Amendment 11
(§ 1B1.10)

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

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

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 Indeed, as originally enacted, the supervised release provisions did not authorize revocation of supervised release.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

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

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

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

The meaning of section 3624 should be determined by courts in the context of a case or controversy. In any event, we believe that amendment 11 represents unjust and unsound public

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

Amendment 12
(§ 2F1.1, § 2B1.1)

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

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

Amendment 13
(Ch. 5, part A)

Amendment 13 consists of two parts. The first part would create a new guideline (§ 5A1.3) to cover the sentencing table. We do not oppose either part of the proposed amendment.

Amendment 14
(§ 2B3.1)

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

Robbery necessarily includes instilling some kind of fear in the victim. Under the Hobbs Act, for example, robbery means "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." The

purpose of the enhancement in § 2B3.1(b)(2)(F) is to increase the punishment for a threat that a reasonable person would understand as a threat of death. The enhancement is inapplicable in situations where there can be no doubt about the existence of such a threat -- where a gun or dangerous weapon is used or possessed, or a toy weapon or an object appearing to be a weapon is displayed or possessed -- because in those situations a greater enhancement supersedes the two-level enhancement of § 2B3.1(b)(2)(F). The requirement of an express threat in the situation where there is in fact no weapon (or even a toy weapon or an object that appeared to be a weapon) helps ensure that the perception of a threat is a reasonable perception. To be reasonable in such a situation, the threat must have been unambiguous and a direct statement of the defendant's intention.

Amendment 15
(§ 2B3.1)

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

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

The proposed definition, including injury as well as criminal conduct, will cause unnecessarily complicated application problems. We therefore suggest that the proposed addition to the definition of serious bodily injury be rewritten. We recommend that the new language recognize that an artificial definition is being used by stating: "For purposes of subdivision (b)(3)(B), serious bodily injury is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse

under 18 U.S.C. §§ 2241 or 2242 or a similar offense under state law."

Amendment 16
(§ 2B5.1, § 2F1.1)

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

We support the first and third parts of this amendment and oppose the second part. The second part of the amendment moves offenses involving altered bearer instruments from § 2F1.1 to § 2B5.1, which results in at least a one-level increase in the offense level. The Commission's explanation for the increase is that the "higher offense level reflects the lower level of scrutiny realistically possible in transactions involving currency." There has been no showing, however, that the current levels of punishment are inadequate. Absent such a showing, there is no justification for the increase.

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

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

We support the amendment.

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

Proposed amendment 18 addresses important issues in theft and fraud cases. Amendment 18(A) includes proposed changes to the more than minimal planning enhancement and to the loss tables applicable in theft, fraud, and tax cases. Amendments 18(B) and 18(C) contain issues for comment regarding, among other things, the loss tables, specific enhancements, and loss determination.

At the outset, it is important to emphasize that the PAG believes that the issues addressed in proposed amendment 18(A-C) are of critical importance, and that Commission action is necessary to clarify and simply the application of these guidelines, while simultaneously serving the twin goals of reducing unwarranted disparity and uniformity. Unfortunately, based on the Commission's failure to propose draft amendment language on the calculation of loss, we have discerned that it is unlikely that any of these significant issues will be addressed during the current amendment cycle. We urge the Commission, however, not to abandon these areas, but to begin the process of obtaining meaningful input from the various advisory groups and from the Department of Justice so that these somewhat complicated guidelines can be addressed during the next amendment cycle. In order to advance that objective, we have included the PAG's general comments on the important issues which are raised by the Commission's published amendments.

I. Introduction

The PAG's views with respect to the fraud and theft guidelines are driven by two guiding principles. First, revisions to the theft and fraud guidelines must not lose sight of the notion that the calculation of "loss," and its role as the driving force in guideline calculations, is not intended as an end in itself, but rather to serve as a rough and approximate proxy for the relative culpability of the defendant and the severity of the offense. The point behind calculation of loss should not be to endeavor to seek mathematical certainty regarding the precise quantity of funds lost by the victim(s), but rather to measure in approximate terms the appropriate punishment for the offense conduct. Accordingly, amendments which simplify the calculation of loss by reducing the need to engage in detailed and complex fact finding, particularly where the impact of the calculation on the total loss figure is relatively small, are supported.

Second, the use of actual loss as a surrogate for culpability suffers from two serious and readily identifiable flaws in a potentially large number of cases. First, the use of actual loss to drive guidelines calculations wholly fails to take into consideration the distinction between those defendants who intend to appropriate the lost funds to their own use, and those who do not. Using bank fraud as an example, a simple calculation of the loss suffered by a bank from a bad loan does not distinguish between the offender who intends from the beginning to pocket the full amount of the loan and abscond, on the one

hand, and the offender who honestly intended to repay the loan but was unable to do so as a result of unexpected developments, on the other. It is respectfully submitted that there is a wide divergence of culpability between cases in which intended loss or intended gain is similar to the actual loss, and cases where intended loss or gain is zero or near zero. Because actual loss is only a loose surrogate for culpability, the avoidance that in a potentially large number of cases factors such as proximate cause, intended loss, and intended gain must be permitted to play a role.

Using these two principles as a guide, the PAG submits the following comments regarding the proposed amendments.

II. Consequential damages.

The guidelines currently permit the inclusion of reasonably foreseeable consequential damages only in government procurement cases. It has been observed that singling out this particular type of case for different treatment is likely unwarranted. Their would appear to be two options for elimination of this unwarranted disparity: (1) eliminate the use of consequential damages in procurement cases, or (2) consider consequential damages in all cases. In the interests of simplicity and ease of application, the PAG strongly supports the first of these options. Evidence regarding consequential damages will almost never be within the possession of either the government or the defendant, and will require considerable investigation, research, and discovery from third parties. It involves litigation of frequently complex issues which may have almost no factual connection to the conduct underlying the charged offense. Given that loss amounts are intended only to serve as a rough guide to culpability, the added complexity and burden involved in litigating issues of consequential damages is likely not worth the effort in order to arrive at an appropriate sentence. In highly extraordinary cases in which actual loss is minor and consequential damages are extreme, an upward departure could be appropriate. There seems little reason, however, to believe such cases occur with sufficient frequency to justify the difficulty and complexity of calculating such losses in every case, or even in every procurement or product substitution case.

III. Interest

The PAG believes the current guideline commentary with respect to the exclusion of interest from loss calculation is appropriate. The use of loss as a measure of culpability does not require consideration of a victim's opportunity costs or bargained-for interest. In short, the added complexity of calculating interest of either type, which is likely to be a rather small component of the total loss figure in most cases, is not justified by any measurably increased accuracy in

determining culpability or offense severity.

The exclusion of interest from the calculation of loss does *not*, however, necessarily mean that interest actually paid by the defendant should not be deducted from the victim's loss. The reason interest should be excluded is that it essentially represents lost profit, and lost profit is not truly a component of "loss." On the other hand, to the extent that the defendant has paid interest in a loan, the interest represents a direct profit to the bank. The PAG submits that there is no reason why the victim's profits should not be offset against a victim's loss to arrive at a "net" loss for guidelines purposes. Moreover, the inclusion of interest actually paid would present no significant fact finding difficulties. Indeed, inclusion of paid interest would potentially simplify loss calculation by eliminating the need in every case to revisit the payments made by the defendant to determine the principal and interest components of each payment.

IV. Elimination of "more than minimal planning" SOC.

Because of the frequency with which this specific offense characteristic is applied, the PAG agrees with its incorporation into the loss table. On the other hand, because there are a significant number of theft cases which do involve only minimal planning, the PAG strongly believes a specific offense characteristic should be added which provides for a two level *decrease* in those cases in which the defendant used no more than minimal planning. This is particularly appropriate in view of the effect the proposed revision of the loss table would have on offenders in criminal history category II, who may otherwise lose the ability to be considered for a probationary punishment for minor theft and fraud offenses. Limitation of the two level decrease to cases involving losses of less than $250,000 may also be appropriate in order to reduce the need to consider this SOC in those cases in which it is unlikely to be applicable.

V. Risk of loss, intended loss, and intended gain.

The PAG believes that actual loss should ordinarily be used to determine the base offense level in both theft and fraud cases. Intended loss, rather than being used to determine the base offense level only in cases where it is greater than actual loss, should instead be an encouraged basis for both upward and downward departure where it varies significantly from actual loss. Similarly, risk of loss and intended gain should be encouraged bases for departure where they differ significantly from actual loss.

The concepts of risk of loss and intended gain and loss are interrelated in the sense that they present alternatives to actual loss as a means for approximating culpability. It is

important to recognize, however, that they are strictly alternatives, and cannot readily be used to modify the definition or calculation of actual loss. That is, if the guideline utilizes actual loss as a determinant of offense severity, in or loss could easy be incorporated into the guidelines a manner other than as grounds for departure from the guideline range established by actual loss calculation. On the other hand, in those cases where the intended gain or loss differs greatly from the actual loss, significant and relatively frequent departures are absolutely essential if unwarranted uniformity is to be avoided. Otherwise, those who steal money by fraud will be treated in exactly the same manner as those who cause similar losses, but not through any intent to gain or cause loss in such amounts.

Because of the near parity of the current theft and fraud guidelines, the fraud loss table appears to be based on a built-in assumption that the defendant intended gain and loss amounts very close to the actual loss sustained. As set forth above, however, the PAG submits that fraud cases frequently involve defendants whose intended gain was a tiny fraction of the actual loss sustained. While actual loss must play a key role in determining the appropriate sanction for such offenses, the PAG suggests there should be a very permissive commentary suggesting the appropriateness of downward departures in cases where the defendant's intended gain is minimal in relation to the actual loss. A similar downward departure should be encouraged where the loss intended by the defendant is considerably less than the loss actually inflicted.

Because the loss table assumes intended gain and loss will be similar to actual loss, the instances in which the defendant intended to gain or inflict loss in an amount dramatically higher than the actual loss, upward departures in such cases may also be appropriate. Anecdotal evidence suggests that these cases will occur with considerably less frequency than cases warranting a downward departure, parity of reasoning indicates upward departures under these unusual circumstances should also be permitted in the commentary to the guidelines.

VI. Causation.

The PAG favors an express provision in the fraud guideline (or the accompanying commentary) limiting the actual loss figure to those losses for which the defendant's criminal conduct was (1) a "but-for" cause, and (2) a proximate cause. Thus, the defendant's sentence would be increased only by those losses that would not have occurred but for his criminal conduct and that were reasonably foreseeable to him as a direct result of that conduct.

The suggested causation standard follows from the role actual loss plays at sentencing in fraud cases. The fraud guideline contemplates that loss will provide a rough measure of the defendant's culpability. But loss that the defendant either

did not cause or that was not reasonably foreseeable to him has little (if any) bearing upon his culpability. Suppose, for example, that a defendant defrauds a business out of $50,000 through the sale of worthless merchandise and, unforeseeably to him, that $50,000 loss pushes the business into bankruptcy and costs it $5 million. To sentence the defendant based on the unforeseeable $5 million loss, rather than the foreseeable $50,000 loss, would unfairly exaggerate his culpability.

In addition to an express standard limiting the actual loss figure to those losses for which the defendant's criminal conduct is both a "but for" and a proximate cause, the PAG believes that some provision should be made for the "multiple causation" situation. In a "multiple causation" case, the defendant's criminal conduct may both actually and proximately cause a loss, but it does so in combination with other factors--for example, a sharp downturn in the economy or unrelated criminal conduct by another person. To hold the defendant responsible for the entire loss in such a case could overstate his culpability. Although an express proximate cause requirement would produce a fair measure of culpability in most "multiple causation" cases, we suggest that the commentary to the fraud guideline include authority to depart downward in exceptional cases.

VII. What amounts are credited and when credits are valued.

A. Amounts credited.

The PAG believes that the actual loss figure should be reduced by all amounts received or readily recoverable from the defendant at the time law enforcement authorities discover the offense. This would include, for example, (1) any services, goods, or money furnished by the defendant before authorities discover the offense; (2) any security pledged by the defendant before authorities discover the offense; and (3) any other thing of value belonging to the defendant that the victim is in a position to recover through reasonable effort before authorities discover the offense, provided that the defendant does not interfere with the victim's recovery. Category (3) would include, for example, the defendant's money in an account with a victim bank at the time authorities discover the offense and the defendant's goods in the possession of a victim bailee at the time authorities discover the offense.

Reducing actual loss by these amounts will help ensure that the loss figure provides a rough measure of the defendant's culpability. Value that the defendant has <u>already</u> furnished to the victim at the time authorities discover the offense (category (1) above) plainly reduces his culpability; by the act of furnishing the value, the defendant has, to that extent, diminished the harm to the victim and provided tangible evidence of his own good faith. Similarly, value that the defendant has placed at the victim's disposal before authorities discover the offense (categories (2) and (3) above) reduces culpability, since

the defendant presumably expects the victim to recover that amount.

The PAG believes that discovery of the offense by law enforcement authorities should represent the cut-off point for credits against loss. Discovery of the offense by the victim or another non-law enforcement person should not be used as the cut-off for two reasons. First, it usually will be easier to prove when law enforcement authorities discovered an offense than when some other person or entity did so, since law enforcement authorities generally keep records of information received and no resort to third-party witnesses will be necessary. Second, value given after law enforcement authorities have discovered the offense often will be viewed as an attempt by the defendant to buy his way out of trouble. Although such a post-detection payment may merit a downward adjustment or departure for acceptance of responsibility, it does not otherwise diminish the defendant's culpability. By contrast, value given before law enforcement authorities have discovered the offense (whether or not the victim has discovered it) is more likely to reflect the defendant's genuine desire to make the victim whole and thus to reduce the defendant's culpability.

B. When credits are valued.

The PAG suggests that goods and services furnished to the victim before law enforcement authorities discover the offense (category (1) above) should be valued as of the time they are provided. Goods that are pledged as security or that are otherwise readily recoverable at the time authorities discover the offense (categories (2) and (3) above) should be valued as of the time pledged or otherwise put at the victim's disposal. Valuing such goods in this manner will ensure that the defendant does not receive an undeserved windfall or suffer an unjustified penalty from increases or decreases in value after he has made the goods available to the victim.

VIII. Impossibility.

The "impossibility" (or "economic reality") doctrine limits intended loss. The doctrine has significance only to the extent that the guidelines base the loss figure on intended loss when intended loss is greater than actual loss (for example, setting the loss figure at $100,000 when the defendant intends to cause a $100,000 loss but causes no actual loss). As set forth above, the PAG believes the guidelines should not continue using intended loss as an alternative to actual loss for determination of the base offense level. Instead, intended loss should only be used as an encouraged departure ground where it differs significantly from actual loss. If the PAG's position were adopted, the impossibility issue would largely be eliminated except in determining the appropriateness or extent of a possible upward departure, the PAG believes that the impossibility

doctrine should play a critical role in preventing unfair sentences based on unrealistically high intended loss figures. This is particularly so in "sting" cases, where the government can manipulate the intended loss figure almost at will to produce a higher sentence. We suggest that the impossibility doctrine be expressly included in the commentary to the fraud guideline, with allowance for upward departures in exceptional cases where the actual loss figure does not fully capture the defendant's culpability. See United States v. Gailbrath, 20 F.3d 1054, 1059 (10th Cir. 1994) (Tacha, J.).

Amendment 19
(biological weapons; terrorism)

Part A

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

We suggest that the Commission refrain from creating a new guideline to cover the new offenses. Those offenses are unlikely to occur with any frequency, and when they do occur, can be sentenced using the most analogous guideline. See § 2X5.1 If the offense involved terrorism, an adjustment under § 3A1.4 (terrorism) would be available.

Part B

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

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

Amendment 20
(§ 2X3.1, § 2X4.1)

Part 1

Amendment 20 consists of three parts. We do not oppose the amendment in part 1.

Part 2

We support the amendments in part 2.

Part 3

We do not oppose the amendment in part 3.

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

Introductory Comments

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

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

Part A

Part A of amendment 21 would revise the introductory commentary to chapter three, part B. We do not oppose part A of the amendment.

Part B

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

Amendment 22
(§ 3B1.2)

Introductory Comments

Amendment 22 has two parts. Part A would amend § 3B1.2 to "clarif[y] the operation of the mitigating role adjustment in § 3B1.2 . . . ." Part B invites comment on several matters.

Part A

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

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

The second clarification concerns the three-level reduction for a defendant whose role was less than minor but more than minimal. The explanation suggests that this reduction does not provide a meaningfully distinct category and "is unnecessary in view of the overlapping ranges feature of the Sentencing Table." The latter reason is nonsensical -- while ranges for adjacent offense levels overlap, the range applicable to the lower offense level will authorize a lower sentence than the range applicable to the higher offense level. The Commission uses intermediate levels in a number of situations, such as in § 3B1.1. However, only one of the three options in Amendment 21 for revising that guideline would delete that intermediate adjustment. If the overlapping range justification were to be applied consistently, all three options should delete the intermediate adjustment .[1] We do not agree with the view that the intermediate category is not "meaningfully distinct." The key concepts of this guideline presently are defined in a rather subjective way. The existence of the intermediate adjustment provides the sentencing court with a continuum along which to place the defendant.[2] We oppose deleting the intermediate adjustment.

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

Application note 3 presently states that a defendant, to qualify for a two-level reduction, must be "a participant who is

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

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

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

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

The fifth clarification is that "a somewhat more helpful but still flexible definition of minor role is provided." Again, we oppose raising the standard for a two-level reduction. We also do not find the statement that a minor participant "typically possess[es] some of the characteristics associated with a minimal role . . . ." We believe that current application note 3 adequately explains what is required for a two-level adjustment.

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

The seventh clarification is the resolution of a circuit conflict over whether the mitigating role adjustment should be applied based upon relevant conduct or upon comparing defendant's conduct to a hypothetical, average defendant. The proposed language calls for the sentencing court to look at relevant conduct. Bracketed language states that the court "may wish" to compare the defendant's conduct with "the conduct of an average participant in an offense of the same type and scope." We support addressing the matter, but we think that the proposed language needs to be revised. The structure of the proposed new application note 4 suggests that the sentencing court should first decide whether the defendant qualifies for a reduction by looking to relevant conduct. If, after that analysis, the court cannot conclude that the defendant is entitled to the adjustment, or is entitled to a two- or three-level adjustment, the court may then compare the defendant's conduct to that of an average participant in an offense of the same type and scope. The result of that comparison can be beneficial to the defendant, increasing a two- or three-level reduction or taking a two-level reduction when the relevant conduct analysis does not call for any reduction). The result of such a comparison could not be to take away or diminish the amount of the reduction. We believe that the proposal should be modified to spell out this intention more clearly. Further, we believe that the use of the phrase "may wish" is ill-advised. That phrase authorizes, but does not require, the court to consider comparable offenses. The result can only in disparity, as some courts will accept the invitation to consider comparable offenses and other courts will not.

The eighth clarification would add language "to address the

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

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

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

Part B

Part B invites comment on three issues. First, part B seeks comment on whether the Commission should amend the guidelines to provide a single guideline to encompass adjustments for both mitigating and aggravating role. We think it worthwhile to attempt to draft such a guideline.

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

Finally, part B invites comment on whether the guidelines should expressly state whether "couriers" or "mules" should receive a mitigating role adjustment. One of the major failings of the current guidelines is that offense levels for couriers and mules are too high. Couriers and mules frequently are citizens of other countries with depressed economies. The lure of quick and apparently-easy money tempts many whose present is bleak and whose future is dismal. The unpleasant fact is that there is no shortage of people whose lot in life makes bringing drugs into

the United States for a fee an attractive proposition. The work requires no great skill or preparation; anybody can do it. Even life imprisonment for couriers and mules would not appreciably diminish the supply of people willing to be couriers and mules. In short, the war on drugs cannot be won by locking up, for long periods of time, people who serve as couriers and mules. We believe that § 3B1.2 should provide that couriers and mules receive a four-level reduction. Most couriers and mules possess the five characteristics of minimal participation that the amendment in Part A identifies -- they generally are unaware of the scope and structure of the drug operation of the identity of participants other than the person who recruited them or another courier or mule traveling with them; they perform unsophisticated tasks; they have no material decision-making authority; they have no supervisory responsibility; and they receive small compensation in relation to the street-value of what they bring in.

Amendment 23
(§ 3C1.1)

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

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

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

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

Amendment 24
(§ 3E1.1)

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

The proposed amendment confuses and complicates § 3E1.1. It injects subjective terms, such as "extraordinary," into the guideline, thereby assuring frequent litigation. The term "extraordinary" has traditionally been used in the context of departures, adding further confusion to this guideline. Proposed new commentary suggests that meetings with probation officers are required if a defendant is to receive the full benefit of the adjustment. Such a requirement would be wholly inappropriate in a myriad of circumstances and would burden defendants and defense counsel unnecessarily. By suggesting that a defendant must provide criminal history information to receive the full benefit of the adjustment, the proposed commentary would interfere with the fundamental requirement that sentencing enhancements must be proved by the government. Further, this requirement would interfere with a defendant's constitutional right to effective assistance of counsel. No lawyer should advise a client to discuss matters that will necessarily increase his or her sentence.

The PAG has in the past encouraged the Commission to revise § 3E1.1 to provide a standard reduction for a defendant who pleads guilty. (Indeed, in 1990, the Commission amended § 3E1.1 to make clear the significance of a guilty plea in assessing a defendant's acceptance of responsibility, U.S.S.G. App. C, amend. 351.) Even after the amendment, this guideline has provoked a significant number of appeals. Instead of simplifying § 3E1.1, however, the proposed amendment would make it harder for a court to assess whether a defendant has accepted responsibility.

In the past, we have also encouraged the Commission to authorize the additional one-level reduction for defendants whose offense level is below level 16. Instead of making this simple change, the proposed amendment would make application of the additional one-level reduction more complicated. The current guideline provides a bright-line rule. If the defendant qualifies for a two-level reduction, then an additional level is deducted if the defendant (with an offense level of 16 or higher) either timely provides the government complete information about his involvement in the offense or timely notifies his the authorities of his intention to plead guilty. The proposed amendment would authorize an additional one-level reduction only for "extraordinary" acceptance of responsibility which would be determined based on the "totality of circumstances." The proposed amendment would list factors (including some that are currently listed as considerations for granting a two-level reduction) that the court should consider in determining whether an additional one-level reduction is warranted. This only would transfer any difficulty in applying the guideline from stage one (the two-level reduction) to stage two (the additional one-level reduction).

Proposed application note 2(a) is particularly bothersome because it would authorize denying a defendant an additional one-level reduction for failing to provide accurate information

"regarding the defendant's juvenile and adult criminal record." Anyone with real experience in the criminal justice system knows that many defendants honestly do not have an accurate understanding of the disposition of their prior cases. This proposed application note will only serve to penalize defendants whose memories are faulty or whose understanding of the criminal justice system is limited. The proposed test has no bearing on a defendant's acceptance of responsibility for the offense.

Amendment 25
(§ 3E1.1)

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

In 1992, the Commission amended § 3E1.1 to make clear that to qualify for a reduction, the defendant must accept responsibility for the offense of conviction -- failure to admit to relevant conduct is not grounds for denial of the reduction. U.S.S.G. App. C, amend. 459. Thus, the focus of the inquiry should be on whether the defendant has accepted responsibility for his offense -- not whether the defendant has, before sentencing, successfully overcome his propensity to commit any criminal act.

The proposed amendment incorporates the position taken by the Fifth Circuit in United States v. Watkins, 911 F.2d 983 (5th Cir. 1990), which stated that additional criminal conduct unrelated to the offense may provide grounds for denying credit for acceptance of responsibility. Watkins, however, was decided when credit for "acceptance of responsibility" required a defendant to accept responsibility for "his criminal conduct." U.S.S.G. § 3E1.1 (Nov. 1, 1989). After the Watkins decision, the Commission promulgated amendments 351 and 459 to make clear that the defendant need accept responsibility only for the offense of conviction. To be consistent with amendments 351 and 459, the Commission should not promulgate the proposed amendment.

Amendment 26
(§ 3E1.1)

Amendment 26 would revise § 3E1.1 by deleting the requirement in subsection (b) that limits the additional one-level reduction to defendants with an offense level of 16 or higher. We support this amendment. A defendant who meets the criteria under § 3E1.1(b) should not be denied the reduction simply because the defendant failed to commit an offense serious enough to warrant an offense level of 16.

Amendment 27

Introductory Commentary

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

Part A

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

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

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

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

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

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

Part B

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

This provision of part B would likely eliminate most of the utility those offenses have for plea negotiating and could result in an increase in the number of cases taken to trial. As we indicated above, plea agreements serve the interests of the government and the defendant and are an important part of the federal criminal justice system. The offense level for both the maintaining a drug house and the communications device offenses will be determined by the quantity of drug involved, so the penalties will not be minor.

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

A section 924(c) offense does not fit well with the career offender guideline for technical reasons. The minimum punishment for a section 924(c) violation is also the maximum punishment, and any section 924(c) sentence must run consecutively to any other sentence imposed. Those factors render immaterial whether the section 924(c) offense is an "instant offense of conviction"

under the career offender guideline -- the sentence the court must impose will not change. There will be an impact, however, if the section 924(c) offense constitutes a prior conviction for a crime of violence or a controlled substance offense under the career offender guideline. One impact is that an offense of which the defendant has been acquitted can become a prior conviction for purposes of the career offender guideline. A defendant can be convicted under section 924(c) and acquitted of the underlying offense, drug trafficking, for example. If a flow-through approach is taken with regard to section 924(c), then the drug trafficking of which the defendant was acquitted becomes the basis for finding that the defendant is a career offender. We oppose this aspect of Part B.

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

Amendment 28
(resolving circuit court conflicts)

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

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

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

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

Amendment 29(B) seeks comment on whether to reorganize § 5B1.3, § 5B1.4, p.s., and § 5D1 to distinguish more clearly between statutorily required, standard, and special conditions of

probation and supervised release. We have not had problems with the current organization of the relevant guidelines and policy statement, so from our standpoint there is no need to revise their organization. If others have had difficulty with the current organization of these provisions, we would not object to reorganizing them.

Amendment 30
(§ 5D1.2)

Amendment 30 would revise the commentary in § 5D1.2 (term of supervised release) to clarify that a defendant who meets the criteria of § 5C1.2 is not subject to a statutory minimum term of supervised release. We support the amendment.

Amendment 31
(§ 5E1.1, § 8B1.1)

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

Amendment 32
(special assessment)

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

Amendment 33
(Chapter 5, part H)

Amendment 33 would add a policy statement (§ 5H1.13, p.s.) providing that "neither susceptibility to abuse in prison nor the type of facility designated for service of a term of imprisonment is ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." We oppose this amendment as unnecessary and inconsistent with the Commission's goal of simplifying the guidelines.

We also think it unwise to address the type of facility designated for service of the prison term imposed. Designation is a matter within the discretion of the Federal Bureau of Prisons and cannot be known for certain at the time sentence is imposed. Unless the Commission has data suggesting that there is a problem, we recommend that the Commission not address the designation matter.

Amendment 34
(§ 5K2.0, p.s.)

Amendment 34 would revise § 5K2.0, p.s. (grounds for departure) by including a discussion of departure policies derived from the introduction to the Guidelines Manual. The amendment would also add language stating that in reviewing a district court's decision to depart, appellate courts apply an abuse of discretion standard, citing Koon v. United States, ___ U.S. ___, 116 S.Ct. 2035 (1996). We do not oppose the amendment.

Amendment 35
(successive federal prosecution)

Amendment 35 creates a new policy statement (§ 5K2.19, p.s.) to state that "prosecution and conviction in federal court following prosecution in another jurisdiction for the same or similar offense conduct is not ordinarily relevant in determining whether a sentence below the guideline range is warranted." We oppose this amendment; the issue should be left to the courts to deal with.

Amendment 36
(presentence report)

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

Amendment 37
(Consolidation)

Part A

Amendment 37(A) would merge § 2E1.4 (use of interstate commerce facilities in the commission of murder for hire), which is applicable to convictions under 18 U.S.C. § 1958, into § 2A1.5 (conspiracy or solicitation to commit murder). This consolidation would not effectively change the offense level for section 1958 convictions; however, the consolidation would subject section 1958 defendants to a two- or four-level enhancement for injury to a victim[3] that is not automatically

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

available[4] under the current version of § 2E1.4. Defendants being sentenced for § 1958 convictions also would be subject to an upward departure for "substantial risk of death or serious bodily injury to more than one person" that also is not automatically available under the current version of § 2E1.4.

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

Part B

Amendment 37(B) would merge § 2A2.4 (obstructing or impeding officers) into § 2A2.3 (minor assault). This merger would not affect the offense level for sentences presently treated under § 2A2.4; however, those sentences would be subject to an upward adjustment for substantial bodily injury to a person under age sixteen[5] that is not presently available under § 2A2.4. In addition, sentences currently handled under § 2A2.3 would be subject to a three-level enhancement for obstructing or impeding a governmental officer (although if it applies, § 3A1.2 would not apply). In addition, § 2A2.3 sentences would be subject to a cross-reference to § 2A2.2 (aggravated assault), that would be carried over from § 2A2.4, and to an upward departure for significant disruption of governmental functions, also carried over from § 2A2.4.

We oppose this amendment. Carrying over into § 2A2.3 the cross-reference from § 2A2.4 runs contrary to the purported goals of this amendment to consolidate and simplify, and contrary to the specific goal of reducing the number of cross-references and corresponding calculations. Further, inclusion of a cross-reference may inhibit plea negotiations. The government has the jurisdiction to charge an offense covered by the cross-referenced guideline, § 2A2.2. The cross-reference would compromise the government's ability to charge a lesser offense in order to reach a plea bargain. If the Commission concludes that the cross-

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[4] It would be available if included in the guideline applying to the underlying unlawful conduct. See § 2E1.4(a)(2).

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

reference should remain, then its application should be limited to only those cases involving obstructing or impeding an officer.

Part C

We do not oppose this amendment.

Part D

Amendment 37(D) would merge § 2C1.6 (offers and acceptances of gratuities or loans by bank examiners) into § 2C1.2 (offering, giving, soliciting, or receiving gratuities). The base offense would remain the same, at 7, but sentences currently handled under § 2C1.6 would be subject to enhancements not presently available, such as a two-level enhancement when the offense involves more than one gratuity, or an eight-level enhancement where the official is elected or holds a high-level decision-making or sensitive position.

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

We do not oppose this amendment.

Part E

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

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

Part F

Amendment 37(F) would merge § 2D1.9 (placing or maintaining dangerous devices on federal property to protect the unlawful production of controlled substances) into § 2D1.10 (endangering

human life while illegally manufacturing a controlled substance) and renumber § 2D1.10 as § 2D1.9. The current version of § 2D1.9 provides a base offense level of 23. The current version of § 2D1.10 provides a base offense level of the greater of 20 or 3 plus the offense level from the drug quantity table in § 2D1.1. The amendment would keep this latter structure, with a possible increase in the base offense level from 20 to 23. For offenses currently sentenced under § 2D1.10, increasing the alternative offense level from 20 to 23 would increase the offense level. For offenses currently sentenced under 2D1.9, offense levels could remain at level 23 if 23 is used as the alternative base offense level, could be reduced to 20 if 20 is used as the alternative base, or could be increased if the type and quantity of drug involved put the offense level higher than 20 or 23.

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

Part G

We do not oppose this amendment.

Part H

Amendment 37(H) would merge § 2D3.2 (regulatory offenses involving controlled substances or listed chemicals) into § 2D3.1 (regulatory offenses involving registration numbers and unlawful advertising relating to schedule I substances). This merger would increase the offense level in § 2D3.2 from four to six, "the base offense level most typical for regulatory offenses." This change would not affect defendants whose criminal history category is I, but would shift other defendants into a higher zone within the sentencing table. For example, a defendant with a criminal history category VI is currently in Zone B of the sentencing table. Under the amendment, that defendant would be in Zone D, and would therefore not be eligible for the alternative sentences available under Zone B.

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

Part I

We do not oppose this amendment.

Part J

Amendment 37(J) would merge § 2E2.1 (extortionate extension of credit) into § 2B3.2 extortion by force or threat of injury or serious damage). Defendants convicted of offenses under 18 U.S.C. §§ 892-94 (to which § 2E2.1 currently applies) would be affected in four ways.

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

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

We oppose this amendment. As both the current § 2B3.2 and the proposed § 2B3.2 are written, enhancements are available for making certain threats (two levels under (b)(1)) and for evidencing the ability to carry out those threats (three levels under (b)(3)(B)). Application of both enhancements yields the anomalous result that a defendant who threatens to do something without actually doing it is punished as harshly as a defendant who brandishes, displays, or possesses, a firearm (five-level enhancement), and more harshly than a defendant who uses a dangerous weapon (four levels). Moreover, because displaying or brandishing a dangerous weapon or firearm would invariably constitute the making of a threat, these enhancements would be cumulative. To avoid double-counting problems and to make this line of enhancements consistent with § 2B3.1(b)(2) (i.e., alternative), subsection (b)(1) of § 2B3.2 should be moved to the end of subsection (b)(3)(A) of that guideline.

Part K

Amendment 37(K) would merge § 2E5.3 (record-falsification offenses under ERISA and LMRDA) into 2F1.1 (fraud and deceit). Currently, § 2E5.3 provides for a base offense level of 6 with a cross-reference to § 2B1.1 or § 2E5.1 if the offense was committed to facilitate or conceal a theft, embezzlement, bribe, or gratuity. Defendants now subject to this guideline would

receive a base offense level of 6 under the fraud guideline and be subject to any applicable enhancements such as more than minimal planning that are not available under § 2E5.3 unless a cross-reference applies. (That cross-reference would be incorporated into § 2F1.1 comment.(n.13)).

Amendment 37(K) would also expand Application Note 13 of § 2F1.1, and include a new cross-reference to formalize the note: "If the offense conduct is addressed more specifically by another offense guideline, apply that guideline." Notably, this cross-reference would not contain the usual condition "if it results in a higher offense level." Consequently, it is possible that the cross-reference would result in lowering the offense level of some offenses. However, inclusion of this cross-reference would be out of line with the goals of simplifying the guidelines and reducing the number of cross-references.

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

Part L

We do not oppose this amendment.

Part M

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

Offenses under § 2K1.6 would be unaffected by the consolidation. The base offense level would remain at 6 and the cross-reference would be incorporated into § 2K1.1. Certain offenses under 2K1.1, particularly those involving failure to report theft, would be affected by the consolidation because they be subject to the cross-reference. Application of the cross-reference to § 2K1.3 would increase the offense level from 6 to a minimum of 12, thus eliminating probation for what is otherwise a misdemeanor offense.

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

Part N

Amendment 37(N) would merge § 2L2.5 (failure to surrender

We do not oppose this amendment.

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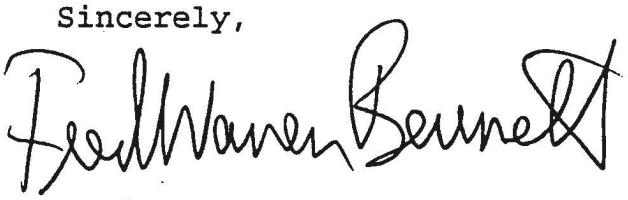
[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,



Fred Warren Bennett
Chairman
Practitioners' Advisory Group

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March 24, 1997

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

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

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 Amendment #10 (dealing with increasing the penalties for Methamphetamine) for Part II of the 1997 proposed guidelines and issues for comment. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. Depending on time constraints I may send you an additional letter on other proposed amendments that are included in Part II, but I wanted to make sure that the Commission received our views on Amendment #10.

Proposed Amendment #10--Part II
(increasing penalties for Methamphetamine)

The PAG believes the Commission would be well advised to conduct a study on problems associated with the manufacturing and distribution of Methamphetamine and postpone dealing with this proposed amendment (Parts A.-D.) and the issue for comment (Part E.) during this amendment cycle. We believe the Commission needs more time on this issue in light of the uncertainty of near term Commission and Congressional action on crack cocaine--we strongly feel it would be wrong to propose increased penalties for this drug without "fixing" the drug guidelines and statutes dealing with crack cocaine.

Nevertheless, if the Commission feels that it **must** act at this time I am enclosing herewith the PAG proposal dealing with proposed amendment #10, along with a corresponding drug quantity table

showing how our proposal would work.

[END OF COMMENTS ON PROPOSED AMENDMENT #10--PART II]

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Crack Cocaine

After the Public Hearing held on Tuesday, March 18, 1997, PAG members Lyle Yurko, Esq., Carmen Hernandez, Esq., and I met with Commissioner Budd in regards to crack cocaine proposals. Mr Yurko delivered to Commissioner Budd what was at that time a "working draft" document prepared by PAG member Yurko outlining a crack cocaine proposal. As both Mr. Yurko and I mentioned to Commissioner Budd, this "working draft" document had **not** been approved or agreed upon by the PAG; in fact, a significant number of members of the PAG are not in accord with any proposal to increase at this time the penalties for powder cocaine--at any level--in light of the uncertainty in the Commission and in Congress with how to "fix" the problems with the penalties for crack cocaine. Commissioner Budd did note at the Commission meeting held on Wednesday, March 19, 1997, that this document had not been approved by the members of PAG.

To the extent any copies of the "working draft" document has been circulated by Commissioner Budd to other Commissioners or staff members, I wish to strongly reiterate that this "working draft" document is just that--a proposal drafted by Mr. Yurko which has not yet been finalized or approved by members of the PAG.

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On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment further on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett

Fred Warren Bennett
Chairman
Practitioners' Advisory Group

METHAMPHETAMINE AMENDMENT

PART A

The Practitioner's Advisory Group has proposed changes in the drug table which call for an increase in penalty for offenders at quantity levels above Level 26. Those who deal in quantities of 400 grams of mixtures and 40 grams of pure methamphetamine and lower should not have their sentence increased. When concepts of relevant conduct are factored into the proposal, these offenders generally are distributing very small amounts of these drugs over time. Dealers who distribute a few grams of substances per week are currently punished adequately (100 grams equals 5 years). However, for the dealer who possesses more than one pound of a mixture of methamphetamine over time or on one occasion, the Practitioner's Advisory Group has proposed an increase which is 50 percent of the Commission Proposal. This proposal should satisfy the Congressional mandate which we frankly believe was purely politically motivated. If any increase in methamphetamine punishment is justified at all, we believe our proposal, which increases penalties for larger dealers but which does not change sanctions for the already harsh punishment for street dealers, represents a sane response to the Congressional mandate.

PART B

Many controlled substances consumed in the United States are imported from other countries. Until now, no increase for

importation has been thought necessary to adequately punish controlled substance offenders. The Practitioner's Advisory Group believes that treating importation of methamphetamine offenses differently from all other offenses would disproportionately penalize those who possess and sell this substance. We would favor only an import enhancement which applied equally to all substances if there were evidence that clearly established that such drug crimes were being currently inadequately sanctioned. But no evidence has been shown to justify such an increase, rather for at least five years, the Commission has been presented with a barrage of overwhelming evidence which justifies lowering penalties for those who commit drug crimes, and especially for offenders corresponding to Level 26 and lower. The Practitioner's Advisory Group believes that Congress currently lacks the political courage to accept lower drug penalties. Therefore, we believe that the Commission should not submit decreases in drug penalties at this time because while such an act would evidence the Commission's political fortitude, it would not maintain the credibility of the Commission with Congress. However, the Practitioner's Advisory Group strongly urges the Commission not to contribute to the atmosphere of hysteria by increasing penalties whenever Congress suggests higher punishment. No importation increase is necessary to adequately sanction the distribution of controlled substances above the harsh levels which are currently prescribed by the Guidelines and, therefore, no increase should be proposed by the Commission.

PART C

Likewise, little evidence has been presented warranting any sanction increase for environmental damage caused by methamphetamine production. Unless convincing evidence is presented, no Guidelines changes should be established.

PART D

The current special skills sanction embodied in §3B1.3 has functioned adequately for ten years. No special methamphetamine section needs to be created, rather, in the spirit of "simplification," methamphetamine cases should simply continue to be subjected to §3B1.3, unless evidence is presented which overwhelmingly demands special treatment.

PART E

No aggravating factors are warranted and therefore no proposals to modify need be made.

CONCLUSION

The Practitioner's Advisory Group understands that the issues embodied in the methamphetamine proposal go beyond simply prescribing sanctions for methamphetamine offenders. The broader

question of who should control punishment, Congress by mandatory minimums or the Commission by more proportional guidelines is at issue. However, by increasing methamphetamine penalties only at the high levels and only one-half as heavily as Congress was contemplating, the Commission can respond to what has become an increasingly demagogic anti-drug atmosphere in Washington and elsewhere with a degree of sanity. Commissioner Gelacak has proposed defiance of Congress's methamphetamine mandate in the face of evidence that drug penalties are already too harsh. The Practitioner's Advisory Group proposal dilutes the Congressional increases, saving for another day the fight for a complete return to sane drug policies.

Proposed Amendment ___: Part A (The Drug Quantity Table)

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
(1) · 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); · 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); · 1.5 KG or more of Cocaine Base; · 30 KG or more of PCP, or 3 KG or more of PCP (actual) · ~~30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice"~~; 22.5 KG or more of Methamphetamine, or 2.25 KG or more of Methamphetamine (actual), or 2.25 KG or more of "Ice" · 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); · 12 KG or more of Fentanyl; · 3 KG of more of a Fentanyl Analogue; · 30,000 KG or more of Marihuana; · 6,000 KG or more of Hashish; · 600 KG or more of Hashish Oil.	**Level 38**
(2) · At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); · At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); · At least 500 G but less than 1.5 KG of Cocaine Base; · At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); · ~~At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice";~~ · At least 7.5 KG but less than 22.5 KG of Methamphetamine, or at least .750 KG but less than 2.25 KG of Methamphetamine (actual), or at least .750 KG but less than 2.25 KG of "Ice" · At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); · At least 4 KG but less than 12 KG of Fentanyl; · At least 1 KG but less than 3 KG of a Fentanyl Analogue; · At least 10,000 KG but less than 30,000 KG of Marihuana; · At least 2,000 KG but less than 6,000 KG of Hashish; · At least 200 KG but less than 600 KG of Hashish Oil.	**Level 36**
(3) · At least 3 KG but less than 10 KG of Heroin	**Level 34**

(or the equivalent amount of other Schedule I or II Opiates);
· At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 150 G but less than 500 G of Cocaine Base;
· At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
· ~~At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";~~
· At least 2.25 KG but less than 7.5 KG of Methamphetamine, or at least 225 G but less than 750 G of Methamphetamine (actual), or at least 225 G but less than 750 G of "Ice"
· At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 1.2 KG but less than 4 KG of Fentanyl;
· At least 300 G but less than 1 KG of a Fentanyl Analogue;
· At least 3,000 KG but less than 10,000 KG of Marihuana;
· At least 600 KG but less than 2,000 KG of Hashish;
· At least 60 KG but less than 200 KG of Hashish Oil.

(4) · At least 1 KG but less than 3 KG of Heroin **Level 32**
(or the equivalent amount of other Schedule I or II Opiates);
· At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 50 G but less than 150 G of Cocaine Base;
· At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
· ~~At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 KG of Methamphetamine (actual), or at least 100 G but less than 300 KG of "Ice";~~
· At least 750 G but less than 2.25 KG of Methamphetamine, or at least 75 G but less than 225 G of Methamphetamine (actual), or at least 75 G but less than 225 G of "Ice"
· At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 400 G but less than 1.2 KG of Fentanyl;
· At least 100 G but less than 300 G of a Fentanyl Analogue;
· At least 1,000 KG but less than 3,000 KG of Marihuana;
· At least 200 KG but less than 600 KG of Hashish;
· At least 20 KG but less than 60 KG of Hashish Oil.

(5) · At least 700 G but less than 1 KG of Heroin **Level 30**
(or the equivalent amount of other Schedule I or II Opiates);

· At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 35 G but less than 50 G of Cocaine Base;
· At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
· ~~At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";~~
· At least 225 G but less than 750 G of Methamphetamine, or at least 22.5 G but less than 75 G of Methamphetamine (actual), or at least 22.5 G but less than 75 G of "Ice"
· At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 280 G but less than 400 G of Fentanyl;
· At least 70 G but less than 100 G of a Fentanyl Analogue;
· At least 700 KG but less than 1,000 KG of Marihuana;
· At least 140 KG but less than 200 KG of Hashish;
· At least 14 KG but less than 20 KG of Hashish Oil.

(6) · At least 400 G but less than 700 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 28**
· At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 20 G but less than 35 G of Cocaine Base;
· At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
· ~~At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";~~
· At least 125 G but less than 225 G of Methamphetamine, or at least 12.5 G but less than 22.5 G of Methamphetamine (actual), or at least 12.5 G but less than 22.5 G of "Ice"
· At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 160 G but less than 280 G of Fentanyl;
· At least 40 G but less than 70 G of a Fentanyl Analogue;
· At least 400 KG but less than 700 KG of Marihuana;
· At least 80 KG but less than 140 KG of Hashish;
· At least 8 KG but less than 14 KG of Hashish Oil.

(7) · At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 26**
· At least 500 G but less than 2 KG of Cocaine

(or the equivalent amount of other Schedule I or II Stimulants);
· At least 5 G but less than 20 G of Cocaine Base;
· At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
· ~~At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";~~
· At least 100 G but less than 125 G of Methamphetamine, or at least 10 G but less than 12.5 G of Methamphetamine (actual), or at least 10 G but less than 12.5 G of "Ice"
· At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 40 G but less than 160 G of Fentanyl;
· At least 10 G but less than 40 G of a Fentanyl Analogue;
· At least 100 KG but less than 400 KG of Marihuana;
· At least 20 KG but less than 80 KG of Hashish;
· At least 2 KG but less than 8 KG of Hashish Oil.

(8) · At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 24**
· At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 4 G but less than 5 G of Cocaine Base;
· At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
· At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of "Ice";
· At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 32 G but less than 40 G of Fentanyl;
· At least 8 G but less than 10 G of a Fentanyl Analogue;
· At least 80 KG but less than 100 KG of Marihuana;
· At least 16 KG but less than 20 KG of Hashish;
· At least 1.6 KG but less than 2 KG of Hashish Oil.

COMMENTS ON PROPOSED 1997 GUIDELINE AMENDMENTS

Submitted by: Richard Crane
Attorney and Member of Practitioners Advisory Group
2200 Hillsboro Road
Suite 310
Nashville, TN 37212

Proposed amendment number 7. I object to the narrowing of a judge's discretion to use a different guideline than the one set forth in the statutory index. I believe that there are occasionally "atypical" cases where another guideline section is more appropriate.

To my knowledge there has been no abuse of this authority to use other guidelines in atypical cases and I wonder why the Sentencing Commission has chosen this time to make this particular change.

Proposed amendment number 8. I support incorporating the holding in *U.S. v Hill* into the application note.

Proposed amendment number 9. I believe that Option 1a is the fairest way to handle acquitting conduct. However, I would incorporate that part of Option 2 which requires that the conduct be established by clear and convincing evidence.

Proposed amendment number 11. It is bad enough that the Commission must designate an amendment for retroactive application. Now the Commission would suggest that any reduction only be in the term of imprisonment. In fact, if a defendant has already served a lengthier term of imprisonment than the retroactive guideline would require, then a reduction in some other aspect of the sentence might be the only way that the defendant could be treated in a fair and consistent manner with others so situated.

Proposed amendment number 16. I have no objection to this amendment.

Proposed amendment number 18a. The major changes seems to be in replacing the more than minimal planning increase with an increase for use of sophisticated means. If more than a minimal planning is arguably unclear or ambiguous, why does the Commission feel that an enhancement based on "sophisticated means" will be any less so?

I object to all changes in the loss tables and find that the justification that it will reduce probation officer and judicial workload to be nonsense. Most cases are pled and the Commission should encourage plea agreements to stipulation the amount of the loss. Also, I think arriving at a just sentence is more important than reducing probation officer and judicial work.

I do, however, agree that there is no reason why there are different base offense levels for 2B1.1 and 2F1.1 and, with proper study, the two guidelines could probably be consolidated.

As for the definition of loss, it needs a lot of work and certainly is an area that generates the most controversy in white collar cases. The use of "intended" loss is widely misinterpreted as is the use of "gain".

Proposed amendment number 21. Of the three options, I prefer option three. However, I think that the number of participants should be considerably more than 4 and I think the "otherwise extensive" language ought to be deleted. Offenses which are otherwise extensive usually involve money or drugs and the extensiveness is addressed by the increase related to quantity. In the rare situations where that is not the case, and upward departure might be warranted.

I also think that organizing one other participant should not result in a 2 level increase. Come on, not many offenses involve only a sole offender!

Proposed amendment number 23. I oppose the proposed amendment. I suggest a amendment that says that the Court has to find beyond a reasonable doubt that perjury was committed.

Proposed amendment number 24. I support this amendment. I would combine it with proposed amendment number 26.

Issues for comment: I support a statement in § 1B1.8 that information provided not be included in the pre sentence report. I would also like § 1B1.8 to immunize information given by the defendant at the time of arrest, if he later enters into a cooperation agreement.

I also believe that multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting a departure in that the collateral consequences of a defendant's conviction can be the basis for a downward departure.

Proposed amendment number 33. I oppose this amendment. I know of no study as to why these factors are not relevant considerations for downward departure.

Proposed amendment number 34. Why not include the rest of the departure language from the introduction in § 5K2.0? I specifically refer to that portion of § 4(a) of chapter 1 part A dealing with manipulation of the indictment.

Proposed amendment number 35. I oppose this amendment.

National Association of Criminal Defense Lawyers • NACDL • 1958

March 17, 1997

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

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments.

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

Thank you for your consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke /CSR

Judy Clarke
President

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

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National Association of Criminal Defense Lawyers
NACDL 1958

COMMENTS ON THE 1997 AMENDMENTS - Part I

Amendment 5 - § 3A1.4 (Terrorism)

NACDL does not support this amendment for three reasons. First, it appears to have broader applicability than the enhanced penalties in 18 U.S.C. § 2332b, the section which defines a "Federal crime of terrorism". Second, it is inconsistent with the structure of the guidelines because it creates a criminal history adjustment in chapter three, the only such adjustment to be found in the guidelines. Third, because it is structured as a mandatory minimum offense level and criminal history adjustment this enhancement carries with it the evils of mandatory minimum sentencing -- it employs a "tariff-like approach" which disproportionately raises the punishment for a number of relatively less serious offenses, it may be subject to prosecutorial manipulation, and it may give rise to disparate application against minorities. See U.S. Sentencing Commission, "Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" 26, 32, ii (1991).

NACDL recommends that the Commission revise the § 3A1.4 adjustment so that it applies only under the same circumstances as the enhanced penalties under 18 U.S.C. § 2332b, i.e., where the title 18 offense (1) involved conduct transcending national boundaries and (2) involved a killing, kidnapping, maiming, or conduct resulting in serious bodily injury or that created a substantial risk of serious bodily injury. The adjustment should also be graduated to conform to the graduated penalties applicable under § 2332b which range from life imprisonment to a term of not more than 10 years imprisonment. See 18 U.S.C. § 2332b(c)(1).

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This amendment proposes to make permanent a 1996 emergency amendment implementing § 730 of the Antiterrorism and Effective Death Penalty Act of 1996.[1] The amended § 3A1.4 adjustment applies in each case where the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g). The adjustment increases by 12 the offense level to a minimum offense level 32 and imposes a criminal history category VI. U.S.S.G. § 3A1.4. Thus in each case where this adjustment applies, the guideline range will be a minimum of 210 - 262 months (OL 32 & CH VI), before any adjustment for acceptance of responsibility.

Section 2332b(g) provides for enhanced penalties for "[a]cts of terrorism transcending national boundaries" where the offender "kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon...or creates a substantial risk of serious bodily injury to any other person...", or threatens, attempts or conspires to do so. 18 U.S.C. §§ 2332b(a). In the definitional section, a "Federal crime of terrorism" is defined as an offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"

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[1] Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), provides:

> **§. 730. Directions to Sentencing Commission.**
> The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code.

The adjustment for international terrorism (amendment 526) was promulgated in response to § 120004 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994) which directed the Commission to:

> amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

and is a violation of certain specified sections of title 18. 18 U.S.C. § 2332b(g)(5)(A). Not all of the title 18 offenses specified in the definitional section, however, necessarily involve killing, kidnapping, or acts which create a substantial risk of serious bodily injury. Furthermore, many of the specified title 18 offenses can be committed wholly within the United States without involving conduct "transcending national boundaries".

The § 3A1.4 adjustment does not require any finding that (1) the conduct involved "transcend[ed] national boundaries" or (2) the offender killed, kidnapped or created a substantial risk of serious bodily injury. Yet, a number of relatively less serious offenses which are not likely to involve those two requirements are specified as "federal crime[s] of terrorism". For example, one such offense is 18 U.S.C. § "1361 (relating to injury of Government property or contracts)" which, absent the two additional requirements necessary for enhancement under § 2332b, is punishable by a fine or imprisonment up to a maximum of ten years. 18 U.S.C. § 2332b(g)(5)(B)(i). Similarly, 18 U.S.C. § 2280(a)(2) which relates to certain threats of violence against maritime navigation is punishable, absent the two additional requirements necessary for enhancement under § 2332b, by a maximum term of imprisonment of 5 years. Because of the tariff-like approach of this § 3A1.4 adjustment, conduct involving relatively less serious acts of protest may be prosecuted under these statutes and result in a guideline range harsher than intended or necessary.

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

NACDL does not oppose the first part of this amendment which amends § 1B1.1.

NACDL opposes the second part of the amendment because it does not simplify the definition of "offense" as it purports to do. Further, the amendment which adds a new application note to § 3C1.1, though denominated a "conforming amendment", expands the scope of "during the investigation or prosecution of the instant offense" to include obstructive conduct beyond the offense of conviction. As amended, the obstruction adjustment would apply

> in relation to, the investigation or prosecution of the federal offense of which the defendant is convicted and any offense or related civil violation, committed by the defendant or another person, that was part of the same investigation or prosecution, whether or not such offense resulted in

> conviction or such violation resulted in the imposition of civil penalties. It is not necessary that the obstructive conduct pertain to the particular count of which the defendant was convicted.

Proposed § 3C1.1, comment (n.8). This expanded scope is inconsistent with the manner in which most circuits have interpreted this adjustment. E.g., United States v. Yates, 973 F.2d 1, 4-5 (1st Cir. 1992) (holding that obstruction must occur during the investigation, prosecution, or sentencing of the offense of conviction); United States v. Perdomo, 927 F.2d 111, 118 (2d Cir. 1991) (same); United States v. Woods, 24 F.3d 514, 516-18 (3d Cir. 1994) (same); United States v. Haddad, 10 F.3d 1252, 1266 (7th Cir. 1993); United States v. Barry, 938 F.2d 1327, 1332-35 (D.C. Cir. 1991) (same). As the 10th Circuit explained in United States v. Gacnik, 50 F.3d 848, 852-53 (10th Cir. 1995):

> A plain reading of U.S.S.G. § 3C1.1 compels the conclusion that this provision should be read only to cover willful conduct that obstructs or attempts to obstruct "the investigation . . . of the instant offense". . . . [T]he obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution, or sentencing; or as regards a completely unrelated offense, does not fulfill this nexus requirement.

The Commission should not undertake to expand the scope of this adjustment in derogation of the manner in which it has been interpreted by the majority of circuit courts of appeals through this back-door "conforming" amendment. The Commission certainly should not expand the scope without some explanation of the need for the revision and empirical support for its view. Furthermore, in expanding the scope of the obstruction adjustment to include related civil violations and offenses that may not be prosecuted or as to which the defendant is not found guilty, the Commission should bear in mind that in most cases imposition of the obstruction adjustment serves to preclude a reduction for acceptance of responsibility. This has the effect of a 4- or 5-level swing in the offense level, a severe enhancement that should not be expanded lightly.

Amendment 8 - § 1B1.3 (Relevant Conduct - "same course of conduct")

NACDL does not oppose this amendment which adds language to the relevant conduct commentary that explains 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". Proposed amendment to § 1B1.3, comment (n.9(B)). This language, derived from the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), provides a helpful illustration of the outer limits of "same course of conduct" in drug transactions.

Indeed, NACDL recommends that the commentary be expanded to explain that the mere fact that the same controlled substance is involved in other transactions is never enough, without more information, to show that the other transactions are part of the same course of conduct as the offense of conviction. Other factors, including "the degree of similarity of the offenses, [and] the regularity (repetitions) of the offenses," that provide a nexus with the other transactions should be present for multiple transactions to be deemed part of the "same course of conduct". U.S.S.G. § 1B1.3, comment. (n.9(B)).

Amendment 9 - § 1B1.3 (Relevant Conduct - Acquitted Conduct)

Of the options published by the Commission pertaining to the use of acquitted conduct in determining a defendant's offense level, NACDL prefers option 1B. This option creates a new subsection in the relevant conduct guideline which provides that:

> Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section.

Proposed amendment Option 1B (§ 1B1.3(c)).

Option 1B also proposes to create new commentary which would explain that acquitted conduct may be used to establish an enhancement under the guidelines when the elements of the enhancement differ from the elements of the offense as to which the defendant was acquitted. See Proposed § 1B1.3, comment. (n.10). The amended commentary cites as an example, that after an acquittal on a § 924(c) charge for using and carrying a firearm in connection with a drug offense the court may impose the gun bump

in U.S.S.G. § 2D1.1(b)(1) which requires only that "a dangerous weapon . . . was possessed". See e.g., United States v. Watts, __ U.S. __, 117 S.Ct. 633 (1997) (reversing and remanding where lower court refused to impose § 2D1.1(b)(1) gun bump because of acquittal on § 924(c) charge)).

The only issue before the Supreme Court in Watts is that addressed in the first part of the proposed amended commentary. The statements of Justice Scalia with respect to the import of 18 U.S.C. § 3661 as prohibiting any restriction by the Commission of the use by the sentencing court of acquitted conduct in determining the sentence are dicta, not part of the opinion of the court, and if correct would undo much of the sentencing guidelines which time and again restrict the use of information by courts in determining the appropriate punishment. See e.g., U.S.S.G. § 5K1.1 (requiring government motion before a court may depart based on substantial assistance; § 5K2.13 (permitting departures based on diminished capacity only where the offense is non-violent); Koon v. United States, __ U.S. __, 116 S. Ct. 2035, 2047 (1996). Furthermore, the Supreme Court expressly declined to address whether a sentence enhancement that results in a substantially higher punishment so as to amount to "a tail which wags the dog of the substantive offense" would violated due process of law. United States v. Watts, 117 S. Ct. At 637-38 n.2, citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

NACDL opposes the last sentence of the amended commentary, however, which provides that "acquitted conduct ...may provide a basis for an upward departure". Proposed § 1B1.3, comment. (n.10). NACDL opposes the use of acquitted conduct as basis for an upward departure and opposes the other published options which would permit the use of acquitted conduct in calculating the offense level because it believes that "[t]here is something fundamentally wrong with such a result." United States v. Baylor, 97 F.2d 542, 549 (D.C. Cir. 1996) (Wald, J., concurring specially).

The NACDL's position on this issue may best be summarized by reference to Judge Wald's concurring opinion in Baylor:

> Guideline "law," I am well aware, runs overwhelmingly against Baylor's claim that a sentencing court should not use the core conduct underlying an acquittal to increase an offender's base offense level for the crimes of which he was convicted. This circuit has gone along with most other circuits in ruling that the guidelines and the law authorizing

their creation permit such use, and that this practice is constitutional. See United States v. Boney, 977 F.2d 624, 635-36 (D.C. Cir.1992) (citing cases from all circuits except the Ninth). Only the Ninth Circuit has held to the contrary, claiming that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." United States v. Brady, 928 F.2d 844, 851 (9th Cir.1991).

But this consensual surface is eroded by a growing body of resistance to what commentators and scholars recognize as a blatant injustice. Despite the near unanimity of the circuit holdings, many individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice. [FN2]

FN2. See, e.g., United States v. Frias, 39 F.3d 391, 392-94 (2d Cir.1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.' "); United States v. Hunter, 19 F.3d 895, 897-98 (4th Cir.1994) (Hall, J., concurring) ("[A]s regards charges on which the jury has acquitted the defendant, ['pricing' these charges at the same level of severity as convicted conduct for sentencing purposes] is just wrong."); United States v. Concepcion, 983 F.2d 369, 395-96 (2d Cir.1992) (Newman, J., dissenting from the denial of a request for rehearing in banc) ("In some way, the law must be modified. A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); Boney, 977 F.2d at 637-47 (D.C. CIR.1992) (Randolph, J., dissenting in part and concurring in part) ("My analysis, and my colleagues'

... rests somewhat uneasily with the 'special weight' the Supreme Court has accorded acquittals in its Double Jeopardy jurisprudence."); United States v. Galloway, 976 F.2d 414, 436-44 (8th Cir.1992) (Bright, J., dissenting) ("If the former Soviet Union or a third world country had permitted [the practice of punishing people for conduct that had not been the subject of indictment or trial] human rights observers would condemn those countries."); United States v. Restrepo, 946 F.2d 654, 664-79 (9th Cir.1991) (Norris, J., dissenting) (arguing that the 'preponderance of the evidence' standard for counting conduct underlying acquitted charges in sentencing should be rejected) ("Circuit has followed circuit without, in some cases, even a vestige of independent analysis. ... There are signs, however, that the dam is finally cracking, signs of an emerging awareness of the truly profound implications of the changes the Guidelines have wrought." (citing Brady)); United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir.1990) ("This [twelve-fold increase in the sentence] is perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.' (Quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)). In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations."); United States v. Jones, 863 F.Supp. 575, 578 (N.D. Ohio 1994) ("The right to a trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that charge." (citing Brady)); United States v. Cordoba-Hincapie, 825 F.Supp. 485, 487 (E.D.N.Y.1993) ("Can the guarantees of a jury trial to determine the substantive predicates of criminality be shortcircuited

by characterizing a critical element of great significance in deciding punishment as one for the judge to determine in fixing sentence--a sentence predetermined under fixed guidelines, not one imposed under a discretionary regime? ... Congress could not have intended such a bizarre and dangerous result when it adopted guideline sentences").

A parallel body of work condemning sentencing based on acquitted conduct has been growing in the academic community. See, e.g., Kein R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 STAN. L.REV. 523 (1993); David Yellen, Illusion, Illogic, and Injustice: Real- Offense Sentencing and the Federal Sentencing Guidelines, 78 MINN. L.REV. 403 (1993); Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L.REV. 1179 (1993); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681 (1992); Michael Tonry, Salvaging the Sentencing Guidelines in Seven Easy Steps, 4 FED. SENTENCING REP. 355, 356-57 (1992); Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM.CRIM. L.REV. 161, 208-20 (1991).

Although I fully recognize that Boney requires affirmance on this issue, to my mind the use of acquitted conduct in an identical fashion with convicted conduct in computing an offender's sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, either through a grant of certiorari to resolve the circuit split, or a revision of the guidelines by the Sentencing Commission, or legislation to bar such a result; in Chief Judge Newman's words "the law must be modified." [FN3] Time and experience show us increasingly that the assumptions underlying the decisions upholding the use of acquitted conduct to enhance sentencing are not sound.

FN3. Concepcion, 983 F.2d at 396 (Newman, J., dissenting from the denial of a petition for rehearing).

The practice of sentencing defendants on the basis of crimes for which the defendant has been acquitted has been plausibly attacked along many jurisprudential fronts, including double jeopardy, [FN4] failure to honor the right to a jury trial, [FN5] failure to satisfy the "notice" requirement of a grand jury indictment, [FN6] and due process. [FN7] The explanation offered to defendants who object that they are being punished for crimes of which they have not been convicted is invariably that they "misperceive[ ] the distinction between a sentence and a sentence enhancement," and that by adding the full measure of punishment specified in the guidelines for crimes of which they are not convicted, the court is merely "enhancing" the penalty for the crime of which they are convicted, not imposing liability for a separate crime. Boney, 977 F.2d at 636 (quoting United States v. Mocciola, 891 F.2d 13, 17 (1st Cir.1989)). [FN8] The "enhanced" sentence, after all, still must fall within the statutory range set out for the crime of conviction. See Boney, 977 F.2d at 636.

FN4. See, e.g., United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181- 82 (2d Cir.), cert. denied, 498 U.S. 844 (1990).

FN5. See, e.g., Jones, supra note 2.

FN6. See Lear, supra note 2, at 1229-33.

FN7. See, e.g., Restrepo, supra note 2, at 664-79 (Norris, J., dissenting).

FN8. In his separate concurring opinion, Judge Randolph recognized that "this conceptual nicety might be lost on a person who ... breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at