issue.[3] Such an additional fine provision is seldom needed, because there are very few defendants who can pay the full punitive fine, much less another, separate fine amount based on costs. When a fine is deemed appropriate, however, some courts prefer to base the amount of fine, at least in part, on the estimated cost of defendant's incarceration. The result, nevertheless, is still one fine and the separate provision in (i), with its "additional" language, serves no useful purpose and only serves to generate confusion and litigation.

9. Item 6 of Amendment 28: **Whether "victim of the offense" under §3A1.1 refers only to a victim of the offense of conviction or also to a victim of the relevant conduct.**

We ask the Commission to clarify that guidelines §§3A1.1, 3A1.2, and 3A1.3 refer to a victim of the relevant conduct of the offense, as defined in §1B1.3. This is the majority view, and is consistent with other Chapter Three adjustments. Resolution now would avoid further litigation in the remaining circuits. Three cases in the opposing circuit have been a potential source of confusion and litigation in courts in the remaining circuits.

10. Item 15 of Amendment 28: **Whether the definition of "non-violent offense" for purposes of §5K2.13 (Diminished Capacity) is consistent with the definition of "crime of violence" under §4B1.2.**

Section 5K2.13 provides for a possible departure if the defendant committed a "nonviolent offense" while suffering from certain mental incapacities. The lack of definition of a "non-violent" offense in §5K2. 13, such as exists in the commentary for §5K2.17, has led a minority of the circuits to conclude that perhaps the Commission intended the criteria for "non-violent offense" in §5E2.13 to be different than the criteria for "violent offense" under §4B1.2. Most probably, the Commission intended the definitions in 4B1.2, §5K2.17, and §5K2.13 to be consistent with each other. We recommend that the Commission change the term in §5K2.13 to an "offense other than a violent offense" and/or provide an explanatory commentary note, as it did for §5K2.17.

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[3]There was a circuit conflict on whether there was statutory authority to impose a fine based on costs, which may have been settled, at least as to whether it can be a factor of the punitive fine, with the statutory addition in September 1994, of 18 U.S.C. § 3572(a)(6), allowing costs to be a factor considered in the imposition of the fine. While it is likely that the statutory amendment will also support a separate and additional fine amount too, it has not yet been determined to be so.

As always, we appreciate the Commission's consideration of our submissions.

Sincerely,

Honorable George P. Kazen
Chairman

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Eunice Holt-Jones, Chief, Federal Corrections and Supervision Division, AO

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March 6, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment for the 1997 amendment cycle. Our comments are brief, in recognition of the fact that the Commission has decided to not enact substantive amendments beyond some circuit splits or conforming amendments, due to the number of amendments necessary to implement new legislative provisions at this time. The Commission has, nevertheless, indicated its desire to receive comment on pending issues, and it is primarily to that end that we direct most of the following comments. All of the proposed amendments we discuss are, in our view, worthy of continued serious efforts toward passage next year. We also urge the Commission to do whatever might be possible this year, beyond implementing legislation and some circuit splits, to improve the system where it is clear that it should be done.

A. Circuit Conflicts

The Sentencing Commission has a responsibility to resolve conflicts among the circuits, in order to maximize uniformity of guideline application and to minimize disparity and unnecessary litigation. These reasons, in themselves, are sufficient justification for the Commission to resolve circuit conflicts on an ongoing basis, to do what it can to ensure the smooth and uniform application of the guidelines with the least litigation possible.

We ask the Commission to resolve those circuit splits we cited in our February 21, 1997 letter, and to also adopt any other conforming or clarifying amendments it deems useful for the operation of the guidelines, in compliance with its statutory task of monitoring the application of the guidelines and clarifying those conflicts and confusions that arise, where possible. We list below those published circuit conflicts that we ask the Commission to prioritize for resolution this year:

1. Amendment # 11: **Application of retroactive amendments.**
2. Amendment # 14: **Express threat of death.**
3. Amendment # 17: **Underlying offense.**
4. Amendment #27: **Controlled substance offense/career offender.**
5. Amendment #23: **Obstructive conduct.**
6 Item 4 of Amendment 28: **Definition of facility "similar facility" to a halfway house**
7. Item 8 of Amendment 28: **A sentence to a community confinement center as prison**
8 Item 10 of Amendment 28: **The fine for costs of supervision or imprisonment**
9 Item 6 of Amendment 28: **"Victim of the offense" under §3A1.1**
10 Item 15 of Amendment 28: **Definition of "non-violent offense" in §5K2.13**

B. Acceptance of Responsibility

We have urged, and continue to urge, the Commission to reform the acceptance of responsibility guideline by "de-linking" the third point from the first two points, to bring a greater degree of certainty to the first two points when the defendant enters a plea, and to allow the court to exercise its discretion, based on a totality of the circumstances, to award the third point reduction to those defendants who not only enter a plea, but do something in addition, i.e., the "plea-plus" situation.

The published amendment was a step in that direction, but we have come to realize that a simpler version would better serve the system. We have discussed among ourselves and with others, including the judicial advisory group and members of the Commission, to more clearly focus on what should be changed, and to change only that, and no more, of the current guideline. We are very close to completing a proposal that we believe would be well received, but some minor fine-tuning still needs to be done. In light of the shortness of time remaining in this cycle, and in light of the low probability that the Commission will be receptive to this amendment this

year, we have decided not to urge adoption of any amendment at this time. However, we urge the Commission to keep acceptance of responsibility high on the agenda for the next amendment cycle.

C. Fraud Table and Loss Issues

We appreciate the Commission's publication of our proposed fraud table and the commitment of your staff to work with us and others in an effort to reach consensus on a new proposed fraud table. The Department of Justice has joined the Committee in calling for increased fraud levels, and the recent FJC judicial survey indicated this was one area in which the judiciary wants change. We asked the Commission to minimize unnecessary litigation by converting the one-level categories to two-level categories and by eliminating the more than minimal planning adjustment. We also asked, as has the Department, that fraud offenses levels be significantly raised.

We realize that the Commission has said it will not be enacting any amendments this year beyond some conforming ones and some circuit splits. However, because it appears that we are very close to achieving a consensus draft proposal, and because of the importance of this issue to the judiciary, we plan to continue working on the fraud proposal. We hope to be able to submit a revised fraud table with accompanying adjustments very soon, which will address the concerns of both the Committee and the Department. If we are able to do so, we hope that the Commission will give it serious consideration this amendment cycle.

We also believe that the loss issues published for comment merit serious consideration, and we have spent considerable time reviewing them. We regret that the Commission chose not to seriously pursue these issues this year. Several of them merit clarification by the Commission, in order to avoid needless litigation and to enhance uniformity of guideline application. We hope the Commission will solicit comment on these issues again next year, and that it will commit staff resources early to help response groups such as ours work through possible options, to ensure that meaningful options are submitted to the Commission for serious consideration next year.

D. Mitigating Role

We still believe that both aggravating and mitigating role adjustments should be reformed, along the lines of the published mitigating role proposal. We were actively working to fine-tune that proposal, and were close to a significant proposal when we were told the Commission was not prepared to go forward with it this year. A proposal similar to that published on mitigating role has been pending for Commission consideration since the 1995 amendment cycle. Role is a crucially important aspect of every federal sentencing, and one in which maximum flexibility is appropriate and needed for the sentencing court. We ask the Commission to also keep role on the table for serious reform next year.

E. Conforming Amendments

We ask the Commission to adopt the following amendments, which simply conform the guidelines to recent changes in law. These amendments can only bring benefit to the system, and avoid ambiguity:

Amendment #34 on §5K2.0.
Amendment #29 on Probation and Supervised Release
Amendment #30 on Supervised Release
Amendment #31 on Restitution
Amendment #36 on the Presentence Report.

Thank you, as always, for your consideration of our recommendations.

Sincerely,

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Eunice Holt-Jones, Chief, Federal Corrections and Supervision Division, AO

Statement of

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

on behalf of

Federal Public and Community Defenders

concerning the

Proposed Guideline Amendments, Part II

March 28, 1997

Amendment 1
(§ 2D1.1)

Amendment 1 would repromulgate as a permanent amendment the emergency amendment to § 2D1.11 promulgated by the Commission in February. The amendment would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment is in response to a specific Congressional directive in the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237. We do not oppose promulgating Amendment 1 as a permanent amendment.

Amendment 2
(§§ 2L1.1, 2L2.1, 2L2.2, 2H4.1)

Amendment 2 would repromulgate as permanent amendments several emergency amendments the Commission approved on March 19, 1997. On February 4, 1997, we submitted to the Commission our comments on these amendments. We do not oppose repromulgating the version of the amendments that the Commission adopted on March 19, 1997.

Amendment 3
(§ 2L1.2)

Amendment 3 would implement section 321 and 334 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 321 of that Act amends the definition of the term "aggravated felony" in 8 U.S.C. §1101(a)(43), and section 334 of that Act requires the Commission to amend the guidelines to reflect amendments made by sections 130001 and 130009 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2023, 2030.

Congress initially defined the term "aggravated felony" in 1988 to mean murder, drug trafficking, and illegal trafficking in guns or explosives. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469 (enacting 8 U.S.C. § 1101(A)(43)). Since then, the

definition has become complex and broad. For example, a fraud offense is an aggravated felony if the loss to the victim exceeds $10,000, and receipt of stolen property is an aggravated felony if the court imposed a prison term of one year, suspended execution of the prison term, and placed the defendant on probation for one year. The result is that the label "aggravated felony" is not a reliable way to identify defendants who are deserving of greater punishment.

The unfairness of using an unreliable indicator is heightened by the drastic consequences that § 2L1.2 imposes -- a 16-level enhancement if the defendant has been deported after having been convicted of an aggravated felony. For a defendant in criminal history category II, the effect of this enhancement is to increase the guideline range from 4-10 months to 57-71 months. The unfairness is further heightened by the double counting that occurs. The aggravated felony also counts towards the defendant's criminal history score.

Amendment 3 would revise § 2L1.2 to call for a 16-level enhancement if the defendant had been deported after "conviction . . . for a crime of violence or controlled substance offense [,and such conviction was punishable by more than five years imprisonment]," and a [10, 12]-level enhancement if the conviction was for any other aggravated felony. We believe that, if the Commission adopts the proposal, the bracketed language should be included. The statutory maximum is way to distinguish serious offenses from less serious offenses.

We believe that using the statutory maximum to distinguish between the more serious and less serious offenses is preferable to including all crimes of violence and controlled substance offenses. We also believe, however, that the statutory maximum is still too rough a measure of severity. A defendant may be convicted of a drug trafficking offense that has a 20-year maximum prison term but, because the offense was the sale of a small amount of marijuana, receive probation.

That defendant is less dangerous than a defendant who receives a prison term of 15 years for the sale of three kilograms of heroin or a prison term of 20 years for manslaughter.

We believe that the prison term served by the defendant is a better measure of actual severity than the statutory maximum.[1] The Commission can implement this measure rather easily and without complicating matters by utilizing the criminal history scoring. We suggest that the Commission adopt the following provision:

> If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):
>
> (1) if the conviction was for a crime of violence or controlled substance offense for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 16 levels;
>
> (2) if the conviction was for (A) a crime of violence or controlled substance offense for which the defendant receives 2 criminal history points under § 4A1.1(b) or (B) an aggravated felony, other than a crime of violence or controlled substance offense, for which the defendant receives 3 criminal history points under § 4A1.1(a), increase by 8 levels;
>
> (3) if the conviction was (A) for (I) an aggravated felony, other than an aggravated felony described in subdivisions (1) and (2), or (ii) any other felony for which the defendant receives 3 criminal history points under § 4A1.1(a), or (B) three or more misdemeanors that were either crimes of violence or

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[1]Another possible approach might be to measure the severity on the basis of other statutory or guideline indicators of severity. For example, federal drug laws call for mandatory minimums based upon quantity. A prior drug trafficking offense might qualify the defendant for a 16-level enhancement if the quantity of drugs involved in the prior offense were sufficient to trigger a ten-year mandatory minimum sentence. We do not advocate such an approach because we believe that such an approach would unduly complicate application of this guideline.

controlled substance offenses, for each of which the defendant receives 2 criminal history points under § 4A1.1(B), increase by 4 levels.

Amendment 4
(Appendix A -- statutory index)

Amendment 4 would amend the statutory index to add two new offenses enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Amendment 4 would list § 2H2.1 (obstructing an election or registration) as the offense guideline applicable to the new offense of voting by aliens (18 U.S.C. § 611). Amendment 4 would list § 2A2.4 (obstructing or impeding officers) as the offense level applicable to the new offense of "high speed flight from immigration checkpoint" (18 U.S.C. § 758). We do not oppose the amendment.

Amendment 5
(§ 3C1.2)

Section 3C1.2 currently provides for a two-level enhancement "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Amendment 5, requested by the Department of Justice, would add a mandatory minimum offense level -- that is, where the enhancement applies and after adding two points, "if the resulting offense level is less than [18-20], increase [the level] to [18-20]." We oppose this amendment.

The enhancement would apply only to 0.3 percent of defendants sentenced each year. See, e.g., U.S. Sentencing Comm'n, 1995 Annual Report 74; U.S. Sentencing Comm'n, 1994 Annual Report 69. Moreover, the base offense level for the type of case in which the enhancement is most commonly applied, robbery, see U.S. Sentencing Comm'n, 1993 Annual Report 89, 103 (34 of 91 cases in which enhancement applied were robbery cases), is already at or above the proposed

minimum level, U.S.S.G. § 2B3.1(a) (setting base offense level for robbery at 20). More importantly, for those cases that would be below the proposed mandatory minimum, the current two-level enhancement already represents a proportionally larger increase in offense level than it does for offenses that start at a relatively high level, such as robbery. The Commission has provided no justification for implementing such a disproportionate additional increase.

Amendment 6
(interstate stalking; harassing communications)

The proposals in amendment 6 are cumbersome and complex and if adopted, would impose significant and unwarranted policy changes. The synopsis of this amendment states that the proposals incorporate in the guidelines several new federal offenses. In our view, however, every one of the proposals in amendment 6 is flawed and would unnecessarily increase the difficulty in applying the guidelines. We urge the Commission to take a less sweeping and more reasonable approach to addressing the new federal offenses.

This past November, Congress enacted several new offenses that involve threatening or harassing behavior. Section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201 makes interstate stalking (18 U.S.C. § 2261A) a federal offense:

> Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to, that person or a member of that person's immediate family . . . shall be punished as provided in section 2261 of this title.

The maximum penalties range from five years to life, depending on whether and to what degree the victim is injured.

Section 502 of the Telecommunications Act of 1996, Pub. L. 104-104, adds several new telephone call offenses to 47 U.S.C. § 223. The new offenses (47 U.S.C. § 223(a)(1)(C)-(E)), which have a maximum prison term of two years, make it a crime for a person to--

> (C) make a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
>
> (D) make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
>
> (E) make repeated telephone calls or repeatedly initiate communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

In response to these new offenses, the Commission has published for comment a two-part amendment. Part A of amendment 6, consists of two options that would significantly alter the operation of several guidelines, including the statutory index. Part B requests comment on how to address the new offenses.

The new harassing telephone calls and stalking offenses are different from other offenses covered by the guidelines of chapter 2, part A. The harm in these offenses is ongoing or continuous. These offenses are unlikely to be prosecuted with any frequency in federal court. In the long run, a separate guideline may be the most appropriate way to incorporate these new offenses. In the short term, however, the current version of § 2A6.1 (threatening communications) should suffice to cover the few cases that occur. If § 2A6.1 does not adequately address the circumstances of a particular case, the court may depart.

Part A

As outlined below, we are particularly concerned about the implications of the proposals in Part A. In an apparent attempt at guideline economy, the proposals would amend existing guidelines by adding additional enhancements, cross-references, and commentary that would only increase the complexity of calculating an offense level. Some of the proposed changes would result in significant policy changes as well. The new offenses, particularly the stalking offense, are unlikely to be prosecuted with any frequency in federal court. These offenses, which are often connected with some domestic dispute, are commonly prosecuted in State courts. Most states already have laws prohibiting stalking, and threatening or harassing behavior. The complicated changes in Part A are not only unnecessary, but also counterproductive to the goal of simplifying the guidelines.

Option One

Statutory Index. Option One would amend the statutory index to allow a court to choose one of eleven guidelines to calculate a sentence for a stalking offense. The proposed revision would include as guidelines applicable to a violation of 18 U.S.C. § 2261A the following guidelines: §§ 2A1.1(first degree murder), 2A1.2(second degree murder), 2A1.3(voluntary manslaughter), 2A1.4(involuntary manslaughter), 2A2.1 (attempted murder), 2A2.2 (aggravated assault), 2A2.3 (minor assault), 2A4.1(kidnaping), 2B1.3 (property damage), 2B3.2 (extortion by force), and 2K1.4 (arson).

This proposed change to the statutory index is dramatically at odds with guideline policy. It appears to be an attempt to provide real-offense sentencing of a stalking offense, but is in reality impractical and confounding. How is a court to choose the applicable guideline? The application

instructions in § 1B1.2 (applicable guideline) direct the court to choose the offense guideline from the statutory index "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant is convicted)." The elements of a stalking offense are that the defendant (1) intended to injure or harass and (2) placed another person in reasonable fear of death or serious bodily injury to that other person or that person's family. The charging document for a stalking offense, therefore, will not include any elements that would assist the court in selecting one of the eleven guidelines in the statutory index.

The synopsis of Part A attempts to justify the inclusion of the eleven potentially applicable guidelines by stating that "[t]his approach is consistent with the approach the Commission adopted two years ago with respect to the federal domestic violence offenses, 18 U.S.C. §§ 2261-62." The problem with that analysis is that, unlike interstate stalking, convictions under §§ 2261-62 require either "a crime of violence" or the infliction of some bodily injury.[2] The type of crime of violence (aggravated assault, e.g.) ordinarily will be set forth in the charging document. Stalking requires only an "intent to injure or harass."

Option One of Part A would undercut a fundamental policy of the guidelines by rendering the elements of the offense of conviction relatively meaningless. See William Wilkins, Jr. & John Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L.Rev. 495, 497 (1990). We believe it would be more appropriate to list no guideline at all in the statutory index (particularly since federal stalking is unlikely to be prosecuted frequently), than to change dramatically the structure of the guidelines.

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[2]A conviction under 18 U.S.C. § 2261(2) (interstate domestic violence) requires the intentional infliction of a crime of violence and infliction of bodily injury. A conviction under 18 U.S.C. § 2262 requires the infliction of bodily injury.

§ 2A2.3 (minor assault). Option One would also merge § 2A2.4 (obstructing or impeding officers) into § 2A2.3 (minor assault). Option One would increase by three-levels the base offense levels in § 2A2.3, add enhancements to address stalking or violation of a court protection order and obstructing a government officer, and add a cross-reference to § 2A2.2 (aggravated assault). We oppose these proposals.

We believe that the Commission was correct in 1994 when it rejected a proposed merger of §§ 2A2.3 and 2A2.4. We think it would be a mistake for the Commission to change its mind. As we stated in 1994, the proposed merger would do much more than simplify application by implementing a policy change. The consolidated guideline would include a cross-reference that calls for use of § 2A2.2 if the offense involves 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 merger would be to make § 2A2.3 a mere conduit to § 2A2.2. We oppose the increasing use of cross-references to create a real offense system. The increased use of cross-references is rendering the count of conviction almost meaningless.

We oppose increasing the base offense level of § 2A2.3. The synopsis of the amendment states that the reason for the increase is to "provide a more appropriate and sufficiently severe offense level for offenses sentenced under that guideline." There is no indication that the current base offense level does not provide sufficiently severe punishment for relatively minor offenses. See § 2A2.3 (comment (n.1)(definition of "minor assault")). The majority of offenses covered by § 2A2.3 are misdemeanor assaults -- offenses punishable by imprisonment for one year or less. By raising the base offense level, the proposed guideline would result in overpunishment by reserving a straight sentence of probation only to someone who had a criminal history category of I and only

if the conduct involved no bodily injury. Further, in some cases, the base offense level would exceed the statutory maximum, whether it be six months or one year. We cannot understand why it is necessary to raise the base offense level of minor offenses when no rational justification for the increase has been articulated.

The amended version of § 2A2.3 would also unnecessarily increase the offense level for an offense currently covered under § 2A2.4. In addition to the increased base offense level, the proposal would provide an additional three-level increase "if the offense involved obstructing or impeding a governmental officer in the performance of his duty." Currently, under § 2A2.4, the offense would result in an offense level of six or nine. Under the proposal, the offense level would be nine or twelve. Again, the Commission should refrain from increasing the offense levels when there is no showing of a need for an increase. If the enhancement is intended to allow real offense sentencing by punishing obstructive conduct in offenses not covered under the existing § 2A2.4, such conduct is already covered by § 3A1.2 (official victim), § 3C1.1 (obstructing or impeding the administration of justice), and § 3C1.2 (reckless endangerment during flight).

We also oppose the proposed enhancements for "[two or more] instances of stalking." A stalking offense, by its nature, will ordinarily involve more than one incident of harassing or threatening behavior.[3] What differentiates stalking from other threat offenses is the repetition of the threat over a period of time. In a typical case, it is the repeated encounters that prompt a victim to report the offense to the police or to seek a restraining order. Thus, the enhancement would be

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[3]Indeed, a typical state statute prohibiting stalking, requires that the offense include "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof." 2C N.J. Stat. Ann. § 12-10 (West 1996).

routinely applied. Further, what would constitute an "incident," and would the court be allowed to consider conduct that occurred prior to the offense, as proposed in the amendment of § 2A6.1? Finally, when both enhancements (including the enhancement for violation of a court order) apply, the resulting offense level would be higher than if the victim had actually suffered bodily injury as a result of the offense.

§ 2A6.1 (threatening communications). Option One of Part A would also revise § 2A6.1 (threatening communications) and list it as the applicable guideline for the new harassing telephone call offenses under 47 U.S.C. § 223(a)(1)(C)-(E). The amended guideline would include enhancements for "conduct evidencing an intent to cause bodily injury or to carry out a threat," and conduct by "the defendant [or another person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)]," involving repeated instances of stalking or threatening behavior or violation of a court order.

We oppose the proposed changes to § 2A6.1. We believe the amendment attempts to incorporate in one guideline the characteristics of too many offenses.

The proposed version of § 2A6.1(b)(1) would read "if the offense involved any conduct evidencing an intent to cause bodily injury or to carry out a threat, increase by 6 levels." We suggest that the term "threat" needs to be defined. A violation of the telecommunications offense may involve intent to "annoy, abuse, threaten, or harass." The offenses currently covered by § 2A6.1 require specific types of threats, such as threats to kill, injure, or kidnap. We suggest that for the enhancement to apply, the offense must have involved conduct evidencing an intent to cause death or bodily injury. The new telecommunications offense carries a maximum penalty of two years. With a base offense level of 12 and a 6-level increase for "any conduct evidencing an intent to carry

out a threat," the minimum possible offense level possible would be 18, resulting in a guideline range (27-33 months) that exceeds the statutory maximum by at least three months.

We also oppose the enhancement that would apply for two or more instances of stalking or threatening communications. Stalking involves more than one instance of harassment. Likewise, harassing telephone calls commonly involve more than one phone call. Indeed, two of the new harassing phone call offenses specifically prohibit "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring," and "mak[ing] repeated telephone calls or repeatedly intiat[ing] communication." Thus, the proposed enhancement for repeated instances would almost always apply. The current version of § 2A6.1 does not include an enhancement for repeated instances of other threatening communications, and we are not aware of any problem with the resulting offense levels for those offenses. A court can always depart in an egregious.

In addition, a proposed application note would direct the court to consider "any conduct that occurred prior to or during the offense," even if that conduct did not qualify as relevant conduct. This instruction could result in application problems and an unprecedented change in policy. Repeated instances would not be considered part of the "same course of conduct" for purposes of § 1B1.3, because the grouping rules of chapter three specifically exclude all offenses under chapter two, part A. Thus, even though these offense typically involve "ongoing or continuous" behavior, the use of any guideline under chapter two, part A would prevent the consideration of conduct that occurred prior to or during the offense. We think it is unwise to carve out an exception to the relevant conduct rule to accommodate offenses that are unlikely to be prosecuted in federal court.

We also oppose holding the defendant accountable for violation of a court protection order when the defendant was not subject to and possibly not aware of the order. We question whether

the enhancement for violation of a court protection order is really necessary, particularly since a protective order presupposes that the person subject to the order previously engaged in some type of offensive contact with the same victim. Thus, both the enhancement for repeated instances and violation of an order could result in double counting. Further, if the defendant receives convictions for a prior instance of stalking behavior or for violation of a court protection order, the convictions would raise the criminal history score and result in double punishment.

Because the enhancement for repeated instances would apply in most cases, we are confused as to what the Commission deems to be the "heartland" of a stalking or harassing communications offense. If the four-level reduction offered in § 2A6.1(b)(4) would apply to a single instance "evidencing little or no deliberation" (which would seem to be the norm for a "single instance" of such behavior) or to "harassing communication that did not involve a threat or stalking," then to what type of "single instance" conduct would a base offense level of 12 apply?

We oppose the proposed cross-reference in § 2A6.1. The proliferation of cross-references in the guidelines is disturbing. Eventually, the count of conviction will become meaningless to the point where a judge should be instructed to disregard the statutory index and choose a guideline that the judge determines, by a preponderance of evidence, to represent the "real" offense. This trend toward total real offense sentencing is at odds with the Commission's own determination at the inception of the guidelines that "such a system risked return to wide disparity in sentencing practice." U.S.S.G. Ch. 1, Pt. A(4)(a). Further, this increase in cross-references shows a lack of confidence in a jury's factfinding ability and hinders effective plea negotiations.

Option Two

Option Two of Part A would revise the statutory index to list § 2A6.1 (threatening

communications) as the applicable guideline for a stalking offense under 18 U.S.C. § 2261A or one of the new harassing telephone communication offenses under 47 U.S.C. § 223(a)(1)-(C). Option Two would also amend § 2A2.2 (aggravated assault) and § 2A2.3 (minor assault) by adding a two-level enhancement "if the offense involved the violation of a court protection order." The version of § 2A6.1 in Option Two is basically the same as that in Option One, except that Option Two would change the caption of § 2A6.1 to "threatening or harassing communications; stalking." The amended version of § 2A6.1 would provide a two-level increase for two or more instances of stalking or making a threatening communication to the same victim; a two-level increase for violation of a court protection order; and a six-level increase if the defendant "engaged in any conduct evidencing an intent to carry out the threat made in a threatening communication or to cause bodily injury." The amended version of the guideline would provide a decrease of [4-8] levels if none of the above enhancements applied and the offense involved either "(A) a single instance evidencing little or no deliberation, or (B) only harassing communication that did not involve a threatening communication or stalking." Finally, the amended version of § 2A6.1 would provide a cross reference "if the offense involved conduct covered by another offense guideline."

Option Two would also amend the commentary to § 2A6.1 to require the court, in determining whether any enhancement applied, to "consider any conduct that occurred prior to or during the offense." In addition, the amended commentary would state that an upward departure may be warranted if the offense involved "[numerous][more than two] instances of stalking or making a threatening or harassing communication to the same victim."

We oppose Option Two for many of the same reasons we oppose Option One, which sets forth basically the same proposal. The only significant difference is that the reduction for a "single

instance" would provide a decrease of [4-8] levels, whereas Option One would provide a four-level reduction. For instance, a defendant who caused no bodily injury but violated a court protection order would be subject to the same sentence as a defendant who actually inflicted bodily injury. In addition, since the harassing communications offenses typically involve more than one phone call, the enhancement for repeated instances would routinely apply.

We believe the proposal, attempts to incorporate too many offenses in one guideline. We believe that § 2A6.1 is the appropriate guideline to incorporate an offense involving harassing communications, but not as set forth in this proposal. The new harassing communications offenses have a maximum penalty of two years imprisonment. The proposed version of § 2A6.1 would result in overpunishing these offenses.

Part B

Part B seeks comment on two issues. First, the Commission seeks comment on alternative ways to address the new federal stalking offense. Second, the Commission requests comment on whether conduct not part of the offense should be considered in determining the offense level under § 2A6.1. Finally, the Commission seeks comment on "whether the definition of aggravated assault in the commentary to § 2A2.2 should be amended to eliminate the requirement that intent to do bodily injury be present in an assault involving a dangerous weapon in order for that assault to be considered 'aggravated,' rather than 'minor,' under the guidelines."

As we have indicated above, neither option in Part A would satisfactorily address the new offenses. The new offenses, particularly the stalking offense, are unlikely to be prosecuted in federal court in great numbers. We believe the Commission should examine the characteristics of any cases that may be brought in federal court, and then determine whether and to what extent the guidelines

should be amended. The Commission may decide that a separate guideline for stalking may be more appropriate than revising existing guidelines or the Commission may decide that no amendment is necessary. The proposed revisions would unnecessarily complicate the application of § 2A2.3 and 2A6.1.

We believe that the existing version of § 2A6.1 (threatening communications) should adequately cover the new harassing communications offenses. Because the offenses call for a maximum of only two years imprisonment, we would suggest providing a reduction if the offense did not involve an intent to carry out a threat.

The new offenses typically involve repeated instances or continuing conduct. For this reason, the offenses are not easily accommodated under any guideline in chapter two part A. We would advise against establishing a special exception to the relevant conduct rules just to accommodate these offenses. If it is necessary to amend the guidelines to cover these offenses, then the applicable guideline should be listed under § 3D1.2(d) as offense behavior that is "ongoing and continuous in nature." Otherwise, an unusual number of repeated instances can be handled by a departure.

We oppose revising the definition of aggravated assault. We are unaware of any documented instance where the application note inhibited sufficient punishment of an assault involving a weapon.

Amendment 7
(Chapter 2, parts B and F)

Amendment 7 of part II would amend five guidelines in chapter 2, parts B and F, and the statutory index to respond to changes in law enacted by the Economic Espionage Act of 1966, Pub. L. No. 104-294, 110 Stat. 3488.

Section 101 of the Economic Espionage Act of 1966 enact a new offense, captioned economic espionage (18 U.S.C. § 1831), that punishes theft of, or receipt of a stolen, trade secret, obtaining a trade secret by fraud, and unauthorized duplication of a trade secret. The defendant must intend or know that the offense will benefit a foreign government, foreign instrumentality, or foreign agent, terms defined in 18 U.S.C. § 1839 (also enacted by the Economic Espionage Act of 1966). The maximum prison term for an economic espionage offense is 15 years.

Amendment 7 would amend § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property) by adding a new specific offense characteristic designated subsection (b)(7). Subsection (b)(7) would provide that if the offense involved misappropriating a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, "increase by [2] levels." We do not oppose the amendment.[4]

Section 201 of the Economic Espionage Act of 1966 amended 18 U.S.C. § 1030 (fraud and related activity in connection with computers). Amendment 7 would add an application note to § 2B1.1 stating that, for an offense under 18 U.S.C. § 1030(e)(2)(A) or (B), loss includes "the

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[4]Amendment 7 would amend the statutory Index to indicate that § 2B1.1 is the offense guideline for offenses set forth in 18 U.S.C. § 1831 and § 1832 (theft of trade secrets, also enacted by section 101 of the Economic Espionage Act of 1966), but would not amend the statutory provisions note at the end of § 2B1.1 to list § 1831 and § 1832. We believe that the statutory provisions note to § 2B1.1 should also be amended. Similarly, amendment 7 would amend the Statutory Index to indicate that § 2B3.2 is the offense guideline for a violation of 18 U.S.C. § 1030(a)(7). While amendment 7 would also add a sentence to the background note to § 2B3.2 stating that guideline applies to "offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer,'" amendment 7 would not amend the statutory provisions note to § 2B3.2. We believe that amendment 7 should also amend the statutory provisions note to § 2B3.2.

reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue or costs incurred due to interruption of service." We do not oppose the amendment.

Amendment 7 would also add two application notes addressing grounds for departure. New application note 16 would indicate that an upward departure may be warranted "in cases involving theft of information from a 'protected computer,'" if the defendant sought the stolen information to further a broader criminal purpose.[5] We oppose this language as vague and unhelpful.

New application note 15 would indicate that an upward departure may be warranted if loss "does not fully capture the harmfulness of the conduct . . . ." The new application note gives as an example the theft of personal information that involves a substantial invasion of a privacy interest. U.S.S.G. § 2F1.1 currently contains a similar application note. We believe that the Commission should defer action on new application note 15 and take it up when the Commission begins work on amendment 18 in part I of the proposed amendments. Loss as determined under § 2B1.1(b)(1) -- and § 2F1.1(b)(1) -- may not adequately reflect the harm of the offense, but not only because loss can understate the harm of the offense. Loss so determined can also overstate the harm. New application note 15 should be more balanced and reflect that reality, as should application note 10 to § 2F1.1.

Amendment 7 would amend § 2B1.3 and § 2F1.1 to provide that a defendant convicted under 18 U.S.C. § 1030(a)(4) or (5) receive a prison term of at least six months. These amendments are

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[5]The proposed application note does not define the term "protected computer," but 18 U.S.C. § 1030(e)(2) does. If the Commission intends to adopt that definition, the proposed application note should be modified to say so.

in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 805(c), 110 Stat. 1305. We question the wisdom of mandatory minimum sentences restricting the discretion of judges to fashion an appropriate punishment, but the Commission has no choice in the matter. We do not oppose the amendment.

Finally, amendment 7 would amend § 2B3.2 to add a new specific offense characteristic calling for an enhancement of the offense level using the fraud loss table "if the offense involved invasion of a protected computer resulting in a loss . . . ." We recommend that the Commission not act on this part of amendment 7. This matter should be considered after this cycle as a part of the consideration of the issues involved in amendment 18 in part I. There are a number of questions that need to be addressed. If the protected computer trespassed upon is a federal government computer, does the enhancement of § 2B3.2(b)(1) apply? If the defendant committed the offense at home, where he or she keeps a weapon, does the Commission intend that the enhancement of § 2B3.2(b)(2) apply? By its literal terms, that enhancement would apply, but computer trespassing is different from trespassing upon real property. A first offense under 18 U.S.C. § 1030(a)(3) carries a maximum prison term of one year. Use of the loss table may result in all first offenders under that provision receiving the statutory maximum.

Amendment 8
(flunitrazepam)

Amendment 8 consists of two parts in response to the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, which directs the Commission to "review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam." The Act increases the maximum penalty for offenses involving flunitrazepam. For violations of 21 U.S.C.

§ 841, the Act raises the maximum penalty for flunitrazepam from three-years imprisonment to five-years imprisonment for thirty milligrams and twenty-years imprisonment for one gram. The Act also revises 21 U.S.C. § 959 (import and export) to provide a maximum penalty of twenty-years imprisonment for offenses involving any quantity of flunitrazepam. The Act increases the penalty for simple possession of flunitrazepam to three years.

Part A

Part A presents two options to amend § 2D1.1 (drug trafficking) and § 2D2.1 (simple possession) to address offenses involving flunitrazepam. Both options would revise § 2D1.1 to treat flunitrazepam as a Schedule I and II depressant. Under option one, the base offense level for simple possession of flunitrazepam in § 2D2.1 would remain at level four. Option Two would amend § 2D2.1 to provide a base offense level of eight if the substance possessed is flunitrazepam. We oppose Option Two and do not oppose Option One.

Because the maximum prison term for a flunitrazepam offense is twenty years, it makes sense to treat flunitrazepam like Schedule I and II depressants, which have a maximum prison term of twenty years. We oppose that part of Option Two, however, that would treat simple possession of flunitrazepam as equivalent to possession of heroin or crack and much more seriously than possession of any Schedule I or II depressant. The proposed revision of § 2D2.1 would result, in some cases, in sentencing simple possession of flunitrazepam more harshly than trafficking flunitrazepam. Under the proposed amendment, a trafficking offense involving less than 250 units of flunitrazepam would yield an offense level of six, while simple possession of that same amount would result in an offense level eight.

Part B

Part B seeks comment on how the guidelines should incorporate "date rape" and related crimes. The Drug-Induced Rape Prevention and Punishment Act enacted a new federal offense of "date rape," codified at 21 U.S.C. § 841(b)(7):

> Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

"Date rape" is essentially a state law crime and is unlikely to be prosecuted with any frequency in federal court. We suggest that at this time the Commission not amend the guidelines to incorporate this new offense. The Commission will be in a better position to determine whether and what type of amendment is necessary after there have been some cases prosecuted in federal court.

Amendment 9
(methamphetamine)

Amendment 9 consists of two parts in response to certain parts of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237.

Part A

Part A would respond to sections 101, 201, and 209 of the Act. Section 101 revises 21 U.S.C. § 959 (manufacture or distribution for purpose of unlawful importation) to make it unlawful to manufacture or distribute a listed chemical. Section 201 of the Act revises 21 U.S.C. § 844 to make it unlawful "for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person . . . if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business

in the manner contemplated by his registration." Section 209 of the Act corrects the spelling of certain precursor chemicals.

Part A would amend § 2D2.1 (unlawful possession) to provide a base offense level of 4 "if the offense involved a list I chemical." In addition, part A would amend the statutory index to include § 2D1.11 (listed chemicals) as an applicable guideline for violations of importation offenses under 21 U.S.C. §§ 959 and 960(d)(7).

We do not oppose part A.

Part B

Part B invites comment in response to section 203 of the Act, which revises 21 U.S.C. § 843(d) to provide up to ten years imprisonment for a violation of 21 U.S.C.§ 843(a)(6) or (7) (possession, manufacture or distribution of certain laboratory equipment) if the offense is committed with intent to manufacture or to facilitate the manufacture of methamphetamine. Section 203 directs the Commission to amend the guidelines "to ensure that the manufacture of methamphetamine in violation of section 403(d)(2) of the Controlled Substances Act . . . is treated as a significant violation." Part B requests comment on how to respond to this directive and specifically, on whether there should be an additional enhancement in § 2D1.12 (prohibited flask or equipment) "if the equipment is used to manufacture methamphetamine."

We believe that § 2D1.12, the guideline currently applicable to violations of 21 U.S.C. § 843(a)(6) - (7), treats those offenses as a significant violation. The new offense requires an intent to manufacture methamphetamine, and § 2D1.12 provides a cross reference to § 2D1.1, "if the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance." The cross-reference should ensure a guideline range at or above the statutory

maximum of ten years. If the resulting sentence is inadequate, the government can prosecute the offense as an attempt to manufacture under 21 U.S.C. § 846, for which the statutory maximum is twenty years. Such cases would be sentenced under § 2D1.1.

Amendment 10
(§§ 2D1.1 and 2D1.11)

Amendment 10 consists of five parts in response to sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996. Section 301 of the Act directs the Commission to amend the guidelines "to provide for increased penalties" for offenses involving methamphetamine and to "submit to Congress explanations therefor and any additional policy recommendations for combating methamphetamine offenses." Section 303 directs the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses in the Controlled Substance Act (specifically, 21 U.S.C. §§ 841(d), 841(g)(1), 843(a)(6), and 843(a)(7) which result in violations of subsection (d) or (e) of section of the Solid Waste Disposal Act; section 103(b) of the Comprehensive Environmental Response, Compensation and Liability Act; section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act; or 49 U.S.C. § 5124 (violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)).

Parts A through D of Amendment 10 would increase the guideline penalties for methamphetamine offenses. Part A would revise the drug quantity table. Part B would raise the penalties for importation offenses involving methamphetamine. Part C would provide new penalties for environmental harm caused by manufacturing methamphetamine. Part D would state explicitly that manufacturers may be subject to a special skill adjustment. We believe that before

implementing any of these changes, the Commission should undertake a comprehensive study methamphetamine offenses and their sentencing.

The Congressional directive to increase the guideline penalties for methamphetamine offenses is a part of the latest craze in the current political arena. We trust that the Commission will maintain its role as an independent body committed to a reasoned and rational sentencing policy, and will resist responding impulsively to the political concerns of Congress.[6] Implicit in the Congressional directive is an assumption that the current penalties are not stringent enough. The Commission, as the federal agency entrusted to ensure rational sentencing policy, is best qualified to determine whether this assumption is correct, and if so, what specific changes are called for. For this reason, we believe that the Commission's initial response to the directive should be to gather the facts upon which sound policy judgments can be based.

Part A

Part A would increase the penalty for methamphetamine offenses by revising the drug quantity table in § 2D1.1. The proposal would reduce by one-half the current quantities of methamphetamine required for each offense level in the table. Thus, for a base offense level of 26, the quantity of methamphetamine would be reduced from "at least 100 G but less than 400 G of Methamphetamine" to "at least 50 G but less than 200 G of Methamphetamine." Part A would also amend the drug equivalency table by increasing two-fold the quantity of marijuana listed as equivalent to a particular amount of methamphetamine. For instance, the amount of marijuana equivalent to one gram of methamphetamine would be increased from one kilogram to two

[6]There is a parallel to the crack cocaine hysteria that produced swift legislation resulting in unfair and unwise sentencing policy. The Commission is to this day attempting to remedy that problem.

kilograms. Finally, part A would amend application note B to state "[i]n the case of a mixture or substance containing PCP or methamphetamine, if the purity of the mixture or substance can be determined and exceeds ten percent, then the weight of the actual controlled substance in the mixture shall be used to determine the offense level. In any other case involving a mixture or substance containing PCP or methamphetamine, use the weight of the mixture containing PCP or methamphetamine to determine the offense level."

We oppose Part A. The synopsis of Part A states that the increased guideline penalties would have "the same effect on methamphetamine guideline penalties that would have occurred if Congress had passed legislation to reduce by half the quantities to trigger the mandatory minimum penalties under 21 U.S.C. § 841." Congress considered and rejected that proposal. We fail to understand the rationale for increasing the penalties based on legislation that was never enacted. We suggest that before increasing the penalties for methamphetamine, the Commission come up with a rational explanation for the extent of any such increase. We believe that the Commission should conduct a comprehensive study of the methamphetamine offenses to determine whether, relative to other drugs, methamphetamine offenses are being treated too leniently.[7] Once that question is answered, the Commission will be in a better position to determine how to provide more appropriate punishment.

Part B

Part B of amendment 10 presents three options ("either as an alternative or an addition to Part A") to amend § 2D1.1 to include an enhancement for offenses involving the importation of

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[7]The drug trafficking guideline already treats methamphetamine offenses differently from other controlled substances. The determination of the base offense level of a methamphetamine offense takes into account the purity of the drug by differentiating between methamphetamine and methamphetamine (actual).

methamphetamine or precursor chemicals. Option One would revise § 2D1.1 to provide a two-level increase "if the offense involved the importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully." Option Two would amend § 2D1.1 to provide a two-level increase if "(A) the offense involved the importation of methamphetamine [or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully,] and (B) the defendant [is subject to an adjustment under § 3B1.1 (Aggravating Role)][is not subjected to an adjustment under § 3B1.2 (Mitigating Role)]." Option Three would amend the commentary to § 2D1.1 to state that an upward departure may be warranted "if the offense involved the unlawful importation of methamphetamine, or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. . .. [particularly if the defendant had an aggravating role in the offense under § 3B1.1 Aggravating Role]."

We realize that Congress has directed the Commission to increase the penalties for importation offenses involving methamphetamine, but, in our view, sound policy does not require an increase. We do not understand why importing methamphetamine is any more serious than manufacturing methamphetamine in this country. The vast majority of defendants who are arrested for importing are low-level mules or couriers. Their sentences are already too high. Frequently couriers and mules are poor people without a future who bring drugs into the United States for a fee that has no relation to the street-value of what they bring in. They generally are unaware of the scope of the drug enterprise they are assisting or even the identity of the participants. A simple enhancement for importing will inevitably result in even greater sentences for these least culpable offenders. The enhancement as set forth in Option One is too broad and would unfairly increase the

punishment of those who deserve a reduced rather than an increased sentence, and we therefore oppose it. We also oppose the departure instruction in Option Three because it could result in disparate sentencing. The problem with Option Three is that the proposed commentary provides no guidance as to what type of importation offense would warrant a departure.

We suggest that to comply with the directive, the Commission, as part of the study of methamphetamine offenses, identify those factors that would justify an enhancement for importation. For example, the market-oriented approach Congress has taken to punishing drug offenses suggests that the leaders of methamphetamine-importing organizations are probably most deserving of increased punishment. The exploitation of desperate and despairing individuals who become mules or couriers only makes drug kingpins more deserving of punishment. Although we believe the enhancement for importation is greatly at odds with sound policy, we suggest that the Commission adopt the least onerous alternative in Option Two which would read: "If (A) the offense involved the importation of methamphetamine and (B) the defendant is subject to an adjustment under § 3B1.1, increase by two levels."

Part C

Part C presents two options to amend the drug guidelines ("either as an alternative or an addition to Part A") to provide an enhancement if the offense caused "environmental damage associated with the manufacture of methamphetamine." Option One would amend § 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy), § 2D1.11 (distributing, importing, exporting, or possessing a listed chemical; attempt or conspiracy), § 2D1.12 (prohibited flask or equipment; attempt or conspiracy), and § 2D1.13 (structuring chemical transactions or creating a chemical mixture to evade reporting or record keeping requirements;

presenting false or fraudulent identification to obtain a listed chemical; attempt or conspiracy) to provide an increase of [2-6] levels "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm." Option Two would amend the commentary to §§ 2D1.1, 2D1.11, 2D1.12, and 2D1.13 to state that an upward departure may be warranted "if the offense involved a discharge or emission into the environment of a hazardous or toxic substance or created a substantial risk of environmental harm." We oppose both options.

We believe that manufacturing offenses that create a significant risk of serious environmental harm (at least in this country) occur too infrequently to warrant adding a specific offense characteristic. We believe that a departure would best address the rare instance when such a risk is created. The manufacture of methamphetamine always produces some waste that contains toxic substances. An increased sentence should be reserved for those cases where the toxic or hazardous substance poses a substantial risk of serious environmental harm.

Part D

Part D would amend the commentary to § 2D1.1 and § 3B1.3 (abuse of position of trust or use of special skill) to state that drug manufacturers ("cooks") may be subject to an enhancement under § 3B1.3. Part D also offers an option that would delete that part of § 3B1.3 that states that a sentence may not be enhanced for both use of a special skill and aggravating role. We oppose the amendment.

We believe that the revised commentary is unnecessary and conflicts with existing commentary on the definition of special skill. Not all drug manufacturing takes a significant amount of skill. For instance, converting cocaine powder into crack cocaine or free-base cocaine requires

neither much skill nor much training. The definition of "special skill" in the existing guideline is sufficient to alert a court that it may adjust a sentence when the manufacturing process involves some degree of sophistication.

We also oppose deleting the prohibition against adjusting a sentencing for both use of a special skill and aggravating role. There has been no justification for changing the existing policy to prevent double-counting.

Part E

Part E requests comment on three issues relating to punishing methamphetamine offenses. We believe that the issues can best be resolved after a comprehensive study of methamphetamine cases. As indicated above, we urge the commission to conduct such a study.

Amendment 11
(Indexing of New Offenses)

Part A

Part A of amendment 11 would add offenses created under the Health Insurance Portability and Accountability Act of 1996 to the statutory index contained in Appendix A.

1. The offense guideline applicable to a violation of 18 U.S.C. § 1347, the new offense of health care fraud (punishable by a maximum of ten years in prison (20 years if the violation results in serious bodily injury, and life imprisonment if the violation results in death)) would be the fraud guideline, § 2F1.1. We do not oppose this change.

2. The offense guideline applicable to violations of 18 U.S.C. § 669, the new offense of "theft or embezzlement in connection with health care" (punishable by a maximum of ten years in prison) would be the fraud guideline, § 2F1.1. We oppose this portion of amendment 11.

The new offense, entitled by Congress "theft or embezzlement in connection with health care" and placed in chapter 31 (embezzlement and theft) of title 18, United States Code, punishes "[w]hoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program" with up to ten years in prison. The appropriate guideline for this offense is § 2B1.1, covering larceny, embezzlement, and other forms of theft, not § 2F1.1. Cf. 18 U.S.C. § 1347 (new offense entitled "Health care fraud," placed in chapter 63 (mail fraud) of title 18, United States Code, and violations of which to be sentenced under U.S.S.G. § 2F1.1, see Proposed Amendments, Pt. II, amendment 11(A)(1)).

3. The offense guideline applicable to a violation of 18 U.S.C. § 1035, the new offense of "false statements relating to health care matters" (punishable by a maximum of five years in prison) would be the fraud guideline, § 2F1.1. We do not oppose this change.

4. The offense guideline applicable to a violation of 18 U.S.C. § 1518, the new offense of "obstruction of criminal investigations of health care" (punishable by a maximum of 5 years in prison) would be the guideline for obstruction of justice, § 2J1.2. We do not oppose this change.

Part B

Part B of amendment 11 addresses changes made by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.

1. Section 648 of the Appropriations Act increased the statutory maximum term of imprisonment for 18 U.S.C. §§ 474 and 474A (counterfeiting offenses) from 12 years to 25 years by reclassifying these offenses from Class C offenses to Class B offenses. Section 474, covering the

possession, use, manufacture, or sale of counterfeiting equipment, is presently addressed by § 2B5.1. Section 474A, covering the possession of special paper or counterfeit deterrents, is not listed in the statutory index. Part B(1) of amendment 11 would reference § 474A to § 2B5.1. We do not oppose this change.

2. Section 648 also created a new offense involving fictitious obligations, that is, obligations that are completely made up but used as if real (e.g., Monopoly money used instead of currency), as opposed to being copies of real obligations (i.e., counterfeit). This offense also criminalizes the use of the mail, wire, radio, or other electronic communication to transfer the fake instruments. To be convicted, a defendant must have committed the offense with the intent to defraud. Part B(2) of amendment 11 would reference the new offense, 18 U.S.C. § 514, to the fraud guideline, § 2F1.1. We do not oppose this change.

Amendment 12
(Guidelines incorporating loss table of § 2F1.1)

Amendment 12, which would amend ten guidelines that rely on the loss table of § 2F1.1 to determine the offense level, is dependent upon the Commission's approval of amendment 18 in part I of the amendments published by the Commission for public comment. We recommend that the Commission take no action on amendment 12.

Amendment 18 in part I raises complicated and important issues about defining and calculating loss. We have recommended that the Commission postpone action on amendment 18 and take up the issues raised by that amendment after completion of work on this cycle's amendments. Because amendment 12 in part II is dependent upon Commission action on amendment 18 in part I, we make the same recommendation for amendment 12.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 19, 1997

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the proposed sentencing guideline amendments published for comment in the Federal Register January 2, 1997. The detailed comments that follow relate to the proposed guideline amendments that we understand the Commission is most likely to consider. However, there are a number of other amendments on which we will comment at Commission meetings if the Commission decides to consider them, such as the ones relating to acquitted conduct and role in the offense. We strongly oppose these particular amendments and urge the Commission not to adopt them.

Before addressing the issues the Commission has indicated it is likely to consider, we wish to reiterate the need to amend the fraud, tax, and related guidelines to produce more appropriate sentences and to simplify the guidelines' operation. Specifically, the fraud table should be adjusted to include more than minimal planning and to produce higher sentences for serious offenses. In addition, several new enhancements are needed, as outlined in our proposal last December. We urge the Commission to address the fraud area and would be happy to work with you in finalizing a guideline this amendment cycle. If, however, the Commission decides to delay action on this amendment, we believe the Commission should give it its utmost attention in the next amendment cycle.

AMENDMENT 7 -- STATUTORY INDEX

Amendment 7 amends the Statutory Index and guideline §1B1.2 to clarify that the Statutory Index specifies the offense guideline most applicable to the offense of conviction, subject

to certain exceptions. The effect would be to give the Statutory Index more binding effect than it may now have. Although we agree that the Statutory Index should be given binding effect, we are not convinced that the proposed amendments will prevent the litigation they are aimed at discouraging.

AMENDMENT 10 -- CROSS REFERENCES AND ATTEMPTS AND CONSPIRACIES

Amendment 10 would revise the operation of cross-references that specifically direct the use of a different guideline if it results in a higher offense level. It would also amend the guideline on attempts, solicitations, and conspiracies (where such offenses are not covered by a specific offense guideline), §2X1.1, to eliminate the three-level reduction that now applies where the defendant has not completed all the acts he or she believed necessary for the successful completion of the substantive offense. The amendment would allow downward departures of up to three levels if the defendant were arrested well before such completion. We recommend that the Commission adopt the proposed amendment of §2X1.1. It will simplify the operation of the guidelines and recognize the seriousness of many attempts and conspiracies.

AMENDMENT 11 -- REDUCTION IN TERM OF IMPRISONMENT BECAUSE OF RETROACTIVE GUIDELINE APPLICATION

Amendment 11 responds to recent litigation regarding the reduction of a term of imprisonment under policy statement §1B1.10 because of an amended guideline range. The amendment clarifies that this guideline provision authorizes a court to reduce a prison sentence but not other components of the sentence, such as supervised release. It also provides that the reduced term of imprisonment may not be less than the term of imprisonment the defendant has already served. We support this amendment since the statutory authority for this guideline provision, 18 U.S.C. §3582(c), authorizes a court to reduce a prison term and provides no authority retroactively to reduce other components of the sentence.

While we urge the Commission to adopt an amendment along the lines proposed, we find proposed Application Note 3 problematic. It states that the determination whether to grant a reduction in imprisonment and the amount of reduction are "within the sound discretion of the court, subject to the limitations in subsection (b)" of §1B1.10. We are concerned that this language may result in arguments that the court can depart below the amended guideline range in the retroactive consideration of the amended guideline. The amendment should make clear that a court may not sentence below the amended guideline range.

AMENDMENT 14 -- THREAT OF DEATH

Amendment 14 would amend the robbery guideline by deleting the word "express" from "express threat of death" in the specific offense characteristic imposing a two-level enhancement in cases involving such threats, §2B3.1(b)(2). The commentary would also be amended to clarify that a defendant need not have expressly stated his intent to kill the victim in order for the enhancement to apply.

We favor the proposed amendment. However, the proposed commentary amendment to Application Note 6 would delete examples of death threats previously included. These consist of a number in which the defendant has explicitly stated or written the death threat and one in which there is a combination of words and a gesture: "Give me the money or else (where the defendant draws his hand across his throat in a slashing motion)." We recommend that the Commission retain the proposed examples in the commentary. These examples will continue to be useful to the courts in construing the amended guideline, and their deletion would likely engender arguments that the conduct they describe is not meant to be covered. Retaining the examples would require some adjustment of the commentary preceding them and may also require the addition of further examples illustrating the effect of the amendment.

AMENDMENT 15 -- AGGRAVATED SEXUAL ABUSE AND SEXUAL ABUSE AS SERIOUS BODILY INJURY

Amendment 15 addresses the recent statutory change to the carjacking statute, 18 U.S.C. §2119, which was amended to include aggravated sexual abuse and sexual abuse within the definition of "serious bodily injury." Two options are presented: one narrowly addressing the robbery guideline, and the other amending the definition of "serious bodily injury" generally for the guidelines. We prefer the broader approach, which is embodied in Option 2, since guidelines for offenses other than robbery should recognize that aggravated sexual abuse and sexual abuse involve serious bodily injury. For example, the guidelines applicable to assault with intent to commit murder and aggravated assault, §§2A2.1 and 2A2.2, both include enhancements for serious bodily injury to the victim and should reflect injury in the form of aggravated sexual abuse and sexual abuse.

The proposed amendment may have an unintended consequence that should be addressed. It may give rise to arguments that where sexual abuse or aggravated sexual abuse occurs in connection with a robbery (or other offense if the broader option is chosen), the injury can never be greater than serious. Whichever option is chosen, the Commission should clarify that cases of aggravated sexual abuse or sexual abuse that result in permanent or life-threatening injury are not excluded from the

greater enhancement for such injury just because these offenses themselves constitute serious bodily injury. For example, if a victim suffers permanent or life-threatening injury as a result of a robbery-related rape (such as through contracting the HIV virus), the injury should not be considered merely serious because it occurred in connection with an aggravated sexual abuse. The Commission should clarify the potential applicability of the greater enhancement for permanent or life-threatening injury in this and other situations where such injury occurs.

While we favor Option 2, we are concerned about the proposed narrowing of the portion of the definition of "serious bodily injury" involving impairment of a function of a bodily member, organ, or mental faculty. The proposed change is to require that such impairment be "protracted." While there may be a need to differentiate "serious bodily injury" from "bodily injury," the proposed standard is likely to engender litigation on the meaning of the term "protracted." We are not convinced that there is a need to amend this aspect of the definition of "serious bodily injury."

We also recommend that additional conforming amendments be made if Option 2 is approved. For example, the kidnapping guideline, §2A4.1, includes a two-level increase for serious bodily injury and a three-level increase if the victim was sexually exploited. The amended definition of "serious bodily injury" including sexual abuse and aggravated sexual abuse should not apply to this guideline.

AMENDMENT 16 -- ALTERED BEARER OBLIGATIONS OF THE UNITED STATES

Amendment 16 would treat offenses involving altered bearer obligations of the United States in the same manner as cases involving counterfeit bearer obligations. It would accomplish this result by moving the former offenses from guideline §2F1.1 to §2B5.1. The amendment would also add a two-level enhancement for offenses committed outside the United States -- a feature which is the result of a directive in the Antiterrorism and Effective Death Penalty Act.

We generally favor the amendment. However, we question the need for the addition of proposed Application Note 3, which excludes from the calculation items "that clearly were not intended for circulation ...." because, for example, of defects but includes "partially completed items that would have been completed but for the discovery of the offense ...." Determining which items are defective and which are only partially completed calls for a level of distinction that would be impossible on the basis of found items in many cases. Nevertheless, the presence of this application note would encourage litigation. Had the defective items been better produced, the offender would likely have circulated them along with the well-produced items. The

fact that a counterfeiter has produced some defective items should not reduce his or her sentence; the defective items reflect his or her intent as much as the good ones do.

AMENDMENT 17 -- UNDERLYING OFFENSE FOR RICO AND OTHER GUIDELINES

Amendment 17 amends the guidelines pertaining to use of a communication facility in committing drug offenses, §2D1.6; unlawful conduct relating to racketeer influenced and corrupt organizations (RICO), §2E1.1; interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. Each of these guidelines refers to the offense level applicable to the underlying offense or to the underlying racketeering activity, or similar language. The Commission proposes to specify that the underlying offense is determined on the basis of the conduct of which the defendant was convicted. This language would eliminate relevant conduct as a basis for determining the offense level in many instances and create arguments in others that relevant conduct is not meant to apply to this determination. We strongly oppose these amendments and recommend that, if the Commission acts on this issue, it do so in a manner opposite to that proposed. That is, the Commission should clarify that the underlying offense is to be determined on the basis of relevant conduct.

First, we do not agree that there is a circuit conflict with respect to the two cases cited, United States v. McCall, 915 F.2d 811 (2d Cir. 1990), and United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993). The court in McCall did not discuss the effect of the relevant conduct guideline, §1B1.3, in determining how to apply the guideline applicable to the offense of conviction for violent crimes in aid of racketeering activity. It seemed to assume the result it reached -- that the offense of conviction determines the applicable guideline referred to in guideline §2E1.3. That is, the court never entered into an analysis of whether the direction in §1B1.2 to use the guideline most applicable to the offense of conviction operates beyond selecting the guideline applicable to violent crimes in aid of racketeering, §2E1.3, and to the derivative guideline for the underlying offense. Similarly, the court never discussed the effect of relevant conduct on determining the guideline for the underlying offense. In addition, the court in McCall was apparently concerned about the impact of the defendant's guilty plea and his possible lack of understanding of the operation of the guidelines.

Next, we believe that the proposed amendment would result in seriously incorrect sentences for some of the most dangerous offenders we prosecute. The proposed amendment is a departure from the fundamental policy determination of the guidelines not to use a pure charge offense approach to sentencing. The

Commission has resolved the tension between a charge offense and real offense system generally through the relevant conduct guideline. In most cases the guidelines base sentences on real offense conduct that is reasonably related to the offense of conviction. Thus, for example, uncharged but related drug transactions are part of relevant conduct. The Commission also uses cross-references to achieve this mixed charge-offense and real-offense approach. Thus, murder committed in connection with a robbery results in application of the murder guideline even though the offense of conviction is robbery. This result is consistent with the view that real offense conduct counts toward the sentence where it is connected to the offense of conviction and is not an uncommon or unforeseen result.

While the above description of the guidelines pertains to many guidelines, the Commission proposes to take a narrower approach to one of the most serious federal crimes prosecuted -- that pertaining to racketeer influenced and corrupt organizations. Particularly with respect to racketeering offenses, the relevant conduct approach is important. Crime bosses establish their structure of organized crime, in part, to insulate themselves from the criminal acts that they direct and control. The relevant conduct approach cuts through this insulating structure and punishes the bosses for the acts they command and encourage, even when there are more limited specific counts of conviction that can be proved beyond a reasonable doubt. Precisely because RICO involves criminal enterprises, it is important to focus on the enterprise's illegal conduct, and not simply on any one individual's offense of conviction.

Despite the nature of organized crime, the Commission proposes to treat RICO offenses as if they were mere conspiracies to commit a particular unlawful act. This approach ignores the fact that a RICO offense is not an underlying individual racketeering act, but rather the behavior of conducting the affairs of an enterprise through a pattern of racketeering activity. The heart of the RICO statute, 18 U.S.C. §1962, is a defendant's ongoing participation in an enterprise that affects commerce. A defendant violates the RICO statute only if, among other things, he also engages in a "pattern of racketeering activity" (two racketeering acts) or the "collection of an unlawful debt" that has a specified relationship to the charged enterprise. Generally speaking, the gravamen of the offense is to conduct the affairs of an enterprise through a pattern of racketeering activity. This offense should not be likened to a one-time conspiracy to commit an unlawful act.

Another problem with the proposed amendment is that it ignores the fact that Congress views various forms of illegal conduct as related when committed in an organized crime context. By including particular crimes as RICO predicates, Congress has indicated the nature of offenses it believes are typical of

racketeering enterprises. These include: murder, kidnapping robbery, extortion, controlled substances trafficking, bribery, retaliation against witnesses, and other serious offenses. See 18 U.S.C. §1961. The RICO predicates are related in that they represent the types of criminal activity a racketeering enterprise uses as a means to conduct its affairs. Since Congress regards numerous offenses as related in an organized crime context, the Commission should do so as well. As it does with other related offenses, the Commission should allow the relevant conduct rules to operate with respect to racketeering offenses so that a racketeering defendant's measure of criminal conduct is not limited to his offense of conviction.

We have similar concerns about the proposals relating to the two other racketeering guidelines proposed for amendment, interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. The offenses to which these guidelines pertain are used to prosecute racketeering cases, and any narrowing of the underlying conduct could result in insufficient sentences for serious offenders.

With respect to the proposed amendment of guideline §2D1.6, we believe this proposal will create confusion at best. The proposed new Application Note 1 may be viewed as inconsistent with Note 2. Note 1 states that the offense level must be determined on the basis of the offense of conviction, while Note 2 allows relevant conduct to enter into this determination. Some courts may be able to read these two notes together and understand that the added application note is intended to direct them to the drug distribution guideline, to which relevant conduct, including conduct not contained in a count of conviction, applies in establishing the offense level. However, other courts may find that the new application note limits relevant conduct to the quantity embodied in the offense of conviction and that this new note serves as an exception to guideline §1B1.3. In any case, a great deal of litigation can be expected. The commentary to guideline §2D1.6 should not be amended as proposed. Relevant conduct should control the determination of the offense level.

AMENDMENT 23 -- OBSTRUCTING JUSTICE

Amendment 23 attempts to address recent litigation surrounding the last sentence of Application Note 1 following guideline §3C1.1 on obstruction of justice: "In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant." The Commission's stated concern is that the above language may suggest a heightened standard of proof when a court applies the obstruction enhancement to perjury. While we favor the concept of this

amendment, we find it problematic in its execution in several respects.

The proposed amendment purports to eliminate the suggestion of a heightened standard of proof by deleting part of the above quoted language -- namely, the instruction regarding how the court should evaluate the testimony or statements. However, the proposal substitutes new language admonishing the court to be cognizant that inaccurate testimony or statements may result from confusion, mistake, or faulty memory and may not necessarily reflect a willful attempt to obstruct justice.

While it would be helpful to delete the offending language, the proposed substitute language will raise new questions. The Commission does not ordinarily instruct the courts as to how to consider evidence, and such instruction is not appropriate here. Moreover, some will regard the new language as the practical equivalent of the old, and the problem the Commission is attempting to cure may persist. It would be preferable to delete the offending sentence and to include no substitute language.

The proposed amendment is also problematic in another respect. It deletes Application Note 3(i), which contains a reference to offenses in title 18, United States Code, to which the obstruction enhancement applies. The reason given for the deletion is that the statutes referred to "include a hodgepodge of provisions" and that some have marginal, if any, relevance to the obstruction enhancement. This aspect of the proposal is unnecessary tinkering. The deleted provisions include some that have clear relevance to obstruction, such as influencing or injuring a juror and obstruction of a criminal investigation. The deletion of this language is simply not neutral and will spawn many unnecessary arguments. As a result, the main effect of the deletion will be to increase litigation surrounding conduct that was clearly covered as obstructive conduct in the past. The specifically listed sections of title 18, United States Code, should be retained in Application Note 3.

AMENDMENT 28 -- CIRCUIT CONFLICTS

Amendment 28 includes issues for comment on a number of matters. We agree that the Commission should address significant circuit conflicts when they exist and would be pleased to consider these conflicts further in discussions with the Commission.

We have several specific comments about the proposed amendments to resolve circuit conflicts.

Item 6

Item 6 concerns the issue whether the "victim of the offense" for purposes of the guideline on hate crimes and vulnerable victims, §3A1.1, refers only to the victim of the offense of conviction or to the victim of any relevant conduct. As indicated above, we favor the broader view. For example, a defendant may be convicted of several counts of mail fraud in which part of his relevant conduct, but not his offense of conviction, included a scheme to defraud several vulnerable victims. By contrast, in a similar mail fraud scheme evidentiary considerations may result in counts of conviction that involve one or more vulnerable victims but not other counts that would be included within relevant conduct.

The reasons the guidelines include relevant conduct for purposes of determining the extent of a fraud apply equally to the manner in which that fraud is conducted generally. Real offense sentencing enhances the ability of the guideline system to reduce unwarranted sentencing disparity. Without the use of relevant conduct principles, two offenders who commit identical conduct could receive very different sentences, depending upon the specific charges pursued. Thus, the Commission should resolve this issue so that the vulnerable victim guideline operates in accordance with relevant conduct principles.

Item 13

Item 13 addresses the issue of whether multiple criminal incidents over time may constitute a single act of aberrant behavior warranting departure from the applicable sentencing guideline range. We urge the Commission to specify that such acts are not a basis for departure. A single act of aberrant behavior may constitute a basis for departure because a defendant who acts out of character and engages in illegal conduct on one occasion is deserving of less punishment and is less in need of incapacitation than one who engages in multiple unlawful acts over time. However, to extend the reasoning of this departure basis to multiple unlawful acts occurring over time defies logic and undermines the guideline system. We urge the Commission to disallow this basis for departure when based on multiple unlawful acts occurring over time.

Item 14

Amendment 14 concerns the issue whether collateral consequences of a defendant's conviction can be a basis for a downward departure. The Commission should address this issue since departures based on collateral consequences of conviction may be seized upon by judges as a means of avoiding guideline sentences in white collar cases. In addition to the cases cited by the Commission, a recent tax case, United States v. Olbres,

99 F.3d 28, 32-37 (1st Cir. 1996), shows how the courts have had to deal with this issue. In Olbres the defendants appealed from the denial of a downward departure based on the fact that their business would fail and their 12 employees would be adversely affected if the defendants were imprisoned. The First Circuit rejected a categorical approach to these cases and remanded to the trial court to determine whether the case fell outside the heartland of these offenses. The court gave some indication that a disadvantage to innocent persons is not enough to take a case out of the heartland.

The Commission should disallow collateral consequences of conviction as a basis for downward departure so that the guidelines can operate as intended. Every individual suffers collateral consequences of conviction, whether such consequences be in the form of lost employment or lost business. Collateral consequences are a heartland effect of imprisonment and should not be the basis for a lower sentence. We urge the Commission to disallow this basis for departure.

AMENDMENT 30 -- SUPERVISED RELEASE AND SAFETY VALVE

Amendment 30 amends the supervised release guideline, §5D1.2, to provide that a defendant eligible for the "safety valve" exemption from mandatory minimum sentences is also exempt from a statutorily determined minimum term of supervised release. While we do not object to the substance of this amendment, we would recommend that its form be changed somewhat. The current proposal sets forth the change in an Application Note but includes contrary language in subsection (b) of the guideline itself: "The term of supervised release imposed shall in no event be less than any statutorily required term of supervised release." (Emphasis added.) To improve clarity in this area, we recommend that subsection (b) begin with the words "Except as provided in §5C1.2". With this addition, the commentary and the guideline itself will be consistent.

AMENDMENT 31 -- RESTITUTION

Amendment 31 includes an issue for comment concerning "community restitution" for a defendant convicted of certain controlled substances offenses in which there is no identifiable victim. The issue for comment arises because of section 205(c) of the Antiterrorism and Effective Death Penalty Act of 1996, which permits a court to order restitution based on the amount of public harm in such cases. This provision directs the Sentencing Commission to promulgate guidelines in this area and further provides that no restitution may be ordered until the Commission promulgates guidelines.

We urge the Commission to move forward with a guideline this amendment cycle in accordance with section 205(c) of the Act so

that the statutory provision can take effect in November. Delaying the issuance of a guideline for another year would mean a two-and-a-half year gap between the enactment of the statutory directive and its practical effect.

Since the concept of community restitution is a new one, we believe that a fairly general guideline that complies with the statutory provision would be appropriate. The guideline could be refined in the future after the courts gain experience with this form of restitution. For the present, the amount of public harm caused by the offense could be based on the offense level. Moreover, since the statute provides that the amount of community restitution may not exceed the fine ordered in the case, the guideline could refer to the ranges from the fine table for purposes of community restitution. The Commission should act quickly so that the statutory provision authorizing community restitution becomes a reality.

We would be pleased to provide assistance in the further development of the guidelines discussed.

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider
Counsel to the Assistant
Attorney General

March 13, 1997

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed, pleased find our comments with regard to the amendments proposed by the United States Sentencing Commission.

Sincerely,

Mary Lou Soller
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655 Fifteenth Street, N.W.
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Washington, DC 20005

Alan J. Chaset
Law Offices of Alan J. Chaset
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Alexandria, VA 22314

Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Sections's Committee on the United States Sentencing Guidelines. The members of that committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists. We are corresponding today, however, in our individual capacities as private defense attorneys and not as representatives of either the committee, the section or the association.

On January 2, 1997, the Commission published notice of proposed temporary emergency guideline amendments. Additionally, that notice contained several "non-emergency" proposals to amend and consolidate various other sections of the guidelines. Subsequently, on February 25, 1997, the Commission published another notice containing proposals for other emergency and non-emergency amendments to the guidelines and including some conforming changes to the previously published proposals. While we have already forwarded a brief response to the initial set of emergency proposals in our representative capacity, we are using this occasion to address some of the issues raised within the remainder of those notices and ask that you accept these comments on our own behalf.

As a starting point, we wish to commend the Commission (and more specifically its staff) for the significant amount of effort obviously reflected by the broad range of issues implicated by the various and numerous proposals. To the agency's credit, it was able to craft potential changes to advance its commitment to simplify and consolidate the guidelines while, at the same time, drafting responses to the many legislative directives requiring some more immediate action. And it was also able to deal with other aspects of the guidelines that needed adjustment, able to address several disparate decisions between the circuit courts, and able to attempt to placate the various constituent groups, entities and organizations that seek amendments to the Manual.

Because we are cognizant of the quantum of effort required just to produce the several hundred pages of proposals and because we understand the work that would now be required to polish and refine these matters to permit their adoption and to facilitate their implementation, we appreciate all the more the signal apparently being provided by the Commission as to what can and probably will be handled during this amendment cycle and what needs to be deferred for the present. Rather than being critical of the Commission for raising false hopes, we fully understand that message in general and recognize the impact of the two current commissioner vacancies in particular. Furthermore, considering previously stated remarks in regard to the Commission's Rules of Practice and Procedure, we believe that such deferral would be consistent with the suggestion of a more deliberate system of propôsal, comment, review and more focused reproposal.

Having said the above, we believe that the Commission must in turn appreciate that, as a consequence, it has been somewhat more difficult to enlist volunteer members of our and other such committees to spend the time necessary to fully and properly consider and then formally address each of the proposals on the long amendment agenda. For instance, while some of our

volunteers were ready to volunteer their individual opinions on single issues, there was insufficient comment and discussion provided as to most others. As a result, no clear consensus position could be achieved for each of the items on the lists and thus no fairly representative statement could be crafted. We will, however, be providing herein some brief comments of our own on several of the proposals and we do offer our commitment to continue to work with the Commission and its staff on the remainder.

With that as background and even though we are speaking as individual practitioners, please understand that our principal policy directive on sentencing guideline matters is still to be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18 - 2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18 - 4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding with experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

I. January 2, 1997 - Non-Emergency Amendments

A. Amendment 5: While cognizant of the fact that the proposal here effectively amounts to making permanent a previously promulgated emergency amendment, we remain uncomfortable with U.S.S.G.§3A1.4 in its current and amended forms because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points).

B. Amendment 6: We too are troubled by the confusion surrounding the definition of "instant offense" and its relation to relevant conduct and we also believe that explanatory language is needed. Unfortunately, the current proposal does not fully address and solve that confusion and that need. While we believe that more work is needed on this otherwise worthwhile proposal, we are also troubled by what is labeled as a conforming change to U.S.S.G. §3C1.1. Despite the label, we view the amendment as applied here as more a broadening of the coverage of this obstruction provision as opposed to an explanatory definition.

C. Amendment 8: We support incorporating the holding in United States v. Hill into U.S.S.G. §1B1.3.

D. Amendment 9: While we have previously and consistently stated our opposition to having acquitted conduct being considered for sentencing purposes and while we favor Option

1B among the proposals now being provided, we are cognizant of the fact that the Commission may not presently be in a position to consider all the implications of United States v. Watts and all the issues surrounding the use of acquitted conduct in the guideline equation.

E. Amendment 10: While we are supportive of that part of this proposal that simplifies the operation of Chapter Two cross references by limiting the what goes into/ what is to be considered in the determination of "greater offense level," we believe that more research needs to be undertaken and presented demonstrating the need to amend U.S.S.G. §2X1.1 as proposed.

F. Amendment 11: We are opposed to the proposed amendment to U.S.S.G. §1B1.10 limiting the impact of retroactive guideline changes to only reductions in the term of imprisonment. For many judges, the sentencing decision is a gestalt reflecting the use of the various sanctioning alternatives available under the statutes and the guidelines. Often, the appropriate sentence for the unique combination of offense and offender characteristics is a similarly unique combination of a particular point on the otherwise applicable range of months, a certain fine including the costs of imprisonment and/or supervision, a period of supervision to follow with particularized conditions of supervision, etc. When one of those factors is changed or eliminated in some way, the entire package has thus been changed. The only way to then achieve the desired balance is to similarly adjust each of the other pieces of the sentencing puzzle.

G. Amendments 12 & 18: The need to address the multiple problems associated with fraud and theft and tax guidelines in general and the interrelated loss issue in particular is most apparent as is the appropriateness of taking those matters off the table for this amendment cycle. While we have not as yet developed a specific position on the changes as currently proposed, we are encouraged by the lead taken in this area by the Practitioner's Advisory Group and are impressed with the drafts already authored by James Felman, Barry Boss and John Cline. As the effort on this front moves forward, we anticipate making substantial use of the product being prepared by these individuals and expect to recommend substantial parts of same for your consideration.

H. Amendment 14: Since we believe that the decisions from the 6th and 11th circuits represent the more appropriate response to the application of the "express threat of death" enhancement in U.S.S.G. §2B3,1, we oppose the proposed changes within the guideline and the application note.

I. Amendment 15: While we remain uncomfortable with language that equates injury as conduct and while there might be a better way to frame the point the Commission is trying to make, we prefer Option 1 as the identified narrower approach to the matter.

J. Amendment 16: While having no difficulty with the first and third parts of this proposal, we are opposed to the functional increase in the offense level for the covered bearer instrument offenses that will occur by moving the offenses from U.S.S.G. §2F1.1 to §2B5.1.

There has been no showing/demonstration that the current arrangement is not adequate to address the crime.

K. Amendment 17: We support the clarification of the meaning of "underlying offense" being proposed here.

L. Amendments 21 & 22: We share the belief that the current guidelines relating to role in the offense merit further study and refinement and we have long felt that these provisions could be integrated in some way with the drug guidelines to lessen the impact of drug quantity on the overall guideline assessment. While we see the need for change, we have some difficulties with each of the options being proposed for dealing with aggravating role and mitigating role adjustments. Because these sections are so significant, we trust that the Commission will place the issue high on the priority list for the next amendment cycle and we pledge to work with staff to share our specific thoughts and suggestions.

M. Amendment 23: While we prefer the clear and convincing standard adopted in the District of Columbia circuit, we believe that the decision in United States v. Dunnigan provides all the guidance necessary here. Further, we oppose the last of the four changes being proposed for the application note to U.S.S.G. §3C1.1; there has been no demonstrated need or other data provided justifying the expansion to a broader set of cases.

N. Amendments 24, 25 & 26: Of the three proposals addressing various aspects of the Acceptance of Responsibility concept in U.S.S.G. §3E1.1, we note our support of only those revisions that remove the restriction that currently prohibits the application of the additional one level decrease for offense level 15 or lower.

O. Amendment 28: As a general proposition, we believe that the Commission should not necessarily dictate a determination/resolution each time a disagreement between the circuit courts is identified as regards the implementation or application of a guideline provision. However, we appreciate the difficulties and unfairness that arise because of disparate interpretations and we are cognizant of the twenty-plus-page document prepared by the Commission's General Counsel listing such conflicts already addressed by Commission amendment.

If, however, the Commission decides to address any of the fifteen conflict issues listed within this proposed amendment during this cycle, please permit us to offer our position on several of those items. As to 4), we believe that a federal prison camp is clearly a non-secure facility and thus is functionally similar to the other listed facilities in U.S.S.G. §2P1.1(b)(3). As to 5), we believe that the two level enhancement at U.S.S.G. §2F1.1(b)(3)(A) requires that the defendant affirmatively misrepresent his/her authority to act on behalf of a charitable or governmental organization. As to 12), we believe that the use of the career offender provisions should be restricted to only those who otherwise statutorily qualify and thus cannot be used for departure purposes. As to 13), we believe that it may be reasonable in some circumstances for multiple criminal incidents occurring over a period of time to constitute a single act of aberrant

behavior thus warranting departure. And as to 14), we believe that it may be reasonable in some circumstances for the collateral consequences of defendant's conviction to serve as the basis of a downward departure.

P. Amendments 33, 34 & 35: We appreciate the desire of the Commission to recognize and implement the holding in Koon v. United States. While we support some of the more technical changes in amendment 34, we believe that amendments 33 and 35 are an inappropriate and unnecessary response to that decision and we see no need to merely repeat the language from the introduction in U.S.S.G. §5K2.0. If the Commission does intend to recraft the entire introduction in an upcoming amendment cycle, that would be the time to handle this matter.

Q. Amendment 37: As to the numerous consolidations and refinements proposed within this item, we have reviewed the detailed comments in this regard prepared by the Federal Public Defenders. While not necessarily adopting the position stated therein on each of the proposed consolidations, we find the effort thorough and complete and commend the discussion to the Commission.

II. February 25, 1997- Emergency/Non-Emergency Amendments

Aside from amendments 2, 12 and 13 that are necessarily implicated by either our previous comments our remarks contained above, we have not had an opportunity to review and discuss these proposals. Any comments in that regard from either us individually or more formally from the committee that we chair will be provided by the March 28, 1997 response date.

Finally, attached hereto are some additional comments prepared by one of the members of the committee. While this document was originated as a response to our request for reactions to the amendments being proposed during this cycle, its content is more general in nature and speaks to the structure of the present system and the author's perceived need for dramatic change. Since we are providing the above discussion in our individual capacities, we thought it appropriate to similarly forward this thoughtful piece from Professor Russell Coombs.

Thank you for this opportunity to provide our input.

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

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March 14,1997

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
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Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1997 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1997 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the

Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

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COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 5 will be our comment on proposed amendment (or issue for comment) number 5 and so forth.

Amendment 5
(§ 3A1.4)

Using emergency authority, the Commission amended § 3A1.4 in November 1996, in response to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. U.S.S.G. App. C, amend. 539. The emergency amendment broadened the scope of § 3A1.4 (by deleting "international') to apply to a federal crime of terrorism. Amendment 5 would repromulgate § 3A1.4 (terrorism) as a permanent guideline. We understand that the guidelines must provide an adjustment for acts that involve or promote terrorism, but we oppose the type of enhancement provided by § 3A1.4.

The amended version of § 3A1.4 provides the same enhancement as the original. The adjustment imposes a twelve-level increase in the offense level, a minimum offense level of 32, and a criminal history category VI. We believe that mandatory minimums are counterproductive and inconsistent with the guideline system, and therefore oppose establishing a mandatory minimum offense level of 32. For similar reasons we believe it is inappropriate for a chapter three adjustment to raise the criminal history category.

The guidelines are set up in a logical order: chapters two and three address the offense conduct; chapter four captures the defendant's criminal history. Under this adjustment, however, every defendant will have the same criminal history category. This renders chapter four virtually meaningless and results in unwarranted disparity between defendants with a serious criminal record and defendants with a less serious or no criminal record. A twelve-level adjustment for terrorism is a significant increase to any offense level and there should be no automatic criminal history category VI.

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

Part One

Amendment 6 has two parts. The first part corrects a technical error in the application instructions guideline, §

1B1.2. We support that amendment.

Part Two

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

The explanation of the amendment concerning "instant offense," for example, indicates that the purpose of the amendment is "to distinguish the current or 'instant' offense from prior criminal offenses." The proposed language, however, only results in confusion. The Commission has defined the term "offense" to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n. 1(l)). The term "instant offense," therefore, must mean "the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." If the Commission believes it necessary to define "instant offense," we offer the following suggestion: "The term 'instant offense' means the violation for which the defendant is being sentenced."

The explanation of the amendment to the commentary of § 3C1.1 does not indicate how the amendment conforms § 3C1.1 to the definition of "instant offense." The willful obstruction guideline already uses the term "instant offense." Moreover, the proposed language, once untangled, would change § 3C1.1 substantively. Under the present guideline, the adjustment applies only to the conduct of the defendant or conduct that the defendant aids and abets, see application note 7; U.S. Sentencing Com'n, Questions Most Frequently Asked about the Sentencing Guidelines ques. 62 (June 1, 1994), and only to efforts to obstruct justice with respect to the offense for which the defendant is being sentenced. The proposed "conforming" language would permit application of the enhancement beyond conduct for which the relevant conduct rules of § 1B1.3 hold a defendant accountable. For example, the proposal would call for an obstruction of justice based upon conduct that obstructed the investigation of a civil violation committed by another person, even though the conduct that triggers application of the adjustment (1) did not occur during the offense of conviction, or in preparation for or attempting to evade responsibility for the offense of conviction, and (2) was not part of the same course of conduct as or part of a common scheme or plan with the offense for which the defendant is being sentenced. In other words, absent the proposed amendment, the obstruction enhancement would not apply because the relevant conduct rules of § 1B1.3 would not call for application of the enhancement. We do not believe that the obstruction guideline should be a vehicle for sanctioning

conduct so far removed from the offense of conviction.

Amendment 7
(§ 1B1.2)

We do not oppose the amendment.

Amendment 8
(§ 1B1.3)

Amendment 8 would amend the commentary in § 1B1.3 to provide an example of what is meant by "same course of conduct." The example incorporates the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), by amending application note 9(B) to state that "if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information, is insufficient to show that they are part of the same course of conduct or common scheme or plan." We do not oppose the amendment.

The proposed amendment would provide a useful example to illustrate that similar offenses are not necessarily part of the same course of conduct, particularly when there is a lapse of time between them. In such cases, there must be a stronger showing of a connection between the offenses.

Amendment 9
(§ 1B1.3)

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

We believe that the Commission has the power to limit or preclude the use of acquitted conduct to determine the guideline

range.

Congress has given the Commission great discretion to determine federal sentencing policy. A sentencing rule promulgated by the Commission must be complied with, 18 U.S.C. § 3553(b), unless the rule conflicts with the Constitution or a statute. We are unaware of any constitutional provision that prohibits the Commission from adopting a rule that precludes or limits the use of acquitted conduct to determine sentence.

In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's sentence on conduct of which the defendant has been acquitted. Most people equate acquittal with vindication and do not perceive using acquitted conduct as fair or just. We recognize the differing burdens of persuasion rationale that supports the use of acquitted conduct, but the use of acquitted conduct to determine the guideline range is neither compelled by the Constitution or by statute. We think it unwise policy to have a rule that can render a jury's verdict meaningless.

Amendment 10
(§ 1B1.5, § 2X1.1)

Part A

We support the amendment.

Part B

Part B of amendment 10 would amend § 2X1.1 to eliminate the three-level reduction available for certain attempts, conspiracies, and solicitations. Instead of the three-level reduction, the amended commentary would state that a downward departure of up to three levels may be warranted "if the defendant is arrested well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense." We oppose the amendment.

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