over whether amendment 484 was intended to cover moisture in marijuana.

[26]U.S.S.G. App. C, amend. 497. Amendment 497 added language to the commentary to § 1B1.1 that provides that "absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together)."

We oppose this amendment because it would allow conduct for which the defendant has not been convicted to be used as the primary measure of a defendant's offense level -- and then would add enhancements for the underlying offense that required the cross-reference in the first place. In a Second Circuit case, for instance, the defendant was acquitted of narcotics offenses and convicted of a weapon offense.[27] Section 2K2.1(c)(1) required the application of § 2D1.1, including the gun enhancement of § 2D1.1(b)(1). As the Second Circuit observed, "to add to the narcotics offense level, chosen only to reflect the circumstances of the weapons offenses, an increment for possessing weapons is tantamount to adding an increase on the basis that the defendant possessed weapons in the course of possessing weapons."[28]

Amendment 17(J) -- § 2K2.4

Amendment 17(J) would amend application note 2 to § 2K2.4 by stating that when a sentence under § 2K2.4 is imposed with a sentence for an underlying offense, the court is not to apply any weapon enhancement when calculating the offense level of the underlying offense. The amendment also would add to application note 2 examples of guideline provisions that would not be applied. We support the amendment.

The purpose of application note 2 is to prevent unfair double counting. The changes made by amendment 17(J) will make § 2K2.4

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[27]United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), cert. denied, 114 S.Ct. 163 (1993).

[28]Id. at 390.

easier to apply and are consistent with the purpose of application note 2.

Amendment 17(M) -- § 3D1.2

Amendment 17(M) would add six offense guidelines to the list of offense guidelines subject to grouping under § 3D1.2(d). We support the amendment. The guidelines that would be added appear to us to meet the criteria of § 3D1.2(d), and their inclusion in the list will make application of the grouping rules easier.

Amendment 17(O) -- § 5G1.1 and § 5G1.2

Amendment 17(O) would revise the commentary to § 5G1.1 to state that when multiple terms of supervised release are imposed, they must run concurrently. Amendment 17(O) would also revise the commentary to § 5G1.2 to state that if a consecutive sentence is imposed under § 5G1.2(a), any term of supervised release following that term of imprisonment must run concurrently with any other term of supervised release to which the defendant is subject. We support the amendment.

The result called for by the new language is required by 18 U.S.C. § 3624(e). We believe it appropriate for the commentary to § 5G1.1 and § 5G1.2 to point this out.

Amendment 17(Q) -- § 7B1.1

Amendment 17(Q) presents two options for classifying false statements to probation officers for purposes of revocation of probation or supervised release. Option 1 would treat such a false statement as a Grade C violation. Option 2 would treat such a false statement as a Grade B violation. We support option 1.

False statements are rarely, if ever, prosecuted as felonies under 18 U.S.C. § 1001, so they can be most appropriately classified as Grade C violations. Because most false statements are never prosecuted, classifying them as Grade B violations would result in a tremendous deviation from current practice without any evidence that the current practice is inadequate.

Amendment 18
(§ 1B1.3)

Amendment 18, proposed by the Practitioners' Advisory Group, would amend § 1B1.3 to preclude consideration of acquitted conduct, except as a basis for an upward departure. We support the exclusion of acquitted conduct from the relevant conduct rule, but we oppose allowing acquitted conduct to be used as a basis for an upward departure. We have found that most people -- judges, clients, the public -- are dumbfounded by basing punishment on conduct for which a person has been found not guilty in a court of law. Most people equate an acquittal with vindication. While courts of the past were allowed to consider acquitted conduct when determining a sentence, those courts were not required to do so. Before the guidelines, courts were also allowed to consider factors that are now deemed "not relevant" or "not ordinarily relevant." The systematic use of acquitted conduct to determine a sentence cannot be justified solely on the argument that there is a lower burden of persuasion at sentencing.

The proposed amendment would help to restore some sense of fairness to the sentencing process. The use of acquitted conduct as a basis for departure, however, would be inconsistent with the

principle precluding the use of acquitted conduct and would lead to unwarranted disparate punishment.

Amendment 19
(Retroactivity)

Amendment 19 would revise § 1B1.10 and its commentary. We support the changes to subsection (a) of the guideline because they clarify that subsection. We also support the deletion of subsection (c). Deletion of subsection (c) will return a limited measure of discretion to the sentencing court.

The revision of subsection (b), while clarifying that subsection, continues a flawed policy by requiring the use of harsher provisions not in effect when the defendant committed the offense. We believe that the better approach is to use the Guidelines Manual originally used to sentence the defendant, modified by the amendments listed in § 1B1.10. We therefore suggest that the Commission revise subsection (b) as recommended by the Judicial Conference's Criminal Law Committee in amendment 31.

We oppose proposed changes to the commentary that are inconsistent with the above views on subsections (b) and (c).

Amendment 20
(Theft and fraud)

Amendment 20(A) would revise application note 7 to § 2F1.1 concerning loss. We consider the revision to be clarifying and editorial, and we support the amendment.

Amendment 20(B) invites comment on whether to conform the commentary to § 2B1.1 with the commentary to § 2F1.1 by stating

that (1) loss should be reduced to reflect the amount the victim has recovered before discovery of the offense, and (2) actual loss can significantly overstate or understate the seriousness of the defendant's conduct and may warrant a departure. We support the amendment. The severity of an offense covered by § 2B1.1 should be determined on the basis of the actual loss to the victim. Using other than actual loss artificially inflates the value of the loss and fosters unjustified disparity.

Amendment 20(C) invites comment on whether to revise the provisions in chapter 2, parts B and F, to clarify that interest is not included, under any circumstances, in loss. The Commission has adopted a policy that interest is not a component of loss.[29] Because there is at least one decision that is not consistent with this policy,[30] we believe it advisable for the Commission to reemphasize its policy.

Amendment 21
(§ 2X1.1)

Amendment 21 would revise § 2X1.1 by consolidating subsections (b)(1), (2), and (3) and would revise the commentary to set forth when this guideline, rather than an offense guideline of chapter 2, is to be used. We support the amendment.

Section 2X1.1 is the offense guideline for an attempt,

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[29]U.S.S.G. App. C, amend. 470 ("this amendment clarifies that interest is not included in the determination of loss").

[30]United States v. Lowder, 5 F.3d 467, 470-71 (10th Cir. 1993). There is one other case excluding interest, but it was decided before the Commission adopted amendment 470. United States v. Jones, 933 F.2d 353 (6th Cir. 1991).

solicitation, or conspiracy not covered by another offense guideline in chapter 2. The revision of the text of the guideline would eliminate repetitious language and set forth more clearly the policy of subsection (b).

The revision of the commentary is necessary to cure an ambiguity. Section 2X1.1 applies only if the attempt, solicitation, or conspiracy is not covered by another chapter 2 offense guideline. How does the court determine if an attempt, for example, is covered by another chapter 2 offense guideline? The present version of § 2X1.1 is not as helpful as it could be in answering this question.

Application note 1 presently lists offense guidelines that expressly cover attempts, but the list is not comprehensive. Does § 2X1.1 apply if the attempted offense is covered by an offense guideline that is not included in the list in application note 1? The Commission has not set forth a principle for determining whether § 2X1.1 applies to such an offense. Amendment 21 would cure the ambiguity by revising application note 1 to state, in effect, that § 2X1.1 applies to an offense covered by a chapter 2 offense guideline that is not on the list unless the caption of that guideline states that the guideline applies to an attempt. This is a clear and workable rule.

Amendment 22
(§ 5K2.13, p.s.)

Amendment 22 sets forth two options for revising § 5K2.13, p.s. Option 1 would revise the policy statement to provide that a departure downward for diminished capacity may be warranted for a

defendant convicted of any offense if the circumstances of the offense and the defendant's characteristics do not indicate a need for incarceration to protect the public. Option 2 would revise the policy statement to provide that, absent extraordinary circumstances, a downward departure for diminished capacity is not warranted for a defendant convicted of a crime of violence. Option 2 would also require a finding that the circumstances of the offense and the defendant's characteristics do not indicate a need for incarceration to protect the public. We support option 1.

The present policy statement, unfortunately, introduced a unique term to guidelines lexicon, "non-violent offense." Predictably, there has been litigation as to what "non-violent offense" encompasses.[31] The Commission has thus far given no guidance as to what it intends the term to mean. Amendment 22 would give such guidance.

We believe that option 1 sets forth the policy most consistent with what Congress intended in the Sentencing Reform Act of 1984. Under option 1, a court could depart in any case for the defendant's diminished capacity. Public safety is protected by the provision that the court consider the nature and circumstances of

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[31]United States v. Chatman, 986 F.2d 1446, 1448-53 (D.C. Cir. 1993) (whether an offense is nonviolent requires the court to "consider all the facts and circumstances of a case"); United States v. Poff, 926 F.2d 588 (7th Cir.), cert. denied, 112 S.Ct. 96 (1991) (a nonviolent offense cannot be a crime of violence as defined in the career offender guideline). But see id. at 593-96 (Easterbrook, J. dissenting) ("the reasons behind § 5K2.13 combine with the presumption that different terms in a carefully drafted code such as the guidelines connote different things to lead me to conclude that 'non-violent offenses' refers to crimes that in the even did not entail violence").

the offense and the history and characteristics of the defendant and determine whether public safety requires incarceration. We believe that federal judges can be trusted to make such determinations responsibly.

We oppose option 2, which would preclude a diminished capacity departure if the defendant is convicted of a "crime of violence," as defined in the career offender guideline. The definition of crime of violence is overly broad and a defendant convicted of such an offense may present no serious threat to the public. In our experience, for example, persons with psychological problems who send threatening letters to public officials -- crimes of violence within the meaning of the career offender guideline -- frequently present no serious threat to the public. Such persons lack the capacity or intention to follow through on their threats, yet a downward departure would be precluded.

Amendment 23
(§ 5G1.3)

Amendment 23, proposed by the Probation Officers' Advisory Group, would revise § 5G1.3(c) to provide that in cases not covered by subsections (a) or (b), the sentence for the instant offense can run concurrently with or consecutive to the pending undischarged term of imprisonment. The amendment would also completely rewrite application note 3, deleting the illustrations. Revised application note 3 would suggest use of the grouping rules to determine the sentence that would have been imposed had all of the offenses been federal and sentence been imposed at one time, but would provide that this not be done if to do so would prolong or

complicate the sentencing process.[32] We oppose the amendment.

The amendment would leave completely unstructured a sentencing determination that can have significant consequences. The present standard of "reasonable incremental punishment" would be replaced by unfettered discretion of the kind that Congress sought to eliminate when enacting the Sentencing Reform Act of 1984. The amendment thus would undercut one of the important goals of sentencing, avoiding unjustified disparity.

There are two steps involved in applying § 5G1.3(c). The first is to determine what is an incremental punishment. Under the guideline as presently written, this is determined by treating the instant offense and the offenses with undischarged terms of imprisonment as if they were all federal offenses for which sentence was about to be imposed. The grouping rules of chapter 3, part D, are used to determine the guideline range that would have applied, and the court determines what sentence would have been imposed. Under the present guideline, if collecting the information necessary to carry out this step would unduly complicate or prolong the sentencing process, this step (and, consequently, the next step as well) need not be taken, and the court can use some other way to determine what constitutes "reasonable incremental punishment."

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[32]The proposed standard "prolongs or complicates" is inappropriate. Anything that a probation officer is required to do to prepare a presentence report -- such as verify a defendant's employment -- will prolong the sentencing process. The formulation in present application note 3, "unduly complicates or prolongs," is more appropriate.

The second step is to fashion a sentence in the instant case that results in the total punishment that the court has determined to be appropriate. There are ways of doing this that cannot be thwarted, for example, by a state's action to shorten prison terms to relieve a prison overcrowding problem.[33]

We believe that § 5G1.3(c) as presently written avoids unjustified disparity and is not as difficult to apply as has been claimed. While this amendment, if promulgated, might make a probation officer's job easier, the cost -- inconsistent and unjustifiably disparate results -- is too high.

Amendment 24
(§ 2D1.1)

Amendment 24 would revise application note 12 to the drug trafficking guideline to state that in an offense involving negotiations for a controlled substance, the quantity under negotiation is to be used to determine the offense level unless the completed transaction establishes a greater quantity. Amendment 24 would also amend application note 12 to state that when the quantity used to determine the offense level is based upon a negotiated amount, the sentencing court is to exclude any amount that the defendant was not reasonably capable of producing or did not intend to produce. We support this amendment.

If a drug trafficking case involves negotiating a quantity, § 2D1.1 bases offense severity upon the amount under negotiation.

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[33]Letter from John Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy chief U.S. Probation Officer, Eastern District of New York (Jan. 6, 1994).

This, we believe, is a fair way to determine offense severity, but only if the defendant was reasonably capable of trafficking in the quantity under negotiation and the defendant actually intended to traffick in that quantity. If the defendant was not reasonably capable of trafficking in the quantity under negotiation, then the defendant's intention is irrelevant. Likewise, if the defendant did not intend to deliver (or purchase) the amount under negotiation, then the defendant's reasonable capability is irrelevant. Amendment 24 would revise application note 12 to embody this policy.

Amendment 25
(§ 2P1.1)

Amendment 25 would revise § 2P1.1(b)(3), which reduces a defendant's offense level by four levels if the defendant "escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility." Option 1 would revise § 2P1.1(b)(3) to be consistent with § 2P1.1(b)(2) and apply to escape from any "non-secure custody." Option 2 would revise subsection (b)(3) to preclude application of the adjustment to failure to return from a furlough. Under both options, as is presently the case, there would be no downward adjustment if the defendant while in escape status committed a offense punishable by imprisonment for more than one year. We support option 1.

The base offense level of the escape guideline assumes escape from a secure facility. The Commission has authorized two downward adjustments if the escape was from other than a secure facility.

The greater reduction authorized by § 2P1.1(b)(2) applies if the defendant escapes from "non-secure custody" and returns to custody within 96 hours. The lesser reduction authorized by § 2P1.1(b)(3) applies if the defendant escapes from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility, and does not return to custody within 96 hours. A problem arises when a defendant who has been furloughed fails to return from furlough.

The definition of non-secure custody in application note 1 includes failing to return from furlough, so the greater reduction of § 2P1.1(b)(2) applies. The wording of § 2P1.1(b)(3), however -- "non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility" -- appears to preclude application of the lesser reduction.[34]

The Commission has never indicated why the scope of subsection (b)(3) should be narrower than the scope of subsection (b)(2). We see no significant difference between walking away from a halfway

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[34]See United States v. Tapia, 981 F.2d 1194, 1197-98 (11th Cir.), cert. denied, 113 S.Ct. 2979 (1993) (subsection (b)(3) inapplicable where defendant walked away from work detail outside security perimeter of prison camp); United States v. Shaw, 979 F.2d 41, 44 (5th Cir. 1992) (subsection (b)(3) inapplicable where defendant walked away from prison camp); United States v. Brownlee, 970 F.2d 764, 765 (10th Cir. 1992) (prison camp not a "similar facility" within meaning of subsection (b)(3)); United States v. McGann, 960 F.2d 846 (9th Cir.), cert. denied, 113 S.Ct. 276 (1992) (same). But see United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993) (the Commission's inclusion of the 'similar facility' language [of subsection (b)(3)] indicates that the Commission intended the courts to determine on a case-by-case basis whether the conditions as a specific prison camp are sufficiently similar [to a community corrections center, community treatment center, or halfway house] to warrant a sentence reduction under § 2P1.1(b)(3)").

house and failing to return on time from a furlough. Neither does the Commission when it comes to the greater reduction. We support making subsections (b)(2) and (b)(3) consistent, as proposed in option 1.

Amendment 27
(§ 2K2.1 and 2K2.5)

Amendment 27, published at the request of the Department of Justice, would add identical specific offense characteristics to § 2K2.1 and § 2K2.5. The new specific offense characteristics would increase the defendant's offense level by four levels if a defendant committed the offense "as a member of, on behalf of, or in association with a criminal gang." The term "criminal gang" would be defined as "a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2."

We oppose the amendment, which is similar to a proposal rejected by the Commission last year. The Commission's own working group on violent crime in 1992 issued a report that revealed the many difficulties involved in establishing a suitable definition of "gang".[35] Neither law enforcement nor academic communities have reached a consensus about how to define those terms. The

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[35]"For example, someone, somewhere, would have to decide whether a group 1) had an identifiable leadership; 2) claimed control over a particular territory; 3) recognized itself as a 'denotable group'; 4) was a distinct aggregation; or 5) had been involved in a sufficient number of unlawful activities to create a consistent negative response from the community." S. Winarsky et al., Violent Crimes/Firearms/Gangs Working Group Report 52 (Oct. 14, 1992).

The second step is to fashion a sentence in the instant case that results in the total punishment that the court has determined to be appropriate. There are ways of doing this that cannot be thwarted, for example, by a state's action to shorten prison terms to relieve a prison overcrowding problem.[33]

We believe that § 5G1.3(c) as presently written avoids unjustified disparity and is not as difficult to apply as has been claimed. While this amendment, if promulgated, might make a probation officer's job easier, the cost -- inconsistent and unjustifiably disparate results -- is too high.

Amendment 24
(§ 2D1.1)

Amendment 24 would revise application note 12 to the drug trafficking guideline to state that in an offense involving negotiations for a controlled substance, the quantity under negotiation is to be used to determine the offense level unless the completed transaction establishes a greater quantity. Amendment 24 would also amend application note 12 to state that when the quantity used to determine the offense level is based upon a negotiated amount, the sentencing court is to exclude any amount that the defendant was not reasonably capable of producing or did not intend to produce. We support this amendment.

If a drug trafficking case involves negotiating a quantity, § 2D1.1 bases offense severity upon the amount under negotiation.

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[33]Letter from John Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy Chief U.S. Probation Officer, Eastern District of New York (Jan. 6, 1994).

larger the group and the more diverse its membership, the more likely the group would be considered a "gang" under the suggested definition. Applying such a broad definition poses serious constitutional problems as well.[39]

Amendment 28
(§ 2K2.5)

Amendment 28, published at the request of the Department of Justice, invites comment on whether to expand § 2K2.5 by adding enhancements to raise the offense level "if the firearm was discharged or loaded or if the defendant possessed both a firearm and ammunition in a school zone." The amendment also asks for comment on whether § 2K2.5 should include enhancements now found only in § 2K2.1, such as an enhancement based on the number of weapons possessed. Finally, the amendment invites comment on whether to raise the base offense level of § 2K2.1 from 12 to 14 "for persons who sell firearms with knowledge or reason to believe that the recipient is a felon or other prohibited person or an underage person."

We do not believe that any change in § 2K2.5 is warranted. The Department of Justice has presented no evidence of any problems with § 2K2.5. The guideline already has cross-references to deal with cases where the defendant possessed a weapon in connection with another offense, or an attempt to commit another offense.

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[39]Last year's working group report discussed three of these problems, including conflicts with the "void for vagueness" doctrine, the "overbreadth" doctrine, and unconstitutional restrictions of the right of freedom of association. Id. at 58.

Amendment 29
(Gang membership)

Amendment 29, published at the request of the Department of Justice, invites comment on whether to add an enhancement "applicable to members of criminal organizations who expressly agree, or require others to agree, to commit a crime of violence as a formal condition of membership." We oppose the amendment.

We do not support enhancing a sentence based on someone's affiliation with an organization, particularly when there is no connection between the offense committed and the defendant's membership in the organization. Like amendment 27, the proposed enhancement has application problems as well. What would constitute a criminal organization? It is common knowledge that some college fraternities have hazing practices that amount to commission of a crime of violence. Does the Department of Justice want to increase the sentences of people solely because they belong to a fraternity?

Even without the application problems inherent in this type of enhancement, this amendment is unnecessary because we are not aware of a significant number of federal offenses involving organizations that have crime of violence initiation rites. In our view, the best way to deal with a violent offense that can be directly attributable to an initiation rite is through a departure.

Amendment 30
(§ 4A1.1 and chapter 5, part A)

Amendment 30, published at the request of the Department of Justice, invites comment on whether to expand the distinctions in

assigning points for criminal history. We do not believe that any substantial revision in calculating criminal history points or in the sentencing table would be justified at this time. The Justice Department has not identified any major problems with the rules of chapter 4, part A, or with the sentencing table, that call for major changes. In any event, changes of such a magnitude should be preceded by a working group study and report.

Amendment 31
(§ 1B1.10, p.s.)

Amendment 31, published at the request of the Judicial Conference Committee on Criminal Law, invites comment upon whether § 1B1.10(b) would be modified to call for determination of the guideline range applicable to the defendant under § 1B1.10 "by using only those amendments that have been expressly designated for retroactive application." We support such a modification. This method ensures that all defendants affected by an ameliorative amendment will benefit from the change in policy.

Amendment 33
(§ 2D1.1)

Amendment 33(A), published at the request of Families Against Mandatory Minimums, invites comment on whether to revise the 100 to 1 ratio between crack and powder cocaine in the drug quantity table. We support a one to one ratio.

The reality is that over ninety percent of the persons sentenced for crack offenses are African-Americans. The crack-powder cocaine ratio is not grounded in fact because there is no objective scientific data to show that crack is any more addictive,

dangerous, or crime-producing than powder cocaine.

We realize that the Commission based the quantity table ratio between crack and powder on the mandatory minimum statute adopted by Congress, but the legislative history indicates that Congress, responded to media reports of what was believed to be a new drug, without a careful study of crack. The legislative record reveals no rationale for the ratio other than assumptions unsupported by valid scientific evidence.[40]

We believe that the disparate levels of punishment only cast doubt on the fairness of the federal criminal justice system and are clearly inconsistent with the goal of eliminating unwarranted sentencing disparity. The disproportionate impact of these increased sentences on African-Americans has raised serious Constitutional questions as well. Three district courts, recognizing the unfairness of the sentences, have imposed sentences using the drug quantity level for an equivalent amount of powder cocaine.[41]

We believe that the Commission should take the initiative and revise the ratio in the drug quantity table. Because there has

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[40] For an analysis of the legislative history of the ratio and provocative discussion of the history of racial discrimination in the criminal justice system and "unconscious racism" see United States v. Clary, 1994 WL 68288 (E.D. Mo. Feb. 11, 1994).

[41] See United States V. Walls, 841 F. Supp. 24, (D.D.C. 1994)(cruel and unusual punishment); United States v. Clary, 1994 WL 68288 (E.D. Mo. Feb. 11, 1994)(equal protection); United States v. Majied, 1993 WL 315987 (D.Neb. July 29, 1993)(downward departure under 18 U.S.C. § 3553(b) because "(t)his disparate impact was not contemplated by Congress nor was it considered by the Sentencing Commission in developing the guideline ranges for users of crack cocaine").